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“TRANSPARENCY IN THE OSCE”

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**New Challenges to Parliamentary Oversight of the Security Sector –
Private Military Companies and Private Security Companies**

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Committee on Political Affairs and Security**

Parliamentary oversight of the security sector or in other words the democratic control and use of armed forces is stipulated by the OSCE Code of Conduct on Politico-Military Aspects of Security (CoC). This OSCE document was adopted at the Budapest Summit and entered into force in January 1995. It serves as a guideline for reforming the security sector in the OSCE participating States in compliance with appropriate democratic norms, principles and procedures.

Since adoption of the CoC new challenges to the security e.g. terrorism emerged. In order to accommodate all security needs participating States often reinforce their regular troops with services coming from Private Military Companies (PMCs) or Private Security Companies (PSCs). Until now those companies are not considered as a part of the armed forces, but contribute to the security sector. Though neither the CoC nor international agreed norms regulates the activities of such companies. Mostly joint ventures between armed forces and PMCs and PSCs lack parliamentary oversight.

The following report informs briefly about the CoC and the implementation of it. Further it describes the parliamentary oversight of the EU. In addition it contemplates challenges to the parliamentary oversight. Lastly you will find concluding remarks and recommendations. Before going to the substantial part I would like to thank all institutions which contributed and compiled relevant and valuable information for this report. Especially I would like to mention here the Geneva Centre for the Democratic Control of Armed Forces (DCAF), the Austrian National Defence Academy and the Permanent Mission of Austria to the OSCE as well as the Conflict Prevention Centre of the OSCE.

The Code of Conduct on Politico-Military Aspects of Security

By adopting the Code of Conduct, the OSCE pS agreed to reform their domestic politico-military affairs and to apply internationally agreed principles of **democracy and the rule of law to their national security policies and doctrines**. The CoC is politically binding for all OSCE participating States. Above all it is a normative document that sets common norms of behaviour for the OSCE area and regulates the military and defence policies of participating States, the parliamentary control over armed forces and human rights within armed forces. Since it aims in particular at intra-state norms it is a unique instrument compared to many other politico-military agreements.

With regard to the accountability of armed forces personnel under national and international law the Code of Conduct stipulates the provision for participating States to instruct and to train such personnel in international humanitarian law, rules, conventions and commitments governing armed conflicts. Since the Code of Conduct do not provide a definition of armed forces PMCs and PSCs mostly are not considered to belong to this category. Hence often they

are not trained and instructed as the armed forces personnel and they do not have the same awareness about norms as international humanitarian law.

In 1998 participating States started to exchange information on the basis of a questionnaire. In 2003 a fully revised questionnaire was adopted. This new questionnaire has enabled participating States to have a more focused exchange of information which in turn enhances the CoC's implementation. The information exchange constitutes a unique mechanism to foster international transparency with regard to the armed forces and their control through constitutionally established authorities. The information exchange encompasses inter alia laws and legislative procedures, activities undertaken or ongoing processes to re-structure armed forces. The value of the questionnaire lies in the benchmark of transparency that it sets, as well as the yearly national revision of the adequate implementation of the commitments of the CoC.

Since the last technical update of the questionnaire in 2003 participating States convened several meetings devoted to a better implementation of the Code of Conduct. Among different proposals also an update of the questionnaire on the Code of Conduct was recommended. Besides a contribution to the improvement of the implementation of the Code of Conduct the new updated questionnaire should avoid duplications and achieve more transparency. Among different proposals several participating States proposed to refer in the updated questionnaire also to the national implementation of UNSCR 1325. This should be done by asking which measures have been taken to safeguard the peaceful and lawful exercise of *equal* human and civil rights by persons as individuals, *regardless of gender*, or as representatives of national, religious, cultural, linguistic and ethnic groups.

Due to the fact that PMCs and PSCs are not considered to be covered by the provisions of the Code of Conduct no new questions with regard to instruction and training of such firms on international humanitarian law, rules, conventions and commitments governing armed were made.

In summary the CoC is setting rules which are most valuable contributions to security sector reform and governance. Its effectiveness lays in the fact that it is a politically negotiated document. It also is a model example for a comprehensive commitment that links several governmental departments and areas.

Implementation of Democratic Control of Armed Forces in the OSCE Region

As already mentioned participating States exchange information on the implementation of the CoC. For this information exchange a questionnaire¹ was adopted and updated lastly 2003. Participating States transmit yearly relevant information on

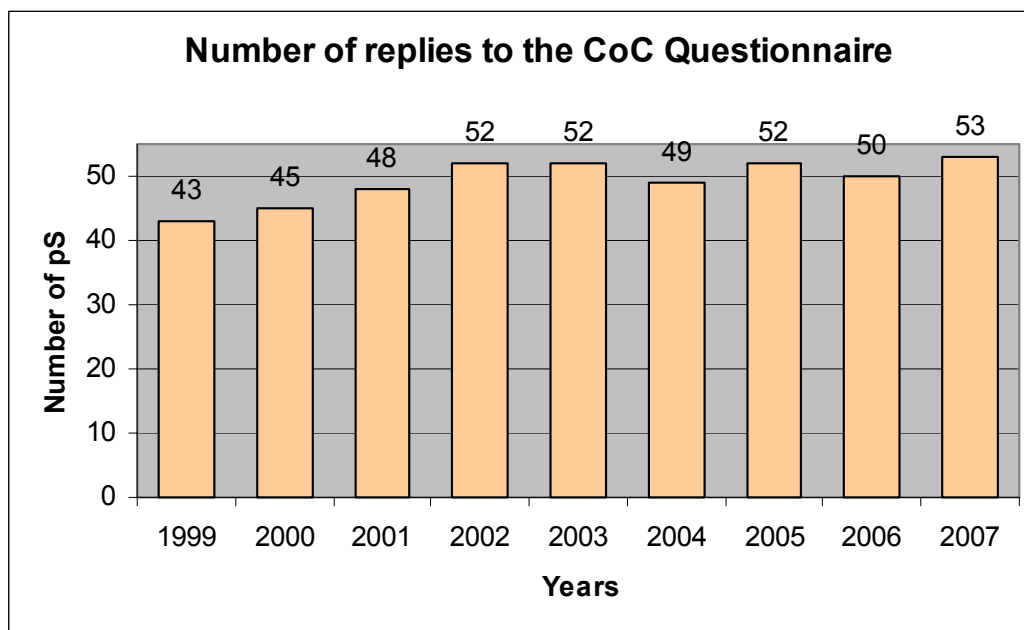
- measures to prevent and combat terrorism,
- national planning- and decision-making process, including the role of the Parliament and Ministries,
- determination/approval of military posture and defence expenditures,
- constitutionally established procedures and constitutionally established authorities/institutions ensuring effective democratic control of the military, paramilitary, and internal security forces, as well as intelligence services, and the police,

¹ FSC.DEC/04/03, 9 April 2003

- roles and missions of the military, paramilitary and security forces as well as controls to ensure that they act solely within the constitutional framework,
- public access to information related to the armed forces,
- stationing of armed forces on the territory of another participating States in accordance with their freely negotiated agreements as well as in accordance with international law,
- procedures for the recruitment or call-up of personnel for service in the military, paramilitary, or security forces,
- exemptions or alternatives to compulsory military service,
- legal and administrative procedures protecting the rights of all forces personnel,
- instruction on international humanitarian law and other international rules, conventions and commitments governing armed conflict included in military training programmes and regulations and
- other relevant information.

Although the main part of this questionnaire is devoted to democratic control of armed forces it also asks for relevant information on implementation of other commitments of the CoC. Not all questions relate to all five categories of armed forces (military, paramilitary and security forces, intelligence services and police). An information exchange on PMCs and PSCs is not explicit required in this questionnaire.

The majority of OSCE participating States follow their commitment and provide information about their implementation efforts annually. The level of commitment to the information exchange is high. All participating States have provided replies to the Questionnaire at least once, and as it is shown below, a clear majority of States (over 70%) have provided replies every year since 1999.

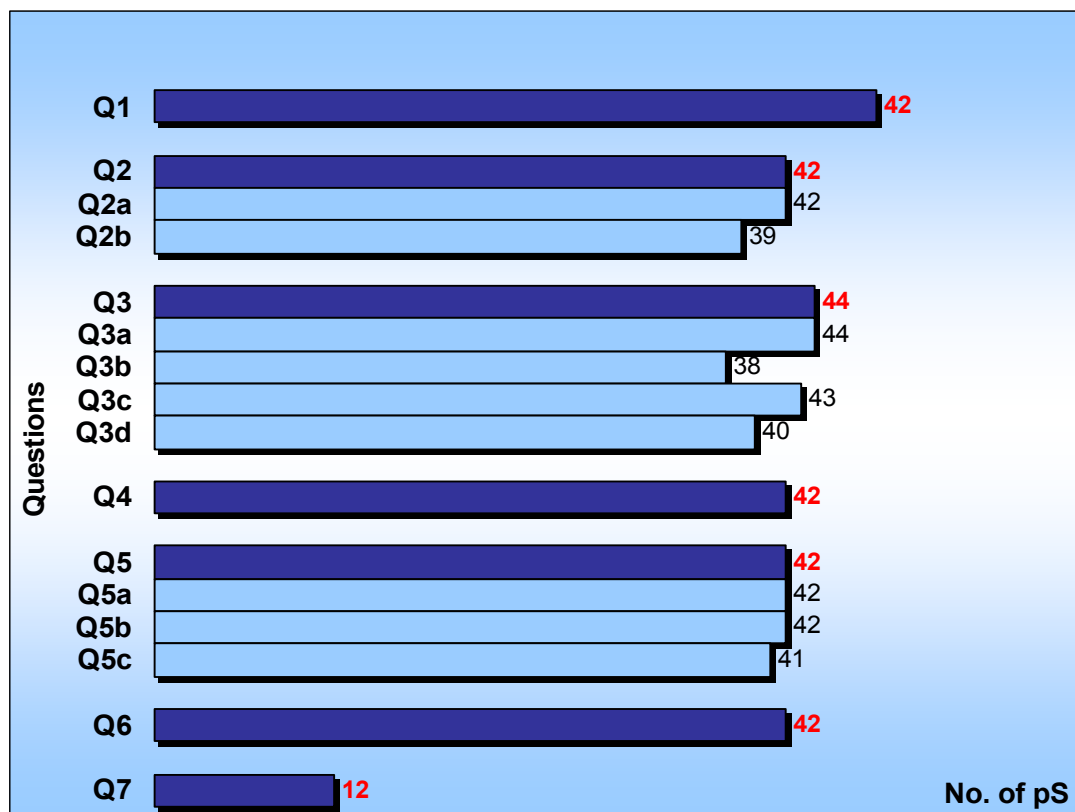


Often the replies provide quite detailed information regarding procedural and legislative issues governing the politico-military aspects of security in the pS. Most pS give updates on relevant laws and decision-making processes, and many also provide details on their practical activities related to the democratic control of armed forces.

However, there is some marked divergence in the replies of participating States to the questionnaire. While this of course to some extent is a result of the complexity of the issue and differences in national practises, it also results from the general wording of the questions: the wording leaves the level of detail of the answers to be decided by the participating States, who are interpreting the questions differently.

For example, there are differences in the weight that the pS give to the legislative base of the democratic control of armed forces on one hand, and on the other hand to the actual procedures ensuring this control. Especially in cases where a pS's reply concentrates heavily on the relevant laws, it is sometimes difficult to get the whole picture of the actual system in place.

The latest numbers that the FSC Support Section of the OSCE has with regard to States' replies to specific questions in the questionnaire are from 2006, and take into account 48 replies that were provided by September 2006. The following chart shows the numbers of participating States that answered each of the seven questions and sub-questions of the questionnaire by that time (48 ps). As can be seen from the chart, there are no big differences in the number of replies to the main questions (in dark blue). Most questions were addressed by the same 42 participating States.



With exemption of question 1 and question 7 all others are related to democratic control and democratic use of armed forces.

Out of the 48 replies covered here, two pS covered only Q1 in their reply, and one participating States provided in addition to answering the question about its combat against terrorism, a general update on all the other questions without dividing the answer according to

the questions. Three countries submitted “nil reports” saying that they do not have armed forces and that questions are therefore not applicable to them, or referred to previous nil reporting (saying that there have been no changes).

Parliamentary Oversight of AF/EU, Case Study

Since the outset of the development of the European Security and Defense Policy (ESDP) of the European Union, parliamentary scrutiny and accountability of decisions for the deployment of civilian and military personnel abroad for ESDP Missions has become the main emphasis of reflection in the area of civil-military relations. Two of the main reasons for this development were the shift of the threat perception in Europe both after the end of the Cold War and 9/11 as well as the change of the tasks for armed forces.

The 2003 European Security Strategy (ESS) identified five major threats – Terrorism, Proliferation of Weapons of Mass Destruction, Regional Conflicts, State Failure, and Organized Crime. Dealing with these threats the ESS states that the first line of defence will often be abroad.² Saying this means that the main task of armed forces, at least in Europe, will no longer be national defense but military missions “out of area”. For the European Union these missions are summarized in Article 17 (2) Treaty on the European Union of Nice (TEU Nice) as the so called Petersberg Tasks encompassing “humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking.”

In 2004 these tasks were extended by the Headline Goal 2010 endorsed by the June 2004 European Council adding joint disarmament operations, support for third countries in combating terrorism and security sector reform.³ Article 28b of the Lisbon Treaty will extend these tasks including now in addition military advice and assistance tasks, conflict prevention and post-conflict stabilization. A typical ESDP crisis management operation, as stated explicitly in the Long Term Vision (LTV) of the European Defense Agency (EDA) will be expeditionary, multi-national and multi-instrument.⁴ For the EU armed forces are seen as one component of a wider, comprehensive and integrated approach to ESDP operations⁵ and the objective of interventions by force is not victory but moderation, balance of interests and peaceful resolution of conflicts.⁶ The LTV mentions in addition that military operations will be subject to ever-increasing scrutiny by elected officials, media and population⁷. Therefore, not only legality of military actions including a United Nations’ mandate for ESDP missions but also legitimacy of military actions meaning acceptance by the population will be crucial. Parliamentary oversight of ESDP missions is exercised by the national parliaments of the EU’s member states. Nevertheless, since there are different models of national parliamentary oversight, national parliaments have difficulties to scrutinize ESDP effectively. In all, four models of national parliamentary oversight can be identified: First, prior authorization before

² ESS, page 7.

³ Doc. 6309/6/04, page 2.

⁴ LTV, point 34.

⁵ See LTV, point 36.

⁶ Ibid, point 35.

⁷ LTV, point 12.

the adoption of a legal basis for the operation; second, prior authorization before the deployment of troops; third, consultative role; and fourth, no role.⁸

At the European Union level this lack of uniformity leads to the question to what extent the European Parliament (EP) is able to scrutinize decisions at the EU level effectively. The EP is the only EU institution which consists of directly elected representatives. It is to mention that in the current Eurobarometer survey 67% of European Union citizens agree that decisions with regard to defence and foreign affairs should be made jointly within the EU.⁹ Decisions within the second pillar of the European Union, however, are taken unanimously by the Council of Ministers. The EP is involved in this decision making process under Article 21 TEU Nice. It states that

“The Presidency shall consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and shall ensure that the views of the European Parliament are duly taken into consideration. The European Parliament shall be kept regularly informed by the Presidency and the Commission of the development of the Union’s foreign and security policy. The European Parliament may ask questions of the Council or make recommendations to it. It shall hold an annual debate on progress in implementing the common foreign and security policy.”

Article 21 TEU Nice, however, does not create an obligation for the Council to consult the European Parliament prior to an ESDP mission. Nevertheless the EP has some possibilities to oversee and scrutinize ESDP issues. **First**, the committee responsible for the CFSP – the Committee on Foreign Affairs – is assisted by a Subcommittee on Security and Defense.¹⁰ **Second**, as stated in Rule 85 (1) of the Rule of Procedure, the President of the EP shall invite the President-in-Office of the Council to make a statement to Parliament, pursuant to Article 21 of the EU Treaty, prior to the appointment of a High Representative for the Common Foreign and Security Policy (CFSP). In accordance with Rule 85 (2) the President of the EP shall invite the High Representative upon his appointment and before he officially takes up his duties, to make a statement to, and answer questions from, the committee responsible. This procedure will change significantly after the Lisbon Treaty has entered into force since the High Representative is no longer Secretary General of the Council but a Vice-President of the Commission. This means, that according to Rule 99 (4) the European Parliament is able to reject the Commission by a majority of the votes cast. Additionally, if the High Representative is a Vice-President of the Commission, the EP will have, pursuant to Article 201 Treaty on the Functioning of the EU, the right of a motion of censure on the Commission which leads to a resignation of the Commission as a body, if this motion of censure is carried by a two-third majority of the votes cast, representing a majority of the Members of the European Parliament.

Third, according to Rule 87 the High Representative shall be invited to make statements in Parliament at least four times a year and shall be invited at least four times a year to attend meetings of the committee responsible in order to make a statement and answer questions. This means that the European Union has legally the right to be informed about ESDP issues. **Fourth**, one of the most powerful means to exercise oversight of ESDP mission is the “power of the purse”. Both, the Council and the European Parliament adopt the annual EU budget. The Commission Communication “Financing of Civilian Crisis Management Operations”

⁸ See Born, Hans et al: Parliamentary Oversight of Civilian and Military ESDP Missions: The European and National Levels. Study mandated by the European Parliament and conducted by the Geneva Center for the Democratic Control of Armed Forces (DCAF), page v.

⁹ Eurobarometer 68 First Results, page 28.

¹⁰ Annex VI of the Rule of Procedure of the EP.

distinguishes in budgetary term three possible categories: a) operations under a community instrument, which are financed under the appropriate community budget line, b) CFSP operations not having military or defense implications, which are financed under the CFSP budget line, and c) ESDP operations having military or defense implications, which fall outside the community budget.¹¹ Operations of the first type are 1st pillar actions, which are charged to the European Communities budget and therefore the EP is able to exercise scrutiny and co-decision power. Operations of the second type are 2nd pillar actions, implemented by a Joint Action of the Council. Expenditures for this kind of operations are charged to the CFSP budget in accordance with Article 28 TEU Nice. Common costs of ESDP missions, the third category, do not fall under ESDP expenditures, are borne by member states via the Athena Mechanism¹² which means that the European Parliament is not able to exercise formal oversight.¹³ In sum, the traditional means of parliamentary oversight, the “power of the purse”, is a particular blunt and ineffective tool in the case of military ESDP missions.¹⁴

Fifth, pursuant to Rule 114 (1), a political group or at least forty Members of the European Parliament are able to table a proposal for a recommendation to the Council concerning the CFSP.

Furthermore the national parliaments together with the EP have developed inter-parliamentary cooperation within the Conference of the Community and European Affairs Committees (COSAC) and Sectorial Committees such as the defense and foreign affairs committees. Finally ESDP and CSFP are discussed within the NATO Parliamentary Assembly and the Assembly of Western European Union which calls itself the “Interparliamentary European Security and Defense Assembly”.¹⁵

To conclude, parliamentary oversight of ESDP missions will become increasingly important since legitimacy of military actions will be more and more crucial. Legally, the European Parliament does not have the authorization to approve an ESDP mission. Nevertheless, the EP has some possibilities to scrutinize ESDP operations. In the meantime it is primary the national parliaments that have to scrutinize their governments in the field of ESDP and CSFP.

Future Challenges to the Parliamentary Oversight of PMCs and PSCs

With the end of the last century new threats have emerged. Although old threats still exist terrorism and state failure influences global stability and security today. In order to accommodate all security needs participating States often reinforce their regular armed forces with military and security services provided by private companies. These firms can be summarized by the categories of Private Military Companies (PMCs) or Private Security Companies (PSCs). Today such security providers are contracted by armed forces and play growing role in the implementation of the defence, development, and security agendas. In the era of globalization, these types of companies are critical in raising and maintaining levels of security in unstable but economically important areas of the world. Ongoing global instability since 9/11 fosters a demand for private military and security services too. The contracting-out

¹¹ See COM(2001)647final, page 4.

¹² Council Decision 2004/197/CFSP of 23 February 2004 establishing a mechanism to administer the financing of the common costs of European Union operations having military or defense implications.

¹³ See Born, page 17.

¹⁴ See Born, page iv.

¹⁵ See Born, page 19.

and outsourcing imperatives of governments further make private military and security solutions viable alternatives for authorities to consider.

Private Military Companies can be defined as;

“... legally established multinational commercial enterprises offering services that involve the potential to exercise force in a systematic way and by military means and/or the transfer or enhancement of that potential to clients. The potential to exercise force can materialize when rendering, for example, a vast array of protective services in climates of instability (on land and sea). Transfer or enhancement, on the other hand, occurs when delivering expert military training and other services such as logistics support, risk assessment, and intelligence gathering. It is a ‘potential’ to exercise force because the presence of a PMC can deter aggressors from considering the use of force as a viable course of action.”¹⁶

Until now those companies/firms are not considered as a part of the armed forces, but contribute to the security sector. Neither the CoC nor international norms or agreed guidelines regulate the activities of such companies. Mostly joint ventures between armed forces and PMCs and PSCs lack parliamentary oversight.

Switzerland in cooperation with the International Committee of the Red Cross launched an initiative on international humanitarian law (IHL) and human rights law (HRL). In general this initiatives aims at creating rules for PMCs and PSCs operating in situations of armed conflicts and in post-conflict situations The two main objectives of this initiative are;

- reaffirmation and clarification of existing obligations of States and other actors under international law, in particular under IHL and HRL

and

- identification of good practices and regulatory options to assist States in promoting respect for IHL and HRL by PMCs and PSCs.

From 14 April to 16 April 2008 a concluding session of this initiative was held in Montreaux. It contributed to advance the common goal to restate the current international obligations of States under IHL and HRL with regard to PMCs and PSCs. A text of Legal Obligations and Good Practices will be finalized over the next months with the aim to endorse it in September 2008. A short Chair Summary on the Meeting is available via the Initiative's website.¹⁷

Concluding remarks

In summarizing this report it can be stated that parliamentary oversight of armed forces is regulated by the OSCE Code of Conduct. But the Code of Conduct provides only for armed forces (military, paramilitary, security forces, and intelligence as well as police). The provisions of the CoC do not apply to PMCs and PSCs.

New emerging threats demand new answer from the executive branch. Participating States reinforce their armed forces with PMCs and PSCs in order to overcoming new threats. PMCs

¹⁶ Ortiz, Carlos. 'The Private Military Company: An Entity at the Center of Overlapping Spheres of Commercial Activity and Responsibility' (PDF), in Jäger, Thomas and Kümmel, Gerhard (eds). Private Military and Security Companies. Chances, Problems, Pitfalls and Prospects, Vs Verlag, 2007, pp. 60-1

¹⁷ <http://www.eda.admin.ch/eda/en/orifil/media/mcom/single.html?id=18351>

and PSCs are operating in armed conflict and in post-conflict situations, but they are not guided by the same norms and rules as armed forces.

Some participating States and some international institutions already are aware of this precarious situation. Initiatives which take care about this problematic use of private companies in conflict situations have been launched. In the OSCE such a discussion did not take place until now.

In order to take up this topic in the OSCE too a resolution on this issue of the PA could be envisaged. This resolution could build upon already existing mechanism of the OSCE, take into account and build upon initiatives of other international actors and last but not least can provide guidance for participating States. This guidance could aim at that participating States perform parliamentary oversight over PMCs and PSCs in their country and assure that the missions of PMCs and PSCs are ruled by international law, in particular IHL and HRL.