



Національний інститут проблем міжнародної безпеки
при Раді національної безпеки і оборони України

DCAF

Женевський центр демократичного контролю
над збройними силами

АКТУАЛЬНІ ПРОБЛЕМИ РЕФОРМУВАННЯ СФЕРИ БЕЗПЕКИ І ОБОРОНИ УКРАЇНИ

Верховна Рада України
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National Institute of International Security Problems
Of National Security and Defence Council of Ukraine

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У виступах розглядалися проблемні питання щодо місця України на європейському просторі, реформування сфери безпеки і оборони України, стану та пріоритетних напрямів реформування Збройних сил України, розвідувальних органів і Служби безпеки, Прикордонної служби, служби цивільного захисту, органів Внутрішніх справ та системи правосуддя в Україні. Вперше на міжнародній конференції були розглянуті проблеми соціально-правового захисту військовослужбовців.
Розраховано на представників органів законодавчої та виконавчої влади, експертів та науковців з питань реформування сфери безпеки.

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MILITARY OMBUDSMAN WHAT IS A MILITARY OMBUDSMAN?

For the purpose of this paper, a military ombudsman (MO) is a mechanism independent of the military command structure that exercises oversight of the defence sector and helps to ensure that it observes the principles and practice of good governance. The MO addresses complaints about improper and abusive behaviour in the military as well as shortcomings in military procedures, and formulates recommendations for corrective action. The MO does not make defence policy or decisions on operational issues. While the immediate purpose of the MO is to redress grievances and to encourage proper conduct of and within the defence sector, the broader role of the office is to enhance its efficiency and effectiveness by making it accountable and responsive to its constituencies.

Why is the Institution Important? The MO helps to

- exercise democratic control over the defence sector
 - ensure respect for the rule of law in the armed forces
 - promote transparency and accountability in defence structures
- focus attention on problems in military practice requiring corrective action
- enhance the efficiency and effectiveness of the defence sector
 - strengthen confidence in the military on the part of both the public and defence sector personnel

An MO can be of particular benefit to transitional and developing democracies; and countries with reforming security sectors, where the Executive and the General Staff tend to be strong, the Legislature weak and the Courts dependent on the other branches. Here the MO can bolster standard mechanisms of oversight and counterbalance the institutional weakness that is typical of such environments.

How to Ensure the Full Potential of the Institution?

For an MO office to realize its full potential, there are three key requirements: operational independence, political authority, and an adequate material/ intellectual infrastructure. Ideally, the office of the MO should

- be legally defined in the constitution or an act of the legislature

- have its own investigative capacity, and be authorized to freely initiate investigations on questions affecting individuals or, as appropriate, of a systemic nature

- have access to the information necessary to conduct any investigation
- be able to operate in the utmost confidentiality
- be able to publish reports for the attention of parliament and the general public

- be empowered to formulate recommendations for consideration by the civil and military leadership, which require official and public responses
 - be housed in its own premises, independently of the General Staff
- Of crucial importance is the staff of the office of the MO. Ideally, this should be made up of civilians whose expertise allows for the MO office to carry out research, formulate legal opinions and develop media policy independently of other departments or government. To avoid problems in accessing classified information, the staff should also be cleared to the highest security level.

How do the German and Canadian Oversight Mechanisms Work?

The German Ombudsman, known as the Wehrbeauftragter des Bundes

(WB), or Parliamentary Commissioner of the Armed Forces, and the Canadian Military Ombudsman are among the most profiled mechanisms for military oversight. They have often been used as models by other countries, for example, the Irish Military Ombudsman and the Czech Republic Armed Forces Ombudsman.

The WB office was established in 1959 after the decision was taken to recreate German Armed Forces. The office is based on the Swedish Military Ombudsman, the first structure of its kind, which was established in 1915. The office of the Canadian Military Ombudsman was set up in 1998 following the investigation into the Somalia affair.

Both offices have approximately 50 staff members. The German WB received 6154 complaints in 2004 for 260,000 members of the Bundeswehr (German Armed Forces). During the same period, the Canadian MO received 2274 complaints for the 60,000 members of the Canadian Forces (CF) and the 20,000 civilians employed by the Canadian Department of National Defence (DND). The annual budget of the German WB in 2004 was around 3,370,000. That of the Canadian MO for the 2003-2004 fiscal year was roughly similar at 3,069,000.

Table 1 - A Comparison of the Canadian and German Systems

Canada's Military Ombudsman	KEY ISSUES	Germany's Wehrbeauftragter
<p>negotiated mandate but no legal statute • by the government on the Defence Minister's (DM) recommendation for a 5-year term (renewable) • current and former members of the CF and DND, and family members • the DM, the military chain of command, a member of parliament • the MO, with notice to the DM</p> <p>any individual complaint within the purview of the CF and DND • systemic issues • the complainant must have attempted to resolve the complaint by referring it to the chain of command or the military grievance system • the MO can refuse a complaint if it is untimely or frivolous or if it would require an injudicious use of resources • the MO can accept a complaint directly in compelling circumstance: • to the DM • the MO makes recommendations and can follow-up his recommendations with the relevant bodies with a view to monitoring implementation • the MO publishes an Annual Report which is tabled in Parliament by the Defence Minister and debated by the relevant parliamentary</p>	<p>What is the legal status of the Office? By whom is the MO appointed? Who can initiate a complaint or trigger an investigation? What kind of cases can the MO/WB address? What preconditions must be fulfilled before the MO/WB can accept a case? To whom does the MO/WB report? What is the nature of the MO/WB rulings? What other sources of influence does the Office have? What about classified information?</p>	<p>article 45b of the Constitution • law on the Wehrbeauftragter des Bundes • by a majority vote of the Bundestag in secret ballot for a 5-year term (renewable) • members of the Bundeswehr (Armed Forces) and their (family members) • the Bundestag, its Defence Committee; the WB at his discretion • any individual complaint or petition made by Bundeswehr personnel • members of the Bundeswehr have the right to contact the WB directly without going through other bodies of the military grievance system • to the Bundestag • the WB makes recommendations and can follow up his recommendations with the relevant bodies with a view to monitoring implementation • the WB publishes an Annual Report, which is submitted to the President of the Bundestag; the President refers the report to the Defence Committee, which requests the DM to comment on it • the WB can request reports on discipline in the Bundeswehr and attend</p>

Table 1 highlights the main features of the two approaches.

What About Other Approaches?

In addition to the Canadian and German independent military oversight mechanisms, described above, there are essentially two other approaches: integrated military oversight mechanisms, or mechanisms that are part of the military hierarchy, and civilian oversight mechanisms, such as a Parliamentary Ombudsman or a Human Rights Ombudsman whose mandates include military and (defence matters). Each of these approaches has its strong and weak points. The military leadership and the executive tend to favour the integrated military oversight mechanism as it appears to be more receptive to command and control issues and attentive to the need to protect the operational effectiveness of the military. The Inspector-General, as this mechanism is most often called, is usually involved in operational issues, and the incumbent is invariably a serving member of the military. The main drawback of this approach is that here the military performs the oversight function on itself. This can create potential for conflict of interest and undermine confidence in the recommendations of the oversight body. This approach tends to be the norm in both democratic and democratizing countries.

Systems where the military oversight function is part of a civilian oversight mechanism have the advantage of ensuring that soldiers' rights are not unduly differentiated from those of the population as a whole. The concentration of the ombudsman function in one office can also be less costly than having several specialized offices. At the same time, a civilian oversight mechanism may lack the necessary expertise for dealing with the defence sector and may fail to focus attention on the particular problems facing military personnel. Examples of this model are Ukraine, Portugal, Lithuania, and Sweden.

The independent military oversight mechanism has the advantage of being able to devote its attention to military matters and of being to operate at arms length from those it is mandated to oversee. Its ability to issue public reports strengthens Parliament's oversight capacity and ensures greater transparency and accountability of the military. While the mechanism may raise reservations in the military hierarchy and the civilian defence management structure, if it is truly independent, impartial, fair and effective in its recommendations, it can come to enjoy their confidence and support.

The approaches described above are not to be confused with ombudsmen that assist a client in developing, and then pursuing, his or her options for resolving problems. Mechanisms of this type have proliferated in recent years in the corporate and educational sectors, and in social organizations. This approach is not typical of the defence sector.

As a final point on the different approaches in play – little or no oversight or accountability of the military is characteristic of authoritarian and failed states.

Open questions

- One question that arises in a security world where it has become increasingly important for the gamut of security sector actors to be able to work together is whether the MO should not become an ombudsman overseeing all security sector actors. In any event, there is a decided need for enhanced oversight of security sector actors other than the military. Here the oversight function tends to be even more underdeveloped than in the defence sector.
- Increasingly, the military and other security sector actors find themselves engaged in theatres well beyond their country's national borders and traditional areas of deployment. This development has important implications for the oversight function.
- There is a small but increasing number of countries that have a MO. They should consider meeting on a multilateral basis for exchanges of mutual concern and with a view to developing interest in the institution.
- A host of regional and international institutions have direct or indirect responsibilities in the area of oversight. They should be encouraged to consider regional and general approaches to oversight, including the possibility of developing a code of conduct for oversight.

Issues related to that of the Ombudsman

- human rights and the armed forces
- trade unions and the armed forces
- military justice
- minority rights and the armed forces
- relationship between parliamentary committees and the defence ministry
- military and society
- civilian oversight of the security sector
- organizational models for the relationship between the MoD and the General Staff

Further Information

Born, H., Fluri, P., Johnson, A. (eds.) *Parliamentary Oversight of the Security Sector: Principles, Mechanisms and Practices*, Handbook for Parliamentarians no. 5. IPU/DCAF, Geneva, 2003, pp.90-93.

Gleumes, Karl. *The Parliamentary Commissioner for the Armed Forces. His Role in Exercising Parliamentary Control over the Federal Armed Forces and Processing Petitions From Service Personnel*. Berlin, German Bundestag, 2001.

Marin, Andre. *The Way Forward – Action Plan for the Office of the Ombudsman*. Report to the Minister of National Defence of Canada. Ottawa, 1999.

Marin, Andre. *Overhauling Oversight: Ombudsman White Paper Submitted to the Prime Minister of Canada*. Minister of National Defence and Minister of Veterans Affairs. March, 2005.

Military Ombudsmen on the Web

Australia (The Commonwealth Ombudsman and Defence Force Ombudsman, Federal): www.comb.gov.au

Canada (Ombudsman for National Defence and the Canadian Forces); [www.ombudsman, forces, gc.ca](http://www.ombudsman.forces.gc.ca)

Germany (The German Bundestag's Parliamentary Commissioner for the Armed Forces):

www.bundestag.de/htdocs_e/orga/O3organs/O6armforce.html

Israel (Soldier's Complaints Commissioner):

www.idf.il/english/organization/nakhal/foreword.stm

Netherlands (The Inspector-General of the Netherlands Armed Forces): www.mindef.nl/ministerie/igk/engsh/index.html

Information on other Ombudsman Institutions

Ombudsman International: www.ombudsmaninternational.com

International Ombudsman Institute (IOI):

www.law.ualberta.ca/centres/loi/ Association des Ombudsmans et

Mediateurs de la Francophonie (AOMF):

<http://democratie.francophonie.org/sijip/html/AOMF/>

The Ombudsman Association (TOA): www.ombuds-aa.org/index

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DCAF welcomes comments from readers and will issue revised versions of this background as appropriate. Hard copies of the backgrounds can

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Established in October 2000 on the initiative of the Swiss government, the Geneva Centre for the Democratic Control of Armed Forces (DCAF) encourages and supports States and non-State governed institutions in their efforts to strengthen democratic and civilian control of armed and security forces, and promotes security sector reform conforming to democratic standards.

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Geneva Centre for the Democratic Control of Armed Forces

P. HOEING

EUROPEAN TRENDS IN LAW-ENFORCEMENT AND JUSTICE REFORM (PETER MOEBING) EUROPEAN TRENDS IN DEFENCE AND SECURITY SECTOR REFORM

I. Security sector reform as a global requirement

Security sector reform is a global phenomenon occurring in all parts of the world, east and west, old democracies as well as transition countries. It concerns military defense equally well as internal police and criminal justice reform, it happens in the United States under the auspices of homeland security, in Eastern Europe in the framework of democratic institution building and fulfilling the so-called Copenhagen criteria for EU-accession, whereas – within the EU – reforms take place to make the Union fit for the challenges of a single Area of Freedom, Security and Justice.

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2. The specific European Union context

The specific EU challenge lies in the fact that European integration has from the very beginning been an economy-driven initiative, i.e. to prevent further military conflicts by linking the basic industries of the previous enemy nations, in particular Germany, France, Italy, Benelux and UK.

Not only began the integration in terms of justice and home affairs only in the early 1990s, ie more than 30 years after the completion of the customs union, also Member States remained relatively hesitant to transfer to the EU as many competences in this field as they did in the economic area. As a consequence, the common area of Freedom, Security and Justice has to be built upon the co-existence of initially 12, then 15 and 25 distinct legal systems; differently from the economic field, there is no concept of harmonizing basic legislation such as creating an EU criminal code or a code of criminal procedure. Much rather, JHA integration in the EU relies on the idea of creating “catwalks” between the different national levels, in order to resolve cross-border situations.

2.1. Additional challenge for the newcomers

Besides having to fulfil the general accession (“Copenhagen”) criteria, they have caught up with the evolving JHA accomplishments so far achieved by the Union, the so-called “acquis” – representing in a way a “moving target”.

3. The current trends

Although the various EU treaties since the early 90s (Maastricht 1992, Amsterdam 1997, Nice 2000 and the Constitutional Treaty 2004) have enormously stepped up the role of EU-wide cooperation in criminal justice and law enforcement matters, progress remains limited by certain definite restraints.

At least since the Tampere European Council of 1999, it became clear that the EU legal reform would renounce on the objective of harmonisation of national laws and rather turn to that of mutual recognition of judicial decisions taken in other Member States.

Another cornerstone of European law situation is the acceptance of the diversity of national services to implement the relevant legislation rather than creating a “federal” judicial or law enforcement body. **3.1. Criminal justice** The mutual recognition principle is closely linked to the existence of mutual confidence: the full acceptance of foreign decisions requires that certain minimum standards, in material as well as procedural terms, be respected throughout the Union.

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