Legal Framing of the Democratic Control of Armed Forces and the Security Sector: Norms and Reality/ies
Legal Framing of the Democratic Control of Armed Forces and the Security Sector: Norms and Reality/ies

Edited by

Biljana Vankovska

Beograd ● 2001
Legal Framing of the Democratic Control of Armed Forces
and the Security Sector: Norms and Reality/ies

Published by:
Geneva Centre for the Democratic Control of Armed Forces
Ruede Chantepoulet 11, P.O Box 1360, CH-1211 Geneva 1

Centre for Civil-Military Relations, Belgrade
Narodnih heroja 21, 11070 Novi Beograd

Edited by:
Biljana Vankovska

Editors-in-chief:
Theodor Winkler
Miroslav Hadžić

Translation editor:
Vuk Tošić

Cover design:
Marija Vuksanović

Type setting:
Leviathan Design

Printed by:

Printing:
500 copies

ISBN - 86-83543-03-X

Belgrade ● 2001
CONTENTS

Amb. Theodor Winkler
Foreword................................................................................................................... 7

Biljana Vankovska
Introduction........................................................................................................... 9

PART I

SETTING THE PROBLEM: THEORETICAL
PERSPECTIVES ON LEGAL ASPECTS OF
DEMOCRATIC CONTROL OF
ARMED FORCES

Plamen Pantev
Legal issues of Democratic Control of Armed Forces
in the Process of Security Sector Reform: The Case of
Post-Communist Countries in South East Europe................................. 17

Vojin Dimitrijević
Societal and Cultural Prerequisites for Promotion and
Implementation of Democratic Control of Armed Forces......................27

Lidija Basta Fleiner
The Relevance of the Western Legal Expertise for the Rule
of Law in Countries in Transition................................................................. 35

Ilona Kiss
Military Rights in Peacetime: Obstacles to and Opportunities
for Providing Judicial and Non-Judicial Remedies in East
European and Central Asian Countries..................................................... 45

Peter Rowe
Control Over Armed Forces Exercised by the European
Court on Human Rights............................................................................ 57

Jan Oberg
Democracy and Democratic Control of Armed Forces
in a Civil Society’s Perspective: A Few Critical Remarks....................... 69
PART II

EMBEDDING DEMOCRATIC CONTROL OF ARMY FORCES IN TRANSITIONAL SOCIETIES: LEGAL PROBLEMS AND ACHIEVEMENTS

Marie Vlachova
Legal Framework of Democratic Control of Armed Forces in the Czech Republic.......................... 81

Alexander Nikitin
Civilian and Parliamentary Control over the Military: Purposes and Principles of the CIS Model Law................................. 95

Vaidotas Urbelis
Democratisation and Integration: Democratic Control of Armed Forces in the Baltic States................................. 109

Nansen Behar
Civil-Military Relations and the New Defence and Security Legislation in Bulgaria................................. 125

Ljubica Jelušič and Marijan Malešič
Legal Aspects and Controversies of Democratic Control of Armed Forces: Slovenia in Transition................................. 137

Dimitrios Koukourdinos
Constitutional Law and External Limits of the Legal Framing of Democratic Control of Armed Forces: Croatia and Yugoslavia in Focus................................. 155

Miroslav Hadzič
(In)Ability of the Local NGOs to Influence Law-Making Process: Between Lack of Will and Lack of Knowledge................................. 171

Jeff Fischer
Military Control in Kosovo: International Forces and the Absence of State................................................................. 187

ABOUT THE AUTHORS................................................................................ 197

GENEVA CENTRE FOR DEMOCRATIC CONTROL...................... 203

CENTRE FOR CIVIL-MILITARY RELATIONS............................... 207
FOREWORD

The Geneva Centre for the Democratic Control of Armed Forces (DCAF) encourages and supports countries in their efforts to strengthen democratic and civilian control of their force structures, and promotes international cooperation in this field.

This book is a concrete result of a conference organized by the Centre in addressing an issue that has mainly been tackled in the past in a cursory manner, but which calls for deeper considerations: the gap between normative efforts and actual reality in the domain of legal reform.

The Seminar titled *Legal framing of democratic control of armed forces and the security sector: norms and reality/ies* was simultaneously the launching event of a DCAF working group – the “Working Group on Legal Aspects of the Democratic Control of Armed Forces”. The Seminar was held in Geneva on 3-5 May 2001. Having brought together in a single forum more than thirty academics, experts, practitioners from different political and national settings as well as representatives from NGOs and international organizations (NATO, OSCE) the seminar aimed at making an intellectual contribution through brainstorming and open exchange of ideas and experiences. The quality of the papers presented indicates that one can expect this book to trigger further debate on the significance and shortcomings of the legal dimension of democratic control of armed forces in transition countries.

In accordance with its basic mission and purpose the Geneva Centre for the Democratic Control of Armed Forces is devoted to supporting future follow-ups that will contribute to further development of legal interest and expertise in the field of civil-military relations and security sector reform. Not by coincidence, this book is published as a joint effort of DCAF and the Belgrade Centre for Civil-Military Relations. The Geneva Centre for the Democratic Control of Armed Forces strongly believes that a close cooperation with local partners on the spot is the best way to foster the dissemination of knowledge and for encouraging further debate on the key issues related to democratic control of armed forces.

Ambassador Theodor Winkler
Director
Geneva Centre for the Democratic Control of Armed Forces
INTRODUCTION

At first glance it appears that the relationship between law and democratic control of armed forces is bizarre. Legal studies have never clearly focused on the issue of democratic control of armed forces and civil-military relations, while debates on democratic control of armed forces have also not addressed purely legal issues. At the same time, very few would challenge the premise that the rule of law principle is essential precondition for implementation of democratic control of armed forces. Surprisingly enough, the field of civil-military relations has traditionally been of focal interest for political scientists and sociologists. Very few lawyers have shown scholar interest in these issues, while mainly dealing with them in a cursory manner and in the context of other major problems.

The collapse of communism and challenges of the new social phenomenon called ‘transition towards democracy’ have brought new impetus for studies of democratic control of armed forces. Again it seems that there is not much left for lawyers to contribute because so-called first generation (mainly constitutional and legal) reforms of civil-military relations appears to be a clear success. Despite of this early optimism there are still many open issues and big challenges, so the question surfaces: how ‘powerful’ or ‘powerless’ is the law in its endeavor to alter and/or discipline reality when it comes to democratization of civil-military relations? What are the factual possibilities and limitations of the law as a means of introducing democratic practice to the security sector? And finally, how wide is the gap between the normative/legal and factual/‘true’ reality in countries that claim that have successfully accomplished the first generation reform?

Throughout the decade-long transition of the post-communist countries of the CEE/SEE region the interest for the democratic control of armed forces has focused on the sociological and political aspects of this process. The fact that certain important questions of law have been raised in this process, often resulting in pure imitation and rarely in significant legal innovation, has been overlooked in the public and academic debate. The law has been perceived as a shortcut in the long-lasting process of implementation of the principle of democratic control of armed forces and not as a continuous endeavor. Not surprisingly, there is still a long list of examples that may be useful in revealing the gaps and indeterminacies in the security/defense domain legal frameworks. Although all of the states emerging from the former communist block
have claimed to be “democratic”, it has become evident that that without
the rule of law democratic form may be no more than a cloak for
authoritarian practices where the role of the armed forces is strongly
emphasized. In many respects the prospects for reconstruction in the
region are depend on the establishment of a modern legal system.

The fact that relationship between the law and democratic control of
armed forces seems very straightforward may lead towards two possible
oversimplifications. A too narrow understanding of law may yield the
conclusion that the mere existence of a constitutional and legal
framework for the democratic control of armed forces is sufficient for
meeting democratic criteria. In other words, the constitutional and legal
provisions on the competences of state institutions in regard to the
military, governing mechanisms of supervision and accountability,
military missions and the position of the armed forces, etc. are considered
to be classical legal matters of great significance for any democratic
system. This approach overlooks the fact that the law is much wider and
that modern legal systems are developed in many fields. Each or many of
them have points of contact and relevance to the democratic control of
armed forces. Similarly to medical doctors who are specialists in various
fields of medicine, lawyers also possess various expertises necessary for
better understanding and implementation of matters that, at first glance,
may seem to be military-political matters. For instance, human rights law
is becoming a pillar of modern democracy along with constitutional law,
while narrowly grasped military law is a thing of the past. In addition,
ownadays international law has much more to say on matters that used to
be part of the sovereign state domain. The other danger is that democratic
control of armed forces may be comprehended as a problem that calls for
only political, sociological, cultural and other solutions, and thus, legal
means may be underestimated.

The idea of this volume was conceived at the seminar of the Geneva
Centre for Democratic Control of Armed Forces, held in Geneva in May
2001. Intense and interesting debate opened a range of issues related to
the relationship between law and democratic control of armed forces. In
addition to some more general/theoretical deliberations, the discussion
mainly focused on national-case studies, exploration of the relevance of
the Western legal expertise for the countries in transition as well as
evaluation of the influence of civil society and grass-root initiatives on
the law-making process.

As this volume clearly shows, authors agree on the several most
essential points. There are no definite answers for many questions but the
list of new challenges show the indispensability of law in the
implementation of democratic control of armed forces and developing
democracy. The basic premise is that rule of law is an equally important
premise for democratic control of armed forces both in mature
democracies and in emerging ones. The law makes political processes
predictable and politicians – responsible; it forms the perspective of the
armed forces law, provides security and may disable attempts of political manipulation. The role of law in promoting democratic control of armed forces is an issue that may be analyzed from various perspectives (political, purely legalistic, and/or socio-political viewpoint). As many have put it, democratic control of armed forces is too serious an issue to be left only to (constitutional) lawyers to sort out.

An overview of the development and traditions of rule of law in mature democracies, nevertheless, shows that law may have helpful capacity for promotion of democratic principles, but also has its limitations. In order to be workable, rule of law must be set up in a democratic environment, along with efficient and reliable political institutions and supported by a mature civil society. Developed democracies face new challenges, especially because of the different supra-national setting that is being created in the Western security community in the aftermath of the Cold War. Democratic control of armed forces and rule of law in transitional countries face a double challenge. Namely, they need to be introduced and implemented for the first time in certain national settings, and at the same time, they long to catch up with the new developments in military structure internationalization.

The papers that analyze national case studies in the former Eastern block, at first glance, may seem very complex and too divergent to yield any overall conclusion. However, deeper insight shows that all countries in transition as well as the only NATO member state (Czech Republic) still face similar problems in regard to the appropriate use of legal means in promoting democratic control of armed forces. The so-called “first generation” transformation of civil-military relations in most countries in transition, which includes establishing a new constitutional and legal framework for democratic control of armed forces, has been successfully completed. However, the major problem is not the absence of legal norms but their unsatisfactory implementation. External factors (i.e. incentive given by the cooperation with NATO and imitation of Western legislation) have played a major role in establishing the legal framework for democratic control of armed forces. However, in many cases the questions of applicability and incompatibility of imported legal models with the post-communist needs is of crucial importance in the implementation of the legal provisions. There is a predominantly narrow comprehension of democratic control, which is usually limited only to armed forces and, thus, excluding secret services, internal security forces, etc. Major obstacles for legally guaranteeing the principle of democratic control of armed forces should include authoritarian historical legacy, democratic deficiencies, parallel processes of state and nation establishment that presume military as a focal institution, and immature civil society. Generally, all countries in transition lack free access to information and independent civil expertise. In this sense, the
significance of training and education for parliamentarians (law-makers),
civil servants, staff, and citizens is still very high.

The significance of the foreign legal experiences for the democratic
control of armed forces in countries transition raises several dilemmas
regarding the question of whether democratic control of armed forces
may be a gift and how international forums and institutions might
encourage better implementation of this principle. There is a basic
consensus among NATO member states that the Alliance shall not
impose common solutions and models of democratic control of armed
forces on other countries. Moreover, NATO attempts to combine and
reconcile the principles of state sovereignty, democratic control of armed
forces and multinational military structure. The European Court on
Human Rights thus becomes an extremely important institution with a
profound effect on issues such as: internal and external use of armed
forces, balanced approach to a state protection of national security and
respect for individual human rights, etc. The judgments of the European
Court silently but firmly influence legislative changes in the Council of
Europe member states, which often include standards established by the
Court’s decisions in their legislation. The case of the so-called umbrella-
law on democratic control of armed forces adopted by the CIS
Parliamentary Assembly shows one possible approach in promoting this
principle on a regional level. The idea built around the premise that a
ready-made law enables regional debate and comparison of national
experiences. Furthermore, the model law is expected to be tailored to
specific national settings.

The simultaneous and crosscutting reforms that are underway in the
countries in transition sometimes are sometimes conflicting. Particularly,
when the political elites try to combine legitimacy and efficiency it is
often done at the expense of legality. Countries involved in intra-state
conflicts or even in cases of “absence of a state” (such as the present
situation in Kosovo) call for a more flexible and non-traditional notion of
democratic control of armed forces that would include all armed
structures and formations active on a certain territory. Evidently, these
cases presume different external legal assistance.

Unlike advocating the “bottom-up” approach in law-making, national
and international NGOs mainly address challenges that may be
summarized in one problem: how to reconcile the character of the
military as a classic hierarchical top-down institution with the bottom-up
influences and demands of the civil society? The papers show that the
issue is still open because both military and civil society undergoes
profound transformation, particularly in the post-Cold War era.
Democracy is basically about having a choice. Thus, the essential issue is
that NGOs bring forward alternatives to government security and defense
policies – plain criticism cannot change reality. NGOs in Western
democratic countries are often engaged in various assistance
programmers for local NGOs in transitional countries and rarely pay any
attention to democracy “at home”. Even mature democracy cannot be an unquestioned notion. Grass-root democracy implies protection and implementation of basic human rights of individuals no matter whether they are civilians or military officers. One of the most urgent legal issues in many post-communist countries is the position of human right of conscripted soldiers due to the contradiction between legal norms and the norms derived from the classical understanding of military ethos.

This book project began with a seminar organized by the Geneva Centre for Democratic Control of Armed Forces (DCAF). Given the high quality of papers presented and extremely productive discussions, DCAF decided to disseminate the findings of the seminar which promised to be the beginning of a long series of events, projects and various other activities of the DCAF Working Group on Legal Aspects of Democratic Control of Armed Forces, independently or in cooperation with other institutions. The editor would like to thank the administrative and scientific staff of the DCAF and the Belgrade-based Centre for Civil-Military Relations for various means of support provided for this project. Meanwhile, the DCAF WG on Legal Aspects continues its research and strives to promote the role and rule of law in this domain.
PART I

SETTING THE PROBLEM: THEORETICAL PERSPECTIVES ON LEGAL ASPECTS OF DEMOCRATIC CONTROL OF ARMED FORCES
Introduction: the Theoretic Argument

Karl Deutsch wrote in 1971 that the main task of law is to make life more predictable. Legal regulation in general aims at facilitating the functioning of social relations and at stimulating their development in a definite direction. This potential of the legal normative system explains the reliance on it in carrying out post-Cold War security sector reform and the democratic control of the armed forces in the transition countries of South-Eastern Europe. Which are the specific features of the legal norms – national and international – that make them appropriate and effective tools of the transformation processes in the area of civil-military relations in the countries of this part of the European continent?

The legal acts are normative means of setting objectives and determining the instruments of their realization. The achievement of the results of the rule of law is very much due to the legal definition of the aims and tasks, of the rights and obligations of the legal subjects as a kind of prescriptive information in the social management system.

The legal norms that are contained in the various legal acts in a state are specific ‘models of behavior’, created by the legislative or executive bodies with the objective to optimally regulate the attitude of the people in society. This can be achieved thanks to the concentrated and systemic knowledge and its programmatic character, contained in the legal norms, directing the behavior of the individuals. Legal norms are specific social algorithms, because of their ability to prog-

ram future behavior and of their nature of formalized models of social relations.

Furthermore, the legal norms are not just means of achieving particular aims, but also instruments of setting aims. This is true for the states’ Constitutions, for the laws and for the sub-legal normative acts.

The big issue, concerning the post-Communist countries of South-East Europe in their security sector reform and efforts to establish democratic control of their armed forces, is how this regulative potential of the law in shaping social processes and their results can be utilized. Three main questions need to be answered in that respect: 1) what are the constituent elements of the legal concept of the DCAF? 2) What are the international legal resources in that field? 3) What specific legal regulative needs stem from the South-Eastern Europe environment?

The Legal Concept of DCAF and its Components

Security sector reform, including the establishment of the democratic control over the armed forces, strongly depends on the legal regulation in the countries of the South-East European region for one basic reason: there is no social, political and historical democratic tradition of civil-military relations, in different degrees in the individual states of the Balkans. All the potential of the legal normative regulation, described in the previous paragraph, is indispensable for the accelerated compensation of the deficiencies of the historic tradition in the sphere of civil democratic control of the armed forces. The development of constitutional and legal tradition may induce the culture of democratic civilian oversight of the military. In addition to that, the legal reform promoting DCAF in the transition countries of South-Eastern Europe has the task to meet the needs of the applicants for membership in NATO and the EU.

It is unfortunate that the longer democratic tradition in many countries of Western Europe and North America has not led to the formation of a single national legal norm of democratic control of the armed forces. Few authors are discussing this issue. It is indispensable that the eventual formation of a single legal norm of DCAF, perhaps more correctly – the legal principle of DCAF, is of a

highest hierarchical order and force. Hence, its logical location should be in the Constitutions of the different democratic countries. The difficulties, stemming from the procedure of changing a Constitution and, more importantly – the lack of clear legal contents of such a norm, have prevented the establishment of such a constitutional legal norm. However, the dialectics of the military profession strongly calls for the establishment of a legal concept and, eventually – a norm of DCAF. The introduction of legal normative restraints certain functional aspects of the military profession is indispensable and is in a fundamental interest of society. Each legal system has its specific constitutional basis and legal solutions and they are naturally reflect the form of DCAF. A Cabinet/Parliament system definitely differs from a strong President/Parliament system.

Here is a list of possible areas of regulation that may constitute the contents of the legal concept of DCAF – a necessary springboard for future formulation of a single norm. There is a full understanding that shaping a complex and harmonious norm that systematically encompassing the various sub-areas is not an easy task. However, the need to arrange the relations between civilians and military firmly and democratically, to accelerate the security sector reform in transitional societies, to improve the condition of the issue in societies with deficiencies in democratic tradition and practice, and even to better channel management of the problem in established democratic societies, requires an effort in formulating a single constitutional principle of DCAF. The legal concept of DCAF should include:

1. Basic agreement between the political actors in society (ruling and opposition) on the role and place of the armed forces and on various aspects of the democratic control over them. First, the different political actors and the military should recognize that it is normal for democratic change of power position of the different participants necessitates the responsible and restrained behavior of all, especially on the issues of security and defense.

2. Setting the constitutional and legal framework of the system of subordination of the command and control of the defense establishment in peace and in war. This would essentially reflect the need of democratic society to institutionalize self-restrained and self-limiting behavior. Without establishing mechanisms of self-limitation of the existing power, democracy would hardly be protected at all. The arrangements should also reflect the specific requirements of the principle of separation of power.

3. A defense-planning organization that would guarantee the supremacy of the democratic political and civilian component
in the transparent and monitored activity of the armed forces. A key issue that needs to be legally regulated is the structure of the armed forces of an individual state in servicing national foreign-policy objectives and the respective force requirements that should logically match the objectives.

4. Politically and legally guaranteed respect of military professionalism in regard to its competence. A logical addition should be encouragement, included in legal means, of the prestige and confidence in the military profession, security institutions in general as well as improvement of the social status of the servicemen and servicewomen in these institutions. A stable legal regulation of the officer and civilian salaries within the system of the national security and defense is indispensable. At the same time the best of expertise should be utilized in introducing anti-corruption legislation for the military ranks and security services.

5. Legally guaranteed de-politicization of military activity and military professionalism. Adopting legal norms on various hierarchical order and power that banning the creation or sliding of the security institutions towards praetorian structures. Introducing of clear and simple legislation banning paramilitary formations.

6. Legally guaranteed responsibility and accountability of the Parliament for its own decisions in the area of security and defense; a real and competent influence on the defense budget formation; transparent debates on the military activity, including regular reports and hearings; providing assistance to both the military and to society in shaping relations of mutual trust and respect, including between the military experts and representatives of the civil society’s expert community. The specialized commissions on national security and defense have a significant role in that respect.

7. A legal and political support of the activity of independent research institutes addressing security and defense issues, the press and other media as well as all other professional alternative information sources. The dependence on autonomous sources of information, knowledge and analysis is a critical feature for democracy, including the area of security and defense.

8. Legally guaranteed competence and expertise of the military and civilian leaders in the area of defense and of legislative authorities. Appointment of civilian leaders to national security institutions, including both the responsibility of the position and the competence and expertise of the respective profession,
are indispensable for the democratic civilian control of the security and defense institutions. Adequate legislation on personnel promotion and military education policy can significantly add to the progress in that area.

The legal concept of DCAF should reflect the already accumulated legislative experience and of the practice in law implementation. The best example from established democracies both in terms of positive and negative practices, are most welcome. However, transitional countries, including those in South-Eastern Europe can extensively exploit their own experience. The legal concept of DCAF and the eventual legal norm of DCAF are entitled to address the longer-term perspective of the issue of the democratic civilian control over the armed forces and the other security institutions of civil-military relation, leaving behind the general approach to legal regulation in this area of just being a reaction to particular and various needs. The rule of law principle in the sphere of civil-military relations requires a thorough and systemic approach to the problem.

International Legal Backing of Democratic Control of the Armed Forces or an International Legal Obligation?

The legal concept of DCAF has its international legal aspect too. While international law – the Charter of the United Nations and existing international legal treaties, conventions and agreements – does not provide for or even mention the democratic control of the armed forces, the imperative international legal principle of refraining from the threat or use of force against the territorial integrity or political independence of any state has certain reference to DCAF as one of the indispensable elements of stability and security. DCAF has also a logical link with the international legal principle of settling international disputes by peaceful means in such a way that peace and security are not threatened. The obligation to assist the UN and refrain from assisting any state against which the United Nations has taken preventive or enforcement actions, also has a certain reference to the different elements of DCAF.

However, it would be an overstatement to say that DCAF legally stems from these imperative international legal principles. They may provide a certain argument to the need to elaborate the international

---

aspects of the implementation of DCAF on an inter-state level and in a legal treaty form, but hardly anything more than that.

The Code of Conduct on Politico-Military Aspects of Security, adopted by OSCE member states at the Budapest Summit of December 1994, is certainly closer to a concise international normative regulation of DCAF. Section VII of the Code is devoted to the democratic political control of military, paramilitary and internal security forces as well as of intelligence services and the police. The Code thus gives a normative definition of the contents of the term “armed forces” – a quite broad and encompassing one. Its regulative utility may also be traced in the following aspects:

1. Participating states will further the integration of their armed forces with civil society as an important expression of democracy.
2. The states will provide and maintain effective guidance and control of its military, paramilitary and security forces by constitutionally established authorities vested with democratic legitimacy, at all times. The roles and missions of such forces and their obligations will be clearly defined within the constitutional framework.
3. Defense expenditures will be given legislative approval by each participating state. Restraint of military expenditures, transparency and access to information related to armed forces will guide principles in this activity.
4. Participating states will ensure their armed forces will be politically neutral.
5. Taking special measures to guard against accidental or unauthorized use of military means.
6. The states will not tolerate or support forces that are not accountable to or controlled by their constitutionally established authorities.
7. The participating states will ensure that their paramilitary forces refrain from the acquisition of combat mission capabilities in excess of those which they were established for.

The last three provisions hold a special meaning for the troubled countries of the Western Balkans. The timing of the adoption of the Code coincided with the escalation of the bloody wars in the former Yugoslavia and the mounting conflict in Chechnya.

8. Recruitment or call-up of personnel for service in its forces will be consistent with the obligations and commitments of the state in respect of human rights and fundamental freedoms.

---

9. The participating states take on the obligation to reflect the rights and duties of armed forces personnel in their laws and other relevant documents. The introduction of exemptions from and alternatives to military service is a significant element of this obligation.

10. The states will make international humanitarian law widely available in their respective countries. Military training programs, regulations and instructions must reflect this requirement, including the achievement of an adequate awareness by the personnel that they are individually accountable for their actions under national and international law. Military commanders should also achieve awareness of their individual accountability for the unlawful exercise of their authority and for eventually giving orders contrary to national and international law. The responsibility of the superiors does not exempt the subordinates from any of their individual responsibilities.

11. The possession and the exercising of human rights and fundamental freedoms by the armed forces personnel will be an obligation of the states in conformity with the constitution, laws, requirements of service and international law. The states will provide the appropriate legal and administrative procedures to protect the rights of all its force personnel.

The Code of Conduct on Politico-Military Aspects of Security is a politically binding document. It is an agreement of the OSCE member-states, reached by consensus. The politically codified norms on the democratic control of the armed forces are a valuable contribution to the efforts in defining the parameters of the legal concept of DCAF and its international legal aspects. The Code of Conduct is a major step-stone on the way to defining a full-fledged concept and norm or principle of DCAF, being more than a political obligation, considering the solemn pledges of the heads of states.

**Specific Legal Regulative Needs for DCAF in South East Europe**

First, the issue of DCAF is one of the key problems of the transition of South-Eastern European countries to democracy and market economy. Hence its specific legal regulative aspects are only part of a broader constitutional and legal reform – different in each individual state.

Second, the contents of DCAF in the transitional countries of South-East Europe varies, depending on how the wars and conflicts in
the Western Balkans involved the respective societies in the past decade.

Third, the legal regulation of DCAF reflects the different way of adaptation of the individual Balkan countries to the post-Cold War security and defense agenda, including the different levels of adaptation to cooperation with NATO and the Alliance’s Partnership for Peace Program.

The specific ‘missions’ of the legal reform in South-East Europe in promoting DCAF are:

- Eradicating the contradictions between the old and the new systems;
- Bring to terms civil-military relations in the countries, influenced directly by the wars and violent conflicts; placing various paramilitary formations under reliable democratic control;
- Confirming the irreversible character of the democratic changes in the armed forces and the countries’ security institutions;
- Reflecting the new requirements in the military field in a programmatic fashion.

The hierarchy of legal acts that facilitate the functioning of DCAF and stimulate the development in that area may be: 1) National Security or a Defense Concept; 2) Military Doctrine or a Defense Act; 3) Law of Defense and the Armed Forces or a Service Law; the alternative service may be regulated in this or another law; 4) Doctrines of the different branches of the armed forces, including different security institutions – intelligence, counter-intelligence, police, etc.; 5) New training regulations and field service manuals.

A fundamental requirement of the legal reform is sealing the “legal vacuum” in this area, achieving harmonious relations between the many hierarchically arranged legal acts, regulating the military affairs and the DCAF. Non-contradictory legal norms are indispensable in shaping the functioning legal status of the serviceman or servicewoman, whether in uniform or civilian.

A major inadequacy in South-East Europe that needs to be corrected is the rough structuring and functioning of the legal mechanism of the civilian democratic control of the armed forces. The key issues are the need for clear legal differentiation of competences, non-contradictory definition of the order of decision-making and the oversight of the implementation of the passed decisions.

There are three specific areas of legal-normative insufficiency:

First, the legal structure and position of the General Staffs of the armed forces – should they be of a ‘classical’ or of a ‘joint’ type, and directly subordinate institutions of the defense systems to the Ministries of Defense, or not.
Second, the full adaptation of domestic legislation on military service, of the respective norms, regulations and manuals to the new international defense and security needs and tasks of the armed forces.

Third, the legal regulation of relations in society and between the institutions, concerning the military and civilian crisis and conflict management, and what the specific roles and tasks of the armed forces should be.

While establishing the system of legal acts in the sphere of DCAF is certainly a fundamental prerequisite for improving the practice of civil-military relations in the region’s societies, no less important, however, is the level of effective implementation of the provisions of the legal and sub-legal acts. The attitude aspects of the legal system of DCAF tend to become even more important with the progression of the social, political and the military reform in the countries of South-East Europe. The guarantees on raising the quality of the implementation of the legal norms on DCAF are very much linked to the will, intelligence and character of the Members of Parliament working in the National Security and Defense Commissions, to the role of the media, different pressure groups and expert institutions of evolving civil societies in these countries. Unless public scrutiny and accountability are provided, the legal normative regulation will remain an unfulfilled job.

Conclusions

The list of tasks of the legal reform of the civil-military relations and DCAF in South-Eastern Europe is probably longer than that in other parts of Central and Eastern Europe. The reason is the combination of problems in the transition, wars and post-war developments, and the huge Western support that needs to be adapted to the specific domestic needs within a national framework. Nevertheless, some conclusions can be drawn:

1. The regulative potential of law in implementing the reform that would establish and further DCAF in the countries of South-East Europe is great. The program capacity of law in general is an objective guarantor in that respect.

2. The elaboration of the legal concept of DCAF and molding a complex legal norm or principle of DCAF will in time have a positive effect on the ongoing reforms in South-East Europe. This effect, however, will be even broader.

3. Utilizing the political normative regulative effect of the Code of Conduct on Politico-Military Aspects of Security, adopted by OSCE and gradually achieving an international legal regulation in that area will strongly support the processes of democratization in the sphere of civil-military relations and security relationships in general.
4. The countries of South-East Europe, whose legal normative regulation of DCAF is progressing in a differentiated manner, might substantially profit from the international legal agreements that encourage the establishment of the various elements of DCAF in the individual countries and societies.
The emphasis on the legal aspects of the democratic control of armed forces (DCAF) carries with it the danger to deal with the whole issue in technical terms of hierarchy and the democratic nature of the ultimate superior. It is certainly very important to examine the general problems of constituting a democratic government, and the particular issues of empowering the state democratic organs to effectively act in the specific environment of the armed forces. In other words, this refers to the question whether major decisions regarding the army will be made, and respective organs constituted, in accordance with the essential rules of democracy and will they be implemented by agents and agencies that will respect the principles close to the substance of democracy, i.e. rule of law and human rights?

I expect these questions to be dealt with in detail in other papers. Instead, I propose to examine the elements relevant to the true success of this effort, which lie outside the law but are necessary for the law to be effectively implemented.

Constitutional law is, paradoxically, one of the weakest branches of law. Even the most carefully prepared and defined constitutional arrangements, put down in impressive and coherent constitutional texts, can collapse much easier than legal regimes envisaged in less important areas of law. If there is a strong determination, accompanied with impressive rhetoric, not to observe the constitution, and if – on the other hand – there is no determination to defend the constitutional regime and no incitement to abide by it, the whole structure can disintegrate, suddenly or gradually. An example that comes first to the mind is the fate of the Weimar republic in Germany, which was perverted and subsequently destroyed because of the lack of support.
by the strongest political classes and the bureaucracy that was supposed to sustain it. Weimar Germany was, as Abendroth aptly said, "a democracy without democrats" – it was even not respected by its courts and, when the latter were pressed to act, the judicial decisions had no genuine authority, as manifested in the Leipzig trials after World War I, a frequently forgotten example of the failed efforts to try war criminals before national courts.

Let us examine for a moment the reasons of the failure of the Weimar Constitution in order to try to draw conclusions more germane to our subject. This constitutional arrangement, together with the first social-democratic government in Germany after the 1918 armistice, appeared to the German public as imposed from the outside, by the victors in the preceding war. By the Versailles Treaty, Germany was declared to be solely responsible for the outbreak of the First World War. Implicitly, in premonition of the conclusions made after the next German defeat in 1945, Germany was held to be prone to aggression because it was not democratic. The perception in Germany was that it was forced to democratize and to have a democratic constitution, while not being able to rely on an impressive majority for "bourgeois" democracy – it should be borne in mind that the social-democratic left had to disassociate itself from the communist and procommunist movements very popular at the time and to seek other allies. In this context it is very important to note that the Weimar Constitution was adopted and implemented in the shadow of another imposition of the peace treaty, which limited German armed forces to only 100,000 men. The von Seeckt plan to transform this maximum into a minimum by creating an army of officers, which can easily be expanded to a mighty and numerous force, was not only a brainchild of the essentially undemocratic Prussian military caste but a tacit agreement in which many politicians participated. This essentially contributed to the constitution's "insincerity", if this word is permitted, to the indifference of the Wehrmacht towards democracy and its despise of democratic leaders. With these and other instances of deficient loyalty it is highly improbable that a better constitutional court, a better President and stricter arrangements as to legislative powers could have saved the Second Reich and the democracy within it.

II

Jumping abruptly to the present times it is quickly realized that, in Europe, the subject of military-civilian relationships and of the civilian control of armed forces has become interesting and acute after the collapse of "truly existing socialism" in the Eastern part of the
continent. This has added a new dimension to the traditional concerns of the anti-democratic role of the military in other parts of the world. The difference between the independent and seemingly uncontrollable role of the army and the militarized parts of the police in Western Europe and the respective roles the military played, say, in Latin America, was essentially that in the latter case there has been a long tradition of the military rule in politics and controlling the civilian government elements, whereas in communist countries this has never been a case. From 1917 to 1989 communist armies were essentially controlled by civilians in central committees and polit-bureaus of the respective communist party. The presence of a number of generals in the supreme bodies of the communist party does not detract from the truth of this statement. In communist system’s armed forces were loyal to the civilian leadership of the party and the state – they never found the force to rebel or to resist orders coming from the communist state, they never even dreamt of it. It is enough to remind the reader of the purge Stalin made in the Red Army top ranks on the eve of World War II, which, in view of Hitler's threats and proclamations, would have ended in suicide in other circumstances. However, it sufficed for Stalin to slightly alter his rhetoric from communist to nationalist for the surviving high officers to return to duty and again behave strictly according to the instructions of the Party, in matters of military strategy as well as politics.

It helps to note that communist states were not governed by their constitutions. These documents were pieces of window-dressing: they had many other purposes (realistic and unrealistic) but they did not seriously deal with the way the state was governed. Reading the constitution did not enlighten anyone on the nature of the process of political decision-making. The hierarchy within the armed forces was preserved (although it ran through state and party channels) but the top decisions were a "civilian" input coming from the top echelons of the communist party. This should be remembered in order to avoid mechanical comparisons with the role of the army in situations governed predominantly by explicit constitutional arrangements. I say "predominantly", because in no country are the rules of the political game, including those relating to the use of the military, the only ones discernible from the constitutions and laws. Such rules in communist countries were studied, with various degree of success, by Kremninologists and others during the existence of the "Socialist Camp".

The following question is: why were communist armies so loyal to their civilian communist superiors? It can be immediately coupled with the need to explain the behavior of the same entities when they are expected to operate in a new, democratic environment.
The provisional answer to the first question is that the civilian and military leadership (and most of the rank and file) shared the same ideology, at least in the modest form of a basic set of values and paradigms of the world and society. Marxism-Leninism was a secular ideology with a number of religious features. "Democratic centralism" which abolished factions in the widest party bodies, together with the recognized "historic mission" of selected cadres, gave, as in a church, polit-bureaus and central committees the right to authentically interpret the dogma. On the basis of a shared Weltanschauung, practical decision-making was delegated to these relatively small bodies, whose composition was determined by mysterious patterns, quite different from democracy. Effective control of the armed forces was thus assured through the adherence to the same set of rules and principles, set by authorities who were technically superior in the sense of the organization of the state but also recognized as the infallible interpreters of the shared ideology.

What happens to such armed establishments when they have to face a democratic situation and to submit to democratic leadership? It appears that they have adapted very poorly in terms of submitting to democracy pure and simple, that is, in the ideal sense of being military professionals doing jobs assigned to them by democratically elected or appointed organs of the state. Some premonition was to be found in the role of the Polish Army in suppressing the movement started by Solidarity. General Jaruzelski, who had been very popular in Poland even with a hint of being predominantly a Polish patriot, found his army ready to introduce the first military regime in a supposedly communist country, in order to preserve socialism as interpreted by its already worn-out international leadership. When Poland’s supreme values became national and catholic, the Army had no further problems in adapting. This has happened more or less in all European former communist countries, regardless of many problems yet to be faced by democratic governments in overcoming the resistance of the traditional army mentality.

III

True problems arise in countries which purport to have abandoned communism for a political system that favors the citizen instead of the member of the predominant ethnic nation, in other words, in states which are not nation-states in the romantic "German" sense of the word, where communism could not have been replaced by nationalism without undue damage, and where this attempt was made on the basis of ethnically-neutral patriotism.
Such dilemmas have been affecting the Army of the Russian Federation, as demonstrate by its conduct in Chechnya and the position of marshal Sergeev and his generals towards the situation in Yugoslavia, where their stand was consistently in favor of Milosevic and the Serbs. It was the Russian generals who resisted the Ahtisaari–Chernomyrdin plan for ending the NATO intervention related to Kosovo until the very end. This empathy was probably inspired by "traditional" Russo–Serbian friendship and religious proximity, as well as by shared nostalgia of communist values.

The trials and tribulations of the Yugoslav People's Army (JNA) of the former Socialist Federal Republic of Yugoslavia (SFRY) are probably the most illustrative case in point (or at least best known to me). The JNA was definitively on Milosevic's side after his advent in Serbia, based on clever manipulation of Serb nationalism and an alliance with the national intellectual elite, when the country had been immersed in crisis which led to armed conflicts in 1990, on account of the blossoming of nationalist and separatist movements in other parts of SFRY. The rest of the story is known: to say the minimum. The JNA was against the results of elections everywhere but in Serbia and Montenegro, it logistically and morally supported Serb separatists in Croatia and was fighting along Bosnian Serbs in Bosnia and Herzegovina. Its present remaining components are the Army of Yugoslavia (VJ) in the Federal Republic of Yugoslavia (FRY), until October 2000 dominated by Milosevic and his Socialist Party of Serbia and its sister parties in Montenegro, and the Army of Republika Srpska, which was financed by FRY at least until the autumn of 2000, according to recent statements by Milosevic himself. Many non-Serb elements of the JNA officer corps joined the respective armies of their new fatherlands – some after initial hesitation. This hesitation is very illustrative and I shall return to it later.

The confusion that reigned in the JNA and is reigns in the VJ was best illustrated in two publications. One was a book by Veljko Kadijevic, the last SFRY minister of defense, who was in charge of JNA operations in Croatia in 1991 and who was the inspirer of a semi putsch where JNA tried to persuade the collective head of SFRY (the Presidency) to declare a state of emergency and depose all political leaders of the federal units, except those in Serbia and Montenegro. With a slight simplification, Kadijevic's version is that of a grand conspiracy against socialist Yugoslavia, led by capitalists in Germany

---

6 V. Kadijevic, Moje vidjenje raspada – vojska bez države (My View of the dissolution – Army without State), Belgrade, Politika, 1993.
and the US, and implemented by Gorbachev who was in charge of dismantling socialism. The important point is that Kadijevic, representing the top military brass, was initially on the side of Milosevic and Serbia, not because he and many of his colleagues were Serbs, but because Milosevic was defending socialism. While in Croatia and Slovenia the 1990 elections were won by coalitions of "bourgeois" nationalists and irresolute social-democrats, the elections in the same year in Serbia and Montenegro were won by unreformed communist parties, the one in Montenegro not even bothering to change its name. In Kadijevic’s view and that of his colleagues (who included a significant number of non-Serbs) the results in other republics were scandalous: they had been carried by enemies of socialism! Kadijevic came to the conclusion that JNA should side with the Serbs through a mental process which is not easy to reconstruct but is clearly expressed in his book: after having discovered that the working people and other people in Croatia and Slovenia were not supporting socialism he came to the conclusion that only Serbs shared his ideology and shifted to the position that the reformed JNA should defend the borders of the Greater Serbia. This was the moment when many military officers from other parts of Yugoslavia (Bosnia and Herzegovina, Macedonia) who until then had loyally participated in operations in Slovenia and Croatia, consequently started abandoning the cause, realizing that defending socialism had been gradually abandoned in favor of a bizarre version of Serb "socialist nationalism". The Bosnian Serb army, later to become the Army of Republika Srpska, was established by a JNA decree: all JNA officers coming from Bosnia and Herzegovina were seconded to that army; officers of Serb origin obeyed not without some pressure, while many Moslems and Croats joined their new national armies and were later fighting on opposite sides.

Another volume remains as a powerful testimony of the confusion in an ideologized army. In January 1993 the FRY Federal Ministry of Defense organized a colloquium, the proceedings of which were published in a voluminous book (598 pages) titled The New World Order and the Policy of Defense of the Federal Republic of Yugoslavia.

Apart from some serious contributions, although very few in number, the meeting and the ensuing book were dominated by speakers belonging to the far right, even fascist, dominated by anti-

---

7 Kadijevic himself comes from a mixed Serb-Croat marriage.
8 Novi svetski poredak i politika odbrane Savezne Republike Jugoslavije, Belgrade, Savezno ministarstvo odbrane, 1993.
western xenophobia and resulting in proposals such as the blueprints for an alliance of orthodox states.

The contributions of the then active military officers were symptomatic and therefore are of particular interest. Without exception they show that their authors were in desperate search for new ideological identity at the moment when Marxism-Leninism appeared to be definitively exhausted. The resulting concoction can be summed up as a combination of nationalism with some ingredients of simplified communist doctrine, such as (anti-Western) xenophobia and fear of capitalism, this time personified in the New World Order. Conspiracy theories permeate the argument, even in pieces that look as if they would "scientifically" discuss conspiracy theories. Thus a contributor in a convoluted text under the title "Conspiracy theory and defense policy" seriously considers, among other things, "the possibility of a conspiracy against Serb history".9 The prevailing theme in this and similar contributions is nationalist self-pity: apart from being perennial victims, Serbs have never been united and even "conspired against themselves"! Traditional enemies were abundantly present: in addition to the classical foes of socialism, such as the United States, in a sudden departure from non-alignment, which in Tito's times had been strongly doctrinally espoused by JNA, there were new discoveries of Islamic hostility and Russian and Orthodox love and friendship.

This point of disorientation was overcome by total submissiveness to Slobodan Milosevic, who retired some of the most outspoken ultranationalist officers represented in the volume, including its official editor, the head of the VJ Centre for Strategic Studies and Defense Policy, probably fearing that they would rather join or become closer to one of the new ultra-right nationalist parties, such as the Radical Party of Vojislav Seselj, with whom at that time Milosevic had a precarious love-hate affair. Totally abandoning communist rhetoric was something that could not be imposed both on the Socialist Party and the Yugoslav Army after its fresh transformation from a communist to a national tool. After all, for Milosevic nationalism was rather a weapon than a matter of conviction.

VJ followed obediently its leader in all positions he formally occupied and eventually proclaimed him to be its supreme commander even if this was against the FRY Constitution, which sees in this place a body of three persons. This was obedience out of fear or cupidity: "ideological" Army rhetoric was degraded to ordinary

---

9 S. Radišić, "Teorija zavere" i politika odbrane, Novi svetski..., note 4 above, p. 141. The then lieutenant colonel Svetozar Radisic is at the time of writing (April 2001) the official spokesperson of the General Staff of VJ.
sycophancy. Nevertheless, under Milosevic the armed forces were effectively controlled by their "civilian" chief.

The capacity to inspire fear and blind submissiveness is not there with the new governments in Yugoslavia and Serbia. It is however improbable that VJ will submit itself to civilian control only because it believes that it must do so according to the constitution: it will seek to find out what is the ideological orientation of the new government so as to discover whether it is sufficiently inspired to follow it.

In other words, it will probably do what it likes to do and grudgingly obey if faced with an impressive disapproving political consensus, but there will be room for sabotage if it discovers that some of the orders and instructions do not fit into its new definition of reality. So far, the army has shown some inclination to follow the calls to reduce the length of conscript service (yet strongly resisting professionalization), it even has appeared ready to swallow the frog of conscientious objection (with punitive consequences) but it does not renounce its nationalism, feeling that there is possible support in parts of the new ruling elite. In this respect, it has come out with preventive initiatives, often accompanied with the Serbian Orthodox Church, such as supporting obligatory religious lessons and introducing Army chaplains. In view of its traditional hostility towards human rights it is symptomatic that the generals have tried to suffer least damage by identifying human rights solely with the freedom of religion.

IV

The preceding examples and remarks were meant to underline the dilemmas described at the beginning of this paper. How do we secure shared values, goals and similarities of thinking necessary for civilian control to be effective. In a post-communist state this boils down to establishing a convincing civil "ideology" legitimizing both the constitution and its implementation. In societies where there are competing values, where the civic element is still in the shadow of ethno-national and religious ideologies, the civilian factor risks to lose its weight if the underlying principles are not shared. The Army needs symbols and the new civic state has few symbols to offer: if it offers the symbols of the dominant nation or religion, they tend to alienate ethnically and religiously others, if new symbols are invented, as in Bosnia and Herzegovina, they evoke no memory and are emotionally hollow. A possible way out is a radical rethinking of the army in the sense of making it a part of the civil society, or move the focus to international relations in order to be able to abolish the army altogether.
Lidija R. Basta Fleiner

RELEVANCE OF WESTERN LEGAL EXPERTISE TO RULE OF LAW IN COUNTRIES IN TRANSITION

Introduction: Mapping the Issues

The process of transition and democratic consolidation in Central and Eastern Europe has been proceeding under the leitmotiv of rule of law. This argument not only dominates the political struggle between various players and their political programs, but also represents the underlying, taken-for-granted framework of Western legal expertise when addressing the processes of transformation in post-communism countries. Moreover, there is a general agreement that the rule of law goes hand in hand with democracy. The constitutionalist interpretation of democracy as “no longer defined only by simple majority power to make law but also by the requisite respect for constitutional rights and liberties”\(^\text{10}\) claims that a primary function of democratic rights is to safeguard other, more fundamental rights. “Democratic rights are justified in a given institutional setting just to the extent that they serve this function better than do alternative feasible arrangement.”\(^\text{11}\) Further reflection logically reaches the position that human rights legitimate democratic systems. Democracy as state form acquires the relevance of a fundamental human right.\(^\text{12}\)

Accordingly, the processes of transition and democratic consolidation in post-communist countries have a clearly defined objective – that of introducing liberal constitutional democracy broadly taken.\(^\text{13}\) However, the liberal model of constitutional


\(^{13}\) Constitutional democracy can also be defined as the rule of law opposed to its immanent institutional premises. By saying this we actually make the case for the
democracy alone has so far demonstrated certain major structural ambiguities, which run counter to its (self-understood) claim of universality.

At the outset I should also make another, already well-known point. The first ten years of transformation have convincingly demonstrated that – due to the historical context within which the democratic transition is taking place in Central and Eastern Europe – a liberal constitutional and democratic design for itself does not necessarily create a democratic polity properly taken, which functions under the rule of law. This experience has to be taken into account as one of the major indicators when addressing the relevance of the Western legal expertise for the rule of law in transitin countries.

This is why the paper will first address the major challenges of the Western model of constitutional democracy that underlies the respective expertise in the given countries in transition (II), then proceed with specific structural problems in the transformation processes in terms of a direct, short-term viability for the rule of law, including their effects on the feasibility of democratic control of armed forces (III) and conclude with some of the major lessons learned (IV).14

In General: The Immanent Challenges to the Rule of Law as the Underlying Framework of Western Legal Expertise

Most of the challenges confronting the rule of law at the beginning of the new millennium relate to multiculturalism and globalization. And yet, at the same time, most of these challenges have

---

14 The lessons learned rely primarily on the experience in providing various forms of services in Eastern and South Eastern Europe within the Mandate “Rule of Law and Decentralization within Multiethnic Societies”, which the International Research and Consulting Centre has been carrying out for the Swiss Agency for Development and Co-operation since 1997.
been giving the main tune to the developments and doctrinal debates in the West throughout centuries.\footnote{More in: L. R. BASTA FLEINER, \textit{Historical Development of the Rule of Law in the Major Western Legal Traditions: From the Medieval Idea of the Supremacy of Law Towards the Modern Ideas of the Rule of Law}, Sino-Swiss Conference on the Rule of Law, Beijing, Nov 28-30, 2000 (in print).}

Let us relate to some of these issues in brief:

- \textit{The nature of state and law and their respective relation.} – Here we deal with the most fundamental problem of the legitimacy of both state and law. Although it may seem to be a primarily doctrinal problem, this is by no means the case. The understanding of the state as a \textit{giver} of human rights, unlike that where the state cannot remain legitimate if violating fundamental human rights, can have direct consequence on constitutional policy of human rights in a given state. Should one read new constitutions of the transiting countries of Central and Eastern Europe, one can easily “trace” this fundamental difference in setting the legitimacy of the state as the source or as a guarantor of human rights.\footnote{When regulating the rights of \textit{man}, the constitutions of Hungary (1997) and Poland (1997), for example, relate these rights to a “\textit{man}” as their bearer. However, the Romanian Constitution of 1991 and the Bulgarian Constitution of 1991 use the term “\textit{citizen}” also when addressing the bearer of the rights of man.}

- \textit{Democracy and the rule of law} – The far reaching, fundamental impact that the understanding of the nature and role of the state and law has for the relationship between democracy and the rule of law is more than obvious. Somewhat schematically, this impact could summarized in the following dilemma: Does the basic value underlying the modern constitution, that of inviolability of human rights, also limit and control a democratic sovereign, or is it the other way around? To put the question even more radically: What if a conflict between legal and political sovereignty occurs?

- \textit{The formal as opposed to the substantive concept of the rule of law} – The key-issue at stake here affects the very nature of a given form of government and its basic political underpinnings. In other words: Is the rule of law reduced to a mere (positive) legal form in communicating to the public otherwise independent political decision-making; or should the rule of law instead primarily provide legal instruments for a political control of power-holders?

- \textit{Human rights as the cornerstone of the rule of law} – All of the above referred open issues could be, in the final instance, brought under the umbrella of human rights. However, the position alone – that the inviolability of basic human rights persists as immanent in the rule of law – leaves open and yet unanswered some of the major problems of this clear and non-disputable principle, also recognized
by international law. The answers that have still not been given are not of mere doctrinal relevance but indeed affect the core of the contemporary nation-state and ongoing supra-national processes of globalization:

1. What is “universalisable” in human rights? – The non-disputable values of human life, liberty and dignity, or also the global actors who claim the right to be “universally” legitimated to define “universality” in given cases? The major paradox of globalization can be formulated as follows: While being more or less successful in advancing neo-liberal economic principles beyond the nation-state, the process of globalization runs into a problem once its partisans try to argue that the structural principles of liberal law and politics can be immanently stretched beyond the boundaries of a given nation-state.

2. How is the basic liberal underpinning of the rule of law to be interpreted within a multicultural context? What remains “universalisable” in fundamental human rights from the multicultural perspective, if the human rights policy alone cannot address the demands that cultural diversity be (also politically!) accommodated? Democratic integration of multicultural societies representing a new type of corporate societies, is a major structural precondition for the viability of human rights policy. And yet, the fundamental question, still awaiting an appropriate answer, can be formulated as follows: What would be the source of democratic unity in a multinational state?

In Particular: the Challenges to the Rule of Law in the Countries in Transition

It has often rightly been said that the constitutional paradigm within the democratic transition of Central and Eastern Europe have been developed under a “permanent constitutional crisis”. Given the historical context of transition, this does only imply that the constitution-making process has long persisted as the focus of major political issues and conflicts. There is something more fundamental in the paradigm of a permanent constitutional crisis. It also bears in itself the major question of how far the radical departure of communist from the modern constitution paradigm can be epochally transcended, and if so, how far modern constitutionalism can be “stretched beyond” its normative roots in order to accommodate constitutional transition in societies that came out of “negative modernity”, i.e. of an exclusive, restrictive “universality” of communist party rule. In order to properly address the constitutional policy as a means of democratic
consolidation, the acting pouvoir constituante in the transiting countries of this region must additionally face the dilemma, which may be – somewhat emphasized – formulated as follows: Does constitution-making in Eastern and Central Europe have to, and can it at all, reach the post-modern constitution paradigm by simultaneously following and transcending the basic guidelines of modern individualist liberalism?

III.1. The transformation difficulties of the countries of Central and Eastern Europe have almost axiomatically been addressed as the “simultaneity problem” (das Dilemma der Gleichzeitigkeit). The syntagma denotes a unique phenomenon of crosscutting between otherwise historically diversified processes, those of nation-state building (including territorial vindications), introducing market economy, generating civil society and establishing democratic will-formation. The impact of this epochal feature on the constitutional transition is crucial indeed. In this case, constitution-making cannot imply ratification of the multifold historical process of establishing modern polity and modern politics. It must itself first induce such a process. More to the point: “These countries have simultaneously to create a constitution and its most important prerequisites”.

There are two, equally important tenets of the post-communist constitution-making which result from this structural challenge: a strong accent on socio-economic rights, and the communitarian concept of citizenship. The letter has been often followed by the strategy of ethnification of politics, generally applied in Central and Eastern Europe. Within a multiethnic society, the principle of citizenship (arising) out of ethnicity cannot be articulated as other than

---


19 “What I mean by “ethnification” of polities and politics is a number of interrelated strategies of individual and collective, social as well as political factors. First, territorial boundaries are drawn in a way that maximizes ethnic homogeneity. Second, policies that differentiate the status rights of citizens according to ethnic affiliation are pursued. Third, policies are proposed, advocated and resisted, and associations as well as political parties are formed, in the name of fostering the well-being of an ethnic community at the expense of excluding those internal and external groups that are considered not belonging to it. (C. OFFE, Ethnic Politics in East European Transitions, New School for Social Research, New York, 1992. See also from the same author: Der Tunnel am Ende des Lichts. Erkundungen der politischen Transformation im Neuen Osten, Campus Verlag, Frankfurt/M/New York, 1994.
that of a dominant ethnic collectivity. It is the majority ethno-nation that acts as *pouvoir constituant*, it is the majority ethno-nation in search of its (own) ethnic state that lays down the “universalité” of the underlying legitimacy basis. This legitimacy paradox of a mono-ethnic state within a multiethnic one has direct impact on the possibilities for democratic control of armed forces. In terms of its role and its self-understanding the army remains also mono-ethnic: Those who symbolize the state will usually have the backing of the army and police as state institutions. In other words, within multiethnic transiting states, which suffer on a permanent legitimacy crisis, the fact that the state issue remains “pending” makes any democratic control of armed forces hardly feasible. Those who (pretend to) defend the state will claim legitimate right to exclusive control of both the army and the police.

Furthermore, due to the lack of socio-political and economic prerequisites for constitutional democracy and the rule of law, the constitutional processes in Central and Eastern Europe have at best demonstrated the common problem of permanent tension between the two major preconditions for successful democratic transition, namely those of *democratic legitimacy*, on one side, and *effective government*, on the other.

In consequence, the major problem for constitutional and legal policy has been how to introduce such principles of decision-making and institutional devices that would guarantee a democratic consensus stable enough for further consolidation of the transition processes within societies atomized by means of epochal political and economic reforms. In this respect, for example, the well known disputes on presidentialism vs. parliamentarism in Eastern Europe have gone much further than confrontation over the system of powers. All the various forms of presidentialism or semipresidentialism, or of rationalized parliamentarism with a directly elected head of the state as a moderator between the powers of the state, as well as between the state and society, addressed one and the same problem: How to successfully compose legitimacy and efficiency in transitional government. This is why the constitutional bargaining over presidency was not only a most evident give-and-take process, but also one very much burdened with the illusion of a “benevolent dictator”. Namely, in spite of the positive effects, a strong role of the head-of-state remains ambivalent in transiting societies and in principle excludes checks-and-balances, thus remaining one of the major institutional

obstacles for democratic control of armed forces, also. In addition, the role of moderator, often given to the heads-of-state in transiting countries may additionally “intensify” the relationship between the chief executive and the army.

III. 2. The next major challenge affects the rule of law properly taken. Namely, unlike traditional Western constitutional democracies, where the principle of the rule of law inherently postulated legality as grounds for legitimacy, in the post-communist European context of transition the case may well be the other way around. I am full aware how radical the hypothesis may sound, but I would nonetheless argue that – for the time being, in a great number of countries, – there is no intrinsic identity between legality and legitimacy, and there may well be a case of intrinsic tension between the two! Why is this phenomenon at all relevant for democratic control of armed forces? – Simply because the army and police, being state institutions, share the negative effects of the unlawful acts of the state on behalf of the rule of law!

The latter is certainly the case not only in issues on the introducing market economy and cutting down welfare rights, but even more so in the process of re-privatization and the attempts of retroactive criminalization of acts of the old regime. Here the fundamental underlying dilemma becomes fully transparent: that of Rechtsstaat as a method vs. Rechtsstaat as an aim of transition. For example, a strongly disputed decision of the Hungarian Constitutional Court, which blocked welfare reform through its interpretation of the socio-economic rights as acquired, quasi-property rights, was rather in line with “populist reasoning” and the idea of the Constitutional Court being a legitimate protector of vox populi.21 This constitutional conflict can also be taken as a paradigm for the above-mentioned structural problem of the rule of law in democratic transition in general.22 It has clearly demonstrated that the transition to the rule of law cannot often itself run under the very principles of the rule of law. More radicalized, the paradox reads: How can the new regime, which claims to be legitimate (also) because it remains within legally established limits of its powers, undo the breaches of law by the old regime, while not at the same time violating the law itself.

And yet, the role of the constitutional courts in Eastern Europe, especially in those countries that have advanced in democratic transition, deserves a somewhat more differentiated perception. By

providing a guarantee that the constitutionally established rules of the game will be respected by the other two branches of power, as well as by steadily reconstructing a catalogue of universally recognized elements of democracy and rule of law, constitutional courts proved to be influential stabilizing factors of the democratic process and major generators of a constitutionalist-democratic political culture. In this sense one could also argue that the activity of the constitutional courts displayed major ambiguities to the permanent interplay between the politque constitutionnelle politisante and politque constitutionnelle politisée.23

These additional challenges to the rule of law in the countries in transition gain special relevance to the strategies that are to be defined and policies that are to be pursued, since Western legal expertise usually comes with the standards for good governance, which in fact “translates” the principles of constitutional democracy and rule of law into the preconditions for “governability/Regierbarkeit”. (Good governance being the management of regime relations and the public realm on the basis of institutional “rules of the game” that guarantee efficiency, accountability, transparency and legitimacy.)

Lessons Learned

Given that Western legal expertise in countries of Central and Eastern Europe takes the Rule of Law/Government under Law as a set of normative principles for constitutional and political design, the major underlying task for experts in fact remains to make a case for the Rule of Law. In this respect, Western legal expertise has often to cope with a profound reluctance of the other side to take the major principles of constitutional democracy for granted. The credibility is directly linked to the capacity to both pursue critical insights into the principles and solutions they argue, and link them to the given context of the specific country.

In consequence, the initial challenge for any major/systemic Western legal expertise in countries of Central and Eastern Europe in transition is how to set up a “code of communication”, to define in advance the approach and the type of argument that could make the partner receptive to the messages that are to be communicated. In other words, the principle targets of good governance (good government leadership) – those of preservation and promotion of peace and security, support of human rights and constitutional democracy – can be met only if their basic positive effects can be

convincingly demonstrated within the given situation of a specific country.

The political actors in transiting countries in Central and Eastern Europe almost unanimously recognize the emancipation potentials contained in constitutional democracy and rule of law as such. However, they try to critically relate these principles to their own situation, whereby the issues of multiethnicity and transition equally dominate as major limits of democratic constitutional design and protection of human rights. The demand for far reaching political and legal reforms remains debated against the need for well reflected reforms which would guarantee (or in same cases, bring) stability and peaceful transition.

This is how we have arrived at the point of opted strategies, not only preferably but also feasibly involved by Western legal expertise in the countries of transition in the Central and Eastern Europe. I shall start with more than a general remark: The major challenge for the outside actors would be, in my opinion, making clear in advance whether a consensus-based or consensus-generating strategy is to be pursued in each given case of legal expertise. This starting matter of clarification seems to be of major importance, since the consequences of respective strategic orientation are profoundly different. For example, in the cases of countries with deep ethnic cleavages and conflicts it becomes more than clear that a consensus-based strategy and the related policy in the beginning need not have much to do with democratic legitimization properly taken. On the other hand, it is precisely by means of an appropriate consensus-generating strategy among different ethnic groups, that democratization processes can be launched and further endorsed.

Something also very important, although of a different nature has to be mentioned here: the still strongly rooted egalitarian legitimization cannot be but transcended only by means of economic policy. The latter can make its way only when balanced by measures that will be able to soften its negative effects on the standard of those whose support of the very same economic policy is still lacking. Generally speaking, a consensus-generating strategy (also) of foreign actors must face the fundamental challenge of the historically non-precedent dynamics in simultaneous structural changes in these countries. On grounds of close insight and understanding of each given case, the expertise has firstly to define feasible avenues and instruments in paving the path to democracy through endorsement, restoration and introduction of alternative values in order to encourage a new basis for the identity and homogeneity of polities in statu nascendi.
As already said, in the transiting countries the rule of law cannot rely upon already achieved economic and socio-political reforms as its structural pre-condition. This is why any Western legal expertise must give a proper account of the major issue at stake, namely: is the transition to democracy and rule of law feasible indeed by means of the principles of rule of law? Can major illegalities and principal injustices of the old regime be accommodated without putting questioning the legality and justice of the new regime? In other words, the good governance programs have equally to establish the strategy for the rule of law as a method, as well as for the rule of law as a goal of transition.

In addition, when related to the strategic target of democratic development, the rule of law argument must meet the major challenge of the interrelationship between constitutional stability and legal security, on one side, and the dynamics of development and of multiethnic societies, on the other. More in particular, the good governance programs must offer a strategy that will convincingly demonstrate that the rule of law principles and institutional guarantees are indispensable prerequisite for the process of democratic development, including decentralization (peace and stability as a condition sine qua non for a democratic development). Such a starting point becomes exceedingly relevant in terms of the need to balance and blend – for example – centralized and decentralized governmental solutions (e.g. to try to balance centralized judiciary with the strong decentralization of administrative services).

Last but not least, the success of Western legal expertise and the role of the foreign actors must first of all be evaluated through the insiders’ eye. Furthermore, the involvement of competent experts with an inside perspective in the initial process of shaping the program of good governance can, e.g., make a decisive contribution to its positive effects in a twofold sense:

a) by providing an indispensable inside “flair” and information on all the factors of given economic and social, as well as political and legal backgrounds that can directly affect the proposed program, be it in a positive or in a negative sense;

b) by making the decision-making actors in the partner country more receptive already in the initial phase to the proposed political and legal reforms and thus more willing to carry them out efficiently and effectively.
Ilona Kiss

RIGHTS OF CONSCRIPTS IN PEACETIME: OBSTACLES TO AND OPPORTUNITIES FOR PROVIDING JUDICIAL AND NON-JUDICIAL SOLUTIONS IN EAST EUROPEAN AND CENTRAL ASIAN COUNTRIES

Introduction

According to a recent assessment of the Russian army, one or two cases of conscript murder invariably occur each day. These qualified murder cases, which do not include accidental death and suicides, are officially motivated by so-called non-statutory or non-regulated military relations (‘neustavnie otnoshenia). In reality this is the phenomenon of “dedovshina”, the extreme form of violence and harassment of young soldiers by the elders. It is a covert system used by second-year servicemen to control the first-year soldiers and force them through humiliation and physical beating to do things that, in principle, they are not obliged to do. “Dedovshina” has become an almost integral part of the armed forces, and presently is widespread in the post-Soviet armies, especially the Russian army. “Paradoxically, the Russian army would collapse without dedovshina” – a member of the Russian State Duma said during a recent conference. “It has become the cement of the contemporary armed forces. If today, by some miracle, we could instantly eliminate this phenomenon, the following day there would be no army at all”, he added.

Whether one accepts it or not, “dedovshina” has really become an officers’ tool corps for controlling conscripts. “Dedovshina” is a tacit informal deal between officers and commanders and the “elderly” conscripts who act as a surrogate control unit toward the newly recruited soldiers. This is a chain of control mechanisms, based on unofficial hierarchy in the barracks, and results in prison-like terms of human formation, subjugation and manipulation. This dismal situation is usually explained by the moral decay of officers because of the appalling living conditions, miserable salaries, and completely
inadequate food and ammunition supplies. As for the social conditions, the average monthly salary of a battalion commander (in the range of lieutenant-colonel) in the far-east is Rbl. 2391, which is equal to 46% of the minimum living standard in this region. Although this is an unacceptable fact, it cannot be considered as justification or explanation for using dedovshina as a conscript control tool.

Most experts allege that the vicious circle mentioned above can only be stopped by eliminating compulsory military service and transforming the conscript system into a professional service. However, my starting point is different. I will argue for my thesis that some judicial and non-judicial solutions should and could be introduced against the unjustified control tools even under the compulsory conscription system. This does not mean that I intend to defend the conscript service as such. Rather, I only would like to present my observations and recommendations as to how the unjustified, covert forms of inner control of armed forces should be replaced by a legally justified form of public or democratic control. My observations were collected during the implementation of the conscripts’ rights advocacy and military justice project which was launched by COLPI two years ago in East European and Central Asian countries.

Legal Basis of Conscript Service and Implementation

Methodology

In the CIS countries and Baltic states, issues relating to (compulsory) military service are provided for by the laws concerning liability for national military service, conscription, status of servicemen, etc., and by corresponding by-laws: statutes, regulations, orders of the defense minister and others. In general, the military legislation covers principal issues concerning conscript military service: the age of the conscripts, service terms, recruitment, warrants and procedures for exemption from and deferment of military service, conditions of conscript military service, etc. However, because these regulations in some cases directly oppose the general principle of human rights, the question really is how these laws are implemented in the every day practice. I would like to focus on the methodology of the simultaneous consideration of national legislation and international standards of human rights.

The term of conscription itself involves major human rights restrictions. It is sufficient to refer to the right to life and to liberty (i.e. freedom from slavery, and forced labor), freedom of movement and residence, right to personal security, and the freedom to choose
residence or employment. Even if we accept that restrictions may be imposed on these and other rights, the key point to examine is the following: how great is the possible and necessary dimension of the restriction, or in other words, what is the inviolable essence of individual rights in the case of conscription.

The existence of conscription cannot be questioned from the aspect of human rights. Human rights are not infinite; in the interests of certain state purposes reasonable restrictions are allowed. In countries where conscription exists, this entails legitimate restriction of certain human rights. International human rights treaties – including the European Human Rights Convention – also recognize the existence of conscription. But a human right can only be restricted in the interest of a certain constitutional objective provided that the restriction is inevitably necessary and that the restriction is not disproportionate compared to the objective pursued.

The fundamental objective of maintaining the military is to defend the homeland. Defense is one of the ultimate roles of the state and therefore it is hardly disputable that the state, if necessary, may restrict human rights to carry out this role. However, to ensure the observance of human rights to the largest possible extent, in a democracy there is also a state objective as important as defense. Accordingly, we have two equally important state aims. These aims are not diametrically opposed; nevertheless, they may be in factual or apparent contradiction in some cases. Conscript service in peacetime contributes to home defense by enabling the masses of citizens to be trained and prepared for armed combat and other activities directly supporting it. The training and preparation take place in a unique environment, within the military system, and the protection of this system, which is somewhat different from civilian society, may also justify restrictions. Thus when we need to obtain a judgment on the legitimacy or necessity of a restriction concerning conscripts, we must ask the following questions:

- Does the given restriction serve the training purposes indeed?
- Does the protection of the military system require the restriction?
- Is it justified that in the given case the military system differs from the values and norms of civilian society?

The essential military areas of expertise that are different from other social systems or work organizations and include the following:
- Soldiers must endure extreme situations and they must be prepared for them during their training.
- Obedience and discipline must be maintained under any circumstances.
- Permanent operability and readiness must be ensured.
• Certain uniformity must be maintained and military cohesion must be facilitated.
• The military must meet certain expectations of society.

Simulation of the mentioned conditions during training is acceptable, provided that the soldier’s life, health and bodily integrity are not directly endangered. The special encumbrance (or suffering if you like) can only be caused for training purposes; it cannot be a form of punishment, retaliation or other arbitrary act. The military is a dangerous institution, and thus even only one undisciplined soldier can cause massive damage, while the operation of an army consisting of undisciplined soldiers may be unreliable. Maintaining discipline is a vital social interest and therefore, the more stringent sanctions attached to soldiers’ disciplinary offences are justified. It is questionable, however, what other means may or should be used aside from the more stringent disciplinary and criminal sanctions to prevent offences.

To what extent should we restrict soldiers’ freedom of expression, right to complaint and court appeal, or freedom of assembly and association to suppress breaches of discipline entirely? It is difficult to agree with the view that human rights necessarily cause disciplinary problems in the military, and thus their restriction serves preventive purposes. On the other hand, it seems to be necessary to increase the protection of the military hierarchy by more stringent restrictions on the freedom of expression compared to the general rules. As a result, we cannot obtain absolutely valid and finite answers in human rights cases of soldiers and citizens in general. However, I believe that the presented method of analysis and comparison of legitimate or illegitimate human rights restriction in providing effective conscript preparation may serve as a legal basis for the inviolable essence of conscript rights.

Legal Obstacles to the Implementation of International Human Rights Standards on National and Regional Levels
• Mobilization process, right to alternative service

1. Alternative service may be considered as an indicator of the degree of wellbeing of the armed forces in a country. Statistics shows that the ratio between servicemen taking part in compulsory military service and those who opt for the alternative service has recently changed in favor of the latter. Hence, the refusal of military service has become a statistically significant social phenomenon. In such a situation, it is the military service
that seems to gradually become an alternative to service in the
field of social work. According to the data obtained through
interviews with registrants, the main (unofficial) argument in
favor of opting for the alternative service is the fact that the
conditions of the conscript military service (in terms of everyday
comfort, material well being, cultural and spiritual needs’
satisfaction, etc.) are highly deficient. This is the political reason
why in most of the countries of the region (Armenia, Uzbekistan,
Azerbaijan, Kazakhstan, Georgia, Ukraine, Russia and Latvia)
legislation on alternative service has not been adopted, or has not
been enforced, and is the reason why the parliaments of these
countries are reluctant to even consider it. Therefore, one can
argue that civil right stipulated by Article 9 of the European
Convention on Human Rights, namely the right to freedom of
conscience, is violated in these countries. The legislative
stipulation of the allowing the possibility of conscientious
objection to conscription, on the grounds of religious or pacifist
convictions would dissolve inconsistencies between legislations
of the countries in question and international documents that
provide civil rights and freedoms.

2. In some countries, where laws on alternative service have been
adopted, certain discriminations obstruct its equal
implementation. In Moldova, citizens of the draft age that are
eligible for conscript service and do not have the right to
conscription deferment, are not supposed to join any pacifist
movements during the draft periods (in May-June, and
November-December). Another discrimination is that members of
only ten, out of the nineteen registered religious confessions, may
be exempted from draft to the army service on religious grounds.
Such differentiation between the religious confessions indicates
apparent discrimination between various population groups on
religion-related grounds. In other countries, the periods of
alternative service are considerably longer than those stipulated
for conscript military service. For example, in Georgia conscript
military service term is one year and six months, while the term
stipulated for the alternative service equals three years, i.e. almost
twice as long. In Kazakhstan, these terms equal respectively 1.5-2
and 3 years, in Kyrgyzstan: respectively 1.5-2 and 3 years, in
Estonia: 8-16 and 24 months, etc. Such discriminatory measures
violate civil rights, in particular the right to beliefs and freedom of
conscience. Taking into account the fact that alternative service is
supposed to be a substitute for the conscript military service, its
duration must not be significantly different from that envisioned
for the conscript military service. In order to resolve this
legislative conflict, it would be advisable to reduce the duration of alternative service to the level of the conscript military service duration.

3. Mobilization committees and military medical boards in most of the countries of our region carry out their responsibilities in a negligent manner, in conducting medical examination of draftees. This frequently leads to the cases where persons who are not eligible for conscript military service due to health conditions are registered and consequently admitted in the army service. In order to remove these shortcomings, it would be desirable to include only highly qualified and experienced specialists in the makeup of military medical boards, and allow the presence of representatives of the public during the board proceedings, for example representatives of soldiers’ mothers’ groups, as it is done in Armenia, or other non-government organizations. Such innovations would eliminate negligent treatment of responsibilities on the part of the members of military medical boards.

- Penitentiary system structure and issues, problems of providing freedoms

1. In all the countries of the CIS and Baltic states, the right to rest and free time and freedom of movement are provided for by internal service statutes in the same way: military servicemen must be within the location of their military units, and have the right to leave the base only to perform service-related duties or by virtue of leave or discharge from the military unit, authorized by a commanding officer. These restrictions are not considered violations of the military service members’ rights, since they are conditioned as specific tasks of the Armed Forces. In most of the countries conscripts have the right to leave the locations of their military units once a week. However, these provisions are not observed anywhere. It became clear from interviews with conscripts that they are given leave once in a two-three month period and sometimes even less frequently, instead of having a free day once a week. These facts point to severe violation of the military servicemen’s right to free movement, even during off-service time. The right to leave the location of their military units must entail obligation of the commanders to provide leave of absence! At this point, commanders exceed the restrictions concerning conscript military force service.

2. In Russia, Moldova, Georgia, Ukraine, Armenia, Azerbaijan, and other countries, soldiers are frequently engaged in various
duties on the property of military units and outside it, and rarely participate in military drills. They build houses and garages, guard crop fields, gather harvest, dig ditches and trenches, lay down communications, fell forest, build roads and perform other manual labors that are in no relation to military service. These activities represent a type of “gray labor”. Since military service is not perceived as compulsory (slave) labor, there is no connection between national security and such labor. Gray labor is in a way even more harmful than the black one. This practice violates the Resolution of the Parliamentary Assembly of the Council of Europe No. 1166 ii, which was adopted in September 1998, and which particularly stipulates “the necessity to guarantee that conscripts are not deployed for tasks not compatible with the fact that they have been drafted for national defense service, and are therefore not deployed for forced or compulsory labor in cases when it is not conditioned by extraordinary circumstances (in accordance with Art. 10 and 11 of the European Convention on Human Rights)”.  

3. Legislations of the CIS countries and Baltic states stipulate that members of armed services must be provided accommodation, clothing, food, hygiene items, etc. during their term of conscript military service. However, conscripts receive very small money allowances, which do not even cover half of the necessary expenses (toothpaste, toothbrush, shampoo, matches, cigarettes, etc.). For example, members of the conscript military service in Moldova receive the money allowance of 7 – 18 Moldavian leis (around 0.5 – 1.5 USD), while the price of a tube of toothpaste is 7 – 18 leis or more, and a tooth brush costs 15 – 25 leis or more.  

4. Legislation also provides that military servicemen should be provided with a well-balanced diet with a rather high caloric content, as well as all the necessary requirements in regard to adequate accommodation of the members of armed services in barracks. In reality they receive meals that are poor in vitamins, low in calories and insufficient in amount. As a result, there have been cases of dystrophy in soldiers in Georgia, Azerbaijan, Moldova, and other countries. The barracks of military units in Georgia, Azerbaijan and other countries are often cold and damp, which results in frequent and severe illnesses of soldiers. In Azerbaijan, e.g. exhaustion, pneumonia, tuberculosis, and meningitis are the most common diagnoses. In Georgia, soldiers often suffer from heart condition, contagious diseases, tuberculosis, and gastric and duodenal disorders. In Belarus, individuals with chronic diseases are often inducted into the army,
where their condition further deteriorates. In 1998 in Azerbaijan, approximately seventy military service members died of tuberculosis, and during the first three months of the year 2000, fifteen soldiers died of meningitis, and so on. The medical offices and hospitals of the military units are ill-supplied with drugs and medicines, and as a result military service members do not receive adequate medical attention.

5. In all the CIS and Baltic countries, Armed Forces statutes, and especially disciplinary statutes and internal service statutes, represent almost literal translations of Soviet military statutes. They contain numerous violations of servicemen’s rights, and are largely outdated in respect to contemporary standards. In order to ensure the elimination of these drawbacks, it would be advisable to adopt new statutes that would conform to constitutions of the countries in question and with international standards on human rights protection.

6. The strictest disciplinary punishment of the conscripts is disciplinary arrest. The procedure of this disciplinary punishment imposition and implementation is exercised with most severe violations of human rights provided for by international documents on human rights protection. The inconsistencies between the disciplinary arrest procedure and the international requirements are as follows:

- No list of particular offences entailing punishment in the form of a disciplinary arrest is provide in military disciplinary regulations.

- A conscript may be subjected to arrest for any offence in the cases where the (military) commanding officer considers such a measure appropriate.

- Disciplinary arrest may be applied in cases of any disciplinary offences, even minor ones, which is a violation of Art. 9 of the International Covenant on Civil and Political Rights, and represents an “arbitrary” measure, according to the explanations of the Committee on Human Rights. For example, there was a case when a conscript was subjected to a disciplinary arrest for over five days for merely throwing a cigarette butt on the parade ground, i.e. in an improper place. Undoubtedly, such a punishment in this case is “inappropriate” and “unfair”, according to the Committee on Human Rights.

- Taking into account its duration (fifteen-twenty days), and the implementation procedure (it is served in solitary or common
lockable cells, which are usually guarded, etc.), disciplinary arrest is considered as strict punishment, according to the European Court’s ruling in the case of Engel et al. against the Netherlands (1968). Therefore, disciplinary arrest represents an infringement on the freedom of an individual because such a measure may be carried out only in cases listed in Art. 5 of the European Convention on Human Rights.

- The relevant grounds for such measures are absent in respect to disciplinary arrest: this type of arrest is not a “lawful taking of a person into custody on the ground of his/her conviction by a competent court”.

- There is no measure undertaken to ensure the appearance of an individual before a competent court, provided there is solid grounds to assume that an offence has been committed by the accused.

- The military servicemen are not subjected to the disciplinary arrest by a judge or other official, appointed by the law to perform the role of a court of law. The decision is made by the commanding office of a military unit or department, who is not a judge or another official perform court functions, which clearly violates Art. 5, Ch. 1: a, c, of the European Convention on Human Rights.

- Servicemen apprehended by commanding officer are not immediately handed over to a judge or other proper official carrying out court functions, as stipulated in Art. 5, Ch. 3 of the European Convention, but instead are transported directly to a guardhouse, where members of the conscript military service serve their arrest term.

- They are in an unprivileged position compared to other citizens. The conscripts may be subjected to disciplinary arrest by their military commanders for other (not peculiarly military offences), while civilians, for committing a civilian offence, may be subjected to an (administrative) arrest exclusively by a judge or appropriate court establishment. Disciplinary punishment in the form of disciplinary arrest may be imposed on servicemen by any superior commanding officer and may last for any of the above-mentioned terms.

- It is not a rare case that commanders impose a punishment in the form of disciplinary arrest for terms longer than provided by law. For example, in the Republic of Moldova in 1998 and 1999, there were cases where within a disciplinary procedure
conscripts were arrested by orders of the military unit’s commanding officer for lengthy, continual terms (25 days, 36 days, 48 days, 54 days, etc.). The arrested conscripts are kept in common or solitary cells. They have the right to sleep seven hours a day. However in confinement, they are not to sleep or sit on beds during the day, the beds are taken out of the cells, and those that are left inside are lifted and fixed to the walls, and the arrested servicemen are prohibited to sit. At nights they sleep on wooden bedsteads without any sheets, covers or mattresses, on mere planks. On those days when the conscripts do not work, they are brought out for walks which do not usually exceed fifty minutes a day. If not brought out for work, the arrested are kept in common or solitary cells locked during the day. An armed watch guards the cells. During the entire period of their custody, members of the conscript military service are not supposed to have cigarettes, matches or lighters in their possession. All these dispositions indicate severe violations of Art 5 of the Universal Declaration of Human Rights, Art. 7 of the International Covenant on Civil and Political Rights, Art. 3 of the European Convention on Human Rights, the Convention against torture and other cruel, inhuman or degrading treatment and punishments, since such a procedure of punishment undoubtedly represents a form of torture to the arrested military servicemen and a measure degrading their human dignity.

Estonia is the only country where the types of the disciplinary punishments and the procedures of their implementation entirely meet the requirements of the European Convention on Human Rights and the explanations of the European Court. The military disciplinary legislation of this country provides for three types of restraints on the accused’s freedom and movement: prohibition to leave the property of the military unit; disciplinary detention; disciplinary arrest. The Administrative Court operating in Estonia must be informed immediately on imposing a disciplinary arrest. The Court rules whether such punishment is in accordance with the law.

In some countries disciplinary punishments imposed by military commanders cannot be appealed against in courts (Belarus, Latvia, Kyrgyzstan and others), and the right of defense is violated and so on. Therefore, serious infringements on the rights of conscripts occur in the countries in question. In particular, the right of court jurisdiction over the rulings involving constraint on personal freedom, and the right to fair court trial are violated.

Opportunities for Grass-roots Involvement in
Conscript Rights Advocacy: Perspective for Introducing a New Alternative Complaint System Model

COLPI facilitated several organizations in expanding their activities to include advocating of conscripts' rights and to founding capacities in the field. Examples include following: in Moldova a center for the protection of conscript servicemen and draftees’ rights was created with COLPI assistance; in Azerbaijan, where there was no civil initiative for such movement, the NGO “Lawyers of XXI. Century” included a new branch for this purpose; the Belarus organization VIT also established a group for such activity. These organizations established a permanent consultation service for conscripts, involving experienced lawyers as well as young student volunteers.

COLPI also facilitated the establishing active communication channels between similar organizations and a network of conscription-related NGOs is presently being formed. Particularly the young generation of activists regularly communicates. The most important area is public awareness activity: COLPI initiated a publication project on conscript rights. The brochures were elaborated by ten organizations and distributed among conscripts.

Other special projects were initiated by COLPI aimed at introducing some non-judicial remedies for the mentioned situation.

1. Legal clinics on conscript rights advocacy: Several groups of attorneys are willing to launch a legal clinic fulfilling the great need of conscripts and their parents for consultation on conscript rights.

2. Seminars for schoolchildren: Conscription-aged young people need special courses on their rights. Organizations taking on this task would like to adopt teaching materials developed by COLPI and ECCO.

3. Training: There is a general need for training special attorneys in the protection of conscript rights. Civilian attorneys cannot access arrested conscripts because of the lack of authorization. Specialized attorneys could give lectures in barracks and provide consultation. They are independent from the military hierarchy, but are professionally educated. There is also a general request to organize training or workshops on international standards for medical officers.

4. Lobbying for legislative drafting and access to medical information: In several countries there is no mechanism for lodging complaints against medical decisions against rulings on
fitness for military service, and the list of disorders is closed (Uzbekistan, Tadjikistan).

5. Monitoring: There is an urgent need for monitoring the system of punishment in barracks. There is no appropriate circumstance and no strict regulation on detaining people there: it is without any form of control.

The above initiatives are very useful and sometimes very successful; however they have a common disadvantage: all they are separated from the military system and they are based on external control. Therefore, a new model was initiated in some countries (St. Petersburg, Armenia, Azerbaijan) for providing internal control of conscript service, mainly providing internal and alternative complaint mechanisms. At the end of my presentation, I would like to make some comments on it.

In some countries of the CIS and Baltic states, legislation stipulates the right of appeal to a court of justice against decisions by military commanders, imposing disciplinary punishments. However, this right remains solely on paper: conscripts are not aware of their rights; lawyers do not have free access to the military property, etc. That is why conscripts rarely appeal to courts for protection of their rights. For example, in Moldova, during the entire period of existence of the Military Court, since 1992 to the present, not one member of the conscript military service, who was arrested within a disciplinary procedure, was brought to court. The right of conscripts to a fair trial during a reasonable period is not implemented. This occurs for various reasons:

- Military lawyers do not inform personnel of the contents of laws and statutes and of conscript rights and freedoms in a proper way. They themselves quite often demonstrate insufficient knowledge of the general and military legislation, and for that reason cannot give sufficient explanations of the legislations’ content and its application to military personnel.
- In most countries there is no military lawyer organization, nor are there human rights committees, who would address military cases and issues regarding the protection of military servicemen’s, particularly conscripts’ rights and liberties. There are no non-government organizations dealing with these issues.
- Having no legal assistance on anyone’s part, conscripts have to face their commanders, who perform the functions of their commanders, “lawyers”, “prosecutors” and “judges” at the same time. As a result, conscripts’ trivial (not to mention more complicated cases) human rights are very often violated.

We consider establishing an alternative complaint system to appropriate action in resolving these problems. This representation or spokesman system would be able to provide conscripts with additional
or alternative channels and mechanisms for complaint. It would include spokesmen/representatives from the platoon level up to the central level of the armed forces. This model was elaborated in Sweden and Netherlands, and adopted in Finland, Austria and in several other countries. It is also a good model for cooperation between ministries of defense and conscripts rights advocacy groups in certain countries. Introducing this model is very difficult, and would meet much resistance from officials. But at the same time, it is an opportunity for real grass-roots involvement in the internal and external control of the conscript service.
CONTROL OVER ARMED FORCES EXERCISED
BY THE EUROPEAN COURT OF
HUMAN RIGHTS

Some 40 States are members of the Council of Europe and therefore High Contracting Parties to the European Convention on Human Rights (1950). In a seminar dealing with the democratic control of armed forces it is particularly important to consider the effect of this Convention given the statement in its preamble. This affirms the belief of the members of the Council of Europe in the ‘fundamental freedoms which are the foundation of justice and peace in the world and [which] are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend.’ The Convention draws the link, therefore, between ‘an effective political democracy’ and the safeguarding of human rights. Indeed, the Court of Human Rights in 1996 stated that ‘Article 3 as the Court has observed on many occasions, enshrines one of the fundamental values of a democratic society. Even in the most difficult of circumstances, such as the fight against organized terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment.’ Moreover, inherent in much of the decision-making at the Court is the concept of democratic values. In situations involving the armed forces the interests of a

---

24 Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, FYR Macedonia, Turkey, Ukraine, United Kingdom.


26 Where restrictions are permitted to certain rights, under the Convention (Arts. 8-11) they can only be justified if they are in accordance with national law and are ‘necessary in a democratic society.’ The ‘hallmarks of [a democratic society] include pluralism, tolerance and broadmindedness,’ Lustig-Prean v. UK (27 September, 1996) at para. 62.
State ‘in protecting its national security must be balanced against the seriousness of [an] interference with [an individual’s Convention rights].”

Although the Convention refers to the armed forces only once (in Article 4, referring to military service) it has had a profound effect on imposing limits on their use externally (as a means of dealing with civil disorder or armed conflict) and their internal operation (how it deals with its own members). The Court has, however, stressed that ‘the armed forces of a country exist to protect the liberties valued by a democratic society, and so the armed forces should not be allowed themselves to march over, and cause substantial damage to, such principles.”

The principal factor that has led to this conclusion is the right of an individual, who claims to have been the victim of any violation of the rights set out in the Convention or its protocols, to make an application to the Court. If he succeeds before the Court he will be entitled to compensation to be paid by the defendant State. The judgments of the Court are made public and the State concerned is required to abide by the decision. For these reasons, other States not involved in a particular case are very likely to alter their own law or practices to avoid similar applications being brought to the Court from individuals within their separate jurisdictions. In particular, there is an obligation upon the State to provide an effective remedy under national law to those whose rights and freedoms under the Convention have been violated. There is therefore a danger of underestimating

---

27 Leander v. Sweden (25 February 1987) at para. 59. The interests of national security in this case prevailed over the applicant’s rights under Art. 8, para. 67. See also Engel and others v. Netherlands (8 June, 1976) at para. 100 (ban on distribution of soldiers’ journal, serious threat to military discipline, Art. 10); Hadjianastassiou v. Greece (16 December, 1992) at para. 47 (report on experimental missile system, Art. 10) Compare Vereinigung Demokratischer Soldaten Österreisch and Gubi v. Austria (19 December 1994) at para. 40 (refusal to distribute publication of association of soldiers not a serious threat to military discipline Art. 10); Larissis v. Greece (24 February, 1998) at paras. 54 and 59 (to protect lower ranking airmen from improper pressure imposed on them by officers, but compare the proselytizing of civilians in the same case, Art. 9).

28 Smith and Grady v. UK (27 September, 1999) at para. 83.

29 Art. 34. The right is also given to non-governmental organizations or groups of individuals. See also Art. 36. Compare inter-State cases, Art. 33.

30 Art. 41 ‘just satisfaction to the injured party.’

31 Art. 46.

32 Art. 13.
the significance of the actual decisions of the Court since alterations in
the law and practices of other States will generally remain hidden
from international view.

As a result of this right of individual application and the decisions
emanating from the Court a State may take the view that the
Convention, to which it is a High Contracting Party, gives too much to
the individual and not enough to the State. In these circumstances,
however, its range of options is extremely limited. It may denounce
the Convention but only within the limits imposed by Article 58. If it
has not entered a reservation upon accession it cannot do so
subsequently. It may, at any time, derogate from some of its
obligations contained in the Convention and the protocols but only in
‘time of war or other public emergency threatening the life of the
nation.’ The conclusion must be drawn that the Convention sets the
standards for all the member States of the Council of Europe whether
any particular State has or has not been a respondent in an application
brought by an individual. It provides an effective mechanism whereby
the actions of States can be subjected to external judicial scrutiny.

Effects External to the Armed Forces: their Use
During Civil Disorder or Armed Conflict

Civil disorder occurring in a member State may or may not
amount to an armed conflict. Whether it does will depend, to a large
extent, upon the classification of the disorder made by the State
concerned. For the purposes of the Convention this distinction is not,
however, significant, although it will be in applying international
humanitarian law concurrently. Faced with disorder greater than can
be contained by normal police actions a State may call upon units of
its armed forces to support the police or to supplant them, depending
upon the scale of the disorder. Where this is done there is a very real
risk that the State, acting through its armed forces, will infringe the

33 Art. 15. For further discussion see below.
34 See common Art. 3 to the Geneva Conventions of 1949 and their additional
Protocol II of 1977. Any purported derogation could not avoid the obligations
contained in these conventions if they applied, Art. 15 (3). For the concurrence of
the Convention rights and international humanitarian law during an armed conflict see,
Reidy, The Approach of the European Commission and Court of Human Rights to
International Humanitarian Law (1998) 324 IRRC 513. For a case where rebellion
by sections of the armed forces led to a finding that an armed conflict had come into
existence see Juan Carlos Abella v. Argentina, Case No. 11.137, Report No. 55/97,
Inter-Am CHR, OEA/Ser.L/V/II.95 Doc.7 at 271 (1997) at para. 156.
35 There are, of course, other alternatives but for the purpose of this paper I will
consider only the use of the armed forces.
rights of some of those within its jurisdiction.\textsuperscript{36} This is not because of an inherent tendency on the part of the armed forces, as such, to deny human rights, but is due largely to the use of the weapons and equipment available to them, to their military tactics and to the imposition of national law designed to curb ‘organized terrorism’ or ‘threats to national security.’ The need for protection offered to individuals by the law is at its greatest when the interests of the State in restoring public order may be perceived to be the primary consideration of the security forces.

Faced with such a situation the State may derogate from its Convention obligations in so far as it is permitted to do. Both Turkey (in respect of provinces in South East Anatolia) and the UK (in Northern Ireland) have, respectively, made such derogation, although the latter’s derogation has been withdrawn.\textsuperscript{37} Neither State purported to derogate in respect of the right to life.\textsuperscript{38} Turkey did so in relation to Articles 5, 6, 8, 10, 11 and 13 and the UK in respect of Article 5 (3).\textsuperscript{39} Despite the notification to the Council of Europe of such derogations there have been a number of cases brought to the Court\textsuperscript{40} based upon alleged breach of a variety of rights under the Convention.

It is, perhaps, not surprising that a number of applications were made alleging a breach of the right to life under Article 2, since both in the Turkish provinces and in Northern Ireland members of the armed forces used firearms in the course of their purported duties. The only justifications for killing are set out in Article 2 (2). A condition precedent to any lawful killing is that it results from force that is ‘no more than absolutely necessary.’\textsuperscript{41} Moreover, the force used must be for the purposes of achieving the objectives set out in Article 2 (2) (a),(b) or (c).\textsuperscript{42} It is, ultimately, for the Court and not the State

\textsuperscript{36} The obligations of the State under the Convention are owed to ‘everyone within its jurisdiction,’ Art. 1. The nationality of the victim is therefore irrelevant.

\textsuperscript{37} As from 26 February, 2001.

\textsuperscript{38} This is permissible under Art.15 but only in so far as the death results from ‘lawful acts of war.’ This could not apply in situations falling short of an ‘armed conflict.’

\textsuperscript{39} See the current List of declarations made with respect to treaty no.005, situation on 09/03/01 Derogations, Council of Europe, http://conventions.coe.int

\textsuperscript{40} The Court may investigate the extent of the derogation and determine whether it was justified under Art. 15, see Brannigan and McBride v UK (22 April, 1993) at paras. 66, 74. See also Brogan and Others v. UK (29 November, 1988).

\textsuperscript{41} ‘A stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is “necessary in a democratic society,”’ Ergi v. Turkey (28 July, 1998) at para. 79.

\textsuperscript{42} Ergi v. Turkey at para. 79. See also Gulec v. Turkey (27 July, 1998) at para. 73.
concerned to judge of this necessity. The Court has stated on more than one occasion that it will be no excuse for the State concerned to plead that its action was taken in the face of ‘violent armed clashes’ or that the scale of the ‘incidence of killings’ justified its action.\footnote{Kaya v. Turkey (19 February, 1998) at para. 91; Ergi v. Turkey at paras 85 and 98.}

Should the deprivation of life not be justified the State will be required to pay the costs of the case and/or compensation to the victim’s family. Thus, if it is proved that the victim was an actual or suspected terrorist and a violation of rights is found by the Court it may award his family only the costs of the action and not compensation.\footnote{For example, see McCann v. UK (5 September, 1995) at para. 219.} It is otherwise if the victim was an innocent bystander.\footnote{Gulec v. Turkey; Ergi v. Turkey.}

The Court has shown a willingness to go beyond judging the acts of the soldier, who fired the shot which killed the victim, and to consider whether the liability of the State is engaged through the actions of those who planned the operation that resulted in death. It has found States to be liable on this basis, largely due to the inadequacy of any alternative strategy to using high-powered firearms against demonstrators or suspected terrorists.\footnote{Gulec v. Turkey at para. 71; McCann v. UK at paras. 201-214.} In \textit{Gulec v. Turkey} (1998) the Court concluded that ‘the gendarmes used a very powerful weapon [firing from an armored vehicle] because they apparently did not have truncheons, riot shields, water cannon, rubber bullets or tear gas.’\footnote{Gulec v. Turkey, \textit{ibid}.} It has also declared that States are required to conduct an independent and impartial inquiry into any killing as a preliminary step to providing the victim’s family with an effective remedy at national level.\footnote{Art. 13.}

The Court has also proved effective in controlling what might be considered as torture, inhuman or degrading treatment\footnote{This is considered to be ‘a difficult provision to interpret because of the generality of its text,’ Harris, O’Boyle and Warbrick, \textit{Law of the European Convention on Human Rights} (1995, Butterworths, London) p. 88. See Smith and Grady v.UK (27 September, 1999) anti-homosexual policy in the armed forces, its investigation and discharge did not amount to degrading treatment as it did not reach ‘the minimum level of severity,’ para. 122.} of suspects during periods of civil disorder. When the British armed forces were found to have engaged in various forms of interrogation techniques against suspected IRA members in Northern Ireland the Republic of
Ireland brought the issue before the Court. The UK was found to have been in breach of Art. 3 and such practices were terminated.

It is not uncommon for members of the armed forces to detain civilians during periods of civil disorder. The national law may give them such a power but its compatibility with the Convention will have to be considered. It is, however, likely that a derogation from some of the obligations contained in Articles 5 and 6 will be made to give the armed forces powers greater than they would have in normal times. The Court will assess whether the derogation is in conformity with Article 15 as a means of ensuring its control over the powers of the State to issue a derogation and thus to restrict the fundamental freedoms of those subject to the action of the armed forces. In Aksoy v. Turkey (1995) the Commission decided that, despite a derogation issued by Turkey, detention by the security forces for 14 days without being brought before a judge could not be justified by that derogation. The Commission explained that in relation to Mr. Aksoy’s detention there ‘would seem to be no speedy remedy of habeas corpus accessible to detainees and no legally enforceable right of access to lawyers, doctors, friends or family members. The individual may therefore, to a large extent, be cut off from the outside world for a period of time which can lend itself to abuse, as it did in the present case.’

Given the equipment available to the armed forces and their tactics it is frequently the case that destruction of private property takes place. In Isiyok v. Turkey (1997) the applicant’s house was bombed by military aircraft. The Commission brokered a friendly settlement between the parties, the result of which was that Mr. Isiyok was paid substantial compensation.

The jurisprudence of the Commission and the Court illustrates

---

50 Ireland v. UK (18 January 1978). For further examples see Cyprus v. Turkey (10 July, 1976) at paras. 372-410; Aksoy v. Turkey at paras. 165 and 169 ('Palestinian hanging’ and conditions of detention). For the Court decision see ibid (26 November, 1996) at para. 64.

51 For a machinery to guard against torture, inhuman or degrading treatment see the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987).

52 See Brannigan and McBryde v. UK (note 10 above)

53 Compare Reidy, op. cit. at 519, n. 24 who concludes that ‘the low point of the Court and Commission in this regard is widely considered to be Brannigan and McBryde v. UK’. See, however, Aksoy v. Turkey (26 November, 1996) at paras. 78, 83 where derogation did not justify detention for 14 days without being brought before a judge.

54 Ibid, at para. 182.

55 Application No. 22309/93.
well how a State may be held liable to pay compensation to a person (or his family) affected by the actions of its armed forces. It is of little legal significance that in some of the cases the actors are described as ‘police,’ ‘security forces,’ ‘gendarmes,’ or the ‘military’ since the same law applies whatever their designation. To terminate a conclusion at this point would be to ignore the consequences of individual cases on the behavior of the State concerned and of other States. Thus, a decision from the Court may have the effect of stopping a particular practice while the disorder is continuing. A good example of this is *Ireland v. UK* (1978) when the Court held that certain forms of interrogation were contrary to Article 3. This practice was then discontinued even though the disorder lasted for more than 15 years after that decision. As a result of this jurisprudence, which is available publicly, States not involved in any civil disorder are also able to learn the lessons to be drawn from fellow member States’ involvement in such action. By looking at the cases brought by applicants the Court has been able to view the issues in an objective fashion and is able to avoid being swayed by considerations that commonly exist at the national level. These can be characterized as: the armed forces have been called in because the situation is very serious, there have been a number of armed clashes, casualties amongst the armed forces, police and civilians have been high, and therefore a serious restriction upon fundamental freedoms and human rights is justified.\(^{56}\)

A State may even bring the citizens of another State within its jurisdiction through the operation of its armed forces during an international armed conflict. The Court\(^ {57}\) has taken the view that ‘the responsibility of a contracting party may also arise when, as a consequence of military action – lawful or unlawful – it exercises effective control of an area outside its national territory.’\(^ {58}\) This case concerned the denial to an applicant of her rights to property located in northern Cyprus following the Turkish invasion in 1974.

**Effects Internal to the Armed Forces**

It might be thought that applications brought by members of the

\(^{56}\) This may affect one part of the community more than another if the former is suspected of harboring the ‘terrorists’. Note the use of Art. 14 with other rights.

\(^{57}\) *Loizidou v. Turkey (Preliminary Objections)* (23 February 1995) at para.62.

\(^{58}\) This would also include individuals who have come under the control of foreign armed forces even though such forces do not have effective control over an area outside national territory. See also *Cyprus v. Turkey* (10 July 1976) (Commission).
armed forces against their respective States have been brought by conscripts and not by members of all volunteer armies. This has not proved to have been the case. Actions have been brought by both categories of soldier. It may also be thought that the Court would take a much more relaxed view of the application of the Convention to serving members of the armed forces. It might be argued, for instance, that the armed forces are *sui generis* and their role, so closely linked with the need to protect the State itself, justifies a very wide margin of appreciation by States. This has not, however, been the practice of the Court, largely because when the rights of an individual conflict with the claimed interests of the State, it has seen the need to explore whether membership of, and restrictions placed on fundamental freedoms in the armed forces really are compatible with Convention rights.

The Court has felt able to set aside a government’s views as to whether a particular restriction of a Convention right is necessary for the operational effectiveness of its armed forces. It has, in other words, kept a watchful eye on this margin of appreciation and it has imposed its view on the State. In *Lustig-Preen and Beckett v.UK* (1999) it decided that the policy of the British armed forces in investigating and subsequently discharging the applicants solely on the ground of their homosexuality was contrary to Article 8 and that the action of the UK in maintaining this policy was not ‘necessary in a democratic society.’ The British government’s view was that such a policy was necessary on the grounds that it was ‘intimately connected with the nation’s security and was, accordingly, central to a State’s vital interests.’ It argued that ‘the presence of open or suspected homosexuals in the armed forces would have a substantial and negative effect on morale and, consequently, on the fighting power and operational effectiveness of the armed forces.’ The Court refused to accept these arguments and concluded that ‘assertions as to risk to operational effectiveness must be substantiated by specific evidence.’

---

59 For convenience the term ‘soldier’ will be used to refer to all categories of serviceman or woman. All the cases brought by members of the armed forces against the UK have involved volunteer servicemen or servicewomen. A high proportion of similar cases against other States have been brought by conscripts.

60 *Leander v. Sweden* (26 March 1987) at para.59. Note the dissent of Judge Loucaides in *Lustig-Preen and Beckett v.UK* (27 September 1999) ‘I believe that the Court should not interfere simply because there is a disagreement with the necessity of the measures taken by the State. Otherwise the concept of the margin of appreciation would be meaningless.’

61 *Ibid* at para. 70

A similar approach has been taken to Article 10, freedom of expression. On the one hand the Court has stated on a number of occasions that, ‘the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline, for example, by writings.’ On the other, it has attempted to consider whether any restrictions are ‘necessary in a democratic society.’ It has drawn distinctions on the facts in several cases and it has refused to accept the government’s view in some cases as to what is required for the operational effectiveness of its armed forces. In a memorable phrase the Court has stated that ‘Article 10 does not stop at the gates of army barracks.’ It went on to hold that a letter addressed to his commanding officer by a serviceman, in which the writer expressed ‘certain strong and intemperate remarks concerning the armed forces in Greece’ could not draw restrictions on his freedom of expression. A strong dissenting opinion of eight judges, however, clearly considered that the view of the majority could lead to an undermining of military discipline.

The armed forces may prove to be a danger to the democratic society of which they are a part (and to individual servicemen) if military discipline is not maintained. This point is behind the Articles 8-11 cases considered above. But the argument goes further than this and will also encompass other Convention rights. Again, there is a margin of appreciation given to States to determine the limitations on the freedoms of servicemen and women which are enjoyed by civilians. The ‘special characteristics of military life’ have to be taken into account in assessing whether particular features of the military system are compliant with the Convention.

A particular problem faced by the court has been the nature of

---

63 Ibid at para. 82. See also Smith and Grady v. UK (27 September, 1999).
64 Engel and others v. Netherlands (8 June, 1976) at para. 100.
65 Art.10 (2).
68 Ibid at para. 47.
69 Engel and others v. Netherlands at para. 98.
70 Ibid at para. 59.
71 Ibid at para. 100.
military justice systems. Such systems are clearly not prohibited *a priori* by the Convention and are necessary to enforce discipline. In *R. v. Genereaux* (1992) Lamer CJ summed up extremely well the need, which is equally applicable to the Canadian Charter of Rights and Freedoms (1982) and to the Convention, for military justice systems. He said:

To maintain the armed forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military.

Like the areas discussed above, the Court has imposed its own view of whether a State has exceeded its wide margin of appreciation in military discipline cases. It has refused to accept that the rights of the individual soldier must be subordinated to the operational efficiency of the armed forces, even in those armed forces which are comprised only of volunteers. The fact, however, that a number of States have entered a reservation to the Convention so as to prevent the Court having jurisdiction in military discipline matters (and not in respect of any of the other Convention rights) suggests that they wish to retain the maximum degree of latitude over such activities. In those States which have not entered a reservation it is too late to do so. The effect of this is that the Court has jurisdiction over military justice issues in 30 of the 40 States party to the Convention.

Where it is able to exercise jurisdiction the Court has insisted upon an ‘independent and impartial’ military court, on the basis of Article 6 (1) of the Convention. The reason for this is not a mere technicality but ‘what is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused.’

---

72 *Ibid* at para. 59; *Findlay v. UK* (25 February, 1997) and cases cited therein.


74 Ten States have done so. They are Czech Republic, France, Lithuania, Moldova, Portugal, Russia, Slovakia, Spain, Turkey, and Ukraine.

75 Art. 57 of the Convention. An alternative might be to denounce the Convention, Art. 58 (six month’s notice) and immediately accede to it with a reservation. For discussion of this possibility in the UK Parliament see House of Commons Parliamentary Debates, Standing Committee D on the Armed Forces Discipline Bill, 7 March, 2000, at cols. 120-121.

76 For the distinction between purely military (or disciplinary) offences and criminal offences, see *Engel and others v. Netherlands* at para. 82.
must be comprised of individuals who have not been appointed by the military chain of command, nor who are involved, or are objectively perceived to be involved, with the prosecution.78

In summary proceedings for a breach of the disciplinary code States have been heard to argue that to maintain military discipline, speed of a hearing or trial is of the essence. Despite the categorization by a State of certain conduct as ‘disciplinary’ rather than ‘criminal’ the Court79 has taken the view that the nature of the punishment must be considered in order to determine whether Article 6 applies. If it does the issues usually revolve around the lawfulness of any detention and whether the soldier has been brought promptly before a judicial officer.80 Since a commanding officer81 cannot be described as a ‘person authorized by law to exercise judicial power’ the imposition of another person has proved to be necessary. In peacetime this may prove to be little more than a bureaucratic nuisance but in time of armed conflict it may be thought to pose practical difficulties. The United Kingdom armed forces resolved this problem by a statutory alteration to military procedures.82

**Conclusion**

The preceding pages have attempted to show how the Court of Human Rights83 has been able to balance the fundamental interests of the State with the fundamental rights of the individual. It has been able to do this by construing widely or narrowly the ‘margin of appreciation’ given to States but it has also shown that it, and not the State, is the ultimate arbiter of State action by its armed forces. In

---

77 Incal v. Turkey (9 June, 1998) at para. 71.
78 Duinhof and Duijf (4 May, 1984) para. 38; Findlay v. UK (25 February, 1997); Coyne v. UK (24 September, 1997); Cable and others v. UK (18 February, 1999); Moore and Gordon v. UK (29 September, 1999); Smith and Ford v. UK (29 September, 1999); McDaid and others v. UK (10 October, 2000).
79 Engel and others v. Netherlands at para. 82 and for an analysis of the punishments imposed upon each of the applicants see paras. 83-91.
80 Art. 5 (3).
81 Hood v. UK (18 February, 1999).
82 The Armed Forces Discipline Act 2000. During the passage of this Act questions were asked in Parliament about the practicalities of having a judicial officer available to determine the lawfulness of detention when a soldier was involved in military exercises or was engaged in an armed conflict, House of Commons Debates, Vol. 344, col. 1162 (17 February, 2000). The Government explained that video conferencing would be used, where necessary, _ibid_ at col. 1201.
83 Including the Commission when it was in existence.
such matters it has faced, perhaps, its greatest difficulty since the State’s view of its requirements for military efficiency (in relation to both the external and the internal effects discussed above) is a powerful one, given the crucially important role accorded to the armed forces in the whole security of the State, but the Court has not lost sight of the purposes of the Convention, so well set out in its preamble.
The Needs for Discussing Democratic Control of Armed Forces

One reason we discuss democratic control of armed forces and not about democratic control of for example schools or hospitals may be that armed forces constitute a special category in social affairs. There are several reasons for that. They are related to the national and international interests of the state, which itself is traditionally defined as the side that holds monopoly over the tools and methods of violence.

Armed forces are related to the institution of war and warfare; but when war occurs, democratic decision-making is usually more or less suspended. Armed forces, whether state, paramilitary or otherwise non-state, commonly turn over governments in processes that deny democracy.

In conclusion, there is a essential problem since the armed forces are (also) part of society's arsenal of violence and destruction which, we would like to believe, are incompatible with democratic governance, with the very nature of the democratic ethos and conduct. This uneasiness with armed forces can be dealt with, to a certain extent, by assuming or asserting that armed forces exist to not be used for which reason arguments in favor of or balance of power, deterrence or, in the post-Cold War era peacekeeping and/or peace-enforcement.

Another reason for the mentioned uneasiness or perceived incompatibility between democracy and armed forced is, of course, that the classical military organization is perceived as less than ideal from the viewpoint of democratic values. Generally, it is centralized and hierarchical with little opportunity for dialogue and consensus building and operating in a very limited time constraint, permitting less dialogue. It is also much more male- than female. The relationship of armed forces to secrecy in military and security affairs,
to intelligence and covert operations, to death squads, clandestine arms and ammunition exports, to human rights violations and other less noble realities of our world, add yet more arguments backing the idea that armed forces may constitute a problem inside the framework of open society operating according to standard definitions of democracy.

There are many other reasons for discussing the possibility of democratic control of armed forces around the world. If one accepts that there is such a thing as a military-industrial complex, MIC, (sometimes extended to include wording such as bureaucratic, media, research) – a concept that has existed since President Eisenhower's farewell speech – it is difficult to deny that there could be a fundamental conflict between democratic society and such complexes as they tend to be 'societies within society' and are virtually unaccountable.

Most democratic societies discuss allocation to various sectors on the state budget, but that of national defense is seldom in focus. World military R&D is, by far, the largest single research effort; world military expenditures today equal the combined income of 49 percent of the poorest people on earth, i.e. almost half of humanity. The leading county of the democratic world, the United States, consumes about 40 percent of it all, having recently decided to increase its budget to a mind-boggling 328 billion dollars for the year 2002.

Most people, when told, find such figures deplorable but find, also, that there is little they can do about changing them. Facts like these speak about wrong priorities from a humanitarian viewpoint; they speak of privileges and lack of global democratic participation in resource allocation decision-making. They remind us of the gaps between the haves and have-nots.

In addition, the MIC operates according to principles that deny the market. Giant, worldwide operating corporations produce systems needed by armed forces. The state(s) is, normally, the only buyer of these products, forming what is sometimes called a monopsonistic market. Competition is minimal, surplus capital and resources from the civil economy are absorbed and, when wars are fought, material objects destroyed. This combination of surplus capital absorption and material destruction that call for new investment serves a balancing, calibrating function in the modern, globalizing market capitalism, not the least in what is usually called democratic societies.

Finally, there is the huge problem of nuclearization, a term that covers a way of thinking, an ideology and – of course- the weapons and command structures as well as the strategies on which they are based. No country or government possessing them has offered its people a referendum about their existence or their use in defense of the domestic territory. The nuclear arsenals that promise peace in the eyes of some and threaten to destroy mankind several times over
according to others are controlled by less than 1000 politicians, technicians and high-level military staff worldwide. Nuclear weapons have been considered fundamentally at odds with the basic provisions of international law. In spite of all, they exist, they are further developed – and they are not a focal point of debates in democratic societies.

In summary, regardless of the constructive, peaceful or humanitarian, or other roles armed forces may perform in democratic societies, there remains a problem given their very nature as based on violence (whether in use or not). They exist to be able to perform violent actions. The relationship of violence versus non-violence to democracy is curiously under-researched in political science as well as in social science. Their interaction with culture and norms – western and non-western – is likewise neglected; the dominant paradigm of the West seems, at least at a quick glance, to make such analyses less relevant or urgent.

Current author tends to criticize this state of affairs. If a society increasingly bases its survival and development on the interaction between structural and direct violence (domestic and/or globally), the hypothesis can be advanced, and merits study, that democracy in a broad sense will consequently suffer. The opposite hypothesis also merits further study and discussion, namely that non-violence, or the minimization of violence, will serve to increase democratic sentiments and governance.

The Concept of Armed Forces

What is meant by that term today? If by "armed" we mean organized forces that operate by means of arms, i.e. violence, it includes quite a broad spectrum. First, of course, there are conscript armies, but they are vanishing, giving way to professional, more elite-based, highly professional structures. Then there are popular liberation armies or movements fighting for collective purposes against what they perceive as an oppressor. There are mercenaries, people who fight for whatever cause as long as they are paid.

There is variety of categories of paramilitary forces, more or less crime or mafia-related, and we have seen "warlords" operating their own small personal armies based on loyalty, a sort of post-modern banditry on the rise world-wide. There is a wealth of Special Forces, which co-function more or less openly with regular armed forces and are instruments of the state.

Then there is terrorism; it may be defined as the use, and usually threatening the lives of, innocent people not party to the conflict at hand, aimed at achieving certain political goals. This definition covers "private" terror or terrorist groups that often reach the media
headlines; however, there is a considerably bigger – in terms of power and people killed – state-based terrorism, which may hold thousands or millions of innocent people hostage which less frequently makes those headlines.

The sanctions against Iraq are a particularly cruel example and could also be seen a mass-destructive weapon. Likewise, the Kwangju massacre in South Korea in 1980 (endorsed by the U.S. State Department), the decade of sanctions affecting people throughout the Balkans and NATO's (terror) bombing of civil targets in Yugoslavia would fall in the category of state terror in its consequences, regardless of the humanitarian motives that allegedly legitimated them.

We also find private military companies (PMC) operating in combined training and advisory roles, engaged in logistics, military training, base operations, personal and other security services. Their clients may be government as well non-governmental forces and they are frequently the de facto result of "outsourcing" operations from defense ministries in, say, the United Kingdom or the U.S. In spite of being formally private and independent of governments, they are staffed by former military and intelligence officers and promote one way or another, national interests of their governments. Examples include Vinnell Corporation, Military Professional Resources Incorporated (MPRI), DynCorp, Sandline International, Executive Outcomes, etc.

The degree to which this type of military corporate development is compatible with democratic control deserves further debate, particularly since they are usually 'outsourced' – i.e. perform functions governments would rather not be associated in the eye of the public.

In summary, when we talk of 'the armed forces' there is a surplus of types, formations and functions. Armed forces of democratic states may be seen as more simple cases and thus easier to control. However, they too can be 'tainted' with their more or less direct relations to and cooperation with less democratic varieties such as those mentioned above – if not in times of peace, then quite often in times of crisis and war.

**Blurred Civil-Military Relations**

Over the past few decades there has been a number of reasons why it has become increasingly difficult to distinguish between "the military" and the civilian spheres of society in modern Western democracies. Here are some of them, taken from various levels and spheres:
The military increasingly takes up civilian functions from civilian institutions and operators, e.g. humanitarian catastrophes, humanitarian intervention, and civilian peace-keeping. Add to that transport and general security including bodyguards and other protection measures and special forces in action when, say, heads of states meet.

Democratic Western societies have increased the technical capacity to carry out surveillance of public space and monitor all types of communication (Echelon). This is often done for both industrial and military or police-related reasons. Democratic states like Norway have been revealed to collect information on, say, domestic peace researchers and activists not for spying in the service of other nations but for having politically incorrect views on matters of national defense, security and conflict-resolution. Trends like these combined with the routine registration of citizens in an average of 50-100 databases point in the direction of control of the people and not by the people; in short, toward the authoritarian state.

Technological sophistication is another factor. In the past we armed men to make armies, now we man weapons systems and conduct wars over mind-boggling distances and speed. Complex technology systems require highly sophisticated expertise, civilian as well as military. The 'technological soldier' is more likely to wear a shirt and jeans than a green uniform.

Much intelligence consist of gathering information from open sources on civilian affairs and psychologically important features (PSYOP), and not only in knowing about the opponent's latest weapons systems or military plans.

During the 20th century, the proportion of civilians killed in wars have increased dramatically, modern warfare aims at a series of civilian targets whether ethnic cleansing or NATO bombing from the height of 10 kilometers which is bound to increase the probability of civilian casualties.

What is with a contemporary buzz word called civil society – another blurred term – can wage wars more easily. It costs only a few dollars nowadays to obtain a Kalashnikov and some radio transmitters; warlords spring up in war zones and intimidate other civilians in ethnic cleansing operations. All of it militates against the more gentleman-like moral code of conduct and concepts of honor of the classical, professional soldier.

By consistently covering wars and violence, the media in general promote, whether intentional or not, military and other violence-related values and, so to speak, 'civilianize' them. This coincides with violence having become an indispensable and quite
unchallenged ingredient in entertainment, particularly movies and television.

During the last decade or so, we have also witnessed an overall weakening of leading, predominantly civilian, conflict-resolution organizations such as the United Nations and the Organization of Security and Co-operation in Europe, OSCE. The fundamental purposes of the UN to "save succeeding generations from the scourge of war" (Preamble) to bring about peace "by peaceful means" and (Charter Article 1) have been systematically undermined by leading powers and, by many, considered "unrealistic." Simultaneously, NATO has emerged as the dominant peace-keeper (or, at least, conflict-management instrument) and the European Union (EU) is undergoing a rapid process of militarization not the least in the wake of the handling of the Yugoslav-Kosovo/a conflict in spite of the fact that it was always know as a civilian institution.

The generation of people born in the 1960s and 1970s – Greens, feminists, leftists and humanists as well as their NGOs – used to be committed to peace and non-violence and an alternative, just world order. With the end of the First Cold War (another could well be in the making) they have, at least in part, embraced the new liberal ideology, part of which contains a wholehearted endorsement of conflict-resolution with violent means. Whatever else may be said about that development and why it has taken place in the 1990s, it tends to make the use of armed forces look rather more civil, even civilized, than less. It also, implicitly, conveys a common understanding that there is a "we" who are civilized and try to prevent "others" who are a bit more primitive from fighting each other. It seems, simply, to be the Zeitgeist in which we live at the beginning of the 21st century.

Toward an Understanding of post-Cold War, Contemporary Militarism?

So, the armed forces simply look more civil than before and, in certain respects, society as such looks more militant. Once upon a time, social science textbooks would define militarism or militaristic values along the lines that the military sought to dominate every corner, the values and the "culture" and the ways people thought, thus preparing it mentally for war fighting. Some advanced the "garrison state" hypothesis while others saw a "1984" coming.

This is not what contemporary militarism is about; rather, it is precisely about the organically intertwined processes of the
civilianization of the military and the concomitant militarization of civil society. This globalizing and more "one-dimensional" society (Marcuse) may, precisely for that reason, have become increasingly difficult to decipher and, thus, move in the direction of genuine 'inner' peace and a just world order. And, indeed, the idea of abolishing weapons and wars – which could be perceived as one step towards higher levels of mankind's civilization – seems pretty much neglected.

Being anti-military was never a practical attitude if for no other reason then because it targeted the person in uniform rather than the overall system that had produced him. But anti-militarism could have that focus: against what was perceived as a dark corner, an authoritarian aberration or "deformity" built onto society. Take it away, the pacifist would say, and everything will be fine!

Being anti-military today has to mean a strong opposition to considerable parts of our Western civil society and codes which have since 1945 and the advent of nuclearization, integrated the military in a increasingly civilian(ized) mode. Popularly speaking, the military and the rest of society could be clearly distinguished (and separated) in the past, while in contemporary society they are much more like Siamese twins: one can't be changed without changing the other.

So the armed forces have gained much more legitimacy in both their military and their (newer) civilian operations; the price was to become much more modern, integrated and professional, adopting Western values of democracy and development rather than remaining in the barracks with self-isolating authoritarian values of the classical officer. The soldier has increasingly become a citizen with a profession like anyone else. He – or she – is paid to do a job, highly educated, and devoid of the traditional norms such as patriotism, willingness to die for a cause, chivalry, honor and paternalism.

Seen in this perspective, it is complete folly to believe that militarism is incompatible with modernity. On the contrary, if both spheres adapt, it is just as manifestly present; it is just much less obvious, much more embedded in the structure of society, which means it is much more difficult to do away with. The soldier no longer lives outside general society; he or she swims like a fish in the contemporary Western social establishment, inside our democratic order and norms.

This kind of reasoning can help us explain why in the general discourse humanitarian intervention does not refer to, say, changing the direction of a new economy or world order that would create a more just world through political means and human empathy, where everyone would have their basic needs met. It implies, instead, that military action is undertaken within the present order to protect people who find themselves and their human rights threatened, provided that
they are also interesting for one reason or another to the interventionist. The principled altruistic war and wars fought for higher principles whenever violated, is a myth. The defining criteria is and remains self-interest, state or corporate, or both. But the policies are not conducted by generals but, rather, by civilians in suits, academics and, as in the case of Clinton, Fischer, Solana, Cook, and others – by former skeptics towards the military in general and NATO in particular.

Thus, peace or peacekeeping implies the extended, long-term and/or long-range deployment of forces to keep levels of violence lower than they would otherwise be. It means to try to manage – but not resolve – conflicts. It seldom, if ever, means doing something about the underlying root causes in all their nasty complexity, or help create a peace that is defined by the involved parties themselves. Whatever the United States or NATO have done, whatever the EU will be doing, using military means will be legitimated by the declared commitment to peace. In any case this is completely non-controversial as no journalist would ask someone like Javier Solana what he means when he talks about peace.

Croatia, Bosnia's two – or rather three units, Kosovo, Serbia and Macedonia are examples of perpetuated turmoil. While the West may have managed to reduce the direct violence to a certain level (by introducing stronger means of violence and not by intellectual force), it has not begun to address the structural violence that is a sine qua non of its own global role and dominance, neither has it begun to address the cultural dimensions of its own past and present conflict with the local conflict region.

In summary, from one point of view the modern militarist western society promotes democratic control; it has become easier since there is more contact, co-operation, trust and more common values between those in uniform and those in three-piece suits. From another angle, war – in contrast to what is often stated – has become much more acceptable precisely because of the integration, the civilianization-cum-militarization of the two spheres of society. And it goes without saying that when democracies fight wars and make interventions their know how to legitimate it by referring to highly civilized norms such as peace, human rights, minority protection, democracy or freedom – and they do it as a sacrifice, not out of fear. In contrast, "the others" start wars for lower motives such as money, territory, power, personal gain, because they have less education, a less civil society, a lower level of democracy and are intolerant, lack humanity or are downright evil.

The period we live in is characterized by what it succeeded but not what it is: we call it the post-Cold War period. Be this as it may, two
major trend-setters (and discussion pieces at academic conferences) are Fukujama's "end of ideology" and Huntington's "clash of civilizations." The first helped legitimize the reduction of pluralism and produce the prevailing opinion that there is only one way to conceive and carry out things: only one view of human rights, democracy, peace-making, economic development, and organizing the world, which is namely the dominant paradigm of the West. The other, whether intended or not, solidified a sense of western triumph over its major contender throughout the 20th century, as well as produced a (non-existent) civilization threat against that very West. Instead of being descriptive, both curiously turn out to be prescriptive.

It can safely be assumed that sentiments and domain assumptions such as those of Fukujama and Huntington help allow the West to be seminally ignorant of the right to democratic decision-making in newly sovereign states. If we believe in the dynamism of the West, there is also hope that it does not necessarily have to be like that. Gandhi was once asked what he thought about western civilization and answered with a smile that it would be a good idea. All it would take is Matt. 7:3 and a fundamental recognition of this plädoyer for pluralism and cultural nonviolence, formulated by Gandhi and nailed to the wall of his Sabarmati ashram in Ahmedabad:

"I do not want my house to be walled in on all sides and my windows to be stuffed. I want the cultures of all lands to be blown about my house as freely as possible. But I refuse to be blown off my feet by any."
Marie Vlachová

LEGAL FRAMEWORK OF DEMOCRATIC CONTROL OF THE ARMED FORCES IN THE CZECH REPUBLIC

State of Democratic Control of the Armed Forces in the Czech Republic

A legislative definition of the army's new role in society, the distribution of defense-related powers among the state's institutions, control of the military budget, and governmental control of the army through a civilian Minister of Defense represent primary problems of establishing standard relations between armed forces and any of the post-communist countries. Renewal of the prestige of the armed forces within society is probably of the same importance.84 A. Bebler describes the steps necessary for establishing the bases of democratic control over a totalitarian army as follows:

- Separating the army from the Communist Party,
- Depoliticizing the army by shielding it from influence exercised by the Communist Party as well as newly created political parties and other entities,
- Placing the armed forces under parliamentary, governmental, presidential, and public control,
- Creating channels (means, institutions, organizations) through which the army can articulate its interests.85

As in other countries, the most important task of the Czech politicians after the Velvet Revolution was depoliticizing the army, i.e. eliminating the Communist Party's influence. The legislative basis

---


for this measure was removing the leading role of the Communist Party from the Constitution. Further, the army's Political Administration Center, political departments in individual corps, and political positions were abolished in 1990. Professional soldiers and conscripts were banned from participating in any political activity, a measure intended to eliminate the Communist Party's influence over the armed forces and to ensure that the military would remain apolitical after stabilization of the political system. Thus, the basic conditions for establishment of democratic control of the armed forces were created relatively quickly. Another important step that strengthened the national character of the military was a peaceful departure of Soviet troops from the country's territory and a nonviolent division of the Czechoslovak federation and its federal army. The formerly totalitarian army became an apolitical institution defending the interests of the nation state. The powers to manage and control the armed forces were gradually transferred to the political representatives defined in the Czech Constitution, i.e. the President, the Government, the Parliament, the Supreme Audit Office, and the civilian judiciary. Slowly, but steadily informal actors, such as journalists, arms manufactures, experts, NGOs and various associations, began to get involved in the process of controlling the armed forces. The creation of defense and military laws was part of establishing new relations between society and military. Its main stages and achievements will be described in this study.

Progress and Main Principles of the Legislative Reform of the Armed Forces

The process of creating and approving the new military legislation lasted nine years, and it is uncertain whether it would have ended successfully without the Czech Republic's accession to NATO. The process can be divided into three stages:

a) During 1989-1993, the original communist-era military legislation, mostly from 1950's and 1960's, was still in effect, and only the most necessary amendments were made.86

b) During 1993-1997, as a result of the demise of the Czechoslovak federation, a number of substantial theoretical and practical problems resulted in the necessity to draft an entirely new and comprehensive set of defense laws. Both politicians and defense experts supported this measure. The latter prepared

---

86 An amendment to the Conscription Act and the Act on Certain Aspects of Career of Professional Soldiers.
c) During 1999-2001, the new defense legislation started to be put into practical application. Recently, amendments to some laws have been tabled, mostly with the aim of adjusting the conditions for dealing with emergencies and harmonizing the existing legislation with international law. The actual process of submitting defense bills to the Government and the Parliament was unusually fast. The proposals were drafted by the Ministry of Defense and approved by the Government in February of 1999 and immediately submitted to the Parliament. The legislation was approved by the Parliament on September 14, 1999, and, after being signed by the President, it was included in Section 76 of the Collection of Laws published on October 12, 1999. An advantage of this process is that individual laws are closely related to the constitutional Act on Security of the Czech Republic adopted in 1998.

The main reason why the pace of the process of creation and approval of defense laws increased only in 1997, the time when the Czech Republic started accession talks with NATO, is that defense and military issues were previously considered marginal by politicians and the society on the whole. The Czech society concentrated chiefly on economic and social problems and establishing a democratic political system. The political willingness to confront security, defense, and military issues was rather low, and the Defense Ministry's proposals to adopt a new legislative framework were repeatedly postponed by the Government, which had to focus on hundreds of other laws politicians deemed more important. In an attempt to excuse delays in adoption of new laws, elected officials argued that postponement would be beneficial to the quality of the new legislation and would allow harmonization with the requirements stemming from the Czech Republic's membership in NATO. In point of fact, preparations for NATO membership did stimulate an active approach to security and military legislation.

Preparation of the new defense legislation was based on principles stemming from an effort to harmonize the Czech law with the standards used by the European Union and NATO member countries. The principles and objectives were as follows:

a) The laws had to be formulated in a way ensuring compliance with the constitutional Act on Security of the Czech Republic87 which specifies that protection of the Czech Republic's

---

supremacy, territorial integrity, and democratic principles, lives and health of the population, and material values are the fundamental responsibilities of the state. The law establishes conscription duty based on which personnel is drafted to the armed forces, determines the duration of a state of emergency, and sets the conditions under which the Government or the Prime Minister may declare a state of emergency. Further, the legislation defines the duties of the Parliament in a situation when a state of emergency is declared and describes the status of the State Security Council. The law contains general definitions of the duties of government authorities relating to ensuring state security. The details of conscription duty, tasks of the army, the police, and rescue forces are defined in specific defense laws.

b) An important objective was ensuring compliance of effective laws with the Constitution. In particular, it was necessary to make sure that exemptions from general laws are adopted only in necessary cases when it is essential for fulfillment of military tasks, compliance with conditions of military service, and preservation of certain traditional military institutions.

c) An effort was made to ensure a comprehensive nature of the new laws, so that the defense legislation incorporates various aspects concerning numerous legal areas defined in other laws and regulations.

d) It was necessary to make sure that the new defense laws are compatible with the existing legislation on duties of members of armed forces and services, such as the Czech Police.

e) Further, the creation of the new defense laws was driven by an attempt to attain the greatest possible compatibility with the legislation defining military service of professional soldiers in other democratic countries.

In 1999, the government also prepared laws which responded to international agreements endorsed by the Czech Republic, especially duties arising from the country’s membership in NATO, i.e. the Act on Deployment of Foreign Armed Forces in the Czech Territory and the Act Banning the Use of Antipersonnel Mines. These laws defined conditions for the use of the Czech armed forces outside the Czech territory and approval of deployment of foreign armies in the Czech Republic in cases when the Parliament cannot be convened for any reason and the approval is given by the Government (so-called "blanket approval"). The Government's proposal of the blanket

approval was passed by Parliament in October 1999, its effectiveness limited up to December 31, 2001. This measure was necessitated by the situation, which occurred in connection with the Kosovo crisis and NATO's air campaign in former Yugoslavia. The standard procedure set forth in the law, i.e. approval of a Government's proposal to deploy Czech troops abroad by the Chamber of Deputies and subsequently by the Senate, proved to be excessively long and unsuitable for exceptional situations when the country is required to efficiently fulfill its duties arising from membership in NATO.

**Contents of Defense Laws from the Viewpoint of Principles of Democratic Control of the Armed Forces**

The defense laws adopted in 1998-1999 include one constitutional act (the abovementioned Act on Security of the Czech Republic), five acts, three amendments of other acts affected by the new defense legislation, and a number of implementing regulations (decrees and Government regulations) concerning the new defense laws. Below is a brief overview of the five new acts with a detailed description of passages concerning democratic control of the armed forces.

**Act No. 218/1999 Coll., on the Scope of the Conscription Duty and Military Administration Offices (so-called Conscription Act)**

This piece of legislation is the legal basis for securing military defense of the Czech Republic. It replaced a law adopted in 1949 that despite a number of amendments passed after 1990 did not correspond to contemporary international, national, and economic principles and was in disagreement with the Constitution. The principal purpose of the Conscription Act is to define the scope and substance of the conscription duty, i.e. the constitutional principle based on which conscripts are drafted to the armed forces. Further, the legislation establishes military administration offices, i.e. territorial administration units of the Ministry of Defense responsible for conscription, recruitment, and training of reservists.

The conscription duty includes the obligation to be enlisted, the duty to complete military service, and other duties, such as reporting information necessary for keeping military records. The law stipulates under what conditions conscripts are considered incapable to undergo
military training. It defines military service as the duty to begin military training or civilian service at the applicable time and to properly complete it (substitute service is completed by persons who refuse to serve in the armed forces due to personal principles or religious beliefs, as specified in the Civilian Service Act), maneuvers, and exceptional duties all soldiers must fulfill in the case of a state of emergency or a state of war.

The conscription duty applies to male citizens of the Czech Republic aged between 18 and 60 years, in the case of professional soldiers – 62 years. Women may be drafted on a voluntary basis during a state of war. The law stipulates that foreign nationals may subject themselves to the conscription duty in the Czech Republic. Further, it specifies that military service in foreign armed forces completed by individuals who have received Czech citizenship or have double citizenship will be taken into account in respect of the conscription duty in the Czech Republic.

The law defines the duration of basic military training (12 months), substitute service (reduced from five to three months), and maneuvers (12-16 weeks). A new provision stipulates that reservists may be called on to take part in exceptional maneuvers for a maximum of eight weeks for the purpose of performing rescue work in cases of natural disasters threatening lives, health, the environment, or substantial material values.

Further, the Conscription Act describes in detail the recruitment procedure, enlistment of individuals for basic military training and substitute service, the procedure for calling reservists for maneuvers and exceptional duty, concessions from service duties for family or social reasons, the manner of determining medical incapacity preventing individuals from undergoing military training, and mobilization procedure.

Act No. 219/1999 Coll. on Armed Forces of the Czech Republic

This act is of fundamental importance to democratic control, especially because it defines the responsibilities and powers of government authorities and institutions exercising control of the armed forces. As was mentioned earlier, the constitutional basis for this piece of legislation is the Act on Security of the Czech Republic which specifies in Article 3, paragraph 1 that security of the Czech Republic is ensured by the armed forces, among others. Further, Article 4, paragraph 1 specifies that personnel are recruited for the needs of the armed forces on the basis of conscription duty. According to Article 4, paragraph 2, the tasks, organization, and training of the armed forces are defined by a special law—the Act on Armed Forces
of the Czech Republic—in order to "ensure civilian control of the armed forces."

Matters concerning the armed forces of the Czech Republic and their individual parts were originally defined in several laws. That system was inadequate, lacked transparency, and did not correspond to the present-day defense-related needs of the Czech Republic as well as tasks, which stem from peacekeeping, rescue, and humanitarian missions completed in collaboration with foreign armed forces. As a result, it was necessary to concentrate provisions pertaining to individual parts of the armed forces and their tasks into a single piece of legislation. The purpose of the new law is to take into account recent social and economic developments and to define the tasks for the armed forces, which correspond to the needs of the Czech Republic in accordance with the United Nations Charter. Further, the law defines the country's present and future international obligations, especially those arising in connection with NATO membership.

The act contains a definition of defense-related terminology (military unit, military facility, military rescue unit, military hardware, military armaments, etc.), describes the army's basic tasks, and specifies the manner of management of the armed forces. It stipulates that the Czech army fulfills not only traditional tasks, which consist of defending the nation-state from external enemies, but also tasks arising under international agreements on joint protection against attack. In addition to the basic defense- and alliance-related tasks, the law specifies that the Czech army may be deployed to guard important state facilities, to protect the state border, and to secure internal security and order alongside the Czech Police. Further, the armed forces can be used to perform rescue work in cases of natural disasters or other serious calamities, which endanger the lives and health of people, the environment, or considerable material values. The army's air force is responsible for transporting state officials, providing medical rescue transport services, and transporting humanitarian and medical materials as part of aid provided to people affected by crises in foreign countries.

The act divides the armed forces into the Army of the Czech Republic, the Presidential Guard, and the Presidential Military Office. The Presidential Guard is responsible for guarding and defending the Prague Castle and other structures used by the President as a temporary residence. In addition, the Presidential Guard is responsible for acts of military honor performed for the highest representatives of foreign countries and foreign ambassadors visiting the President. The Presidential Military Office is in charge of the Presidential Guard and fulfils tasks related to the President's role as the highest commander of the armed forces.
The legislation also describes the personnel of the armed forces and specifies that the legal status of soldiers on active duty and reservists be defined in a special law. Labor-law relations of civilian personnel are subject to the civilian Labor Code. Since military courts were abolished after 1990, the act establishes the Military Office for Legal Representation of the Ministry of Defense with the aim of resolving the problem of who represents the state in court disputes. Under the law, political parties and political movements are excluded from the armed forces, a fact that restricts soldiers’ right of association. With regard to the transfer of civilian defense from the jurisdiction of the Ministry of Defense to the Ministry of Interior, the act contains provisions defining activities of rescue and training bases of civilian defense (so-called military rescue units) which constitute an independent specialized force within the army that fulfills humanitarian tasks relating to civilian protection.

In regards to democratic control of the armed forces, the most important are provisions that define management and control of the army and identify the bodies responsible for internal and external control. Part III, Section 12 of the act refers to civilian control by constitutional institutions, i.e. the Parliament, the Government, and the Supreme Audit Office. The scope of the control is defined in the Czech Constitution, the constitutional Act on Security of the Czech Republic, and other laws. For the first time in history, the new act defines the powers of the President, the Government, the Ministry of Defense, the Minister of Defense, the Chief of the Presidential Military Office, and the Chief of General Staff in a uniform and comprehensive manner.

As the highest commander of the armed forces, the President approves basic military regulations, appoints and recalls the Chief of the Presidential Military Office, confers historical names or names of honor on military units, and awards military standards. At the recommendation of the Government, issued following a debate in the Defense and Security Committee of the Chamber of Deputies, the President appoints and recalls the Chief of General Staff of the Army of the Czech Republic.

The Government is responsible for approving operation plans pertaining to the use of the armed forces during a state of emergency or a state of war, making decision on the structure and size of armed forces, and approving the concept of development of the army. The Government decides these issues based on proposals made by the Minister of Defense.

90 Act No. 166/1993 Coll. on the Supreme Audit Office, as amended.
The Defense Ministry's task is to determine and implement measures aimed at development of the armed forces, to establish and abolish military units, facilities, and rescue units, to exercise control over the army, and to monitor technical aspects of the use of military hardware, armaments, equipment, and structures. Under the new act, the Ministry of Defense has the power to issue commands to soldiers.  

A part of the ministry is the General Staff of the Army of the Czech Republic, which is responsible for commanding the armed forces. The army is controlled by the Ministry of Defense Inspection, which is the highest internal audit body of the ministry subordinate directly to the Minister of Defense. The Inspection collaborates with other authorities responsible for inspection activities, such as the Supreme Audit Office.


For the first time in history, there is a law, which clearly differentiates basic military training, substitute service, and maneuvers that take place based on the conscription duty from the military service of professional soldiers. The act defines the recruitment procedure, the progress of basic military training, substitute service, and maneuvers, specifies regulations pertaining to safety and protection of health, describes monetary and in-kind entitlements, liability for damages, and compensation for damages, deals with issues concerning healthcare and sickness insurance of soldiers on active duty, and sets forth provisions pertaining to military disciplinary action. The act restricts certain civil rights of soldiers with the aim of ensuring that active duty is undisturbed. The purpose of the law is to clarify the rights and duties of citizens in respect to the fulfillment of the conscription duty. It should be mentioned that the laws of European Union countries do not contain uniform provisions on the progress of military training; this area is within the jurisdiction of individual states. The same applies to NATO member countries. For the most part, the personnel of armed forces of NATO member countries is recruited based on a conscription duty, and the specific rights and duties for individual categories of soldiers are defined in

91 The powers and responsibilities of the Ministry of Defense in respect to the army stem from the powers specified in Section 16 of Act No. 2/1969 Coll. Establishing Ministries and Other Central Government Authorities of the Czech Republic, as amended.
particular laws. However, a number of aspects, such as vacation, service travel, leave, and disciplinary rules are similar in other countries where military service is compulsory.

**Act No. 221/1999 Coll. on Professional Soldiers**

The Czech public and media paid very close attention to preparations of this act, which many people perceive as representing the entire defense-related legislation.

The law defines the recruitment process and the progress, changes, and termination of military service of professional soldiers. Based on a number of proven traditional principles, the legislation introduces certain new aspects that reflect the transformation of the Czech army and the requirements that stem from the Czech Republic's membership in NATO.

In most NATO armies, the service of professional soldiers is derived from the system of state civil service defined in a single law that applies to all civil servants; such laws contain provisions that describe the specifics of service of members of the armed forces. As the Czech Act on Civil Service does not define the specific aspects of military service and a new version of this law has not yet been drafted, it was necessary to adopt a special law, i.e. the Act on Professional Soldiers. Preparation of this act was very difficult due to the fact that there were no general legal standards pertaining to professional soldiers. The process of drafting this law included a comparative analysis of the entitlements of customs officers, police officers, professional soldiers, and members of the Security Information Service and the Prisons Service. The goal was to ensure that compensation paid after termination of duty, accommodation, recreation, medical insurance, and sickness benefits are basically the same for the members of all armed forces and services. In addition, the preparatory stage included an identification of areas that needed to be paid special attention in respect of laws effective in other NATO member countries. Especially important were retirement benefits, as the experience of various NATO armies shows that they play a significant role in respect of a person's decision to become a professional soldier and to stay on active duty. Retirement benefits provide professional soldiers with social security during service, taking into account the demanding nature of the military profession, the potential threat to one's life during military training, and the necessity to adjust family life to army needs. They are intended to help soldiers with the transition to civilian employment after termination of active duty. The experience of foreign countries was also used in determining the restrictions of certain civil rights of
soldiers, selecting the place of service, serving in multinational armed forces and peacekeeping missions abroad, participating in tasks where soldiers' lives and health are endangered, and conforming to military discipline.

A fundamental change introduced by the law is the notion of military service not as a lifelong profession, but as a commitment lasting a definite period of time according to the needs of the armed forces, i.e. between two to 20 years.\textsuperscript{92} Further, the act contains detailed provisions on healthcare, accommodation, recreation, social allowances, service of soldiers enrolled in study programs, special aspects of service of clergy and medical personnel, and assistance to families of soldiers who die or suffer serious injuries while on duty.

**Act No. 222/1999 Coll. on Securing Defense of the Czech Republic**

Adopted to replace an outdated act from 1960's, this legislation is based on the constitutional principle that duties can be imposed on state authorities only under the law. Under the new act, national defense is one of the main responsibilities of the state. Although the legislation is entirely new, it uses traditional legal institutes, which have been adjusted to reflect changes in political, social, and economic conditions.

The main purpose of the law is to determine the duties of individual entities responsible for defending the Czech Republic against attack and to define liability for violations of these duties. The act defines the responsibilities of the Government, central government authorities, and district offices. The Government is responsible for assessing the security situation of the Czech Republic, monitoring developments of possible risks of attack, approving fundamental defense-related documents (security and defense strategy, analytical and concept materials, etc.), and verifying measures adopted in the defense sector. The law gives the Government sufficient powers to exercise central control of government authorities and municipalities during a state of emergency or a state of war in respect to vital activities aimed at protecting the state, its population, internal security, and economy, and to coordinate these activities throughout the country.

The Ministry of Defense is responsible for drafting defense and strategic concepts, namely the Military Strategy of the Czech Republic and planning documents, and for coordinating security- and defense-

\textsuperscript{92} With the exception of service abroad which may last less than two years.
related activities between government authorities and bodies of local self-governments. The ministry is also responsible for monitoring the readiness of the armed forces for mobilization.

The law defines measures that are necessary during a state of emergency or a state of war in non-military areas and which are implemented with the aid of various legal entities and individuals. The law specifies their duties in respect to national defense. In addition, it identifies facilities crucial for defense of the Czech Republic, such as land and structures in military compounds and their accessories used by the armed forces as well as other important structures (buildings, ground communications, nuclear power plants, hydro works, etc.). Occupying a prominent place among structures important for national defense are military compounds, i.e. special areas intended for securing defense and training of military personnel in field conditions. The nature of present-day armies and weapons systems requires relatively large and very sparsely populated areas with minimal civil use where the military training function is dominant. As a result, the law stipulates that military compounds may be established or closed only based on a specific legal measure,\(^\text{93}\) defines the ownership rights to immovable located in military compounds, and sets forth the rules for exercising ownership rights and registration of immovable.

---

**Conclusion**

It is beyond question that the defense laws adopted in 1998 and 1999 have helped improve democratic control of the Czech armed forces. The principle of civilian control over the army has become a legal standard, and the powers and responsibilities of institutions and government authorities involved in activities concerning national defense and security are now defined in specific legal provisions. The comprehensiveness, uniformity, and correlation of defense laws and their conformity to international agreements and compatibility with the defense legislation of other NATO member countries make the set of Czech defense laws a fundamental instrument based on which democratic control of the armed forces can continue to develop in the future.

Even though civilian control of the army is explicitly defined only in the constitutional Act on Security of the Czech Republic and the Act on the Armed Forces of the Czech Republic, the defense laws are beneficial for the level of democratic control on the whole, as they make this area more transparent for all government authorities, legal

\(^{93}\) Formerly, military compounds could be established and closed based on a decision by the Government.
entities, and individuals that in any way come in contact with the armed forces. The legislation is important for all citizens who are subject to the conscription duty or are interested in a professional military career, as it clearly and comprehensively defines their basic rights and duties, including restrictions of civil rights and advantages which compensate the dangerous and demanding nature of serving in the armed forces. The defense legislation has created conditions necessary for departure from the traditional notion of democratic control based on government, formal, and legislatively defined institutions in favor of a more modern concept which emphasize informal players outside the establishment, such as civilian science and research institutes, the public, the media, interest groups, non-governmental organizations, etc.94

Most politicians and Ministry of Defense officials and some independent military experts believe that civilian control of the armed forces, as defined in the defense legislation, is entirely sufficient. However, democratic control cannot be narrowed down to civilian control, as civilian control is not necessarily democratic. Even the communist regime had relatively good civilian control; however, it was not democratic and represented what Huntington95 defines as subjective control and Nordlinger96 as a correlation between political and military structures. Democratic control reduced to the state institutions defined in the Constitution and specific laws means that only control elements are present, without the management aspect, which includes both a definition of tasks of the armed forces and the readiness to bear the political responsibility. This approach would exclude a number of important entities, “defense community”, from control of the army, which act as a specific counterbalance to official institutions and may very effectively help control the armed forces, for example by disclosing the army’s problems and difficulties.

Such community is still too vague, dispersed in the Czech Republic, and consequently, its influence on political decisions and the public is relatively low. It lacks an institutional foundation and although its members are aware of the necessity to institutionalize their activities at least to a certain extent, they lack a vision as to what structure the institutional base should have. The Ministry of Defense tries to coordinate community activities to some extent; however,

---

mutual communication tends to be sporadic and irregular. The political representation does not clearly understand the function and goals of the defense community, sometimes perceiving its members as potential competitors or a source of criticism, which could jeopardize politicians' careers if disclosed in the media. On the other hand, there are no fundamental disagreements, as politicians are aware of the necessity to have qualified expertise emanating from sources other than executive military bodies. In order to function in a standard manner, the defense community must create a core that will consist of respected specialists who will attract other people, such as university students, scientists, and representatives of cultural life, ecology experts, spiritual leaders, and persons from other areas of social life.
The founding and development of new independent states in the geo-strategic area of Eurasia in the last decade of the 20th century has by now already passed the initial stage of establishing the basic elements of new states – borders, state government structures, national currencies, separate armed forces and military infrastructure, etc. The division of the former Soviet military infrastructure into individual “national armed forces” of the new independent states was mainly completed by the second half of the 90s. Since that time civil-military relations in some states of the Commonwealth of Independent States (CIS)97 progressed in the direction of forming democratic civil control over the military domain. In other states military power fell under the unilateral control of the executive branch or even became a “kingdom within the kingdom” controlled by no one. The situation in the CIS reflects the diversity of civil-military relations models existing on the continent and throughout the world.

Civil-Military Relations Model Diversity in the CIS

Analysis of the present situation in civil-military relations in different countries of the CIS allows for the categorization into three major groups of states.

---

97 CIS in broad format includes Armenia, Azerbaijan, Belorussia, Georgia, Kazakhstan, Kirgizstan, Moldova, Russian Federation, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. Only 6 out these 12 countries remain part of the Collective Security Treaty (military integration branch of the CIS), namely: Russia, Armenia, Belorussia, Kirgizstan, Kazakhstan, and Tajikistan. Countries of so-called “GUUAM” group (Georgia, Ukraine, Uzbekistan, Azerbaijan, and Moldova) tend to deviate from initial format of the CIS and participate in CIS structures and agreements with reservation. Still the UN has recognized the CIS as a “regional interstate organization” in 1994, in compliance with provisions of the Chapter VIII of the UN Charter.
1) The first is the group of CIS states where the necessity and suitability of the civil democratic control over the military is recognized, at least on the level of principles and fundamental political decisions. In these countries certain laws and legal regulations on democratic civil control have been either adopted or are in the process of elaboration, corresponding institutions and structures are being created, and civic society institutions (from parliaments to non-governmental organizations and media) play an evident role in shaping civil-military relations.

CIS countries belonging to this group include Russia, Ukraine, Moldova, Kazakhstan, and Kirgizstan.

2) The second group of the CIS states establish civil-military relations following the model of strict and rigid political control by the central executive power over the military organization, with minimal influence of the legislative branch (parliament) and oppressing (more or less openly) the role of non-government organizations, media and other non-state subjects.

To different extents, the situations in Turkmenistan, Uzbekistan and Belorussia qualify them for this group.

3) The third group includes countries that have spent the past decade in the state of declared or undeclared civil and interstate wars and conflicts, which has immensely influenced their military sphere and provoked its disproportional and mainly uncontrolled development. Such countries include – Tajikistan, famished both due to internal civil war/unrest and border military infringement from Afghanistan; Georgia, which suffered armed conflicts in its secessionist parts of South Ossetia and Abkhazia; Armenia and Azerbaijan, involved in armed conflict over Nagorno-Karabakh.

The trend of this group of countries seems to be towards the second model with centralized authoritarian control rather than towards the first model with broad democratic civil control.\(^98\)

Practically all CIS states passed through a period (approximately the first 5 years of their existence as independent states, somewhere between 1991 and 1996) during which military institutions of each new state were based primarily upon “residua” of the former Soviet military infrastructure\(^99\). During that period relations between the

---

\(^98\) Though evolution of civil-military relations. Azerbaijan and Georgia might be influenced in the direction of the first model due of their desire to meet the criteria for intensive partnership with NATO and EU, with their “European criteria” of democracy and transparency.

\(^99\) The fact that the breakup of the former Soviet military infrastructure, onto 15 pieces, during the first half of the 90s occurred without a major clash or threatening
military institutions and civil society in many CIS states remained unclear, chaotic, and under weak legal regulation.

**Laying Legal Foundations for Democratic Control**

Attempts to ratify new civil-military relations in legal norms and institutional reform, marked second half of the 90s in all CIS countries.

Such ratification usually started with the introduction of general civil-military relation concepts and definitions into the country’s Constitution and into the National security concept and Military doctrine (sometimes into the Foreign policy doctrine as well). In the next stage a typical list of laws and legislations has been adopted in major CIS states which (with varying titles and details from country to country) created a legal foundation for the system of civil (or, in some cases, political) control over the military sphere. A typical list of such laws adopted (or still under consideration) in the CIS states includes:

- Law on defense
- Law on State of Emergency (and/or State of War)
- Law on Military conscription
- Law on the status of the military personnel
- Law on the Armed Forces
- Law on the Forces of Interior
- Law on the Border Guard Forces
- Law on Military Justice (or on Military Procurator’s Office)
- Law on alternative military service
- Law on social welfare for the military personnel and members of their families
- Law on acquiring and possessing arms, etc.

All these legal regulations with certain exceptions have already been adopted by most of the countries from the first group, and in some countries from the second and third groups.

In case of the Russian Federation, legal foundations for civil-military relations are set by the following main documents, laws and decrees:

- Constitution of the Russian Federation\(^\text{100}\)
- Military Doctrine of the Russian Federation\(^\text{101}\)
- National Security Concept\(^\text{102}\)
- Federal Law “On defense”\(^\text{103}\)

conflict could be considered an significant success of the CIS, which thus reasonably effectively performed its role as a “peaceful divorce tool” of the former Soviet Republics.

\(^{100}\) Voted for in December 1993.


Federal Law “On conversion of defense industry in the Russian Federation”¹⁰⁴
Federal Law “On the status of the military serviceman”¹⁰⁵
Presidential Decree “On prime measures on reforming the Armed Forces of the Russian Federation and improving their structure”¹⁰⁶
Presidential Decree “On measures of strengthening the state control over the external trade in sphere of military-technical cooperation”¹⁰⁷
Presidential Decree “On measures of strengthening the state governing over the military structures formation”¹⁰⁸
Federal Law “On military obligatory service”¹⁰⁹
Federal Law “On civil defense”¹¹⁰, etc.

After separate fundamental laws and decrees were adopted, the question was raised concerning the necessity and ability to combine the basic parameters of civil-military relations in a unified legal document e.g. the Law on civil (or democratic, or parliamentary) control over the military sphere (or the state military organization). Almost simultaneously first drafts of such “umbrella” legal document were developed in Russia,¹¹¹ in the Inter-parliamentary Assembly of the CIS¹¹², and in Ukraine.¹¹³

Reasons for Elaborating “Umbrella” Laws on Democratic Control of the Military

¹⁰³ Entered into force on May 31, 1996
¹⁰⁴ Entered into force on May 13, 1998
¹⁰⁵ Entered into force on May 27, 1998
¹⁰⁶ Issued on July 16, 1997
¹⁰⁷ Published on August 26, 1997
¹⁰⁸ Published on September 5, 1997
¹¹⁰ Entered into force on February 12, 1998
¹¹¹ First draft of such a Law was titled “On civil control over the military organization and activity in Russian Federation” and has been introduced to the Russian State Duma in 1997. It was authored and co-sponsored by the group of Russian MPs, including E.Zelenov, A. Arbatov, N. Bezborodov, E. Vorobiev, E. Zyablitsev, L. Rokhlin, M. Surkov and A. Yaroshenko. In 2001 the draft was reintroduced into the plan of legislation activity of the Parliament.
¹¹² Draft of the Model Law was titled “On the Parliamentary Control over the Military Organization (of the CIS member state)” and was elaborated by the inter-agency working group headed by A.Nikitin and Yu.Fedorov.
¹¹³ Ukrainian Law was titled “On civil control over the military organization of the state and its activity” and was introduced to the Ukrainian Supreme Rada in 1999.
What factors prompt the necessity for unified and strong legal foundations of civil democratic control over the military, embodied in a general law on democratic control? Why are combinations of the separate regulations listed above not enough? Such factors exist and are quite similar in Russia, Ukraine, and many other CIS states. Among them:

– National security concepts and military doctrines adopted in the early or mid-90s address only duties and definitions in the transition of the role and purposes of armed forces. They recognize the reduced external role of armed forces (consequence brought about by the end of the Cold war), but remain unclear or unsatisfactory in defining internal use of armed forces in conflict resolution, anti-terrorist and peacekeeping roles of the military, resulting from new forms of modern threats and challenges. Thus the necessity to ratify general roles and limitations on use of armed forces domestically and abroad remains unresolved;

– Existing law “packages” and decrees do not systematically define the correlation and coordination of responsibilities and roles between “force structures”, on one side, and civil political structures, on the other, as well as correlation between various “force structures”. For example, the Russian military organization at a certain stage included 26 ministries and agencies with militarized or para-military personnel and roles. At one moment the sizes of the Forces of the Interior (under the Ministry of Interior), as well as of Border Guard Service (separated from the Ministry of Defense) were greater than the land-based component of the Russian Armed forces subordinated to the Ministry of Defense and the General Staff. A similar situation occurred in Kirgizhia, where the Forces of Interior outnumbered the Armed Forces under the Ministry of Defense, and in the Ukraine, where about 30,000 servicemen of the Presidential Guard where not included in the laws introduced to regulate Armed Forces.

– Military reform plans (the genuine and fundamental reform, freeing Armed Forces from the legacy and troubles of the former Soviet military infrastructure) countries remain crippled in most CIS. Reforms proceed chaotically (if at all) and under strong lobbying by various groups within the military itself. Without a general Law on civil democratic control over the military it remains unclear who and how might define the general size, structure of the military organization in society, and the corresponding size and structure of the military budget. These basic parameters are defined de facto either by the military itself,
or (quite voluntarily and without democratic approval) solely by presidential executive structures.
– On more than one occasion during the past decade the military in various countries of the CIS “took sides” in internal political disputes and clashes, e.g. in Georgia in 1992-1995, and in Russia during coup d’état attempts in 1991 and 1993. At the same time, existing laws do not set a requirement and mechanism for the depoliticization of the military.
– Civilian components (including civilian minister of defense) remain an exception rather than a rule114. Parliamentary or public control over the nomination of high-ranking military “cadres” requires legal regulation.

Past conflicts in the CIS (Tajikistan, Moldova/Transdnestria, North Ossetia/Ingishhetia, South Ossetia/Georgia, Abkhazia/Georgia, Karabakh, Chechnya) show that state and military forces involvement in armed operations in conflict areas not the result of rational democratic political decisions, but rather decisions made on a disorganized ad-hoc basis. Countries often found themselves de facto in a state of war, though the public or parliaments had not declared it. Potential laws on democratic civil control of the military domain must provide a clear mechanism for passing politically conscious decisions on involvement in conflicts (especially beyond a country’s own borders) and use of armed forces.

– Systematic laws on civil democratic control over the military are necessary not only in providing supervision and limitation of military activity, but also in protecting the military from abuse by politicians, and in protecting human, economic and social rights of the military staff (including their families, military pensioners, employees of the military industries, etc.). One of the tasks of potential legal regulation of the democratic control is to regulate the defense budget, its allocation and implementation. In contrast to the Cold War Soviet military system, the current problem in the CIS is not over-financing, but rather significant under-financing of the military organization with severe consequences on the social aspects of the military personnel living conditions.

114 Moldova and Ukraine were among the first CIS countries to introduce civilian Minister of Defense. First civilian Defense Minister in Russia was nominated only in 2001 (still, being formally “civilian” he is a retired military from the “force structures”).
CIS Model Legislation Mechanism

As far as the problems of the civil-military relation, an international mechanism of CIS Model Legislation may be conveniently employed in this case, as many CIS states are structurally quite similar. The very institution of the CIS Model Legislation is quite young. Creation of new Parliaments of the independent states took place between 1991 and 1994-1995, thus the legislative structure of the CIS called the CIS Inter-Parliamentary assembly with an HQ in Saint-Petersburg became fully operational only in the second half of the 90s.

Between 1995 and 2001 more than 100 legislation acts (called Model Laws, or Recommended Legislative acts) have been adopted by the CIS Assembly. They span from social welfare and economy to defense and security. Among recently adopted include Model laws the Law on Arms and the Law on Combating Terrorist Activities.

After adoption, each model law may be used by national parliaments as a “pre-fabricated draft” for adaptation to national specific conditions and for further legislation procedures in becoming a national law. By definition, Model Law is less concrete and more universal than national laws. It elaborates certain general principles, definitions, formulations applicable (ideally) to all CIS countries. Adaptation to national conditions may change the text significantly, though practice shows that many Model laws are applied to national legislation without principal changes, only with reasonable editing.

Not only the direct function of a Model Law (to assist to national legislation process) is important. Their elaboration and discussion converts into the “school of interoperability” between parliamentarians of various CIS countries, helps them to compare and mutually adjust their views on basic issues.

Another important function of the process of elaboration of Model laws is promoting inter-ministerial and inter-agency dialogue and coordination within each CIS country. During the process of debating each Model law parliamentarians tend to consult various national ministries and institutions, circulate drafts, collect amendments, thus promoting elaboration of national position on the issues which otherwise might be out of focus of national political elite at all.

Model law elaboration also has important side-function in introducing principles of international law into national “legal domains” of the CIS countries. Parliamentarians tend to follow broader international law principles when they are formulating wording pretending to fit the needs of many countries, than when they are involved in domestic legislation.
The Assembly itself, like national parliaments, is subdivided into permanent committees or commissions (including Permanent Commission on Defense and Security), and focus of the legislative activity is on the level of commissions, rather then on the level of Assembly as a whole.

The Permanent Commission on Defense and Security consists (as do other commissions) of parliamentarians, nominated by national parliaments of all (or most) CIS countries. There is no centrally coordinated “plan” of elaborating and adopting Model laws: normally the agenda is filled by initiatives of various parliaments, ministries or commissions, and drafts may very much vary in size, style, legal and analytical quality.

The process of debating (normally draft undergoes two-three readings in the Commission and then one or two discussion in the full format of the Assembly) may last quite long, so far Commissions often hold no more than 2 or 3 sessions per year. In many cases because of rotation of representatives from national parliaments each new hearings brings face to face new set of individual parliamentarians from many countries. That leads to situation when individual political views are presented by debating MPs rather than a unified “state position”. Sometimes mechanism of experts/advisors from executive branch of various countries and legal circles (who work relatively permanently with each commission) may dominate the changing sets of individual parliamentarians and determine the direction of debates.

Main Principles Codified in the CIS Draft Model Law: Structure of Civil Democratic Control

Draft Model Law “On Parliamentary Control over the Military Organization of the (CIS member state)” was elaborated following the initiative of the Moscow-based Center for Political and International Studies. The principal work was done in 1998-1999 by the inter-agency working group of experts which included representatives of the Legal department of the Russian Ministry of Defense, experts from the CIS Collective Security Council, Association of International Law, Moscow State Institute of International Relations, Center for Political and International Studies, advisors from the Defense Committee of the Russian State Duma.

The draft was discussed and coordinated with experts from the Parliaments of Ukraine, Kirgizstan and Kazakhstan. Important positive reference for the draft was supplied by the Chief of the General Staff of the Russian Armed Forces Army General A. Kvashnin, former Russian Minister of Interior and currently Deputy
Chairman of the Security Committee Army General A. Kulikov, and CIS Collective Security Council Secretary General Ambassador V. Zemsky. Army General A. Kvashnin wrote, in particular, in his address to the Inter-Parliamentary Assembly that “the draft of the Model Law on Parliamentary Control has been deliberated by the Ministry of Defense of the Russian Federation and, in general, is supported by the Ministry”.

In 1999-2000 the Draft Model law on Parliamentary Control went through initial presentation before the Assembly and two hearings in the Permanent Commission on Defense and Security. Three times the draft was discussed with Parliamentarians of national parliaments and experts in Kiev, Bishkek and Alma-Ata. Though the Draft Law presently continues to be in the process of consideration and discussion by the Inter-Parliamentary Assembly, the main principles and general framework of the Model Law have been set and could be analytically described and studied.

First of all, from the point of view of international law, the Model Law confirms and adapts the basic requirements of the Code of Conduct regarding military-political aspects of security adopted by the OSCE, to the CIS state of affairs.

One might mention that the very notion and term “control” have been questioned in process of debating the Draft law from two aspects. Some participants of debates suggested avoiding the strict meaning of the term control by using softer Western notion (widely used, for example, in the British Parliament) of “oversight”. Other critics insisted that term “control’ makes the process of civil-military relations unidirectional. They suggested titling the entire draft “The law on Civil-Military relations in the CIS member state” to stress that the law shall not only add instruments of control to politicians but, in reverse, also to provide better guarantees and conditions for the military. Both suggestions were used to shift accents in other parts of the text leaving “control” as the main title.

There were many debates on whether it is appropriate to speak of “civil control”, “democratic control”, “parliamentary control” or “public control”. To clarify correlation between various formats and “layers’ of control, the preamble of the Law was supplied with an explanation.

It was specified that civil democratic control could be performed by the following state institutions:

a) by the head of state;
b) by the parliament,
c) by the government,
d) by the organs of regional and local self-governance,
e) by the system of justice
f) by the institutes of civil society, the media and by the individual citizens in legally defined limits and forms.

Parliamentary control is considered an integral part of wider civil democratic control over the military organization in society.

After intensive debates it was considered unrealistic to combine within one law regulations covering all the mentioned “levels” of civil control. Unexpectedly, the main difficulty occurred in achieving consensus on defining credentials and limitations of non-governmental actors of control (political parties, NGOs, media), since their rights significantly differ both de jure and de facto in various CIS states, and this was considered too sensitive to regulate indirectly through the Inter-parliamentary legislation. Also it was recognized that role of the head of state and the government is normally defined by Constitutions and numerous regulations of existing domestic law. So the given Draft Law focused on the role of Parliaments as central components of the representative democratic political system, with understanding that parliamentary control does not equal to civil democratic control as a whole but rather represent its seed and central element.

Notion and Definition of Parliamentary Control

The very notion of Parliamentary control is defined in the Draft Law functionally – as activity in creating and adequately implementing the system of legal and administrative measures reached by Parliament in interaction with other bodies of state power and institutes of the civil society aimed at:

a) effective rule over the armed forces, troops, military formations and bodies, constituting the state military organization, on the part of top executive and legislative authority institutions on behalf of security and protection of national interests of the state;

b) providing political neutrality (de-politicization) of armed forces, troops, military formations and bodies, constituting the state military organization, and non-participation of these forces, troops, formations and bodies, as well as of their personnel, in political activity;

c) de-ideologization of the state military organization;

d) establishing a state military organization as an integral element of the rule of law, law-abiding state, protecting human rights and social interests of the military;

e) guaranteeing maximum affordable glasnost and transparency of the military organization, constructive interaction of the
military organization with the media, public organizations and institutions of the civil society.

Principle of Political Neutrality or De-politicization

Obviously, the most debatable principle here is the principle of full political neutrality and de-politicization of the military organization. In this case it was considered a methodologically wrong approach to impose complicated decisions on “what is right and what is wrong” in politics onto the military itself. That could lead to voluntarism and tears within the military. Military commanders cannot and should not reconsider orders and instructions of the state legitimate political ruling bodies (like President, acting government and Parliament) from a moral, political or ideological viewpoint.

Political neutrality, so important for sometimes internally-split CIS states, primarily requires that political parties, public movements and organizations be prohibited from involving the military in their activities, as well as prohibited from create militarized and armed formations subordinated to them.

Secondly, armed forces, military personnel, all military organization of society must obey orders and instructions from the legitimately elected or constitutionally appointed state leadership, regardless of the political and ideological orientation of the latter.

Thirdly, servicemen and armed forces personnel shall have no right of being involved in political activity outside their direct service responsibilities, executing orders and decisions of political parties, public movements and organizations, being members of the political parties or movements, cooperating with them and assisting them, or participating in their political propaganda and agitation.

Fourth, creating political organizations and activities of political parties and public movements is to be prohibited in the armed forces and in the other components of the state military organization.

Fifth, to balance the “negative limitations” with “positive guarantees”, the following principle has been added. Provided that all the above formulated requirements of political neutrality have been met, servicemen and armed forces personnel must not be restricted in

---

115 This principle has become a subject for intensive debates. Some critics mentioned that it is a limitation of the citizen’s right “to elect or be elected”. To avoid this collision it was clarified that a military serviceman may become a candidate at political elections of various levels, but them he or she must temporarily take a formal leave from the acting armed forces for the period of electoral campaign, and in case of successful elections onto political post to retire from the military service.
appointment to positions or dismissed from their positions on account of any political or ideological reasons.\textsuperscript{116}

**Mechanisms of Parliamentary Control of the Military Organization**

The Draft Law clearly defines 8 main forms (or mechanisms) that are to be used by Parliament in fulfilling its function of civil democratic control over the military.

a) Mechanism of adopting all national legislation on the purposes, functions, size, structure, limitations of the armed forces and other components of the state military organization.

b) Financial mechanisms. Allocation and adoption of defense budget with further control of its de facto implementation.

c) Personnel policy. Approval of all major appointments of senior military commanders. Elaboration and approval of the structure and size of the armed forces, distribution of personnel positions and salary categories.

d) Ratification of international treaties dealing in military issues, arms control and reductions, use and limitations of use of armed forces and military power.

e) Mechanism of parliamentary hearings, complaints, investigations.

f) Legislative regulation of protection of human, economic and social rights of the military servicemen, members of their families, military pensioners. Organization of an effective interaction between the military and institutions of civil society and the media.

g) Mechanism for estimating military-political situation inside and outside the country, introducing a state of emergency or declaring a state of war, concluding peace treaties.

h) Mechanism of legislative regulation of the use of armed forces abroad, as well as regulation of foreign armed forces access to national territory.

Each mechanism is defined further on and described in the Draft Law in a separate article. Here we would like to illustrate in some detail at least two of such mechanisms: budget control and control on enhancing transparency and openness of the military organization.

\textsuperscript{116} That means certain protection against “purges” in the army, and orientation strictly to professionalism against orientation to “clan” or “party” loyalty, so spread in formerly Soviet armed forces.
Budget and Financing as Means of Control

The Draft Law postulates that parliamentary control of the military organization in defining general size, structure and sources of its financing is one of the most direct and strongest tools of democratic accountancy and transparency of the military sphere. Concurrently, defense budget allocation by the Parliament is to be supplemented with an effective mechanism of control over the actual defense budget expenditure.

Preliminary discussions with participation of MPs have shown that in practically all CIS countries defense budget approval is not followed by any form account or government report on how allocated resources are spent. A typical situation occurs when funds are allocated for one type of purposes within the military budget (e.g. increasing of military pensions) while later they are de facto spent for buying new arms and equipment or other urgent needs. This is why the Draft Law suggests establishing an obligatory mechanism of a yearly report by the government (or head of state) to the Parliament on the actual implementation and spending of the military budget, or wider, budget used for purposes of financing the military organization.

The Draft Law also prohibits reshuffling articles within the defense budget after it is passed, and use of funds allocated for the needs of the military organization for other government needs. This article is aimed at protecting military interests, statistics shows that, since for example in Russia in various years only 40 to 70% of the allocated defense budget money was in fact given to the military by the government.

In order to improve accountability and enhance transparency it is suggested the law provide for information on the general size and structure of the military budget (including subdivision of allocations between national defense, national security needs and other articles within the defense budget) be open and available to the public.

Closing (making secret) items or parts of the budget financing the military organization or certain components of it, could be done only on the grounds of direct connection with types of information included in the Law on state secrets.

Transparency Provisions

Special provisions are aimed at enhancing transparency in the state military organization. Article 6 of the Draft Law requires the Parliament to codify not only the exact list of types of information that are declared state secrets (to avoid vague and arbitrary interpretation of secrecy limits), but also to codify the list of types of data on the mi-
litary organization (including, for example, its general size, structure, overall defense budget) that are to be obligatorily publicized (made publicly available) by the state on the regular basis. This provision is aimed at providing the public and NGOs, as well as taxpayers with sufficient information to generally estimate the status and trends of the military organization.

Article 5 of the Draft additionally suggests providing full guarantee that the Parliament possesses the right of final approval of the general size, structure and composition of the national armed forces and other components of the military organization. Government should be obliged by law to supply Parliament (as the democratic representation of the public) with all the necessary information (including secret) necessary for competent decision-making on defining the size, composition and structure of the military organization.

It is too early to predict the results of further deliberation and final adoption or dismissal of the Model Law on Parliamentary Control by the CIS Inter-Parliamentary Assembly. However, already at the present stage the very elaboration of the Draft Model Law and broad discussion on principles of Parliamentary and civil democratic control by parliamentarians from numerous CIS countries, ministry and institute involvement in the debates and expertise on this issue have significantly advanced the general identification of necessity and understanding of concrete forms of democratic control of the military domain in the CIS.

---

117 Information containing state secrets may be considered at the closed sessions of respective Parliamentary committees with special measures aimed at non-leakage of state secrets from the Parliamentary circles.
EMBEDDING DEMOCRATIC CONTROL OF ARMED FORCES IN TRANSITIONAL SOCIETIES: LEGAL PROBLEMS AND ACHIEVEMENTS
Vaidotas Urbelis

DEMOCRATIZATION AND INTEGRATION: DCAF IN THE BALTIC STATES¹¹⁸/¹¹⁹

Introduction

In Lithuania, Latvia and Estonia the trend towards democratic control of the Armed Forces reflects the more general trend of democratization in society as a whole. The establishment of democratic control over the Armed Forces has never been a key issue in the politics of Baltic states,¹²⁰ but was largely understood as a prerequisite for their integration into Western structures and discussed only in a small circle of defense policy experts and lawmakers.

Civil-military relations in the Baltic states since independence have generally been characterized by the small size of the armed forces, and a strong civilian presence in the Defense System (DS). As a result, in the first few years of independence, civil-military relationship already contained several important preconditions for the establishment of democratic, and certainly civilian, control of the military.

In theory at least, their parliaments exercised control over the military. This model was far from perfect, however, in practice,

¹¹⁸ I am grateful for the helpful comments, particularly on the Legislative Framework section, made by Graham Roberts, PPBS advisor to Lithuanian Ministry of National Defense.


civilian control was often confused and civil-military relations complicated. The situation was made worse by a shortage of legislation and internal procedures relating to the civil-military relationship. However, since the beginning of 1994, when the Baltic states officially declared their goal of NATO membership, qualitative changes in this relationship have taken place.

Their parliaments passed several important laws embodying the principle of democratic civilian control of the Armed Forces, which are now firmly established within the DS. While, these reforms have contributed to the implementation of democratic control of the military, in practice they have not prevented the development of conflict between civilian and military authorities over certain defense and security matters.

Development Phases

The period of the Baltic states’ wider transition to democracy, which took place between 1990 and 1995, is of particular interest in the context of this study. The Baltic states were faced with the task of creating their Armed Forces ‘from scratch’. As a result and in contrast to the situation in many other post-communist countries, the military and more broadly the DS were not faced with making the transition from subordination from a deeply ideological political system (communism) to the one with fundamentally different values (liberal-democracy).

In general however, the development of civil-military relations and democratic control over the armed forces in the Baltic states has passed through several qualitative stages. These can be divided into three periods: first, the fight for independence between 1990-92; second, the period of transition between 1993-95; and third, the period of stabilization, from 1996 to the present.

In 1990 Lithuania, Latvia and Estonia declared their independence from the Soviet Union, but international recognition did not follow immediately. The situation at this time was unstable and unpredictable with Moscow implementing both direct and indirect military, political and economic pressures in response to the policy of independence. In this environment, one of the primary tasks of the new states was to establish a national defense system in order to control and protect the states’ territory and national borders.
In Lithuania on April 25, 1990 the Lithuanian Government established the Department of National Defense. The Lithuanian Armed Forces themselves grew from the Military Technical Sports Club, which was established by the National Defense Department at this time. A year and a half later, this organization became the basis of the Rapid Reaction Brigade.

In Latvia at the end of August 1991, border protection forces were created under the supervision of the Department of Public Security. In September, Home Guard units were formed, with members being drawn from national lists. On November 13, 1991 the Government decided that a Ministry of Defense should replace the Department of Public Security. The new Ministry of Defense took over the property of the Department of Public Security, as well as the majority of its personnel, and the former institution was disbanded in December 1991.

During this period, the Soviet army was still deployed on the territory of the Baltic states. Relations between the majority of the Lithuanian, Latvian and Estonian citizens and Soviet servicemen were strained and there was constant tension. In general, the vast majority of the Baltic states public supported the withdrawal of Soviet troops from all their military facilities and bases in the country. The policy of neutrality was directly implemented as a means of enabling the departure of Soviet Armed Forces.

The years 1992–1994 marked the ‘transitional’ phase of the Baltic states’ civil-military relations, and were characterized by a period of economic and financial crises. In addition, at this time, the Baltic states had an extremely limited legislative framework to support the establishment of democratic control over its Armed Forces.

As a result of internal disputes and clashes, along with the inability of senior officials from the Lithuanian, Latvian and Estonian Ministries of Defense and other individual leaders to deal with defense issues, discontent flourished among officers and serving personnel. Insufficient funding for clothing, housing, and salaries for the military personnel also worsened the situation. Due to these factors, the popularity of military service declined and there was a significant

---

121 The exact status of this institution was the subject of some discussion at the time. After an evaluation of the political environment, it was decided that a department would be created rather than a ministry. This decision was changed in 1991, and the Department of National Defense became the Ministry of National Defense.

increase in the number of qualified and skilled staff leaving voluntarily for the more lucrative commercial sector.\textsuperscript{123}

The most serious crisis in Lithuania’s civil-military relations resulted from the actions of volunteers (National Defense Volunteer Forces – NDVF), and took place in July 1993. Around a dozen NDVF volunteers retreated with their weapons into the woods surrounding the city of Kaunas. They demanded the removal of several senior civilian and military officials, and greater NDVF autonomy from the Ministry of Defense.\textsuperscript{124} Further problems in civil-military relations emerged after several incidents in which Lithuanian airspace was violated by the Russian Federation. The Chief of the Air Force Colonel Zenonas Vegelevicius went so far as to openly criticize the government for not paying sufficient attention to the problem.\textsuperscript{125}

As with Lithuania, Latvian volunteers enjoyed a high degree of autonomy and posed similar problems for Latvian authorities. However, it took until 1994 to formalize and codify many of the decisions taken in the immediate aftermath of independence. The Home Guard was placed under the control of the Ministry of Defense and integrated into the NDS.\textsuperscript{126}

Importantly however, in general these examples of civil-military tension were characteristic of the ‘transitional’ phase of the civil-military relationship. Different dynamics have been evident from 1994 onwards.

\textit{Intensive negotiations with Russia on the withdrawal of the remaining former Soviet troops from the territories of the Baltic states also took place in 1992–1994. Lithuania was first to sign the agreement on withdrawal of Russian troops. The last Russian soldier left Lithuanian soil on August 31, 1993, and from Estonia and Latvia on August 31, 1994.}

After the withdrawal of Russian troops, two major events marked the change in the relationship between civil and military sectors in the Baltic states. First, the Baltic states applied for NATO membership, a move that would have been unthinkable in the first two years of independence when the Soviet army was still present on their territory. Indeed, the withdrawal of Russian troops sparked a noticeable change


\textsuperscript{124} R. A. Vitas, \textit{op. cit.} p. 82.

\textsuperscript{125} Vegelevicius again publicly criticized the Defense Minister for ignoring the Air Force in 1999.

\textsuperscript{126} I. Veksne, \textit{op. cit.}
in the orientation of the Baltic states’ foreign and security policy. This moved away from a policy of neutrality, to become more clearly oriented towards integration into Western security structures and the implementation of common European principles, including democratic control of the Armed Forces.

Second, the parliaments approved new defense laws that confirmed their intention to achieve integration into Western structures as the primary means for ensuring the Baltic states’ security and regional stability. These laws also clearly established the principle of democratic control of the Armed Forces, which has now become one of the fundamental principles of the defense establishment.

Factors Influencing the Development of Civil-Military Relations

Many factors have influenced the development of civil-military relations in the Baltic states. These include the influence of the past, domestic political and social factors and the international context.

Two different periods have played an important role in influencing post-independence civil-military relations in the Baltic states. These are the Soviet era and the inter-war years. From the former, the Baltic states military inherited a negative attitude towards democratic control of the military. However, the significant persistence of communist or Soviet influence on military culture and practices has been more limited than in many other post-communist countries.

This was particularly the case in the volunteer services (NDVF in Lithuania, Zemesargs in Latvia, Kaitseleiit in Estonia), whose memberships were made up almost entirely of young volunteers. Indeed, it might be said that at present, the vast majority of commissioned and non-commissioned officers in the Armed Forces have only served within their own national defense systems.

Former Chief of Staff of Estonian Defense Forces Ants Laaneots recalls,127 “in 1992, when we made an attempt to create a general list of Estonian officers with a professional military background, we found only 431 names, including 16 officers in western armies. The rest had a background in the Soviet armed forces. We only managed

to include about 60 people out of the whole group in actual service, which was an insignificant number compared with our real need”.

The Baltic states’ pre-war armed forces are most closely associated with the war for independence against Russia of 1918-1920. Previously, however, well-organized and highly influential military personnel actively participated in a coup d’etat in 1926 in Lithuania, which brought an authoritarian regime to power. During this period, in all Baltic states certain high-ranking military personnel continued to exercise a significant influence upon the political life of the country, and although military obedience to civil authorities was respected in principle before 1940, democratic control was entirely absent in practice.

These historical legacies had some influence on the establishment of the DS in the early 1990s. The Baltic states’ military establishment showed itself to be keen in conveying the highest values of the professional, well organized, and respected pre-war Armed Forces into the modern Armed Forces, and the partisan legacy struck a chord with the more-recent struggle for independence in 1991. On the other hand the adoption of the traditions of the pre-war military was sporadic and varied in different services within the DS.

The model for the development of a modern military in the 1990s reflected the prevailing mood in Lithuanian, Latvian and Estonian societies, which were keen to combine traditions of the past with an acceptance of liberal-democratic values. As a result, even though the initial units of the Armed Forces were created from volunteers and former officers of the Soviet army, their new structure and doctrine reflected a more ‘western’ approach to military reform. Importantly, however, a residual Soviet influence amongst some elements of the Armed Forces’ officer corps did lead to a certain resistance to ‘westernization’ of military norms and values.

The international context, and particularly the Baltic states’ desire to join NATO has played a leading role in the development of democratic control of the AF. The formal request for NATO membership signaled the new priority in their foreign and security policy goals. This step also marked a qualitatively new stage in the development of the DS, and encouraged the adoption of legislative framework for practical implementation of democratic control of the Armed Forces. The position of the political authorities on this principle was positive and there was no significant opposition from within the military.

Although NATO has not adopted formal membership criteria, there is no doubt that democratic, civilian control of the military has become a de facto prerequisite for aspiring members. In the case of the Baltic states, NATO signaled that democratic, civilian control of
the military must be unambiguously entrenched and Lithuania, Latvia and Estonia rapidly undertook the required reforms.

NATO provided not only requirements but also instruments to accomplish this task. The countries’ engagement in NATO’s Partnership for Peace (PfP), in particular the PfP Planning and Review Process (PARP) and more recently Membership Action Plans (MAPs), have had a significant impact because they required countries to adopt detailed defense planning standards and practices operating within NATO.128

Similarly, NATO member states and Partner countries have also provided training and development opportunities for the Baltic states’ military and civilian personnel in their defense education establishments, which has allowed officers to become more familiar with NATO command and control procedures.129

Another important influence on the development of democratic control of the Baltic states’ Armed Forces has been the encouragement of international contacts and military cooperation. This process has helped facilitate a greater understanding of liberal-democratic civil-military relations both within the military and the civilian sector.

The forming of the multilateral Lithuanian, Latvian and Estonia battalion (BALTBAT) was of particular importance. The business of administering this multinational project with participation of many Western European states helped establish the new Baltic defense bureaucracies and encouraged the development of the culture of democratic control of defense.130

Since August 1994, for example, the Baltic states’ troops have participated in UNPROFOR, IFOR, SFOR, AFOR and KFOR missions. In all cases they operated as a part of multinational formations. About 1,030 soldiers from BALTBAT units have been deployed in peace support operations in Lebanon and Bosnia-Herzegovina.131

This is a considerable number of personnel in the Baltic states context, constituting as it does nearly 10 per cent of the total number

131 Lessons learned … op. cit. – p.5
of professional soldiers in the Armed Forces. This number is likely to increase in the future.

Assistance from Western countries considerably contributed in the sphere of training and education in changing the attitude of the military towards civilian control and oversight. As P. Goble pointed out, “even in the best of circumstances, the experience of all armies suggests it takes 10 to 15 years to ‘grow’ new field grade commanders and almost as long to train the non-commissioned officers – sergeants and corporals – who are the backbone of NATO-style forces.”

Subsequently, education and training emerged as a key priority in the development of Lithuanian, Latvian and Estonian Armed Forces and in Western assistance to the Baltic states. Thousands of Baltic states’ officers and civil servants have undergone training in Western military educational institutions.

In 1999 the Baltic Defense College (BALTDEFCOL) located in the Estonian city of Tartu started to train senior staff officers from Estonia, Latvia and Lithuania at the brigade level according to NATO standards. The College is commanded by a Danish general, with the United States, Germany, Denmark and other Western countries being major providers of funding and teaching staff.

The Armed Forces and the Public

According to a variety of surveys, the Baltic states’ public does not perceive any military threat coming from the West, but many are concerned about a potential threat from the East. The dominant point of view expressed by the general public is that the Armed Forces would be unable to withstand a large-scale military invasion by a major power. Consequently, there is a widely held view that the Armed Forces are more important as a symbol of statehood than as an element of national power.

Issues of defense policy and civil-military relations have been raised from time to time in major newspapers, largely in connection with the resources mismanagement in the DS, but they have never become a major issue on the political agenda. As far as the general public is concerned, the development of the structure and missions of the Armed Forces remains in a category of ‘higher politics’ in which they appear to have little interest.

---

As a result, residual negative associations with the Soviet army and a poor understanding of the role of the new national defense structures still influence general views towards the military. The capitulation of the regular armies to Soviet forces in 1939-40 also seriously harmed the reputation of the military forces.

Military service remained unpopular against this background, with a 1994 opinion poll in Latvia ranking the military eighteenth in a list of desired careers. In 1993, Vitas concluded that Lithuania’s military forces suffered from a chronic lack of popular prestige. This conclusion is not necessarily the case today. In 2000 a public poll showed that of all state institutions, the Lithuanian Armed Forces ranked fourth in popularity in public opinion polls, surpassed only by the mass media, the President and the Church. In Latvia, public support for the army rose from 3.7 per cent in January 1999 to 35.8 per cent in December. Only the Church and the mass media received higher confidence ratings than the military.

Several developments have contributed to this increasing positive attitude towards the Armed Forces from the Baltic states’ public. First, the governments have made increasing efforts to publicly present information concerning security policy and Armed Forces. Senior officials now appear more frequently on television and in major newspapers than they did in the past and relations with the mass media have improved significantly.

Secondly, Western observers and officials have also frequently emphasized the successful evolution of the Armed Forces, and their positive opinions have been reflected in Lithuanian, Latvian and Estonian society. Participation in international peace operations and training exercises has demonstrated their growing military capability, and training and discipline in the Armed Forces has improved significantly.

Legislative Framework in the Baltic States

\[\text{133} \text{ I. Viksne, op. cit.} \]
\[\text{134} \text{ R. A. Vitas, op. cit. p.73.} \]
\[\text{135} \text{ Polls has been conducted by “Vilmorus.” Results are published monthly in the largest Lithuanian daily “Lietuvos Rytas.” It should be noted, however, that the economic crisis of 1999 saw the LAF’s resurgent popularity become somewhat dented.} \]
\[\text{136} \text{ I. Viksne, op. cit.} \]
From 1990 to 1993 the development of DS's of the Baltic states proceeded in a somewhat confused manner, and the subordination of the military to civilian authority lacked appropriate oversight mechanisms. There was also an insufficient or non-existent legal framework to support the reform process, and, perhaps more importantly, both the military and civilians lacked experience in constructing state defense policy. Political parties frequently clashed over fundamental principles of defense policy and were not able to provide clear guidelines for defense planning.

The decision to apply for NATO membership was approved by the majority of citizens of the Baltic states and in effect resolved the Baltic states’ major security policy dilemma in a stroke, and internal clashes over defense policy have decreased significantly since then. Indeed, since 1994, arguments over security have ceased to be about its fundamental goals, more over how best to reach the agreed objective of NATO membership. The agreement over the primary goal of the Baltic states’ defense policy has also served to ease the strained relations between the political parties and provided an opportunity to develop a legislative framework for civil-military relations.

The three Baltic States have adopted essentially similar official laws and regulations for legislative control of the military, but they vary somewhat in their implementation and in the influence which Parliament and President exercise over the national defense. In all Baltic states the President is the Supreme Commander of the Armed Forces. Ministers of Defense are responsible for the implementation of defense policy, and parliaments possess very strong influence in establishing the main principles of defense policy and are in charge of political instruments for controlling the military.

The legislative framework in the Baltic states was established in a very short period between 1993 and 1995. Numerous laws, regulations, defense and security concepts were adopted by the state authorities. Most of them were based on similar documents that existed in Western democracies.

In Estonia the principles of democratic control are established in the Constitution and other legal acts concerning National Defense: the

---

137 In Latvia the election of October 1998 saw six parties elected to the Saeima. Five of these, the People's Party, the Latvian Way, the Alliance for Fatherland, Freedom/LNNK and the New Party, remained committed to a western oriented foreign policy. In Lithuania five major political parties confirmed their adherence to integration into transatlantic structures, in the Joint declaration.

138 H. von Riekhoff ‘Report on Specific Problems and Developments in Civil-military Relations in the Baltic Republics, Bulgaria, Romania, Russia, Slovakia, Slovenia, and Ukraine’ (Carlton University, 2001 (forthcoming).
Military Service Act (March 9, 1994), the Peacetime National Defense Act (February 6, 1995), and the Wartime National Defense Act (September 28, 1994). According to the Peacetime National Defense Act, National Defense is organized by the Riigikogu, the President, the Government and the Commander of the Defense Forces. The Government functions as the executive state authority administering national defense.

In May 1996 the Riigikogu adopted the “Guidelines of the National Defense Policy of the Estonian State”. The purpose of this document was to ensure the stability of the development of National Defense and to guarantee civilian control of armed forces. It includes an entire chapter titled “Civilian control”. On February 20, 2001 the Government approved the National Military Strategy which determines the missions of the Estonian Defense Forces, with reference to the geopolitical environment and threat assessment, and gives guidance for their development and employment.

In Latvia in the early and mid-1990s, the Saeima passed a number of laws which provide the legal basis for Latvia’s armed forces, defense policy and civil-military relations. The November 1992 Law on the Defense Forces and the April 1993 Law on the Home Guard define the tasks of Latvia’s armed forces, their organization and recruitment procedures, guarantees of human and social rights of servicemen and ex-servicemen. The November 1994 Law on State Defense defines the general principles of Latvian defense policy. In February 1995 the Saeima passed the Law on the Participation of the National Armed Forces in International Operations.139


On October 2, 2000 the Military Defense Strategy of Lithuania was approved by the State Defense Council and confirmed by the Minister of National Defense on October 4, 2000. The Strategy evaluates the geo-strategic environment, assesses potential threats, identifies the role and tasks of the Lithuanian Armed forces, describes its development plans, and explains how civilian control of the Armed Forces is exercised.

_The establishment of a codified legal framework was a significant step towards implementation of the civilian democratic control of the military in the Baltic states. On the other hand, the Baltic states now_

---

139 I. Viksne, _op. cit._
suffer from the number of different rules that regulate civilian control over the military. The Baltic states were so willing to implement this principle in the shortest possible time that they created a whole network of rules, regulations, laws and procedures which are far in excess of anything comparable in most other Western democracies. The problem the Baltic states are faced with now is how to implement defense policy in accordance with existing laws rather than passing new ones.

For instance, in order to strengthen civilian control, Lithuanian laws stipulated "in the absence of the President of the Republic from the country, the Minister of National Defense shall remain in Lithuania". It came as no surprise, that at the end of the day this law has been violated but no measures have been taken as a result.

The legal framework is strongly influenced by the constitutional arrangements of the Baltic states. Estonia and Latvia are parliamentary republics, while Lithuania is a semi-presidential republic where the President is responsible for foreign and security policy. If one were to evaluate the influence of the Baltic Presidents in the defense sphere, Lithuania's President would probably score highest and Estonia's lowest.

To be more precise, the Estonian and to a lesser extent Latvian constitutions are interesting amalgams of their pre-war constitutions, which had been modeled on the French Third Republic, and the British Westminster system, with certain elements taken from the German example. The general line has been to move closer to a diminution in the power of the President, as a strong president does not work well under a British style Parliamentary system.

In a crisis situation where the countries face external aggression and/or invasion, the Presidents of Lithuania, Latvia or Estonia have considerable executive power in declaring a state of war or calling for mobilization measures, even prior to a decision by parliament. This can be explained by the small size and vulnerability of the Baltic states, the need for rapid executive emergency decisions, even if parliament is not in session.

At other times, the executive power of the President is more limited and is exercised more indirectly, as his decrees have to be countersigned by the Prime Minister or the Minister concerned.

In the Baltic states the main issues of national defense shall be considered and coordinated by the State Defense/Security Council, consisting of the President, the Prime Minister, the Parliamentary

140 H. von Riekhoff, op. cit.

141 H. von Riekhoff, op. cit.
Chairperson, the Defense Minister and the Commander in Chief of the Armed Forces. While Defense/Security Council recommendations are not binding in law, they carry considerable weight and finally determine the final decision made in other fora. The State Defense Council in Lithuania is more powerful and more active than its counterpart in Estonia and Latvia. Unlike their Lithuanian counterparts they cannot use the State Defense/Security Council as a policy making tool.

The chain of command for the Armed Forces in Lithuania, Latvia and Estonia starts with the President of the Republic identified as the Supreme Commander of the AF. The chain of operational command for military operations and other defense activities begins with the President (in Latvia together with the Prime Minister), and through the Minister of National Defense, extends to the Commander in Chief of the Armed Forces or, under extraordinary circumstances, Commanders of other branches of the regular forces.

In comparison with most Western models, the Baltic Prime Ministers' involvement in defense policy has a surprisingly low profile. It may be indicative that the Prime Minister is hardly ever mentioned in legal acts. The legal constitutional provisions focus on the shared authority between the President and the Minister of Defense, without singling out the Prime Minister. Only in Latvia does the Prime Minister seem to be gaining influence, as in the draft Law on National Security defining that the Prime Minister shall chair the State Defense Council.

The Defense Minister is responsible at an executive level for defense policy-making and defense management. The Minister formulates and oversees the implementation of the national defense policy, guides the international cooperation in the defense area, provides guidance for the development of defense structures and has the right to establish structures within the DS.

The Commander in Chief of the AF is subordinate to the Defense Minister, and his role is to implement the defense policy as formulated by the Minister and his staff at the Ministry of Defense. In peacetime, the Commander in Chief of the AF is responsible for preparing military strategy and defense planning. He also prepares

142 H. von Riekhoff, op. cit.

143 In Lithuania, the Commander in Chief is also responsible for state defense and the development of the LAF, assigning LAF tasks during mission implementation, formulating the requirements and means for ensuring effective interaction of different LAF elements, the effective functioning of command and control and mobilization of the reserves.
contingency, operational and mobilization plans, based upon the country’s defense policy and military strategy. Civilians within the Ministry of Defense must make policy-making decisions on administrative and political matters. It is significant that in practice, however, where difficulties have emerged in the operation of these structures, they have often resulted from a shortage of civilian personnel with relevant defense expertise.\textsuperscript{144}

The new Republics had to rely almost entirely on recent university graduates, in recruiting civilian defense personnel to staff the Baltic Defense Ministries, who had little or no practical government experience and no appropriate academic background, as these subjects were not included in the curricula of Baltic universities. The quiet “civil war” which ensued for a while between civilian officials and military officers in the MoD’s was thus driven both by different perceptions of their respective roles as by shortages of qualified personnel.\textsuperscript{145}

The Parliaments of the Baltic states play the most important role in controlling the military. They approve the budget, establish the legal basis for national defense, determine the level of armed forces, vote on appointment or dismissal of senior military officers, approve the policy guidelines and priorities. Acting on proposals made by the President of the Republic, they have a right to declare a state of war, issue mobilization and demobilization orders, determine AF availability for fulfilling international obligations of the state. On average the parliaments in each country amend and pass about 20 legal acts a year on national security and defense matters. Ministries of Defense drafts the majority of these, but the parliaments have also developed expertise on this issue, and continue to be the key institutions in the law-making process. In addition, parliamentarians can request information, clarification, and briefings from Ministry of Defense officials on various relevant security and defense-related issues.

The Parliamentary National Security Committees have a responsibility to exercise parliamentary control of national defense. Their responsibilities include oversight of the military structure, state security, civil defense, state border protection, as well as to present

\textsuperscript{144} The percentage balance between military and civilian experts working at the Ministry of Defense, for instance, in Lithuania, is 52 per cent to 48 per cent respectively. At the operational and tactical levels the proportion of civilians is about 22 per cent of the total, and their function is limited to administrative and financial spheres.

\textsuperscript{145} H. von Riekhoff, op. cit.
proposals and recommendations on improving their activities. A team of advisers, administrative staff, and the information branch of the Parliaments exist to support the work of the Committee.

All legislation on defense and security matters must undergo discussion in the National Security and Defense Committee in Lithuania, Defense and Internal Affairs Committee in Latvia, and National Defense Committee in Estonia, before it can be submitted to the plenary session of the Seimas, Saeima or Riigikogu. In most cases the view of the Committee is of vital importance, and in practice most drafts approved by the Committee were later passed as laws. The Committee regularly holds debates on national security issues.

Whilst the formal powers of the Committee are quite robust, during most of the period since 1991 there has been some difficulty in translating these powers to effective scrutiny. This is largely a consequence of the understandable lack of experience and knowledge of the committee members. However two factors have gone some way towards rectifying this weakness: first, appointment of members with more experience and knowledge of defense issues have strengthened the Committees’ expertise;146 second, over time the Committee members have themselves become more experienced and their reports and recommendations more authoritative. As a consequence, the Seimas, Saeima or Riigikogu contributions to scrutiny of defense decision-making has increased.147

Conclusions

Since early 1994, the principle of democratic control of the armed forces has become clearly established within the Baltic states legal systems. Their Constitution and laws in general now comply with this principle characteristics of Western democracies. The procedures of the legal framework have also largely been adhered to in practice, though there have been some difficulties in the fulfillment of some of the regulations, particularly at the executive level.

On the other hand, however, in the words of Christopher Donnelly, ‘a country which has no problems of civil-military relations and democratic control is a country which has no democracy’, and the

146 For example, in Latvia they include Juris Dalbins, former Commander of the National Defense Forces and Janis Adamsons, former Commander of the Boarder Guard.

147 I. Viksne, op. cit.
development of civil-military relationships to date are clearly part of a
dynamic process rather than an end in themselves.\textsuperscript{148}

Issues of civil-military relations have largely remained in the
realm of ‘higher politics’, and, with a few exceptions, have not been
harmed to such an extent that they have become major public issues
on the political agenda. Positive change is obvious in the
establishment of civil control over defense policy in the Baltic states.
Examples of illegal acts from the military sector, which could threaten
the interests of the society or the State, have vanished due to firm
control of the national defense system exercised by the political
authorities. While particular incidents may still occur in future, it is
likely that these will be isolated instances that can be handled on a
case-by-case basis. Harold von Riekhoff noticed that even in the
beginning of nineties “the lack of expertise and resources led to the
poor quality of civilian control and leadership, but not the principle of
civilian control over the military as such”.\textsuperscript{149}

In conclusion, it is possible to identify two main factors that have
had a fundamental impact on the evolution of democratic control of
the armed forces in the Baltic states. First, the development of the
armed forces emanated from a very limited base in the early 1990s,
and as a result, the military had no preconditions or preconceptions on
its particular role in relation to the civil sector. As a result, the armed
forces institutional interests and commitments to the old regime were
extremely limited. As a consequence, the issue of democratic, civilian
control of the armed forces always had limited a potential to become a
truly divisive issue in Baltic states’ politics.

Secondly, the essence of the Baltic states foreign and security po-
licy remains focused on integration with the West, and meeting the
accession criteria for membership in Western institutions. As a result,
common European values and principles, including that of democratic
control of armed forces are being strictly implemented in the Baltic
states, and their continued development remains high on the political
and public agenda.

\textsuperscript{148} C. Donnelly, ‘Defense Transformation in the New Democracies: A

\textsuperscript{149} H. von Riekhoff, \textit{op. cit.}
Nansen Behar

CIVIL–MILITARY RELATIONS AND THE NEW DEFENSE AND SECURITY LEGISLATION IN BULGARIA

Introduction

The first part of the last decade was a period of a slow democratization of the armed forces of Bulgaria. The legislative process and the reforms in the army were delayed and not very effective. In the last four years, however, the reforms in the Army and the new defense and security legislation were accelerated and the whole system of a civil-military relations in the country were brought to the level of a solid basis for further democratization of the security and defense structures. During the term of the 38-th National Assembly of Republic of Bulgaria three important laws were introduced and approved: The Law on Defense and Armed Forces (1996, amended 1997), the National Security Concept (1998), Defense Doctrine of Republic of Bulgaria (1999).

Regardless of these important steps towards democratization of the Army and modernization of the mechanisms of civil control, some new important legal issues have been raised – how to harmonies the Bulgarian defense legislation with the legislation of western countries, but at the same time preserve the national specifics and traditions. These issues still remain on the national agenda and in some cases require significant legal innovation not only in the basic laws mentioned above but in the entire system of related laws (such as the Labor Code, The Law of Social Security, the Law for Crisis Management, the Law for Classified Information etc.)

In spite of the progress made in recent years, the development and effective management of democratic relations between the society and Armed Forces continues to be one of the priorities on the Bulgarian political agenda. After years of difficult and painful decisions the
political transition of the country to democracy has achieved successfully in general terms and the basic principles of democratic civil-military relations were implemented. The Bulgarian Armed Forces operate under new judicial and procedural regulations; they are largely under political and public control and have become an important factor in the domestic democratic process. The reorganization of the Armed Forces from the typical totalitarian standing of “a state within the state” to a size, structure and function, acceptable from internal and international point of view is a process of extremely high political and strategic importance. The defense reform in Bulgaria is a factor for strengthening civil society, effective integration policy into the European Union and NATO, ensuring adequate socio-economic development. It requires special public (including international) attention, civil society and free mass media monitoring and political-military cooperation for the successful development of effective standards, norms and procedures that will guarantee capable Armed Forces and lively democratic control.

New Achievements and Difficulties

Ten years after the beginning of democratic reform, civil-military relations in Bulgaria are already placed under reliable, manageable and evolving civilian and democratic control. Without overrating the achievements in this field, one could say that the definite introduction and practical record of this major principle of any modern functioning democracy exists but the issue continues to be among the main questions on the political agenda of the country.

The answer to the question ‘who has the control over the defense policy’ is a major criterion and an indicator of the level of maturity of civilian democratic control over the military. The Bulgarian military, the country’s political leadership and society in general accepted the meaning and the consequences of the principle of civilian democratic control of the armed forces. The 1989-91 period marked the initial legislative and institutional approximation of the requirements of the democratic principle. The new, democratic Constitution of 1991, followed by the new laws of defense, the armed forces, the internal security and intelligence services defined the roles and the responsibilities of the Parliament, the President, the Government and the General Staff according to the requirements of the democratic civilian monitoring.

The National Assembly (Parliament) is the main institution for political direction and control of the Armed Forces and the other security structures. It carries out these functions through its legislative
activity, adopting decisions and other acts and parliamentary control. In the security sphere, the National Security Committee assists the activity of the Assembly.

The legislative acts adopted by the National Assembly in the area of national security include: the National Security Concept, the Military Doctrine (as a political-military document on the strategic level), the Law of Defense and the Armed Forces, and other basic laws, such as on the Special Intelligence Means.

The National Assembly adopts the declaration of war and concludes peace; approves the deployment and use of the Bulgarian Armed Forces (BAF) outside the country’s borders, and the deployment, transit and use of foreign troops on its territory; following the motion by the Prime Minister, it introduces martial law or a state of emergency throughout the country’s territory; ratifies or rejects by law all international initiatives that are of a political and military nature; addresses corrections to the national borders. The National Assembly ratifies international treaties, both bilateral (e.g. for international military cooperation) and multilateral (e.g. the Treaty on the Conventional Forces in Europe – CFE, the “Open Sky” Treaty, etc.), conventions, as well as laws regulating particular issues of defense, internal order, security, the defense-industrial complex (The Law of Control over Foreign Trade Activities with Armaments and Goods and Technologies with Dual Purpose Application).

The Law of Defense and the Armed Forces of the Republic of Bulgaria (LDAF), adopted in 1995, added the following powers to the National Assembly: adopting the National Security Concept (as a “Grand strategy” document) by decision, and the Military Doctrine as proposed by the Council of Ministers; adopting long-term programs for the development of the Armed Forces; determining the size of the Armed Forces; ensuring the necessary legislative norms for the establishing civil protection units and carrying out humanitarian tasks in the event of natural and industrial disasters; establishing, re-shaping and closing military educational institutions.

The National Assembly carries out parliamentarian control over the activities of all powerful bodies: the Ministry of Defense, and in consequence – over the Bulgarian AF, Military Intelligence and Military Counter-Intelligence; over the Ministry of Interior, and in consequence – over the Border Forces and the Gendarmerie, the National Security Service (Counter-Intelligence); National Intelligence Service and the National Guard Service. The parliamentarian National Security Committee and the Foreign and Integration Policy Committee assists the activities of the National Assembly and carries out parliamentary control on its behalf.
According to the Constitution of Republic of Bulgaria the President of the Republic is Supreme Commander in Chief of the Armed Forces of the Republic of Bulgaria\textsuperscript{150}. He appoints and dismisses the senior command of the Armed Forces and bestows all higher military ranks, acting on a motion from the Council of Ministers. The President presides over the Consultative Council for National Security, whose status is established by law. The National Intelligence Service and the National Guard Service are under his authority. On a motion by the Government, he declares general or partial mobilization for war. Whenever the National Assembly is not in session and cannot be convened, he proclaims a state of war in cases of armed attack against Bulgaria or whenever urgent action is required by virtue of an international commitment. He proclaims martial law or any other state of emergency. The National Assembly is convened forthwith to endorse the President’s decision.

The Law of Defense and the Armed Forces\textsuperscript{151} specifies that the President acting on a proposal by the Council of Ministers approves the strategic plans for activities of the Armed Forces and alerts the Armed Forces or part thereof to an advanced alert; in a military conflict or war he coordinates the foreign policy efforts for participation in international organizations and security structures with the aim of terminating the military conflict or war; he commands the Supreme Headquarters, issues acts for preparing the country and the Armed Forces for war; implements the wartime plans; introduces a restrictive regime for the dissemination of information related to the defense of the country; introduces proposals for making peace to the National Assembly.

Along with the introduction of martial law, declaration of war or with the actual start of military activities, the President forms the Supreme Headquarters (SHQ). The SHQ assists the Supreme Commander in leading the defense and the Armed Forces and shall include the Prime Minister, the Minister of Defense, the Minister of Foreign Affairs, the Minister of Transport, the Minister of Territorial Development and Construction, the Chairman of the Committee for Posts and Telecommunications, the Chief of the General Staff and other individuals, designated by the Supreme Commander.


The structure of The Council of Ministers (Government) addressing national security issues consists of the Ministry of Defense, the Ministry of Interior, the Ministry of Foreign Affairs, the Committee for Posts and Telecommunications, the Civil Protection, the Inter-Agency Committee on Issues of the defense-industrial complex and the mobilization readiness of the Country, the Directorate of Confessional Issues, the General Directorate “State Reserve and Wartime Supplies”, the National Council for Fighting Against Narcotics Abuse and Narcotics Trafficking, the National Bureau for Territorial Asylum and Refugees, etc.

The amendments in the Law of Defense and the Armed Forces in 1995/1997 added to the competence of the Council of Ministers execution political direction of the Armed Forces; formulation and performing state defense and military policy; maintaining combat and mobilization readiness of the Armed Forces; approval of mobilization plans, the Regulation for the Military Service, the state General Wartime Plan and the wartime draft budget; regulating production of and trade in defense items; determining the standards and the order for accumulation, preservation and use of raw materials and materials for wartime; commanding and mobilization of the Armed Forces and the transition of the country from peace to war; opening, transforming and closing military facilities, branches, institutes and colleges; approving requirements of the transport, energy, communications and storage systems, settlements and production, and economic sites in compliance with the needs of the defense; proposing assigning and discharging the senior command of the Armed Forces to the President of the Republic and for bestowing all senior military ranks and others.

In addition to these, based on the experience of crises management in Bosnia and Herzegovina and amplification of cooperation with NATO, the 1997 amendments added to the competence of the Council of Ministers the approval of the deployment and use of Bulgarian military units outside the country’s borders for executing humanitarian, ecological, educational, sports and other tasks of a non-military character; approval of the deployment and use of individual unarmed military outside the country’s borders for the executing official or representative tasks by virtue of international commitments; approving deployment and use of military equipment outside the country’s borders; approving deployment of foreign troops in Bulgaria or their crossing of national territory for the execution of tasks of a peaceful character.
The Minister of Defense is responsible for conducting the state policy in the Ministry of Defense. The ministers in all governments since 1991 were civilian (though in one case a retired Flag Officer).

The Minister of Defense implements political direction and civil control of the Bulgarian Army by: participating in the development and updating of the National Security Concept; compiling the state draft budget in its part for the Ministry of Defense; allocating the budget and administrating the financial and material-technical security of the Bulgarian AF; ruling personnel policy and being responsible for the recruitment of personnel for the Bulgarian AF and officer training the; organizing cultural, educational and patriotic activities; implementing general oversight on the military education system, military scientific and research institutes; implementing international cooperation in the field of defense; issuing regulations, ordinances, instructions and orders and being responsible for the legal basis in the Ministry of Defense; organizing activities for the support and care for citizens who have suffered at or in connection with the defense of the country; being responsible for the management and up keeping of state military property, sports activities and for development of sports infrastructure; organizing Ministry of Defense inspection activities; nominating to the Council of Ministers a senior general for appointment to the post of Chief of the General Staff; approving staff of the Ministry of Defense central administration and the General Staff; directing the information, publication and public relations activities of the Ministry of Defense, the Military Police and Military Counter-Intelligence and others.

The Minister of Defense, acting on a proposal by the Chief of the General Staff submits to the Council of Ministers drafts for the country’s Military Doctrine (a political-military document); proposals of the number and organization of BAF; drafts for General state wartime plan; proposals for assigning and discharging of senior command staff and promoting to higher military ranks; proposals for announcing a general or partial mobilization. Following the same procedures he accepts officers for regular service and confers first officer rank; promotes to a higher rank, downgrades to a lower rank and discharges from military service officers of the Bulgarian AF; appoints and recalls the Bulgarian defense and military attaches abroad and Ministry of Defense representatives to international organizations. The Minister of Defense is assisted by Deputy Ministers and chief of the Political Cabinet, who are civilians.
In performance of his controlling functions the Minister of Defense is supported by an Inspectorate, including civilian and military staff. The Inspectorate controls the effective implementation of the budget and procurement policy, observes the human rights, personnel and recruitment policy, social policy and environmental protection, information on corruption, squandering and misuse of material and financial resources, military discipline; management of military property; observation of international agreements and others.

The problems of fulfilling of the formal requirements for civilian democratic control primarily involve its effectiveness. Although not a uniquely Bulgarian problem, it has specific features that are and will continue to be dealt with in further improvement. First of all, there is still a lack of realism and coherence between budget and defense plans. More concretely, once plans are endorsed they are regularly found to be unaffordable within the allocated budget. The result is that MoD has to adopt a significantly different force posture from that agreed by Parliament in order to meet affordability constraints.\(^{152}\)

There was an unrealistic belief among many of the Bulgarian political and military leaders that once the formal requirements of the civilian democratic control are met it will be guaranteed. The reason of this wrong perception is the lack of understanding that effective civilian control is attainable only if there is clarity in the relation “resources – forces – goals of the defense policy”.

Since the autumn of 1998, the establishment and the effective functioning of a vigorous system for defense planning was one of the emphases in MoD activity in an effort to overcome this issue. The system existing at that time had four major deficiencies:

a) lack of certain functions (broken link between national security objectives and existing force structures; lacking organizations to that are designated important components in defense planning);

b) no holistic but rather a ‘mosaic’ approach to defense planning (the ‘bottom-up’ planning is not backed by a rational mechanism for adapting resource requirements for force organization. Decreased combat potential and reduced morale were the logical consequences);

c) no long-term assessment. The short-term horizon of planning and programming has economic, financial and cognitive prerequisites. All they need to be changed towards a more

prospective thinking and linking goals with realistic resource estimates;

d) cultural, perceptual and educational deficiency. The traditional understanding of planning among the Bulgarian military is understood as ‘operational planning’ – a highly classified activity carried out by few, highly expert military officers of the General Staff of the country’s armed forces. So, there is still a way to go before integrating long-term strategic planning through programming and operational planning in a comprehensive system. Failing to carry out this task will inevitably mean hampering interaction between the civilian and military leadership.

However, the latter conclusion means that the system requires capable civilians and military – both of them experts on defense issues. Still too many of the present civilian staff in the MoD are retired military officers of various ranks and age. The inflow of civilians in the MoD is still modest, especially in terms of expertise on defense, military, control of information issues. The ongoing reform of the education system on military, defense and security issues is expected to lead to major improvements in time. A fundamental problem remains – the inadequate parliamentarian expertise on military, defense and security issues within the Assembly in general, and in the very National Security Committee. The inertia of old thinking that “the military issues are the domain of military experts” is characteristic for some Members of Parliament who have special responsibilities in implementing civilian democratic control over the armed forces and other security institutions.

Civil-Military Relations: Social Aspects

MILITARY PERSONNEL SOCIAL SECURITY. In accordance with the Law of Defense and the Armed Forces, the salary of the military personnel is composed of salary for rank and salary for position, as well as, in an order determined by the Minister of Defense or the head of another ministry, additional consideration for long service and for service and conditions adverse to health.

Compensation shall granted in the extent of the minimal salary, established in the country, to the spouse of regular service military servicepersons, who have terminated employment relations on account of following them in move from one location to another.
Regular service military servicemen shall be ensured food, working and uniform clothing, other commodities or money for them, which shall not be taxed. At movement to another location, one-time compensation shall be paid to regular service military servicemen and their dependents, under conditions and order determined by the Minister of Defense or the head of another ministry.

At discharge from regular military service, regular service military servicemen shall receive one-time compensation in the amount of as many gross salaries as their years in service, but no more than 20. In reducing the number of the Armed Forces by decision passed by the National Assembly, compensation shall be determined in the act of reduction, independently of the amounts owed under law.

Military service health insurance, retired military servicemen. Those who suffered during or in connection with the defense of the country and war veterans shall be included in the account of the state budget. The funds for pension insurance of the military servicemen and military disabled shall be included in the state budget account. The military servicemen shall obligatory be insured against accidents, occurring during or in connection with performance of the service duties, from resources of the state budget.

In the event of death of a military servicemen the expenses for the funeral shall assumed by the corresponding ministry and the deceased shall be paid military tribute.

The military servicemen or his family shall be issued a one-time financial compensation in the amount of 10 gross salaries in the event of grave bodily damage and 6 gross salaries in case of moderate bodily damage, caused during or in connection with performing the official duties.

The military servicemen in conscript military service shall use free of for public passenger transport charges, to the garrison destined, and in going on home leave – corresponding ministry cover transport costs from the garrison to the residence and back.

LEGAL STATUS OF MILITARY PERSONNEL. The organization and the order for military service in the armed forces are set by regulations. Officers and enlisted people serving in the armed forces cannot be detained without the permission of the Defense minister or the head of other department, although such permission is not needed in cases of grave crimes. In such cases, the Defense Minister or the other department head must be immediately informed, without any delay.
Professional military servicemen are not allowed to take part in political parties or coalitions with political aims. They should not carry out anything at their office – during the entire term of their service – which would violate their political neutrality. Those who serve in the armed forces are not allowed to take part in rallies and demonstrations organized by political parties, coalitions, or trade unions with political aims. In attaining any post or fulfilling their duties, those serving in the armed forces cannot be obliged to declare their political, religious or ideological views.

Those serving in the armed forces can follow their religious beliefs and take part in religious rituals outside of the military unit, although the establishing religious groups within military units is forbidden. Service members may not belong to or organize trade unions.

No commands and orders in the army may be issued which are in violation of the Constitution, the laws and the international agreements of the Republic of Bulgaria. Commands and orders must be linked only to military service and – if necessary – there should be instructions for their proper execution. They should in no way offend the personal dignity of the subordinated and private they should in no case impose on a person to perform any crime.

The Path Ahead

Today there is an unconditional necessity to give meaning to and assess what has been achieved, as well as to appraise in what direction further policy of democratic control and civil-military relations should develop. The arguments supporting this necessity are that any further development of the mechanism of democratic civil-military relations in Bulgaria as well as in countries like Bulgaria, requires new meaning of the theoretical and legislative basis.

– First, the theory of civil-military relations, which we have used so far, has not been obviously adjusted to suit the conditions of the 21st century, even less to the transition we are undergoing. The model of ‘military professionalism’ developed by Huntington and Janovitz in the 60s and applied in the US, Great Britain and the Netherlands, is apparently applicable only to a certain extent to Bulgaria. *Its conceptual basis is too closely tied to a model of a political system, military tradition, and economic potential of the kind Bulgaria does not and cannot possess;*
Second, the models of Huntington, Janovitz, Finer, Feaver and other influential conceptualists in fact reflect the doubts related to the behavior of the military existing in their own countries and rather than influencing decision-making on different home and foreign policies.

In Bulgaria there are no examples, indicators or symptoms whatsoever of military influence of that kind and scale. There is no reason to believe that if the military have not been involved in the country’s political life so far, it will do so in the future. The trend to impose the Anglo-Saxon meaning of the ‘control’ notion is an inadequate purpose. This fact has already been realized and recognized by a number of West European researchers, who almost unanimously use the expression democratic oversight rather than democratic control;

Third, from the point of view of civil-military relations and democratic control, ‘military professionalism’ proves to be the concept whose implementation is immeasurable. Even in the American routine, where professionalism is tested under different conditions, it turns out that it functions in certain areas, while catastrophically failing in others. The reason for this is that the definition of the "military sphere" notion in which modern military are used, has extended and there is no "professionalism" equally adequate for any occasion. In countries such as Bulgaria, where professionalism is hardly ever tested in a real military setting, any measurability of military professionalism increasingly controversial.

Fourth, the specific structure of the national military command system is the most essential reason that motivates me to raise the issue of inadequate theoretical basis of civil-military relations and democratic control. We had enough time and reasons to test and assess the results of the implementation of the borrowed theoretical model on our command system. The potential of this model has been used generally in a good way, up to now but it has already been exhausted. Further pursuit of this model will not yield to any better results – with a classical General Staff available, while rights and responsibilities are delegated by law, with a president involved in the planning of the military strategy – to impose a further model of civil-military relations of Anglo-Saxon type is unreasonable.

The second basic issue is that the new model of civil-military relations should be based on a new paradigm – the paradigm of ‘control’ within the model of relations between civilian and military personnel should be substituted by the paradigm of ‘partnership’.

‘Partnership’ is the possible notion, around which the conceptual model of our civil-military relations could be built. ‘Partnership’ comprises of three key features: distributed responsibility, mutual
trust, and support in defense management. ‘Partnership’ suggests not merely ‘control’ over the military on the part of civilians, but a policy of building inner consensus. The achievement of management consensus means stability of the defense system, confidence in the leading civilian and military personnel, motivation of officers, and realization of military professionalism.

Military reform in East European countries represents the specific state of the civil-military relations. That is why the policy of reforms needs special theoretical support.

Today we have good reason to state that both from a theoretical and executive policy point of view ‘military reform’ should be considered as a specific sphere of civil-military relations. This conclusion is confirmed not only by the ‘Bulgarian experience’, and even not only by what has happened and is still going on in CEE but also by what is happening in the sphere of defense and armed forces in NATO countries. The success of the military reform means success of the new model of civil-military relations; its failure means deterioration of confidence, returning to the starting point of the ‘army – society’ formula, and killing the motivation for making sacrifices in the name of security and the armed forces of Bulgaria.

The main problems faced by the military reform management from a parliamentarian point of view are the following:

– There exists a real problem to successfully manage the multitude of the reorganization processes that have begun simultaneously, such as downsizing personnel, garrisons and combat equipment, reconstructing the social and military training system, developing a new budget and logistics management system, modernization and rearmament. Moreover, the management bodies are being reorganized at the same time.

– The broad military reform also requires an uninterrupted firm political commitment, including necessary funding.

– Preparations for NATO membership face a difficult to change defense system, based on the vision of a mass army and total preparation of the national economy and society for a long-lasting war. The military-strategic dimension of the military reform is, in fact, a change in the philosophy of how to build and use armed forces.

– The judicial and normative basis of the military reform, as well as that of the preparation for membership, require constant development – lessons are learnt daily both by carrying out the reform, and in managing the crises in the Balkans.

– Keeping up personnel motivation turned out to be the most difficult – a formula for improving the standard of life and service
of the militaries should be found, as well as an approach to attract and retain trained civil staff. We should bear in mind the impact of the generation exchange leading to a changing social structure which, in turn, brings about (mainly among young people) contradictory, predominantly negative views of the military profession.

* * *

The examination of the civil-military relations in Bulgaria not only requires an analysis of the historic changes in the political-military field and the specific national traditions, but also has to be in conformity with the conditions of transition from totalitarian to democratic government. No universal theory exists about the relations between the civil society and its military should look like. There is also no ready model for their “implantation” in the transition period.

The study of the civil-military relations must above all to take into account the specific conditions under which they are being developed, including the past heritage. It must also to take into account the character of the emerging and the possible problems in the general political situation, and particularly in the civil-military relations; the specific conditions of the institutionalization of political process in transition, including the relations between political powers, non-governmental organizations (NGO’s), the media, the international environment – on one side, and the military – on the other.
Ljubica Jelušič,
Marjan Malešič

LEGAL ASPECTS AND CONTROVERSIES OF
DEMOCRATIC CONTROL OVER THE ARMED
FORCES IN SLOVENIA

Introduction

The paper aims to define the framework of political control over the Slovenian Armed Forces as defined by laws of the independent Slovenia, and to analyze the dilemmas originating in the gap between democratic norms and the possibility of implementing them in reality (in the period of 1991-2001). Having in mind the fact that many present problems and misunderstandings of the armed forces in relation to the political state are due to the historical roots in former socialist Yugoslavia, we decided to find some explanations in past partocratic type of civil-military relations. However the majority of current controversies is connected with the inconsistency between the conceptual demands and reality of the independent Slovenia. Therefore it is erroneous to blame the past for the incompetence of current politicians to execute the control over the Slovenian Armed Forces (SAF) in legal terms as written in basic state documents.

The paper is divided into three parts. The first part deals with conceptualization of civil-military interface in the broader international community of transition states and with determining Slovenia as transition state. In second part we present the legal framework of DCAF in Slovenia and its consistency with conceptual demands of political control over the armed forces according to parliamentary type of civil-military relations. The third part presents some Slovenian controversies of political control over the SAF. The presented controversies are the result of inability of Slovenian politicians to develop consistent legal framework that would aid political control over the SAF to be better implemented.
Throughout the past decade, the expression "civil-military relations" became very popular in Slovenia, as also in other post-socialist transition states. It was used to describe the relationship between civilian and military spheres; however, it is very difficult to draw a clear line between civil and military institutions, skills and interests. Even without analyzing the military structure but taking it as a unique, problems arise in defining the civil sphere. In our view, the civil sphere consists of the political state and civil society. Hence, there is a triangle of relations to be taken into account: relation between civil political state institutions and the military, the relation between civil society and the military, both in military and non-military environment; the relation between civil society and political state in a military environment. There is also a possibility of indirect relations, as in case where the political state, and the political elite in its name, acts as a mediator between the armed forces and the civil society. There are cases when the political elite shares interests with the army, but the two may object to the interests of the civil society. It is also possible that the political elite dominates the army as well as the civil society. We need to be aware of different relations in order to depict precisely where we are going to observe armed forces and legal framework of the control over them.

The affinity to deploy the paradigm of democratic control over the armed forces in terms of political control exercised by democratically elected political bodies might be too narrow for transition states. As Slovenian case will show, the democratically elected political bodies can implement control over the armed forces (more or less competent), but it is neither the only nor the most powerful control. The institutions of civil society are very engaged in exercising this control. First, civil society is very young and the newly organized institutions, non-governmental organizations, do not fully trust the political state or military in their attempts to develop defense sector. Second, the political state is formed by democratic mechanisms (elections), but it does not mean that it is also fully capable of keeping...
up with the military’s abilities to transform. The situation in transition states, and also in Slovenia, shows that political state institutions are not developed enough, that they are, as in third world countries, less organized than military structures. Therefore, it is not easy to fulfill the expectations of having the military subordinated to political authorities, if these authorities lack the organizational and authoritative competencies. The development of the so called “weak states” is another reason to cautiously observe military activities. It is not an exaggeration if we link the appearance of weak states with war-affected territories in South Eastern Europe. Slovenia experienced armed conflict with the federal army at the beginning of its independence in June/July 1991. It is rather normal to expect its civil-military deficiencies as consequences of the war within state borders and war in its vicinity, although it would be a simplification to make it the only explanation.

The defense and security policies of Central-East and South-East European States in general have changed considerably since 1989 – in response to external impulses, internal revolutions or accelerated political evolutions or even armed conflicts in the Balkans region. Bebler (1997: 69) summarized the trends of change in all these states, more popular under the common denominator »transition states« in the following way:

- increased transparency of defense politics and often enhanced review of the role of parliaments and public opinion;
- defense ministry civilianization;
- thorough personnel changes in the upper echelons of the armed forces;
- national emancipation, adoption of new security and defense doctrines;
- partial redeployment and an altered profile of armed forces;
- greater emphasizing of participatory management approach within the military establishments, humanization of certain aspects in its functioning (occupationalism), but combined with stronger institutionalism155;
- relative political neutralization of the armed forces, discontinuation of the military’s internal security role, disbanding separate military formations for internal security, in some states abolishing separate military courts;
- ideological pluralization, abolition of widespread and obtrusive discrimination against known religious believers, decriminalization of conscientious objection.

155 Occupationalism and institutionalism are understood in terms of Moskos, Wood (1988).
After more than a decade of military recovery from the past partocratic control and adapting to the new multi-party or multi-ideological control, it is possible to add some new common denominators:
– de-secularizing armed forces, which means introduction of military chaplaincy to nearly all post-socialist states (except Albania, Bulgaria, Macedonia);
– decreasing conscription importance to the level of serious political debates on abolishing conscription and introducing all-volunteer forces;
– westernizing national security presented through the governmental desires to become NATO members, valuable participation in Partnership for Peace program, increased participation and external legitimating of armed forces in peace support operations;
– redefining the content and rewriting all basic state documents concerning national security.

The adoption of new Constitutions, in some transition states prefabricated by Western legal advisers, and new laws did not assure a deep democratic transformation. There is a certain mutation of the political systems and also civil-military relation systems, in which a number of inherited problems affect the outcomes of democratization. There are issues of military-related pathology (especially in war-affected countries). The three main intended shifts affecting civil-military interface – relative political neutralization of armed forces, mainly military professionals, increased functional professionalism of the military and civilianization of defense ministries have not been necessarily mutually supporting and are sometimes contradictory. The negative side effects of transition of the civil-military interface have been made possible by insufficiently developed democratic political culture, art of pluralist consensus and tolerance among top politicians. There is also weak or even non-existent parliamentary control over the actual execution of defense policies. The conclusion is that transitional systems of civil-military interface have moved closer to West European models since 1989, but in various degrees and with different speeds. We witness today a greater diversity throughout the region than existed during the Cold War. Today's diversity is on the democratic side of the spectrum. Civilian rule has been reaffirmed as the norm. It is the norm of democratic "civilocracy".

Various countries establish civil-military relations and democratic political control over armed forces according to their historical experiences, cultural traditions and development level of political culture. However, there are some less common characteristics that could be summarized as follows:
– solid constitutional and legal framework,
– accountability of armed forces to the Government by way of a
civilian defense minister,
– cooperation of military representatives with qualified civilians
in the process of defining defense requirements, policy and
budget,
division of professional responsibility between the civilian and
military sphere,
– supremacy and scrutiny of the parliament over armed forces and
defense matters in general and
– internal and external (international) transparency of security and
defense matters of the state.

These characteristics can be found in all post-socialist states. The
differences occur in the degree to which they are realized in practice
and how effective they are.

**Legal Framework of Control of the Slovenian Armed Forces (SAF): Ambivalence of Objective and**
**Subjective Political Control**

The key legal solutions for Slovenian national defense are
embodied in the Constitution, Defense Law, Law on Military Service
and some other acts of the Republic of Slovenia. The mentioned
documents basically also set the formal outlook of control over the
SAF. The formal legal framework and the consistency of norms show
the level of legal culture and ability to organize the systemic solutions
for all actors in the defense sector. However, analysis of the practice
itself, showing the real compliance and consistency with legal
solutions, is also crucial.

**Slovenia Facing the Challenge of Organizing**
**State Apparatus**

The task of preparing all legal documents of an independent state
was one of the most difficult ones after the victorious summer of
1991, when the Yugoslav Peoples Army (YPA) decided to withdraw
its units from Slovenia. Slovenia existed as an independent state from
July 1991 till January 1992, before it was widely recognized as a real
member of international community. During this period it had to
operate as a normal state, although without recognition, first because
its citizens expected stability and a normal life, and second, because of
the expectations of the international environment that it would act in a
state manner. It was something of a revolutionary period of the state
and nation, but without revolutionary enthusiasm and simplifications.
Fortunately, Slovenia, like other Yugoslav republics, had certain basic
state structures that were developed in the federal state and actually helped the republics to maintain and further develop their state attributes. For example, republics were autonomous in their educational system, cultural, scientific, partially economic and some elements of security policies, including the police, the Territorial Defense units, civil defense structures and organizations of rescue and self-protection were the most important.

The police was organized within republics. Its activities were controlled by republic secretary of interior, who was subordinated to the federal secretary of interior. Police officers had the same uniform and insignia throughout Yugoslavia, but each republic also added its own national insignia. The police had the duty of establishing and keeping law and order within the republic borders, and it had some common federal duties. It was supposed to form common Yugoslav special police forces, as well as make its units available to federal government in case of urgent need at distant parts of Yugoslavia. For example, following mass riots in Kosovo in 1981, the common Yugoslav police forces were formed to reinstall law and order in the region. Slovenia, as other republics, contributed its police officers to these law-and-order keeping forces. Being part of the common units, they still wore specific Slovenian insignia on the uniform, according to which local population knew exactly where the policemen were coming from. The mission in Kosovo, which lasted from 1981 till 1989, was organized according to the rules of modern peacekeeping missions (with policemen from all Yugoslav republics, but not from the foreign states). Therefore, when Slovenia decided to send 15 policemen to UNMIK in November 2000, for many older police personnel it was like a repeat of 1981-1989 activities, and experiences from that period helped train the new “law-and-order keepers” for UNMIK.

The Territorial Defense (TD), which was a part of common armed forces, was also organized on the level of republics. It followed the same common doctrine of total national defense and social self-protection, but in organizational terms it was quite autonomous. Its NCO and officer corps consisted of citizens of Slovenia. Even active officers, who were sent from the YPA to the highest commanding positions of the TD, were of republic origin, the commanding language was national. In Slovenia, TD used Slovenian language as the commanding language, as opposed to the YPA, which was commanded in only one of the Yugoslav languages, Serbian, written in Latin alphabet. TD was organized as a territorial component of armed forces following Warsaw Treaty attack and occupation of Czechoslovakia in 1968. Because of its national attributes, e.g. subordination to republic authorities, national language, regional
personnel representation, the TD was perceived by the YPA as a more and more competitive armed component, and not as complementary one. Indeed, in 1991 it served as a core of the new Slovenian Armed Forces.

Having its own police, Territorial Defense, civil defense mechanism and units for rescue and self-protection helped Slovenia fight the independence war of 1991 as a total national defense war. It meant also that after war the Slovenian political state maintained some of the basic principles and institutions from former common past, because they had proven themselves successful in armed conflict of 1991. It was very important for the legitimacy of the defense system to maintain victorious mechanisms, witnessing war in neighboring and other parts of the former Yugoslavia, as well as being affected by consequences of this war (Slovenia accepted more than 100.000 refugees from the Croatian and Bosnian war during 1992-1993). Gradually, a huge disappointment in the United Nations and European Union diplomatic and peace keeping activities developed in Slovenian society, witnessing so many victims and no way out for oppressed nations in the two former Yugoslav republics.

The arrival of NATO and the USA in the war considerably changed Slovenian opinion. Ruling coalition politicians in 1994 decided very quickly to request membership in Partnership for Peace program and apply for NATO membership. This fact redirected strategic defense thought in Slovenia away from total national defense, towards more professionalized and smaller armed forces. At the end of 1994, Territorial Defense changed its name in Slovenian Armed Forces, clearly announcing its transformation from guerrilla force of total national defense into standing modern army. The transformation forced SAF into searching for new sources of legitimacy, since the victory from 1991 was not strong enough anymore. The political decision was to legitimize the armed forces through new tasks and activities linked with NATO or other bilateral and multilateral activities. Slovenian soldiers attended international military exercises. A huge NATO exercise, Cooperative Adventure Exchange, was organized on Slovenian territory, and in 1997, Slovenia sent its first soldiers and units on international peace keeping missions. Slovenian soldiers were continuously present from that time in UNFICYP until June 2001, and are part of SFOR and KFOR missions at the Balkans.

**Consistent Strategic Documents as More Difficult than Defense Practice**

When Slovenia came across the opportunity to establish its own state mechanisms, the task was easier in areas where it had some
institutions from the past. The police proceed with its duties; the economy was highly oriented towards Western European markets, the new multi-party Parliament was formed in 1990. Territorial Defense continued with its training, and was gradually transformed into standing army. It received a completely new task, to train the conscripts in basic military service. Certain documents were needed in hurry, such as a new Constitution. It was the same with documents, which were to define the legal framework for the defense and security policy. The Defense Law and the Law on military duty were the first to be written. There was a lack of doctrinal documents, which meant that the political state did not have time to prepare doctrines and strategies. The main focus was on documents that would set the details of the system. The first national security doctrinal document was the Resolution on the fundamentals of national security. It was teamwork by experts from the defense system and experts from university defense studies. For many years it remained the only document of this type. The problem, which marked the development of national security system, was inconsistency of its basic laws. First, they were written as parallel documents, second, there was no common doctrine to guide the laws, and third, the security and defense practice developed more rapidly than the political will to accept new documents. New documents would need a certain level of agreement among all political parties or political elite in order to pass parliamentary procedure. As the political landscape was divided without clear a majority of ruling coalitions until after the 2000 elections, very few strategic security documents were prepared to go into procedure. One of those that passed the procedure was decision of all parliamentary parties to support government’s endeavors for NATO membership, accepted in early 1997 before the NATO Madrid summit. It is still the only political document (not legal) demonstrating the country’s orientation towards this security alliance.

The practice is driven by political will. The SAF is standardizing its activities in order to become compatible with NATO forces. Soldiers are, as said, taking part in NATO peacekeeping units at the Balkans; officers are studying at NATO Defense College in Rome and at other NATO educating institutions. The NATO Prague Summit in 2002 is approaching. Public debate on advantages and disadvantages of NATO membership has not been fully opened yet, although there are some sporadic attempts by NATO skeptics to rise the public. According to public opinion polls, the public acceptance of possible NATO membership has remained stable around 50% since 1997. Public refusal is also very stable, reaching around 30% at highest. When abnormal NATO activities take place on the international scene,
the number of those opposed to NATO membership does not grow. The skeptics go to the group of “undecided” group.

The problem of lack of doctrinal documents became a state burden. The country went through different steps of MAP (Membership Action Plan) for NATO and one of the requirements for membership eligibility was also consistency of documents, made according to common principles. With a significant amount of help from the University defense studies experts, the defense system finally clarified the hierarchy of documents in 2000. Some of missing documents were than negotiated and written in the period of 2000-2001, but adopted at the government level only. The ten-year period of preparing the documents has shown very clearly that Slovenian politicians were not able to negotiate and define the raison d’état in security matters. It was a consequence of the fact that in former Yugoslavia some basic doctrinal documents were prepared in Belgrade, on the level of federal state, and Slovenia did not have the expertise to do it. Sometimes, these documents look like a bunch of wishes and desires, without realistic evaluations and prognosis.

If we analyze the legal framework of civil-military relations, we would deviate from the Constitution of Slovenia, where the following basic principals, also important for national security, appear:

- the adoption of multi-party parliamentary democracy,
- the division of power – legislative, executive and judicial branches of power,
- national security policy is adopted by the National Assembly,
- all executive defense activities are embodied in a single body the Ministry of Defense, headed by a civilian.

The Constitution, Defense Law and other acts provided a sound basis for the development of the model of civil-military relations that are typical for advanced parliamentary democracies:

- division between civil and military power, the latter being subordinated to the former,
- the President of the Republic is the Supreme Commander of the armed forces,
- all crucial national security related decisions are made by the National Parliament,
- the role of the military in the decision-making process is professional only and not political,
- the military is strictly depoliticized and limited to the professional military roles.

According to the Constitution, the citizens have obligatory military duty, which is elaborated for the male population, but not clearly prohibited for the female. Citizens also have the right to conscientious objection (Article 46), for religious, philosophical and
humanitarian reasons (Article 123). If they are not ready to cooperate in military activities, they should be enabled to assist in the defense of the country in some other way. The Law on Military Duty and Conscientious Objection's Act regularize further the principles of military duty, as also the ways to serve in humanitarian, rescue and self-protection organizations and in non-armed military service.

Any encouragement of national, racial, religious or other inequality and inflaming national, racial, religious or other hatred and intolerance is a violation of the Constitution. Any encouragement of violence and war is also counter-Constitutional (Article 63).

The state of emergency is declared when major and general danger threatens the existence of the state. The National Assembly, following the proposal of the Government passes the decision on the declaration of war or state of emergency, the introduction of precautions and their abolition. The National Assembly decides on the use of defense forces. In the event that the National Assembly cannot meet, the above mentioned obligations are performed by the President of the Republic who is obliged to seek the confirmation of the National Assembly as soon as the latter is able to act (Article 92).

The President of the Republic represents the Republic of Slovenia, and he/she is a Supreme Commander of the defense forces (Article 102).

The sort, scope and organization of defense, intangibility and integrity of state territory are defined by the Defense Act, which is adopted by a two-thirds majority in the National Assembly. The National Assembly controls the exercising of defense. While assuring its security, the state emanates above all from peace policy and the culture of peace and non-violence (Article 124)

The Defense Law prohibits the use of armed forces for any kind of political and party activity, and does not allow professional officers to be members of political parties. The armed forces are apolitical and non-party and their tasks are purely professional. Military courts were abolished and the members of armed forces are the subject to civil legislation and courts. The right of conscientious objection is very liberal, as seen before, there is a variety of reasons respected, the length of service is the same as for those who serve in the armed forces, which is 7 months, and the request for conscientious objection to be recognized could be submitted to the commission before the military service starts, during it or after it (in reserve units).

The National Assembly, as the highest legislative body, defines the national security policy of the state and exercises control over the armed forces, especially through committees such as the Defense Committee, Committee on Budget and Finance, Committee for Control of the Intelligence Services and Committee for Control of the
Realization of National Security Resolution adopted by the National Assembly. The National Assembly supervises the development and equipping of the armed forces, through allocation of defense funds.

The Government has the executive role in the defense sphere, and it is responsible for keeping the unity and concordance of the defense forces in line with the national security and defense policy. The Government is also responsible for exercising the defense measures, on the basis of the decisions made by the National Assembly.

The President of the Republic, as seen before, is a Supreme Commander of the defense forces, i.e. Slovenian Army.

In the process of achieving solid solutions in civil-military relations, international security cooperation also plays an important role. The desired compliance with EU and NATO country standards in that field and the cooperation within the OSCE increase the transparency of defense matters. Transparency in the field of security and military affairs becomes a crucial element of cooperation and partnership between states, and an important link in the democratic parliamentary control of the armed forces that foster constitutionality and legality in the security field.

Controversies of Control: Gap Between Legalism and Reality

We mentioned already the problem of lacking doctrinal security documents and also the fact that practice of adopting western patterns of training and managing the military surpassed the legal framework of defense issues in Slovenia. It meant that the defense system was forced to follow the models in order to stay in international security mechanism. The political state was not able to follow the progress with its strategic guidance, let alone the ability to control the activities of the defense system. A very illustrative example of political lagging behind is the question of conscription. The defense system was challenged with reducing number of motivating conscripts from 1995 on. In 1995 the number of conscientious objectors rapidly increased and the number of drop outs from the military service because of health and other reasons also went up. No politician asked for explanation until summer 1999, when one of the parliamentary parties argued for all voluntary force in the media, not in parliament. The question was raised to get the attention of possible young voters in the upcoming parliamentary elections and was not a serious concern oriented towards the resolution of manning the SAF. Nevertheless, the problem of manning SAF is deteriorating in the meantime. There are very qualified debates within the defense sector on the issues of abolishing whether to abolish conscription or not, of motivating young
people for military service. Some projects on professionalization of the armed forces are in progress within the defense sector and in autonomous University defense studies, supported by the expertise of scientists from various European countries. The topic remained an issue of internal professional autonomy. However, the defense sector is aware of its subordination to the civil political power and it is waiting for a parliamentary or political decision on conscription. The question is why has parliament not opened a debate on conscription yet. Is it due to the fact that a majority of parliamentary parties still lacks opinion on the future of conscription?

The legal framework of parliamentary civil-military relations is set according to the western patterns. In order to see the practice of these relations, we will recall and analyze some major indicators through examples from defense practice.

The Division Between Civil and Military Power,
the Latter being Subordinated to the Former

The example of non-polarization of conscription in Slovenia very clearly shows the outcomes of division when civil political power is not aware or not educated on issues of defense sector. The defense sector, although aware of the problem and possessing some solutions, awaits the guidance from civil power. Non-existing political decision and support (political imperative) have negative effects on military legitimacy, but it does not hamper the legitimacy of the whole political system.

The subordination of military to political power in 1991 was accompanied by public applaud. Slovenian public felt excluded from control over the YPA for many years. The YPA was under civilian partocratic control, but it was the control of one party – the League of Communists. The newly independent state and authors of its basic documents wrote about the loyalty of the armed forces to the Constitution and thus to the state (especially to the parliament, the president of the republic, and the government) as the basic security mechanism against the involvement of the military in political affairs. It was understood as loyalty to the whole parliamentary spectrum of parties - not to the one, ruling political party as in past. Consequently the armed forces have become politically neutral, at least formally. However, new political parties tried to install a very similar method of controlling (subordinating) the military as communists did in the past. Instead of parliamentary control over the armed forces and over the defense sector, the party that posts a minister of defense, usually understands defense and military as its own struggle to employ party members or
to promote party sympathizers (as party membership of soldiers is forbidden by law). Democratic control over the armed forces is mutated into one-party (the minister's) control again and other parties have to wait for another constellation of political power in the ruling coalition in order to exercise their "democratic" control over the armed forces. It seems that in transition period Slovenian armed forces are experiencing the "subjective political control" as described by Huntington (1995) who defines this type of control as the struggle between different civilian political elites over control of the armed forces. It is far from democratic control and far from objective political control of armed forces.

The President of the Republic is the Supreme Commander of the Armed Forces

The paradigm of supreme commander works fully when the government (prime minister and defense minister) and the president are from the same political or ideological grouping. If it happens that the president of the republic belongs to one part of the political spectrum, and the executive branch to the other, it might cause a dispute over the competence. This happened in Slovenia at the time when the defense minister was from radical right party, and reached its climax in the dispute concerning defense competencies in 1993-94. The dispute was between the President of the Republic, who is constitutionally "the supreme commander of the Slovenian defense forces" and the Minister of Defense, to whom the Chief of General staff is directly subordinated. It means that the commanding chain from the supreme commander might go straight to the Chief of General staff, whereas the opposite process is possible only through the office of defense minister. The dispute during the mentioned years was illustratively seen through rank promotion. According to the law, the minister of defense is eligible to promote the officers to all officer ranks and the President as supreme commander to the generals' ranks. The MOD Janez Janša would like to promote his followers to the highest ranks but he was aware that President of the Republic would never confirm his decision. Therefore, he decided to install new rank, the rank of brigadier, whom he appointed as minister but gave them the insignia of the general. His decisions caused the polarization within the officer corps.

The MOD Janez Janša was forced to resign after the Depala village Affair in spring, 1994. The affair was a continuation of the dispute between the President of the Republic and the Minister of Defense. Namely, the minister suspected that a former military officer of the Slovenian
army was persuading intelligence informers, his former colleagues, and military officers to collaborate for the benefit of the President of the Republic. He ordered to the special military units to catch this person, as they did. The problem was that the person was a civilian and the special military units acted against him very brutally. It became clear that special military units were not under control of any parliamentary body or other civil institutions, but of the defense minister himself. The government decided not only to ask for the minister’s resignation, but also to disband the military unit, the famous Special Brigade MORIS, which became popular among citizens during the 1991 war as very brave unit, but then its elitism and devotion to one person only caused its destruction. Some people even thought that the was MORIS transformed into the minister’s personal guard.

Crucial National Security Decisions are Made
by the National Parliament

The power relations in the Parliament and the executive political power are change according to election results. This means that multiparty democracy brought a significant uncertainty into the political landscape of post-socialist states. They were accustomed to the stable and long-lasting division of power, which was changing but not very fast, and not on account of elections. The newly established multiparty democracy meant that the division of power changes every four years and sometimes with extraordinary elections or successful interpellations even more frequently. The Parliamentary makeup changes in high percentages, which means that new politicians are not occupational politicians with the possibility of having long-lasting jobs as MPs. The difference between post-socialist democracies and western multiparty democracies is in changeable nature of the parliamentary membership. In post-socialist democracies the majority of MPs are new after each election. It was the same in Slovenia with all three elections (1992, 1996, 2000; the ones from 1989 were the first. Government changes also occur\textsuperscript{156}, which are sometimes faster than the changes in parliament.

As certain number of the elected parliamentary members change, it is not easy for the Parliament to follow a consistent and stable politics of control over the repressive state apparatus and over other state functions. In Slovenia Parliament sometimes shows great difficulties in effective control of the military. Fortunately, the first go-

\textsuperscript{156} Slovenian defense systems experienced 7 different defense ministers in 10 years of independence.
vernment and parliament were clever enough to set the legal rules, which keep the military in the barracks and deprive it even of its professional autonomy. It is not the Parliament that exercises the real and effective control, but institutions of civil society, media, researchers, civil defense experts, NGOs. Civil society, especially mass media and journalists seem to be a more efficient long-term controller of the armed forces than the politicians without the appropriate knowledge and experience. The media serve more and more as a presenter of military activities to society, and as a civilian controller of the military. Parliamentary supervision of the armed forces is presented through the formulation of the defense policy as well as through defining the defense budget; establishing parliamentary committees for defense, controlling the realization of the concept of national security as planned, and supervising military intelligence. The majority of parliamentarians would need some instruction in how to exercise the control over the armed forces, but they do not have time to attend such seminars or training workshops, due to their everyday obligations in different commissions. The lack of direct experience with the reality of the SAF and the defense sector call for the defense socialization (education) of the political elite and civil society. It does not mean the militarization of the civil political society, but the urgent need to familiarize politicians with the new military, the new defense, the new national security. The majority of politicians was socialized in former Yugoslavia and their perception of the military was built upon the knowledge of former YPA (the thesis is valid for male politicians).

Military is Strictly Depoliticized and Limited to the Professional Military Roles

The legal framework sets the role of the military in the decision-making process as professional only and not political, but in many cases it is difficult to define the borders between professional military questions and the politics.

The politicians who took the lead after the first multi-party elections in 1989 agreed to legally limit the political role of the military and have set by law the de-politicization of the armed forces and its officers (the elimination of the political party from the army; the abrogation of the post of political commissioner; the cancellation of ideological contents from curriculum and from drills for officers, non-commissioned officers and soldiers). The mentioned de-politicization was comparable to similar processes in other post-socialist states. The special characteristic of Slovenia (although it also exists in some other states,) is the prohibition for officers to participate in political parties, as well as the right to be elected – they have only passive voting right, “to
vote, but not to be elected"). When the selection of officers for the newly formed armed forces was made in 1991-1992, it was not so much according to the "red or expert" label, but rather according to the officers' loyalty to the Slovenian state during the ten-day war in 1991. Due to the shortage of senior officers (they did not leave YPA, as the younger did) the promotion to higher ranks was made possible fairly soon, even in cases of inadequate /as to the sort and degree/ education.

The military side was very satisfied with the status of political sterility (political non-partisanship of military professionals). It helped put together officers from very different political and ideological backgrounds. The military also uses the political sterility as the excuse to disengage from doctrinal issues and lobbying in political parties. The result is a vulnerability of military professionals to political abuse in disputes between different political groups. Military professionals are not able to draw the line between the control over themselves and their professional autonomy. Professional autonomy is in many cases a subject of control (politicians deal with professional military issues), instead of executing effective control over issues that are supposed to be civilian-controlled, i.e. defense policy, military and defense budget, the balance of defense budget, etc.

Executive defense activities are embodied in a single body – the Ministry of Defense, headed by a civilian.

Slovenia had a large number of defense ministers in its 10 years of independence. This fact caused much damage to the defense sector and particularly to the military. The defense personnel used to wait on minister’s instructions. Being de-politicized meant no need to push any changes, since every new minister decided to revolutionize to the MOD, new strategic orientations, new guidance, new transformations and reorganizations. As the term of their mandates was very short, nearly all reorganizations stopped half-way and caused a lot of confusion among military people. The nomination of the civilian defense minister was therefore a symbol of new democracy, but his real political and expert influence was very small. Such an act in itself tells nothing of the minister's "military stand", his (non)aggressive behavior pattern, nor of the interests she/he stands for). It turns out sometimes that civilian ministers did not know a lot about the entire national security system and were not able to find appropriate advisers. Being elected by the people, the “polis”, they feel knowledgeable enough and there is no chance to instruct them on defense issues.

157 The purges were understood in sense that unsuitable officers were not invited to the new military or their requests for job in it were rejected. The unsuitable officers were those who did not depart the YPA within the time period, given by Slovenian political leaders.
Conclusion

Legal framework of control of the armed forces was a very important issue in strengthening public support for the defense sector and the SAF. It gives a sense of certainty to the public, a sense of legal limits on what the armed forces are allowed and what they are not. The SAF are very happy to have this legal protection, because they can exist in very quiet and non-active environment. Every move or publicly announced idea would be dangerous, so it is better to hide and wait, and perform the routine work. The political state is also very helpless in controlling the defense sector due to its lack of defense knowledge. The level of real control over the AF is very low. Instead of the politicians, parties or parliamentary commissions, there were many instances where academic institutions, mass media and public played the crucial role in democratic control over the armed forces.

The academic institutions that developed defense studies and civilian experts on defense matters are the only professional controllers of the armed forces. They have to develop objective control of the armed forces. Due to the lack of professional autonomy, it would still be impossible to develop objective control within the military ranks and files, as in the officer corps. Research on the armed forces by military scientists or by civilian scientists with access to the military units could also help improve civil-military relations. Researchers may serve as transmitters of civilian desires and expectations to the military - how could the military know what are civilian expectations if it is politically sterile and closed in the barracks not to disturb public sentiments – the only mediators might be media and researchers with their surveys.

Regarding the fact that the major mission definition of the armed forces after the Cold War has generally changed (Moskos, 2000: 15), the predominant source of military legitimacy became new peacekeeping, humanitarian and other PSO missions. The legal framework for controlling armed forces according to the two previous major missions (defending the homeland and alliance support) is not sufficient anymore. All countries, not only transitional ones, will have to re-conceptualize or further develop channels of control of the armed forces, deployed out of area. The forces of transitional countries are in a specific situation. They are supposed to gain legitimacy in PSO tasks, too, but the societies, where they exist, control them through mechanisms of modern and late modern civilian control. The step back in forming control over the armed forces is the result of political change from authoritarian civilian control toward democratic control. The transition societies have to learn the democratic mechanisms and behavior in case of new missions paralleling.
The result is post-modernity combined with elements of chaos. The military side is in fact out of control, because the civilian side lacks the knowledge on how to control it. The military stepped back in all societal and possible political activities, having learned from the past that such activities might lead to loss of legitimacy. Therefore, the military in such countries, as Slovenia, is marginalized and ignored in public debates, even in cases when the hot issue concerns the professional autonomy of the armed forces. The conclusion would be: civilian control is unprofessional and in most cases exercised as a control over the feud.

SOURCES:


Dimitrios Koukourdinos


Introduction

According to the Italian political scientist Sartori, democracy needs a ‘taming’ of politics: ‘that politics no longer kills, is no longer a warlike affair’\textsuperscript{158}. In this respect, Law plays a role of great importance. It institutionalizes practices and procedures, so that the authorities exercise state power in an ordered and predictable way. The respect of law, and the constitution in particular, is what renders democracy ‘the only game in town’.

This is even more correct in the case of control of the armed forces. The existence of a clear, consistent, and efficient legal framework shaping the relationship between the military and the political institutions, as well as their respective spheres of competence, has been underlined as one of the prerequisites of civilian and democratic control of armed forces. The democratic management of a country’s defense is based on the legal and procedural framework in which policy discussions and policy formation take place. The legal dimension of the ‘rules’ of policy-making concerns responsibilities and restrictions, which stem from constitutional and statutory provisions. Indeed, the enactment of new legislation in the field of defense policy was one of the first steps taken by the transitional countries of Central Eastern and South Eastern Europe in achieving democratic management of their armed forces.

Without denying the importance of legal provisions in the establishment of DCAF, one should not overlook the limitations of a legalistic approach. The law can enhance and institutionalize rules, practices and procedures of vital importance to the control of the armed forces. Nevertheless, the legal provisions function inside a space delimited by factors of an explicitly political nature. In the case of redefinition of the state and the creation of new state structures, civil-military relations and their genesis tend to be influenced to a great degree by the state-making process. Thus, the examination of the legal aspects of DCAF in such circumstances is not limited merely to the assessment of the defense system through the study of special laws in a more or less established political framework, but is intrinsically connected to the general political/constitutional system and its legitimacy.

Certain problems go far beyond the mere application of legal norms. They are directly related to the separation of powers at the general political and constitutional level. These problems concern political legitimacy and not normative legality. The major role that legal regulations can play is to spread an institutional culture, which, once developed, prevents the military from exerting undue influence, or politicians abusing power. But, they cannot in and by themselves guarantee the stability of the system of democratic control, when the political legitimacy of the Basic Law, the Constitution, is under question.

The legislation on democratic control of the armed forces starts from the Constitution itself and goes down to Internal Military Statutes and other Military regulations. As a whole, all these documents are important for the establishment of democratic control of the armed forces, but their relevant weight varies. In this respect, the Constitution is at the top of the pyramid. It is the part of the legal system that interacts with the political structure of a country; in fact, it is the legal/institutionalized expression of the political system. Regarding democratic control of the armed forces, the Constitution has a twofold importance for the functioning of the overall system through: a) the special provisions that refer explicitly to the armed forces and other issues related to defense; and b) the general web of checks and balances of the overall political system.

The Constitution cannot lay down but the very basic guidelines of the defense system. The detailed definition of the rights and duties of the citizens, the armed forces and the political institutions must be defined as exhaustively and as clearly as possible in special laws. The latter thus gives substance to the constitutional provisions. On the other hand, being the most important piece of law, the Constitution equally defines the external limits within which the rest of the
The latter certainly can and should not alter the general political framework set by the basic law of the state.

The aim of this paper is to shed some light on the grey zone between legality and legitimacy of the democratic control of the armed forces system. This is of special importance in the case of the former Yugoslav republics. Although Eastern Europe is usually treated as one group, the transition process has posed different challenges in different countries. The constitutional choices and arrangements made in CE and SE Europe bear similarities with each other and differ from the solutions provided in previous transitions such as those in Germany, Italy, Spain, or Greece in at least one respect; the tendency to prefer a political system with a bi-headed executive. The Western Balkans, here exemplified by Croatia and the FRY, provide an illustration of a number of interesting aspects which are directly connected to the bifurcated executive branch and which furthermore testify to the negative consequences constitutional deficiencies may have for the functionality of the democratic control of the armed forces.

The case of the Republic of Croatia

The Constitutional Framework

The Constitution of the Republic of Croatia was promulgated in December 1990, after the first multiparty elections took place. This means that the framework was set under the dominant influence of the victorious HDZ (Hrvatska Demokratska Zajednica, or Croatian Democratic Union, CDU) and its leader and President of the Republic, Franjo Tudjman, who left his mark on the character of the political system. On the other hand, the Constitution of the Republic of Croatia was voted in place by the opposition as well as the ruling HDZ, even if the main opposition parties strongly criticized certain aspects of the Constitution.

The Constitution, which remained unchanged until recently, established a semi-presidential system of governance, somewhat similar to the French model. There are two institutions directly elected by the citizens, the President and the bicameral Parliament, for 4 and 5 years respectively. As regards to the Government, the President appoints and relieves of duty the Prime Minister, and following the proposal of the latter, he appoints and relieves of deputy prime ministers and members of the government (and hence the minister of defense). After his nomination and the approval of his ministers by the President, the Prime Minister presents his government to the House of Representatives. The government must enjoy the support of the
majority of deputies. In this way, the government is accountable both to the President and to the Lower House of the Parliament\footnote{Ibid., Articles 111-113}. The President, at the proposal of the Prime Minister and if the Parliament has not accepted the budget or has passed a vote of no confidence, may dissolve the Lower House and call elections.

The Parliament is the representative body of the people and is vested with the legislative power. It is divided into two chambers, the House of Representatives (Zastupnički dom) and the House of Counties (Županijski dom). The Lower House has all the typical authorities of a legislature, including the passing of the Constitution and laws, the acceptance of the budget, the oversight of the government’s work and, of special significance to the system of defense, the right to decide on war and peace. The Upper House has more of an auxiliary character, with its main power vested in its authority to return laws to the Lower House for a second review. As to the government, it is entrusted with the power to propose bills to Parliament, and to implement policies and laws voted by the legislature.

Thus, the constitutional position of the President is what gives the Croatian political framework its specific character. Apart from the aforementioned role of the president in the formation of the government, he may call governmental sessions where he sets the agenda and where he presides. This gives him the opportunity to act \textit{de facto} as head of government. Combined with the rest of his authorities, his influence is extended to include not only decisive powers on the formation of the government, but equally on its very functioning.

The dominant position of the President is even more pronounced in the field of defense. In this policy area, the Constitution contains specific provisions as regards to his competencies: (a) the President is the \textit{Commander-in-Chief} of the armed forces, (b) he appoints and relieves of duty military officers, and (c) he decides on the composition of, and presides over, the National Defense and Security Council (VONS). The latter is one of several advisory bodies that the President can make use of at his discretion in the field of defense.

In the event of a state of war or an immediate threat to the independence and unity of the state, or when the government bodies are restricted from performing their constitutional duties, it is the right of the President to enact decrees with the force of laws. Apart from the state of war, the Constitution does not provide any specifications as regards to which institution has the right to declare a state of emergency as described above.
In sum, the Constitution provides for a more active role of the President in the field of defense compared to his powers, tasks and responsibilities – which are already extensive, given that the Croatian political system is semi-Presidential – in other policy areas.

**Special Legislation on Defense**

The relevant legal documents in this category are i) the *Law on Defense*, originally adopted in 1991, amended twice, in 1993 and 1996, and ii) the *Law on service in the Armed Forces*, which was adopted in 1995. The former was one of the first statutory laws of the new state, a clear symbolic as well as an essential manifestation of its sovereignty. There is no coincidence that this law was adopted by Parliament on June 26, 1991, just a day after the declaration of the independence of Croatia from the Yugoslav federation. In brief, this law regulates the rights and duties of the citizens as well as those of the government and other bodies of the state administration for the defense of the sovereignty, independence and territorial integrity of the country. It also includes basic regulations of the armed forces of Croatia, and military duties and other important issues of the defense system. The second law was enacted on March 22, 1995, a few months before the operations of the Croatian army in Krajina. It is a more specific law, which regulates the structure of the armed forces, its training and education, the divisions and ranks inside the officer corps as well as in the lower level, and the procedures of promotion and release from service.

The laws verify and strengthen the dominant position of the President in the defense system. More specifically, as the Commander in Chief, the President has extensive decision-making powers, both as regards to the structure and the organization of the armed forces, as well as to its use and commanding. More specifically, he decides on the basic development plans of the armed forces, the basic organizational structure and the system of command and control, and the plan for the use of the armed forces. He orders the use of the military and he gives the directives for the undertaking of measures for mobilization and preparation of the armed forces.

Of particular interest is the President’s competence in the personnel policy and in the appointment and promotion of officers. In fact, there has been a remarkable change in this aspect between the two versions of the Law on Defense. Thus, according to the 1991 *Law on Defense*, the Commander-in-chief appoints and dismisses all generals, admirals, and military commanders at the corps level and in
other equivalent or higher ranks\textsuperscript{160}. However, the same article in the 1993 version stated that the President appoints and relieves from duty all senior officers and generals, and all military commanders from upwards of the \textit{battalion} level\textsuperscript{161}.

Moreover, according to the law on defense, the President is granted extensive powers in the case of extraordinary circumstances. The Law elaborates on the constitutional reference to emergency situations. It defines the latter as the occurrence of armed and other violent activities against the independence, territorial integrity and constitutional framework of the Republic. The declaration of extraordinary circumstances is exclusively under the jurisdiction of the President, who can order the undertaking of readiness and other necessary measures.

Compared to these extensive responsibilities of the President, the government of the Republic and in particular the Minister of Defense executes mainly administrative tasks regarding everyday operation of the defense system. The Government’s responsibilities, which are part of the executive functions of each government, concern mainly procedural and administrative tasks in the operation of the defense system, and thus they only indirectly refer to the control of armed forces. Among other things, the Government proposes plans on defense and security, including development measures and obtaining necessary financial resources. It is generally responsible for the wartime organization of the state administration.

As to the Ministry of Defense, it performs more specialized tasks in the administration of the defense, which ranges from observation of the execution of relevant laws by administrative bodies and their coordination and the estimation of potential war threats and other threats against the country, to elaborating plans for the use and commanding of the armed forces as well as tasks related to the professional training of the members of the armed forces. Finally, the minister of defense plays a role in the appointment and promotion of military officers, as he appoints and dismisses all non-commissioned officers, junior officers and military commanders up to the company level\textsuperscript{162}.

Apart from these explicitly administrative tasks, the Ministry of Defense performs commanding and other special functions \textit{servicing the needs of the President}, in coherence with the authority of the latter in the field of defense. This is in compliance with the right of the President to delegate certain tasks of management and command of the armed forces to the minister of defense, apart from cases of

\textsuperscript{160} Law on Defense, National Gazette, Republic of Croatia, no 49/91, Article 52
\textsuperscript{161} Law on Defense, National Gazette, Republic of Croatia, no 74/93, Article 52
\textsuperscript{162} Ibid
deployment or use of the military. In turn, the minister of defense is directly accountable to the Commander-in-Chief for all those functions that the latter has delegated to him.\textsuperscript{163}

In sum, the Ministry of Defense plays an important role in the defense system, but only within a sphere of activities that is regulated mainly by the President. In other words, both the government and the ministry participate in the input (through proposals) and the output (through execution) of the policy-making process, however the extensive authority of the President in the area of defense policy has far-reaching effects as to his relationship with the government and the Ministry of Defense. The latter especially stands in a paradox situation. Although it is a division of the government, being a ministry, the laws on defense imply a more direct relation of the minister to the President rather than to the Prime Minister. The excessive influence of the former in the functioning of the ministry is reinforced by the fact that the General Staff of the Croatian army is considered to be an integral part of the ministry of defense, but its organization and its members are regulated by the President. In addition, the Chief of the General Staff is accountable to the core executive for all issues concerning the commanding and use of the army in peace and war.

\textit{General Remarks}

It is obvious from the above that the President as Commander in Chief has the responsibility for setting all the key guidelines in the organization and development of the Croatian armed forces. His is a central position in the creation of the general framework of the military, and it is de facto strengthened by the central role of the presidential office in the overall political system, laid down by the Constitution.

Surely, the Constitution has to be tested under different circumstances and for a longer period of time in order to assess its real functioning. In Croatia, as in many East European countries, this has not been the case. Nevertheless, during this first period of post-communist politics in the country, the system has demonstrated strong presidential tendencies. In the case where the President is also the leader of the majority party in the parliament, and thus the party in government, the role of the former is dominant, and the role of the second branch of the executive, as well as that of the legislature, can easily be marginalized. This was very much the case in Croatia under Tudjman.

\textsuperscript{163}Law on Defense, National Gazette, Republic of Croatia, no 74/93, Article 47
The above does not mean that the system lacks checks and balances. Both the Constitution and the defense legislation grant the legislature and the government certain tools for curbing presidential powers. Nevertheless, these tools were already weak and the specific constellation of powers rendered them completely inadequate. One could claim that the situation would be different if there was a cohabitation of a President and a government from different parties. However, until recently this was not the case in Croatia.

The situation changed noticeably with the appointment of a new President and a new coalition government after 2000. Clashes between Mesić and the new Minister of Defense Radoš show that amendment of the existing legal framework, although necessary, will not be an easy task. The Constitutional changes of late 2000 which moved in the direction of limiting presidential powers were a first step. Nevertheless, the new President seems reluctant to abandon his special role in the field of defense.

In sum, the existing legal framework has proved that under specific political conditions, it leaves many authoritarian ‘loopholes’. Yet, as the major problem was not a contradiction of constitutional and legal provisions, but overemphasizing presidential powers in the relevant laws, the problem may be solved by framing a more functional system. More specifically, it is an urgent necessity that a new Law on defense prescribes a clearer and more balanced division of competencies between the two heads of the executive.

The Case of the Federal Republic of Yugoslavia

The Constitutional Framework

The Federal Republic of Yugoslavia was proclaimed on April 27, 1992. It was the strategic choice of the ex-communist leadership of Serbia and Montenegro to reconstitute Yugoslavia as a federation, instead of pursuing a policy of separate nation-states. The decision was made solely by the ruling elites of the two member states, and the opposition was excluded. In a conspicuous attempt to demonstrate the continuity between the ‘second’ and the ‘third’ Yugoslavia, the FRY was voted into existence by the federal chamber of the old Socialist Federal Republic. Of the 220 delegates who once sat in the federal chamber, only 73 were present to vote this decision into effect.

Apart from questions of legitimacy, the fact that the new state has a federal structure also makes things more complicated. Any analysis that attempts to examine the real levers of power has to take into account not only the horizontal, but also the vertical distribution of powers. Although defense is an exclusive responsibility of the federal
institutions, specific republican institutions do play a major role in the political system as a whole. Therefore, their examination is necessary in order to assess where the real power of command and control of the military lies.

The first basic problem in the legal framework of DCAF concerns the incompatibility between the federal and the Serbian Constitution. Although Serbia has recognized the primacy of the federal legislation, the Serbian Constitution itself still contains clauses that could be considered conflicting with the federal ones. More specifically, on the issue of defense, the Federal Constitution clearly states that this is under the exclusive jurisdiction of the federal authorities\textsuperscript{164}. Yet, in the Serbian Constitution it is explicitly stated that the defense and security of Serbia and its citizens is a responsibility of the republic\textsuperscript{165}. Moreover, the constitutional responsibilities of the Serbian President include the command of armed forces in peacetime and war and the organization of defense\textsuperscript{166}. In contrast to the Montenegrin Constitution, the Serbian one was not amended in order to be compatible with the federal provisions.

Since the federal constitution enjoys legal priority, the above discrepancies could be considered as minor details. However they created an institutional confusion regarding the role of the republics in the control of the armed forces. From late 1990 till the summer of 1993, there was a Serbian and a Montenegrin counterpart together with a federal minister of defense. Their functions were never defined and they existed as an institutional anomaly with no clear responsibilities. In fact, their existence could be deemed unconstitutional, since defense was made the exclusive responsibility of the federation.

Setting aside the constitutional confusion regarding defense and its institutional expression, a closer look at the general distribution of power on the level of the federation and the republics is helpful in understanding the relative importance of the various institutions in the field of defense. Herein lies one of the basic problems of the FRY political system, equally affecting the field of defense, namely that there is a parliamentary model of governance at the federal level and an essentially presidential or semi-presidential arrangement at the republican level.

As noted, the federal constitution provides for a typical parliamentary democracy. Regarding the legislature, the Federal Assembly is composed of two Houses, the Chamber of Citizens and

\textsuperscript{164} Constitution of the Federal Republic of Yugoslavia, Article 77
\textsuperscript{165} Constitution of the Republic of Serbia, Article 72
\textsuperscript{166} Ibid, Article 83, para 5
the Chamber of Republics. The former is made up of federal deputies elected proportionally by the Yugoslav electorate, whereas the latter is comprised of 20 deputies from each member-state. Both Chambers decide concurrently on issues within the jurisdiction of the Federal Assembly, by majority votes in each of the two Houses. Apart from enacting laws, the budget approval and the supervision of the work of federal government, the federal parliament decides on alteration of the FRY borders, on war and peace, and it declares a state of war and a state of emergency\textsuperscript{167}.

The federal government must enjoy the confidence of the majority in each chamber of the Federal Assembly\textsuperscript{168}. The federal Prime Minister is accountable to the Assembly for his work and for the work of the federal government as a whole. As a part of its competence, the government calls general mobilization and organizes defense preparations\textsuperscript{169}. What provides the federal and republic systems with their special character, is the position and the role of the respective Presidents. In all three systems, the government is not accountable to the President but to the parliament. Yet, there is a difference in the way of election to office. The republics’ Presidents are directly elected, whereas until 2000, the Federal President was elected indirectly by the Federal Assembly for a 4-year term. He was completely dependent on the will of the federal parliament. If the latter held that the head of state had breached the Constitution, it could remove the President from office by a two-thirds majority vote. The position of the federal President was thus weaker relative to the position of the republican Presidents.

This observation is very important given the constitutional role of the President of the FRY, as the commander-in-chief of the Yugoslav Army. This is established in the federal constitution, according to which, ‘in wartime and peacetime, the Army of Yugoslavia shall be under the command of the President of the Republic, pursuant to the decisions by the Supreme Defense Council’\textsuperscript{170}. In fact, this latter is the second structural deficiency of the legal system of DCAF in the FRY.

According to the federal constitution, the SDC consists of the President of FRY and the Presidents of the member republics, with the Federal President presiding over the sessions\textsuperscript{171}. This means that the

\textsuperscript{167} Constitution of the Federal Republic of Yugoslavia, Articles 78-95

\textsuperscript{168} Ibid, Article 101

\textsuperscript{169} Ibid, Article 99, paragraph 9

\textsuperscript{170} Constitution of the Federal Republic of Yugoslavia, Article 135, paragraph 1 (emphasis added)

\textsuperscript{171} In practice, the meetings of this body were usually attended by the federal Minister of Defense and the Chief of the General Staff. However, this was not
republic authorities enjoy a status equal to that of the federal President in defense policy-making and the control of armed forces. The situation is even more complex if we take into account that no rules on procedure and decision-making are prescribed for this body. Thus, it is not clear if decisions are to be taken by consensus or simple majority voting.

If the latter is the case, the republics’ Presidents can overrule the opinion of their federal counterpart, making defense, contrary to the letter of the law, a de facto responsibility of the republics. Another consequence of this structure is the possible interference of the republics’ authorities in the work of the federal government and the ministry of defense. The command and control of the federal army depends thus mainly on the politics of the day, that is, it is not firmly institutionalized.

Hence, the position of the Federal President as the Supreme Commander of the armed forces is just nominal. The Supreme Defense Council is essentially the higher decision-making body. The President of FRY has no independence and, in fact, the performance of all of his duties is under the control of the SDC.

Special Legislation on Defense

There are two, largely complementary laws in the field of defense, i) the Law on Defense and ii) the Law on the Yugoslav Army. Their adoption did not take place immediately after the creation of the new state and the ‘new’ army. They were firstly put into force on November 6, 1993, but only as provisional ones. Their publication as normal laws was finally carried out seven months afterwards, on May 18, 1994. Thus, there was a critical period of 2 years following the creation of the FRY during which the defense system and the control of the armed forces were not fully institutionalized, not even from a legal perspective.

The laws cover different but closely interconnected areas. More specifically, the Law on Defense concerns the overall defense system of the country. It sets the rights and duties of citizens, the military, the federal and republic institutions and other legal entities in defending the sovereignty, territorial integrity, independence and constitutional order of the FRY. The Law on the Yugoslav Army sets the legal basis established in any legal document, and thus, it was made on an ad hoc basis. In any case, apart from the Presidents, no other member can participate in the decision-making process, and the eventual presence of others is linked to their advisory character; See Constitution of the Federal Republic of Yugoslavia, Article 135, paragraphs 2 & 3
for the functioning of the military institutions. In its 364 articles it covers a wide spectrum of issues. Its more interesting provisions include clauses regulating the internal organization of the army and the procedures for appointing and promoting officers.

The aforementioned laws follow the philosophy of the Constitution, which sets the Supreme Defense Council as the de facto highest body in the defense system. The Federal president is entrusted with specific responsibilities such as the implementation of the Defense Plan of the country, and the commanding and use of the Yugoslav Army in peace and war. He decides on the basic internal organization, army development and equipping, and he orders mobilization. Moreover, the President appoints and dismisses generals, admirals and officers of equivalent rank, while other officers, non-commissioned officers and soldiers are assigned to duty by the Federal Minister of Defense, the Chief of Staff and officers duly authorized by them. However, as in the federal constitution, all the president actions must be in line with the decisions of the Supreme Defense Council (SDC). The latter passes decisions according to which the President commands the Yugoslav Army, and assesses the possibility of war and other threats to the defense and security of FRY.

Yet, the defense laws contain a second serious deficiency, concerning the responsibilities of the federal government. The most important responsibilities of the latter include ordering general mobilization, the financing the army and the issuing orders during a state of emergency. In these operations, the government is checked both by the Federal Assembly and the Supreme Defense Council. The former declares a state of emergency and approves the federal budget, whereas the latter makes the decision on the Defense Plan and assesses possible war- and other threats to national defense. The above balance of powers is similar to that in many liberal democracies. However, the problem lies in the relationship with the SDC, as the republican Presidents have the opportunity to establish guidelines for performing the federal government’s duties, without being checked by any federal agency.

As to the Federal MoD, it is left to execute the decisions made by the Security Council. In general, it carries out administrative and special functions, which are related to the realization of defense policy.

---

172 Law on Defense, Official Gazette, FRY, no 43/94, Article 40
173 Law on the Yugoslav Army, Official Gazette, FRY, no 43/94, Article 4
174 Ibid, Article 16
175 Law on Defense, Official Gazette, FRY, no 43/94, Article 41
and the operation of the defense system, e.g. the preparation for mobilization and military training. Yet, most of the responsibilities concerning the administration of the military itself are not part of the ministry’s jurisdiction, but they are executed by the General Staff.

The highest military institution is in charge of the main tasks, such as organization of the military, education and recruitment, in line with the strategic guidelines set by the SDC. The Chief and other members of the General Staff are appointed by the federal President, following the approval of the Supreme Defense Council. Thus, the General Staff is responsible solely to this body and not to the Ministry of Defense. It is not a part of the ministry’s structure. Such an arrangement weakens the position of the ministry, and subsequently that of the federal government’s, in control of the military. Actually such control is non-existent, as the chain of command goes directly from the Supreme Defense Council to the General Staff and down to the military units.

The Ministry of Defense is transformed into a second rank institution, whose main duty is the securing of funds from the federal Assembly. In the words of late federal minister of defense Pavle Bulatović, ‘…as a federal government ministry, [the MoD] is obliged to ensure the economic and administrative prerequisites for the efficient functioning of the defense system. Therefore, neither the Federal Government, nor the Defense Ministry are superior to the General Staff, nor is the opposite the case’. In fact there is no connection between the two.

The Ministry of Defense exists as a separate institution parallel to the General Staff, administering issues that do not relate to the everyday management of the military. This is an abnormal situation as the main federal executive body has no saying in commanding the army, and the latter totally rests in the hands of the Supreme Defense Council, where republic representatives form a majority. The constitutional provision that defense is an explicitly federal responsibility is de facto and de jure overruled.

176 Borba, 28-29 October 1995, in FBIS-EEU-95-217, p 48
177 This specific arrangement was hotly disputed during the drafting of the Law on the Yugoslav Army. The initial proposal that was put on the table by the then federal Prime Minister Milan Panić in late 1992, provided for a wider role of the federal ministry in the control of the military. This was strongly opposed by both the military leadership and the authorities of the Republic of Serbia. They both argued that the proposed bill was unconstitutional, and that the federal government wanted to retain the powers of the socialist Federal Secretariat of Defense. The General Staff made it clear that it would not accept any other institution but the Supreme Defense Council, as its controlling body. See Vojska, 11 March 1993, in FBIS-EEU-93-076, p 38; Borba, 7 April 1993, in FBIS-EEU-93-085, p 69.
General Remarks

The legal framework of the defense system in Yugoslavia is not only dysfunctional, but also has far reaching effects concerning the character of the whole political system. Although the FRY is considered to be a parliamentary and federal state, the field of defense stands as a unique policy area, which is beyond federal and parliamentary structures. The all-powerful institution of the Security Council acted as the autocrat in the control of the military, completely eliminating the role of the government and hence the parliament.

In this respect, the Yugoslav case testifies too deep and severe fallacies in the Constitution itself. The whole structure was tailored to grant Milošević the actual commanding of the military, both as President of Serbia, and as Federal President. It should be noted that the position of the federal President has been significantly strengthened following the recent Constitutional amendments, in the summer of 2000. According to these amendments, the federal president is now elected directly by the people. Moreover, he may be dismissed only if the Constitutional Court rules that he has violated the Constitution, and if the Federal Assembly votes to do so by a two-thirds majority. Again, the amendments were tailored to fit Milošević, in his effort to remain the power centre of the Yugoslav political system, regardless of his position.178

The non-institutionalized character of the defense system, and hence of the DCAF means that the problem lies not so much in the ‘poor’ legal provisions, but in the legitimacy of the entire model. The dramatic fall of Milošević and the election of Koštunica as the Federal President by the electorate directly, may have boosted the legitimacy of the post, but the discrepancies in the defense system have not ceased to exist. Yet, their change depends not only on the relations between the power holders, as in Croatia, but is equally connected to the issue of the future of the state. No amendment can be enacted before an adequate solution to this issue has been provided. The fact that the defense-related clauses of the Serbian Constitution were not and have still not been amended testifies to the instability and the

Conclusions

The brief analysis of the defense legal frameworks in Croatia and the third Yugoslavia demonstrates the ability and the limitations of legal norms to provide for a democratic control of the Armed Forces. In the case of Croatia, the Constitution and the special laws prescribe a very strong presidential role in the field of defense. Yet, explicit political factors, namely the occurrence of the same person as President and leader of the majority party, turned the semi-presidential system into a typical presidential model, and hence the authority of the head of the state in the control of the military was not reviewed by the government and legislature. However, this phenomenon is characteristic for semi-presidential systems, as French experience shows. In this case, limitation of the President’s rights through special laws can possibly undo the imbalance between his authority and the authority of the government.

In contrast, the Yugoslav case is more problematic. Instead of establishing a stable system, the constitutional provisions on defense contradict the philosophy of the Constitution itself, namely that the FRY is a parliamentary democracy, and that defense is a responsibility of the federation. The special defense laws go even further, by marginalizing the role of the ministry of defense in controlling the military. The chain of command goes from the Defense Council directly to the Supreme General Staff. In this case, the real urgent question is not the mere amelioration of the legislation, but the constitutional framework itself. However, changing the latter is a question of an explicitly political nature, where legal norms can provide very few solutions.
Miroslav Hadzic

(IN)ABILITY OF LOCAL NGOs TO INFLUENCE LAW-MAKING PROCESS: BETWEEN LACK OF WILL AND LACK OF KNOWLEDGE

It would not be easy to challenge the starting thesis of this paper, which implies that the so-called third sector (of the NGOs) has little influence on the normative formation of society. Moreover, it appears that its (potential) influence grows increasingly weaker the closer one gets to the sphere of civil-military relations and/or the security sector. There are two complex reasons which contribute to this outcome: first, the security sphere is, in principle and in reality, mostly separated from civil society actors and, second, the high degree of legal and judicial protection makes this sphere the least accessible to non-governmental organizations. From that position, NGOs may have a very indirect and limited influence on the establishment and practice of democratic control over the armed forces. In addition one should include a few other interfering factors. Every state incorporates the substrate of its own social-political being into the security domain through its foreign and defense policies. Therefore, the nature of the ruling order directly determines the manner of understanding and practicing one’s own security and that of the others. The defining of security needs and intentions of a state, and therefore also the use of the army and the police, is essentially a political job, which is practically the exclusive competence of the executive and legislative branches of power. Far from being insignificant is another fact, namely the army and the police as central and authorized holders of security power have huge discretion in state emergencies. In such situations, the activity of the NGOs is at least always bordering on suspension. On top of that, the state security domain is highly susceptible to ideological and propagandist manipulations. All this, taken together, increases the political risk and may deter the action of civil society actors. The case of Serbia/FRY is taken as an example to test the viability of the initial remarks. In this context, we shall naturally try to preliminary measure the power and impotence of the
Our attention shall be focused on the existing legal assumptions for placing the Yugoslav Army (YA) under the democratic civil control. With that purpose, we shall first outline the civil military heritage of Serbia/FRY, focusing on the available arsenal for the democratic civil control of the YA. After that, we shall look into the capacities of the existing NGOs in Serbia/FRY, on the basis of an analysis of the essential characteristics of the third sector in the country.

**Civil-Military Legacy of Serbia/FRY**

The exclusion of the Yugoslav Army (YA) from democratic civil control may not be properly understood without taking into account the historical background, or better the civil-military legacy of the Serbian and Yugoslav societies. The Serbian legacy in civil control of the army created in the first Yugoslav state and then transferred to the second one with certain communist modifications could be summarized in a few points:

a. A general lack of democratic tradition and institutions facilitated the prolonged domination of authoritarian models of rules, with the army as the key stronghold of the rulers;

b. Frequent Serbian and Yugoslav wars (for liberation, unification and dissociation) have increased the social and political power of the army. This slowed down the state transition from war to peace, favoring the militaristic trends in the society;

c. Lasting absence of instruments and procedures of democratic civil control in the Serbian and Yugoslav societies led towards the systematic exclusion of the army from the competence of the parliament and the public. This gave rise to the domination of the clientelistic and politicized (party) model of the army;

d. Lack of civil control, coupled with the inherent corporatism of the army worked in favor of frequent interfering of senior army ranks in social events (crises). Political activity of the army was based on the personal loyalty of the corps of (non-commissioned) officers to the rulers. This necessarily resulted in the ideological self-legitimacy of the army, (ab)use of patriotism and reduced understanding of combat (professional) moral of the army staff;

e. The underdeveloped state of specific scholarly disciplines (i.e. military sociology) deprived the public of the proper knowledge on the subject of civil-military relations and aggravated the emerging of competent civil society institutions. The outcome was the lasting domination of the ideological
approach to civil-military relations and the decreasing rationality in positioning the army and the defense of the society; and
f. Non-existence of a free and critical public, combined with the closed military-defense sphere facilitated the tabooing of the issues related to the army and defense sphere. The lack of awareness of the need for democratic civil control encouraged the widespread idolizing of the army by the public and the media.

The nature of the civil-military relations in the FRY before the launch of changes (October 2000) was still determined by the war origins of Milosevic’s regime and the Army. This fact created numerous political limitations for establishing democratic civil control over the YA:

a. Due to the powerlessness of the political system and the denial of the principle of separation of power, procedures and instruments for civil control of the army were practically non-existing;
b. Bearing in mind that during the eight-year existence of the FRY the Federal Parliament failed to adopt a strategy of defense, no one in the country knew about the aims, objectives and manner of employment of the Yugoslav Army. This left sufficient space for arbitrariness in the supreme command of the army;
c. In the absence of a state plan for transformation, the Yugoslav Army (the eastern Serbian remnants of the Yugoslav People’s Army) and its top ranks were left to self-transformation away from the public eye. This reduced the prospects for the rational organizing of the civil-military relations and adequate transformation of the inherited military organization.
d. Repressive suppression of the free public prevented the control role of the media and NGOs, as well as promotion of the concept of democratic civil control of the YA, and
e. The ten-year impotence of the opposition in developing an alternative strategy of social development deprived the citizens and YA members of a program for a modern pattern of civil-military relations.

Deficiencies in the constitutional status of the YA additionally favored the political submission of the generals to Milosevic's authority.

**Constitutional Controversies**

The position and tasks of the Yugoslav Army as well as the procedures for its use have been regulated by the FRY Constitution. However, the provisions addressing the army and the defense in the Constitution of the Republic of Serbia are in direct contravention with
the Federal Constitution.\textsuperscript{179} A comparison of the two constitutions\textsuperscript{180} reveals formal “existence” of two armies in Yugoslavia, which are under the command of two mutually independent centers of supreme command. The top of the YA chain of command is taken by the Supreme Defense Council (a collective body), which implements its decisions through the FRY presidency.

In opposite, the Serbian president is, in his command of the (fictitious) armed forces, limited only by the republic constitution and laws. Moreover, these acts indicate that any of the specific cases of state emergency may be proclaimed in Serbia, independently from the federal authorities. According to the letter of both constitutions, the internal use of the army may be ordered by the FRY Supreme Defense Council and the Serbian President, as soon as he is assigned the forces.

With an intention to conceal the separatist nature of the 1990 Constitution Milosevic, already at that time, circumvent appointing the armed forces of the Republic of Serbia (in addition to the existing Yugoslav People’s Army and the Territorial Defense Units). Therefore the Constitution does not define the composition or the tasks of such forces as well. In order to be on the safe side, the Serbian President was granted supreme command of these forces in war as well as in peace.

The above-mentioned constitutional-systemic deficiencies enabled Slobodan Milosevic to expand and practice his informal power, from the post of the FRY president, otherwise an office of protocol nature. The YA was naturally within his reach. That was the critical moment when his power obtained a kind of public legitimacy

\textsuperscript{179} Although Art. 115. para 1 of the FRY Constitution requires that “the constitutions of republic members, federal laws and those of the republics, as well as all other regulations and by-laws must be in compliance with the Constitution of the FRY”.

\textsuperscript{180} The new Serbian Constitution was adopted on September 28, 1990. It, among other things, sought to prevent the endangering of constitutional rights of the Republic of Serbia in the SFRY. Thus, Art. 134 reads: “The rights and obligations which the Republic of Serbia, as component part of the SFRY, has under this constitution, and which are pursuant to the federal constitution exercised within the Federation, shall be exercised in line with the federal constitution”.

If the bodies of the Federation or acts of another republic, contrary to the rights and obligations they have under the SFRY Constitution, impair the equality of the Republic of Serbia or otherwise endanger its interests, without proper compensation, the republic bodies shall adopt appropriate acts for the protection of interests of the Republic of Serbia”. The constitution makers and their superiors naturally failed to specify what kind and size of compensation would suffice for the endangered Serbian constitutional rights and duties.
of the federal political level, and the confliction of the constitutions became practically unimportant.

The federal constitution directly permitted the internal use of the YA by assigning it the task of defending the constitutional order and protecting the territorial integrity of Yugoslavia. Prior to October 5, 2000 no one could have reliably predicted whether the YA would be used against the democratic opposition and citizens in Serbia, especially because the generals announced their intention to prevent a violent change of power. Since Milosevic renamed his conflict over the FRY constitution with the authorities in Montenegro into an alleged clash of “federalists” against separatists, there was a clear possibility for the army to intervene invoking its obligation to protect the Yugoslav territory (FRY Constitution, Art. 135).

The fact that the Army was assigned the mission to defend constitutional order was only the continuation of the constitutional tradition of the second Yugoslav state (1945-1991), which had allowed the army to become a key internal defender of the current political order and the ruling elite.

The Constitution of the Federal People’s Republic of Yugoslavia (FNRJ) of 1946 already anticipated that the Yugoslav Army, among other things “shall maintain peace and security”. The Constitutional Act of 1953 assigned the Federation, and thereby also its army, the duty (Art. 9) of defending the country and “protect the social and political order”. The SFRY Constitution of 1963 (Art. 114) refers to this as “the socialist social and political order of the republic,” and the obligation of the YPA (Art. 255) was to protect the “constitutional order” therefore also applied to its socialist nature. Constitutional amendment XLI of 1971 prescribes that the SFRY armed forces (item 3) consist of the YPA and Territorial Defense Units and that they, among other things, have the task of defending the constitutional order. The most recent SFRY constitution (passed in 1974) confirms the obligation of the armed forces (Art. 240) to protect “the constitutionally established social order of the SFRY”.

The constitution makers, naturally, avoided defining the contents and elements of the “constitutional order” that is to be protected. They also avoided specifying the ways of endangering this order. Thus the procedures and means the army should (might) use to protect this order were left out of the constitution.

Ideological determination of all constitutions passed by the second Yugoslav state, however, removed any doubt as to the subject of protection: socialist order, understood as the embodiment of the unlimited will of the Party and the Leader. The primary obligation of the army was thus to use all means to protect what was called “socialism”. Therefore the army had to guarantee the lasting political
monopoly of the Leader and the Party. The final result is well known – the YPA not only failed to protect the socialist constitutional order but also readily joined the destruction of its own state and a war waged against its own citizens.

Normative deflation of the FRY Constitution from this standard did not fill the constitutional gap. One could still only guess what the notion of the “constitutional order” actually means.

Equally ambiguous is the question how to identify the possible actors who may endanger the constitutional order and the ways it can be endangered. Also it remains unknown what the means at the disposal of the YA in defending the constitutional order The only certain thing is that it could only be done in the case of “internal unrest of larger scope when violence is used to endanger the constitutional order of the country”. Such a wide qualification of conditions requiring (military) defense of the constitutional order, actually leaves the judgment of the situation to the political will of the current rulers. This provision was usually used to derive discretionary authority of the federal bodies to limit the citizens’ rights and freedoms in states of emergency.

Another “gap” in the constitution is due to the omissions in prescribing the procedure for the supreme army command. The federal structure of the third Yugoslav state is the key reason for establishing the civil and collective supreme command of the YA. Since they had transferred part of their sovereign rights to the federal state, the federal units (republics) have right to (share in the) command of the YA through their representatives in the Supreme Defense Council. Thereby at least nominally, they retain the control over the central state defense and coercion apparatuses.

For functional reasons the implementing the decisions (commands) of the Council was delegated to a single member – the president of the FRY, who is at the same time president of the Council. This also responded to the operational requirements of the single-command principle and subordination in the military organization. At the same time, this solution was supposed to avoid simultaneous, un-harmonized tripartite command. In order to ensure that the authorized delegate does not endanger the rights of co-commanders, the Constitution strictly prescribes that he must adhere to the Council’s decisions in his command of the YA. The importance of this principle is confirmed by the fact that it was repeated in the Acts on the YA and Defense to the letter.

However, the constitution makers omitted to completely develop their concept of collective command. They failed to specify the Council’s decision-making procedure. Thus, it remains unknown whether the decisions require a consensus or majority vote.
Furthermore, it does not specify it the Council may pass decisions in incomplete composition or whether the presence of all three members is required for its decision to be considered valid.

On top of that the constitution makers did not prescribe the procedure establishing the compliance of the FRY President’s command with the Council’s decisions. It is therefore unknown whether the Council verifies the adherence of its delegated commander to the jointly adopted decisions and if so - how. In other words, does it confirm that his acts are legally founded on the Council’s decisions? Therefore, one knows how the Council may, if at all, sanction - e.g. revoke or amend, the orders of the FRY president it finds in breach with its own decisions.

The constitutional gap also exists with respect to procedures and instruments for the establishing political responsibility of the Council and President for their command of the Army. This completes the exemption of the Council and its members from any responsibility. It is not only that no one knows how individual responsibility of Council members is sanctioned, but we do not even know if this collective body is accountable to anyone at all. A wider interpretation could possibly establish control competences of the Federal Parliament. But, it could not prove the Parliament’s right to hold the Council and/or the FRY president politically accountable for a specific (non)action.

**DOS' Dilemmas**

The fact that the Democratic Opposition of Serbia (DOS) does not have a comprehensive program for reforming the sphere of civil-military relations had been revealed even before the opposition came to power. Lack of an intention to establish democratic control of the army was confirmed after the period of dual rule (October 2000 – January 2001). During this period the Federal Government issued a decree renaming the Defense Ministry into the Ministry of the Yugoslav Army. It thus reduced the sphere of defense and derogated the competences of the Ministry. To make things worse, the bulk of the Ministry staff still consists of military personnel and it objectively cannot act as the central civil supervisor of the Army.

The principal, self-legitimizing principle of the DOS and President Kostunica is legality. The effective scope of this principle has not been verified in the sphere of civil-military relations yet. Therefore, there is no evidence that the Army has been placed under democratic control. Namely, the enthronement of the authorities chosen by the citizens (DOS) created the first and essential condition for application of the concept. However, the required infrastructure
and effective submission of the army to the parliamentary and public control are still lacking.

The DOS' abandonment of its leading principle is also evident in the fact that the procedures for the removal of the constitutional and legal obstacles (collisions, “gaps”) in the way of establishing democratic control over the army have not been initiated yet. Moreover, the new authorities have not manifested sufficient will to use the existing regulatory capacities in securing at least parliamentary control. The whole issue has been reduced to frequent and public pledges of loyalty to the new president and democracy made by the military senior ranks since October 5, 2000. In turn, President Kostunica has on a number of occasions explained to the public his own reasons (“preserving institutions”, “concern for army morale”) for retaining the military top brass appointed by Milosevic. Not surprisingly, the leading generals still parade the public scene and, along the way, interfere in the going political processes unpunished.

It is not easy to grasp the reasons for the restrained approach to reform of the civil-military legacy. There are a number of objective circumstances and a few assumptions one could offer in favor of the DOS. The fact that the FRY remains a virtual state after the authorities of Montenegro have disconnected from it, partly justifies the DOS. Milo Djukanovic dropped by the Supreme Defense Council only once and apparently left pleased with the change in the command of the II Army Group. There is no evidence that he, or anyone else in the Council, actually tried to initiate swift, even if only personnel changes within the army and in relation to it.

The KLA spillover into the Serbian south may also be taken as a serious reason. Moreover, one should add the ongoing delicate transfer of power in Serbia, fraught with security risks, and assume that, under the current circumstances, the DOS has not wished, or dared, to open another front of political, social, ideological or propagandist nature. In other words, the DOS has judged that the new loyalty of the old military brass is sufficiently reliable and that it should not hurry in changing it. Finally, one should not exclude the assumption that this is due to the political calculation by the DOS members (leaders) based on their concealed efforts to assuming appropriate starting positions for future, post-election division of power.

Some New Characteristics of the Third Sector in Serbia/FRY

Eradication of the traditional forms of self-organization and self-help in the Serbian society was completed during the period of forced
industrialization and prevalence of communist provenience social engineering. The agitated citizens were brought together under the “umbrella” of a surrogate organization through countless branches of the Socialist Alliance of the Working People. That was, essentially, only an additional instrument for securing the communist monopoly. This was followed by the ten-year violent destruction of society, seasoned with the transition of communist authoritarianism to a plebiscitary caesarianism.

In sum, it is not easy to explain the pre-war appearance and the accelerated development of the third sector in Serbia/FRY. It would be fairly accurate to say that all this was encouraged by the early and more recent dissident groups (of all profiles) encountering the model of NGOs imported from modern societies. The internalization of the concept of civil society encouraged parts of the intelligentsia and the young population to adjust this model to local circumstances. In the absence of appropriate research it is difficult to say to what degree the flourishing of the NGOs reflected the needs of citizens or/and their other existential necessities. The experience suggests that in good many cases this was the outcome of both factors combined. This is partly confirmed by the high concentration of citizens from academic circles (university professors, scientists, judges, jurists, public and cultural personalities, etc) in the NGOs.

The wartime circumstances decisively influenced the effective self-profiling of the NGOs in Serbia/FRY. During the course of time, the focus shifted from politically benign aims towards three more specific directions: resistance to war and warlords, dealing with the consequences of the war and preparation of the society for the way out. This necessarily created a discrepancy between the proclaimed non-political nature of the NGOs and their enforced politicization. Finally, following the pace of self-termination of the ruling regime, NGOs entered the political domain and became participants in a pro-democratic coup. Political reach of the anti-regime activity of the NGOs was largely limited by the resistance of the leading opposition parties. They recognized the NGOs as a competitor not only in the struggle for public influence but also for the division of foreign assistance to change in Serbia.

Naturally, there was also a dark side to the whole story. It was decisively determined by the fact that the regime kept the third sector operating on the verge of legality. Their existence was accompanied by police pressures— from planting “moles” to the creation of phantom (regime) associations and dosed repression.

The combined effects of the existential motive and marginal legality generated a new grey (black) market. The emerging disloyal competition obstructed effective coordination and integration of the
third sector. Not the least contribution to the silent and concealed antagonism among the NGOs was provided by the donor foundations themselves with their lack of clear-cut criteria and support procedures. True, we must recognize the reality that most of the otherwise small number of foundations also lived a semi-underground existence.

The program orientation of NGOs was largely dictated by the demands of the war era and a self-destructing society. The absence of a substantial number of institutions specializing in the field of security and civil-military relations may be understood as a logical outcome of the general lack of knowledge and expertise. This is confirmed by numerous political-theoretical products of the NGOs which, in their examination of the causes for the war and prospects of creating “another” Serbia duly kept the police and the army beyond the entire context.

After Milosevic's electoral defeat and the initial dismantling of the regime in his service, changes spread to the third sector. What ensued was an unpublicized break of the temporary alliance between the DOS and the NGOs. The currently ruling parties are once again frowning at the NGOs and especially their intention to retain their public and control function. This is accompanied by a “brain drain” from the third to the state sector, which substantially depleted the power of the NGOs. In addition, the foundations have also channeled their activities towards the state and its institutions, leaving the NGOs without sufficient support. This created another obstacle. If the NGOs, in line with the principles of the civil society, are to become partners in the transformation of the old and the creation of the new environment, they are, today, obliged to first obtain the consent of the new power holders, which is not easy. That is why a large number of the NGOs are faced with the job of reconsidering their own purpose or re-channeling their programs and actions.

Civil-Military Challenge of the Third Sector

The temporary nature of everything in Serbia postpones the access of the NGOs to the security sphere. One could now hardly expect that the new and restrained power holders wish to let participants from the third sector onto the military turf. The only possibilities they still have are cooperation with other NGOs and publicly assist the stabilization of the emerging order. In this context, they must publicly identify the normative obstacles for placing the army under democratic control. While waiting for the fundamental reforms to be initiated they can only continue their research of the civil-military and civil-police relations. In addition, they have to intensify public promotion of the concept of democratic control of the
armed forces. For this purpose they must develop the new forms of public informing and specialized education for democratic control.

The need for security stabilization of the region imposes trans-border cooperation of actors in the third sector. This cooperation would, among other things, require opening channels for intra-regional transfer of knowledge and experience, standardization of procedures and the modeling of optimum, normative and institutional, solutions for democratic control of the army.

The creation of the Geneva Centre for the Democratic Control of the Armed Forces opened a number of opportunities for local NGOs, such as:

– contribute to the promotion of the very idea and help prove the need for democratic control of the armies in the region;
– implement publishing, educational and information programs to encourage the transfer of knowledge and experience acquired in the democratic transition of societies in the region;
– create a regional database to stimulate and facilitate intra-regional exchange of knowledge, information and experience in the democratic control of armed forces and modern arrangement of civil-military relations;
– prepare and publish periodical (semi-annual and annual) analyses and reports on the democratic control of armed forces and increase the transparency of civil-military relations in the states within the region;
– develop comparative studies assisting the creation of regulatory and institutional assumptions for the democratic control of the army in the states of the region;
– use various forms of educating professional soldiers (officers), public actors (journalists, political-party and NGO activists) and especially educators, so as to add to the more widespread application of the principle of democratic control of the army;
– implement research, educational and information programs contributing to the increase in protection of human rights in military organizations in the regional states;
– engage in the study of military organization and military profession in order to facilitate professional and democratic transformation of the armies in the regional states;
– create scientific-research and educational programs to spur the development of special scientific disciplines and the formation of experts in the sphere of civil-military relations;
– encourage regional linking of specialized NGOs;
– engage in the research of security aspects and implications of democratic control of armed forces and thus contribute to the security stabilization of southeastern Europe.
ANNEX

CCMR Findings on Necessary Initial Steps

For Serbia/FRY to meet modern standards of personal (citizen’s), social and state security it will be necessary to radically re-shape the military/defense sphere. This requires transformation of the inherited civil-military relations with the purpose of establishing civil control of the YA. This calls for a well-planned and meaningful transformation of the Yugoslav Army.

The initial assumptions of democratic civil control of the YA may be created by means of amendments to the constitutions of the FRY and Serbia, as well as the legislation on the YA and defense. Thus, the following elements of civil-military relations would need to be arranged:

1. Defending the Constitutional Order

   a. First alternative: abolish the YA obligation to defend the constitutional order
   b. Second alternative:
      – precisely define the notion of the “constitutional order” in the FRY constitution, as well as – the threats to it;
      – prescribe, in the Constitution and the laws on the army and the defense, detailed decision-making procedures regarding the military defense of the order and then strictly define the competences of the Army, as well as the objectives, forms and methods of its activity in this respect;
      – limit the internal use of the YA to a previous agreement of the federal and republic parliaments and anticipate a time limit for the re-examination, i.e. confirmation of such decisions;
      – prescribe consensus in adopting any decisions in the Supreme Defense Council concerning the use of the army in defending of the constitutional order;
      – oblige the Federal Constitutional Court to examine the compliance of the decision of internal use of the YA within 48 hours of its adoption and authorize the Court to annul any decision it may find faulty on that account and to order the restitution of the previous state of affairs.
2. Supreme Command of the Army

– Abolish all provisions of the Serbian Constitution referring to war and peace, armed forces and supreme command of the Serbian President;
– In the FRY Constitution, specify the manner of decision making of the Supreme Defense Council (identifying cases requiring consensus as opposed to those when voting is allowed) only in the full composition (with all three members present);
– Define the constitutional right of the Supreme Defense Council to control and sanction (non)compliance of the FRY president’s measures with its own decisions;
– Develop procedures and instruments for establishing political and legal responsibility of the Council and the FRY president in commanding the YA to the Federal parliament and the Constitutional Court;
– Separate the supreme command of the army in war and peace: e.g. list the activities and/or competences of the Supreme Defense Council and the FRY President to command in peacetime which have to be countersigned (approved) by the federal Prime Minister.

3. Relations Between the Defense Ministry and the YA General Staff

– The Yugoslav Army and its General Staff should, in times of peace, be submitted in the first instance to the Defense Ministry, while the constitution must provide that the defense minister is a civilian;
– Their peace and war-time competences must be differentiated and their mutual relations (superiority/submission) elaborated in detail;
– The subject matter and competences of the Defense Ministry and/or the YA General Staff in terms of regulating civil-military relations and relations within the Army by means of by-laws must be limited;
– The chief inspection of the YA must be subordinated to the Supreme Defense Council or the Defense Ministry;
– The military security service must be subordinated to the defense minister and the promotions and appointments made conditional on his approval.

4. Inspection, Supervision and Civil Control

– The concept and procedures for the civilian control of the army must be incorporated into the Constitution and laws, emphasizing the submission of the YA to the civilian, democratically elected authorities (a new article in the Constitution reading: “The YA shall be under the democratic civil control of the legally elected legislative and executive bodies and the citizens”);
– Legal regulations should underline the control dimension of the defense (YA) budget, and especially the procedures for controlling the spending of the funds accordingly appropriated;
– The Constitution and laws should authorize the Federal Parliament and its competent committee to oversee the YA and the defense system;
– An obligation of the Defense Ministry to deliver regular reports to the federal parliament and its appropriate committee on the situation regarding to the defense and the army must be introduced, along with

5. Protecting the Constitutionality and Legality in the Army

– The competences of military courts and prosecutors over civilians, especially in peacetime, should be reduced;
– The competences of the military security service and military police over professional soldiers and especially citizens should be scaled down;
– The extent of the military (state) secrets should be reduced and clearly defined;
– Constitutional guarantee of human freedoms and rights of professional soldiers as well as citizens when within the reach of the Army should be introduced along with an YA General Staff and the Defense Ministry obligation to respect international conventions in war as well as in peace;
– The legal institution of direct appeal by army members to the defense minister and the Federal parliament (Committee) should
be introduced, including their obligation to address such complaints in due course, while fully protecting the identity of the complainant;
– Legal regulations elaborating and guaranteeing the right to civilian military service and conscientious objection should be adopted.

6. Control Role of the Public

– Constitutional and legal guarantees of the right of the media, NGO’s, civil professional institutions and citizens to partake in the democratic civil control of the army and the defense system should be provided;
– The Defense Ministry and the YA General Staff should be obliged to ensure regular (and as requested) accurate informing of the public and institutions of civil society (naturally, in line with the regulations governing military secrets).
Jeff Fischer

DEMOCRATIC CONTROL OF ARMED FORCES AND KOSOVO
Security in the Absence of State

Introduction

The security environment of Kosovo will be a major determinant in the eventual shape and scope of “substantial autonomy and meaningful self-administration”181 envisioned by the United Nations for the former Serbian province currently under international administration. It is this need for security in the absence of state that makes control of the armed forces an important issue as Kosovo defines itself as a political and territorial entity. And, it is the democratic control of these forces that is the key to demilitarizing the situation and fostering development of political processes to replace violence as a means of achieving governance.

This interim status of Kosovo is at the core of the “absence” of “state.” The use of these words, “absence” and “state,” is intended as more of a descriptive context than a legal one. In fact, Kosovo remains part of the Federal Republic of Yugoslavia (FRY), but its status within Serbia is under review. The United Nations has supreme authority in the governance of Kosovo as long as Security Council Resolution 1244 is in effect.

Rather than stateless, the case could be made that Kosovo is “bi-stated,” with two tiers of provincial administration (laws of FRY and UN Civil Administration). In either case, the practical result has been an absence or delivery gap in many state-provided, public services to the people of Kosovo. An example of one such delivery gap is public security.

The organization and control of armed forces involving Kosovo can be classified into three major categories: 1) international forces under multi-lateral control; 2) national forces under government control; and 3) insurgent forces under local control. Within these three
categories, there is the additional need to identify forces as military, police, or paramilitary in nature. In the case of Kosovo, the term “armed forces” must be broadly defined to cover the array of organizations that include combatants, police, emergency services, insurgents, and criminals.

Specifically, the armed forces include the Kosovo Force (KFOR), United Nations (UNMIK) Police, Kosovo Police Service (KPS), and the Kosovo Protection Corps (KPC). Outside of Kosovo, there is the Yugoslav (VJ) and Macedonian military (ARM) and comparable police units. The insurgent ethnic Albanian groups such as the National Liberation Army (NLA) operating in Macedonia and the UCPMB in Serbia can also be included under this definition.

**Armed Forces**

**KFOR**

In the security hierarchy, at the pinnacle is the Kosovo Force (KFOR), the principal armed force in theatre. KFOR possesses substantial resources provided by the North Atlantic Treaty Organization (NATO). KFOR’s mandate is based upon the June 10, 1999 Security Council Resolution 1244 and its Annexes. The Resolution makes several general statements about security in Kosovo.

Demands in particular that the Federal Republic of Yugoslavia put an immediate and verifiable end to violence and repression in Kosovo and begin and complete verifiable phased withdrawal from Kosovo of all military, police, and paramilitary forces according to a rapid timetable, with which the deployment of the international security present in Kosovo will be synchronized.\(^{182}\)

In addition, the Resolution states, “… the deployment in Kosovo, under United Nations auspices, of international civil and security presences…”\(^{183}\)

In addition to these general provisions, there are eight legislated responsibilities described in Section 9 of the Resolution providing the statutory parameters for the KFOR presence. Summarizing the Resolution, those eight responsibilities are:

1. Deterring hostilities and enforcing the ceasefire;
2. Demilitarizing the Kosovo Liberation Army (KLA);

\(^{182}\) Resolution 1244, Section 3
\(^{183}\) Resolution 1244, Section 5
3. Establishing a secure environment for returns;  
4. Ensuring public safety;  
5. Supervising demining;  
6. Supporting the international civilian presence;  
7. Conducting border monitoring; and  
8. Ensuring freedom of movement.  

And, Annex 1 (G-8 Ministers) echoes the mandate, “Deployment in Kosovo of effective international civil and security presences, endorsed and adopted by the United Nations, capable of guaranteeing the achievement of the common objectives.”  

Forces from NATO are specifically authorized to participate in Annex 2, Section 4 as it states, “The international security presence with substantial North Atlantic Treaty Organization participation must be deployed under unified command and control and authorized to establish a safe environment for all people in Kosovo…”

**UNMIK Police**

Security Council Resolution 1244 requires the creation of an international civilian police under UN administration. As KFOR is the lead security force for the military dimension, the UNMIK Police must be considered similarly in the arena of civilian policing.

**The two main tasks of the UNMIK Police are “to provide temporary law enforcement and to develop a professional and impartial Kosovo Police Service (KPS) trained in democratic police work.”**

During the final phase of the UNMIK Police mission, policing responsibilities will be handed over to the KPS and the international police will become international police monitors to assure that the handover has been successful.

In full force, the UNMIK Police would number around 5,000 officers. Over 47 countries have sent officers to serve with the UNMIK Police. A Police Commissioner who exercises all operational, technical, and disciplinary authority over all police personnel commands the UNMIK Police Force. He reports to the Special Representative of the Secretary General (SRSG). The UNMIK Police organization is divided into three sections: 1) Civilian police (CIVPOL), regular policing and criminal investigation; 2) Special Police Units; and 3) Border Police.

The UNMIK Police collaborate with the Organization for Security and Cooperation in Europe (OSCE), which operates the Kosovo

---

184 Resolution 1244, Annex 2  
185 UNMIK Police web site
Police Service School, the training academy for the KPS. The curriculum includes crime investigation, defense tactics, legal affairs, first-aid, conflict intervention, forensics, and democratic policing “in which loyalty toward the democratic legal order is the focus.”\textsuperscript{186}

**Kosovo Police Service**

A strategic emphasis has been placed on the Kosovo Police Service (KPS) to be the lead local security partner of the UNMIK Police and KFOR as required. Reasons for the emphasis can be speculated to include a desire on the part of UN administrators to contrast the professionalism of the KPS with that of their predecessors, the MUP. Following the 1999 conflict, the Serbian police (MUP) were removed from the province as the police force. In addition, the KPS is a civilian force. As discussed in the section on the Kosovo Protection Corps (KPC), both KPC’s membership and public persona give it a military appearance and create confusion over its security role when it has none. There is no such ambiguity surrounding the role and responsibility of the KPS.

The KPS has also been successful at diversity in staffing. In fact, the KPS was the first functioning multi-ethnic institution in post-conflict Kosovo. Among the over 3,500 officers who have graduated from the Kosovo Police Service School, 20% are women and 10% are minorities, many from the Serb community.

As the ranks of the KPS grow, it will assume greater responsibility and numerical presence where UNMIK Police once worked. Over the long term, the UNMIK Police will phase out and hand over their policing activities to the KPS.

**Kosovo Protection Corps (KPC)**

It is a common misunderstanding that the Kosovo Protection Corps (KPC or TMK in Albanian) is being groomed as a National Guard or paramilitary organization. It is easy to understand the confusion. The KPC was established as a demobilization vehicle for the fighters of the Kosovo Liberation army (KLA) to transition to civilian life. As such, its genesis is a military one. The misunderstanding may be reinforced by military-style uniforms and weaponry carried by KPC members. There is a KPC barracks just outside of Pristina adjacent to a bombed out VJ barracks site. The

\textsuperscript{186} OSCE web site
KPC is divided into regional task groups (RTGs) that correspond to KFOR’s Multi-National Brigade (MNB) boundaries. KFOR is also formally delegated the responsibility of supervising the day-to-day activities of the KPC, giving a military to military impression. Finally, in the Albanian language, its alternative acronym, TMK, stands for Trupate E Mbrojtjes, a name that reportedly carries a military connotation not conveyed in the English equivalent. In many respects, the KPC convey a public persona that is judged more military in character than of park rangers or fire fighters.

Those factors aside, the mandate of the KPC is not security oriented, it is emergency oriented. The mandate is crafted in UNMIK regulation 1999/8 and describes the KPC as a civilian emergency service agency, with the following five tasks:

1. Provide disaster response services;
2. Perform search and rescue;
3. Provide a capacity for humanitarian assistance in isolated areas;
4. Assist in demining; and
5. Contribute to rebuilding infrastructure and communities.  

Although there is some required clarification of fire, ambulance, and rescue responsibilities with the municipal authorities, the statutory intent of the original regulation was obviously to demilitarize the organization. In fact, it was proposed that the KPC vote in advance of the October 2000 Election Day, a common military voting practice. The SRSG’s office objected to these arrangements because it is a common military voting practice. The KPC has been compared to the French Civil Emergency Organization.

The KPC has also been subject to charges of excess and criminality even after its date of formal establishment on January 21, 2000. These alleged misdeeds include murder, “prisoner” mistreatment, illegal policing, collection of fictitious “taxes”, protection, and other forms of intimidation for compensation.  

Although there is supposed to be a 10% minority quota in the KPC, it is almost exclusively ethnic Albanians (there are a reported 75 non-Albanians in the KPC) and there are no Serbs among the 5,000 members.

Therefore, neither the designs of the UN administration nor the behavior of the KPC are moving events toward a formal re-militarization of the former ethnic Albanian combatants.

Forces Outside of Kosovo

187 Overview of Kosovo Protection Corps, UNMIK Publication, page 1
188 Memorandum Assessment of Kosovo Protection Corps, February 29, 2000
Outside of Kosovo, in the Presovo Valley (Serbia proper), the Yugoslav military have gained new security responsibilities by NATO in the former Ground Safety Zone (GSZ), a five kilometer safety zone between parts of Kosovo and Serbia proper established after the 1999 conflict. KFOR found it difficult to control the movement of the UCPMB, the ethnic Albanian insurgents operating in the area, in and out of the zone, Serb police (MUP) became the frequent targets of attack, and KFOR and the VJ devised a deployment plan. The Macedonian military (ARM) and police became regional security players in 2001 in their combat against the ethnic Albanian National Liberation Army (NLA).

### Control of Armed Forces

Within Kosovo, KFOR, UNMIK Police, and KPS have a role in law enforcement and are subject to UN supervision. Legal supervision in Kosovo is a combination of the supremacy of Security Council Resolution 1244 and its Annexes followed in the hierarchy by newly constituted regulations that are signed by the SRSG with the concurrence of the UN Secretariat in New York. Depending upon the topic, a regulation could be vetted in New York with the Department of Political Affairs (engaging divisional specialists), the Department of Peacekeeping Operations (engaging international civilian police), and Department of Legal Affairs. On the secondary tier, Administrative Directions can be executed by the SRSG without consultation. Where these laws are not precedent, applicable Yugoslav law may apply.

Although the United Nations is given supremacy in Kosovo governance, the mandate and assets of the international military and police forces are substantial. The security situation in Kosovo is so tenuous that the UN civilian administration has a substantial dependency on the international military to maintain sufficient public order so that governance can occur. The mission could not proceed without their presence.

### Security and State

The security situation in Kosovo is a consequence of the conflict and its antecedents; a UN administration struggling to fulfill its governance responsibilities; and societal pressures that easily provoke individual and collective disputes.

In its state-like role, there are five major security challenges facing the civil administration.
1. Returning and securing placement of Serbs displaced to Serbia proper back to their homes in Kosovo;
2. Resolving the ethnic Albanian prisoner release and ethnic Serb missing person issues;
3. Restoring neighborhood security to ethnic Serb and other minority streets, apartment buildings, and other enclaves;
4. Demilitarizing ethnic Albanians insurgents operating in Macedonia and the Presovo Valley/Serbia; and
5. Reducing intra-ethnic criminal rivalries.

These specific challenges combine with the day-to-day threats to the population of crimes such as murder and trafficking in drugs and people; terrorist attacks against “opponent” positions; bombings; landmines and unexploded ordnance.

The international and governmental armed forces have the lead role in the management of conflictive behavior in Kosovo. This conflictive behavior possesses ethnic, economic, and social dimensions. The ethnic dimension involves the protection of minorities, in particular, the ethnic Serbs from retaliatory ethnic Albanians. Smaller communities of Moslem Slavs such as the Gorani and Ashkali are singled out for ethnically motivated intimidation by one side or another. The Roma have also been targets of intimidation. In addition, there are intra-ethnic rivalries played out through criminal activities and violent politics.

It is the flight of ethnic Serbs from Kosovo and the failure of the international community to ensure the security of their return that has been a major obstacle in efforts to politically integrate the two largest communities. A political break-through to engage the ethnic Serb community in the political life of Kosovo hinges upon their security, in particular, the security of perhaps 100,000 returning ethnic Serbs who fled the majority ethnic Albanian neighborhoods where they lived before 1999. A registration in 2000 of displaced persons from Kosovo to Serbia by the United Nations High Commissioner for Refugees (UNHCR) placed the total figure at around 187,000.

The faltering economy contributes to security problems. In survey research conducted in mid-2000, 30.32% of respondents listed unemployment as the primary problem facing residents of Kosovo. Crime and violence were considered the second most serious problems (21.20% of respondents), followed closely by concerns over the economic situation in general (19.07% of respondents). With such concerns, it is not unprecedented that frustration manifests itself through violence. It is obviously outside of the direct responsibility of armed forces to manage economic issues. However, an improvement

---

189 Prism Research conducted for OSCE Elections 2000
in the security climate could be seen as a harbinger for the economic climate resulting in consumers and investors gaining more confidence in Kosovo as a place to conduct trade.

There is a crosscurrent of social issues, behaviors, and expectations at play in the security environment. These issues include the conditioned responses by people to threats against them or their interests. The responses are colored by such group conditioning as the familial security affiliations among ethnic Albanians or the authoritarian Milosevic regime on the attitudes of ethnic Serbs. The proliferation of firearms playing a daily role in settling disputes, protecting family and friends, and celebrating special events and holidays, also has a security dimension to it.

Finally, there is also a regional stability dimension to the Kosovo security scenario. It must be noted that to the southwest, Albania remains fragile as a consequence of the massive civil unrest experienced there in 1997 precipitating the fall of the first democratically elected president, Sali Berisha. To the southeast, Macedonia was drawn into the cycle of conflict in 2001. A European Commission and US-backed peace agreement is currently being implemented. NATO has been deployed in Task Force Harvest (TFH), a weapons collection from primarily targeted at ethnic Albania insurgents. In Serbia and the FRY, a delicate political transition is underway to replace Milosevic’s people, policies, and tactics. Finally, Bosnia and Herzegovina experienced ethnic tensions in 2001 in Croat areas requiring SFOR troops to quiet street rioting.

In such an environment, the challenge to international and governmental armed forces extends beyond the blunt superiority they possess in keeping the peace as a result of their assets, numbers, and training. These forces must also reduce the opportunities for friction among potential antagonists. The techniques employed to reduce these opportunities include notifications on holiday and public events, close protection of key figures, checkpoints, minority community and business protection.

Security and Status

The elections to be held in 2001 will create a Kosovo-wide assembly. Although transitional in nature and limited in authority, one of its qualities will be to represent Kosovo as the negotiating entity in talks on the resolution of the interim status. Until there is a Kosovo “side,” duly elected to represent the Kosovo positions at negotiations, the status question will remain open. This uncertainty of territorial and political status is a further grassroots destabilizing influence.
Under a 2001 election calendar, status talks could potentially begin in 2002. However, neither the international community nor the regional players are pushing for early negotiations. This means that an international security presence would be required at least through a KFOR 5, 6, 7 and 8 (into the first half of 2003).

**Key Issue Summary**

There are 12 key issues that emerge from this analysis and provide a summary of the situation.

1. The success of the UN civil administration in managing the security situation in Kosovo will be a major determinant on the eventual shape and scope of “substantial autonomy and meaningful self-determination.”

2. Armed forces will play a significant role in this process and their democratic control will promote a de-militarization of the situation.

3. Without international protection, its interim status exposes Kosovo to advances by governmental and insurgent armed forces.

4. As the surrogate state or provincial government, the UN civil administration must functionally replace the public services that used to be delivered by an established, authoritarian government. Gaps have been experienced in the delivery of services such as public security.

5. The strategic security partner of the international community is the KPS, which has received recognition for its professionalism, and gender and ethnic diversity.

6. The military demeanor of the KPC has blurred the popular perceptions about its non-military role in emergency services for Kosovo. The KPC is not regarded by the international community as a nascent “National Guard.”

7. The UN civilian administration has extraordinary powers of governance; however, the impact of the security situation on its ability to govern has created a substantial dependence by the administration upon KFOR, the UNMIK Police, and KPS.

8. Insurgent ethnic Albanian forces have militarized the relationship with Macedonia and re-militarized the Ground Safety Zone with VJ presence.

9. Improvements of the security situation mean resolution of five major security challenges including ethnic Serb returns, prisoner and missing person issues, minority enclaves, de-militarizing insurgent groups, and reducing intra-ethnic rivalries.
10. Resolution of the security situation is not a matter for the armed forces alone, but rather, there are ethnic, economic, and social issues that influence security in day-to-day life.

11. Armed forces must create situations where the opportunities for friction among potential antagonists are minimized.

12. Security is connected to the timetable for the resolution of the status issue and the uncertainty created by an absence of direction on this matter.

Conclusion

There is the potential for other Kosovo-like governance scenarios to occur. A “Kosovo scenario” is an interim international administration in a post-conflict environment. Intense status disputes exist in such locales as Kashmir, Tibet, Nagorno-Karabakh, Aceh and northern Iraq that could someday require international security forces and administration in supervising transitions in territorial and political status.

In order to avoid the absences and gaps that have been experienced in Kosovo, the international community, both armed forces and civilian administrators, should develop “advance response scenarios” for territories where disputes exist and there is the potential for the international community to provide transitional governance and security. These scenarios can serve to define the roles of international and regional armed forces well before engagement discussions are considered.

The methodology for an advance response scenario is to identify a particular territorial dispute and develop a series of plans that reflect the responses by the international community to the plausible outcomes. The advance response scenarios are an integrated armed force and civilian plan that identify the case-by-case issues and requirements associated with the initiation of an internationally administered, post-conflict government.

By having such a set of scenarios in place, the international community can be in a better position than in the past to anticipate the challenges and obstacles associated with such transitional administrations. The scenarios may propose models for electoral and governance institutions as well as take up practical matters such as funding, staffing, and other logistical requirements. With such a planning foundation in place, the international community can proceed with security and governance possessing better insights and expectations that has been the case in Kosovo.
ABOUT THE AUTHORS

Biljana Vankovska

Professor at the University of Skopje (Macedonia), currently working as Senior Fellow at Geneva Center for Democratic Control of Armed Forces. She has been visiting lecturer at several US universities, the George Marshall Center, and served as guest Senior Research Fellow at Copenhagen Peace Research Institute (COPRI) between 1997 and 2000.

A member of the Executive Board of the IPSA/RC on Armed Forces and Society. International advisor at the Transnational Foundation for Peace and Future Studies in Lund. Member of the International Board for the BalkanPeace Network, University of Ottawa.

She has published two books in Macedonian and one in English and authored several book chapters and journal articles published in *inter alia* Bulgaria, Germany, Croatia, India, Albania, Yugoslavia, Romania, Austria and USA.

Plamen Pantev

Associate Professor in International Relations and International Law at the Law School, Department of International Relations of Sofia University "St. Kliment Ohridsky", Sofia. He is founder and Director of the Institute for Security and International Studies (ISIS), Sofia, Bulgaria and author of four books and more than one hundred other academic publications in the fields of international relations, international law, security studies, civil-military relations and international negotiations.

Vojin Dimitrijevic

Doctor iuris, University of Belgrade; Doctor of Laws *honoris causa*, McGill University, Montreal. *Associé, Institut de Droit International.* Director, Belgrade Centre for Human Rights. Professor of International Law and International Relations, University of Belgrade School of Law, until dismissed in 1998. Chairman, Council of the Institute for International Politics and Economy, Belgrade. President, Yugoslav Association for International Law. Associate member of the Venice Commission for Democracy through Law, Council of Europe. Former member, Rapporteur and Vice-Chairman of the UN Human Rights Committee.
Lidija R. Basta Fleiner
Professor of Constitutional Law and Director of the International Research and Consulting Centre (IRCC), Institute of Federalism, University of Fribourg, Switzerland. Her main academic and teaching fields are: legal, state and political theory and comparative constitutional law (primarily individual rights and freedoms and constitutionalism in general, as well as theory and institutions of federalism and minority protection in particular; also constitutional aspects of transition in Central and Eastern Europe). In recent years, she has published the following books: “Federalism and Decentralization in Africa: The Multicultural Challenge” (coauthor, 1999); “Rule of Law and Organization of the State in Asia” (coauthor, 2000); “Constitutional Reform in Serbia and Yugoslavia” (coauthor, 2001).

Ilona Kiss
Program director of the military justice and conscripts’ rights advocacy projects with the Constitutional and Legal Policy Institute (OSI/COLPI). In 1996, she founded and then directed the Russian Studies Center at the Open Society Institute-Budapest. Her main research areas are history and present processes of Russian politics and culture. She has published more than one hundred and fifty analytical articles on post-Soviet politics and culture, translated a great number of works on Russian philosophy, sociology, political science, and arts, translated and/or edited books on Russian humanities. She is the Editor-in-Chief of the political and cultural monthly journal, “Beszélő”.

Peter Rowe
Professor of Law at the University of Lancaster Law School, England. Formerly, Professor of Law in the Faculty of Law at the University of Liverpool (1988-95). Published, Rowe, Defence: the Legal Implications (Brassey’s, London, 1987); Rowe (editor), The Gulf War 1990-91 in International and English Law (Routledge, 1993), articles in journals.

Jan Oberg
Marie Vlachova
Military sociologist, employed with the Czech Republic Ministry of Defense. Head of Research Department of the MOD since 1995. In 1999 - 2001 the Czech delegate to the NATO Committee for Women in Armed Forces. In 2001 seconded to Geneva Center for Democratic Control of Armed Forces (DCAF) for a two-year stay. She is devoted to security and defense reform of the Czech Republic and coordinating the Geneva DCAF working group on Military and Society.

Alexander I. Nikitin
Director of the Center for Political and International Studies, Russia – a independent non-governmental research institution involved in analytical work, consulting, publishing, organization of conferences in the spheres of international security and international relations. Professor of the Department of Political Sciences in the Moscow State Institute of International Relations. International Research Fellowship with the NATO Defense College (NDC) in Rome (Italy) in 1996. Guest lecture courses in the University of Iowa (USA), NDC (Rome), Geneva Center for Security Policy (GCSP). Vice-President of the Russian Political Science Association and Executive Board member of the Russian Academy of Political Sciences. Vice-Chairman of the Russian Pugwash Committee of Scientists for International Security and Disarmament. Author of 3 monographs and more than 70 articles and chapters in academic periodicals, journals and books.

Vaidotas Urbelis
Research Fellow at Vilnius University, Institute of International Relations and Political Science. His academic interests include theory of strategy and war, peace studies, US and Russian foreign policy.

Nansen Behar
Director of Institute for Social and Political Studies in Sofia and Professor of International Economic Relations. He served as a deputy chair of the parliamentary committee on national security in the 38th National Assembly of Bulgaria. He has published several monographs on the economic aspects of national security, security challenges in South Eastern Europe, civil-military relations, etc. He is associated with numerous international professional and academic associations. Member of Pugwash and Transcend Networks.

Ljubica Jelusic
Associate professor of military sociology, polemology and peace studies in the Faculty of Social Sciences, University of Ljubljana, and is currently serving as Head of Defense Studies department at the

Marjan Malesic
Associate Professor at the Faculty of Social Sciences, University of Ljubljana. He received his M.A. and Ph.D. degrees in Defense Studies from the University of Ljubljana. His current research topics are crisis management, security policy, conscription vs. All-Volunteer Force, mass media and public opinion on security issues. He currently serves as a Head of the Defense Research Centre at the Faculty of Social Sciences, University of Ljubljana, and as a Chairman of ERGOMAS (European Research Group on Military and Society). His main publications in recent years include: (ed.). Propaganda in War (1997), Stockholm: SPF, (ed.). International Security, Mass Media and Public Opinion (2000). Ljubljana: FDV; and Peace Support Operations, Mass Media and the Public in former Yugoslavia (2000). Stockholm: SPF.

Dimitrios Koukourdinos
PhD candidate at the Government Department, the London School of Economics and Political Science. His research focuses on the creation of military structures, as an integral part of state-building and democratization in former Yugoslav republics. He has contributed articles to the monthly Greek magazine, Epikentra and currently he is research fellow at the ‘Constantine Karamanlis Institute for Democracy’, in Greece.

Miroslav Hadzic
Senior research fellow in the Institute of Social Sciences in Belgrade, Ph.D. from the Faculty of Political Science, University of Belgrade. He abandoned the Army of Yugoslavia at his own request in January 1994, holding the rank of Colonel. He concluded his two-decade teaching career at the Higher Military-Political College of the Yugoslav People’s Army with the title of associate professor. Most of his research efforts during the past decade have focused on civil-military relations and the security risks in South-Eastern Europe. This year he published the books: “Chronic Shortage of Security – the Case of Yugoslavia” and ‘Fate of the Party Army”. He edited two collections of works addressing the democratic civilian control of the army and police in the FR Yugoslavia. One of the founders and the acting director of the Centre for Civil-Military Relations, NGO, Belgrade.
Jeff Fischer
Currently serves as a Senior Advisor for Elections at the International Foundation for Election Systems (IFES). Served as the organization’s Executive Vice-President from 1993 to 1999 where he directed daily operations of all IFES departments and programs. In 1996, he was appointed by the OSCE to serve as Director General of Elections for the first post-conflict elections in Bosnia and Herzegovina. In 1999, appointed by the UN as Chief Electoral Officer for the Popular Consultation for East Timor. In 2000, appointed by the UN and OSCE to head the Joint Registration Taskforce in Kosovo and served as the OSCE’s Director of Election Operations in Kosovo. He has also directed IFES technical assistance projects in Haiti (1990-91) and Guyana (1991-92). Also worked on election assistance, observation, or conference projects in over twenty countries.
In spite of the progress made in the past decade, the transformation and management of democratic civil-military relations remain a major challenge to many States. This is particularly true for the countries in transition towards democracy, war-torn and post-conflict societies. Armed and paramilitary forces as well as police, border guards and other security-related structures remain important players in many countries. More often than not, they act as "a State within the State", putting heavy strains on scarce resources, impeding democratization processes and increasing the likelihood of internal or international conflicts. It is therefore widely accepted that the democratic and civilian control of such force structures is a crucial instrument in preventing conflicts, promoting peace and democracy as well as ensuring sustainable socio-economic development. The strengthening of democratic and civilian control of force structures has become an important policy issue on the agenda of the international community. As a practical contribution to this general and positive trend, the Swiss government established the Geneva Centre for the Democratic Control of Armed Forces (DCAF), in October 2000, at the joint initiative of the Federal Department of Defense, Civil Protection and Sports and the Federal Department of Foreign Affairs.

Mission

The Centre encourages and supports countries in their efforts to strengthen democratic and civilian control of force structures and promotes international cooperation in this field, with an initial focus on the Euro-Atlantic region. To implement these objectives, the Centre:

* collects information, undertakes research and engages in networking activities in order to identify problems, establish lessons learned and propose best practices in the field of democratic control of armed forces and civil-military relations;
* provides its expertise and support in a tailor-made form to all interested groups, in particular governments, parliaments, military authorities, international organizations, non-governmental organizations, academic circles. DCAF works in close cooperation with national authorities, international and non-governmental organizations as well as relevant academic institutions and individual experts. In its operational and analytical work, DCAF relies on the support of 30 governments represented in its Foundation Council, on its International Advisory Board comprising some 40 renowned experts, its own Think Tank and its working groups. Furthermore, DCAF has established partnerships or concluded cooperation agreements with various institutions, such as research institutes, international organizations and inter-parliamentary assemblies.

**Work Program**

In order to be able to thoroughly address specific topics of democratic control of armed forces, DCAF has established or plans to establish twelve dedicated working groups covering the following issues: security sector reform; parliamentary oversight of armed forces; legal dimension of the democratic control of armed forces; transparency-building in defense budgeting and procurement; civilian experts in national security policy; democratic control of police and other non-military security forces; civil-military relations in conversion and force reductions; military and society; civil society building; civil-military relations in post-conflict situations; criteria for success or failure in the democratic control of armed forces; civil-military relations in the African context. Planning, management and coordination of the working groups is focused in the Center's Think Tank. DCAF provides expertise on bilateral and multilateral levels as well as for the general public. A number of bilateral projects in the areas of security sector reform and parliamentary control of armed forces have been initiated in support of the Federal Republic of Yugoslavia, the Republic of Serbia, Bosnia and Herzegovina as well as Ukraine. At the multilateral level, DCAF implements several projects in the framework of the Stability Pact for South Eastern Europe and the Organization for Security and Cooperation in Europe. To reach specialized and general audiences, the Centre regularly organizes conferences, workshops and other events, produces publications and disseminates relevant information by means of information technology, including its own website (<http://www.dcaf.ch>).
Organization and Budget

DCAF is an international foundation under Swiss law. Thirty governments are represented in the Foundation Council.* The International Advisory Board is composed of the world's leading experts in DCAF's areas of interests, acting in their personal capacity and entrusted with advising the Director of DCAF on the Center’s overall strategy. DCAF staff comprises 30 specialists from 15 nations, who work in four departments: Think Tank, Cooperation Programs, Information Resources, Administration & Logistics. The Swiss Federal Department of Defense, Civil Protection and Sports finances most of the DCAF budget, amounting to 7.1 million Swiss Francs in 2001. Another important contributor is the Federal Department of Foreign Affairs. Certain member States support DCAF by seconding staff members or contributing to the Center’s specific activities.

Contact
For additional information please contact:
Geneva Centre for the Democratic Control of Armed Forces (DCAF)
Rue de Chantepoulet 11, P.O.Box 1360, CH-1211 Geneva 1,
Switzerland
Tel: +41 (22) 741-7700; Fax: +41 (22) 741-7705;
E-mail info@dcaf.ch; Website: www.dcaf.ch
CENTRE FOR CIVIL-MILITARY RELATIONS,
BELGRADE

The Centre for Civil-Military Relations in Belgrade is a non-governmental, independent, non-profit and non-political association of citizens. It deals with research, information and education. It was established in 1997.

The Centre has integrated researchers with various scientific qualifications who possess theoretical and practical experiences from the military organization.

The Centre has established cooperation with many domestic and foreign non-governmental organizations. It develops professional cooperation and exchange of information with individuals and similar institutions.

In organizing and carrying out research on civil-military relations, as well as through cooperation with similar domestic and international associations and scientific institutions, the Centre strives:

◊ To contribute to the increase of transparency of civil-military relations in the FR Yugoslavia;
◊ To animate the professional and political interest of citizens, their associations, political parties, parliamentary and state organs for a modern organization of civil-military relations in the FR Yugoslavia;
◊ To raise and stimulate public interest in the increase of rationality and efficiency of the FRY system of defense;
◊ To emphasize the need and support a faster inclusion of the FRY in regional and other international collective security organizations;
◊ To assist media, through various educational programs, in better understanding of civil-military relations;

So far the Centre has completed the following research and informative-educational projects:

• Workshop for Civilian Control of the Army and Police – a seminar for the media and journalists carried out in Belgrade and 9 other cities in Serbia and Montenegro. Completed in April 2000.
• Normative Prerequisites for Civilian Control of the Army and Police in Serbia/Yugoslavia – project completed in August 2000 in cooperation with the Center for Advanced Legal Studies, a NGO from Belgrade.
• The Centre has held four round tables with the subjects from its field of research:
  Civil-Military Relations in the FRY (May 1998), Media Image of the Army of Yugoslavia (September 1998 in cooperation with the Media Center from Belgrade), Army and Police in Ethnic Conflicts (December 1998 in cooperation with the Forum for Ethnic Relations), The Army of Yugoslavia at the Watershed of Crisis (August 1999 in cooperation with the Civic Alliance of Serbia).
• In cooperation with the Belgrade Centre for Human rights the Centre held a scientific conference Protection of Human Rights and Freedoms in the Army of Yugoslavia (January 2001)
• Democratic Civilian Control of the Army of Yugoslavia – a conference organized in April 2001, together with the FRY Federal Ministry of Defense.

Current projects include:
• Protection of Human Rights in the Army and Police of the FR Yugoslavia – a project in the final stage of completion
• TV Workshop for Democratic Control of the Army – project for 7 TV programs prepared in cooperation with the Production Group TV Network from Belgrade.
• Informative-Educative Seminars on Democratic Civilian Control of the Armed Forces – for members of the Federal Ministry of Foreign Affairs, Ministry of Defense and Yugoslav Army General Staff in collaboration with the Geneva Centre for the Democratic Control of Armed Forces

So far the Centre has published three books: Civilian Control of the Army and Police, in Serbian and English. Democratic Control of the Army and Police in Yugoslavia – Normative Prerequisites, and Chronic Shortage of Security – the Case of Yugoslavia in Serbian. The Centre has also published four issues of the Center’s Bulletin in Serbian and one issue in English.

A collection of papers, Protection of Human Rights in the Army and Police of the FRY will be published by the end of the year.
The members of the Centre took part in the New Serbia Forum and many international scientific conferences. They participate in the third working table of the Stability Pact for SE Europe.

Centre members actively cooperate with many domestic and international media, including the BBC, Free Europe and others.

CONTACT:

For additional information please contact
Centre for Civil-Military Relations
Cetinjska 30/1, 11000 Belgrade, Yugoslavia
Tel/fax: +381 11–32–45–675
e-mail: ccmr@eunet.yu