

info@democracy-reporting.org
www.democracy-reporting.org

CONSTITUTIONAL PROVISIONS FOR DEMOCRATIC GOVERNANCE OF ARMED AND SECURITY FORCES

EXECUTIVE SUMMARY

The governance of armed and security forces is on the agenda of different post-2011 constitution-making bodies in the MENA region, such as Libya and Yemen. New constitutions should take into account states' international obligations as well as comparative good practice in this area.

Constitutions should make clear that the state possesses the monopoly of coercive force. The armed and security forces must be controlled by democratically legitimate institutions. This principle should be clearly stated and further translated into the set-up of state institutions: The Supreme Commander of the armed forces should be a civilian, the civilian government may decide on appointments of high-ranking officers, national security councils or similar bodies should respect civilian supremacy in decision-making, the Minister of Defence should not be a military, or at a minimum should have resigned from military position and parliament must have the right to review the budget of security and armed forces and through dedicated committees of supervision.

Constitutions should also make clear that the armed and security forces can only operate in the framework of the rule of law and respect for human rights. The constitution should lay out the mandate of the armed and security forces clearly. The role of military tribunals should be narrow and members of the armed forces should enjoy human rights as other citizens. This includes the right to vote for military personnel. At the same time, military and security must remain politically neutral as institutions. This is explicitly stated in a number of constitutions.

1. INTRODUCTION

Over the past decades, several new constitutions included detailed provisions to the governance of armed and security forces. This has been particularly the case with post-conflict countries and countries transitioning from (military) dictatorship towards more democratic systems of government. Examples include post-1989 transitions in Eastern Europe, the post-dictatorship constitutions in Latin America and the democratic constitutions adopted in several African countries in the 1990s.

The armed forces were central players in many authoritarian regimes and played a role in some of the Arab uprisings of 2011.¹ The question of their governance and control was on the agenda of all post-2011 constitution-making bodies in the region. So far, the results in this regard have been mixed: After ambitious articles in the early drafts of the Tunisian Constitution, the final version reflected democratic standards, but is not very detailed.² The Egyptian Constitution of January 2014 grants the military considerable privileges and in some aspects reverses the idea of the democratic control of the armed forces.³

Other Arab countries still drafting constitutions include Libya and Yemen where armed forces have never been solid and coherent institutions. As they undertake the drafting of new

¹ Philippe Droz-Vincent, « A return of armies to the forefront of Arab politics ? », Istituto Affari Internazionali, Working paper 11/July 2011. Available at: <http://www.iai.it/pdf/dociai/iaiw1121.pdf>.

² Haykel Ben Mahfoudh, "Security Sector Reform in Tunisia Three Years into the Democratic Transition", Arab Reform Initiative, July 2014. Available at: <http://www.arab-reform.net/sites/default/files/Mahfoudh%20-%20Tunisia%20SSR%20-%20July%202014%20-%20ARI.pdf> ;
د. هيكال بن محفوظ، "تطورات القطاع الأمني في تونس بعد الثورة وفي خلال سنة 2013"، http://carnegieendowment.org/files/Security_Sector_in_Tunisia_in_2013_.pdf.

³ Nathan Brown, "Egypt's constitutional cul-de-sac", CHR. Michelsen Institute Insight, 31 March 2014, available at: <http://carnegieendowment.org/2014/03/31/egypt-s-constitutional-cul-de-sac/h7su#>; "Egypt's draft-constitution rewards the Military and the Judiciary", December 4 2013. Available at: <http://carnegieendowment.org/2013/12/04/egypt-s-draft-constitution-rewards-military-and-judiciary>. In-depth assessment of the main elements of Egypt's new constitution, Michael Meyer-Resende, European Parliament, http://www.europarl.europa.eu/RegData/etudes/note/join/2014/433846/EXPO-AFET_NT%282014%29433846_EN.pdf.

constitutions, the governance of armed and security forces emerges as one of the top concerns of Yemen and Libya's constituent assemblies. The Yemeni National Dialogue Conference, concluded in January 2014, had one of its nine working groups focusing on the issue of "armed and security forces and their role."⁴ The outcomes⁵ have been forwarded to the Constitution Drafting Committee still at work. The Libyan roadmap for the constitution drafting adopted by the Constitution Drafting Assembly, in May 2014, provides for a Chapter of the constitution to be devoted to the issue of armed and security forces.⁶

Constitutions are an essential guarantor of democratic governance of armed and security forces. A constitution alone is not sufficient to ensure effective democratic governance of armed and security forces, but it provides the basic legal framework. By its nature as a fundamental document, a constitution will not include all relevant details, but it should include the most important principles and rules. While each armed or security body should be subject to different regulations depending on its function, constitutions have a unique scope over all involved actors and can ensure that oversight mechanisms are tailored to each service.

The monopoly on the use of force is the fundamental feature of the modern state and, in a democracy, every aspect of state power should be controlled by the democratically legitimised institutions. The balance of power, transparency and public accountability, strong and independent judiciaries, the rule of law, respect for political rights and freedoms, and other essential elements of democracy — are central parts of democratic governance of armed and security forces.⁷

In designing the architecture of armed and security forces' governance, constitutions should adhere to obligations in the international law and take inspiration from comparative constitutional practice, including democratic oversight over armed and security forces and their organisation. This is particularly relevant to countries where armies played historically a major role in establishing and maintaining authoritarianism.

2. INTERNATIONAL OBLIGATIONS AND STANDARDS ON THE DEMOCRATIC CONTROL OF ARMED AND SECURITY FORCES

International obligations on the democratic governance of armed and security forces can be derived from international and regional instruments. These include general instruments on human rights and democracy such as the Universal

Declaration of Human Rights of 1948 and the International Covenant on Civil and Political Rights (1966). They also include more specific documents, often soft law sources, such as the Code of Conduct of Law Enforcement Officials;⁸ the UN Human Rights Commission draft principles governing the administration of justice through military tribunals⁹ and several UN General Assembly's resolutions. For Libya, the African Charter on Democracy, Elections and Governance is applicable.¹⁰ There are also several instruments by regional organisations which do not bind Libya but may provide inspiration: The Organisation for Security and Cooperation in Europe (OSCE) Code of Conduct on Politico-Military Aspects of Security;¹¹ the Code of Conduct for Armed Forces and Security Services in West Africa;¹² the Inter-American Democratic Charter¹³ and the Quebec City Plan of Action adopted by the Summit of the Americas of 2001.¹⁴

Constitution-making bodies are not expected to draft the internal regulations of the different armed and security forces institutions or to provide for every single aspect related to their operation. They are rather expected to set out the main principles and most important rules governing armed and security forces. Ordinary legislation and regulation will deal with these matters in more detailed terms. It is therefore advisable for constitution-making bodies to consider the core obligations and good practice in order to translate them into constitutional provisions. For the needs of this briefing paper, three main standards have been selected as particularly important in the context of constitutional reforms in the MENA region. These are: the subordination of armed and security forces to democratically elected institutions; political neutrality and non-interference in politics; abiding by the rule of law and by human rights. These have direct implications to be taken into account while drafting the relevant constitutional provisions most notably regarding the establishment and organisation of armed and security forces, their command, oversight, control and use.

2.1 SUBORDINATION OF ARMED FORCES TO DEMOCRATICALLY ELECTED INSTITUTIONS

In a democracy legitimacy is derived from the people who chose their representatives. All exercise of state power must be democratically accountable. However, armed and security forces, which wield the state's monopoly of coercive power, are at risk of developing a sense of autonomy from the

⁴ <http://www.ndc.ye/ar-issue.aspx?show=7>.

⁵ "Outcomes of the National Dialogue Conference", available at http://www.ndc.ye/ndc_document.pdf p. 123 and f.

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<http://www.cdalibya.org/%D8%A7%D9%84%D8%AE%D8%A7%D8%B1%D8%B7%D8%A9-%D8%A7%D9%84%D8%AF%D8%B3%D8%AA%D9%88%D8%B1%D9%8A%D8%A9>.

⁷ Democracy Reporting International, International Consensus: Essential elements of democracy, October 2011, available at: http://www.democracy-reporting.org/files/essential_elements_of_democracy_2.pdf.

⁸ UN General Assembly's Resolution 3/169 (1979) of 17 December 1979.

⁹ Draft principles governing the administration of justice through military tribunals UN E/CN.4/2006/58.

¹⁰ Adopted by the 8th ordinary session of the Assembly, held in Addis Ababa, Ethiopia, 30 January 2007.

¹¹ Adopted at the 91st Plenary Meeting of the Special Committee of the CSCE Forum for Security Co-operation in Budapest on 3 December 1994.

¹² Adopted by the ECOWAS Council of Ministers in Abuja on 17–18 August 2011.

¹³ Adopted by the General Assembly at its session of Lima on 11 September 2001.

¹⁴ Declaration of the third Summit of the Americas adopted in Quebec on April 2001, available here: <http://www.americascanada.org/eventsummit/declarations/declara-e.asp>.

political system, especially in countries with weak democratic tradition.¹⁵

This is one of the best-established principles on armed and security forces' governance. The UN General Assembly and the Commission on Human Rights highlighted this principle in a resolution on "promoting and consolidating democracy"¹⁶ stating that militaries must be "accountable to democratically elected civilian government."¹⁷

Outside of the UN system, the African Charter on Democracy, Elections and Governance states that "State Parties shall strengthen and institutionalize constitutional civilian control over the armed and security forces to ensure the consolidation of democracy and constitutional order."¹⁸

Implicit in the control by democratically elected institutions is the prerequisite idea of state monopoly of coercive power, which is a central element of definition of modern state. The idea is expressed in regional instruments in different ways. The Economic Community of West African States (ECOWAS) Code of Conduct indicates, under "Definitions", that reference to armed and security forces "shall include all those who acting on behalf of the state, play a role in defence and security." The OSCE Code of Conduct makes this point in clearer terms by stipulating that "participating states will not tolerate or support forces that are not accountable to or controlled by their constitutionally established authorities."¹⁹

2.2 NON-INTERFERENCE IN POLITICS AND IDEOLOGICAL NEUTRALITY

Political and ideological neutrality of armed and security forces is a key element in enabling civically elected institutions to fulfil their role and, hence, to maintain the democratic character of the system of government. This does not mean individual members of these institutions should only enjoy limited civil and political rights, but rather that the institutions as such should observe strict political neutrality. Accordingly, several international instruments provide for the necessary political neutrality of armed and security forces as one of the objectives of civilian control. Article 2 of the ECOWAS' Code of Conduct requires "strict neutrality in political matters" from the personnel of armed and security forces. The article further puts an obligation on political authorities and groups to "refrain from undue interference or

extending partisan politics to the operations of armed forces and security services."²⁰

2.3 ADHERENCE TO THE RULE OF LAW AND RESPECT FOR HUMAN RIGHTS

Armed and security forces must at all times be subject to the rule of law and exercise their power within its limits. The rule of law includes human rights.²¹ The UN 'Approach to Rule of Law Assistance', including assistance to constitutional reforms, also identifies, as part of the framework for strengthening the rule of law: "Police and other law enforcement agencies that protect individuals and communities, enforce the law without discrimination and take appropriate action against alleged violations of the law (...) "²² as well as a "military and civil defence force that has allegiance to the Constitution (...) and to the democratic government, and follows international humanitarian law."²³ The UN Code of Conduct for Law Enforcement Officials (1979), among others, links states' international obligations in the area of human rights to security services: "Law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons."²⁴

Further principles important for the conduct of armed and security forces are generally provided for such as the principle of proportionality. Article 3 of the Code of Conduct for Law Enforcement Officials states that officials "may use force only when strictly necessary and to the extent required for the performance of their duty." The obligation of armed and security forces to abide by the rule of law and human rights

20 Cf. also the Commonwealth of Independent States' Model Law on the Parliamentary Oversight of the State Military Organisation (adopted by the 18th Plenary Session of the Inter-Parliamentary Assembly of the Participant States of the CIS (Resolution no. 18-13 of 24th November 2001) 20 sets, as objectives for parliamentary oversight of armed and security forces, ensuring "political neutrality (de-politicisation) (...) and (de-ideologisation) of armed forces" and "to shape the state military organization as an integral part of a law-abiding state" (respectively art. 9 and 1). The OSCE Code of Conduct on politico-military aspects of security puts this points clearly when it states that "Each participating State, while providing for the individual service member's exercise of his or her civil rights, will ensure that its armed forces as such are politically neutral" (point 23 of the OSCE Code of Conduct). Parties to the African Charter on Democracy, Election and Governance (adopted by the 8th ordinary session of the Assembly on 30 June 2007), "reject and condemn unconstitutional change of government in any Member State as a serious threat to stability, peace, security and development" (art. 2§4 and art. 4); states that "State Parties shall take legislative and regulatory measures to ensure that those who attempt to remove an elected government through unconstitutional means are dealt with in accordance with the law" (art 14§2). Cf. Berger, Antje & Hammady, Omar O.D., "Economic Community of West African States (ECOWAS)" in. Wolfrum R., Max Planck Encyclopedia of public International Law, Oxford University Press, 2014 (<http://opil.ouplaw.com/home/EPIL>).

21 In his report of 2004 on "The Rule of Law and transitional justice in conflict and post-conflict societies", the UN General-Secretary defines rule of law as a "principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency" Report by the UN General Secretary to the Security Council, UN Doc. S/2004/616 of 23 August 2004.

22 Guidance Note of the Secretary General, The UN Approach to Rule of Law Assistance, (April 2008), p. 6. The Guidance note is available at: <http://www.unrol.org/files/RoL%20Guidance%20Note%20UN%20Approach%20FINAL.pdf>.

23 Idem.

24 UN Doc. A/31/169 of 17 December 1979, Art. 2. The text of the Resolution is available at: <http://www.un.org/documents/ga/res/34/a34res169.pdf>.

15 Democracy Reporting International, International Consensus: Essential elements of democracy, October 2011, available at: http://www.democracy-reporting.org/files/essential_elements_of_democracy_2.pdf, p. 9; for case studies on the region, Cf. Steven E. Cook, Ruling but not governing: the Military and political development in Egypt, Algeria and Turkey, Baltimore, Johns Hopkins University Press, 2007; Madjid Benchikh, Algérie: Un système politique militarise, Paris, L'Harmattan, 2003; "The Role of the Egyptian Military in Domestic Society"; Stephen H. Gotowicki, "The Role of the Egyptian Military in Domestic Society", National Defense University, 1997. Available at: <http://fmso.leavenworth.army.mil/documents/egypt/egypt.htm>.

16 UN A/RES/ 55/96 of 28 February 2001.

17 UN A/RES/ 55/96 of 28 February 2001, § 1-c (ix); UN Human Rights Commission, Resolution 2005/32, Paragraph 14 (b)(vii)

18 Article 14-1. Cf. also Article 2 of the ECOWAS Code of Conduct for Armed Forces and Security Services providing for their subordination and loyalty to the democratically elected constitutional authorities. The same idea is found in article 14-§1 of the OSCE Code on politico-military aspects of security and article 4-§2 of the American Charter of Democracy.

19 Point 25 of the OSCE's Code on politico-military aspects of Security.

goes together with securing the fundamental rights of military and security personnel. They are naturally covered by general human rights guarantees. Some international documents specifically stress this point. Article 15 of the ECOWAS Code of Conduct provides that “in the exercise of their duties, armed forces and security services personnel shall, within the limits of national law, enjoy fundamental rights and freedoms as defined in the Constitution.” Articles 9 and 16 of the same Code of Conduct empower security personnel to ignore unlawful orders by superiors, further clarifying that their loyalties lie with the national rights-based legal framework and not unlawful superiors.

Part and parcel of human rights guarantees is access to justice and effective remedies. Traditionally, the specific nature of military life was used to justify the establishment of military tribunals on the ground that civilian judges lack the expertise in military matters.²⁵ However, the independence of the judiciary function shall be preserved and safeguards must be established to prevent military courts from being fora of justice with lower standards.²⁶ The United Nations Commission on Human Rights developed a draft of principles governing the administration of justice through military tribunals.²⁷ These include: the establishment of military tribunals by constitutional provisions or by law; respect of international obligations of fair trial even during the application of martial law; no jurisdiction to try civilians nor minors; limiting the jurisdiction to offences of strictly military nature committed by military personnel; no jurisdiction on persons accused of serious human rights violations; limitation of military secrecy; guarantee of habeas corpus; right to competent, independent and impartial tribunal; public nature of hearings; and recourse procedure in the ordinary courts.

3. CONSTITUTIONAL FRAMEWORK FOR ARMED AND SECURITY FORCES

The role of armed and security forces can be a challenge in states without a long democratic tradition. Often the armed forces as one of the best-organised and strongest groups within the state have a tendency to interfere in politics. As they have no democratic legitimacy – the military commanders are appointed, not elected – and only rely on coercive power, such a role subverts the democratic order. In a state of law all state organs including the armed forces are subject to law; they may operate only within the frame which the constitution and the ordinary legislation sets up. The armed forces are not autonomous or beyond the law, but they form part of the state structure and are part of/at the disposal of the executive branch of government. This has to be guaranteed not only by provisions directed to this end but also

by procedures and structures, which may implement these material requirements.

The position of the armed forces in the legal order encompasses on the one hand their structure and on the other hand their functions. Structural elements are the definition of the armed forces – specifically the exclusiveness of armed forces under the control of the state, the position of the armed forces within the state organs, the personal interrelationship between the armed forces and the government and the legal position of the members of the armed forces. Functional aspects bear on the internal and external missions of the armed forces.

3.1 MONOPOLY OF ARMED FORCES

A defining element of modern state is the monopoly of coercive force. Parallel structures which may fulfill armed and security forces' functions are not admissible. Art. 17 of the Tunisian constitution expressly provides that only the State may establish the Armed and Internal Security Forces. In the same sense art. 199 para. 3 of the South African Constitution excludes the establishment of any security services and armed organisations other than those provided for by the constitution or the ordinary legislation. The same idea is reflected in art. 239 of the Kenyan Constitution, art. 101 of the Chilean Constitution, art. 216 of the Colombian Constitution. A different issue is the use of (arms) by individuals and certain groups of people. There should be strict legislation on arms control, meaning that a person may carry an arm only with a special permission by the state. The legislation determines the objectives for which a person may carry arms, such as hunting, sports or self-defense of persons under a specific risk. Private security companies must be under a strict control of state authorities. This extends to the registration of such companies, to the description of their work, which should not include missions of public order.

The state's security services do not form a monolithic block. The best-known separation is between the police and the military. They differ not only with regard to their composition, but specifically with regard to their functions. Whereas the police forces have to maintain the public order within the state, the military forces – broadly speaking – defend the external security of the state. Some countries provide mixed forms such as the Gendarmerie in France (similar: the Carabinieri in Italy, the Guardia civil in Spain, the Guarda Nacional Republicana in Portugal or the Garde nationale in Tunisia). These are police forces with military weapons exercising functions of armed forces within the states but to a certain degree also beyond.²⁸

States are free in organising their armed forces. However, being a matter of highest importance for the stability of the state, the basic structure of the armed forces should be

25 Vashakmadze, M., *Understanding military justice*, DCAF, Geneva 2009, p. 10
26 The United Nations Resolutions “the Basic Principles on the Independence of the Judiciary”, UN Doc. 40/32 of 29 November 1985 and 40/146 of 13 December 1985
27 Draft principles governing the administration of justice through military tribunals, Report submitted by the Special Rapporteur of the Sub-Commission on the promotion and protection of Human Rights, Emmanuel Decaux, UN E/CN.4/2006/58

28 S. Derek Lutterbeck, *The paradox of Gendarmeries: Between Expansion, Demilitarisation and Dissolution*, Geneva 2013, <http://www.dcaf.ch/Publications/The-Paradox-of-Gendarmeries-Between-Expansion-Demilitarization-and-Dissolution>

regulated in the constitution, also in order to show that the armed forces are under the rule of law.

In some MENA countries, including Libya and Tunisia, security and intelligence services attracted special attention in this regard. These countries had, historically, weak or un-institutionalised armies and authoritarian regimes upheld their rule mostly through security and intelligence services. In the post-2011 uprisings, plans for radical reform were implemented or considered as these services collapsed with the previous regime (Libya)²⁹ or were dissolved and their top command dismissed.³⁰ It is generally advisable to define the mandate, role and responsibilities of security and intelligence services in an exhaustive and clear manner.

They should operate only according to, and within the limits of, existing and publicly known laws respectful of guaranteed human rights notably in terms of detention, arrest, use of force and data collection.³¹ The intelligence services should not only be limited by the law, but the constitution should provide for the establishment of democratic oversight; typically through a parliamentary committee³² (as e.g. in Germany). Some constitutions contain detailed provisions in this regard covering the governing principles of security and intelligence services, their role, structure, conduct and oversight (e.g. South African Constitution, art. 205-208; Chile, art. 101). Others limit themselves to providing for the missions of these services, their submission to democratically elected institutions and commitment to the rule of law while referring to legislation for the purposes of structure and internal regulation (e.g. art. 19 and 65 of the Tunisian constitution).

3.2 ARMED FORCES SUBJECT TO THE LAW

The security services should not only respect the law, but, beyond, they may operate only insofar as it is authorised by the law. They must not create their own functions and powers. These must be laid down in the legislation adopted by the competent organ. The armed forces are integrated into the state through the legal regulation of their status and powers. This is expressly reflected in some modern constitutions, for example art. 198 lit. c of the South African Constitution, art. 238 para. 2 lit. b of the Kenyan Constitution.

The armed forces are not only bound by the law, but they are also subject to judicial supervision, including in criminal matters. International obligations on judicial systems in the

context of democratic governance are of special importance in this regard. Access to justice is an inalienable right according to the International Covenant on Civil and Political Rights (ICCPR), which guarantees that citizens will also be able to seek recourse for alleged violations by security personnel. The independence of the judiciary is also an essential element of democracy.³³

It is within a state's discretion to establish a particular military jurisdiction or to decide in favour of the ordinary jurisdiction as being competent for acts committed by members of the armed forces when carrying out their duties.³⁴ The main point is that no immunity is granted for specific acts of the armed forces or to specific members of the armed forces. The members of the armed forces are equal before the law.

Some states allow for the establishment of military tribunals in emergency situations or in times of war whose jurisdiction shall extend also to civilians.³⁵ The Geneva Conventions do not explicitly prohibit the extension of the jurisdiction of military tribunals to civilians. However, according to standards in recent times developed, military tribunals cannot try civilians but in very exceptional circumstances, for example when civil tribunals are not available.³⁶ The Tunisian Constitution of 2014 restricts the jurisdiction of military courts to military offences³⁷ and further stipulates that "(N)o exceptional courts or exceptional procedures that may prejudice the principles of a fair trial may be established or adopted."³⁸

3.3 THE PERSONAL RELATIONSHIP BETWEEN THE GOVERNMENT AND THE ARMED FORCES

The armed forces are under the control of the government – not the other way around. Therefore it is up to the government to appoint at least the superior officers. The armed forces can

33 Democracy Reporting International, *International Consensus: Essential elements of democracy*, October 2011, available at: http://www.democracy-reporting.org/files/essential_elements_of_democracy_2.pdf, p. 10.

34 For example, the German constitution provides for the possibility to establish military tribunals. However this provision has never been implemented. Therefore, German soldiers are tried by ordinary courts also for crimes committed while exercising their functions. There is no discussion on the introduction of a military jurisdiction. Many states provide for a military jurisdiction, sometimes limited to acts of members of the armed forces, sometimes extending to all acts deriving from an armed conflict, s. f.e. the US Patriot Act.

35 S. US Military Commissions Act of 2009.

36 UN Doc. CCPR/C/GC/32 (Aug. 23, 2007) "Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials."; Draft principles governing the administration of justice through military tribunals UN E/CN.4/2006/58; Inter-Am. C.H.R., Report on Terrorism and Human Rights, para.261, OEA/Ser.L/V/II.116.doc.5.rev.1 corr.(Oct.22,2002) "[M]ost fundamental fair trial requirements cannot justifiably be suspended under either international human rights law or international humanitarian law . . . includ[ing] the right to be tried by a competent, independent and impartial tribunal in conformity with applicable international standards. In respect of the prosecution of civilians, this requires trial by regularly constituted courts that are demonstrably independent from the other branches of government . . . and generally prohibits the use of ad hoc, special, or military tribunals or commissions to try civilians."; Annex I, Resolution on Terrorism and Human Rights (Dec. 12, 2001) (including a more categorical prohibition: "According to the doctrine of the IACHR, military courts may not try civilians, except when no civilian courts exist or where trial by such courts is materially impossible." Cf. also Draft principles governing the administration of justice through military tribunals UN E/CN.4/2006/58.

37 Article 110 §-2.

38 Article 110 §-1.

29 International Crisis Group, *Holding Libya together: Security challenges after Qadhafi*, Middle East/North Africa Report N°115 – 14 December 2011, available at:

[http://www.crisisgroup.org/~media/Files/Middle%20East%20North%20Africa/North%20Africa/115%20Holding%20Libya%20Together%20--%20Security%20Challenges%20after%20Qadhafi.pdf](http://www.crisisgroup.org/~/media/Files/Middle%20East%20North%20Africa/North%20Africa/115%20Holding%20Libya%20Together%20--%20Security%20Challenges%20after%20Qadhafi.pdf)

30 Haykel Ben Mahfoudh, "Security Sector Reform in Tunisia Three Years into the Democratic Transition", Arab Reform Initiative, July 2014, p. 3-4. Available at: <http://www.arab-reform.net/sites/default/files/Mahfoudh%20-%20Tunisia%20SSR%20-%20July%202014%20-%20ARI.pdf>.

31 Aidan Wills, *Guidebook: Understanding intelligence oversight*, DCAF, Geneva, 2011. Available at: <http://www.dcaf.ch/Publications/Guidebook-Understanding-Intelligence-Oversight>.

32 DCAF, *Compilation of good practices for intelligence agencies and their oversight*, 2011. Available at: <http://www.dcaf.ch/Publications/International-Standards-Compilation-of-Good-Practices-for-Intelligence-Agencies-and-their-Oversight>.

make proposals for the promotion of officers and the appointment of the supreme military commanders, however, it remains with the government – or the president - to decide on these. This underlines that the – democratically elected - politicians are responsible for the armed forces. Decisions on the appointment of the commander of the armed forces are a form of structural control.

As an expression of the civilian supremacy the Supreme Commander or the Commander-in-Chief must be an elected, civilian official at all times. Many constitutions include an article to this effect (Tunisia, US, France, Turkey, Indonesia, Albania, Malaysia).

A specific question concerns the Minister of Defense who has a special relation with the forces. In some countries, the minister of defense is at the same time a high-ranking officer of the armed forces. Actually, no general standard can be identified which requires that the Minister of Defense be civilian. However, in order to strengthen the separation of powers and specifically the control of the politicians over the armed forces, good practice suggests that the Minister of Defense retires from the armed forces before he takes over ministerial responsibility. It is not appropriate to give the armed forces a say in the appointment of the Minister of Defense as it reverses the idea of democratic control of the military.

It was noticeable that the Yemeni National Dialogue Conference adopted a principle to be enshrined in the constitution according to which “the position of Minister of Defence is a political one. Her/his holder is to be appointed by the President of the Republic if a presidential or semi-presidential system of government (was to be adopted), and by the Prime Minister if a parliamentary system of government (was to be adopted).”³⁹

In some states with a semi-presidential system, the president has a say in the nomination of the Minister of Defense, especially when the parliamentarian majority which elects the government is in opposition to the president.

In many countries there are National Security Councils or similar bodies, typically composed of civilian government representatives and members of the armed forces and other security forces. As far as decision-making is concerned it should always be clear that the civilian representatives ultimately make decisions. Article 118 of the Turkish Constitution makes clear that the National Security Council only plays an advisory role.

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3.4 DEFENSE BUDGET AND ECONOMIC ACTIVITIES OF THE ARMED FORCES

The defense budget should be adopted by parliament through a public and transparent procedure.⁴⁰ Budget rights provide an essential civilian control of the military. Armed forces should not have significant in-come generating activities. Such economic activities may distract the armed forces from their real functions. The task of the armed forces is the defense of the country, it is not their task to get involved in economic activities. Nevertheless, in some countries the armed forces exercise economic activities on their own. They are owners of corporations, have a vast real estate and produce goods for their own use or even for the civil market. Egypt is an example for it.

However, such an entanglement between defense and economy should be avoided for three reasons: First, such economic activities may distract the armed forces from their real functions. Second, there may be conflicts of interest if the armed forces serve the security of the country and their own well-being. Third, having the budgetary control by parliament would be undermined if armed forces have their own, independent sources of income. Therefore the armed forces shall not be allowed to exercise economic activities in their own interest. Defense budget should be adopted by parliament through a public and transparent procedure.

3.5 RESPECT OF HUMAN RIGHTS

The respect of the armed forces for human rights starts within the armed forces. It forms part of the professional ethics and obligation of a superior to treat the subordinates in a way that respects human rights standards. Persons who join the armed forces do not waive their human rights. Any form of humiliating treatment, of corporal violence or of undue restriction of the freedom of speech must not be tolerated within the armed forces. Persons who do not respect these principles must be held accountable. Soldiers who are treated with respect are less likely to violate the principles of human rights and of humanitarian law than soldiers who are kept in a lawless position. The protection of the soldiers aims at guaranteeing their dignity. Some legal orders expressly lay down the obligation of the members of the armed forces to disobey a military order, if it constitutes a crime (e.g. art. 11 of the German Law on members of the armed forces, art. 199 para. 6 of the South African Constitution).

In Germany, the armed forces were deeply reformed after the committed atrocities during the second world war. The new concept was the “citizen in uniform”, meaning that the persons serving in the armed forces maintain their status as citizens. To reinforce their rights, the constitution provides for an ombudsman elected by the parliament who shall supervise the respect for fundamental rights in the armed forces by reporting violations. Although the concept of the “soldier in

40 Democracy Reporting International, *Pluralism in Constitutions*, a Research Report, April 2013, p. 25. available at: http://www.democracy-reporting.org/files/dri_research_report_pluralism_in_constitutions.pdf.

uniform” or “citizen-soldier” was introduced especially for the protection of the conscripted soldier, it survived the transformation of the armed forces into a professional army after the abolishment of the conscription. A broader sense was attached to it than the pure protection of the persons who rendered their military service.

The concept has been taken over by many countries, especially those in transition from an authoritarian regime to democracy (e.g. Czech Republic, Hungary, Lithuania, South Africa).

In this context, the question of political engagement of members of the armed forces is relevant. Formerly – e.g. in France and in Germany – soldiers did not have a right to vote, in order to keep them off the political struggle and the electoral campaigns. These restrictions have been abolished in most states. However, in some states the legislation still upholds the obligation of abstaining from political party membership (e.g. UK, Poland, Spain) in order to guarantee the political neutrality of the armed forces.

The Tunisian Law on elections and referenda of 1 May 2014 deprives members of armed and internal security forces of the right to vote (art. 6). This seems to be based on the constitutional provision according to which they “shall remain entirely impartial (article 18).” The Libyan electoral law on the General National Congress contained a similar provision regarding members of armed forces (art. 9-4). This approach was however abandoned in subsequent electoral laws, notably those on the constitution-drafting Assembly and the House of Representatives. Limiting the right to vote of members of armed and security forces is considered to be a disproportionate restriction of the right to political participation. It may be justifiable to determine limits for political activities of armed forces members in countries that face particular risks of military interference in politics.

3.6 COMPOSITION OF ARMED FORCES

From a perspective of effective democratic control it is important also to look at the composition of security forces. In some cases security forces are manifestly not representative in their composition. A Geneva Centre for the Democratic Control of Armed Forces (DCAF) study noted in relation to the Syrian army “while Alawites make up only around 12 per cent of the Syrian Population, they account for 70 per cent of career soldiers in the Syrian Armed Forces. The imbalance is even more pronounced in the officer corps, where 80–90 per cent are estimated to be Alawites.”⁴¹ Looking at the Arab uprisings the study came to the conclusion that armed forces were most likely to be open to political reforms if they had a high level of institutionalisation in the form of a clear set of rules which enshrine meritocratic principles and established

career paths, as opposed to systems based on personal, tribal or sectarian loyalties.⁴²

Such institutionalisation of security forces should be anchored in constitutional provisions. In this sense, the German Constitution, for example, not only lays out the role of the armed forces (article 87a), it also includes principles for the organisation of the armed forces (article 87c). In Portugal the parliament has the exclusive legislative power for the “Organization of the national defence, determination of the duties to which it gives rise, as well as general foundations of the organization, functioning, and discipline of the Armed Forces (article 167d).”

3.7 INTERNAL USE OF ARMED FORCES

Whereas the foregoing sections deal with the guarantees within the structures of the armed forces, the following parts describe limitations which are established with regard to the activities of the armed forces. The most important question in this context is the use of armed forces within the state for upholding the public order. Actually, there are many fields where armed forces are used internally, e.g. in cases of natural disasters, catastrophes, protection of the infrastructure or protection during mass events such as Olympic games. In many of these cases they are helping civil organs, which cannot cope with the challenges, and are using their technical capacities and professional know-how in order to address the problems.

Beyond these cases, the armed forces quite often are also used to fight against insurrections or rebellions. These cases are much more delicate, as the military is expected to use force against citizens. Various constitutions deal with this question in different ways. Some of them do not provide for any restriction of the armed forces in such cases (specifically the Scandinavian countries but also the UK). Others give some guidelines (Spain) whereas in some countries there are very narrow limits for the internal use of the armed forces. In Germany, the armed forces may be used apart from the case of defense against an attack from abroad only insofar as it is being authorised by the constitution. The German Constitution is restrictive in the admission of the use of armed forces due to the past experiences. In the US, the Posse Comitatus Act of 1878 adopted after the American Civil War and the following occupation of the South by armed forces prohibits the use of armed forces for the enforcement of federal law.

Most constitutions provide for the use of the armed forces only in situations of emergency. This shall exclude that the military forces are used in normal situations of internal unrest. In such cases a military role would not only be sensitive for political reasons but the military is usually not trained in dealing with civilian unrest.

⁴² It is however noticeable that the outcomes of the Yemeni National Dialogue Conference provide for a principle to be enshrined in the constitution according to which command positions within armed, security and intelligence services are to be allocated on the basis of 50% for the South and 50% for the North. For the remaining positions, representation should be based on the number of population in both sides, for 50% of the positions, and on geographical criterion for the other 50%. Cf. “Outcomes of the National Dialogue Conference”, available at http://www.ndc.ye/ndc_document.pdf p. 134.

⁴¹ Page 46, Arab Uprisings and Armed Forces: Between Openness and Resistance, SSR Paper 2, DCAF. The study referred to data collected by the ICG.

To limit the use of the armed forces the constitution shall describe exclusively when the armed forces may be used. The second safeguard for the use of armed forces lies in the procedure of declaring the state of emergency. Such a decision should never be taken by the armed forces themselves. They are an instrument, not an actor. With regard to the importance of the decision and in order to prevent any abuse by the executive the declaration of a situation of emergency shall be within the exclusive powers of the parliament. The decision shall specify the extension and the duration of the use of the armed forces. The parliament will preserve the power to revoke the internal use of the armed forces any time.

3.8 USE OF ARMED FORCES ABROAD

It has been a long tradition of the distribution of powers within the state that the government may autonomously decide on the use of armed forces abroad. It was considered that the foreign politics and external security belong to the realm of the government. In this sense, e.g. in the United States, in the United Kingdom and in France it is the president or the government which decides on the use of the armed forces abroad. The parliament has no say in it. Its only competence lies with the declaration of war. As such, declarations of war came out of fashion since the Second World War and this competence has become irrelevant. In Germany, the Constitutional Court decided that in spite of the fact that the German Constitution does not contain an express provision to this end, the use of the armed forces require the prior consent of the parliament.

In the U.S. in 1973 the war power declaration was adopted by the Congress. It aimed at establishing the requirement of parliamentary consent for the use of armed forces abroad. Although some doubts were shed on the constitutionality of this act, US presidents increasingly tried to obtain parliamentary approval on the use of armed forces. In France, the power to deploy the armed forces abroad still lies exclusively in the hands of the president. However, in a constitutional amendment of 2008, a new provision (art. 35 para. 8) was inserted which requires the consent of the parliament if the engagement of the armed forces exceeds 60 days.

The UK still sticks to the traditional distribution of powers in this realm. The Queen is the Supreme Commander of the armed forces while the actual power is exercised by the prime-minister. However, when planning a military commitment in Syria in 2013 the Prime Minister tried to get the support by the parliament. When it was rejected, he abstained from using the forces. A number of states introduced provisions in the constitution according to which the use of armed forces require the prior consent of the parliament.

4. CONCLUSION AND RECOMMENDATIONS

A constitution is not an ordinary legislation. Not all the points mentioned above can be and shall be transformed into constitutional provisions. They serve above all as illustration of the most important aspects, which have to be taken into consideration in the drafting process of the constitution.

The most important principles that should be included in a constitution are:

1. The exclusive power of the state to regulate all types of security services;
2. Control and oversight by democratic, civilian authorities with a primary role for parliament;
3. The general character of the armed forces being bound by the rule of law, including human rights protections;
4. Clear provisions on the use of armed forces internally and externally.

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This briefing paper was written by Omar Hammady, DRI country director in Libya, Matthias Hartwig, senior research fellow at the Max Planck Institute for comparative public law and international law in Heidelberg and, Duncan Pickard, non-resident fellow at the Rafik Hariri Centre.

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