

ARMENIA AND DEMOCRATIC CONTROL OF THE ARMED FORCES
ANALYSIS AND PERSPECTIVES

"Views, comments and conclusions expressed in the articles do not necessarily reflect the views of the OSCE or OSCE Office in Yerevan"

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FOREWORD

The thematic unity of the articles collected in this publication is the OSCE Code of Conduct on Politico-Military Aspects of Security which is one of the main OSCE's mechanisms to address global security challenges. Negotiated in the Forum for Security Cooperation (FSC) and adopted at the 1994 Budapest Summit, it still remains a unique document aimed at regulating the role of armed forces in democratic societies. The Code reiterates and deepens the main principles of the Helsinki Final Act developing the "rule of a game" between participating States, basically concerning the non-use of force. However, the Code furthers beyond the logic of the Helsinki Final Act defining important norms and "behavioral standards" of politico-military aspects at intra-state level.

From perspective of democratic control over armed forces the sections VII and VIII explicitly describe commitments by participating States to develop a comprehensive mechanism of civilian control over their armed forces, including military, paramilitary and security forces, intelligence services and the police. Without effective democratic civilian control and governance of security sector institutions, there will be no substantial progress in terms of overall security, which will also have adverse influence on economic and human dimensions of security. Therefore democratic civilian control of armed forces, which logically implies inclusion of both conventional military forces and internal security services within a clearly defined constitutional and legal framework, is currently accepted as an important tool of conflict prevention and international confidence building.

The Republic of Armenia as all the OSCE member states has full commitments on implementing the Code and OSCE Office in Yerevan is providing comprehensive support to the relevant authorities in overall security sector reforms.

This publication is a result of a close cooperation between our Office and the Ministry of Defense of the Republic of Armenia, particularly the National Strategic Research Centre after Drastamat Kanayan. I hope that the articles collected in this publication which are devoted to the history of the Code, Armenia's and international experience in implementation of the Code's provisions will raise practical interest among civil society, academicians and policy makers.

*Ambassador Sergey Kapinos
Head of OSCE Office in Yerevan*

FOREWORD

OSCE Office in Yerevan implements its mission aimed at supporting in the establishment of democratic system of values and institutions and peace and stability in the region through multilateral cooperation with governmental and non-governmental structures.

This publication is also a product of such cooperation. It became possible due to joint efforts of the OSCE Office in Yerevan and the RA MoD National Strategic Research Centre after Drastamat Kanayan.

I believe that from the perspective of public administration principle and human rights priorities it is a quite valuable scientific-analytical material of public democratic control over the armed forces, which contains practical recommendations. This publication will really contribute to constructive cooperation between the OSCE Office in Yerevan and RA Ministry of Defence.

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NEGOTIATING THE CODE: A POLISH VIEW (1996)

ADAM KOBIERACKI ¹

Note from the OIY:

Irrespective of 15 years which have passed after publication of this article many ideas and considerations of its content are still valid in mid 90. There was ongoing process in the OSCE towards the creation of a security model for Europe for the 21st Century. It will be intellectually worth reading the content and context of this article in the framework of the ongoing discussion in the OSCE called the Corfu Process.

The Office expresses its gratitude to the Author for the Copy Rights

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2009-2011

Political Context of the Code: An Introduction

The Code of Conduct contains a set of principles, provisions, norms, and rules of responsible and cooperative behaviour in the field of security. Commitments embodied in the Code affect responsibilities of states towards each other and of governments towards their people. The very idea of the Code emerged at the Helsinki Follow-up Meeting in 1992 and was included in the mandate of the OSCE Forum for Security Cooperation established there. Depending on the perspective, there may be different explanations concerning the origins of this idea. First, the political context of the Code will be discussed.

From the perspective of the EU, the Code was extremely important, representing the first comprehensive expression of a common foreign and security policy. Thus, the Code was viewed as a set of norms relating to European security and, first of all, its politico-military aspects. It was intended to reflect the EU's role in and understanding of the European security system. These political and, to a certain extent, prestigious motives are probably the reason that the EU states felt so attached to their draft of the Code that it was almost impossible to persuade them to change any part of it. Therefore, though apparently it was not the only reason, time for compromise-oriented negotiating with the EU came only at the very last stage of the negotiations. One could add that internal mechanisms for consultation within the EU were only just being developed at that time, a fact which did not make the negotiation any easier.

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From the very beginning, the Code was important to the US insofar as it was deemed capable of introducing new or improved norms of behaviour into the field of security, without repeating or reconfirming already existing principles and commitments. The main US concern throughout the negotiations appeared to be how to elaborate a meaningful document which would not diminish the role of NATO and the US in European affairs. Contrary to the 'comprehensive' EU approach, the US attitude towards the Code was thus rather 'selective'. Some of the EU states were actually searching for a basis for a pan-European security system, while the US was mainly interested in improvements to the existing OSCE *acquis*. The divergence of views between the US and EU can be regarded as the first round of political debate concerning the nature of the Code. The second round of this debate, which is probably the best known, was formed by the conceptual discussion on the so-called 'broad' (advocated by Hungary and Austria) versus 'narrow' (advocated by almost everybody else) concepts of a Code. The narrow approach concentrated on the politico-military aspects of security, with primary emphasis on elements such as democratic control and use of armed forces. The broad approach focused on the specific understanding of the CSCE's² comprehensive concepts of human rights, fundamental freedoms, and economics, as well as protection of the environment. To a number of delegations, moreover, the broad approach suggested a sophisticated system of security assurances, although this debate was concerned with competing ideas, there was nonetheless a measure of practical understanding that the same elements formed the basis of the answers to questions of democratic control of the armed forces and the use of armed forces: all proposals gave some attention to issues related to human rights and security assurances. Opinions diverged on the primary focus of the Code, and the degree of emphasis, detail, context, and operational effect accorded to the various elements. There was also a Turkish draft of the Code. Apart from suggesting certain commitments clearly linked to a specific Turkish perception of security challenges (such as those relating to terrorism), it was apparently also intended as a political counterbalance to the EU draft. The next round of political debate - last but not least - was linked to the Polish draft of the Code. It is worth recalling that Poland was the first state to table its own proposal for the Code in Vienna. In essence, it was an effort to develop a principle relating to the non-use of force through the establishment of a set of specific measures stemming from that principle and concerning the comprehensive notion of security. Polish interest in the Code was linked to efforts to join Western European security structures. The Code was also regarded as a means to persuade Russia that there could be a variety of instruments providing for European security. The final version of the Code was based on the US suggestion concerning the scope of the document, presented in Budapest during the preparatory work for the summit, and

² Since 1996 former Conference (CSCE) become an Organization (OSCE)

modified by Poland in order to extend its scope slightly beyond the extremely important, but selective, issues, such as democratic control of armed forces. The Polish idea, in accordance with the essence of the EU approach, was to put these selective issues in a proper, i.e., broader, security context.

There were, in fact, substantive concepts and ideas for the Code, which resulted in four original proposals submitted by Poland, the EU (supported by some other States), Turkey, and Austria and Hungary. The common denominator reflected in the final version was the desire to elaborate new norms of behaviour in the field of security, while taking into account all previous OSCE commitments in that regard.

As is usually the case, the final product of the negotiations, which lasted for almost two years, represents a compromise between different extreme views. Those contradictory views, however, related more to the scope and coverage of the Code, and less to its basic concept, which remained uncontested. There were, for example, unsuccessful attempts to include and rewrite all fundamental OSCE commitments relating to security in the Code, or to include extensive provisions concerning the treatment of national minorities, economic cooperation, and ecological issues. The only possible compromise version turned out to be a set of norms relating to the politico-military aspects of security, well-placed in a wider context of commitments relating to the comprehensive and cooperative notions of security.

The history of the negotiation of the document testifies to the importance attached by all OSCE states to its basic concept, and hence their efforts to shape the scope of the Code in accordance with their different, individual security priorities and threat perceptions.

First, there was a need to address new challenges and risks to security, which had replaced the old risks of the Cold War and the era of confrontation, in a meaningful way. Under the conditions of a bipolar world and the risk of global military conflict, all possible sources of tension other than global were ignored or overshadowed. They became visible and potentially destabilizing only after all the democratic changes in the OSCE area, the dissolution of the former Soviet Union, and the emergence of new states had taken place. Second, the OSCE needed to take stock of all its previous achievements in the broader field of security in order to accommodate and adapt itself better to the new circumstances and requirements. From that perspective, the concept behind the Code could be seen as an attempt not so much to revise OSCE security-related commitments, but rather to reconfirm them in their entirety under the new circumstances and, at the same time, to develop them, addressing new sources of threats and instabilities. To put it in more illustrative terms, as far as the OSCE was concerned, it was an effort to regroup and restructure its forces in accordance with new strategies and in response to new 'threat perceptions'.

Third, another basic assumption was linked to the necessity to take into account and respond to the problems and needs of the new, newly sovereign, and newly democratic

states of the OSCE family. It is here that one finds the reasons for the very prominent place given in the Code to issues like the cooperative and comprehensive nature of security, its indivisibility, democratic control of armed forces, and the principles concerning their actual use.

Provisions of the Code relating to the democratic control and use of armed forces should also be viewed as an attempt to contribute to the democratic, and thus stable and predictable, development of the new and newly sovereign or democratic states.

Thus there were three basic assumptions underlying the concept behind the Code. It is not simply another OSCE document relating to security, but a possible foundation for further OSCE efforts aimed at creating a community of security interests and responsibilities among participating states. In that sense, it is linked to current OSCE work on the Security Model for Europe for the 21st Century. The Code reflects both what has been achieved so far and contains guidelines for future developments in the broader field of security. In doing so, it avoids being repetitive and declaratory. In fact, it contains a set of commitments providing for the enhanced security of all participating states, and constitutes an effective instrument of conflict prevention, as well as the application of the principle of the non-use of force.

Specific Commitments under the Code and Their Origins.

The preamble and the *first section* of the Code set out a broad security context in which all the commitments made under the Code are to be seen. In this part of the Code, the participating states commit themselves not to strengthen their security at the expense of the security of other states. Stressing the importance of a cooperative approach to security, they emphasize the key role of the OSCE in this regard, and the need for continued development of complementary and mutually reinforcing institutions. The states also declare their readiness to act in solidarity in the event that any of them is faced with a security challenge. The 'security context' was taken from the EU draft and can be seen as a confirmation of the OSCE security strategy. The Polish idea of 'solidarity' is also reflected here, although in a manner clearly modified to suit the taste of all OSCE states.

The *second section*, which is rather brief since it consists of just one paragraph, contains commitments both not to support terrorism and to take measures in order to prevent and combat terrorism. It was introduced on the insistence of Turkey, and was finally agreed upon due to the persistent efforts of the Turkish delegation.

The *third section* recalls the fundamental OSCE principles, i.e., those of the Helsinki Final Act, and reconfirms their continued validity today. It specifically refers to and develops one of them, which is of basic value to the security of any state, namely, the obligation to refrain from the threat or use of force against the territorial integrity or political independence of any state. As has already been mentioned, the principle relating to non-use of force was the main Polish concern in the negotiation on the Code.

For the most part, the French and German delegations insisted on references to all fundamental OSCE principles being included in the Code.

The *fourth section* groups together provisions relating to security and self-defense arrangements which states have the right to enter into. It stresses the right of any state to belong or not to belong to international organizations, including treaties of alliance, as well as the right of any state to change its status in this respect. This was the most important section for newly emerged or newly democratic states, and the most difficult task here was to find language acceptable to the Russian Federation. Obviously, the issue most discussed was the possibility of the enlargement of NATO.

Section five commits participating states to continue their arms control efforts and was introduced mainly due to the French position.

The *sixth section* deals with tensions of a different nature which may lead to conflict and with OSCE responsibilities in the field of conflict prevention. In this section, one can find some guidance on what the OSCE participating states are expected to do in the event of armed conflict. It is along these lines and, to a certain extent, on the basis of those commitments that the OSCE states are undertaking common efforts with regard to the current events in Chechnya, which could, in fact, be qualified as an internal armed conflict. From the very beginning of the negotiation of the Code, there was a common understanding that OSCE conflict prevention activities would have to be reflected in the document.

Section seven covers provisions relating to the democratic control of armed forces. Democratic control of armed forces was seen as a way to guarantee the internal stability of the state, its responsible behaviour towards its own citizens and other states, and as an instrument aimed at increasing the predictability of a state's actions. This section was equally important to well-established democracies, eager to stress their achievements in the field and to impose well-tested standards on others, and to newly established ones, eager to stress their readiness to put the concept into practice.

Section eight offers several guidelines relating to the actual use of armed forces and their internal organization. The responsibility for the implementation of commitments contained therein lies with both the military and the civilian authorities. One of the provisions in this section relates to the rules governing the behaviour of armed forces while performing internal security functions, and was introduced mainly at the insistence of the EU. It was, on the basis of this provision, that some OSCE states have strongly criticized the Russian authorities for disproportionate and excessive use of force in Chechnya. The last provision in this section commits participating states not to use armed forces to limit the peaceful and lawful exercise of their human and civil rights by persons as individuals or as representatives of groups, nor to deprive them of their national, religious, cultural, linguistic, or ethnic identity. The idea behind this provision is clear: armed forces must not assume or be given police-type functions aimed at limiting the rights of the people. It is also clearly linked to the specific national perceptions of

security threats of those states which do have problems with national minorities. As mentioned earlier, widespread consensus existed during the negotiation on the need to introduce these provisions into the Code.

The next section is *section nine*, consisting of just one, though important, provision. It says that each participating state is responsible for the implementation of the Code and that for the purpose of assuring full implementation of the Code, different existing OSCE bodies, mechanisms, and structures can be used. It was a commonly held view among the participants in the negotiations, that the Code must not become yet another OSCE 'commitment' in the unfortunately widespread meaning of the word: important, but not observed.

Section ten is the final section, citing the politically binding nature of the Code. In order to strengthen this binding nature, the participating states also agreed to seek to ensure that their relevant internal documents and procedures or, where appropriate, legal instruments, reflect the commitments made in the Code. This section is what remains of various suggestions, including the Polish one, to make the Code a legally binding document.

Lessons from the Negotiation of the Code.

It is obvious from all that has been said so far that the strangest phenomenon throughout the negotiations was the lack of a comprehensive Russian proposal for the Code. The delegation from the Russian Federation was active in the negotiations, but more in terms of defending its basic views on European security, and less in terms of actively shaping the content of the Code. It was probably due to Russian preoccupation at the time with more imminent security issues, and the lack of a clearly formulated Russian security strategy. At a certain point in the negotiations, the common Polish-Russian negotiating proposal for the scope and structure of the Code was, at least informally, viewed as proof of Russian interest in the negotiation of the document, which had been questioned earlier. The actual adoption of the Code, however, most probably contributed to the subsequent Russian initiative for the development of the European Security Model for the 21st Century.

In general terms, the lessons from the negotiation of the Code may be summarized as follows:

- The Code constitutes an inevitable stage in the adaptation of the OSCE to the new politico-military realities in Europe;
- The negotiation of the Code presented the first opportunity for testing the ability of the EU to take a common position on European security and its capability to deal with security issues in a manner comparable to NATO involvement in European security;
- New individual national perceptions of security challenges made the negotiation difficult, but at the same time contributed to the importance of the Code for each and every OSCE State; and

- This was the first time that the OSCE attempted to codify norms of state behavior in the field of politico-military aspects of security. The result of that attempt is that the Code may serve as a basis for broader arrangements, even legally binding ones, in the future.

The Future of the Code

The short period of time which has elapsed since the adoption of the Code does not yet allow for a thorough analysis of its functioning or its influence on the military security situation in the entire OSCE area and in the individual regions. It should be stressed, however, that the scale, coverage, relevance, and nature of the Code's commitments make its implementation and further development an obvious candidate for continued international attention. The Code's eventual further development becomes even more relevant in the context of ongoing OSCE efforts towards the creation of a security model for Europe for the 21st Century. Indeed, the Code constitutes a normative basis for European security nowadays. It can hardly be ignored in the process of shaping the European security system for the next century.

**THE SYSTEM OF OVERSIGHT AND CONTROL OVER THE
DEFENSE SECTOR MANAGEMENT IN THE REPUBLIC OF ARMENIA**

Main Drafter: VIRAB KHACHATRYAN

1. TRANSPARENCY AND ACCOUNTABILITY AS PREREQUISITES FOR AN EFFECTIVE CONTROL OVER THE DEFENSE SECTOR MANAGEMENT, AND THEIR REGULATION BY LAW

1.1. Transparency and Accountability, Their Role and Significance

State bodies in democracies try to be as open and transparent as possible when carrying out public administration. This desire has to do with citizens' demands, on the one hand, and with a realization of a need to have citizens' trust in and support of the public administration system, on the other hand. In view of these two factors, the current public administration theory attaches great importance to the strengthening and wide application of the principles of transparency and accountability in public administration, including the defense sector management system.

Let us explain the essence of the principles of transparency and accountability, and show their role in the defense sector management system.

1.1.1 Transparency

Transparency signifies a situation, where citizens, non-governmental organizations, as well as other civil society institutions are able to get information they are interested in, directly from the state body that possesses this information, without having to resort to other means.³ This is very important for ensuring the effectiveness of public administration, including the defense sector management.

➤ **Transparency contributes to a greater public trust towards public administration bodies.**

Experience shows that public distrust develops when information is lacking. If information on certain events is scarce, citizens start coming up with their own interpretation, which is not always reflect the reality. The situation gets even worse, when some media outlets take advantage of the fact that official information is not forthcoming and try to “unearth” sensational materials that they publish without proper professional analysis, seeking to increase their ratings. The society, in turn, would like to be informed about everything that is going on in the country. Therefore, if the natural desire “to be informed” is not satisfied, people tend to get bitter and believe the discrediting information or the different made-up versions, to put it mildly. These situations are often created by state bodies that use different excuses in order not to provide information, thus causing disinformation to be published.

➤ **Transparency contributes to a greater efficiency in the fight against human rights violations in the armed forces and corruption in the defense sector.**

The above statement is especially important from the viewpoint of establishing an “early warning” mechanism for the fight against human rights violations and corruption.

³ See: Commentary on the European Convention on Human Rights and Fundamental Liberties and its Protocols. Yerevan, 2005, page 335

The society is more interested in creating preventive mechanisms than in being informed about crimes that have already been committed. The creation of such mechanisms will, undoubtedly, have a positive effect on the prevention of violation of laws in the armed forces.

Transparency is closely linked to the human freedom to receive information. In this sense, the principle of transparency in public administration corresponds to the human right to receive information.

The European Convention for the Protection of Human Rights and Fundamental Freedoms allows to restrict the freedom to receive information in some cases, when such restrictions are necessary to protect the rights and freedoms of others, public safety and other similar values. All other information must be provided to any individual, as soon as he/she requests it. Therefore, the freedom to receive information works when the initiative comes from an individual.

At first, it may seem that state bodies have no obligations towards the society in this regard. However, state bodies are the ones that should be interested in making the sector as open and transparent as possible, in order to win public trust. This is done by press releases and regular reports containing as much comprehensive information as possible on the situation in the defense sector.

These days, the issue of ensuring transparency in the armed forces management has transcended the national level and become an issue of concern for the international community. Today, the international community fully realizes that a lack of transparency in the management of a given country's armed forces may lead to militarization of that country, causing new disasters and calamities.

The need for transparency in the armed forces management is discussed in the OSCE Code of Conduct on Politico-Military Aspects of Security, which is rightly regarded as one of the most comprehensive documents in the area of security. In particular, paragraph 22 of the said document reads: "Each participating State will, with due regard to national security requirements, exercise restraint in its military expenditures and provide for transparency and public access to information related to the armed forces."⁴

In general, public is interested in two types of information related to the armed forces:

- a) Information about defense expenditures,**
- b) Information on the human rights situation in the armed forces.**

Openness and transparency of information on defense expenditures have two important aspects.

On the one hand, it allows any member of the public to control the effectiveness of public funds. Experience shows that the more transparent the procurement process is,

⁴ See the OSCE Code of Conduct on Politico-Military Aspects of Security

the more effective it becomes. Moreover, in order to prevent corruption, it is necessary to ensure transparency of the entire procurement process.

On the other hand, transparency of defense expenditures makes it possible to prevent militarization attempts on time, which is extremely important from the point of view of international security. This subject is dealt with in the Treaty on Conventional Armed Forces in Europe (CFE), according to which every member-state has the right to possess certain types of weapons, but only in quantities that do not exceed the quotas set by the Treaty.

Transparency of budget allocations for the needs of defense is very important in this regard.

The Republic of Armenia has been taking some steps to ensure transparency of the armed forces management. These steps are summarized in the **Public Information Concept Paper**.⁵ According to the Concept, more transparency in the defense sector is one of the things that is necessary in order to have a more powerful, combat-ready and internationally recognized armed forces. The Concept also states that the society's awareness of the main challenges facing the army and the real situation in the armed forces will serve as a sufficient basis for preventing human rights violations under the guise of enforcing the military discipline. Moreover, the use of mechanisms for democratic control over the armed forces will contribute to a more targeted use of the potential of the institution that is called upon to provide the country's security and defense. In turn, this will ensure that this institution is not drawn into processes that may have undesirable consequences.

One of the Concept's priorities is **to train officers responsible for public relations in military units**, because military units are the part of the armed forces that most of the people come into contact with. For example, citizens and the media have no way of finding out about an incident in a military unit other than by contacting the Ministry of Defense. If they contact the military unit in question, the unit's officials ask these citizens or the media to obtain the ministry's approval first, claiming that they need to maintain military discipline or that they don't have a proper authorization to talk to the public. This is why the public's right to receive information quickly is limited very frequently. Therefore, every military unit needs to have an officer responsible for public relations.

Considering that the main mission of public relations officers is to maintain contacts with citizens, we think that public relations officers should be civilians and they should not be part of the military subordination, in order to be able to act somewhat independently and freely. Also, considering that the mentality of "not doing anything without the ministry's approval" is an element of military mentality, we think these civilians should not be soldiers who have just completed their military service. Obviously, it takes soldiers a long time to get over the "military discipline and unconditional carrying out of orders" mentality. For this reason, we think it is necessary

⁵ Approved by the RA Minister of Defense on November 13, 2007. See: www.mil.am

for public relations officers to be **“civilians with journalistic education”** rather than **“trained officers with military education,”** as stated in the Concept.

There are also some mechanisms to ensure the transparency of the RA defense expenditures. However, these mechanisms are not sufficient. In particular, all procurement for the needs of defense is done in accordance with the RA Law on Procurement. The law allows for both open (public) or closed procurement. Closed procurement is used when purchasing something that constitutes state or official secrets, which precludes the transparency of this process, because the notions of “confidentiality” and “transparency” are incompatible.

It is worth noting that the Republic of Armenia is not the only country in the world that needs to purchase things constituting state or official secrets. However, the experience of several countries has demonstrated that in such cases procurement is made from one source. However, the situation is somewhat different in the Republic of Armenia. For example, every year, in the law approving the annual state budget, allocations for defense needs are classified as containing state or official secrets. Obviously, procuring everything for the needs of defense from a single source is undesirable from the point of view of corruption risks. This situation can be avoided by using closed bids as a special way to organize procurement. To select participants for closed bids, the RA Ministry of Defense posts an announcement on its website, to determine who is eligible to participate in a closed bid. Those, who wish to participate in a closed bid, submit all the documents listed in Article 5 of the RA Law on Procurement to the Ministry of Defense in advance. Only after that, those, who are deemed qualified, sign an agreement on non-disclosure of state or official secrets and receive an invitation to participate in a bid. After this point, the entire procurement process remains confidential and no information on it can be obtained.

It is worth noting that an analysis of the published announcements about procurement for the needs of defense has revealed that the keeping the procurement of a number of items confidential needs to be seriously justified.

Therefore, it can be stated that the issue of transparency of budget allocations for defense needs is still unresolved in the Republic of Armenia.

In addition to transparency in the defense sector, no less important is the role of the independent and specialized media. In this case, the transparency of public administration and the specialized media would complement each other. Indeed, an effective application of the principle of transparency without independent and specialized media is difficult to imagine, because most of the citizens do not always understand the official information easily, as it is usually addressed to the people who are specialized in that area. The media’s role is to provide official information and, in general, all information about the situation in the sector to every member of the public in an easily understandable language, supplemented by analysis and conclusions, if necessary. This is the mission of the specialized media. Otherwise, in many cases,

information provided by public administration bodies will either not reach the target audience at all, or will reach it in form that is not easily understandable.

It must be added that the application of the principle of transparency and activities of the independent and specialized media are interlinked. The application of the principle of transparency would not be effective if there were no independent and specialized media; likewise, the media cannot operate effectively without the principle of transparency.

Press releases are extremely important if independent and specialized media exists. Press releases should reflect the complete situation in the sector.

Many countries have media outlets specialized in the area of defense. In particular, these include Russian publications like «Независимое военное обозрение» and the relevant sections of the «Ежедневный журнал» online publication, the British «Jane's Defence» periodical, etc.

In its reply to the annual questionnaire regarding the OSCE's Code of Conduct on Politico-Military Aspects of Security, the RA delegation noted that the public is informed through the Ministry of Defense information service, Haykakan Banak [Armenian Army] magazine, Zinuj [Armed Forces] TV program, Hay Zinvor [Armenian Soldier] weekly newspaper and press conferences.⁶ The questionnaire covers only the measures and actions taken by state bodies to ensure the transparency of the sector. According to the Concept, the RA Ministry of Defense is committed to covering the situation in the sector, but so far this coverage has been one-sided. The information provided by the Ministry covers mainly visits by the Ministry officials, their speeches, other official events, and press releases on these events. It is obvious that full coverage can be provided only by a media outlet that is independent of the state body in charge of the sector, and only such a media outlet could present the complete situation in the sector by covering both the positive and the negative aspects.

It is worth noting that there is a type of information that is no less interesting for the public, yet the RA Ministry of Defense does not provide any such information. In particular, there is currently no way of finding any information about military servicemen subjected to disciplinary sanctions (including information on confining soldiers to disciplinary isolators). However, this type of information is necessary in order to exercise proper control over the human rights situation in the armed forces and to punish those who violate human rights, when such things happen.

The Concept also requires to conduct public opinion polls in order to find out the public's attitude towards and expectations from the armed forces. To do this, it is possible to organize forums in the RA Ministry of Defense website, which would make it possible to identify issues of interest to the public and to find out where the public stands on various issues.

⁶ See: Information Exchange on the Code of Conduct on Politico-Military Aspects of Security, Republic of Armenia, Year 2008.

Obviously, public involvement in all of the above is very important. People should not be just passive consumers; they should be actively involved in addressing the issues in the defense sector and, at the same time, they should exercise effective control over the sector's regular developments.

Thus, the following conclusions can be drawn, based on the above:

- ***it is necessary to have an independent and specialized media outlet that would provide comprehensive and objective coverage of the defense sector, as well as professional analysis of developments in the sector;***
- ***military units need to have civilian public relations specialists with journalistic education to work on relations between the public and the armed forces;***
- ***special attention needs to be given to press releases in order to ensure that the information they provide to the public is as comprehensive as possible;***
- ***criteria for justifying the confidentiality of state budget allocations for the defense sector need to be reviewed;***
- ***it is necessary to disseminate information about individuals subjected to disciplinary sanctions;***
- ***information about corruption in the sector, human rights violations, as well as about measures to fight against these things, needs to be disseminated through “official channels,” at the initiative of state bodies. This mechanism would contribute to the exercise of public control over the fight against human rights violations and corruption. Publishing information about disciplinary sanctions against military servicemen or increasing the transparency of the procurement process as much as possible can be cited as examples.***

1.1.2 Accountability before the Public

Accountability is one of the principles of governance. Generally speaking, it covers a number of concepts, including responsibility of state bodies and public officials, as well as the concept of charging them, if necessary. Transparency and accountability are means to ensure public administration's lawfulness in a democratic society. The principle of accountability makes it possible to hold the culprits accountable for the negative consequences of their actions discovered through the principle of transparency.

The principle of accountability stems from a number of articles in the RA Constitution. For example, according to Article 2 of the RA Constitution, the power

belongs to the people, and the people exercise that power through free elections, referenda, as well as through state and local government bodies and public officials, as provided by the Constitution. Article 5 says that the state power shall be exercised in conformity with the Constitution and the laws, and that state and local government bodies and public officials are allowed to perform only such acts for which they are authorized by the Constitution and the laws, which are ways to reflect the people's will. An analysis of these articles shows that, when exercising their lawful powers, state bodies and public officials are supposed to remember that they exercise their powers on behalf of the people, and that the people have the right to demand them to justify any of their actions at any time. Public officials are supposed to remember that the powers given to them are not an end in themselves, and those people "for whom they work" have the right to hold them accountable at any time.

This is especially important in the case of the armed forces. Issues of the armed forces being accountable to the political leadership and the needs to establish effective control over the armed forces have been discussed since the old times. In particular, Jean-Jacques Rousseau had thought that military men do not understand the working style of politicians. They hate politicians, because they consider them to be cowards. However, politicians' restraint and balance are often the only things that make it possible to avoid major wars. This leads to a conclusion that if decisions to use armed forces were left to the military leadership, then any dispute, however small, could easily turn into a serious large-scale conflict. Therefore, the armed forces need to be fully accountable to the political leadership.

The OSCE Code of Conduct on Politico-Military Aspects of Security also contains provisions on accountability to the political leadership. According to paragraph 25, "the participating States will not tolerate or support forces that are not accountable to or controlled by their constitutionally established authorities."

However, there may be some situations where the state is simply unable to control military organizations operating on its territory. Undoubtedly, the existence of such organizations poses a security threat for the entire international community. Therefore, the Code of Conduct contains another provision, according to which, in such situations, the participating States may seek consultations with other participating States.

From the point of view of the armed forces being accountable to the political leadership, it is important that the highest official in the military hierarchy, the commander-in-chief of the RA Armed Forces is the country's President. Even though the post of the RA Minister of Defense is considered a political post, which can be occupied only by a civilian, it is worth mentioning that the defense minister's role in the chain of command of the Armed Forces is not clear. In particular, Article 12, paragraph 1 of the RA Law on Defense specifies that the general governance of the armed forces is carried out by the RA President. According to paragraph 3 of the same Article, the armed forces are managed by the Head of the Armed Forces Staff. At the same time, paragraph 2 of the same Article states that the direct governance of the armed forces is

done by the Minister of Defense, who is in charge of organizing and controlling the activities of the armed forces and other bodies and organizations under the RA Ministry of Defense.

Before analyzing the above, it is worth mentioning that there are no such concepts as “general” or “direct” governance in the management theory. Governance means the setting of policy in a sector, and it cannot be general or direct, simply because policy cannot be set generally or directly. Management is a set of activities aimed at enforcing the laws or decisions reached as a result of governance. Therefore, it is not clear what “direct or general governance of the armed forces” is.

Despite the fact that the law attempted to define the notion of “direct governance” as the organizing and controlling the activities of the armed forces and other bodies and organizations under the Ministry of Defense, it is worth noting that the organizing is a management function. In addition, the Minister of Defense is involved in organizing the defense sector and not the activities of the armed forces; therefore, he is involved in the management of the defense sector and not of the armed forces. As for control, it is completely out of the armed forces and defense sector management. The Minister of Defense cannot control the defense sector and especially the armed forces, simply because he is the management body of the defense sector. The manager cannot be the controller at the same time. He can only be the one who exercises oversight.

In addition, being a member of the government, the Minister of Defense cannot be the direct governor of the armed forces, because his powers have to be in tune with the government’s powers, whereas the government is not empowered to govern the armed forces.

This leads to a conclusion that the Minister of Defense is involved in the management of the defense sector only and not in the governance of the armed forces. Being a management body of the defense sector, the Minister of Defense can also carry out oversight of the sector.

Accountability is also important in the area of procurement. Procurement is done with budget allocations, i.e. funds generated by taxes, duties and other mandatory payments by citizens. Citizens pay that money in order for the state to address various issues. Addressing these issues must ultimately be directed at ensuring citizens’ normal activities. Therefore, citizens have the right to know how their money is spent. That is why it is important to publish information about budget allocations. Obviously, this is not an absolute statement. There are always some expenditures that need to be kept confidential in the interests of national security. However, the principle of confidentiality should not be universal and should not apply to all expenditures.

To ensure accountability in the area of procurement, among other things, Article 7 of the RA Law on Freedom of Information states that the holders of information must publish the information in their possession, including information about their budget, at least once a year, unless stated otherwise by the RA Constitution and/or other laws.

The RA Law on Freedom of Information requires holders of information to publish not only information about budget allocations. They are also required to publish, at least once a year, guidance on how to fill out written requests for information, as well as information about the staff structure, environmental impact, statistics on information requests received by that agency, brief description of these requests and grounds for rejecting the requests.

Going back to the principle of accountability in the armed forces, it is worth noting that the RA Ministry of Defense has never published this kind of information in any systematic way. Some information on the structure of the RA Armed Forces, the ministry officials and the budget can be downloaded from the ministry's website. However, no one can find any information about the staff structure, vacancies, statistics on information requests or brief description of these requests. This refers to posts to be filled by military servicemen and not by special civil service employees, because the latter are filled by publically announced competitions. Publishing information on positions to be filled by military servicemen is also important, because military servicemen wishing to get transferred from their current place of service must know where other vacancies are. However, the only way for military servicemen to get this kind of information today is through "personal contacts."

Some of the types of information covered in the RA Law on Freedom of Information, especially the summary of the received information requests, are extremely important from the point of view of democratic control over the sector. Moreover, given the peculiarities of the sector, it would be more appropriate for the RA Minister of Defense to provide an annual report to the National Assembly that would cover cases of human rights violations in the armed forces and steps that have been taken to address the situation, sectoral reforms, activities related at social security of military servicemen, expenditures of state budget resources, and other important issues. The publishing of such reports (with the exception of information constituting state or official secrets) would increase the effectiveness of control over the sector.

1.2. Democratic Control Over the Armed Forces as a Means to Ensure Lawfulness: Stipulation by the RA Legislation

Both transparency and accountability are prerequisites for democratic control over the armed forces.⁷ Being a way to ensure lawfulness in the armed forces, democratic control is different from administrative oversight and state control.

Administrative oversight is a part of public administration, the purpose of which is to support the carrying out of public administration. That is why oversight bodies operate

⁷ In this regard, it is difficult to agree with the thought expressed in the Venice Commission's Preliminary Report on Democratic Control of the Armed Forces, according to which the purpose of democratic control over the armed forces is to achieve maximum transparency. It is the introduction and consistent adherence to the principles of transparency and accountability that create favorable conditions for democratic control over the armed forces.

within the public administration system. As for control, it is outside of a specific public administration body and is exercised by independent bodies.

State control was prevalent in countries like the former USSR; it was different from democratic control, as it was carried out by party bodies and the involvement of any democratic element was not possible. Formally, it included wide public participation; however, the ultimate goal was to make sure that the will of the party is carried out.

Having chosen a democratic path of development after the collapse of the Soviet Union, the post-Soviet countries faced the challenge of establishing a mechanism for democratic control over the armed forces. It must be noted that the Soviet Union used to have a rather effective system of control over the armed forces. The control was exercised by the communist party. The party made sure that the armed forces were carrying out its will. This control was civilian in its nature, but there was obviously nothing democratic about it, because the communist regime and the principles of transparency and accountability to the public were incompatible.

After the system collapsed, we found ourselves in the following situation: the complete party control, which was an integral part of the Soviet system, was no longer there, while the effectiveness of the newly established democratic control institutions was not ensured. The issue is exacerbated by the fact that it is impossible to solve the problem by passing new laws or creating certain institutions. It can only be resolved by means of legislative measures and a complete set of specific activities.

Generally speaking, it can be stated that all the countries of the former socialist bloc are facing almost the same challenges. The following obstacles hinder the establishment of an effective democratic control over the armed forces:

- *unjustified confidentiality regime,*
- *lack of proper coverage and specialized analysis of developments in the defense sector,*
- *lack of political will,*
- *lack of active involvement of civil society institutions (non-governmental organizations, the media) in the democratic control over the armed forces,*
- *absence of a society that is aware of its rights and willing to stand up for them,*
- *low level of people's legal awareness/knowledge.*

It can be stated with confidence that almost all of the post-Soviet countries need to address these problems first, in order to create an effective system of democratic control.

Based on our observations, and without going into details of developments in other countries, we can say that Ukraine is the one post-Soviet state that has made significant progress in terms of democratic control over the armed forces. In 2003, Ukraine's Supreme Rada (the parliament) passed a law on *Democratic and Civilian Control over*

Law-Enforcement Agencies and Military Institutions, in an attempt to regulate in a systematic way the various aspects of democratic and civilian control.

The Russian Federation has attempted to pass such a law twice, but the process was suspended because the proposed legislation contained several shortcomings and many unfounded provisions, and because the Federal Assembly (the parliament) and the federal government had reservations about it.

The Republic of Armenia does not have one single piece of legislation that would cover all the aspects of democratic civilian control over the armed forces. This is why there is still no uniform understanding of democratic civilian control over the armed forces, and it is unclear what institutions should be involved, how the control should be exercised, etc.

The establishment of a system for democratic control over the armed forces in the Republic of Armenia has had a fairly long history. The first legal provisions on democratic control can be found in a 1996 law on Approving the Bylaws of Internal Service. Article 81 of that law requires commanders to improve their personal professional knowledge and leadership/management skills, by acting independently within the scope of their powers, in close cooperation with state and public administration bodies, non-governmental organizations, enterprises and collectives, war and armed forces veterans, as well as to strengthen their leadership by strong cooperation with officers and non-governmental organizations operating in military units, and by directing the efforts of their personnel towards finding active and creative solutions to the proposed tasks. Other provisions of the same law require commanders to take into consideration the opinions of non-governmental organizations, allow military servicemen to have contacts with their family members and non-governmental organizations, etc. Despite these provisions, commanders have never followed these requirements, because they contradict directly their understanding of how a military unit is supposed to be run. In addition, from a civilian/democratic point of view, the Disciplinary Bylaws of the RA Armed Forces gives military servicemen the right to challenge the actions of state bodies or commanders in a court of law, which is mentioned in Chapter 5 of the Bylaws. However, this document does not contain any mechanisms for the exercise of this right. This is evidenced by the fact that soldiers do not get any leave or vacation to go and challenge their commanders' actions. If a soldier leaves his military unit to go to a court, then he would be considered absent without leave, which is a disciplinary infraction.

In addition to the above, other elements of democratic control can be found in the fact that budgets are approved by the parliament, and that the parliament is the one that ratifies international agreements on military cooperation, etc.

The first serious step towards establishing democratic control over the armed forces was to declare the post of the minister of defense to be a civilian post, following which a civilian was appointed as the minister of defense.

The next important step in that direction was the adoption of Article 8.2 of the Constitution, according to which the armed forces are supposed to maintain neutrality in political matters and remain under civilian * control. This provision is supposed to be the basis for developing the entire mechanism of democratic control over the armed forces in the country.

The Law on Defense was passed in 2008, and it contained Article 4, according to which the principle of civilian control over the armed forces was proclaimed to be one of the main principles of operation of the armed forces.

Provisions on democratic civilian control can be found in other legal acts as well, such as the Rules of Procedure of the RA National Assembly, the RA Law on Budgetary System, and others.

Nevertheless, there are currently some issues that are controversial from the point of view of democratic control over the armed forces. In particular, this is the case with the application of Disciplinary Bylaws of the RA Armed Forces, approved by the RA Government Decision No. 247 of August 12, 1996. The problem is that according to paragraph 54 of the said document, disciplinary sanctions for soldiers include *confinement in disciplinary isolator (disciplinary cell)* for up to ten days (or up to seven days in the case of soldiers serving under a military contract). This sanction can be applied by commander's order. This contradicts a number of constitutional provisions:

➤ ***According to Article 16 of the RA Constitution, everyone has the right to liberty and security.*** A person can be deprived of liberty in cases and in accordance with procedures defined by law. The law can allow deprivation of liberty only in cases described in the Constitution.

An analysis of these cases indicates that only a court has the right to order deprivation of liberty as a form of punishment.

It must be noted that similar cases can be found in the case law of the European Court of Human Rights. In particular, applicants Engel, van der Wiel, Jan de Wit, Johannes Dona and Willem Schul in the case of *Engel and Others vs. the Netherlands* claimed that the disciplinary sanctions they were subjected to violated Article 5(1) of the European Convention.

In its judgment in this case, the European Court noted that, at the time when the Convention was being drafted and adopted, many of the participating States used to have disciplinary battalions, where certain rights and liberties of military servicemen could be restricted, while these same restrictions could not be imposed on civilians. Therefore, the mere existence of such a system did not go against these countries' international commitments.

* As was already mentioned, it is not right that the Constitution uses the term "civilian" only, because civilian control is not complete without democratic control.

In the judgment in this case, the Court expressed the following position:

- ***military disciplinary sanctions are not outside the scope of Article 5(1) of the Convention.*** The issue is not only that the text must be considered in the light of Articles 1 and 14 of the Convention, but also that it contains an exhaustive list of cases of deprivation of liberty. Therefore, a disciplinary sanction or measure can constitute a violation of Article 5(1).

- in order to determine if a person was “deprived of liberty” in the sense of Article 5, consideration should be given to that person’s specific situation. Military service, in the way it exists in participating States, is not considered a deprivation of liberty in the sense of the Convention, and it is specifically mentioned in Article 4(3)(b). The rather extensive restrictions on the military servicemen’s freedom of movement have to do with the special requirements of military service; other related restrictions are not covered by Article 5.

- every participating State has the right to establish its own system of military disciplinary sanctions, for which it has wide discretion. The line that the participating States cannot cross, as required by Article 5, is different for military servicemen and for civilians. Disciplinary sanctions or measures, which can be regarded as deprivation of liberty, do not have the same nature when applied to civilians, as opposed to when they are applied to military servicemen. Nevertheless, Article 5 may apply in the latter case as well, if these measures take a form of restrictions that are significantly different from the regular conditions that prevailed in the given participating State’s armed forces. In order to make such a determination, the Court must consider a number of factors, such as the nature of the disciplinary sanction, its duration, its consequences and the mode by which a person was deprived of liberty.

All of the above clearly confirms that only a court can order and apply a punishment in a form of deprivation of liberty, which is a principle that is not followed in the Disciplinary Bylaws of the RA Armed Forces.

In order to avoid this contradiction, the Republic of Armenia made the following reservation when signing the European Convention on Human Rights:

Provisions of Article 5 shall not affect the application of the Disciplinary Bylaws of the RA Armed Forces, approved by the RA Government, according to which detention and disciplinary isolation of soldiers and sergeants is reserved for officers.

➤ ***A new article (Article 83.5) was added to the RA Constitution as a result of the 2007 constitutional reforms.*** According to the new article, “restrictions on the rights and freedoms of natural persons and legal entities, their obligations, as well as forms, extent and procedures for liability, means of compulsion and procedures for applying them ... shall be set forth exclusively by laws of the Republic of Armenia.” However, the Disciplinary Bylaws of the RA Armed Forces were approved by a government decision, and not by law.

After the constitutional reforms, when Article 5 of the Convention (according to which means of liability can be defined by law only) was incorporated completely in the RA Constitution, the issue of regulating military discipline by law became an urgent challenge. For that reason, the RA Ministry of Defense has developed and is currently circulating a draft law regulating the disciplinary aspects of the RA armed forces.

➤ ***Deprivation of liberty by decision of a military unit commander contradicts Article 2 of the RA Constitution***, according to which the state power is exercised through bodies and officials provided by the Constitution. There is no doubt that deprivation of liberty is a form of exercising the state power; therefore, this must be done by bodies or officials provided by the Constitution.

Obviously, the issue of creating a legal basis for democratic control will not be resolved by adopting new disciplinary bylaws only. Many other laws also need to be amended, including laws that are not directly related to human rights violations. Such laws include, in particular, the RA Law on Budgetary System, the judicial procedure codes, and others. Thus, democratic control should be regulated by conducting parallel reforms in a number of legal acts. We think it would be inappropriate to have a single law on this subject, because it would have to contain various substantive and procedural norms pertaining to different sector.

Conclusions and Recommendations

Having examined the legal regulation of democratic control over the RA Armed Forces, we can state that the sector has not been properly regulated yet. The relevant laws are yet to be developed and passed. However, we think the National Assembly needs to adopt a Concept of Democratic Control, in order to avoid possible contradictions in future laws and to set out the main principles for regulating the sector. This Concept should set out the “notion of democratic control” and the main principles that should serve as the basis for the whole future legal framework. Moreover, a simple “copying” of the relevant European experience is unacceptable. It is important to study the experience of other countries when developing our own framework, but simple adaptation of the experience of the others is unacceptable. Our own reality and peculiarities must be taken into consideration. Otherwise, the effectiveness of the new norms would be jeopardized.

2. OVERSIGHT BODIES IN THE DEFENSE SECTOR AS A MEANS TO ENSURE LAWFULNESS

The theory attaches great importance to the various means for ensuring lawfulness in the public administration sector. At the same time, it also gives importance to issues related to ensuring it.

It is thought that there are two ways to ensure lawfulness. These are called oversight and control.

Oversight is a government function, carried out in the process of government. As a rule, such oversight functions are given to bodies established within the public administration system.

Unlike oversight, control is not done in the government and it is not a public administration phase. It is carried out by bodies with special control functions, and these bodies are completely independent from other state bodies. In addition, because of the current developments, control is commonly thought to consist of internal and external control. External control is carried out by international organizations. Good examples of such control are the various Council of Europe organizations, the OSCE, the UN and others that are actively involved in ensuring lawfulness inside the country within the framework of various international organizations. At the same time, it must be noted that the state itself consents to join these control systems. This is done in the interests of the state to be involved in global processes. Obviously, the more open and transparent the state is before the international community, the higher international reputation it will have.

In view of all this, the following part of the report provides an analysis of oversight and control mechanisms aimed at ensuring lawfulness in the defense sector.

2.1. The RA MOD Military Police as a Means to Ensure Lawfulness

In the most general terms, the Military Police can be described as a body, whose primary purpose is to carry out law-enforcement function in the armed forces. Such bodies were created mainly during World War I, when issues of ensuring lawfulness and discipline in the armed forces were particularly urgent.

In the Soviet Union, the idea of having military police was consistently rejected. The main reason was based on a premise that criminality is incompatible with the communist utopia. Nevertheless, the USSR paid serious attention to law enforcement and fighting crime in the armed forces. It is obvious that in a huge country like the Soviet Union it was not appropriate to assign the function of law-enforcement in the armed forces to regular law-enforcement bodies like the ministry of interior, the prosecutor's office or others. That is why a number of other bodies were established (e.g. patrol service, traffic service, etc.) that, in essence, carried out the functions of military police.

On the whole, an examination of the military police powers in different countries has revealed that the military police is responsible for things like discipline in garrisons, protection of certain buildings and sites, investigation of crimes committed in the armed forces, anti-terrorist activities, quelling of civil unrest (USA, France, Australia), inspection of military vehicles, conducting investigation and inquest in military sites (UK, Italy). It can be said that these powers do not stem from the functions of the armed forces, but they may have a certain connection to activities of the armed forces. It must also be noted that these powers are more effectively exercised by a relatively independent and autonomous body.

Currently, there is no such body in the Russian Federation, even though there are plans to establish Military Police within the Ministry of Defense in the spring of 2010.

In the Republic of Armenia, Military Police was established in May 1992, by order of the Minister of Defense. This body had no special status until 2007, when a law to define the Military Police status was adopted. Military Police has a status of a department within the Ministry of Defense.

The RA Military Police status is defined in the RA Law on Military Police. According to the law, the Military Police is responsible for the following:

- 1) *investigation of military crimes in the armed forces that were committed on the territory of military units or by conscripts in military service;*
- 2) *deterrence, prevention and stoppage of crimes being planned or committed by military servicemen;*
- 3) *protection of property that belongs to the authorized body;*
- 4) *proper exploitation and safe operation of vehicles that belong to the armed forces.*

The RA Law on Military Police also stipulates that the Military Police is supposed to contribute to strengthening the lawfulness and discipline in the armed forces, examining the morale in military units and military management bodies and increasing the level of legal awareness.

The Military Police Bylaws were approved by the RA Government Decision 1554-N, on December 25, 2008. According to this legal document, the Military Police is considered a division that is separate from the Ministry of Defense staff. The structure and the number of staff of the Military Police were approved by another government decision (Decision 884-N of July 19, 2007). It was decided that the information on the number of staff members must be classified as confidential.

There is still no common opinion on the need for the Military Police and its role. Some think it is like an appendix that doesn't really have any specific functions; all of its functions should be transferred to other state bodies. The advocates of this point of view argue that an examination of the Military Police tasks shows that there are no problems that cannot be resolved by bodies other than Military Police.

Nevertheless, we will try to come up with certain conclusions and recommendations on the role of the Military Police in the Republic of Armenia after examining the powers given to this body by the RA Law on Military Police.

➤ ***Investigation as a Power of the Military Police***

According to the RA Law on Military Police, the Military Police is supposed to investigate military crimes in the armed forces that were committed on the territory of military units or by conscripts in military service. In this regard, it is interesting to remember Article 56 (paragraph 2) of the RA Criminal Procedure Code, according to which commanders of military units and heads of military organizations are considered to be investigative authorities in cases involving military crimes, as well as in cases involving crimes committed on the territory of military units or by conscripts in military service. At the same time, the same Article stipulates that the Military Police is also considered an investigative body in cases that are under its powers to investigate. However, the scope of this power of the Military Police is not clearly defined in the legislation, which, in practice, can lead to a collision of powers.

This raises an obvious question: what cases should be investigated by military unit commanders, and what cases should be investigated by the Military Police? It must be noted that investigation often requires the involvement of several people and the carrying out of operative-investigative activities, which is not something that a military unit commander can do. Naturally, he cannot involve other military servicemen in operative-investigative activities, because they don't have the required knowledge and skills. Therefore, it is more appropriate to have investigations conducted by a specialized agency created specifically for conducting investigations. At the same time, it is not clear why investigation of military cases should be treated as a separate category of investigation. We think it would have been more appropriate to give investigation of military cases to the police and not treat it as a separate type of investigation. This is important, because sometimes contradictions can arise in practice. In particular, the simple fact that a crime was committed by a conscript does not necessarily mean that there were no civilians involved in that crime. In this case, according to the Criminal Procedure Code, the part of the case involving civilians must be detached and investigated separately. An attempt to address this problem is made in Article 7(3) of the RA Law on Military Police, according to which the Military Police and the RA Police are supposed to investigate crimes jointly, if these crimes were committed with the involvement of military servicemen, outside of the territory of military units and other military organizations.

In any case, we do not think that this serves the interests of investigation. That is why we think the Military Police should not have investigative functions in the Republic of Armenia. The main goal is to fight against crimes in the armed forces, and this is best done by non-military institutions, considering the fact that the law does not differentiate

clearly between two different investigative bodies, such as military commanders and the Military Police.

➤ ***Deterrence, Prevention and Stoppage of Crimes Being Planned or Committed by Military Servicemen as a Power of the Military Police***

The next set of tasks of the Military Police includes deterrence, prevention and stoppage of crimes being planned or committed by military servicemen. This power is also related to the fight against crime and is something that is exercised by law-enforcement agencies. The exercise of this power by the Military Police can also create certain difficulties in practice, because the planning and committing of crimes by military servicemen may also involve civilians, and the Military Police cannot possibly do anything about cases involving civilians. In addition, the Article of the law, which talks about crimes being planned by military servicemen, specifies that the Military Police can exercise certain powers when a military serviceman committed an administrative offense. Obviously, this has nothing to do with the goals of the Military Police described in the RA Law on Military Police, or with the title of the said article.

Moreover, the Military Police is, in essence, given functions that belong to law-enforcement agencies. However, this is controversial, because a division within the armed forces is basically given the powers of a law-enforcement agency, which, we think, cannot be considered appropriate. We think the Military Police should have been given general oversight functions and not the functions of a law-enforcement agency.

➤ ***Protection of the Authorized Body's Property as a Power of the Military Police***

According to the RA Law on Military Police, the protection of the authorized body's property is one of the functions of the Military Police. According to Article 9 of that law, while protecting the authorized body's property, in cases and in accordance with procedures prescribed by law, the Military Police is allowed to take measures in order to prevent military servicemen's unlawful actions against the said property, to ensure proper use of the property, and to provide recommendations to the relevant officials on how to address the identified problems in terms of protection of the said property.

As for the Military Police's authority to take measures to prevent military servicemen's unlawful actions against the authorized body's property, it must be noted that such measures should be taken by military unit commanders, who can actually do it more effectively. There is no doubt that prevention requires timely reaction to a situation. Therefore, military unit commanders can react more effectively than Military Police employees.

As for the Military Police exercising control over the proper use of the said property, or the task to provide recommendations to the relevant officials on the protection of the property, these functions are in tune with the control powers of the Military Police.

Of special interest is the Military Police's power to ensure proper and safe use of vehicles belonging to the armed forces. To this end, the Military Police registers all vehicles belonging to the armed forces. It also organizes and conducts technical inspection of all armed forces vehicles and trailers.

If drivers of vehicles belonging to the armed forces create a dangerous situation for traffic or violate traffic rules, the Military Police has the right to stop such vehicles, check the drivers' licenses and documents for the cargo that is being transported, issue protocols/tickets, prohibit the further exploitation of vehicles that are technically faulty or dangerous for traffic safety, inspect the vehicles belonging to the armed forces and the cargo they are transporting, seize the vehicles belonging to the armed forces that have been declared missing and are found, detain drivers operating an armed forces vehicle under the influence of alcohol, as well as drivers who do not have proper driver's licenses or other documents allowing them to operate the vehicles, followed by seizing the said vehicles and ensuring proper storage of their cargo.

However, it must be noted that we think the Military Police should not be involved in issuing protocols/tickets to drivers who break traffic rules, because this can be done more effectively by the Traffic Police. In addition, the legal consequences of such protocols/tickets are not clear. Will this lead to drivers paying a fine, which is what is normally supposed to happen in case a person gets a ticket?

We think the law fails to provide for some powers, such as escorting the armed forces technical equipment, ensuring safe transportation of such equipment and regulating traffic in times of war in places where military equipment is supposed to pass.

When talking about the Military Police, we cannot ignore some of its other powers that include apprehension of military servicemen for desertion or for violations of rules related to the wearing of the uniform. Violation of rules related to the wearing of the uniform leads to administrative liability and does not contain elements of a crime. As for desertion, it doesn't always contain elements of a crime. However, there are many cases when military servicemen are apprehended and brought to the Military Police for breaking the rules related to the wearing of the uniform. An analysis of the tasks of the Military Police, assigned to it by the RA Law on Military Police, indicates that this agency does not have such powers. If we also consider Article 5 of the RA Constitution, according to which state bodies and public officials are allowed to perform only such acts for which they are authorized by the Constitution and the laws, then we end up with the following question: what is this function of the Military Police based on, after all?

2.2. The RA Military Prosecutor's Office as a Means to Ensure Lawfulness

The status of the Prosecutor's Office and its tasks are defined in the RA Constitution. In particular, Article 103 of the RA Constitution states that the Prosecutor's office is a unified system headed by the Prosecutor General. Based on this provision, we can assume that the Military Prosecutor's Office is also an integral part of the Prosecutor's Office, and its tasks are based on Article 103 of the RA Constitution. Thus, in order to ensure lawfulness in the armed forces, the Military Prosecutor's Office shall:

- a) Instigate criminal charges and prosecution,
- b) Oversee the lawfulness or preliminary inquiries and investigations,
- c) Defend the charges in courts,
- d) Files lawsuits to protect state interests,
- e) Appeal against court judgments, verdicts and decisions,
- f) Oversee the lawfulness of the serving of penalties and other means of compulsion.

Article 18 of the RA Law on Prosecutor's Office states that, in the armed forces, the powers described in Article 103 of the RA Constitution are carried out by the Military Prosecutor's Office.

We think that having a separate Military Prosecutor's Office also has to do with the "special attitude" towards the armed forces. We think there is no need to separate the armed forces from other aspects of public life and to establish separate bodies to ensure any specific aspect of its activities. In particular, there is no difference between bringing a lawsuit to protect state interest in the armed forces and doing the same thing in any other area of public life.

2.3. Internal System of Oversight over the Armed Forces Management

In addition to the bodies mentioned above, oversight over the lawfulness in the Ministry of Defense system is carried out by two other institutions operating in the Ministry's staff: the Control Department and the Financial Inspectorate. The first of these bodies oversees implementation of the Minister's orders. The second provides oversight of expenditures in the Ministry of Defense system.

By nature, what these institutions do is not control but internal oversight, because they operate within a public administration body. In essence, their mechanisms and the external oversight mechanisms complement each other.

It must be noted that, in the beginning, both of these institutions only carried out inspections, i.e. their oversight was *post factum* and not *a priori*. In particular, there was an inspection committee⁸ that carried out planned inspections in military units to identify

⁸ This was the old name of the Control Department, before the approval of the new bylaws of the RA Ministry of Defense.

the existing problems, to check how the Minister's orders are carried out, etc. In addition, the inspection committee sometimes got involved in inspecting the implementation of various tasks set by various departments within the Ministry before themselves. This practice could not possibly be effective, because control can be effective only if it is exercised by an independent body from outside of the public administration body. Obviously, there is always going to be an element of subjectiveness if control is done by the public administration body itself, which reduces the effectiveness of any such control.

The effectiveness of departments like the Financial Inspectorate or the Control Department depends on the quality of oversight over the lawfulness in the management process. Therefore, they must be involved in the management right from the beginning, in order to be able to prevent any violations of law before they occur. They should have the power to disallow certain managerial actions, if necessary. This will certainly have a positive impact on the lawfulness in the management system. Considering the fact that the Minister of Defense, being a public administration body, must also have an oversight function, which is one of the management functions, and given the fact that the Control Department and the Financial Inspectorate operate in the Minister's staff, it can be stated that the Minister's oversight function has been delegated to these two institutions. They are supposed to carry out oversight "on behalf of the Minister."

This practice is rather common in the last few years. In particular, representatives of the RA Ministry of Defense Control Department are included in a procurement commission charged with making procurements for the Ministry's needs. In addition, the Control Department is involved in competition commissions and testing commissions charged with filling vacancies in special civil service, which contributes to lawfulness in the management process, as well as to the Minister's exercise of the oversight functions.

In the future, these two bodies must get more involved in the drafting and implementation of decisions in the sector, thus ensuring a more effective exercise of the Minister's oversight functions.

3. SYSTEM OF CONTROL OVER THE DEFENSE SECTOR MANAGEMENT

Democratic control over the armed forces is exercised by a number of state bodies and civil society institutions, such as non-governmental organizations, free media, etc.

Naturally, parliamentary control lies in the center of the control system. Parliamentary control is exercised by a democratically elected parliament. This role is given to the parliament, because the latter, being the highest representative organ of the country, i.e. a unique “forum” of society, is able to ensure democratic control over the armed forces in the most impartial and complete way.

3.1. The RA National Assembly as a Democratic Control Body

A model law on ***Parliamentary Control over a Country’s Military Structures*** was adopted at the 18th session of the CIS Inter-Parliamentary Assembly on November 24, 2001. According to that model law, parliamentary control is considered a key element of civilian/democratic control. It is interpreted as an activity carried out by the parliament in cooperation with the authorities and civil society institutions, aimed at the establishment and effective use of systems of administrative means and legal norms. The purpose of the law is to ensure effective management of the armed forces, their political and ideological neutrality, further development and greater transparency of the military structure, its effective cooperation with the media and non-governmental organizations, protection of military servicemen’s civil and social rights, including helping former military servicemen to adapt to life in the society.

According to the model law, parliaments carry out democratic control by means of 1) passing laws, 2) approving the armed forces budget, 3) controlling the implementation of the budget, 4) approving the size and structure of the armed forces, 5) ratifying or nullifying international agreements, or commissioning studies on various key issues in the defense sector, 6) announcing or canceling a military state or a state of emergency, 7) providing legal regulation for the use of the armed forces and carrying out a number of other “acts.”

Let us now turn to the question of to what extent does the RA National Assembly have the powers required to carry out such control.

According to Article 80 of the RA Constitution, members of parliament have the right to ask written and oral questions of the Government, while factions and parliamentary groups also have the right to submit interpellations to the Government, which the latter is supposed to answer during one sitting of a regular weekly session. The National Assembly does not pass any resolutions in connection with parliamentarians’ questions. According to Article 105 of the National Assembly’s Rules of Procedure, the National Assembly may adopt a decision to submit recommendations to the relevant public administration bodies in connection with interpellations. Thus, the National Assembly can use these methods to get information on subjects of interest to

the parliament. However, this form of control is ineffective, because the parliament is lacking some practical levers to pursue the matters and ensure that the problems raised in interpellations are address properly. This form of control would have been more effective if the parliament had the opportunity to provide political assessment of the executive's solutions to the problems raised in interpellations, which would definitely influence the public's assessment of the executive's work, or if the parliament had the right to give the government a vote of no confidence in such situations, which is something that is not provided for in our Constitution.

As for the ways in which the armed forces may be used, they are defined in the Military Doctrine approved by the RA President's decree, which actually contradicts the parliament's key role in democratic control over the armed forces.

Moreover, considering that the National Assembly approves the budget for military needs, it would have been logical to allow the National Assembly to approve the size of the armed forces and the number of people to be drafted to the army. However, according to Article 7 of the RA Law on Defense, the size of the army is determined by the RA Government, while the number of people to be drafted to the army is decided by the Minister of Defense. It is completely understandable why the determination of the number of staff is left to the Government (presumably, in order to ensure the system's flexibility), but it is not understandable why the determination of the size of the army is left to the government and, especially, why it is that the number of people to be drafted to the army should be decided by the Minister of Defense.

The RA National Assembly's role in the budgetary process is limited only to approving the budget, amending it and exercising control over its implementation, as expressed in approving budget implementation reports. However, this leaves out oversight over the proper use of budget resources. For example, the lists of products, work and services to be procured under each budget classification is approved by the RA Government. This means that the National Assembly, having approved budget allocations by broad categories, is unable to control how this money is spent at the end. *Of particular concern is the problem of redistribution of money between different budget lines, which is also done by the RA government.*

In order for the parliament to play its proper role in tune with democratic principles, it is necessary to amend Article 15 of the RA Law on Budgetary System, so that the Government is no longer allowed to redistribute money between different budget lines and this power is given to the National Assembly. In addition, a similar change needs to be made in the RA Law on Procurement, which says that the list of products, work and services to be procured in accordance with budget allocations is to be approved by the Government. Even though this suggested amendment would reduce the speed with which such redistribution can be made, it would force public administration bodies to pay more attention when developing their annual programs in order to avoid the need for any future amendments as much as possible.

When talking about parliamentary control over the defense sector, it is important to consider *the role and functional characteristics of the standing committee on defense, national security and internal affairs*, which is a National Assembly's committee specialized in this sector.

Almost every parliament in the world has a specialized committee on defense and security issues. These committees usually organize discussions and reach conclusions on issues like the military doctrine, long-term security planning, military cooperation with other states or institutions, peacekeeping activities, control over the defense budget implementation, army draft policy, etc.

In addition, parliamentary committees also widely engage researchers and civil society institutions. The latter provide committees with expert analysis and other relevant information, or invite their attention to important issues facing the society. In some countries, parliamentary committees (e.g. committees of the British House of Commons) are not authorized to collect information on their own, while in other countries (e.g. the US congressional committees) they have practically unlimited powers to collect information from external sources. In some countries (e.g. Canada, Belgium, Germany, Italy and Turkey), parliamentary committees have the right to establish norms by adopting or proposing amendments, while committees in other countries (e.g. Great Britain, Hungary), are only authorized to carry out control over the executive and over budget allocations, without a possibility to create norms. In some countries, parliamentary committees on defense issues are required to submit reports on the defense sector to the parliament. These reports may be followed by voting, and sometimes even by a vote of confidence.

Having examined the powers of the parliamentary committee, we can state that it should serve as a link between the parliament and the defense sector.

According to Article 73 of the RA Constitution, standing committees are established for preliminary discussion of draft laws and other legal acts, as well as for giving the National Assembly conclusions on these drafts. According to Article 21(4)(f) of the RA National Assembly's Rules of Procedure, the RA NA standing committee on defense, national security and internal affairs covers issues related to defense, security, emergency situations, police, military-industrial complex, military educational institutions, military and police service.

Giving these powers to the committee has to do with the fact that the parliament is the highest legislative and representative organ of the state. Despite the fact that Article 62 of the RA Constitution does not directly proclaim the RA National Assembly as the highest representative body, but defines it only as the body that exercises legislative power in the Republic of Armenia, the RA NA standing committees are also given powers typical for a representative body. Such powers include the right to request the relevant authorities to provide information about the situation in the sector. However, all of this is done through "discussions on other issues."

In addition to standing committees, there is a possibility to establish temporary ad hoc committees on specific issues. However, there have been no such ad hoc committees on any defense issues so far.

Relevant legal, professional, specialized and other resources are required in order for committees to exercise their powers properly.

According to the Rules of Procedure, standing committees have one clerk and three specialists. According to Article 23 of the Rules of Procedure, any standing committee has the right to establish sub-committees and create working groups, define their tasks, time period for their activities and procedures for their operation, and select their leaders. Working groups can include members of parliament, experts from the committee, faction or parliamentary group, assistants to members of parliament and other specialists. There is no specific mention of the tasks that subcommittees and working groups may tackle. However, based on the fact that they are supposed to go into details of standing committee's work, one can assume that their purpose is also to organize preliminary discussion of draft laws and *other issues*, and to provide conclusions to the National Assembly.

As we can see, the standing committee has no possibility to cooperate with non-governmental organizations, which weakens its position from the viewpoint of parliamentary control over the defense sector. However, this gap can be filled if the RA NA standing committee on defense, national security and internal affairs signed a memorandum of understanding with a group of non-governmental organizations, which would allow them to cooperate in the area of defense and make parliamentary control more comprehensive and effective.

It must be noted that there already have been examples of cooperation between the RA NA standing committee on defense, national security and internal affairs and civil society institutions. A meeting between the chairman of the RA NA standing committee on defense, national security and internal affairs and non-governmental organizations working in the area of defense, national security and internal affairs took place at the committee, in 2009, with support of the OSCE Yerevan office. During that meeting, the committee chairman urged the non-governmental organizations to cooperate with the committee and support it in its activities. Such meetings take place on a regular basis, which helps institutionalize such cooperation. Non-governmental organizations introduce main areas of their activities, talk about results of their studies, inform the committee chairman about their concerns and offer some recommendations. The committee is greatly supported by the OSCE Yerevan office in terms of exercising its parliamentary control functions to the fullest. This support is based on a memorandum of cooperation between the RA NA standing committee on defense, national security and internal affairs issues and the OSCE Yerevan office, signed on October 17, 2008. Under the memorandum, in December 2008, the committee received an OSCE-funded report on the implementation of the *RA Law on Citizens Who Have*

Not Performed Military Service in Accordance with the Established Procedures. In this report, independent experts raised a number of problems with the implementation of that law. Also, discussions on military statutes, private security organizations and other issues have been organized.

3.2. The RA Control Chamber as a Democratic Control Body

The status and the main functions of the RA Control Chamber are defined in the RA Constitution. According to Article 83.4 of the RA Constitution, the RA Control Chamber is an independent body that controls the use of budget resources, state and community property.

As seen from the status of the Control Chamber, the scope of its powers includes control over the effectiveness of the use of state budget resources and the use of public property. Unlike other bodies with oversight functions in the defense sector, such as the Military Police and internal structures, the Control Chamber carries out control that is not a part of public administration. Obviously, the oversight carried out by the Military Police and internal structures is an integral part of public administration; therefore, this oversight is somewhat limited by the fact that these organizations are part of the same public administration system.

Unlike these organizations, the control bodies do not have executive/commanding powers that are typical for organizations operating within the executive branch of power. Their only task is to carry out control. In essence, the subject of control can be divided into two parts: control over the use of state and community property (including budget resources), and control in the area of human rights protection.

Based on the aforementioned constitutional norm, the RA Law on Control Chamber was adopted on December 25, 2006. The law provides a detailed description of the Control Chamber's powers. According to that law, the Control Chamber has the following functions in the area of public administration, including the armed forces management:

- control over budget expenditures,
- control over the use of extra-budgetary state resources. As we can see, the Control Chamber is considered to be the body that exercises control over the use of state and community property, including budget resources. As part of its powers, the Control Chamber has the right to inspect the procurement process, budget expenditures and the use of procured property in the armed forces management.

According to the RA Constitution and the RA Law on Control Chamber, the Control Chamber is required to report the results of its activities to the RA National Assembly at least once per year.

3.3. The RA Judiciary as a Democratic Control Body

Being an institution responsible for the administration of justice, the RA judiciary also plays a great role in ensuring democratic control over the armed forces. There are currently no specialized courts to try cases related to military servicemen.

The courts should be involved in decisions to apply sanctions to military servicemen, if these sanctions are related to limiting the rights of these servicemen.* In addition, military servicemen should be able to use courts to appeal against their commanders' actions that violate their rights. At the same time, one must admit that this mechanism already exists, even today. For example, according to Article 18 of the RA Constitution, *everyone is entitled to effective legal remedies to protect his/her rights and freedoms in courts and other state bodies*. Considering the fact that constitutional norms apply directly, we can state with confidence that there is no need to pass any other legal act in order to apply this constitutional provision.*

However, there are certain obstacles for the exercise of this right. In particular, an important question is: how should a military serviceman, whose rights have been violated, appeal against his commander's decisions? He cannot leave his military unit. In case of the slightest suspicion that a serviceman is about to exercise this right, his military commander will try to do everything in his power to prevent this. Suffice it to say that soldiers can leave their military units only with their commander's permission. Also, in many cases, courts are usually very far from military units. It is interesting to note that investigative bodies have been brought as close as possible to military units, whereas it was decided that no such "closeness" was necessary in the area of human rights protection. There is no doubt that no military serviceman is able to travel dozens of kilometers to get to a court. *We think there need to be judges on duty in military units, in order to improve the situation*. For example, judges can be sent to military units once a month and work there for a while. Then, military servicemen, who think their rights have been violated, can turn to judges in accordance with procedures defined by law, and the judges can take their cases, in accordance with the established legal procedures. This should be preceded by informing military servicemen about different ways to protect their own rights, including legal protection in courts. Also, it is necessary to give leave of absence to military servicemen who plan to protect their rights in courts, and to impose strict sanctions on commanders who would try to prevent military servicemen from exercising their right to judicial protection.

In addition to the above, it must be noted that the exercise of the right to judicial protection in the area of military service has certain peculiarities. For example, a survey among individuals with military education has revealed that the majority of respondents think that military servicemen have no right to challenge military commanders' orders in

* Such sanctions include the keeping in disciplinary isolators, as discussed above.

* A similar norm is included in the Disciplinary Bylaws of the RA Armed Forces.

courts. This has to do with the mentality that “the commander’s word is the law” and ignoring it or objecting to it will lead to a severe punishment. Also, there are ambiguous feelings towards military servicemen who try to protect their rights in courts. In particular, commanders may become hostile to military servicemen who try to exercise their right to judicial protection. These issues need to be addressed early on, in general education school and military educational institutions. Special attention should be paid to the fact that a refusal to follow an obviously illegal order or command does not lead to liability. However, military servicemen should be able to understand clearly what constitutes an illegal command. This too can be achieved with relevant educational programs in schools and military educational institutions. The important thing is that these programs must be developed and taught by ***civilians with relevant civilian education.***

3.4. The Human Rights Defender as a Democratic Control Mechanism

The protection of human rights in the defense sector is important, especially because military discipline and the confidentiality regime create “favorable” conditions for human rights violations. State and public control are extremely important for carrying out effective control in this sector.

There was a plan to establish an institute of military ombudsman under the Individual Partnership Action Plan (IPAP). Since the RA Constitution does not provide this opportunity, a post of advisor on issues of military servicemen and military affairs was created at the RA Human Rights Defender’s office. This advisor assists the Human Rights Defender in the protection of military servicemen’s rights.

However, the protection of military servicemen’s rights was one of the Human Rights Defender’s functions even before this post was created.

In general, the Human Rights Defender carries out the following functions:

- *Constant monitoring of human rights protection,*
- *Dealing with citizens’ complaints,*
- *Being a speaker for civil society,*
- *Publishing reports on various issues, including those that are of interest for the armed forces.*

An example of such a report is the Human Rights Defender’s extraordinary report on Human Rights Protection during Implementation of Disciplinary Policy in the Armed Forces, published in 2009 by an expert group established with support of the OSCE Yerevan office.

The report covered the following main issues:

- *the issue of legal certainty,*
- *lack of justification for choosing a specific form of disciplinary sanction,*
- *failure to record violations of law,*
- *ineffectiveness of appeal mechanisms,*

- *condemnation of torture,*
- *freedom of information and the confidentiality regime in the army.*⁹

The Human Rights Defender's office has a group dealing with military servicemen's and criminal procedure rights. When the group receives specific complaints, it visits the relevant military units to examine the situation there. In the Human Rights Defender's report, there is a separate chapter, where he describes cases of violation of military servicemen's rights. However, in light of all of this, the role of the special advisor remains unclear. He doesn't have any specific powers in the actual process of protecting the rights of military servicemen, and he doesn't publish separate reports.

Besides, as a rule, the Human Rights Defender usually reacts when the office gets a specific complaint or a report, even though he visits military units frequently. However, it is obvious that, because of many reasons (fear, discrediting, etc.), military servicemen prefer to tolerate the violations of their rights in silence rather than to complain to anyone. In particular, in his annual report's section on military servicemen's rights, the Human Rights Defender noted that his job was made significantly more difficult by the low level of legal awareness among military servicemen. Some soldiers (and sometimes even junior officers) have no idea about their rights. In addition, they have developed a strange system of values, where the standing up for one's rights is considered a "betrayal." Some commanders treat human rights as an inferior thing and refer to human rights protection mechanisms with derogatory statements. There are even cases when officers, who are being prosecuted for human rights violations, start talking about their past military history and years of service in the armed forces, without realizing that nothing gives them the right to violate human rights.

These mechanisms are essentially not effective. Even though the Human Rights Defender's staff members started visiting military units routinely in 2008, we believe such visits cannot be effective. Judging from the Human Rights Defender's reports, most of the cases of human rights violations come to light as a result of complaints.

A public control mechanism can close the gaps in the system to some extent. Non-governmental organizations should visit military units themselves and by their own initiative in order to examine the situation with human rights protection. To this end, a separate non-governmental body should be created outside the system, e.g. adjacent to the RA National Assembly's standing committee on defense, internal affairs and national security. Acting independently and freely, this body would present the said committee with its own observations on the human rights situation in the armed forces.

⁹ See Extraordinary Report on Human Rights Protection during Implementation of Disciplinary Policy in the RA Armed Forces. The RA Human Rights Defender, Yerevan, 2009, <http://www.ombuds.am/main/am/10/31/0/4/>:

3.5. Public Control as a Democratic Control Mechanism

The most active part of democratic control over the armed forces is the public control mechanisms that include non-governmental organizations and the media. While all the state bodies organize their work mainly on the basis of complaints, public control can be more proactive. In many European countries, parliaments make use of non-governmental organizations and the media during the exercise of their control functions.

A public council has been established adjacent to the RA Minister of Defense. Being a consultative body, the council is supposed to assist the Minister in the relations with the public, particularly by drawing his attention to various problems in the sector. We think the establishment of such a council is unnecessary, because such mechanisms can be effective only when they work completely independently of the person in charge of the sector, rather than with him. Otherwise, such a council can gradually grow too close the agency it is supposed to control.*

There is another consultative body that has been created recently in the Republic of Armenia – the Public Council adjacent to the RA President. An analysis of the Public Council's bylaws reveals that it is supposed to draw the President's attention to various problems and to represent citizens' interests in the relations with public administration bodies. The Public Council's goals are to promote the development of democracy and fundamental human rights and liberties, prevent intolerance, promote sustainable development and strengthening of civil society, contribute to the establishment of mutual trust between public administration bodies and citizens and other civil society members, dialogue and partnership between the society and the authorities, increasing the level of public's involvement in public administration, and help carry out public control. The Public Council represents citizens' interests in their relations with state bodies, promotes civil society's and citizens' involvement in public administration, and invites the President's attention to issues of importance and interest to the public by providing alternative approaches and opinions. The Public Council has 12 committees, including a committee on defense, national security and internal affairs issues, which covers the defense sector, among other things.

However, the Public Council cannot be effective if it works separately from other civil society institutions. It should cooperate actively with non-governmental organizations and the media, who work towards the same goals.

The RA Ministry of Defense currently cooperates with a number of non-governmental organizations working to protect human rights in the armed forces. These include "Soldier and Rights," "Soldier's Mother" and "Soldiers and the Law" non-governmental organizations. These organizations are engaged mainly in the protection of soldiers' rights in the period of draft and during the military service itself. They monitor

* This concern may well become a reality, because the council's chairman has been given the status of advisor to the RA Minister of Defense, thus becoming a part of the RA Ministry of Defense system

the food, have free access to military units, meet with soldiers, identify cases of non-statutory relationships, and conduct public investigation into cases of soldiers' deaths. In their interviews to the Human Rights Defender's Bulletin publication, the heads of these organizations stated that most of the complaints are related to individuals with medical conditions being drafted to the army.¹⁰ In addition, there were problems with granting leaves of absence. Thanks to the efforts of these three organizations, the issue of leaves of absence has been resolved to some extent in 2010. A vacation schedule is prepared in the beginning of the year, which is then sent to the Ministry of Defense, and leaves are granted in accordance with that schedule.

There is a rather active non-governmental organization called the National Center for Legal Studies. In 2009, its experts conducted a study, with the OSCE support, on the Main Issues of the RA Defense Sector Management. The book, published as a result of the study, was presented to the public on October 5, 2009. The study contains an analysis of the powers of public administration bodies and officials in the defense sector, and covers issues related to the use of the armed forces and the introduction of the civil service system. The organization also follows the various draft laws being discussed by the RA National Assembly's standing committee on defense, national security and internal affairs, carries out public expertise of these draft laws and, if necessary, provides feedback to the committee.

Despite the fact that the civil society sector is rather actively involved in the defense sector, there is still much to be done in this regard. Future steps should include further development of cooperation with public administration bodies, delegating some powers to the civil society sector and increasing the civil society's involvement in the discussion of new recommendations on regulating the defense sector.

¹⁰ See Human Rights Defender's Bulletin, Issue No. 5, pp 23-29

CIVIL CONTROL OF ARMED FORCES IN US AND ITS DIFFUSION ON POST-COMMUNIST REGION

ALEKSANDR AVETISYAN¹¹

Introduction

We fear others we create an institution of violence to protect us, but then we fear the very institution we created for protection.¹²

Due to their structure and functions the armed forces are continuously playing significant role in history and development of every state. The military establishment is designed, operated, and supported to serve the goals and interests-in particular, security goals and interests - of the society at large.¹³ And because of their coercive power armed forces have a direct or indirect, but in both situations high influence on state authority and in case of non-efficient oversight could artificially broaden out the frame of their responsibilities defined by law and seize political power. Of course, it should be avoided otherwise super militarization of public life is imminent and consequences are unpredictable. Confidently, it would seriously harm the balance between public institutions and hinder regular development of non-military spheres of social life. The civil-military challenge is to reconcile a military strong enough to do anything the civilians ask them to with a military subordinate enough to do only what civilians authorize them to do.¹⁴ The only way to ensure balance is establishment of political and legal mechanisms to reduce the risks of military intervention to public policy and life. Civil control of armed forces seems to be most productive mechanism to balance military power. Civil control of armed forces is the tool by means of which the public will subjects the armed forces to itself through the state policy.¹⁵ But the question rises how? Logically it is task of state, as armed forces one of the state institutions and state should have more or less effective methods and appropriate resources to govern armed forces like other institutions, despite of letting them govern the state. Additionally, latter mentioned follows from the basic principles of international law, such as sovereignty which guarantees every state to solve its internal issues itself.¹⁶ Of course the role of state in this is issue is crucial, however the samples of history very often

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¹² P. D. Feaver, "The civil-military problematique: Huntington, Janowitz, and the question of civilian control", *Armed Forces and Society* 1996, 23, 149, p. 150.

¹³ A. J. Goodpaster, S. P. Huntington, "Civil-military relations", *American enterprise institute for public policy research*, Washington, D.C, 1977, p. 31.

¹⁴ P. D. Feaver, "The civil-military problematique: Huntington, Janowitz, and the question of civilian control", *Armed Forces and Society* 1996, 23, 149, p. 149.

¹⁵ A. R. Avetisyan, "To the issue of civil control over the Armed Forces". «Haikakan banak» («Armenian Army») *Defence-academic quarterly*, Drastamat Kanayan Institute for national strategic studies, Ministry of defence, Republic of Armenia, 2–3 (56–57). 2008. page 88. Available at: http://www.mil.am/arm/hb/2008_2_3.pdf.

¹⁶ For example, Article 2.1 of UN Charter. Available at: <http://www.un.org/en/documents/charter/index.shtml>

prove that it is not often just state responsibility to implement civil control of armed forces.

Many specialists of civil – military relations when addressing the problem of “civil control of armed forces” mention it as a political governmental control of executive, some of them as a parliamentarian control, but very few of them considering it as a problem of whole society. As a result the role of social institutions such as media, local NGO’s, ombudsman type institutions¹⁷, church and society in general is minimizing in this very important issue. But the oversight of these institutions is very important in every state as an additional support to state policy and especially alternative measure of pressure when the state is militarized itself influenced by ideological system of values of leading political parties, or political power is seized by armed forces. Let’s remember Fascistic Germany where the armed forces were remaining under the absolute influence and control of leading party, correspondingly under the civil control, but it did not make them less dangerous for the world and for its own society as well. Another example is Soviet Union where the armed forces were not so much under the control, but strongly integrated to state policy of communist party and were the guards of communist regime¹⁸.

Besides, super militarized state is real treat to international peace and security. Accordingly, another influential actor of civil control of armed forces might be considered the international society. Of course, international society would not be able to fulfill this important task without coercive mechanisms, such as internationally legal economic, political or even military sanctions. Hence international civil control is being transformed the issue of higher significance. Thus, international progressive society uses its persuasive and even binding mechanisms to introduce the notion of civil control of armed forces to risky areas of world and tries to avoid militarization of non stabile states. Anyway, it is more than obvious that simply introduction of the phenomena of civil control of armed forces should not be efficient if it is not based on appropriate public understanding of democratic values. Therefore, all this developments imply changes in understanding of the notion of civil control of armed forces. Although in developed states it is considered to be civil control of armed forces, but its introduction

¹⁷ The ombudsman institutions in different countries usually seek to be the state institutions, but the frame of their responsibilities assures them to be independent enough to oversight state bodies and army as well and implement effective control of army activities, accordingly keeping them under the effective civilian control.

¹⁸ Robert V. Barylski wrote in his book “The soldier in Russian politics” : “The military remained stable and outside of politics during transitions from Brezhnev to Andropov, from Andropov to Chernenko, and from Chernenko to Gorbachev.” Of course they were stable, but never outside of politics none periods mentioned by author nor before or after that. Author itself proves that in the same book, when he says: “...soldiers who served as elected deputies in Congress participated in these debates and established the precedent that people in uniform had the right to criticize their supreme commander’s policies and to reprimand him in public and on record.” It is paradox when the soldiers being elected as deputies in Soviet Congress could be outside of politics. Correspondingly, soviet militaries were strongly involved in politics and, moreover were carriers and guards of soviet ideas, avoiding by this civil control of armed forces.

to developing militarized states renamed it as civil democratic control of armed forces. Initially, it seems not to be so many differences between civil and democratic control, as logically the purpose of civil control is establishment and strengthening of democratic values, but again the example of Fascistic Germany comes to prove that even the armed forces were under the civil control, it could not be deemed as a democratic. End of the Cold War brought the new era of world policy and civil – military relations were and still remain in the focus of changes. World practically became unipolar leading by US and its allies. At the same time Communist regime has left as a heritage states with paralyzed governmental systems for that time internally being influenced by military power. Those were more or less interested to integrate to the new world, but have had no appropriate background to understand the system of democratic values. It is more than clear that US would never tolerate militarized societies in post soviet region, so widely spread campaign started to encourage, persuade or even oblige post soviet states to establish demilitarized democratic systems, which should be based on principle of civil control. Obviously, some of post soviet states have had better potential to understand and accept democratic values than others, due to their geographical and ideological similarities to Western Europe. For example, Baltic and most of the Eastern European states have accepted new system very rapidly and for a short period became the full carriers and spreaders of democratic values in other parts of former Soviet influence¹⁹. Other post-communist states still remain risky areas and appropriate targets to introduce there the civil democratic control of armed forces even they are actively involved in international community and could enjoy fully rights of membership. Western states and especially US even having active multi vector cooperation with most of them are still trying to settle the notion of civil control of armed forces in post communist states to make them more predictable, because fragile democracies of post communist area very vulnerable to changes in their internal policy and strongly tend to be transformed back to militarization and totalitarianism, hence become real treat to international peace and security. Civil democratic control of armed forces is introducing to post communist area by different persuasive mechanisms of international powerful organizations such as NATO or OSCE, sometimes identifying as a requirement or strong recommendation necessary to join or cooperate with those organizations. Not surprisingly persuasive mechanisms could be transformed to more coercive measures up to various sanctions (including use of force). From the first side direct connection between lack of civil democratic control and use of force seems to be a little bit

¹⁹ Many events in frame of military cooperation especially for post communist states both in bilateral or multinational (for example in frame of NATO program “Partnership for peace”) level take place in Baltic or East Europe States, because it is easy to explain military transformation under the democratic cover on the experience of the states that have lived in similar circumstances and passed the process of transformation recently. Besides, there were initiative of Baltic states in frame of Partnership for peace program to cooperate with South Caucasus states in 3+3 format (Lithuania, Latvia, Estonia – Armenia, Georgia, Azerbaijan), but due to lack of political will of parties it was not come into force.

confusing, but there are a lot of visible ties between those two issues when lack of democratic control is combined with some other non-democratic arguments, which serves as a political motivation to intervene to the domestic affairs of the state.

Above mentioned serves as an evidence that US pays serious attention on spread over of the notion of civil democratic control of armed forces in post communist states and considers it as a warranty of international security and good relationship. Presumably, the way to transfer it to post communist states would be introduction of their own experience, but due to geopolitical and historical circumstances US has had totally different understanding of civil control of armed forces, so US experience in this filed does not suit to new challenges. The solution seems to be found by teaching post soviet states to basic concept of civil control of armed forces at the same time adding some new basic principles to concept based on democracy, such as enlargement of capabilities of non state actors and strengthening transparency towards international progressive community.

Civil control of armed forces in US

“Even when there is a necessity of military power, within the land, ...a wise and prudent people will always have a watchful and jealous eye over it.”²⁰

These words belong to Samuel Adams who was one of the signers of US Declaration of Independence. Presumably, it reflected the American approach to the concept of civil – military relations and later became basis to define civil control of armed forces. D. V. Johnson II and S. Metz wrote: the relationship of the uniformed military and civilian policymakers in the United States is complex and fluid, but is based on a single principle: civilian control.²¹ The historical developments and geographic location of US also played decisive role in defining new theory of civil-military relations. Huntington considered that civilian control has existed in the United States, but it has been the product of geographic isolation and the international balance of power.²² Analyzing the geographical and historical issues M. Cairo wrote:

Geography also played an important role in American attitudes toward the military. Throughout the 19th century, broad oceans acted as a buffer to the North American continent and America's neighbors did not present a serious threat. With its isolation, the United States was virtually immune from significant military threats from Europe and Asia. The abundant natural resources of the United States also made it virtually independent from the rest of the world.²³

It follows that the absence of a clear external threat diminishes the significance of a country's military, which can be subordinated to government institutions.²⁴

All mentioned factors played their role to introduce legal definition of this notion into American politics. Thus, the first legal provision on this issue should be considered Article II Section I of US Constitution. In accordance to US Constitution: “the President shall be Commander – in – Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States.”²⁵. This provision serves as a guaranty: as long as the head of state is drawn from a civilian

²⁰ M. F. Cairo, “Civilian control of military”, Democracy Papers, US Department of State, International information programs. Available at: <http://usinfo.org/zhtw/DOCS/Demopaper/dmpaper12.html>

²¹ D. V. Johnson II and S. Metz, “American civil-military relations”, New issues, enduring problems, Strategic studies institute, US Army war college, 1995, p. 2.

²² S. P. Huntington, “The soldier and the state”, The Theory and politics of civil-military relations, The Belknap press of Harvard University Press, Cambridge, Massachusetts 1959, p. 189.

²³ M. F. Cairo, “Civilian control of military”, Democracy Papers, US Department of State, International information programs. Available at: <http://usinfo.org/zhtw/DOCS/Demopaper/dmpaper12.html>

²⁴ Edited by C. E. Welch, Jr., “Civilian control of the military”, Theory and cases from developing countries, State University of New York Press, Albany 1976. p. 24.

²⁵ Article II Section I of United States Constitution.

background, his personal command over the military provides a veneer of civilian control.²⁶

There are theoretical rejections whether Article 2 Section 1 of US Constitution really establishes basis for civil control of armed forces. Samuel P. Huntington writes: “The United States Constitution despite the widespread belief to the contrary, does not provide for civilian control.”²⁷ Huntington criticism mostly was based on absence of understanding of notion “military professionalism” in Constitution.²⁸ He found the historical factor as a main source of defects in Constitution, as military professionalism and civilian control as the subordination of that profession to political institutions were simply unknown to the eighteenth century.²⁹ Another author, M. Cairo agrees that the details of civilian control are never clearly spelled out in the Constitution, as the Founders never envisaged a professional military class and, therefore, could not have foreseen the nature of civilian control today.³⁰ He thinks that civilian control of the military in America has evolved as a matter of custom and tradition as well as from constitutional legalities.³¹

However, it should be admitted that even this “non-completed” definition of US constitution has had revolutionary impact if we will take into account the historical period when the Constitution has been adopted. Besides, the other basic principle such as separation of power settled in US Constitution should be admitted as indirect supportive measure to form the legal basis of civil control of armed forces in US. Correspondingly, constitutional measures to oblige armed forces subordinate civil will have been established and shared between three branches of power: legislative, executive and judicial.

The Founders succeeded in creating constitutional structures that unambiguously subordinated the armed forces to political rule, and at the same time divided central control over defence matters between the legislative and executive branches³². They gave the authority to declare war, the power to raise and equip armed forces, and the making of rules and regulations for those forces, to the elected Congress. They granted to the executive (the civil government) the

²⁶ C. E. Welch, Jr., “Civilian control of the military”, Theory and cases from developing countries, State University of New York Press, Albany 1976. P. 6.

²⁷ S. P. Huntington, “The soldier and the state”, The Theory and politics of civil-military relations, The Belknap press of Harvard University Press, Cambridge, Massachusetts 1959, p. 163.

²⁸ This notion was the basis of his theory on civil control of armed forces, which is discussed latter in this paper.

²⁹ S. P. Huntington, “The soldier and the state”, The Theory and politics of civil-military relations, The Belknap press of Harvard University Press, Cambridge, Massachusetts 1959, p. 164.

³⁰ M. F. Cairo, “Civilian control of military”, Democracy Papers, US Department of State, International information programs. Available at: <http://usinfo.org/zhtw/DOCS/Demopaper/dmpaper12.html>

³¹ M. F. Cairo, “Civilian control of military”, Democracy Papers, US Department of State, International information programs. Available at: <http://usinfo.org/zhtw/DOCS/Demopaper/dmpaper12.html>

³² R. Joo mentions only two, executive and legislative branches of power as measures of civil control, but the judicial branch of power should be included to list as well, taking into account importance and role of judicial power in Common law system.

*power to conduct war, and assigned to the President, the popularly elected head of state and supreme civil authority, the role of the Commander-in-Chief of the armed forces.*³³

It is very important to remember that Constitution has been adopted after revolution and those steps has been conditioned to have powerful army capable to address threats and at the same time influential civil political power able to subdue military power, because it is problem of each post war period when former military leaders are trying to balance their inactive military status by active civil activities and seize political power. But we are facing to paradox situation here, because most of the Founders of Constitution themselves were militaries.

*All members of the Convention (assembled in Philadelphia in late May, 1787) were familiar with the military problems of the Revolutionary period and the preceding decades. Many of the delegates had had considerable military experience. The presiding officer, George Washington, had served as a commander –in-chief of the American forces during the recent Revolutionary War. Also present - to list the delegates by their titles in the late war-were such veterans as Colonel Alexander Hamilton, Captain Jonathan Dayton, Major William Pierce etc.*³⁴

It follows that former military leaders of Revolution had analyzed on their own experience how dangerous could be military intervention into politics and to avoid it they have settled constitutional instruments. Thus, they believed it was necessary to demonstrate that under the new Constitution the military would be subject to civilian authority in order to protect democracy.³⁵

Later developments of American history brought conceptual approaches to the issue of civil control of armed forces. Probably the most widespread and influencing concept of civil control of armed forces has been given by S. Huntington. Huntington's basic approach to define civil control of armed forces is answer to question how military power can be minimized. He discusses civilian control from two perspectives: subjective civilian control and objective civilian control, where the subjective civilian control is based on issue that's it to minimize military power by maximizing civilian power in relation to military and civilian control in the objective sense is the maximizing of military professionalism.³⁶ In Huntington's theory objective civilian control prevailing, because maximizing of civilian power in relation to military always means to maximize the power

³³ R. Joo, "The democratic control of armed forces", Chailiot paper 23, 1996, available at: <http://aei.pitt.edu/480/01/chai23e.html#chap2>

³⁴ See L. Smith, "American democracy and military power". A study of civil control of the military power in the US, The University of Chicago press, 1951, p. 18.

³⁵ M. F. Cairo, "Civilian control of military", Democracy Papers, US Department of State, International information programs. Available at: <http://usinfo.org/zhtw/DOCS/Demopaper/dmpaper12.html>

³⁶ S. P. Huntington, "The soldier and the state", The Theory and politics of civil-military relations, The Belknap press of Harvard University Press, Cambridge, Massachusetts 1959, p. 80-83.

of particular civilian group or groups, but not the civil society whole, while objective civilian control achieves its result by militarizing the military, thus making them enough professional to abolish themselves intervene into political issues and keep themselves away from political decision making process unless state needs them to activate their participation in politics³⁷. Generally, the focus of his study is the officer corps and the rise of military professionalism,³⁸ which he considers as basic components to provide effective civil control of armed forces.

However, this theory seems to be a little more ideological, as it does not tackle a problem of very simple characteristics of human beings. Even achievement of the highest level of professionalization of military does not stop them to be human beings, correspondingly have strivings to rule society, but not to be ruled by them, all the more if they have appropriate resources to seize the power. Besides, dynamics of development should be always taken into account. Professionalized military who understands and obeys taboos not to move the step towards policy making field, does not keep the abreast of the time. Because new security challenges often if not always require involvement of militaries into politics, but even the highest understanding of military business does not a guaranty of well understanding of politics. Thus, the formats of civil control should be considered also on the context of historical periods, by taking into account demands of those periods.

For example, another theorist of civil-military relations M. Janowitz is an antagonist of Huntington's theory therefore their opinions to the problem in some senses are similar. He has focused on the officer corps and the concept of professionalism as well, but he has paid much more attention to the historical-political developments and looked at the problem through the prism of Cold War, when the nuclear age threats oblige military to assume new role than they usually cover, by centralization on the national security matters in the civilian executive branch (creation of Department of Defence and National Security Council), with a more vigorous effort to gain access to the pinnacle of civilian power, the White House.³⁹ Thus, Janowitz's concept was based on issue how to enlarge measures and levels of civil control of armed forces and suggested three main mechanisms of civil control such as: budget process, allocation of forces and missions, and advice to the President on foreign policy issues.⁴⁰

Above mentioned comes to prove that civil-military relations in general, and naturally civil control of armed forces in it should be evaluated and discussed in frame of dynamics of development process, as they need to be updated due to new challenges that society facing for a particular period. American scholars have built their concepts of civil control of armed forces being influenced by issues of post American Revolution or

³⁷ Ibid.

³⁸ P. D. Feaver, "The civil-military problematique: Huntington, Janowitz, and the question of civilian control", *Armed Forces and Society* 1996, 23, 149, p. 158.

³⁹ Ibid, p. 164.

⁴⁰ Ibid, p 165.

Cold War periods, but the new concept based on American experience of post Cold War era is needed. On this issue P. Feaver writes:

*The two deans of American civil-military relations, Samuel Huntington and Morris Janovitz, continue to dominate the theoretical debate, although their theories do not adequately explain the delegation/control dynamic. A new theory is needed and the outlines of it are evident in the specific weaknesses of the established rivals.*⁴¹

Of course US needs in a new concept of civil control of armed forces in new era, as the post Cold War period has been outlined by significant changes in national and foreign policy of United States. Some scholars of civil-military relations think that this new era by some reasons has refreshed the civil-military “gap” in US. For example, P. Feaver and R. Kohn discuss the issue taking into account the speech of Secretary of Defence William Cohen in 1997 at Yale University when he told: “a chasm ...developing between the military and civilian worlds, where the civilian world does not fully grasp the mission of the military, and the military does not understand why the memories of our citizens and civilian policy makers are so short, or why the criticism is so quick and so unrelenting”.⁴² In his another article P. Feaver finds the ties between civil-military “gap” and internal political developments of United States, when liberal leaning Democrat Clinton has been elected while he has had ideological misunderstanding with conservative leaning and Republican oriented militaries.⁴³

However, the new concept cannot be based only on internal US experience and deal with US civil-military relations. It should be admitted that after Cold War US has huge influence on the wide part of post communist region and new concept should be some kind of guidelines for these states, as most of them seek to build their civil-military relations in similar way as US and its Western allies do, or at least they have to accept US experience, because the proper level of civil-military relations is one of the most important requirements to shift forward their relationship with US and West and make it closer.

⁴¹ Ibid, p. 170.

⁴² P. D. Feaver, R. H. Kohn, “Soldiers and civilians”, The civil-military gap and American national security, Triangle Institute for security studies, MIT press, Cambridge, Massachusetts, London, England, 2001, p. 1.

⁴³ P. D. Feaver, T. Hikotani, S. Narine, “Civilian control and civil military gaps in the US, Japan and China”, Asian perspective, Vol. 29, N 1, 2005, p. 233-271.

INTRODUCTION OF CIVIL CONTROL OF ARMED FORCES IN POST COMMUNIST REGION AFTER COLD WAR

Post Cold War period has been outlined by Russia's weakening position to maintain influence on post communist area. Correspondingly, Western states and particularly United States has shown great interest to be represented in this area. In these circumstances US could not affiliate passive role and had to take initiative to its hands, because this was an excellent chance to remove weakened Russia out of the region.

Even after Cold War armed forces of post communist states carried heritage of communist regime and still tried to be main actors in politics. Besides, collapse of former Soviet Union has been combined by number of local conflicts in the post communist region by involving those still powerful armed forces, which seemed to be hotbeds of high grade tension and real threat to international peace and security. That was a historical momentum to incline scale of a balance, as transitional period of post communist region was full of violence and situation seemed to become non manageable, even chaotic, because there were no more communist regime power who would be able to regularize situation. New superpower needed to press troubles and violations in region. Of course US did not like and presumably would not be able to take this heavy burden on its shoulders solely and undertake for security in region. Reasonably, the only adequate power that could represent Western interest in region and regulate situation was the NATO.

Further developments were addressed to establish new wider Euro-Atlantic security zone, which would involve territories of Central and Eastern European part of former communist community. However, it was quite clear for NATO leaders that the new format of peaceful and even supportive relationship with post communist states should be established, which would bring post communist states to accept NATO standards and transform their military systems. All these transformations would make post communist states more predictable and adequately less dangerous for a new Euro-Atlantic security zone.

Actually NATO found solution of the problem. In NATO's 1994 Summit of Brussels officially was declared about the new program of cooperation called Partnership for Peace (PfP).⁴⁴ This program has aimed to activate military cooperation with post communist states in different fields. At the same time PfP initiative had to made NATO members to think carefully on possible developments of cooperation, as ideological and historical gaps between "old" and "new" allies warned about possible misunderstanding between them, which might become dangerous source of tension. The Western understanding of post communist region was to see them as highly militarized societies. Even after collapse of communist regime its legacy of behavior towards armed forces remained unchangeable. According to some authors armed forces of post communist

⁴⁴ NATO's official website, www.nato.int

states were oriented, towards the Cold War mission of conflict with the West, they were large in size and supported by high levels of defence spending, and they were based on universal male conscription.⁴⁵

It is fact that these circumstances worried the NATO and made to accept membership or even closer relationship with new partners only in case of fulfillment several requirements towards democratization. A. Bebler writes:

*Being consciously aware that the historic success of NATO in creating a zone of peace among its members was due at least as much to the democratic nature of the Allies as it was to their military defence efforts, NATO's sixteen nations realized that the promotion of healthy civil-military relations in the new democracies would benefit European stability as a whole.*⁴⁶

Of course radical reforms in civil-military relations and strengthen of civil control of armed forces should be the first step to make post communist region (or part of it) more or less suitable to Western system of values in this field. However, there was a strong diversification on willingness to implement those preconditions in the post communist states. The post communist states of Central and Eastern Europe, as well as Baltic states have shown greater interest to be involved in new Euro-Atlantic security community and integrate to NATO and EU. Therefore they have faced broadly challenges: reforming the communist party-state system of civil-military relations and replacing it with, hopefully, democratic models of civil-military relations; reducing the size of the armed forces and defence spending and reorienting the military towards new Post-Cold War missions, and building new bases of military society relations.⁴⁷ Thus, it was logical when most of them fulfilled all requirements and have rapidly passed all the necessary steps towards integration to NATO, such as Individual Partnership Action Plans (IPAP) and Membership Action Plans (MAP) to become enjoying full rights members of NATO⁴⁸.

While other post communist states have had no interest to join the NATO or that interest has been suffering by internal disputes within society, being supported only by the part of nation. For some foreign authors situation in civil-military relations in those post communist states seemed to be quite critical. For example, T. Edmunds, A. Cottey and A. Foster write: "Russia, Ukraine and the other former Soviet republics appear to be moving towards situations where civil-military relations are one part of semi- or "soft" authoritarian regimes, while economic problems have resulted in a more

⁴⁵ A. Cottey, T. Edmunds, A. Forster, "Civil-military realtions in postcommunist Europe: Assessing the transition", Routledge, Taylor and Francis group, London and New York, 2006, p. 1.

⁴⁶ A. A. Bebler, "Civil-military realtions in post communist states", Central and Eastern Europe in transition, Westport, Connecticut, London, 1997, p. 15.

⁴⁷ A. Cottey, T. Edmunds, A. Forster, "Civil-military realtions in postcommunist Europe: Assessing the transition", Routledge, Taylor and Francis group, London and New York, 2006, p. 2.

⁴⁸ NATO's official website, www.nato.int.

general degrading – de-professionalization- of the military.”⁴⁹ However, their opinion seems to be very critical. Of course steps done in this direction by the former Soviet republics (except Baltic States) are not comparable with steps of other post communist states, but it is not yet evidence that there is no steps forward. At least almost all post Soviet republics has built their relationship with NATO in frame of PfP program and correspondingly has obliged to implement goals of IPAP. And among these goals strengthening of civil-democratic control of armed forces is one of the most important.⁵⁰ Except that, some foreign experts also declares about development in this filed. ICPS international consultant Duncan Hiscock in his speech made at the international conference in 13 October 2006 has mentioned Ukrainian achievements of recent years in the field of democratic civilian control, such as adoption of the Law on Democratic Civilian Control over the Military Organization and Law-Enforcement Authorities; MOD great efforts to change the ratio of civilian to military personnel in the ministry (which now stands at 76%:24%); published the first White Paper on Defence etc.⁵¹ Another author, president of Centre for International Security and Strategic Studies professor Alexander Goncharenko writes: “one of the major achievements of the liberal-democratic tradition in the past several years was the development of the theory and practice of civil control of security sector which includes all structures of control not only over armed forces but also over other non-military law enforcement agencies (including special services) as a whole, i.e., over all subjects of the national security system.”⁵² Lots of work has been done in Armenia. Armenia became the first among former communist states which implemented one of the obvious goals of IPAP, and created the practical mechanism (by the format of military ombudsman) of human rights protection in Armed forces.⁵³ Moreover, Law on special civil service has been adopted in 2007, which settled effective balance of civilian personel in central apparatus of armed forces, thus creating proper capabilities to implement civilian control of armed forces. All above mentioned comes to prove that mechanisms of civil control of armed forces have been established in post communist states, or at least in some of them. Perhaps, there is a political will to provide necessary measures for implementation of these mechanisms as well. And it is no deal whether the political will is internal understanding and need of society to reform the field, or result of cultural influence of West, because in both cases

⁴⁹ A. Cottey, T. Edmunds, A. Forster, “Civil-military realtions in postcommunist Europe: Assessing the transition”, Routledge, Taylor and Francis group, London and New York, 2006, p. 2.

⁵⁰ For example, Armenia-NATO IPAP, point 1.6, available at www.nato.int

⁵¹ A speech made by ICPS international consultant Duncan Hiscock at the internationalconference called “Intensified Ukraine–NATO Cooperation: Challenges and Benefits ofAccession to the Membership Action Plan.”

⁵² A. Goncharenko, CISSS President, “Problems of Democratic Control and Security Sector Reform in Post-communist Countries of Black Sea-Caspian Region.”

⁵³ The post of Adviser to human rights defender on military and military servicemen issues has been created at the staff of Human rights defender of Armenia in 2007. Practical task of this mechanism is to address one of the important features of civil control of armed forces that is human rights protection of militaries and their dependants.

society shows development towards democracy, correspondingly society gains benefits of new system, thus trying to avoid internal pressures by the military power (if it exists) and equal development of all spheres of public life. It is important to mention another important role of civil-democratic control of armed forces in post communist community. In some of them due to internal and external factors recruitment army by conscripts still exists. Correspondingly, effective civil-democratic control of armed forces is precondition of human rights protection in army. And it is clear that in this situation classic western understanding of civil control of armed forces is gaining new characteristics, where the protection of human rights in army is becoming one of the main issues of civil control of armed forces.

Conclusion

Collapse of Soviet Union has declared an ideological gap in post communist space, which was followed by chaotic militarized situation in huge region. In parallel the idea of unipolar world has become very actual and US started to be recognized as only world actor capable of stabilizing the region full of violence. But the ideological and organizational differences of governance formed for seven decades were serious obstacle to transform region, however, quick transformations were needed, otherwise region menaced to remain unstable. Of course the first step ought to be demilitarization of region, but it should be implemented only by persuasive mechanisms, making post communist community accept and initiate changes themselves. The most appropriate tool of demilitarization of society seemed to be introduction of notion of civil control of armed forces, usefulness of what had been approved by own historical experience of US in post Revolution period and later as well. The same method were planned to be introduced in post communist region, as a democratic institution for oversight of all security sector. At the same time automatic duplication of this institution seemed not to be effective, therefore the resources of international organizations and think tanks has been combined to set up complex of legal, political and moral norms on civil-democratic control. The classical understanding of civil control of armed forces now was transformed into civil-democratic control of security sector, because traditional civil-military problematic theory famous in US was no more actual in this region by the following reasons. First, because traditional state political control was not enough to implement control and alternative non-state institutions needed to refill the gaps of state control, or even take under the control state activities in defence politics. And second, not only military, but whole security sector needed to be controlled by civilian institutions, as traditional understanding of "military" in post communist region was not only power enforcement institution capable to seize political power, accordingly other powerful militarized institutions should be controlled by democratic civilian institutions as well.

And as a conclusion it has to be mentioned that US has indirectly (mostly through NATO and OSCE) influenced post communist region to admit the notion of civil control of armed forces, as a warranty to secure region, but the notion has itself transformed in new space and gained new characteristics which are mostly aimed to establish new mechanisms of human rights protection and democratization of security sector.

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SOME ISSUES RELATED TO PERFECTION OF THE RA DEFENCE SPHERE MANAGEMENT SYSTEM

VARUZHAN AVETISYAN ⁵⁴

The essential problem of the state is to guarantee the most effective national security of the Republic of Armenia. The main pledge of the national security for the RA is the defence capacity of the state. Therefore, for the purpose of solving this essential problem, the perfection of the defence sphere management system of the security sector has essential significance for ensuring the effective management in the security sector within the context of the RA national security strategy review. Taking into account that in the modern world, upon the imperative of prevalence of democratic values, ensuring of national security has become a strategic priority within the context of strengthening and developing of democracy, this process should be carried out through democratic institutionalization of management systems in the security sector and its defence sphere at the levels of Constitution and laws.

The defence sphere management is an activity related to exercising of the power, therefore, the composition, structure, allocation of the roles and functions and other peculiarities of the defence sphere management system are conditioned with the model of the power realization in the state. The power realization model is formed according to delegation and ratio of authorizations of power realizing subjects (nation, monarch, bodies and officials acting as means of the power realization), formation (selection or appointment) and principles, procedure and mechanisms of activity of bodies and officials acting as the power realization means.

Power realization models are reflected in fundamental norms of constitutions of states and laws adopted in conformity with them.

At present, there are three broadly spread power realization models which may provisionally be divided into monarchy, totalitarian/authoritarian and democratic models. The Republic of Armenia has a democratic semi-presidential system.

In terms of defence sphere management, the essential peculiarity of the latter is that the Government and its member Minister of Defence, as well as the Ministry of Defence are reserved only with authorizations of ensuring the realization of defence*.

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* **Realization of defence** is direct function in its nature and is expressed in immediate actions of protecting population, sovereignty, territorial integrity and inviolability of frontiers of a state from armed attacks: *suspension, retreat of armed attack and liquidation of its consequences*. **Ensuring of realization of defence** is indirect function in its nature and is expressed in actions of addressing, suspending, retreating and liquidating of consequences of the armed attack of territory, population, economy and defence system of a state: *mobilization of material resources, formation of material storage, acquisition of armament and military technique, equipping of territory, etc.* Reservation of only defence authorizations to the GOA is literally fixed in paragraph 6 of Article 89 See also V.P. Avetisyan, Improvement of Legal Grounds for Preparation to State Defence in the Context of Defence Reforms. “Haykakan banak” military magazine, Issue 3 3 (61) 2009

In view of the aforementioned, for the purpose of ensuring of the defence component of the RA security to the possible extent through the possible optimization of the RA defence sphere management system, an option proposed for the defence sphere management system of the Republic of Armenia, as a democratic and rule of law state, incorporates the main elements of the western approach of the defence sphere management and enables to elaborate and maintain effective defence policy⁵⁵.

We think that the proposed option for the RA defence sphere management system may have the following outline.**

The President is at the top of the defence sphere management pyramid. He is the top link as of the defence system managerial as well commanding chain of the armed forces. The President has authorizations as for the defence realization (for example, as a Supreme Chief Commander-in-Chief of the Armed Forces), as well for ensuring of defence realization (for example, as a party approving plans and other documents of the armed forces). The President may appoint and dismiss the Chief Commander-in-Chief in wartime. **As the Supreme Chief Commander- in - Chief of the Armed Forces**, the President governs the armed forces in peacetime and wartime (in case of appointing a Commander-in-Chief in wartime - through the latter), governs the United Operative Center of the Armed Forces Management in wartime. The President appoints and dismisses the supreme commanders and officers, grants the highest officer ranks in peacetime and wartime.

The National Assembly establishes the legal order of **the defence realization and ensuring of defence realization** through adoption of laws, approves drafts of the National Security Strategy, the Military Doctrine and other strategic documents of political-security caliber, takes decisions on using the armed forces outside the territory of the state, declaring war or signing peace, verifies international treaties of political or military nature or those envisaging change of the state frontiers as well as supervises the activities of the President, the Government, the Minister of Defence and the Armed Forces. It performs parliamentary supervision over the execution of the defence expenses, protection of human rights in the Armed Forces, use of the Armed Forces, declaration of the mobilization law or conscription.

The Government, the Prime-Minister and the Minister of Defence are links of the managerial chain of the defence system who, within the frames of their authorizations, ensure the realization of defence.

The Government realizes its authorizations through exercising the right of legislative initiative as well as practical realization of defence of the Republic in the manner prescribed by the Constitution and laws, which encompasses elaboration and

89 See H.S. Kotanjyan, D.S. Chilingaryan, V.P. Avetisyan, A.A. Minasyan, Concept of Defence Policy as a Theoretical-Methodical Toll for Defence Reforms in Armenia. "Haykakan banak" military magazine, Issue 1-2 (59-60) 2009.

** Taking into account that it is impossible to present the detailed research and justification of peculiarities of the option proposed for the defence sphere management system in one paper, we will be limited to description of the outline of the specified option based on the results of the studies.

implementation of the RA internal policy in terms of ensuring the realization of defence and elaboration and implementation of the RA foreign policy together with the President.

The Prime-Minister governs the activity of the Government and coordinates the works of the Ministers with regard to ensuring the realization of defence, takes decisions on issues related to organization of the activities of the Government for that purpose.

The Minister of Defence is a member of the Government and is granted with authorizations ensuring the implementation of the aforementioned authorizations of the RA Government aimed at the realization of defence of the Republic.

He is not an independent management body and participates in the state management in the composition of the Government as a Government member.

The authorizations of the Minister may not exceed the authorizations of the Government. He may not enjoy such authorizations which are not enclosed in the authorizations of the Government nor are deriving directly from them.

He is the coordinator of the policy elaborated and implemented in the sphere of defence for the part subject to the jurisdiction of the Government of the Republic and ensures implementation of functions of the Armed Forces (equipping of the territory, provision of human and material resources, etc).

The Ministry of Defence is not granted with the authorizations of the state power realization, is not a state management body and only, as a state administrative entity, ensures the implementation of the authorizations of the Minister of Defence.

The Armed Forces perform the armed defence of the sovereignty, population, territorial integrity and inviolability of frontiers of the Republic of Armenia from the armed attacks. The Armed Forces observe neutrality in political issues and are under the democratic supervision.

The management of the **armed forces** in peacetime is carried out with the purpose of application of the arms and military units of the armed forces through the body reckoning activities of their commanders – the Unified Operative Management Centre of the Armed Forces.

The Commander-in-Chief of the Armed Forces, when appointed in wartime, shall govern the Armed Forces, manage the Unified Operative Management Centre of the Armed Forces. He is the highest ranked military official of the armed forces in wartime, appoints and dismisses junior and senior commanders and officers of the armed forces, awards ranks to junior and senior officers.

The Chief of the General Staff of the Armed Forces governs the General Staff of the Armed Forces in peacetime and wartime. In peacetime (in wartime - if not appointed as a Commander-in-Chief of the Armed Forces) he also manages the Armed Forces through the Unified Operative Management Centre of the Armed Forces. He is the highest military ranked official of the Armed Forces in peacetime. He (in wartime - if not appointed as a Commander-in-Chief of the Armed Forces) appoints and dismisses junior and

senior commanders and officers of the Armed Forces, awards ranks to junior and senior officers in peacetime.

The General Staff of the Armed Forces is a consultative and planning body. As the Centre for planning and implementation of the policy it provides the Commander -in - Chief of the Armed Forces and commanders of the arms, units and military units of the Armed Forces with relevant elaborations, analysis, recommendations of military-strategic calibre, participates in elaboration of military-political documents of strategic calibre, develops plans for implementation of measures envisaged therein, and, in cooperation with the troops and their commanders, develops options of relevant decisions as well as provides guiding consultations and recommendations for their implementation and monitoring, etc. The General Staff is comprised of the functional (planning, operations and actions, intelligence, etc) sub-structures*.

Arms, Units and military units of the Armed Forces are governed by their commanders. Management of the arms and military units of the Armed Forces are carried out by their command staff/headquarters.

Sub-structures of the territorial defence troops (forces) are governed by the local (zoning) territorial defence chiefs. In operational terms, the territorial defence sub-structure is subordinate to the command staff of the unit/military unit which responsibility zone it is located in⁵⁶.

Opposite to the acting system where the General Staff of the Armed Forces is the central management body of the Armed Forces, the recommended option distinguishes authorizations and functions of the RA defence sphere through the General Staff as the advisory and planning body/centre for planning and implementation of the policy and the Unified Operative Management Centre of the Armed Forces. Such separation is deriving from the necessity of more effective management of the armed forces and utmost promotes the continuous development of the armed forces and strengthening of the defence capacity of the state. In general, distinction of the policy component and implementation component is one of the fundamental achievements of culture and science of the modern management⁵⁷. In case of this approach, a party which elaborates decisions and programs is free from corporative, sectorial interests, while the executing party tries to accomplish the set task as properly as possible. Gaps, errors,

* Almost all NATO-member states have built the management of their armed forces upon the principle of separation of the General Staff as the Center for planning and implementation of the policy and the Unified Operative Management Center of the Armed Forces /Operative Headquarters (taking into account the differences in the power realization model). See for example, the armed forces management systems of the parliamentary Bulgaria (<http://www.md.government.bg/bg/ba.html>), Semi-Presidential France (<http://www.defense.gouv.fr/>) and Presidential USA (<http://odam.defense.gov/omp/pubs/GuideBook/DoD.htm>)

⁵⁶See Y.G. Khachaturov, Issues Related to State Defence and Training of Armed Forces. "Haykakan banak" military magazine, Issue 3 3 (61) 2009. See also H.S. Kotanjyan, On the Issue of Organizing State's Territorial Defence: the Israel Example. "Haykakan banak" military magazine, Issue 3 3 (61) 2009

⁵⁷ See D.S. Chilingaryan, V.P. Avetisyan, T.R. Martirosyan, On the Administration and Management Experience of the US Defence Policy System. "Haykakan banak" military magazine, Issue 4 (58) 2008 and literature used in the article

and omissions of each of the two stated components immediately become visible. There occurs a kind of peculiar competitive situation. Due to this, not only the negative impact of human factor is minimized, but also some manifestations of human negative factors (corporate ambitions, carrier-related intentions, etc) start even “to serve” for common interests. Besides, the quantitative, qualitative and ratio dimensions and criteria necessary for each component of policy and management become explicit, which is almost impossible to identify in the current uniform pyramid-type structure of the General Staff since it is insuperably difficult to see the existing gaps inside of the “pyramid” and especially the reasons of their occurrence from outside of the “pyramid”. In case of combination of certain negative circumstances, the “pyramid” may turn into a self-sustained system with its own interests and goals, suspending the development of the armed forces and minimizing the defence capacity of the state.

Border guard troops perform armed protection of inviolability of frontiers of the Republic of Armenia and are in the composition of the Armed Forces as separate arms. According to the proposed option, it will be necessary to introduce appropriate changes and amendments in the RA Constitution and the defence-related laws as well as to adopt new laws for the purpose of forming a system of defence and a system of management of the defence sphere.

Although introducing of changes and amendments in the Constitution is connected with serious difficulties, its necessity is an urgent issue. While the changes made in the Constitution upon the Referendum held on November 27, 2005 in general made the mechanisms and institutions of the power realization and human rights protection more democratic in many spheres of the public and social life of the Republic of Armenia, regress, parallel to the progress in the sphere of defence, was also fixed. We think that the artificial constitutionalization of “other troops” residual from the totalitarian soviet regime, inaccurate formulation of the authorizations of the Armed Forces in Article 8.2 of the Constitution (upon its literal interpretation, the armed forces ensure the entire security of the state, which means that the entire state machine should be militarized and incorporated into the composition of the armed forces), use of the armed forces conditioned exclusively upon declaration of the martial law pursuant to Paragraph 13 of Article 55, lack of provision to use the armed forces for peaceful and security purposes outside the RA territory (it is insuperable legal obstacle for accomplishment of the obligations foreseen in the UN Charter and other international treaties*, especially in the sphere of defence), minimized authorizations of the National Assembly in the sphere of defence (which makes the parliamentarian supervision over the sphere almost insufficient), as well as many other gaps and omissions occurred due to the lack of the legal regulation concept in the security sector and its defence sphere. All of them should

* We think that all RA international treaties on using of the RA Armed Forces for peaceful as well as other purposes of ensuring the international peace and security outside the RA territory do not comply with the RA Constitution.

be corrected. This issue has prime importance for the national security, the systemic solution of which, based on a uniform concept, will significantly increase the level of protection of vital interests of the state and nation.

We think that after making the relevant changes and amendments in the Constitution, it will be necessary to fully review the security sphere legislation established on the outdated soviet management and legal culture, by attaching special importance to the review of the defence sphere legislation. In particular, it would be desirable to unify the relevant groups of public relations of the sphere and regulated them by the Defence Code. In parallel, it will be necessary to include the border guard troops within the composition of the armed forces, create professional police sub-structures and get rid of "other troops" and legal acts serving as their legal ground, adopt relevant laws on the procedure on activities of the bodies ensuring respective parts of their functions. There will also arise necessity of reviewing the statuses of the national security bodies and police not only as a result of "depriving" the latter from having troops, but also due to the reason that in conformity to the RA Constitution, the authorizations that the Government has as in the defence as well in security and public order protection circumstances are those related only to securing rather than implementing; therefore, similar to the defence sphere, the management of ensuring of implementation in those spheres should be authorized to the ministers of the Internal Affairs and National Security, respectively. The police and national security service, as executors of protection of public order and national security respectively, should have the same relations with the latter as the relation of the minister of defence and the armed forces in the proposed option. Accordingly, the Police and National Security Service should have relevant structures and management.

Summarizing, we may say that in comparison with management systems of other aspects of life, the management system of the RA Defence sphere at the levels of the Constitution and especially laws was mainly formed by ignoring the constitutional and democratic principles, under the inertia influence of the soviet management and legal culture, the main reason of which, we believe, was the lack of a modern democratic concept of legal regulation of the sphere and, the security sector in general. Strengthening of the defence capacity of the state and, therefore, the entire potential of security through perfection of the defence sphere is an issue of strategic importance for realization of effective national security which is possible to solve on the basis of a uniform concept through democratization of the security sector, including its defence sphere and through constitutional and legislative institutionalization. It will be necessary to introduce relevant changes and amendments in the Constitution and defence sphere-related laws as well as to adopt a number of laws for that purpose.

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FINANCIAL CONTROL OF THE REPUBLIC OF ARMENIA DEFENSE SECTOR AS AN INTEGRAL PART OF DEMOCRATIC CONTROL

VIRAB KHACHATRYAN

Control of expenditures in the defense sector is one of the most important elements of democratic control in the sector.

Compared to other sectors, the defense sector has certain peculiarities. Confidentiality is often required in the interest of national security.

The defense sector is also one of the priority areas for public spending. As a rule, the defense sector gets one of the largest shares of state budget allocations. Despite the fact that almost every state around the world has reduced the level of defense expenditures noticeably in the recent years and, especially, since the end of the Cold War, allocations for the defense sector remain significant.

For example, the US military budget amounted to 4% of GDP in 1985. In 2000 and 2001, that number stood at 2.2% of GDP. In 1985, military budgets of Great Britain, France and Germany amounted to 5.2%, 4% and 3.2% of GDP, respectively. In 2000, the numbers stood at 2.4%, 2.6% and 1.6% of GDP, respectively.

A drastic change in defense expenditures is noticed especially in the case of the former USSR and its legal successor, the Russian Federation. Thus, in 1985, the USSR defense budget amounted to 16.1% of GDP. In 2000, that number decreased to 5% of GDP.⁵⁸ The defense budget of the Republic of Armenia amounted to 3.4% of GDP in 2008.

Despite the decrease, it must be noted that defense expenditures still consume a significant portion of state budget resources. This is why the introduction and use of an effective system of democratic control over the defense sector is especially important.

The foundations for democratic control over the sector are laid out in Article 8.2 of the RA Constitution, which states that “the armed forces shall ... remain under civilian control.”* Despite the fact that the provision of financial resources is a part of defense activities, it is important to remember that the ultimate goal of these activities is to meet the needs of the armed forces, ensure their smooth operation and provide them with the relevant material and technical resources required to perform their tasks. Therefore, considering the fact that the armed forces are under civilian control, we can state with confidence that the activities of financial nature, carried out in support of the armed forces, are also subject to democratic control.

Having analyzed the problems encountered by the mechanism for democratic control over financial activities in support of the RA armed forces, we can conclude that

⁵⁸ See: The Military balance 2002-2003, IISS, London

* Scholars have often noted that the mention of “civilian” nature of control over the armed forces is not expedient. They emphasize that it is not important if the control is civilian or not; the important thing is whether this control is democratic. The Constitution considers these two terms as synonymous, which, we think, is against the modern standards for control and the requirements of the sector.

they are similar to the problems hindering the development of mechanisms of control over defense expenditures in the context of democratic control over the armed forces. These problems include: the confidentiality regime, the relevant public administration bodies not exercising their powers fully, lack of a society that is aware of and ready to stand up for its rights, etc.

The financial support of the armed forces is done mainly through budget allocations. This is based on a provision found in Article 18, paragraph 1(a) of the RA Law on Budgetary System of the Republic of Armenia, according to which defense is one of the main areas in programs and expenditures of national importance, financed by the state budget.⁵⁹ Because of this, the defense budget must go through all the phases of development, approval, implementation and control, just like the rest of the state budget, but with consideration given to its peculiarities.

In the Republic of Armenia, the entire defense budget is classified as confidential, which makes it impossible to exercise democratic control over it. Even though every law on approving the next annual state budget indicates how much money is allocated from the state budget, it remains unclear how and on what the money is spent.

The national parliament plays a big role in approving the defense budget, just like in the rest of the budgetary process. Moreover, this role should be significant for the entire budgetary process, and not only during some of its phases. This is what determines the effectiveness of parliamentary control over the sector.

Pursuant to Article 76 of the RA Constitution, the National Assembly is the body that approves the state budget proposed by the government.

The RA Law on Budgetary System of the Republic of Armenia defines budget as a fiscal plan, for a specific period plan, on the raising and spending of funds that are necessary for the state to perform its constitutional and statutory functions.⁶⁰

However, a further analysis of legislation reveals the following: the National Assembly approves the state budget only by approving allocations for broad categories of economic classifications; therefore, in essence, it is unaware what specifically are these resources going to be spent on. For example, Article 7 of the RA Law on the 2010 State Budget indicates that the allocation for military defense amounts to 130,322,810,500 AMD, of which 950,640,000 AMD will be allocated for “Research and Project Development in the Defense Sector”, etc.⁶¹ However, these numbers make it impossible to say what specifically is going to be acquired with these resources. This provision is supplemented by Article 15 of the RA Law on Procurement, according to which the RA government is the body that approves the list of items to be procured with the state budget resources, with agency and functional categorization of budget expenses, together with a separate appendix of quarterly state budget execution

⁵⁹ See: the RA Law on Budgetary System of the Republic of Armenia, HO-137, July 21, 1997

⁶⁰ See: the RA Law on Budget System of the Republic of Armenia, HO-137, July 21, 1997

⁶¹ See the RA Law on 2010 State Budget, HO-225, December 24, 2009

shares, by items to be procured, their quantity and total price.⁶² It must be noted that a significant part of the budget is executed by means of procurement, using budget resources. One can conclude that procurement is an essential part of budget implementation, whereas the RA National Assembly is left out of the control over the budget implementation process, which has a negative impact on the establishment of a mechanism for democratic control over the armed forces. This becomes even more obvious when we note that all procurement for military needs is classified as confidential. This means that both the public and the parliament are simply unable to exercise any control over how the defense budget resources are spent.

Another question is: how justified is the need to classify the procurement of certain items, work or services for military needs? In particular, one can guess by reading some statements published in the RA Ministry of Defense website that things “containing state and official secrets” like flowers, wreaths, photos of the RA president and other such items are being procured for military needs. It is difficult to say how justified it is to classify information on such items as information containing state or official secrets.

Control over the list of procured items, work or services is important from the point of view of expediency of budget spending. In some countries, like Germany or the Netherlands, the intention to procure any property in excess of a certain amount must be discussed with the parliament,* then the parliament receives the technical/tactical characteristics of that property and a justification on how that property will help achieve specific goals, proposed to and agreed on by the parliament in advance, after which the price of that property is discussed with the parliament, and then the seller is discussed and agreed on with the parliament. As we can see, in these countries, procurement of items in excess of a certain amount must go through four phases, which reduces unnecessary waste and uncontrollable spending of budget resources.

We think that the criteria for classifying the process of procurement of items, work and services with the RA defense budget resources need to be reviewed. Obviously, some procurement, really related to state and official secrets, must remain classified as confidential. We think these classified purchases will not account for much of the budget spending. Moreover, in order for control to be effective, the National Assembly should not just approve allocations by broad categories. Instead, it should be given an opportunity to go into greater details as to what will be purchased with the allocated budget resources. This would reduce somewhat the ability to amend the budget quickly, if necessary, but it would also make public administration bodies plan their budgets in more detail and more carefully.

In the context of the effectiveness of oversight functions given to democratic institutions by the RA legislation, one can note the powers of the National Assembly

⁶² See the RA Law on Procurement, HO-160-N, December 23, 2004

* This is done by submitting a report on the needs that will be addressed by the new property

under Article 77 of the RA Constitution. According to that Article, the National Assembly oversees the implementation of state budget and the use of loans and credits from other countries and international organizations. Once the National Assembly gets the findings of the Control Chamber, it discusses and approves annual state budget implementation reports. However, it is worth noting that both the Control Chamber's inspections and the National Assembly's approval of state budget implementation reports are forms of a *posteriori* control. This type of control cannot be as effective as direct control.

Summarizing the above, we can draw the following conclusions:

- Criteria for classifying the items, work and services, procured with the defense budget resources, need to be reviewed;
- Democratic oversight institutions (particularly, the parliament) need to be given the powers to exercise direct control over the budget implementation process.

We think that the establishment of an effective mechanism of control over financial activities in the defense sector depends, first of all, on resolving these two problems.

THE REPUBLIC OF ARMENIA HUMAN RIGHTS DEFENDER AS AN INSTITUTE OF CIVILIAN CONTROL OVER THE ARMED FORCES

*RUSTAM MAKHMUDYAN*⁶³

The issue of citizens' trust towards the state is of key importance for any government. This depends on how developed the systems for the protection of human rights and liberties are. Therefore, the Armenian legal science and practice have to address issues of improving the state/national systems for the protection of human rights and liberties, increasing the effectiveness of the already existing rights protection institutes and looking for new such institutes.

Even though all of the RA state bodies are required by the RA Constitution to protect human rights and liberties, the effectiveness of the existence of other additional institutes dealing with that matter is also quite noticeable in our society. Human rights and fundamental liberties, as well as the institutes for their protection, are special criteria that characterize the state from the legal point of view and determine how civilized the society is, in general.

The RA Human Rights Defender's (Ombudsman) institute takes a leading role among bodies exercising civilian control. It was recognized as a constitutional institute as a result of the 2005 constitutional amendments. The Human Rights Defender's institute can play a real role in the protection of individuals against unlawful actions by the state, if it is established as a body that is independent of the government and is free of political, ideological and mercantile prejudices.

The literature mentions public or extra-governmental control as the most effective means to establish civilian control over the armed forces in a democracy. The term "extra-governmental" is relative. It refers to control by organizations that are not parts of the government but participate actively in state policy implementation.⁶⁴

This also has to do with the fact that the Human Rights Defender's institute is not counterbalanced by other state bodies, but rather operates on the basis of cooperation, as a guarantor of human rights and liberties under the RA Constitution.

The Human Rights Defender's role in the RA armed forces became even more important with the establishment of the post of adviser on military affairs and issues of military servicemen in the Human Rights Defender's staff in 2007, under the RA-NATO Individual Partnership Action Plan.⁶⁵

Despite the fact that this institute was a new thing in the RA state system, it has already played an important role in the area of human rights protection.

According to Article 18, paragraph 2 of the RA Constitution, "Everyone shall be entitled to have the support of the Human Rights Defender for the protection of his/her

⁶³ Ph.D. in Law, RA Human Rights Defender's Adviser on Military Affairs and Issues of Military Servicemen

⁶⁴ For more details, see A. R. Avetisyan, "On Civilian Control over the Armed Forces," published in *Haykakan Banak [Armenian Army] magazine*, issue 2-3 (56-57), 2008, pages 80-83

⁶⁵ See the RA Human Rights Defender's Annual Report for 2008, Yerevan, 2009, page 160

rights and freedoms on the grounds and in conformity with the procedure prescribed by law.”

Article 83.1 of the RA Constitution establishes the requirements for the Human Rights Defender (age, citizenship, residence), the duration of his/her official term, the scope of complaints/applications to be processed by him/her, etc.

In most of the foreign countries, the heads of the executive branch of power (the president, the government, etc.) are outside the scope of this institute’s control. At the same time, the scope of Ombudsman’s powers can be different in various countries, depending on the peculiarities of each country’s legal and public administration system.⁶⁶

Article 8 of the RA Law on Human Rights Defender* (henceforth referred to as the Law) lists all the entities that have the right to send complaints/applications to the Human Rights Defender. The list includes any individuals, representatives of other individuals, individuals under arrest, in detention or serving a sentence of imprisonment, legal entities, trusteeship and guardianship bodies.

According to the same article, any individual, regardless of his/her nationality, citizenship, place of residence, sex, race, age, political and other views, and capabilities can send complaints/applications to the Human Rights Defender.

To protect the rights of others, only their representatives, as well as family members or heirs of deceased individuals can send complaints to the Human Rights Defender (Article 8, paragraph 3).

We think the Law needs to provide a certain exception, taking into consideration that in our reality, in order to avoid undesirable consequences in the future, certain categories of individuals (e.g. military servicemen) prefer to report problems to their parents or other close relatives, who should then be able to raise these problems before the Human Rights Defender. According to the logic of the Law, such complaints cannot be processed; however, such complaints often contain facts requiring immediate reaction.

For this reason, we recommend added the following sentence to Article 8, paragraph 3: “an exception should be made for complaints/applications that are extremely important, and the question of processing or rejecting them shall be left to the Human Rights Defender’s discretion.”

According to Article 3 of the Law on Defense, “The armed forces are a state military structure that forms the basis of the Republic of Armenia military security system. The armed forces provide armed protection of the RA independence, territorial integrity and security.” This article means that the armed forces are the guarantors of the state’s military security. Therefore, the protection of rights of the people involved in a

⁶⁶ Национальные омбудсмены: свод правовых положений /по состоянию на 01.01.1998/, Варшава Представитель по правам граждан Республика Польша; Biuro Rzecznika Praw Obywatelskich, 1999, pp. 160-173.

* Adopted on October 23, 2003, went into effect on January 1, 2004.

body with such special functions, as well as the redress of their violated rights should receive proper attention on the part of the Human Rights Defender.

The Human Rights Defender or his/her representatives should be guaranteed an unrestricted and one-on-one access to individuals in military units, places of detention or imprisonment, or any other place where a person can be deprived of liberty. In addition, in order to ensure the effectiveness of the process, the Law stipulates that any conversation between the Human Rights Defender or his/her representatives and these individuals cannot be interrupted or listened to by other people.

Human rights protection in the armed forces is especially important, because the risks and likelihood of human rights violations often increase under the guise of the military confidentiality regime.

The Human Rights Defender has often covered problems of human rights protection in the armed forces in his annual reports since 2004. The 2008 and 2009 reports also contained recommendations proposing systemic solutions to these problems.

In the area of human rights protection in the armed forces, the Human Rights Defender's activities are aimed at protecting the rights and liberties of military servicemen (including officers, juniors officers/soldiers and highest-ranking commanders) from illegal actions by state officials, as well as taking specific steps to redress their violated rights, including active work on awareness-raising among military servicemen.

The Human Rights Defender can turn to well-respected international organizations for support in his/her activities, organize joint discussions of various problems in the sector and exchanges with his/her counterparts in other countries.

The OSCE Yerevan office is actively involved in human rights protection in the armed forces. A memorandum of understanding has been signed with the OSCE Yerevan office, according to which the OSCE will provide expert assistance to the Human Rights Defender's staff.⁶⁷

The Human Rights Defender has always carried out the protection of military servicemen's rights in two ways: by receiving complaints/applications (both written and oral) and by visiting military units at his own initiative. In addition, the Human Rights Defender has provided commentary and recommendations on draft laws and secondary legislation developed by the RA Ministry of Defense. The power to do so was given to the Human Rights Defender by the RA President's Decree NH-174-N of July 18, 2007 "On Establishing the Procedure for Organizing the Work of the RA Government and Other Public Administration Bodies Reporting to the Government." According to paragraph 42 of the said Procedure, draft laws related to human right and liberties are supposed to be sent to the RA Human Rights Defender for his/her feedback, before they are submitted to the RA Government.

⁶⁷ See the RA Human Rights Defender's Annual Report on Activities of the Human Rights Defender and the Situation with Human Rights and Fundamental Liberties in 2009, page 146 (www.ombuds.am)

This means that the Human Rights Defender's involvement in legislative process is a requirement, rather than a mere desire on the part of the authorized body.

Of course, the aforementioned powers are of dispositive nature, and they imply the use of any one of the available means of military servicemen's rights protection for every specific case, whenever necessary. The legal content of the Human Rights Defender's functions and tasks need to be discussed to the extent to which they are related to the Human Rights Defender's activities and role in human rights protection in the RA armed forces.

According to Article 8.2 of the RA Constitution, "the armed forces of the Republic of Armenia shall maintain neutrality in political matters and remain under civilian control." There is a direct link between this statement and the Human Rights Defender's legal status; the mandate of this institution requires it to remain politically neutral and, therefore, the Human Rights Defender, being unaffiliated with any political party, has wider possibilities for reviewing objectively all the problems related to the protection of military servicemen's rights in the armed forces. The term "military servicemen" covers regular soldiers, officers, junior officers and highest ranking commanders. In other words, the Human Rights Defender protects not only conscripts, but also officers, whose rights have been violated by their superiors.

The fact that the RA armed forces are under civilian control is evidenced not only by the Human Rights Defender's or his representatives' access to the armed forces: many human rights organizations have such access.

In the Human Rights Defender's activities, a special place is given to the problems of protection of military servicemen's rights, which indicates that human rights protection in the armed forces is a complex and multifaceted process that requires the involvement of not only the highest ranking commanders of the armed forces and military unit commanders, but also of the whole society and the state, represented by all of its institutions.

Being independent and irreplaceable, the Human Rights Defender protects military servicemen's rights in the following ways:

a) review of complaints/applications about facts of military servicemen's rights violation, received and logged by the Human Rights Defender's staff,

b) quick response and investigation (at the Human Rights Defender's initiative) of reports about military servicemen's rights violations (reports in the media, information provided by other individuals),

c) regular visits to different military units to prevent possible violations of military servicemen's rights, to identify various problems in these military units and raise them before the relevant authorities,

d) meetings with non-governmental organizations dealing with military servicemen's rights to examine the issues from the civil society's point of view and to respond to them.

In addition, in 2007, the Human Rights Defender initiated a study of the RA legislation related to military servicemen's rights and a continuous process of developing specific recommendations on how to improve the said legislation. This study resulted in an extraordinary report on Human Rights Protection During Implementation of Disciplinary Policy in the RA Armed Forces, published in 2009 by a joint working group established by the OSCE Yerevan office and the Human Rights Defender's staff.

According to Article 12 of the RA Law on Human Rights Defender, the Human Rights Defender is authorized to do the following, when examining the complaints received by his/her office:

- have unrestricted access to any state agency or organization, including military units, and places of detention, including jails and prisons,
- request and receive complaint-related materials and documents from any state or local government body or officials,
- receive clarifications from state and local government bodies or officials, or from state servants, on questions that have arisen in the process of examining a complaint,
- request the relevant bodies to conduct expert analysis of issues that need to be clarified in the process of examining a complaint and to prepare conclusions,
- examine criminal, civil, administrative, disciplinary, economic and other cases, on which judicial decisions or verdicts have entered into effect,
- examine any materials or documents related to a complaint.

The Human Rights Defender may delegate his powers, described in Article 12 of the Law (in particular, paragraphs (2), (5) and (6) of the first part), in writing, to members of his staff or members of the expert council.

As a rule, the Human Rights Defender exercises his powers on the basis of complaints. However, he is authorized to start examining an issue by his own initiative, especially in cases when there are reports about mass violations of human rights and fundamental liberties, or if it is an issue of great public interest, or if it is related to the protection of those people's rights, who are unable to use the various protection mechanisms themselves.

These cases arise mainly when they are media reports about human rights violations or violations of the rights of military servicemen, detainees or prisoners. The number of cases being examined by the Human Rights Defender's own initiative has been increasing steadily since 2004.⁶⁸

It must be noted that both the "victim" and the public (through the media) are notified about the Human Rights Defender starting to examine a particular case by his own initiative.

Obviously, issues examined by the Human Rights Defender's initiative include matters of great public importance, or such an examination is done when the Human

⁶⁸ See the archives of the citizens' reception and letters department of the RA Human Rights Defender's staff

Rights Defender has received information about some past or current violations of rights, where the “victim”^{*} has been unable to complain to the Human Rights Defender or has been unaware of the existence of this institution.

The examination of an issue at the Human Rights Defender’s initiative starts when relevant information is received. In many cases, there is a need to react quickly or to visit the place of the alleged violation before starting an examination. For example, if the office gets a report that an officer has beaten up a soldier, then the Human Rights Defender may request one of his representatives to visit the military unit, where that soldier is located. According to the current law, representatives of the Human Rights Defender have the right to meet with the military serviceman alone, examine him for bruises or other injuries, record any such injuries and report in writing to the Human Rights Defender. After that, the Human Rights Defender is authorized to send official letters to the relevant bodies, requesting them to clarify certain issues or to conduct a proper investigation in order to identify and prosecute the culprits.

One of the areas of the Human Rights Defender’s activities is redressing the allegedly violated human rights (emphasis on the word “alleged” by R. M.).

Once a complaint is received by the Human Rights Defender, a number of steps prescribed by law take place. Within ten days of completing the examination of a complaint, the results of this examination are communicated to the state or local government body or official, whose decision, action (or inaction) was questioned. These bodies or officials are required to respond or clarify their positions to the Human Rights Defender within no more than 15 days after receiving the results of the examination. However, the Human Rights Defender may extend that deadline in some cases.

In many countries, an examination on the basis of decisions adopted by discussions is referred to as “conducting an investigation.” The main way for the Human Rights Defender to influence the redressing of a violated right is a non-binding recommendation/written decision. According to Article 15, paragraph 1 of the Law, the Human Rights Defender is required to adopt one of the following decisions:

a) if the Human Rights Defender sees a violation of human rights or liberties in a decision, action (or inaction) of a state or local government body or officials, then he/she can recommend that the said body or official correct the mistake by suggesting to them what needs to be done to redress the violated human rights or liberties,^{*}

b) the Human Rights Defender may decide that there was no violation of human rights or liberties, if no such violation on the part of state or local government body or officials was found during the examination of the relevant complaint,

^{*} The word “victim” refers to the person whose rights are alleged to have been violated, according to the available information/reports.

^{*} The Human Rights Defender’s staff call this type of decisions “a decision on finding a violation and recommending that the relevant official be held responsible”

c) the Human Rights Defender may decide to stop the examination of the complaint on grounds provided for by law, if grounds for not examining the complaint or for stopping any such examination have been found during the examination,**

d) the Human Rights Defender may decide to file a lawsuit in a court, asking to invalidate normative acts (or their parts) adopted by state or local government bodies or officials in violation of human rights or liberties, if the said state or local government body or officials fail to invalidate the said legal acts (completely or in part) within a certain period of time.

Another way for the Human Rights Defender to influence the redressing of the violated rights is described in Article 16 of the Law, according to which the Human Rights Defender can provide consultation, clarifications and recommendations to state or local government bodies or officials, so that they can study the information on human rights and liberties and draw conclusions, based on their analysis. It must be noted that this measure has been used by the Human Rights Defender since 2004.

Because the Human Rights Defender does not have any means of administrative influence, public administration bodies and officials have formed an opinion that the Human Rights Defender's recommendations or criticism can be simply ignored, left unanswered or have no consequences for the body or person being criticized.

The Human Rights Defender works daily to overcome these stereotypes, to strengthen the conviction that, even though the Human Rights Defender is not part of any specific branch of power, he/she is still authorized by the state to evaluate the actions (or inaction) of public administration bodies and their officials, as they relate to human rights, and that the Human Rights Defender's recommendations are binding. If someone refuses to carry out the Human Rights Defender's recommendations, then he must justify his/her disagreement by international principles and norms only.

In order to prevent possible violations of military servicemen's rights, the Human Rights Defender has established working groups that visit almost every military unit in the country on a regular basis, in accordance with a schedule approved in advance. The purpose of such visits is to clarify specific questions related to specific complaints-/applications and to examine the human rights situation in general, at the Human Rights Defender's initiative. This examination includes monitoring of military servicemen's living and sanitary conditions, talking with them about their rights and giving them legal advice. In addition, the working group pays attention to the enforcement of the principles of legal equality, non-discrimination and others. Issues and problems can be raised not only by conscripts/soldiers, but also by officers. Experience shows that such visits are particularly effective in terms of discovering human rights violations. Results of these visits are

** We think this addition to the Law to define this type of decisions is unclear. It is not clear what the grounds for stopping an examination of a complaint are. We think these could include the exhaustion of all the means to find a violation of human rights, the applicant's written request to stop the further examination of his/her complaint, and other similar grounds.

communicated in writing to the Human Rights Defender. Based on these reports, the Human Rights Defender embarks on defending the rights of military servicemen, while inviting the attention of the relevant state bodies to the problems identified during the visit and recommending possible solutions. According to the Human Rights Defender, the following is the most noteworthy problem in the RA armed forces that has started in the previous years and remains unresolved to this day.⁶⁹ the level of legal awareness of future military servicemen remains low, and the relevant state bodies have to address this problem in schools. According to the Human Rights Defender, both educators and local military commissariats have an important role to play in this matter. The latter could establish proper oversight in schools to make sure that military and legal subjects are taught well. Because this issue is very important, the Human Rights Defender and/or his representatives present the relevant provisions of the RA legislation on military service and the rights of conscripts to military servicemen during their visits to different military units.

The extent of the Human Rights Defender's cooperation with human rights non-governmental organizations is always important in terms of ensuring the effectiveness of the former's activities. This is explained by the fact that non-governmental organizations are closer to the public, and therefore they are in a better position to get information about human rights violations and to forward it to the Human Rights Defender. For that reason, the Human Rights Defender starts his regional visits by meeting with representatives of local non-governmental organizations and getting additional information from them, which is then discussed with the local authorities. Obviously, there are not many human rights organizations dealing with the armed forces. However, the Human Rights Defender has always cooperate closely with any such organizations. Sometimes, these organizations are the only ones who can provide the Human Rights Defender with information about violations of military servicemen's rights.

This information is properly recorded by the staff, and then the issue is examined in accordance with the Law.

The Human Rights Defender exercises his legal powers by adopting acts. We believe there are three types of acts – decisions, recommendations and reports.

Ph.D. in Law, RA Human Rights Defender's Adviser on Military Affairs and Issues of Military Servicemen A recommendation is adopted by the Human Rights Defender on the basis of results of information about violations of human rights and liberties, in a form of clarifications and explanations sent to state bodies and their officials.

A report is a way to present the complete information about human rights situation and a summary of the Human Rights Defender's activities. Reports can be annual (mandatory) and extraordinary.

The Human Rights Defender submits the mandatory annual report during the first quarter of the year to the various public administration bodies listed in the Law and to

⁶⁹ See the RA Human Rights Defender's 2009 Annual Report, Section on the Rights of Conscripts and Military Servicemen, page 148 (www.ombuds.am)

the National Assembly (during its spring session). The Human Rights Defender may issue extraordinary public or special reports on issues of importance or if blatant violations of human rights occur or if violations are routinely not addressed.⁷⁰

International experience shows that there is no particular difference between different acts adopted by the Human Rights Defender. They all have consultative and moral value; therefore, they cannot lead to the guilty officials being held responsible.

Contrary to this, V. Ayvazyan thinks that the Law allows the Human Rights Defender to take certain actions that could contribute to the enforcement of his decisions.⁷¹ In particular, whenever necessary, the Human Rights Defender can submit a special report to the RA President and the National Assembly, thus getting them involved in the protection of human rights and liberties.

The effectiveness of implementation of the Human Rights Defender's consultative decisions may also be increased by means of Article 15, paragraph 6 of the Law, according to which the Human Rights Defender can use the media to publish information about state or local government bodies and officials, who have left his letters unanswered, or have failed to carry out his recommendations completely, or have carried them out improperly, if the Human Rights Defender has exhausted all other means to resolve the problem with these bodies.

The content of the aforementioned article and an analysis of international experience lead us to the following conclusion: even though the Human Rights Defender's acts (decisions) are not legal binding for state and local governments and their officials, they reflect the working practices and the moral characteristics of these bodies and officials, and they shape public opinion on the activities of these bodies and officials, which may hurt the reputation of the bodies and officials who have violated human rights. As for annual reports, they raise the main problems and draw the attention of the entire society and not only of certain public administration bodies.

In view of the above, we can state once again that the institute of the Human Rights Defender is not an additional but rather an alternative means in the state system of human rights protection.⁷²

We believe that in order to emphasize the legal autonomy of the Human Rights Defender and his/her independence from other branches of power, the law should be supplemented by a separate provision to that effect, which has already been done in Ukraine, the Russian Federation and other states.⁷³

⁷⁰ See the RA Law on Human Rights Defender, Article 17

⁷¹ See commentary on the RA Law on Human Rights Defender by V. N. Ayvazyan, edited by R. G. Petrosyan, Yerevan, 2004, page 27

⁷² See also Хаманаева Н.Ю., Специфика правового статуса Уполномоченного по правам человека в Российской Федерации и проблемы законодательного регулирования его деятельности //Государства и права, 2007, И9, с 22:

⁷³ See Article 4 of the Ukrainian Law on Human Rights Representative. National Institutes of Human Rights Defenders (Ombudsmen), (Collection of Constitutional Legal Acts), by L. Hakobyan, G. Novhannisyanyan, Yerevan, Njar, 2005, page 237. Also see: Федеральный Конституционный закон от 26.02.97, №1-ОК "Об Уполномоченном по правам человека в Российской Федерации" //Собрание законодательства РФ, 1997, И9, с 1011; Российская газета, 1997, И43, с 44:

SPECIAL CIVIL SERVICE AS A MEANS OF DEMOCRATIC CONTROL OVER THE ARMED FORCES

*MHER PARVANYAN*⁷⁴

Democracy lies in the foundations of human dignity, freedom and fundamental rights, as well as the prevalence of the majority's interests and opinions over those of the minority.

One of the most important safeguards for democracy is to prevent any potential abuse of the people's will by any force, including the armed forces, and to reduce the risk of any such influence.

History has demonstrated that, under certain circumstances, the national army, whose calling is to protect the people, may become the most real threat against these same people. One of the ways to prevent this from happening is to establish democratic control over the armed forces, which can be defined, in general terms, as armed people carrying out "orders" issued by unarmed people.

One of the ways in which democratic control over the armed forces can be established is by directly involving the public in the management of the armed forces, the purpose of which is to prevent the misuse of the armed forces by introducing a system of checks and balances.

To this end, the Republic of Armenia has introduced a system of special civil service as part of the state service. The purpose of special civil service is to increase the effectiveness and controllability of the distinctly different functions of providing the defense and supporting the provision of defense by separating them both professionally and in terms of their organizational structure. This requires separation of the Ministry of Defense from the armed forces (the army and the general staff), as well as separation of military and civil service classes by military and non-military activity, which would contribute not only to increasing their professionalism, but also to establishing a system of checks and balances that would help prevent possible abuses by the military.

Therefore, the introduction of civil service in the defense sector is aimed at addressing two important national security problems. The first is to prevent or minimize the possibility of the armed forces becoming an internal threat to national security; the second is to increase the effectiveness of the armed forces as the main and the most important organization to counter the external threats to national security.

This article will cover the issue of special civil service as a factor in preventing or reducing the possibility of the armed forces becoming an internal threat to national security.

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Civil service can be defined using the following inter-connected definitions:⁷⁵

- a mechanisms for improving state bodies and public administration system,
- a tool for exercising state powers and public administration,
- a means and a way to build the relations between the state, civil society and individuals,
- a set of social and legal relations between citizens as employees and the state as an employer.

According to the RA Law on Special Civil Service (henceforth referred to as the Law), special civil service is professional activity that does not depend on the changes in the distribution of political forces.⁷⁶ The examination of special civil service as a form of control over the armed forces should proceed in two directions: a possibility to carry out effective democratic control by means of the system of checks and balances in the special service, and an effective democratic control over that system.

The examination of the first aspect, that is the possibility of carrying out effective democratic control by means of the system of checks and balances, should be conducted in the context of how much is the special civil service system protected and what are the possibilities for its effective operation.

The said protection has to do from keeping the system away from formal and informal pressures. The extent of protection depends on legal safeguards for special civil servants and the level of their vulnerability.

The safeguards are ensured by the various principles enshrined in the Law on Special Civil Service, including:

- stability of the special civil service,
- uniformity of the main requirements for all civil servants, and equality of all civil servants before the law,
- legal and social protection of civil servants.

The set of safeguards and conditions for civil servants, imposed by the Law, as well as all the other rights and liberties of civil servants as humans and citizens, generally provide sufficient protection for the special civil service system.

At the same time, it is worth noting that the safeguards for civil servants or the conditions for their implementation do not always exclude the role of the subjective factor, which may also lead to elements of discrimination.

In particular, Article 32 states that it is up to supervisors to decide which of their subordinates get incentives. However, in order to avoid discretion and subjectiveness, the process for incentives should have been the same as the process for applying disciplinary sanctions, i.e. on the basis of an internal investigation, because unfair incentives can become a tool to oppress or discriminate against other civil servants.

⁷⁵ В. В. Черепанов, В. П. Иванов. Основы государственной службы и кадровой политики. ЮНИТИ- ДАНА, Закон и право, М; 2008, сс. 57-73:

⁷⁶ See the RA Law on Special Civil Service, HO-286-N, November 28, 2007, the RA Official Bulletin 2007/66(590)

Another controversial issue is found in Article 21, paragraph 8 of the Law, according to which the question of maintaining the salary of civil servants, who are gone to participate in a training course, is left to the person (or body) who has the authority to appoint that person to his/her position. We think the salary of civil servants should be maintained in any case.

The conclusion is that civil servants are mainly protected from the legal point of view. However, in this context, it is important to consider to what extent civil servants can really exercise the rights given to them by the Law. Interpersonal relations between supervisors and their subordinates, as well as insufficient professional qualities of civil servants can create obstacles in this regard.

Interpersonal relations between supervisors and subordinates should be built within the scope of professional duties and authority. In this regard, some difficulties are created when former military servicemen move into the civil service system. The thing is that when a whole unit, with all its staff members, moves from military service into civil service, then the former corporate and interpersonal social-psychological ties, relations and dependencies will continue to exist for a long time. Therefore, such a unit cannot develop fully as a civilian structure, because it will retain some significant elements of a military collective. Subordinates, who have perceived their supervisor as a military commander and have carried out his orders as military servicemen for years, will often continue to perceive that same supervisor as a military commander in civilian clothes after they all move to civil service, with all the consequences that follow.

Insufficient professional qualities may be an obstacle in this regard, because civil servants without relevant knowledge and skills, required by their specific job, may be subjected to pressure not only by their bosses, but also by their colleagues.

The effectiveness of the special civil service as a means of democratic control depends on its capacity to address the conceptual issues of democratic control. In this regard, in order to evaluate the effectiveness of the system, one has to examine the structure of civil service, the way and the principles by which the system is managed and organized, and the system's professional potential to address the problems it is meant to deal with.

The purpose of examining the organizational structure of civil service in the context of democratic control is to find out to what extent is the civil service involved in the areas related to conceptual issues of democratic control. These issues include:

- adherence to democratic norms and principles in the armed forces,
- development of plans for the protection of the executive and legislative bodies,
- providing the public and various state bodies with general information on the armed forces' activities in compliance with the Constitution, international legal norms and the country's legislation,
- prevention of irrational use of resources,

- restricting or preventing the possibility of the armed forces being used for the interests of individual citizens, social groups and parties,
- prevention of human rights violations.

In terms of organizational structure, the problem has been resolved in the RA Ministry of Defense. Special civil service is introduced in departments (such as the financial/budget, public relations, planning, military education, personnel and other departments) that are not directly engaged in defense, but deal with the aforementioned democratic control issues.

Therefore, one also has to examine the quality of civil service's involvement in these areas, which has to do with the civil service's ability and possibility of solving problems and making decisions. Civil service positions in these areas can be divided into the following sub-groups, by their professional activities, responsibility and powers:

- leadership activities, direct management of specific departments/units or processes,
- assistance-related activities, mainly aimed at providing intellectual support to officials in leadership positions,
- administrative-organizational activities, where strategic decisions are implemented and operative decisions are made,
- support activities, aimed at supporting the Ministry of Defense staff's activities, on the one hand, and meeting the needs of the public and the people, on the other hand.

Therefore, one can conclude that the Ministry of Defense has a relevant organizational structure in place, which is conceptually required to ensure effective democratic control.

In terms of leadership and organization, the special civil service system is more centralized, compared to the conceptual model of civil service.* In particular, the powers of the special civil service council are mainly reserved for the Minister of Defense.

In order to examine the system's effectiveness in terms of its professional capacity, it should be evaluated from the point of view of civil servants' compliance with the principle of professionalism described in the Law. Professionalism is the employee's ability to meet the requirements of his/her employer and workplace environment.⁷⁷ The quality of how a system fulfills its tasks directly depends on professionalism. Also, professionalism helps civil servants to stay away from other pressures.

The main characteristics of professionals and professionalism are:

- properly discharging one's official duties,

* The RA civil service was examined as a conceptual model. See The RA Law on Civil Service, HO-272, December 4, 2001, the RA Official Bulletin 2002/1 (176)

⁷⁷ See: В. В. Черепанов, В. П. Иванов, сс. 57-84

- turning the organization's principles, goals and objectives into the main pillars of the professional's work.⁷⁸

The professionalism of the special civil service in the Ministry of Defense system is hindered by a number of factors.

Most special civil service positions have been filled by former military servicemen. According to the Law, they are required to undergo testing. However, the professional skills and abilities required by competition for the specific position often do not correspond to the testing procedure. For instance, the competition requires knowledge of a foreign language for certain positions, and an applicant provides a statement that he/she is fluent in a foreign language; however, according to the testing procedures, no such statements are required from special civil servants,⁷⁹ which means that a person, who does not fit the position, can continue to occupy it.

In addition, the RA Government decided that, when drawing equivalents between military service positions and special civil service positions, junior officers' positions should be the equivalent of junior special civil service positions.⁸⁰ According to the RA Law on Military Service, junior officers' positions can be occupied also by people with secondary education,⁸¹ whereas the Law requires special civil servants to have higher education.

An introduction of an effective personnel policy planning system is also important from the point of view of raising the level of professionalism. The purpose of such a system would be to develop the professional qualities of civil servants and to make sure that all the positions are filled with suitable people, on the one hand, and to ensure the continuity of the process of bringing in professionals into the system, on the other hand.

Professional civil servants are also good resources for national security, because the implementation of political/strategic national security programs really depends on tactical or operative decisions made by civil servants, as well as on the quality of implementing these decisions. Therefore, the proper current and long-term planning of personnel resources is extremely important. The purpose of current planning is to find out what specialists and how many of them are needed at the moment, where they are needed the most, how to use their professional qualities effectively, how to improve their

⁷⁸ See: "Подготовка кадров государственной службы: учебно-методическое пособие"/под. ред. Е.А. Яблоковой, 2-е изд, Москва, "Флинта" 2005, сс. 10-24:

⁷⁹ See: The RA Minister of Defense Decree No. 579-N of May 14, 2008 "On Approving Competition Procedures for Filling Vacancies in Special Civil Service," the RA Bulletin of Agency Normative Acts 2008/20 (294), and the RA Minister of Defense Decree No. 580-N of May 14, 2008 "On Approving the Working Procedures of Competition and Testing Commissions in Charge of Organizing Competitions to Fill Special Civil Service Vacancies and Testing Civil Servants in these Positions," the RA Bulletin of Agency Normative Acts 2008/20(294).

⁸⁰ See: The RA Government Decision No. 320-N of April 4, 2008 "On Approving the List of Equivalent Special Civil Service and Military Service Positions," the RA Official Bulletin 2008/24 (614).

⁸¹ See the RA Law on Military Service, HO-272, July 3, 2002, the RA Official Bulletin 2002/26 (201)

knowledge and skills in accordance with their job requirements.⁸² Long-term planning has to do with continuous reproduction of high-quality staff, which requires to establish a reserve of personnel and to work with that reserve effectively.

The issue of adequate remuneration is an important obstacle for attracting high-quality personnel. A professional specialist would always compare the salaries in the public and private sector. If the public sector salary is not adequate, then it is not only difficult to attract high-quality specialists, but it is also possible that highly skilled specialists in the public sector would start looking for a job in the private sector.

The examination of the second aspect, that is the effectiveness of democratic control over the special civil service system, should be conducted in the context of the size of civil control over the system and, related to that, the opportunity for citizen involvement.

Opportunities for citizen involvement are extremely important, because a lack of transparency would make it impossible to have effective democratic control, regardless of the effectiveness of any system.

In this regard, it is important to examine the process of personnel selection in the special civil service, in comparison with the conceptual model.

In conceptual terms, personnel selection should be done in accordance with the following principles:

- principle of lawfulness, which means that the personnel policy must comply with the Constitution, laws and other legal/normative acts,
- principle of democracy, which means optimal and rational selection of personnel, without discrimination,
- principle of humanism, which means a desire to establish social justice and to respect human dignity,
- principle of openness, which means maximum availability of information about civil service,
- principle of de-politicization of personnel policy.⁸³

According to the Law, special civil service positions in the defense sector can be filled as follows:

- by individuals already occupying positions listed in the special civil service positions list, i.e. they become civil servants from the moment special civil service system is introduced,
- vacancies in special civil service are filled with or without competition.

On the whole, the procedure described in the Law adheres to the aforementioned conceptual principles. However, there are some problems that need to be discussed. In particular, there is already a limitation in the selection of personnel. This has to do with

82 See "Theory of Bureaucracy" by Ashot Alexanyan. Manual for University Students. E. Van Aryan, 2008, pp.116-130.

⁸³ See: В. В. Черепанов, В. П. Иванов, сс. 380-403:

the fact that most of the positions have already been filled with former military servicemen. In addition to having the already discussed consequences, this also prevents citizens' involvement; opportunities for their involvement are significantly reduced, both technically and physically, because of a lack of vacancies.

However, this problem will get resolved automatically in the long run.

Thus, one can state that, as a means of democratic control over the armed forces, the RA special civil service system conceptually complies with the commonly accepted standards and principles. However, there are still certain problems hindering the system's effectiveness in the context of democratic control over the armed forces. In particular, these problems include the following:

- mechanisms for incentives for civil servants, as well as maintaining their salaries during training, contain room for subjectivity and discretion,
- there are factors hindering the process of attaining professionalism and increase the level of professionalism,
- a comparison of the special civil service system with the conceptual model indicates that the former is more centralized.

Taking into consideration the aforementioned problems in the special civil service system, we recommend the following:

1. Establish a trade union to protect the interests of special civil servants. Moreover, it is possible to use trade unions for nominating civil servants for incentives, which will reduce the possibility of discrimination.

2. Reduce the level of centralization in the special civil service system management by delegating some powers to the civil service council, because the effectiveness of special civil service system greatly depends on an optimal combination of centralized and decentralized management principles. A combination of these principles keeps the system away from the subjective factor, on the one hand, and contributes to a specialized institution carrying out certain organizational functions more fully, on the other hand.

3. Develop and introduce a multi-factor system for evaluating civil servants' professional qualities in order to increase the level of professionalism in the area of civil service.*

4. Introduce a system for personnel policy planning and current and long-term planning of personnel resources, based on scientific principles that take into consideration the developments and changes of strategic goals.

* Such system can include factors like completing assignments on time, amount of paperwork, representational skills, theoretical knowledge, etc.

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ISSUES OF CRIMINAL LIABILITY FOR CRIMES AGAINST MILITARY SERVICE PROCEDURES IN THE REPUBLIC OF ARMENIA

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The defense capability of the Republic of Armenia greatly depends on the combat capability of the RA armed forces, which depends not only on their size, but also on their preparedness and on how well they are equipped and armed. Maintaining the military discipline is extremely important, because any decline in the level of discipline can have serious consequences. Criminal law is one of the strictest means to enforce military discipline, as it ensures criminal prosecution for military crimes that are the most dangerous types of violations of military discipline.

I. Criminal Liability for Military Crimes

Criminal liability for military crimes is described in the RA Criminal Code articles in Part 12, Chapter 32.

Military crimes described in the RA Criminal Code can be divided into eight groups, by types.

1. Crimes against military subordination procedures and statutory relations between military servicemen. This group includes the following:

- a) failure to carry out an order (Article 356),
- b) resistance to a superior or forcing him to breach his military service duties (Article 357),
- c) violence against a superior (Article 358),
- d) breach of statutory relations between military servicemen who are not subordinated to each other (Article 359),
- e) insulting a serviceman (Article 360).

2. Crimes related to evasion of military service in one way or another. This group includes:

- a) absence without leave from military unit or place of service (Article 361),
- b) desertion (Article 362),
- c) evasion of military service by means of self-mutilation, simulation of a disease or other illegal means (Article 363),
- d) refusal to carry out military service duties (Article 364).

3. Crimes related to procedures for the use and maintenance of military property. This group includes:

- a) willful destruction or damage of military property (Article 369),
- b) destruction or damage of military property by negligence (Article 370),
- c) embezzlement of military property (Article 371),
- d) loss or spoilage of military property (Article 372).

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4. Crimes related to breach of rules for handling weapons, ammunition and other dangerous items and materials. This group includes:

- a) breach of rules for handling weapons, ammunition and other dangerous items and materials (Article 373),
- b) handing over weapons, ammunition and other dangerous items or materials to another person (Article 374).

5. Crimes related to procedures for the operation of military equipment:
This group includes:

- a) breach of rules for driving or operating a vehicle (Article 377),
- b) breach of rules for flights and their preparation (Article 378).

6. Crimes related to procedures for carrying out special services. This group includes:

- a) breach of rules for combat duty or combat service (Article 365),
- b) breach of rules for border-guarding services (Article 366),
- c) breach of statutory regulations for guarding or patrol services (Article 367),
- d) breach of statutory internal service regulations (Article 368).

7. Crimes related to abuse of power in the military. This group includes:

- a) abuse of power, transgression of authority or administrative dereliction (Article 375),
- b) negligent service (Article 376).

8. Crimes related to procedures of military service under special circumstances. This group includes:

- a) abandonment or handing over of weapons or ammunition to the enemy (Article 379),
- b) willful abandonment of the battlefield or refusal to use weapons (Article 380),
- c) voluntary surrender (Article 381),
- d) criminal actions by POWs (Article 382),
- e) plunder (Article 383).

At the same time, it is worth noting that some other types of crimes committed by military servicemen are described in Section 13, Chapter 33 of the RA Criminal Code (crimes against peace and human security). These include the use of prohibited means and methods of warfare (Article 387), serious violations of international humanitarian law during armed conflicts (Article 390), inaction or the issuance of an illegal command during an armed conflict (Article 391).

II. Issues of the Extent of Criminalization of Actions Against Military Service Procedures that Are Dangerous to the Public

Legal literature notes that crimes against military service procedures can be considered in two senses. In a narrow sense, these are crimes against military service procedures as described in Chapter 32 of the RA Criminal Code. In a wider sense, these include not only the crimes described in Chapter 32 of the RA Criminal Code, but also crimes mentioned in other chapters of the RA Criminal Code that, if committed by military servicemen, become actions against military service procedures. According to many criminologists, the expansion of the list of crimes against military service procedures is a current trend in the criminal law development. This is proven, for example, by an expanded application of Article 373 of Chapter 32 of the RA Criminal Code. That Article criminalizes the breach of rules for handling weapons, ammunition and other dangerous items and materials. At the same time, this particular crime combines a number of actions of various degrees of danger to the public that are already criminalized under different chapters of the RA Criminal Code and presents them as crimes against military service procedures. For example: Article 233 of the RA Criminal Code criminalizes illegal circulation of radioactive materials, while Article 240 deals with breaching the rules for storage, transportation, delivery or use of flammable or pyrotechnic materials. These are crimes against public security; however, if committed by military servicemen, they fall under Article 373. The same is true for abuses of power in the military. As already mentioned, Chapter 32 of the RA Criminal Code criminalizes the abuse of power, transgression of authority or administrative dereliction (Article 375), as well as negligent service (Article 376). In many cases, these crimes are similar to those committed by other officials. However, there are certain peculiarities in the case of military service. Moreover, we think that certain manifestations of official crimes in the military are currently not criminalized because of the way some provisions are worded.

For example, in second part of Article 309 (Transgression of Authority) of Chapter 29 (Crimes Against State Service) of the RA Criminal Code, the use of violence, weapons or special measures is considered to be an aggravating circumstance, whereas no such aggravating circumstances are mentioned in the article on the transgression of authority in the section about crimes against military service procedures, even though the use of such means and methods is more common in this type of crimes committed in the military.

Essentially, issuing an illegal command should also be considered an official military crime, but Article 375 of the RA Criminal Code does not include it. Besides, we think that issuing an illegal command is more dangerous for the public; therefore, it would be more appropriate to make it a separate crime, punishable by a more severe penalty. Issuing an illegal command is partly covered in Article 391 on inaction or issuing an illegal command during an armed conflict, but it does not cover all the manifestations of the issuing of an illegal command. In addition, the RA Criminal Code

criminalizes breaches of statutory relations between military servicemen only if they are not subordinated to each other, while non-statutory actions by commanders or superiors towards their subordinates are, in essence, not criminalized.

In view of the above, we recommend to include two new crimes in Chapter 32 of the RA Criminal Code: issuing an illegal command and non-statutory actions towards subordinates (which would cover cases of violence and other illegal actions against subordinates, and complete the system of crimes against military subordination procedures and statutory relations between military servicemen). We also recommend to consider the use of violence, weapons and other special measures to be an aggravating circumstance for the crime of abuse of power and transgression of authority covered in Article 375.

There is another circumstance that can serve as a basis for criminalization of certain actions. The experience of the last few years shows that servicemen of the police force are more frequently involved in the protection of public order and public security. In these cases, it is possible that servicemen may commit actions that violate human rights and liberties or damage them significantly. We think that Armenia should follow the example of several countries and criminalize breaches of public order and public security protection procedures by military servicemen that have had a significant effect on human rights or liberties.

III. Issues Related to Subjects of Military Crimes

According to Article 356 (paragraph 5) of the RA Criminal Code, subjects of crimes against military service procedures are persons who serve in the RA armed forces and other forces on the basis of conscription or under a contract, as well as persons involved in military training.

In order to decide if a person is considered a subject of a crime against military service procedures, it is necessary to determine the beginning and the end of military service. According to Article 5 of the RA Law on Military Service, military service for conscripts starts on the day when they report to a military commissariat to depart to their place of service. Military service ends on the day when they are removed from the personnel list of their military unit. The citizen-state military/legal relations start when a military a serviceman reports to a commissariat. For individuals serving under a contract, military service starts on the day when the contract goes into effect, and ends on the day when the contract expires or is terminated. For individuals undergoing military training, military service starts on the first day of military training and ends on the last day of the training. For students of military educational institutions, military service starts on the day they are officially registered as students in these institutions, in accordance with the relevant procedures. According to Article 1 of the RA Law on Military Service, citizens in state service in the armed forces and other forces, as well as students of military educational institutions, are considered military servicemen. Students of military educational institutions have the status of military servicemen and

are, therefore, subjects of military crimes described in the RA Criminal Code. For that reason, not only 18 years-old individuals, but capable 16-years-old individuals can also be subjects of military crimes.

According to Article 5 of the RA Law on Military Service, military servicemen are removed from military units' or military management bodies' personnel lists on the day when military service ends, except in cases prescribed by law. This raises the following question: can a person be considered a subject of military crime and be criminally prosecuted for a military crime, if the military service ended and there are no exceptions prescribed by law, yet the person has not been removed from the military unit's or military management body's personnel lists? Some legal scholars believe that, in such cases, the person cannot be considered a subject of military crime and cannot be prosecuted for crimes against military service procedures, because he has been kept in military/legal relations illegally or by mistake. If the action he has committed constitutes a crime covered in another article of the Criminal Code, then he should be prosecuted as a regular citizen.

The supporters of this approach believe that the same principle should be applied in another situation that has caused disputes in judicial practice. The question is whether a person, who has been conscripted by mistake, can be considered a subject of crimes against military service procedures. According to the aforementioned criminologists, such persons cannot be prosecuted for crimes against military service procedures, because, essentially, they are not military servicemen and they have become subjects of legal relations in this area either by mistake or illegally.

However, we think this is not the right solution, because it reduces inappropriately the effectiveness of maintaining the military discipline, the combat capability of the armed forces and the defense capability of the country by means of criminal law. For example, how can you not prosecute a person, who has breached the rules for combat duty or combat service and caused serious damage by doing so, even if that person was conscripted illegally or by mistake? We think that, in such cases, the way the person was conscripted cannot in itself serve as a basis for relieving him of criminal liability for a military crime. The thing is that, despite a mistake or an illegal action, the person is a *de facto* military serviceman at that time, and he understands clearly the rights and responsibilities that come with his status, as well as the consequences of failing to carry out the said responsibilities. Moreover, his action is as dangerous to the public as any similar action committed by any other military serviceman. Besides, if we don't prosecute such persons for military crimes, then we cannot prosecute them under any other article of the Criminal Code, because it does not contain any other crimes with similar objective aspects. Therefore, we think that, in such cases, these individuals must be prosecuted for crimes against military service procedures. Obviously, in order to prosecute a person in such circumstances, it is

important to find out whether in that situation he was capable of carrying out his military duties.

It must be noted that, while such persons are being prosecuted, it is important to consider prosecuting those who have conscripted them by mistake or failed to remove them from military units' or military management bodies' personnel lists at the end of the military service.

Persons with special status may be subjects of certain crimes against military service procedures. In such cases, we are dealing with a special type of a special subject. In particular, a subject of breaching the rules for border-guarding services (Article 366) may be a person, who is a member of border-guarding duty detail, or a person performing other border-guarding duties, while a subject of breaching the guarding or patrolling regulations (Article 367) can be a person, who is a member of the guard or patrol group, etc.

Individuals, who are not among the aforementioned persons, cannot be subjects of this group of crimes against military service procedures; they can be prosecuted only as accomplices in a crime against military service procedures for inciting, aiding and abetting. The same approach should be taken in prosecuting individuals who occupy special positions in the armed forces or who are not military servicemen, but are engaged in special work in the armed forces.

IV. Issues Related to the Subjective Aspect of Crimes Against Military Service Procedures

The subjective aspect of crimes against military service procedures is characterized both by intent and by negligence. In certain crimes, the motive or purpose is a mandatory characteristic of the subjective aspect (for example, in the case of desertion, the purpose is to evade military service completely).

The main problem related to the legal definition of the subjective aspect of military crimes is that, in many crimes, the causing of serious consequences is considered to be an aggravating circumstance. Moreover, the form of guilt in relation to these consequences is not mentioned, as a rule (it is mentioned only in the second part of Article 375). This means that a perpetrator must have intent to cause the consequences, because, according to Article 28 (paragraph 2) of the RA Criminal Code, an action committed through negligence constitutes a crime, if it is specifically mentioned in the Special Part of the Criminal Code. In this regard, it is important to mention that most of the articles in Chapter 32 of the Criminal Code have a problem with properly defining and interpreting the form of guilt. One of the typical mistakes is that in some articles actions committed as a result of negligence or bad faith, which caused serious consequences, are considered to be special manifestations of the specific crime. Such wording can be found in Article 356, paragraph 4 (failure to carry out an order as a result of negligence or bad faith, which caused serious

consequences), Article 365, paragraph 2 (breach of combat duty or combat service regulations as a result of negligence or bad faith, which caused serious consequences), and in the second paragraphs of Articles 366, 367 and 368. These provisions do not mention the form of guilt in relation to the serious consequences, which makes us assume that the intent was to cause the said serious consequences. However, from the viewpoint of criminal law, this is nonsense, because the notion of “as a result of negligence or bad faith” is characteristic of guilt by negligence, when the person had not foreseen the possibility of serious consequences, or had foreseen such possibility but hoped with self-confidence and with no sufficient grounds that such consequences will not occur. Therefore, it would be more appropriate in these articles to define the form of guilt in relation to the serious consequences (“... caused serious consequences by negligence”). This mistaken approach to the law also leads to mistakes in determining the applicable sanctions for these crimes. Sanctions for crimes described in the second paragraphs of these articles are tougher than for the main crimes committed with intent. This is based purely on the fact that the consequences of the main crime are not serious. However, crimes committed with intent and persons committing them are more dangerous for the public; therefore, sanctions for such crimes and their perpetrators cannot be milder than those for the same crimes committed through negligence, even if the latter had more serious consequences.

In addition, we think another shortcoming of the law is that there is no differentiation in the form of guilt in relation to the serious consequences, both in the aforementioned articles and in any other article where the causing of serious consequences is considered an aggravating circumstance. As already mentioned, there is no mention of the form of guilt in relation to the serious consequences in any of the articles, except in Article 375, which leads to an interpretation that these are actions committed with intent. However, these consequences can also be caused through negligence. Therefore, it would be more appropriate to consider the causing of serious consequences through negligence to be an aggravating circumstance for the main crime, while the causing of serious consequences by intent would be considered an especially aggravating circumstance.

V. The Issue of Sanctions for Military Crimes

The issue of sanctions is also important for the effectiveness of the fight against military crimes. The sanction provided by law for a specific type of crime must correspond to the level of danger of that type of crime for the society. Sanctions prescribed in the Criminal Code must be differentiated and proportional for different perpetrators. In this regards, we think these principles are not fully followed in Chapter 32 of the RA Criminal Code.

For example, Article 357 of the RA Criminal Code criminalizes resistance to a superior or forcing him to breach his service duties, and the second paragraph of this

Article states that, if the same action causes grave or medium-gravity damage to health, then this is considered to be an aggravating circumstance. In the presence of this aggravating circumstance, the crime is punishable by 2 to 8 years of imprisonment. The punishment for the crime of willfully inflicting heavy damage to health, described in Article 112 of the Criminal Code, is 3 to 7 years of imprisonment for the basic crime, and 5 to 10 years of imprisonment for the crime with aggravating circumstances. The crime of willfully inflicting medium-gravity damage to health, described in Article 113, is punishable by a maximum of 3 years of imprisonment for the basic crime, and a maximum of 5 years of imprisonment for the crime with aggravating circumstances. Essentially, the punishment for crimes against regular persons is often more severe than the punishment for crimes that cause damage not only to individuals, but also to the military service procedures and, ultimately, the country's defense capability.

The situation is the same in the case of Article 359. This article criminalizes breach of statutory relations between military servicemen who are not subordinated to each other. This crime is very similar to hooliganism. Perhaps, this is the reason why the maximum sanction for these two crimes is the same (both for the basic crimes and crimes with aggravating circumstances). However, the said military crime is more dangerous for the public than hooliganism, because it affects military service procedures, the combat capability of the armed forces and the state's defense capability. There are other examples as well, but the already mentioned ones are sufficient to illustrate that the legislature has often been unnecessarily lenient when determining sanctions for military crimes and hasn't considered the real public danger of many types of crimes. In this regard, we think that, when determining sanctions for military crimes, it is important to consider the idea that military crimes are more dangerous for the society than regular crimes of the same nature; therefore, sanctions for military crimes should be tougher.

Another problem is the disproportionality of sanctions for different crimes described in Chapter 32, as well as for different types of the same crime.

For example, paragraph 1 of Article 382 criminalizes voluntary involvement of POWs in work of military significance or other activities that may obviously cause damage to the Republic of Armenia or its allies, if there are no elements of high treason. This crime is punished more severely than the crime described in the second paragraph of the same article that is violence against other POWs or cruel treatment of POWs by a POW in a leadership position. It turns out that violence and mistreatment of POWs is less dangerous than participation in some construction work, for example.

Another example: Article 372 of the RA Criminal Code establishes sanctions for the loss or spoilage of military property, and paragraph 1 of Article 377 criminalizes the breach of rules for driving or operating a combat, special or transportation vehicle that negligently caused medium-gravity or grave damage to human health or other severe consequences. The first of these two crimes is punished by a maximum of 3 years of

imprisonment, while the second – by a maximum of two years of imprisonment. It turns out that property is more valuable than human health.

Equally controversial is the practice of punishing conscripts by placing them in disciplinary battalions.

According to paragraph 1 of Article 58 of the RA Criminal Code, conscripts can be sentenced to a period of between 3 months and 3 years in disciplinary battalions for not serious and medium-gravity crimes in cases described in the Special Part of the Criminal Code, as well as in cases when the court finds it appropriate to replace the sentence of up to 3 years of imprisonment with the sentence of placing the conscript in a disciplinary battalion for the same period of time, having considered the circumstances of the case and the personality of the convicted individual.

According to Article 49 and 50 of the RA Criminal Code, “keeping a person in a disciplinary battalion” is a basic type of punishment.

At the same time, it is worth mentioning that a disciplinary battalion is a unit of the armed forces where people carry out military service under tougher restrictions. The time spent in a disciplinary battalion is an additional time of military service, it is not subtracted from the established length of mandatory military service, but is actually added to it. Essentially, “keeping in a disciplinary battalion” is a form of organizing military service, while serving in a disciplinary battalion means longer military service under tougher restrictions.

What follows from the above is the notion of “military service being a punishment,” which is extremely dangerous in terms of motivation behind military service and, therefore, in terms of many other factors, including the combat capability.

VI. The Issue of Qualifiers

The causing of certain consequences is often included as an element of crime in many of the crimes against military service procedures. These consequences are described by means of qualifiers (e.g. significant damage, serious consequences, etc.). Naturally, in many cases, these qualifiers can be defined only in a judicial practice, by taking into consideration the circumstances of a specific case, because many manifestations of dangerous consequences would be impossible to describe in a law. This is particularly true of consequences such as violations of human rights and liberties, restrictions on these rights and liberties, moral damages, discrediting a superior or an official, demoralization in the military unit, etc. However, it is quite possible to describe damage to physical property. Damage to property is described for some crimes in the law, e.g. Article 375 (abuse of power, transgression of authority or administrative dereliction) and Article 376 (negligent service). This raises the following question: why has the legislature qualified/described damage to property in connection with these two crimes only? The thing is that many of the crimes described in Chapter 32 can also cause property damage. In particular, the serious consequences of the

destruction or damage of military property by intent or by negligence, breach of rules for driving or operating a vehicle, or breach of rules for flights and preparation for flights can also be expressed as property damage. We think that the legislature has not been consistent on this subject. This raises yet another related question: is it appropriate to qualify property damage caused as a result of military crimes? We think this approach would be wrong. In case of military crimes, the significance of property damage or the seriousness of consequences cannot be quantified, and, especially, they cannot be qualified in the same way as in the case of regular crimes. However, in the case of the two aforementioned crimes, the numerical expression of property damage (money or value in excess of 500 times of minimum wage) is the same as in the case of Articles 308 (abuse of official authority) and 309 (transgression of official authority) of the Criminal Code. At the same time, a damage in the amount of less than 500,000 AMD may not have a significant negative impact on the interests of military service in some cases, whereas in other cases the impact may be significant. Everything depends on the need for of the damaged item or value at the given time. Therefore, we think it is not necessary to qualify the property damage caused by military crimes, including crimes committed by official in the military, and every time the approach should be based on the circumstances of each specific case.

VII. Certain Issues Related to Legal Definition of Crimes

As already mentioned, legal definitions of many crimes against military service procedures contain mistakes related to the description of the form of guilt. In addition, we think some changes are required in the legal description of the objective aspects of some crimes.

For example, this is the reason why the act of threatening a superior in connection with the performance of military service duties is not criminalized, which, we think, is a mistake. It is true that Article 357 mentions the threat of violence, but it has to do with resisting a superior or forcing him to breach his military service duties: However, the threat of violence can be used for other purposes as well.

Definition of this crime also contains certain linguistic and logical interpretation problems. The article is not clear about whose performance of military service duties is the threat of violence directed at.

Another question is: why is beating a superior mentioned specifically? Isn't it true that beating is just a particular manifestation of violence?

In view of the above, we recommend the following wording for the description of the crime in Article 358: "Violence or threat of violence against a superior in relation to or during the performance of his military duties."

Similar problems exist in connection with Article 359 that criminalizes the breach of statutory relations between military servicemen. According to the article, this crime is described as follows: "Breach of statutory relations between military servicemen who

are not subordinated to each other, expressed in humiliation of the person's honor and dignity, derision or persecution, or accompanied by violence."

The first problem with this crime definition is that it leaves a lot of room for interpretation. The thing is that relations between military servicemen are regulated in detail; therefore, any deviation from regulations is considered a breach of statutory relations. It is true that the breach described in Article 359 is expressed through humiliation of the person's honor and dignity, derision, persecution or is accompanied by violence. but the problem remains unsolved, because, at the end of the day, it is not clear if every instance of violence or other actions described in the article constitute this particular crime. The answer is "yes", if we interpret the law literally. However, we think that the essence of this crime is different. First, it needs to be defined clearly that this crime is a crime against military service procedures; therefore, an action constitutes the crime described in Article 359 when the humiliation, derision, violence or persecution occurred in connection with the victim's performance of military service duties or during the victim's performance of any of his military service duties. Essentially, we are dealing with a special type of hooliganism here; therefore, it must be noted that this crime is also present if the aforementioned actions were not related to the victim's performance of his military service duties, but, for the perpetrator, they were obviously accompanied by a breach of military relations procedures and there was an obvious contempt towards a military collective. If the violence or other actions mentioned in the article have been committed because of a personal motive, were not related to the victim's performance of military service duties and were not accompanied by openly disrespectful attitude towards a military collective, (were committed in the absence of other military servicemen, in an isolated area, or even in the presence of other military servicemen, but under the influence of the moment, as a result of a rage or because of a feeling of revenge for the victim's unlawful actions, and if the internal procedures of the military units were not violated, then they do not constitute the crime described in this article. For example, if a military serviceman asks his fellow serviceman to go out of the barrack, and then commits an act of violence against him, because he suspects him of stealing his property, then these actions do not fall under Article 359. It is worth noting that wrongful qualification of actions has to do with the fact that Article 359 is interpreted very widely, which a result of the crime description is being inaccurate and insufficiently clear.

In view of the above, we recommend the following wording for the description of the crime in Article 359: "Breach of statutory relations between military servicemen who are not subordinated to each other, expressed in humiliation of the person's honor and dignity, derision, persecution or violence in connection with victim's performance of military service duties or during the performance of such duties, or expressed by any of the aforementioned actions, even if they are not connected to the victim's performance of his military service duties, but are obviously accompanied by a breach of military relations procedures and there was an obvious contempt towards a military collective."

We think similar problems exist in connection with Article 361 of the RA Criminal Code that criminalizes absence without leave from the military unit or place of service, as well as the failure to report for military service on time without a compelling reason. The Article notes that this crime is considered committed if the military serviceman leaves the military unit or place of service without permission or fails to report for service on time without a compelling reason for more than three days but less than one month, or if he commits the same action three and more times in three months, for up to three days. This crime is different from the crime of desertion (Article 362 of the RA Criminal Code), because, with this crime, a person evades military service not completely but temporarily. This raises the following question: what happens if the absence without leave from a military unit or place of service, or failure to report for military service without a compelling reason last more than a month? Can we assume that this case falls under the crime of desertion, and that the legislature thought that absence without leave from a military unit or place of service, or failure to report for military service without a compelling reason for more than a month indicates an intention to evade military service completely, which is a mandatory element in the subjective aspect of the crime of desertion and which is what makes it different from the crime described in Article 361? However, a literal interpretation of the law does not warrant such a conclusion, because absence without leave from a military unit or place of service, or failure to report for military service without a compelling reason for more than a month can have the purpose of evading military service temporarily. We think this problem can be addressed by including the absence without leave from a military unit or place of service, or failure to report for military service without a compelling reason for more than a month as separate type of desertion under Article 362. In this case, desertion would be defined as absence without leave from a military unit or place of service, or failure to report for military service without a compelling reason for more than a month, or absence without leave from a military unit or place of service, or failure to report for military service without a compelling reason with the purpose of evading military service completely. Another option would be to treat absence without leave from a military unit or place of service, or failure to report for military service without a compelling reason for more than a month as a separate type of desertion, punishable by a milder penalty.

VIII. Issues Related to Incentives Mechanisms

Articles 361 and 362 of the RA Criminal Code contain provisions that allow to waive criminal liability for deserters and those who left their military units or places of service without permission. According to these articles (paragraph 7 of Article 361 and paragraph 4 of Article 362), a person who committed these actions for the first time may be relieved of criminal liability, if these actions were committed under dire circumstances. We think this wording leaves a lot of room for judicial discretion, because it does not provide clear solutions. Essentially, a military serviceman, who

committed a crime, may or may not be relieved of criminal liability. The question is: what are the criteria for deciding whether a person should be prosecuted or not. Again, there is no clarity. We think it would have been more appropriate to provide a clear solution, which is the case in criminal codes in several countries: a person who committed this action for the first time is relieved of criminal liability, if these actions were committed under dire circumstances.

The words “dire circumstances” present yet another problem. What constitutes dire circumstances, and what doesn’t? We think it would have been more appropriate to have a separate explanation of this in the law. We think dire circumstances can include death of a close relative or an illness of a close relative that requires the perpetrator to take care of that relative, or a threat by another military serviceman to kill or hurt the perpetrator. Other circumstances cannot be considered dire. It is worth noting that extreme need or force majeure also cannot be considered as dire circumstances; these are separate grounds for relieving of criminal liability.

