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**REPORT
ON THE DEMOCRATIC CONTROL OF THE ARMED FORCES**

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on the basis of comments by

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	5
REPORT	10
I. <i>Introduction</i>	10
II. The Scope of the study	10
III. The necessity for the democratic control of armed forces	13
A. The domestic dimension	16
B. The international dimension	18
IV. The role of armed forces in Council of Europe Member States	22
A. External role of armed forces	24
1. Defence against external threats	24
2. Collective Defence	25
3. Peacekeeping, crisis management and peace-building operations	25
B. Internal roles of armed forces	26
1. Military assistance in maintaining public order	27
a. Counter-terrorism operations	27
b. Protection of public buildings and installations	28
c. Protection of borders, coastal waters and airspace	28
2. Military assistance in case of disasters	29
3. Other activities of the armed forces	30
V. Actors, acts, moments and procedures of control	30
A. General Overview	30
B. Domestic Level	33
1. Preliminary Issues	33
a. Historical context of national democracies	33
b. Forms of government	34
c. Constitutional rules	34
d. The control organ	35
2. The role of Parliaments	35
a. Organs involved	36
i) Parliamentary Committees for oversight and control of armed forces	36
ii) Constitutional status of defence committees	38
iii) Other peculiarities of defence committees	39
b. Acts and issues under control	41
i) Approval and control of the military budget	41
ii) Sending troops abroad	44
c. Mechanisms of control	48
i) Legislation	48
ii) Decisions taken by the Parliament in the military field	49
iii) Direct control	50
1) Co-participation in the decision	50
2) Control <i>a posteriori</i> of military decisions with the possibility to revoke or substitute them	50
iv) Indirect control	51
1) Appointment and dismissal of top commanders	51
2) Participation of the Parliament in general defence policy	51
3. The role of the Executive	53

a. Organs involved	53
i) Position of the Head of the State.....	53
1) Monarchies.....	53
2) Parliamentary Republics	55
3) Presidential Republics.....	55
ii) National Defence Council	55
iii) The Minister of Defence.....	56
b. Acts and issues under control, and mechanisms of control	57
i) Requesting and controlling the use of armed forces in states of emergency	57
ii) Appointment of top commanders	59
4. The role of the Judiciary	60
a. The role of the Constitutional Courts.....	60
b. Constitutional provisions referring to military jurisdiction.....	61
i) Constitutional regulation of military courts	61
ii) Constitutional remission to law for the creation of military courts.....	62
iii) Constitutional prohibition of military courts.....	62
iv) Constitutions with no specific provisions on military courts	63
5. Other oversight entities	63
a. The Ombudsmen	63
i) Non specialist Ombudsmen without specific competences	64
ii) Non specialised Ombudsmen with specific competences	64
iii) Specialised (military) Ombudsmen.....	65
b. Audit Offices and Courts of Auditors	66
6. Internal control mechanisms on armed forces	67
a. Codes of conduct or professional ethics	68
b. Command responsibility	68
C. International Dimension of the control	68
1. Preliminary issues	70
a. Legal and illegal foreign military presence	70
b. International organisations	76
c. Legitimate character of the use of force and the international body authorising it	77
2. Organs involved	77
a. Intergovernmental Institutions	77
i) United Nations-Security Council.....	78
ii) North Atlantic Treaty Organisation	78
iii) Organisation for Security and Co-operation in Europe	79
iv) European Union	80
b. Inter-parliamentary dimension of the control	81
i) United Nations General Assembly	81
ii) Parliamentary Assembly of the Council of Europe	82
iii) North Atlantic Treaty Organisation Parliamentary Assembly	82
iv) European Parliament.....	83
v) Western European Union Assembly	83
vi) Organisation for Security and Co-operation in Europe Parliamentary Assembly..	84
vii) Inter-Parliamentary Union.....	85
c. International courts	85
i) The European Court of Human Rights	85
ii) United Nations International Court of Justice.....	86
iii) The International Criminal Court.....	86
3. International Standards	87
a. International Treaties	88
i) Treaties on human rights and humanitarian law.....	88
ii) Treaties on armament control.....	88
b. Codes of Conduct	89
c. The CIS Model Law: a comparative perspective	90

VI. Conclusions	90
Annex A: Overview of national legislation on the authority to decide participation in missions abroad	95
Annex B: Overview of the constitutional rules of appointment of top commanders in selected Council of Europe member States	99
Annex C: Overview of civil and political rights for armed forces personnel: selected examples	104

EXECUTIVE SUMMARY

1. All societies have to reconcile the need for security provided for by the armed forces, on the one hand, and the requirement to respect democratic values, human rights and freedoms on the other hand.
2. The lessons learned from history - even recent - of European States, but not only, have shown that the military might affect democracy and its values. The interests of the military must therefore be subordinate to the interest of a democratic society.
3. The control of the military is an indispensable element of a democratic government. The degree and type of such control will vary considerably according to the system of government, historical traditions and also cultural values.
4. The democratic control over the armed forces has two dimensions, which both enhance and promote confidence-building and peace. The *domestic* dimension implies the primacy of the civilian general interest and of the principles of a democracy over the military. The *international* dimension prohibits in general the threat or use of force against a State.
5. The democratic control of the armed forces is a complex matter. The study has focused on particular aspects related to armed forces: "traditional" issues such as military expenditure or military budget and appointment of top commanders and issues which correspond to the change in the role of the armed forces, both at national and international level.
6. Indeed, since the end of the cold war, armed forces have undeniably undergone a profound shift in both the range and focus of their role. This refocusing of defence and security policy in many Council of Europe member States has led to more and more national participation in international peace missions.
7. Likewise, the changing nature of the threats posed to national security and in particular the rise of international terrorism has resulted in the re-emergence of an internal role of the army in many European states, which requires a specific control of the conditions by which a State uses the army in domestic issues.
8. When considering the control of armed forces at the domestic level, the constitutional framework is of particular importance, since it will fix the organs involved in military issues as well as the control process over the armed forces.
9. The implication and identification of the organs of control will additionally depend on the moment at which the control is exercised: ex ante, ex post or both.
10. When considering the executive level, the impact of the constitutional framework is particularly salient. In parliamentary republics and monarchies, the monarchs or the president will have symbolic or formal control over the military.
11. On the other hand, the presidents of presidential regimes will have substantial powers such as the role of commander in chief, presiding over higher national council and committees as well as appointing military posts.
12. Some constitutions will also provide for a collegial body at the executive level: a specific Council for National Defence of which the main task will be to coordinate and consider the main issues related to defence and also in some countries report to the Parliament. However, the role of the Head of State being generally preponderant in such a Council, the controlling effects are not as strong as they may seem.

13. Ministers of Defence are not usually commander-in-chief; they will however be the first respondent to Parliamentary enquiries and debates.

14. Democratic control over armed forces refers mainly to the existence of a democratically elected organ that reviews and supervises the decisions adopted by the organs or authorities with military competences. The role of the Parliament as an elected body is therefore of paramount importance in the concept of democratic control of armed forces.

15. When considering the parliamentary level of control, the functions and power of a certain Parliament will certainly depend on national rules, on checks and balances that operate within a State.

16. Parliamentary powers over the military sector can comprise powers to legislate, to approve the budget, to advise, to penalise and to approve certain issues or actions. The level of this power, however, will vary from State to State.

17. At the legislative level, the approval and control of the budget always fall within parliament's remit and constitute a significant mechanism of control by the Parliament, in the military field also.

18. In this regard, three types of Parliament have been identified: the budget-making parliament which has the capacity to amend or reject budget proposals and the capacity to formulate alternative budget proposals. The second and largest type in Europe are budget-influencing parliaments which can amend or reject the budget without putting forward their own proposals. The last category will comprises Parliaments with little effect on budget formulation. These will traditionally give their consent to the defence budget as a global figure as presented by the government.

19. Direct control is even more salient when the parliament takes or participates in the military decision making. In this regard, the study shows a variety of manners of parliamentary involvement.

20. Some legal orders make explicit reference to parliamentary authorisation regarding for instance the decision to declare a state of emergency, the power to ratify treaties on military issues and the to send troops abroad.

21. Some other countries have developed tighter legislation on the development of troops abroad for instance. Lastly, a low level of parliament involvement is to be seen when, for instance, prior parliamentary approval is not necessary for national participation in any missions abroad or declaration of state of emergency.

22. Only a few Parliaments possess the power of prior approval in all situations, regardless of the nature of international operations.

23. The better-informed Parliaments appear certainly to be those with the power of prior approval.

24. Direct control of the Parliament will also occur ex post facto this type of control is used to monitor the transparency and the legality of the procedure. Even though in many Parliaments there is a lack of budgetary information regarding specific military missions- notably regarding international missions - the control of the budget and of expenditure which is common to all Parliaments is not to be neglected. In many countries, however defence procurement represents one of the main topics of Defence Committee hearings and inquiries.

25. Indirect control mechanisms of the Parliament will consist of some degree of interference in military decisions or adding conditions to military decisions. This can be the case regarding control over equipment decisions, inspections and visiting troops abroad and the control of arguments which is a more diffuse kind of control. Additionally, when performing its institutional role of proposals and reflection, the participation of the Parliament in the general defence policy must also be interpreted as a mechanism of control.

26. Undeniably, parliamentary specialised defence committees, through their specialisation in military and defence matters, constitute an efficient, and hence extremely significant body to perform the functions empowered to a Parliament.

27. Finally, any Parliament of Council of Europe member States will not only exercise but share its ex post control with other institutions like the judiciary, the ombudsman and audit offices.

28. The role of the judiciary in the control over armed forces is two-fold.

29. Firstly, Constitutional courts as guardians of the rule of law, of democratic procedures and the protection of human rights can check the constitutionality of military affairs when some acts or decisions may have undermined these principles.

30. Secondly, military courts will be competent to judge criminal and disciplinary actions. At constitutional level, the situation of military courts within the member States of the Council of Europe ranges from constitutional regulation of military courts, constitutional remission to law for the creation of military courts, constitutional prohibition of military courts or constitutions with no specific provisions on military courts. Whether ad hoc or standing courts are concerned, the conditions of independence and impartiality set out by Article 6.1 of the European Convention of Human Rights (ECHR) must be respected.

31. At the national level, two complementary oversight entities whose functions and power vary greatly among the Council of Europe member States have been identified in the control over armed forces: The Ombudsmen and the Court of Audits.

32. Even though the degree of control of the Ombudsman differs considerably among States, the role of this institution should not be overlooked. Some States confer few competencies to parliamentary ombudsmen regarding complaints related to armed forces. At the other end of the spectrum, some countries have instituted a specialised (military) Ombudsman whose tasks will generally be to deal with applications from individuals, both soldiers or citizens, who could be affected by military decisions or actions and to ensure the compliance of the armed forces with constitutional principles but also to assist parliamentary oversight and act as an advisory organ for the chief military and/or the Minister.

33. Additionally, the role played by Audit Offices and Courts of Auditors who control the legality and appropriateness of public spending is an important element and constitutes an adequate response to the growing concern of citizens in the accountability of democracies. The military is generally answerable to a national accounting body, except in some countries.

34. Finally, internal control mechanisms on armed forces should not be neglected since they are a crucial component of democratic oversight of armed forces. The army must be committed to democracy, the rule of law and human rights. In this regard specific codes of conduct or professional ethics have been drafted but foremost the duty of superiors to promote and maintain professional standards throughout the military chain of command must be underlined.

35. At the international level, the control of armed forces can be performed by different organs, i.e. international organisations of which member States of the Council of Europe are part and/or international courts.

36. First and foremost, international use of force must be legitimate. States can carry out individual or collective self defence, but in order for their actions to be legitimate they must comply with strict conditions which have been laid down by international law.

37. Whether the military presence can be considered as legal or illegal under international law will prefigure the competence of the control organ involved at the international level.

38. Illegal interventions, for instance, refer mainly to the occupation by armed forces of a foreign territory and illegal acts committed by armed forces in a foreign territory. They will in principle be scrutinised by international courts, whether the European Court of Human Rights (ECtHR), the International Court of Justice (ICJ), or for those Council of Europe countries who have ratified its status, the International Criminal Court (ICC).

39. Legal interventions, like those which refer to foreign military bases or joint military exercises, armed forces placed under disposal of a State by another State and peace keeping or multinational forces have a specific feature since they have been decided or authorised by an international organisation, by an international treaty, special agreements or instruments which will fix the responsibilities and conditions of the military intervention. The organ who has authorised or decided those interventions will first and foremost be the organ of control although international courts might also have a say.

40. There are different types of international organisations whose mission is to safeguard and contribute to international collective defence, security and peace.

41. Their common feature is that the existence of their parliamentary body paved the way for a control of the decisions taken at the executive level of the organisation.

42. The United Nations (UN), for instance, has a worldwide character and a broad mandate from its member States to authorise the adoption of collective measures for the prevention and removal of threats to international peace. The Security Council of the UN may decide or authorize a military intervention; it is the principal provider of legitimacy of the use of force. The UN General Assembly, which is intergovernmental in nature, would be considered as the control body, although it can only make recommendations on these issues and approve the budget of the UN under which the international missions and operations are financed. Even though this control might seem marginal, it is worth mentioning that the UN General Assembly strengthened the conditions of authorising or endorsing the use of force by identifying five further criteria of legitimacy (seriousness of the threat, proper purpose, last resort, proportional means and balance of consequences).

43. At the regional level, inter-parliamentary institutions within - or related to - international organisations in charge of international security and defence issues, enjoy a limited power of control. Indeed, the Parliamentary Assembly of the North Atlantic Treaty Organisation, stands more as a link between Parliaments and the Alliance than as a control organ of the decisions taken by the decision-making body within NATO.

44. The Western European Union Assembly, which is the very first European inter-parliamentary assembly for security and defence matters, has seen its operational activities transferred to the European Union and is mainly a think-tank body with a co-operational role with national parliaments on defence issues. However, more scrutiny on the European Security and Defence Policy (ESDP) of the European Union might be possible in the light of the new European Union Treaty.

45. With regard to the European Union, the second pillar refers to the Common Foreign and Security Policy (CFSP) which might lead to a common defence with the entry into force of the new Treaty. Decision making about the CFSP and the European Security and Defence Policy (ESDP) lies within the Council. The European Parliament which would have a truly democratic legitimacy, since it is the sole international body directly elected has also marginal control competences restricted to being informed by the Presidency and the Commission, asking questions to the Council, making recommendations and holding an annual debate on the policy.

46. Other regional international organisations, like the OSCE, the Inter-Parliamentary Union or the Council of Europe are not specifically in charge of international security and defence issues. However, they might deal with politico-military aspects of security. In this way the Forum for Security Co-operation of the OSCE seeks to assist States in reforming their legislation in the military field or armed control field for instance.

47. These international organisations have fixed and developed through their activities important international standards concerning the democratic oversight of the military. Treaties on human rights and humanitarian law, treaties on armament control which are binding instruments; codes of conduct, model laws, recommendations, resolutions and guidelines which frame the activities of armed forces have resulted from their activities.

48. Lastly, at the international level, International courts play an important role in the oversight of democratic forces. The European Court of Human Rights (ECtHR), the International Criminal Court (ICC) and the United Nations International Court of Justice (ICJ) have contributed a lot to developing and implementing international standards, like the protection of the individual rights of military personnel, the legality of the use of force as well as the definition of international crimes. However, the Common Foreign and Security Policy (CFSP) and European Security and Defence Policy (ESDP), as such, are excluded from the jurisdiction of the European Court of Justice.

REPORT

I. Introduction

49. *In its Recommendation 1713(2005) on “Democratic oversight of the security sector in member states” the Parliamentary Assembly of the Council of Europe (PACE), concerned about the democratic control of the security sector in general, recommended that the Committee of Ministers should prepare some guidelines about political rules, standards and practical approaches to this issue.*¹

50. *On 7 July 2006, the Committee of Ministers of the Council of Europe, in turn, requested the Venice Commission to carry out a study on the democratic issues involved in the supervision of armed forces, as institutions whose mission is to ensure national security, in the Council of Europe member States.*²

51. *A working Group was subsequently set up within the Venice Commission, composed of Messrs. Aureescu, Closa Montero, Haenel, Helgesen and Özbudun. The expertise of Mr Born from the Geneva Centre for the Democratic Control of Armed Forces (DCAF) and that of Mrs Carbonell from the Centre for Political and Constitutional Studies (CEPC) in Madrid, were provided for.*

52. *The present report, which was prepared on the basis of contributions from members of the working group, was discussed within the Sub-Commission on Democratic Institutions on 18 October 2007. It was adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008) on the basis of comments by Messrs. Aureescu, Closa Montero, Haenel, Helgesen, Özbudun, and Born and Mrs Carbonell.*

II. The Scope of the study

53. After thorough discussions, the working group considered that the present title of the report – a study on the ‘democratic control of the armed forces’ – is a more accurate description of its content, since it focuses not only on the subordination of armed forces to democratically-elected political authorities, but also to the legal standards and to the principles of democracy set out by them, which are to be enforced by the competent organ or authority. ‘Democratic control of armed forces’ appears, in this way, more relevant – for the purposes of this study – than the initial title envisaged (‘Civilian command authority over armed forces’) since it comprises the control exercised by civil society, mass media and public opinion, issues that will not be tackled here. For the sake of expediency, this report equates democratic control with civil control in democratic States,³ but it is not limited to its domestic dimension.

¹ Parliamentary Assembly Recommendation 1713 (2005), Democratic oversight of the security sector in member States, adopted by the Assembly on 23 June 2005 (23rd Sitting).

² Reply adopted by the Committee of Ministers on 21 June 2006 at the 969th meeting of the Ministers’ Deputies, to the Parliamentary Assembly Recommendation 1713 (2005) (CM/AS(2006)Rec1713 final 23 June 2006).

³ Some authors propose the contrary idea that “Democratic control implies that the military is controlled by democratically elected civilian leadership”, meaning more than civilian or political control only. BORN H., HALTINER K., and MALEŠIĆ M. (2004), “Chapter 1 - Democratic Control of Armed Forces: Renaissance of an Old Issue”, Renaissance of Democratic Control of Armed Forces in Contemporary Societies, Baden - Baden, Nomos, p. 6.

54. This study analyses the national and international issues involved in the need to ensure democratic control over the armed forces in their national and international operations. For this purpose, the first task was to identify the necessity and grounds for a democratic oversight of armed forces. The response to the question as to why democratic oversight is needed, then, constitutes the starting point for recognising the actors involved, the acts or issues that are under this control, the mechanisms available for it, and the various times at which control is to be exercised.

55. The main dimensions involved are *who* controls, *what* acts or issues are under control, and *how* the control is exercised. The purpose is to reconstruct the panorama of the different solutions adopted by the member states, as to which organs or institutions carry out the control and supervisory functions over the armed forces, to identify the acts and issues of the military that are under control, and to demonstrate the different mechanisms for controlling the decisions by which this national body develops its national security task.

56. The need to respect democratic principles and fundamental rights permeates all State institutions, including those related to the security sector. In general, clear, transparent and effective mechanisms of control over the armed forces (and the security sector in general) exist due to the involvement of democratic institutions. Among these, Parliament must have an essential role in monitoring, scrutinising and control. Given the specific characteristic of this sector (in which the use of legitimate violence is involved), the underlying question is how to balance, or better, how to optimise, on the one hand, the public good, value or end involved in the decisions or acts of the military, with, on the other hand, principles, standards and values of democracy.

57. The idea of democratic control is closely linked with the notion of accountability. On the one hand, horizontal accountability is at stake in the control of armed forces, since Parliament, for example, can control the acts of the Executive related with the military.⁴ On the other hand, the concept of democratic accountability appears as a corollary of the later, as parliaments are accountable to their electorates for policies, decisions, and control concerning the military within their sphere of competences. In this sense, "democratic accountability means that those who have the authority to decide and act are accountable to the elected representatives (representative democracy) or to the people directly (direct democracy). Parliamentary accountability refers to the former".⁵ The study will therefore identify and link horizontal accountability among state powers, and parliamentary accountability facing public opinion, media and society in general.

58. The study examines the different national organs involved and it stresses the importance of the role of Parliaments in the oversight functions over the defence sector, showing the differences existing between national constitutional provisions of the Council of Europe member States. Nowadays, one of the most relevant national decisions about the use of force is involvement in international peacekeeping, peace-building or peace-enforcement operations. Accordingly, the second important focus is placed on the international organisations in which the member States take part, the international standards involved in the regulation of the use of force, and the problems of control and accountability that these international missions generate for parliamentary and/or government institutions, as well as for the relevant international bodies.

⁴ Conceptualised by O'Donnell, "horizontal accountability depends on the existence of state agencies that are legally empowered – and factually willing and able – to take actions ranging from routine oversight to criminal sanctions or impeachment in relation to possible unlawful actions or omissions by other agents or agencies of the state". O'DONNELL G. (1998), "Horizontal Accountability in New Democracies", *Journal of Democracy*, vol. 9, no. 3, p. 117.

⁵ HÄNGGI H. (2004), "The Use of Force Under International Auspices: Parliamentary Accountability and 'Democratic Deficits'", BORN H., HÄNGGI H., *The "Double Democratic Deficit": Parliamentary Accountability and the Use of Force Under International Auspices*, Aldershot, Ashgate, p. 4, no. 2.

59. The study also analyses the way in which the competent organs carry out the democratic control of armed forces. To do this, it is necessary to specify the type of decisions in the sphere of the military sector that are subject to control or oversight. Parliament regulates decisions about the composition, competences, activities and accountability of military personnel when it exercises its natural legislative functions. The legal framework, including its international dimension, of the defence sector will provide limits, more or less restrictive, to the use of force. Other types of decision are taken at internal level according to the hierarchic military structure. Either the superior in the chain of command oversees them, or the ordinary or military courts do so, depending on the issue under review. In other cases, Parliament itself takes decisions concerning the military. Thus, the democratically elected representatives may control, directly or indirectly, decisions taken by the government or by the commanders of armed forces. In using its powers, Parliament, as the locus of democracy, substitutes, changes, affects or influences decisions from the defence and security sphere. Examples range from the appointment of high commanders to the decision to send troops overseas, and the definitions of the contents and extent of the missions. In the latter case, international protagonists become involved, as they have control and oversight competences over troops deployed for an international mission.

60. As regards the acts or issues under control, the Sub-Commission on Democratic Institutions decided to pay particular attention to certain issues. These were control over sending troops abroad, especially in order to participate in international peace missions; conditions and methods for requisitioning the army for domestic issues in times of emergency; military budget and military expenditure, and the appointment of top commanders. Conditions and modalities of requiring the army in domestic issues, arm control issues are also extremely important and should be subject as of another specific study.

61. As to the issue of political neutrality of the armed forces, at domestic or international level, some scholars concur in considering it to be a relevant aspect of democratic control. However, the Working Group decided to view it as part of the statute of armed forces personnel, rather than a control mechanism.⁶

62. This report will not deal exhaustively with all the control systems over the armed forces of the member States of the Council of Europe, but only some representative cases. It aims essentially at identifying the means provided for in Council of Europe member States to ensure democratic accountability of the armed forces. Document CDL-DEM(2006)0002 gives a brief overview of the constitutional rules on democratic control of armed forces in Council of Europe member States.

63. The study will focus exclusively on the democratic control of armed forces,⁷ not on the other forces that comprise the security sector. In fact, the Venice Commission made a report on the democratic oversight of the security services, in a study adopted by the Venice Commission on 1-2 June 2007.⁸ For the purposes of this study, “armed forces” will be taken to mean “regular armed forces” per se, or “regular army” i.e. established by a State under its appropriate laws. Regular forces will have professed allegiance to a government or a State authority.

⁶ CDL-DEM(2007)010, Internal Control Mechanisms in Armed Forces in Council of Europe Member States, by Hans BORN (Expert, Netherlands) and Aidan WILLS (Expert, Switzerland).

⁷ The security sector comprises armed forces, police, intelligence services, and border management.

⁸ See CDL-AD(2007)016.

64. In some countries, national police forces may have military status and military structural functioning: examples are gendarmerie, civil guard, and border police. Gendarmerie,⁹ for instance, are in general a national police force with military status, responsible for law enforcement in rural areas and military installations. These units are usually under the supervision of the Ministry of Defence, rather than that of the Ministry of Interior. These para-military forces train and operate like the military with the purpose of protecting domestic security.¹⁰

65. Gendarmerie, any organised armed forces, groups or units, and volunteer corps which do not form part of the regular army are excluded from the scope of this study. Also excluded are police forces or “para-military” and “armed law enforcement agencies” which may be incorporated into the regular army in many states during time of war, depending on internal organisation.

66. The democratic control of armed forces is a complex subject involving several protagonists, dimensions, issues, and regulations, making it difficult to provide an exhaustive overview. Nevertheless, the structure of the report will attempt to classify some of the competences at stake, and it will take into account the distinction between the domestic and international dimension, even when, as it will become apparent, the classifications or divisions are not always exact. The next section will refer to the necessity for democratic control of armed forces (III). An overview will follow of the role of armed forces in the Council of Europe member States (IV). The central issues will be discussed in detail in section (V). This discussion will be divided into a general overview, the domestic level and the international level. The last two sections will identify the organs involved in the control (executive or inter-governmental, parliamentary or inter-parliamentary, and judiciary or international courts), the acts and issues under control and the mechanisms involved. The legal standards applicable, both national and international, will also be mentioned and examined. The final section will present conclusions as to the suitability and efficacy of the mechanisms.

III. The necessity for the democratic control of armed forces

67. All societies have to deal simultaneously with the need for security (usually met by the armed forces), and the requirement to respect fundamental rights and freedoms. At least in part, the democratic control and oversight of armed forces is a mechanism for meeting the different requirements raised by these needs.

68. As many democratic theorists have pointed out, control of the military by democratically elected civilian authorities is an indispensable element of a democratic government. Thus, according to Robert Dahl, a leading democratic theorist, one of the requirements for a democracy is represented by “institutions for making government policies [which] depend on votes and other expressions of preference”.¹¹ More specifically, Larry Diamond describes one of the basic components of democracy as follows: “Control of the State and its key decisions and allocations lies, in fact as well as in constitutional theory, with elected officials (and not democratically unaccountable actors or foreign powers); in particular, the military is subordinated to the authority of elected civilian officials”.¹²

⁹ For example Italy, France, Romania, Spain and Turkey.

¹⁰ Pnt. 100 of ‘Democratic oversight of the security sector in member States’, Doc. No. 10567, Parliamentary Assembly of the Council of Europe, Strasbourg, 2 June 2005.

¹¹ Robert A. DAHL, *Polyarchy: Participation and Opposition* (New Haven and London: Yale University Press, 1971), p. 3.

¹² Larry DIAMOND, *Developing Democracy Toward Consolidation* (Baltimore and London: The John Hopkins University Press, 1999), p. 11.

69. It goes without saying that, in terms of democratic theory, the military must be subject to control by the elected representatives of those who hold supreme authority. Nonetheless, in some countries the military retains certain *de iure* or *de facto* privileges, autonomies, reserved domains, and tutelary powers. This is quite common in countries which have made a transition from a military-dominated authoritarian regime to a democratic government. To put it differently, such “exit guarantees” are the price paid by civilian political elites to the military for securing a peaceful transition to a democratic regime. While such guarantees can be conceived as facilitating transition to a democratic regime, they can impede the transition to a consolidated democracy. “Building a consolidated democracy”, Valenzuela argues, “very often requires abandoning or altering arrangements, agreements, and institutions that may have facilitated the first transition (by providing guarantees to authoritarian rulers and the forces backing them) but that are inimical to the second”.¹³ Felipe Agüero concurs that “this expansive entrenchment of the military... may become a lasting legacy of the previous authoritarian period, and one that could certainly hinder the consolidation of democracy, eventually threatening its very survival”.¹⁴ The ensuing regimes, therefore, cannot be considered fully consolidated democracies, but perhaps only “electoral democracies”, or “delegative democracies” in the sense used by O’Donnell.¹⁵ In Valenzuela’s words, “in some instances it is possible that democratically elected governments may succeed one another for a considerable time without reversals simply as a result of the caution of [their] leadership in not challenging actors whose power escapes democratic accountability. In this case the resulting stability cannot be equated with progress towards creating a fully democratic regime”.¹⁶

70. While civilian control of the military is a *sine qua non* condition for democracy, the degree and type of such control will vary according to the system of government, historical traditions and cultural values, and different perceptions of threat. Thus, in an American-style presidential system the President, in his capacity as commander-in-chief, is the primary agent of civilian control, whereas in a parliamentary system this task falls to the cabinet. Both systems are compatible with full civilian control, and in either case the legislature is, and should be, another agent enhancing civilian control for a number of reasons, not the least important among which is the fact that in all democracies, regardless of the type of government, the legislature holds the purse strings (see below point V.B.1).¹⁷ On the other hand, the increasing complexity and the technical nature of security issues, the lack of expertise of most parliamentarians, time pressures on Parliaments, and secrecy laws which often come into play in security issues may limit or hinder parliamentary oversight.¹⁸ Furthermore, in countries where democracy has not yet been fully consolidated and the elected authorities still have to contend with the difficult legacies of the previous military regime, the first priority is to establish civilian control itself; whether it is exercised chiefly by the executive or the legislature is a matter of relatively secondary importance.

¹³ J. Samuel VALENZUELA, “Democratic Consolidation in Post Transitional Settings: Notion, Process, and Facilitating Conditions”, in Scott Mainwaring, Guillermo O’Donnell, and J. Samuel Valenzuela, eds., *Issues in Democratic Consolidation: The New South American Democracies in Comparative Perspective* (Notre Dame: University of Notre Dame Press, (1992), p. 58.

¹⁴ Felipe AGÜERO, “The Military and the Limits to Democratisation in South America”, in Mainwaring, O’Donnell, and Valenzuela, eds., *Issues in Democratic Consolidation*, p. 155.

¹⁵ Guillermo O’DONNELL, “Delegative Democracy”, *Journal of Democracy*, 5 (January 1994): pp. 55-69.

¹⁶ J. Samuel VALENZUELA, “Democratic Consolidation in Post-Transitional Settings”, p. 59.

¹⁷ On Parliaments’ role in the civilian oversight of the military, see *Parliamentary Oversight of the Security Sector: Principles, Mechanisms and Practices* (Geneva: Geneva Center for the Democratic Control of Armed Forces-Inter-Parliamentary Union, 2003).

¹⁸ *Ibid.*, p. 19.

71. Relations between civilian and military authorities have occupied the minds of many scholars, Western and non-Western alike. The whole question can be summed up in a simple paradox: "Because we fear others we create an institution of violence to protect us, but then we fear the very institution we created for protection". To put it differently, "how do you ensure that your agent is doing your will, especially when your agent has guns and so may enjoy more coercive power than you do?"¹⁹ One of the most influential theories in this regard was proposed by Samuel Huntington in the late 1950s. In Huntington's view, what he terms "objective civilian control" maximises military security better than liberal anti-military, conservative pro-military, fascist pro-military, and Marxist anti-military ideologies. Objective civilian control, in turn, can be achieved, in his view, by maximising military professionalism. "Objective civilian control is thus directly opposed to subjective civilian control. Subjective civilian control achieves its end by civilising the military, making them the mirror of the State. Objective civilian control achieves its end by militarising the military, making them the tool of the state... The essence of objective civilian control is the recognition of autonomous military professionalism; the essence of subjective civilian control is the denial of an independent military sphere... The one prime essential for any system of civilian control is the minimising of military power. Objective civilian control achieves this reduction by professionalising the military, by rendering them politically sterile and neutral... A highly professional officer corps stands ready to carry out the wishes of any civilian group which secures legitimate authority within the state".²⁰ As Feaver aptly summarises, Huntington's causal chain is as follows: "autonomy leads to professionalisation, which leads to political neutrality and voluntary subordination, which lead to secure civilian control".²¹

72. Huntington's logic may appear to be compelling, but it leaves a number of points open to question. Most importantly, there seems to be a tautological character to the entire argument. Thus, maximising military professionalism is seen as the means to secure objective civilian control, and military professionalism is defined as voluntary subordination to civilian authorities. Perhaps to save the argument from total tautology, it may be said that here Huntington sees a trade-off between military autonomy and the military's voluntary subordination to civilian authorities. In return for the recognition of an autonomous sphere of action for the military, the military adopts a politically neutral standing and voluntarily executes the commands of legitimate civilian authorities. Nonetheless, such an explanation leaves many questions unanswered. First of all, what are the limits of the military's autonomy? Does it include, for example, exclusive decision-making power regarding its education and socialisation patterns, personnel appointments, production and procurement of arms, budget priorities etc.? Secondly, what happens if the civil authority's will conflicts with the professional opinion of the military? Can we say that civilians always have a right to be wrong?²² Thirdly, can the concept of military professionalism be reduced only to obedience to civilian authorities? Are there not other elements of professionalism such as expertise, an esprit de corps, "a sense of self-esteem and moral worth"? Is it not possible for a military to be highly professional in terms of most of these criteria, and yet to develop distinct political attitudes and even to meddle in political affairs? Comparative research shows that armies "that look professional by most measures have still

¹⁹ Peter D. FEAVER, "The Civil-Military Problematique: Huntington, Janowitz, and the Question of Civilian Control", *Armed Forces and Society*, Vol. 23, No. 2 (Winter 1996), pp. 149-50.

²⁰ Samuel P. HUNTINGTON, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (New York: Vintage Books, 1964), pp. 83-84.

²¹ Peter D. FEAVER, "The Civil-Military Problematique", p. 160.

²² *Ibid.*, p. 154.

conducted coups or otherwise subverted civilian authorities”.²³ Turkey provides a good testing-ground for many of the above theoretical considerations.²⁴

73. Moreover, the “raison d’être” of the armed forces in contemporary democratic European States is paramount. This “raison d’être” is justified – and always has been – by the need to protect and to ensure the security of the societies of the respective States from external threats, and – nowadays more than ever – to safeguard democratic values, the rule of law and the human rights and fundamental freedoms of all persons subject to that national jurisdiction.

74. At the same time, in identifying the reasons for motivating the necessity to control the armed forces one cannot ignore the international dimension of the analysis, as – according to contemporary public international law – the maintenance of international peace and security is the most important objective of mankind, and the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State is a fundamental principle of international law,²⁵ an imperative rule (*ius cogens*). In other words, the contemporary use of the armed forces of a State against another State (or, in more general terms, outside the national territory) is an exception subject to important restrictions and limitations, the breach of which engages the international responsibility of the State concerned. The use of (armed) force is *only* allowed (in other words is *legitimate*) so that international peace and security can be re-established and the international legality (or International Rule of Law) can be restored.

75. This analysis will try to identify the reasons justifying the democratic control of the armed forces in the context of these two dimensions – one domestic, and the other one international, both being inter-related.

A. The domestic dimension

76. Democracy always implies civilian primacy over the military²⁶ and control of the command of the armed forces. The Venice Commission has emphasised several times the close relationship between democracy and human rights.²⁷ The rationale behind this principle is explained by the lessons learned from the history (including the recent history) of European States (and not just them). On occasions, taking advantage of the benefits stemming from its inherent discipline, its organised structures, management and components (i.e. number of soldiers and weapons), the military has seized political power in a military coup or threatened the civilian leaders with such conduct or has decided to impose its will by means of supporting a certain government, and this has affected democracy and its values. It is thus clear that democratic control over the armed forces is necessary in order to align the interests of the

²³ Peter D. FEAVER, “The Civil-Military Problematique”, p. 164. See also the critiques pointed out to this possibility in the Turkish case in: Ergun Özbudun, *The Role of the Military in Recent Turkish Politics* (Cambridge, Mass.: Harvard University Center for International Affairs, Occasional Papers in International Affairs, November 1966), p. 8.

²⁴ For a further description of the Turkish case, see doc. CDL-DEM(2007)005.

²⁵ General Assembly Resolution 2625 (XXV) of 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

²⁶ See Venice Commission document CDL-DEM(2006)003, Preliminary Report on Civilian Command Authority over the Armed Forces in their National and International Operations, by Hans BORN (expert, Netherlands) and Cecilia LAZZARINI (expert, Netherlands), p. 4.

²⁷ See, for example, Venice Commission document CDL-AD(2002)032 on the Amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein (paras. 6-8).

military leaders with the prevailing general interests of the democratic society,²⁸ in order to safeguard and protect democratic constitutional values.

77. For this reason, certain objectives, such as political neutrality and de-ideologisation, as much transparency as possible in the activity of the armed forces and accountability of their personnel (absolutely necessary for ensuring that the said values are safeguarded) can be achieved only by democratic control of the military.²⁹

78. Democratic control of the armed forces is necessary in order to reduce the so-called “civil-military gap”, including the building of confidence, cooperation and coordination between the civil and military members of the armed forces institutions, and thus to promote the integration of the military within the democratic society. It is worth recalling in this context the concept of “democratic peace”: “democracies do not fight each other”.³⁰

79. In fact, in a democratic State, the inclusion of the armed forces as an integral part of a society governed by the rule of law³¹ means that the armed forces are a component of the executive branch / power. Democratic oversight is justified by the basic democratic principle of the separation / balance of powers that control each other. Being an integral part of the executive, parliamentary and judicial controls over the armed forces represent a natural and normal implementation of this principle, leading to the necessary accountability of the military to the society they serve and protect.

80. In a parliamentary regime, such a control is natural and logical. It is equally justified in a presidential regime since increased control of the military, either by Parliament or the courts, improves the balance of State powers.

81. The Cold War may have ended, but there are new, unconventional threats to national and international security necessitating a reorientation of the missions, structures, technologies and typology of the armed forces and of their strategies and tactics. All these transformations should be under attentive democratic supervision, as should the fact that they imply considerable costs for society as a whole. The years following the end of the Cold War saw an overall increase in domestic public spending for military purposes. National societies are, of course, entitled to control the way their public finances are spent and to make sure that the results of these reforms are in full conformity with the public interest, and with the imperative necessity that democratic values are observed in this process. This is also in line with the right of citizens to know how the State is planning and applying policies for their security.³²

²⁸ See Venice Commission document CDL-DEM(2006)003, Preliminary Report on Civilian Command Authority over the Armed Forces in their National and International Operations, by Hans BORN (expert, Netherlands) and Cecilia LAZZARINI (expert, Netherlands), pp. 4-5.

²⁹ See Venice Commission document CDL-DEM(2006)001, Preliminary Report on the Democratic Oversight over Armed Forces, by Carlos CLOSA MONTERO (Member, Spain), para. 7, p. 3.

³⁰ Wolfgang WAGNER, Parliamentary Control of Military Missions: Accounting to Pluralism, Geneva, August 2006, Occasional Paper no. 12, Geneva Centre for Democratic Control of Armed Forces, p. 7.

³¹ Idem.

³² Wim F. van EEKELEN, Democratic Control of Armed Forces: The National and International Parliamentary Dimension, Geneva, October 2002, Occasional Paper no. 2, Geneva Centre for Democratic Control of Armed Forces, p. 16.

82. Democratic control, in general, is motivated by the need to ensure that policies decided democratically by Parliament and/or elected government are carried out as decided and planned. This includes the military.³³ Democratic control is also needed by the exigency to avoid that scientific and industrial developments are exclusively conditioned by the needs of the armed forces.

B. The international dimension

83. The international dimension of democratic control over armed forces represents, in general, an international confidence-building measure, an important contribution to shaping the “democratic peace” among States. The principle that guides international regulations on these issues is the general prohibition of the use of force, with some exemptions.

84. The general prohibition on the use of force, including armed forces, was already a principle of international law in 1928 when the Kellogg-Briand Pact was concluded.³⁴ Later on, this prohibition was set forth in the United Nations Charter, especially in Art. 2 (4), as well as in subsequent documents, such as the 1970 United Nations General Assembly Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations or the 1975 Conference on Security and Co-operation in Europe (Organisation for Security and Co-operation in Europe) Final Act adopted in Helsinki. The United Nations International Court of Justice clearly indicated in 1986, in its judgment in the *Case concerning Military and Paramilitary Activities in and against Nicaragua*, that this rule is not only based on conventional provisions, but that it also has a general customary value.³⁵

85. This prohibition results not only from the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence (see *supra* para. 74), but also from other fundamental principles of international law: the principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security are not endangered, the principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, the principle regarding the duty of States to cooperate with one another, the principles concerning the inviolability of borders and the territorial integrity of States.³⁶ So, the prohibition on the use of force is a consequence of the systemic interpretation of all fundamental principles of contemporary international law.

86. The only exceptions to the prohibition on the use of force, including (or especially) the armed forces, are, in contemporary international law, considered to be the following:

- self-defence (individual or collective),
- the use of force as decided or authorised by the United Nations Security Council on the basis of Chapter VII of the United Nations Charter, and
- on the basis of the right / principle of self-determination of peoples.

³³ Luis L. BOROS, *Civilian Control or Civilian Command?* Geneva, August 2003, Working Paper no. 121, Geneva Centre for Democratic Control of Armed Forces, p. 4.

³⁴ Pierre-Marie DUPUY, *Droit international public*, 5^e édition, Paris, Dalloz, 2000, pp. 5, 38, 521.

³⁵ Ibidem, p. 533. See also D. J. HARRIS, *Cases and Materials on International Law*, 6th edition, London, Sweet & Maxwell, 2004, p. 898.

³⁶ In its 1998 Report on the legal foundation for foreign policy, the Venice Commission recommended that Council of Europe member States respect inter alia three principles considered as fundamental for the international public order – resolution of international disputes solely by peaceful means, refraining from the threat or use of force in international relations and compliance with resolutions passed by the United Nations Security Council in matters of collective security. See, for the text of this report, Venice Commission document CDL-DI(1998)003rev.

As the last situation is irrelevant to our discussion, the analysis will focus on those aspects related to the first two hypotheses, which are pertinent for the purposes of this study.

87. Self-defence (in French, “*légitime défense*”), as an exception to the prohibition on the use of force³⁷ is legitimate only insofar as it represents the response to an armed attack (in French, “*agression armée*”). Any such response must be necessary and proportional to the attack.³⁸ Part of the responsibility of the military is to respect these conditions. Their non-observance leads to qualifying self-defence as illegitimate, excessive, unnecessary or disproportionate use of force becoming an aggression³⁹ itself, that is an international unlawful act which engages the international responsibility of the respective State. This is a clear justification for the democratic control of the armed forces.

88. The democratic control of the armed forces must prevent the temptation for military leaders to use “opportunities” offered by circumstances that in reality cannot justify the use of force in order to achieve certain illicit goals, either at international or at domestic level. Also, democratic oversight must, in this sense, prevent *inter alia* the conclusion of “secret understandings” to direct acts of aggression against other States.

89. According to the United Nations International Court of Justice, if use of force is to be legitimate, it has to respect the law applicable to armed conflicts, especially the principles and rules of international humanitarian law.⁴⁰ This is yet another reason for the control of armed forces, as a breach of these rules attracts international responsibility of the State. A democratic State – which is a State where fundamental rights and freedoms are (to be) respected – cannot ignore the imperative need for the same rights and freedoms to be strictly observed by its armed forces when engaged in international military operations. This is also an imperative need in the actual context of the fight against terrorism, in which armed forces are involved. In general, the democratic control over armed forces represents a guarantee that human rights and fundamental freedoms are respected both *within* the armed forces and *by* the armed forces during their operations.

90. Irrespective of the State’s responsibility, a breach of the said rules may involve individual criminal responsibility of armed forces personnel. International criminal law provides for specific sanctions against armed forces personnel who commit crimes against humanity, including genocide, war crimes and the crime of aggression. The democratic control of armed forces must prevent the occurrence of such acts by its political and military leaders, and, in general, by the personnel of its armed forces. This has the potential to affect the credibility of that country in international relations.

³⁷ Dominique CARREAU, *Droit international*, 8^e édition, Paris, Pedone, 2004, p. 564. See also Jean COMBACAU, Serge SUR, *Droit international public*, 6^e édition, Paris, Montchrestien, 2004, p. 619.

³⁸ Case concerning Military and Paramilitary Activities in and against Nicaragua, Rec. CIJ 1986, § 176, § 194. See also Jean COMBACAU, Serge SUR, *op. cit.*, p. 629.

³⁹ The (armed) aggression is prohibited by international law not only by the two London Conventions of 1933 on the definition of aggression (the “Litvinov-Titulescu” Conventions), but also by the United Nations Charter provisions prohibiting the use of force, the United Nations General Assembly Declaration on the Definition of Aggression of 1974 (Resolution 3314 (XXIX) of 14 December 1974). The 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations provides that “(a) war of aggression constitutes a crime against the peace for which there is responsibility under international law”. The 1998 Rome Statute establishing the International Criminal Court set forth the individual criminal responsibility for the “crime of aggression” (the definition of which is still to be decided upon by the State Parties and included in the Statute).

⁴⁰ See the Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons, United Nations International Court of Justice Reports, § 42.

91. Views were also expressed that democratic control of armed forces is justified by the need to control the decision-making process over recourse to certain type of arms, especially weapons of mass destruction, such as nuclear weapons.⁴¹

92. With regard to the second hypothesis – the use of force as decided or authorised by the United Nations Security Council on the basis of Chapter VII of the United Nations Charter – what is relevant here is *the manner in which decisions are made, on recourse to the use of force*, either in the Security Council, or in any other (regional) international organisation acting under the mandate given by the Security Council in order for international peace and security to be restored and maintained. Provided that the armed actions are duly authorised under the United Nations Charter (meaning that they are legal and justified), the problem here is the fact that such decisions are taken by the representatives of the *governments* in the respective international bodies,⁴² even if at domestic level the competence to take such decisions belongs or should belong to the *national Parliaments*. A *certain transfer of competences* is discernible, from the (domestic) parliamentary level to the (international) intergovernmental level. This is a further justification for domestic parliamentary democratic control of the way decisions regarding the use of force are taken at international level. The mandate to engage the responsibility of the State in this field should be under constant supervision at parliamentary level.

93. In this context, members of the Western European Union Assembly adopted at its session in Berlin (6-7 February 2007) a message for European Union heads of States and Governments, ahead of the special European Council meeting of 25 March 2007 on the occasion of the 50th anniversary of the Treaty of Rome.⁴³ In their message, they urged the European Union heads of States and Governments to make every effort to develop a European Security and Defence Policy based on shared objectives (such as those described in the European Security Strategy formulated in 2003), credible capabilities and technologies, developments that should be coordinated with the North Atlantic Treaty Organisation in order to reinforce both the European Security and Defence Policy and the Atlantic Alliance, and *democratic legitimacy*. This third pillar of development of the European Security and Defence Policy is defined as follows:

“these policies must be subject to increased democratic scrutiny of the European Security and Defence Policy by national Parliaments. In this respect, the Assembly of the Western European Union plays a decisive role. We need to strengthen this process. This existing inter-parliamentary forum, which is not a European second chamber, should be enhanced as a vital democratic link with citizens and public opinion.”

94. The Western European Union Assembly called for the European Council to develop this idea further as a matter of urgency.⁴⁴

⁴¹ See, for a comprehensive analysis, Walter B. SLOCOMBE, *Democratic Civilian Control of Nuclear Weapons*, Geneva, April 2006, Policy Paper no. 12, Geneva Centre for Democratic Control of Armed Forces.

⁴² See Venice Commission document CDL-DEM(2006)003, Preliminary Report on Civilian Command Authority over the Armed Forces in their National and International Operations, by Hans BORN (expert, Netherlands) and Cecilia LAZZARINI (expert, Netherlands), p. 4.

⁴³ Assembly of the Western European Union, The Inter-parliamentary European and Security and Defence Assembly, The Message from Berlin to the Heads of State and Government on the Way Ahead for the European Security and Defence Policy for their consideration ahead of the European Council meeting to be held on 25 March 2007 on the occasion of the 50th anniversary of the Treaty of Rome, adopted in Berlin, on 7 February 2007. The full text of the message can be seen at: http://www.assembly-weu.org/en/presse/espace_presse/documents/Berlin%20AssemblyMessage%20FINAL%20ENG%20pres.pdf.

⁴⁴ See footnote 18.

95. The position described overleaf of the Western European Union Assembly (which is composed of designated representatives from the national Parliaments) is symptomatic and eloquent. On the one hand, it emphasises the role of the parliamentary scrutiny which could enhance the democratic legitimacy of the European Security and Defence Policy, commonly considered, despite its inherent difficulties, as a “success story” of European construction,⁴⁵ (even if European Security and Defence Policy operations have always been characterised by a large civilian component).⁴⁶ Nonetheless, there is a need to seek and obtain wider support from European citizens and public opinion for the European construction, the European Security and Defence Policy being a part of it. But the European Parliament has practically no competence in this area, and it lacks control⁴⁷ over national governments in this respect. On the other hand, national oversight is not satisfactory, as it cannot control on its own the collective actions of the European Union governments in the European Union. The solution should therefore be a combined one: increasing the national parliamentary control both at domestic level, and at the level of international inter-parliamentary bodies, such as the Western European Union Assembly, which should act in cooperation with European Union bodies, including the Security and Defence Subcommittee of the European Parliament.

96. Under the Treaty on the European Constitution, Art. V of the Western European Union Treaty of Brussels (providing for mutual military assistance in case of aggression directed against one Member State) was supposed to be replaced by the mutual defence clause set forth in Art. I-41, para. 7 of the Constitutional Treaty and by the permanent structured cooperation provided for in its para. 6. Para. 8 required that the European Parliament should be regularly consulted on the main aspects and fundamental choices of the European Security and Defence Policy. The Treaty amending the Treaty on European Union and the Treaty of European Community maintained⁴⁸ the solution proposed by the Treaty on the European Constitution.

97. The North Atlantic Treaty Organisation Parliamentary Assembly has a similar position: for example, in its 2001 Resolution on the European Security and Defence Policy, it was already urging the member Governments and Parliaments of the North Atlantic Alliance and of the European Union “to strengthen Parliamentary oversight over the European Security and Defence Policy by the European Union national Parliaments, which will have to engage in dialogue with the European Parliament and the other national Parliaments concerned”.⁴⁹ As mentioned in the Declaration of the North Atlantic Treaty Organisation Parliamentary Assembly on the North Atlantic Treaty Organisation’s Riga Summit (Quebec, Canada, 17 November 2006), “the Assembly is a visible manifestation of the Alliance’s shared commitment to parliamentary democracy. Its activities enhance the collective accountability of the North

⁴⁵ See Claire PIANA, *Vers une Europe de la défense ?*, in Damien Helly, Franck Petitville (ed.), *L’Union européenne, acteur international*, L’Harmattan, Paris, 2005, pp. 91-104.

⁴⁶ See Brian CROWE, *Towards a European Foreign Policy*, in *The Hague Journal of Diplomacy*, Vol. 1, no. 1, 2006, pp. 110-111. The author also reminds us that the 1999 Helsinki European Council decided to establish an European Security and Defence Policy Civilian Committee (Civcom).

⁴⁷ See, for a short analysis of the democracy in the European Union, in connection with the actual powers of the European Parliament, Trevor C. HARTLEY, *European Union Law in a Global Context*, Cambridge University Press, 2004, pp. 41-43.

⁴⁸ In its paragraphs 39 and 48, paragraph 39 amends Article 21 (1) Treaty on European Union as follows (in French original): “Le haut représentant de l’Union pour les affaires étrangères et la politique de sécurité consulte régulièrement le Parlement européen sur les principaux aspects et les choix fondamentaux de la politique étrangère et de sécurité commune et de la politique de sécurité et de défense commune et l’informe de l’évolution de ces politiques. Il veille à ce que les vues du Parlement européen soient dûment prises en considération. Les représentants spéciaux peuvent être associés à l’information du Parlement européen.”

⁴⁹ Committee Resolution 308, 2001 Annual Session, Resolution on the European Security and Defence Policy presented by the Defence and Security Committee, Ottawa, 9 October 2001, <http://www.nato-pa.int/archivedpub/resolutions/01-ottawa-308.asp>.

Atlantic Treaty Organisation. They also contribute to the transparency of the North Atlantic Treaty Organisation and its policies and to improving public scrutiny and awareness”.⁵⁰ The Democratic Control of Defence Structures is a specific area of cooperation within the North Atlantic Treaty Organisation Partnership for Peace.⁵¹

98. The Parliamentary Assembly of the Council of Europe took a similar stance in its Recommendation 1713 (2005) on the “Democratic oversight of the security sector in member States”:

“(…)

iv. Defence

a. National security is the armed forces’ main duty. This essential function must not be diluted by assigning the armed forces auxiliary tasks, save in exceptional circumstances.

b. *The increasing importance attached to international co-operation and peacekeeping missions abroad must not be allowed to have an adverse effect on the role of Parliament in the decision-making process. Democratic legitimacy must take precedence over confidentiality.*

c. At European level, it is essential to avoid any step backwards in relation to the *democratic achievements of the Western European Union Assembly by introducing a system of collective consultation between national Parliaments on security and defence issues.*

d. In this connection, *national Parliaments should continue to have an inter-parliamentary body to which the relevant European executive body would report and with which it would hold regular institutional discussions* on all aspects of European security and defence.

e. Deployments of troops abroad should be *in accordance with the United Nations Charter, international law and international humanitarian law.* The conduct of the troops should be *subject to the jurisdiction of the International Criminal Court in The Hague.*

(…)”.⁵²

99. To summarise, the above analysis of both the domestic and international inter-related dimensions of the necessity to control the armed forces show an important number of reasons which justify it, based on the objectives of safeguarding the democratic values, rule of law and human rights and fundamental freedoms, and of maintaining the international peace and security as well as respecting contemporary international law.

IV. The role of armed forces in Council of Europe Member States

100. Armed forces form part of the administrative structure of the State, the State administration being dependent on the executive branch. The role of armed forces in safeguarding national security and in implementing the defence policy decided by the executive should be understood taking into account their position within the distribution of powers of the State and the checks and balances between them.

101. There are no specific international regulations on the roles of armed forces and each State enjoys sovereign entitlement to define the mandate of its armed forces, subject to the constraints of international law (and in particular the United Nations Charter, see below). Nevertheless, several intergovernmental organisations have adopted documents which include provisions for or limitations on the role of armed forces in terms of permissible and non-permissible operations. In this context, the Parliamentary Assembly of the Council of Europe’s Recommendation 1713/2005 and the Organisation for Security and Co-operation in Europe Code of Conduct, are briefly discussed as they elaborate on the role of armed forces and also apply to Council of Europe member States.

⁵⁰ Para. 15.1 of the North Atlantic Treaty Organisation Parliamentary Assembly Declaration. For the full text of the Declaration of 17 November 2006, see <http://www.nato-pa.int/Default.asp?SHORTCUT=1007>.

⁵¹ See <http://www.nato.int/docu/comm/1997/970708/infopres/e-pfp.htm>.

⁵² See <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta05/erec1713.htm>.

102. In 2005, the Parliamentary Assembly of the Council of Europe adopted Recommendation 1713/2005 which called upon Council of Europe member States to adhere to the principles of democratic oversight of the security sector, including intelligence services, police, border guards and the armed forces.⁵³ With regard to the armed forces, the Recommendation stipulates that national security is the armed forces' main duty. This essential function must not be diluted by assigning the armed forces auxiliary tasks, save in exceptional circumstances.' (Art. IV-a). Moreover, the Recommendation states that the deployment of troops abroad should be in accordance with the United Nations Charter, international law and international humanitarian law, while the conduct of the armed forces should be subject to the jurisdiction of the International Criminal Court (Art. IV-e).

103. Through this Recommendation, the Parliamentary Assembly of the Council of Europe established national security as the framework within which all missions of the armed forces should be situated. Missions that cannot be justified within the context of this framework of national security should be avoided.

104. One of the most detailed international instruments on the conduct of armed forces is the Organisation for Security and Co-operation in Europe (OSCE) Code of Conduct on Politico-Military Aspects of Security, adopted in 1993 in Budapest.⁵⁴ This code of conduct is relevant for determining roles of armed forces. The Code stipulates that while each State is free to choose its own security arrangements, they must be in accordance with international law and OSCE Commitments (Art. 10). The external role of the armed forces should 'contribute to international peace and stability' (Art. 13) as well as the inherent right of States to individual and collective self-defence (Art. 9). The Code also acknowledges 'internal security missions' of the armed forces (Art. 36). Non-permissible roles for armed forces are also cited. These would include: any use of force against the territorial integrity or political independence of any State; any use of force in a manner which is inconsistent with the Charter of the United Nations or the Helsinki Final Act (Art. 8); as well as attempts to impose military domination upon other States (Art. 13). Furthermore, the Code specifies that the use of force should always be commensurate with internal and external security needs (Arts. 12 and 36). Finally, it is stated that internal security missions need to be in conformity with constitutional procedures, under the effective control of constitutional authorities and subject to the rule of law (Art. 36).

105. It is clear from the contents of the Code of Conduct that although OSCE participating States are concerned that the use of force for maintaining internal and external security should remain a sovereign matter, the use of force should be applied proportionally, in compliance with international law and subject to constitutional and democratic decision-making procedures.

106. In the past decade, European armed forces have undergone a profound shift in both the range and focus of their roles. The mandates of Council of Europe member States' armed forces have increasingly been expanded to include roles beyond the territorial defence of the State, which is traditionally perceived to be the principal prerogative of national militaries. This change is a central dynamic in the development of what has been termed the 'post-modern military,' which is epitomised by a move towards volunteer armies, and a greater variety of missions.⁵⁵ The shift in the functions of armed forces has resulted from a changed international

⁵³ 'Democratic Oversight of the Security Sector in Member States', Recommendation 1713/2005 of the Parliamentary Assembly of the Council of Europe, Strasbourg, 23 June 2005, <http://assembly.coe.int/Documents/AdoptedText/TA05/EREC1713.htm> (accessed 2 August 2007).

⁵⁴ 'Code of Conduct on Politico-Military Aspects of Security', adopted by OSCE Participating States in Budapest on 3 December 1994. http://www.osce.org/documents/sg/1994/12/702_en.pdf, (accessed 2 August 2007).

⁵⁵ See Charles MOSKOS, C, John WILLIAMS and David SEGAL, *The Post Modern Military, Armed Forces After the Cold War*, (New York, Oxford University Press, 2006), pp. 1-2.

environment since the end of the Cold War. This environment has been characterised by the declining potential for conventional war in Europe and an increase in the threat presented by international terrorism, failed or rogue States and non-state actors.

107. Armed forces fulfil both internal and external roles, the scope of which are defined and constrained by constitutions, national statutes, government acts, national security policies and international law. The tasks performed by national militaries do not only vary according to national legal frameworks but also as a result of differing democratic decision-making procedures and varying historical contexts. The range of roles played by the armed forces of Council of Europe member States is wide and examples can be drawn upon from a variety of Council of Europe member States.⁵⁶

A. External role of armed forces

108. The external roles of armed forces are to a large extent regulated by international law pertaining to the use of force, mainly outlined in the United Nations Charter.⁵⁷ Under the Charter, States may resort to the use of force: in individual self defence, in collective self defence or to restore international peace and security (when authorised by the United Nations Security Council).⁵⁸ Within this framework, States have established remits for their armed forces. These are normally outlined either in a constitution or national statutes (or a combination of the two). It should be noted that the majority of States do not differentiate between the types of overseas operations that their armed forces are permitted to carry out.⁵⁹

1. Defence against external threats

109. The defence of the State against external threats was the original role of most European armies and remains a core function of the armed forces in all Council of Europe member States. Central to this task is the defence of national territory and, in States such as Italy, Germany, Poland, Denmark and Turkey this role is provided for in constitutions.⁶⁰ Since the United Kingdom does not have a written constitution, the military's role in the defence of the national territory is outlined in a governmental act.⁶¹ Many States also task their armed forces with defending particular national values or institutions from external threats. For example, in Italy, the law on the 'Rules for the Institution of the Professional Military Service' stipulates that one of the roles of the armed forces is to 'safeguard free institutions'.⁶²

⁵⁶ Due to time constraints the examples used are drawn from a select number of Council of Europe member States.

⁵⁷ United Nations Charter. <http://www.un.org/aboutun/charter/> (accessed 14 August 2007).

⁵⁸ See Chapter VII of the United Nations Charter.

⁵⁹ George NOLTE and Heike KRIEGER, 'European Military Law Systems: General Comparative Perspective' in Nolte, G (ed), *European Military Law Systems*, (Berlin, De Gruyter Rechtswissenschaften, 2003), p. 39.

⁶⁰ Ibid, pp. 32-33.

⁶¹ Ibid, p. 38.

⁶² Ibid, p. 37.

2. Collective Defence

110. While all States have the right to utilise their armed forces for collective self defence under the United Nations Charter, a number of Council of Europe member States are also members of alliances that demand collective defence.⁶³ Most prominent among these is the North Atlantic Treaty Organisation, which contains a provision in its founding treaty that stipulates that all members should exercise their right of collective defence in the event of an attack on one member State.⁶⁴

3. Peacekeeping, crisis management and peace-building operations

111. The armed forces of Council of Europe member States have played an increasing role in the United Nations and the European Union-led peacekeeping missions.⁶⁵ These missions range from observation missions which involve the deployment of armed forces to monitor a ceasefire or peace agreement, to peace enforcement operations whereby 'peacekeepers' attempt to impose peaceful outcomes through the use of force.⁶⁶ The participation of armed forces in peacekeeping missions is generally justified by reference either to international security or national security due to the potential for conflict States to become bases for terrorist activity, trans-national crime and refugee flows, which may in turn, pose a threat to European States. The participation of armed forces in peacekeeping missions is also justified by governments in humanitarian terms, based on the need to alleviate human suffering caused by conflict.

112. The frameworks regulating the participation of armed forces in peacekeeping and crisis management operations vary significantly among States. In the United Kingdom this function of the armed forces is consistently outlined in Ministry of Defence policy statements, in Denmark crisis management is explicitly cited as a role of the armed forces in the Danish Defence Act of 2001, and in Poland the armed forces are authorised to take part in 'peace operations' by a statute.⁶⁷ The basis for the participation of both the German and Italian armed forces in this type of mission is somewhat less clear. Italian armed forces may participate in peace operations which are in conformity with international law and with decisions of the international organisations of which Italy is a member. It is not clear whether they would be authorised to participate in a peacekeeping mission which did not have a basis in the United Nations Charter.⁶⁸ In Germany, the armed forces are permitted to take part in peacekeeping operations if they take place within the context of a collective security arrangement. It is less certain whether German forces may participate in unilateral or bilateral peacekeeping operations.⁶⁹

⁶³ See Article 51 of the United Nations Charter.

⁶⁴ See Article 5 of the North Atlantic Treaty, April 1949. <http://www.nato.int/docu/basic/txt/treaty.htm> (accessed 2 August 2007).

⁶⁵ For details of European Union peacekeeping mission please refer to http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=268&lang=EN&mode=g (accessed 2 August 2007). For a comprehensive review of United Nations peacekeeping operations please see, Michael DOYLE and Nicholas SAMBANIS, *Making War and Building Peace, United Nations Peace Operations*, (Princeton, NJ, Princeton University Press, 2006)

⁶⁶ DOYLE and SAMBANIS, p. 1, p. 11.

⁶⁷ NOLTE and KRIEGER, p. 40.

⁶⁸ Ibid, p. 40.

⁶⁹ Ibid.

113. States also reserve the right to utilise their armed forces to evacuate citizens from the territory of another State when the lives of their nationals are deemed to be at risk due to a crisis.⁷⁰ This role for the military is often not explicitly referred to, but falls under crisis management or humanitarian missions, which are established roles for armed forces. Nevertheless, in the United Kingdom, the Ministry of Defence has explicitly stated that the armed forces may be used for this purpose at the request of Foreign and Commonwealth Office.⁷¹

114. In addition to participating in peacekeeping operations, European armed forces have increasingly played a role in post-conflict reconstruction efforts in States that have experienced civil war. Since the early 1990s, peace operations have encompassed a broader range of functions, including: institution building; the development of infrastructure; support for the rule of law and good governance, security sector reform (SSR); and disarmament, demobilisation and reintegration (DDR) programmes.⁷² Council of Europe member States have contributed with their armed forces to these efforts, both through multilateral peace-building missions organised under the auspices of the United Nations, the European Union and the Organisation for Security and Co-operation in Europe, and through unilateral operations. In the context of multidimensional peacekeeping, the United Nations Department of Peacekeeping Operations Handbook lists a wide range of tasks for the military, including human rights monitoring, security sector reform and training, support for humanitarian activities, support for international sanctions, restoration and maintenance of law and order and de-mining.⁷³ This list of tasks, which complement the more traditional peacekeeping roles of the military, illustrates the numerous non-traditional tasks that are now undertaken by armed forces in the context of peace-building operations.

B. Internal roles of armed forces

115. States have a greater degree of latitude in determining the functions that their armed forces may perform domestically. It is important to note that the range and extent to which armed forces perform internal security roles is generally dependent upon the existence of intermediary security forces.⁷⁴ Armed forces are usually more restricted in the internal roles that they may fulfil, when states have intermediary security services. The changing nature of the threats posed to national security and in particular the rise of international terrorism has resulted in the re-emergence of an internal role for the military in many European States. The key criteria against which the assessment as to whether to deploy armed forces internally should be made are: proportionality, meaning that the use of force should be commensurate with the security needs; and subsidiarity, which implies that the armed forces should be confined to supporting the civilian authorities and should be subordinated to local or national civil authorities. The internal roles played by armed forces can be categorised in the following

⁷⁰ As occurred in July 2006 when many Council of Europe member States dispatched their armed forces to evacuate their citizens from Lebanon following the outbreak of hostilities between Hezbollah and Israel.

⁷¹ NOLTE and KRIEGER, p. 49.

⁷² The shift to multidimensional peace operations can be traced to the publication of 'An Agenda for Peace' which was formulated by the United Nations Secretary General, Boutros Boutros Ghali in 1992. See Boutros Boutros-Ghali, *An Agenda for Peace: Report of the Secretary General*, (17 June 1992). <http://www.un.org/Docs/SG/agpeace.html>. (accessed 12 August 2007).

⁷³ United Nations Department of Peacekeeping Operations, 'Handbook on United Nations Multi-dimensional Peacekeeping Operations', Chapter V: The Military, (United Nations, New York, December 2003). <http://www.peacekeepingbestpractices.unlb.org/pbpu/handbook/Handbook/5.%20Military.html>, (accessed 14 August 2007).

⁷⁴ Anthony FORSTER, *Armed Forces in Society*, (Basingstoke, Palgrave, 2006), p. 229. Examples of intermediary security forces are Italy's Carabinieri, the French Gendarmerie, Turkey's Jandarma, Spain's Guardia Civil and Romania's Jandarmeria.

groups: (1) military assistance in maintaining public order; (2) military assistance in case of disasters; (3) military assistance in tasks not directly related to national security.⁷⁵

1. Military assistance in maintaining public order

116. Armed forces may provide support to civilian authorities when they can no longer maintain law and order.⁷⁶ Military assistance in law enforcement is a particularly controversial area, and the extent to which armed forces may provide support varies greatly between Council of Europe member States. The scope of potential military roles in this area is often dependent upon the (non)existence of militarised police forces. In States where intermediary forces exist, the armed forces are generally more restricted in this area. In most States, the use of the armed forces in maintaining public order is governed by strict laws and in many cases an official 'state of emergency' is required before troops can be deployed.

a. Counter-terrorism operations

117. The increased perception of the threat posed by international terrorism has led to a rise in use of the armed forces to support civilian law enforcement agencies in many Council of Europe member States. According to Anthony Forster, all States have begun a legislative process to further integrate armed forces into internal security arrangements to enable them to be involved in both responses to emergencies, and in pre-emptive operations.⁷⁷ In Council of Europe member States there have been several prominent examples of armed forces playing a pro-active role in counter terrorism operations, including: the deployment of 16,000 Greek troops to support the police during the Olympics in Athens in 2004;⁷⁸ and the deployment of 450 British soldiers at London's Heathrow airport, in February 2003, in response to intelligence concerns about potential surface-to-air missile attacks against aircraft.⁷⁹

118. Under the German Constitution troops may be employed internally during a state of 'defence or tension' to protect civilian facilities, or to support police forces.⁸⁰ In February 2006 the German Federal Constitutional Court indicated that terrorist attacks constitute 'grave accidents' and therefore the army may be deployed in a preventative capacity. However, it is noteworthy that the Basic Law limits the role of the army to assisting the police, and they are not authorised to use military munitions.⁸¹

119. In the United Kingdom, the armed forces are restricted to providing aid to the civilian authorities during a state of emergency. Apart from providing support with bomb disposal, the British army has rarely been used to provide support to the civilian authorities in counter terrorism operations. However, in 2004 the Parliament passed the Civil Contingencies Act which broadened the definition of an emergency to include 'serious disruption to the political, economic and administrative stability of part of the country, or a threat to its security.'⁸² Moreover, the act outlines the emergency powers of armed forces, allowing them to order evacuations, confiscate property, impose curfews and ban travel.

⁷⁵ See for example, FORSTER, A, *Armed Forces in Society*, (Basingstoke, Palgrave, 2006), p. 227.

⁷⁶ FORSTER p. 228.

⁷⁷ FORSTER p. 238.

⁷⁸ Timothy EDMUNDS, 'What are armed forces for? The changing nature of military roles in Europe' *International Affairs*, Vol.82 : 6, 2006, p. 1071.

⁷⁹ BBC News, 'Blair Authorised Terror Alert Troops,' 17 February 2003. http://news.bbc.co.uk/2/hi/uk_news/2747677.stm. (accessed 3 August 2007).

⁸⁰ Article 87a of The German Basic Law.

⁸¹ Ibid.

⁸² FORSTER, p. 239.

120. In Turkey the armed forces enjoy wide-ranging powers in counter terrorism operations as part of their mandate to defend the country against internal as well as external threats.⁸³ This is evidenced by the Turkish military's ongoing actions against the PKK (Kurdistan Workers Party).

b. Protection of public buildings and installations

121. The guarding of installations by armed forces is another area in which armed forces are deployed to assist in maintaining public order. A prominent example of this is the role played by the French military in guarding nuclear installations throughout the country.⁸⁴ The protection of foreign embassies and missions is another guarding role that is played by armed forces in some countries. While in the majority of Council of Europe member States the police or private security companies guard these buildings, in Switzerland up to 800 conscript soldiers are deployed to support the police in guarding foreign missions. This has been the source of much controversy, with objections raised to the non-specialist nature of the troops involved, the presence of uniformed officers on the streets, as well as the costs incurred by the military.⁸⁵

c. Protection of borders, coastal waters and airspace

122. The protection of borders, airspace and coastal waters are additional roles that are played by the armed forces in many Council of Europe member States. Armed forces are often responsible for protecting civil aviation and this task has become more significant since 11 September 2001. In Council of Europe member States there has been considerable debate on strengthening the mandate of national air forces, allowing them to shoot down civilian aircraft that are believed to have been hijacked. In May 2004, the air forces of three European States were simultaneously involved in tracking a plane that had failed to respond to air traffic controllers.⁸⁶ In the United Kingdom alone, British Royal Air force jet fighters were involved on six occasions in 2006 to intercept suspicious passenger planes entering the United Kingdom airspace.

123. At sea, armed forces are involved in fisheries protection, operations to prevent the trafficking of narcotics into the national territory, immigration issues and rescue of immigrants. The British and Dutch navies have both been proactive in anti-narcotics operations.⁸⁷ The British Royal Navy also has a squadron specifically dedicated to the protection of fisheries, which operates under the Department for the Environment.⁸⁸

⁸³ FORSTER, p. 237.

⁸⁴ FORSTER, p. 239.

⁸⁵ Swissinfo, 'Fewer soldiers to stand guard over embassies', 11 June 2007. <http://www.swissinfo.org/eng/swissinfo.html?siteSect=43&sid=7915538> (accessed 14 August 2007).

⁸⁶ Craig WHITLOCK, 'E.U.'s Patchwork Of Policies Leaves It Vulnerable to 9/11-Style Attack', Washington Post, 18 January 2006.

http://www.washingtonpost.com/wp-dyn/content/article/2006/01/17/AR2006011701639_pf.html (accessed 14 August 2007).

⁸⁷ See Ministry of Defence, 'Ocean Thwarts Drug Smugglers in the Caribbean' 26 June 2007. <http://www.mod.uk/DefenceInternet/DefenceNews/MilitaryOperations/OceanThwartsDrugSmugglersInTheCaribbean.htm>. (accessed 14 August, 2007).

⁸⁸ FORSTER, p. 241.

2. Military assistance in case of disasters

124. Armed forces provide support to the civilian authorities and the population in response to a range of natural and manmade disasters. The majority of Council of Europe member State armed forces are either expressly permitted (through constitutional provisions, statutes or governmental acts) or not explicitly disallowed from performing these tasks. The focus is on manmade and natural disasters including biological disasters. The type of aid provided by armed forces in case of disasters can be relief operations in case of natural disaster, humanitarian catastrophes or public calamities, or assistance in case of biological disasters.

125. In the case of disaster relief operations, some constitutions explicitly regulate the use of the military.⁸⁹ In other States, such as Denmark, even in the absence of specific constitutional provisions to delineate the military's role in domestic crisis situations, the Minister of Defence is authorised to instruct the armed forces to provide 'humanitarian help at home.' Other legal systems authorise armed forces to take part in mitigating the effects of natural disasters, extraordinary threats to the environment and to participate in search and rescue missions through an act.⁹⁰ In the United Kingdom, the armed forces have the same powers and obligations as any citizen, to provide support when the civil power requires assistance in combating disasters. In addition the government can invoke powers under the Emergency Powers Act (as well the more recent Civil Contingencies Act, see above) to proclaim a state of emergency.⁹¹ Finally, some States have special units within the military to comply with these assistance tasks. One example of this is Spain, with its Emergency Military Unit.⁹²

126. Armed forces can also be called upon to assist public authorities in case of biological disasters, i.e. the outbreak of pathogenic micro-organism and toxins.⁹³ Biological threats may originate from attacks of States, non-state actors, or more likely as a result of natural developments. Most States have a clear legal framework in place which stipulates when and how various protagonists should be involved in the management of biological risks, these provisions normally including provisions for civil-military cooperation.⁹⁴

⁸⁹ This is so in the case of the German Constitution (Arts. 35 (2), 87a (4), 91) An example of this was the deployment of 5,000 Bundeswehr personnel to tackle the flooding of major rivers in 2002 (See Federal Ministry of Defence, White Paper on German Security Policy and the Future of the Bundeswehr, p. 72). The same occurs with the Swiss armed forces, that are constitutionally permitted to participate rescue missions and evacuation assistance, which they provided during the floods of August 2007 (See Federal Department for Defence Civil Protection and Sport, Swiss Armed Forces, (Bern, 2006), p. 39. See also 'Heavy Rain Brings Chaos across Switzerland', Swissinfo, 9 August 2007, <http://www.swissinfo.org/eng/swissinfo.html?siteSect=881&sid=8092728> (accessed 14 August 2007).

⁹⁰ This is the case for Poland (Defence Act of 1997, Art. 3 (1a)), and Italy (Law of 14 November 2000. No. 331). NOLTE and KRIEGER, pp. 37, 43.

⁹¹ Ibid p. 47.

⁹² For further information, see the page of the "Unidad Militar de Emergencias" (UME): <http://www.mde.es/ume/>.

⁹³ Because of the internal role of armed forces in the case of biological disasters, we discuss the issue of biological disasters within the context of internal security roles; nevertheless, the threat can also originate from sources outside the country. On this topic, see Sergio BONIN, International Biodefense Handbook 2007: An Inventory of National and International Biodefense Practices and Policies, Center for Security Studies, ETH Zurich, 2007, p. 28. Available at: http://www.crn.ethz.ch/publications/crn_team/detail.cfm?id=31124.

⁹⁴ For example in France, the military police can be activated at short notice to ensure safety of major governmental bodies in contaminated areas, to control individual or collective violence in contaminated areas, as well as enforce a control safety cordon around contaminated zones. Military intelligence plays a role in detecting deliberate biological threats in an early stage. The French military has special chemical, biological, radiological and nuclear units which are trained and equipped to prevent and handle military or technical incidents. Ibid. pp. 29-33; 62-67.

3. Other activities of the armed forces

127. The roles of the armed forces described so far, are all related to maintaining the external and internal security of the State. These missions can be legitimised by the fact that national security was at stake. However, armed forces of Council of Europe member States are also engaged in operations which cannot be justified by direct reference to national security. Some of these activities are: the replacement of vital services during industrial action and other interruptions,⁹⁵ the involvement of armed forces in business,⁹⁶ provision of cartographical and meteorological services⁹⁷ and others.

V. Actors, acts, moments and procedures of control

A. General Overview

128. The renaissance of the debate about the old question ‘who guards the guardians,’⁹⁸ both in national and international spheres, needs to be tackled focusing, first of all, on *who* has the power to control the security sector. Within the security sector, the military has the task of protecting national security and defending the territory from external threats, through the legitimate use of force or the deployment of the proactive apparatus of the State. This task, however, needs to be accomplished within the framework of the rule of law. Democracy presupposes that someone in the State has the power to control the use of force in order to avoid deviations from its constitutionally established functions and principles. Control is also used to stop this power being used to undermine democratic institutions or to disturb the legal or constitutional established order, international law or International Rule of Law. This ‘someone’ has to be, in turn, a democratically elected institution. This issue is highly relevant because the principle of democracy and the rule of law require protection by democratic mechanisms and institutions. After all, they are fundamental pillars of contemporary democracies. The democratic legitimacy of whoever controls the military is transferred to the acts and decisions of the controlled institution or sphere. That is, the monitoring organ, or the controller, has an indirectly legitimising effect on the performance of the armed forces. The subordination of defence to the command of democratically elected officials, and to the ends defined by them in accordance with the constitutional principles and the prevailing law, appears to be a *sine-qua-non* pre-condition, requirement and characteristic of democratic regimes.

⁹⁵ In some Council of Europe member States the armed forces are deployed temporarily to provide services which are normally provided by government departments (or the private sector) but rendered temporarily unavailable. This practice is most common in the United Kingdom, where since 1995, almost 20,000 armed forces personnel have provided fire cover when fire-fighters have taken industrial action. The British army was also deployed to transport petroleum during the 2000 fuel crisis, during which time protestors prevented the distribution of fuel.

⁹⁶ In some Council of Europe countries, most notably Turkey, the armed forces are also involved in business. The Turkish Armed Forces Pension Fund (OYAK) has business interests in 29 companies, concentrated in the automotive, cement, financial, service and iron and steel sectors. Many of the investments are joint ventures with well-known international names, such as Renault and AXA.

⁹⁷ Armed forces frequently provide cartographical and meteorological services which are used on a regular basis, both by civilian authorities and the population at large. Militaries already conduct this work for their own purposes and are able to render these services effectively because they possess the requisite infrastructure and enjoy unprecedented access to the national territory. In Switzerland, the Federal Department of Defence runs ‘Swisstopo,’ which is the national topographical office, producing official maps. Moreover, the Italian military provides regular meteorological reports which are then transmitted to the civilian authorities.

⁹⁸ BORN H., HALTINER K., MALEŠIČ M. (2004), “Democratic Control of Armed Forces: Renaissance of An Old Issue”, Renaissance of Democratic Control of Armed Forces in Contemporary Societies, Baden - Baden, Nomos. The main question, according to these scholars, is “How to institutionalise civil-military relations in such a way that the military has enough capacities to protect society but in such a manner that those military capacities are not threatening society itself?” (p. 1).

129. Several types of issue should come under civilian control, even though the extent of control varies from one country to another and over time. As mentioned at para 12, this study will only deal with some of them, namely control of sending troops abroad, especially for participating in international peace missions; conditions and methods of requisitioning the army in domestic issues in times of emergency; the use of public funds with regard to the military budget and military expenditure, and the appointment of top commanders.

130. The types of decisions and acts under control are as diverse as the various necessities that are satisfied by the military acts and decisions. Thus, the political system gives the army, the navy, the air force, and other authorities and entities the capacity to take regular decisions on various issues. These decisions are administrative ones, as organs of the State Administration adopt them.

131. Oversight may take several forms. The control can be either *ex ante*, *ex post* or both. *Ex ante* control is a form of proactive oversight. *Ex ante* tackles issues before they become problematic. *Ex post* oversight is a form of reactive oversight as issues are only addressed after they have occurred.

132. Parliaments mainly exercise *ex ante* control by passing laws that define and regulate the security services and their powers, and by adopting the corresponding budgetary appropriations. The participation of Parliament in the creation of the national legal framework for security represents the proactive function of Parliament, oriented towards future policies and activities of the executive. *Ex ante* control may encompass granting prior authorisation of, for example, sending troops abroad, or army intervention in an emergency or siege state when the police and other internal security forces are not available in sufficient numbers. *Ex ante* control is primarily the preserve of the executive. The executive is responsible for the day-to-day management of the armed forces (delegated to military leadership) as well as policy and strategies for the armed forces.

133. *Ex post* control qualifies the legitimacy of a measure or act previously decided and implemented and, when necessary, imposes a remedy. *Ex post* control is exercised by a range of institutions including the judiciary, ombudsman, audit offices and Parliament.

134. Parliament exercises *ex post* policy control which takes the form of oral and written questions or interpellation to query a specific act of policy with members of government, budgetary scrutiny and finally accountability on the basis of reports from the Board of Auditors about the implementation of the budget. Where there is a suspicion that serious misconduct may have occurred, Parliament has the authority to hold a formal inquiry.

135. In most Western Parliaments there is a tendency to move beyond control *ex post facto* to participation in the governmental decision-making process even before the government has tabled a formal proposal.⁹⁹ To this end, it is crucial that Parliaments receive timely information on the government's intentions and decisions regarding security issues. Parliament's case cannot be a strong one if the government only briefs it after having reached a final decision. In such situations, the Parliament is confronted with a '*fait accompli*' and has no alternative but to approve or reject the government's decision. As far as regular and long-term policy issues are concerned, Parliaments should have enough time to analyse and debate essential matters such as the defence budget, arms procurement decision-making or a defence review. One way of getting around the time pressures that routinely confront parliamentarians in carrying out their work is to develop a proactive strategy and to enhance the expertise of parliamentarians with regard to the security sector and to set a clear policy agenda.

⁹⁹ VAN EEKELLEN W., Democratic Control of Armed Forces. The National and International Parliamentary Dimension, DCAF Occasional Paper no. 2, October 2002, available at <http://www.dcaf.ch/publications/kms/details.cfm?lng=en&id=18357&nav1=4>

136. A number of factors influence the type and characteristics of the mechanisms of control over the military in the different States, such as historical context, forms of government, legal framework, and the organs responsible for the control. At international level, in turn, the differences among international organisations that intervene in the security sphere, the various legal standards, and the modalities of the control of the acts of national troops that take part in international missions are some of the key elements for examining the international dimension of control over armed forces.

137. With regard to the method of exercising control, it could be said that, generally speaking, control means a degree of intervention on the decisions adopted by the controlled organ. Separating decisions and control means that there are at least two views on the same issue. It also serves to assure the compliance of an act or decision with democratic principles, standards and values. The model of control or oversight needs not to be fixed expressly and once and for all. It can, however, be progressively developed.

138. Democratic control over armed forces refers to the existence of (at least) an organ or institution democratically elected that reviews and supervises the decisions adopted by the organs or authorities with military competences.

139. In this sense, for example, the concept of security itself has become broader, not simply embracing military aspects, but also other geopolitical and contingent international issues. The regional disputes for territory or space in nearby zones, the political instability of some countries linked economically with others, ethnic, religious, cultural or demographic tensions, unsatisfied nationalism, are all factors that could deeply affect national interests. This is why it was urgent to articulate new answers and solutions related to armed forces mission and decisions.¹⁰⁰

140. In the same way, armed forces have been forced to adapt their functioning and activities to the new international requirements of security. From decisions focused on clear and defined threats to peace and security, they have moved to face diffuse threats such as terrorism, organised crime, biological or information attacks, among others, and to plan defence and security accordingly.¹⁰¹

141. Finally, the armed forces hold a relevant position as a consequence of globalisation, since States integrate in collective security and defence systems, involving them, *inter alia*, with military contributions to various international missions.¹⁰² For instance, one of the most significant changes in the post-Cold War period was the increase of the participation of armed forces in peacekeeping and humanitarian operations. This is one of the main functions developed by military forces in modern Europe. But this growth of the functions of the armed forces in the international sphere leads to new challenges and problems. One of them is the democratic control of those operations. A further conflict is the subordination to different commanders: on the one hand, national forces act under the command of the international organisation, but, at the same time, they are partly subordinated to the control system of their

¹⁰⁰ Centro Superior de Estudios de la Defensa Nacional (2003), "Adecuación de la defensa a los últimos retos", Madrid, Ministerio de Defensa, Secretaría General Técnica, p. 51.

¹⁰¹ Institut des Hautes Etudes de Défense Nationale (2002), "Défense globale et politique militaire de défense", Rapport de 1^{ère} phase, 54^{ème} Session nationale, p. 16, [on line] <http://www.ihedn.fr/portail/rapports.php>.

¹⁰² In 1991, the North Atlantic Treaty Organisation reviewed their Strategic Concept, and, in the presence of new risks according to which the foreign military threat became less important, proposed to export security. This, through the creation of forces of less scope that support peacekeeping and conflict prevention. In 1999, in Washington, the Alliance considered the experience of the last years, in which their intervention was centred on peacekeeping in the Balkans, and approved the 'New Strategic Concept', more clearly oriented to missions of exportation of peace. Centro Superior de Estudios de las Defensa Nacional, "Adecuación de la defensa a los últimos retos", (note 100), p. 52.

States.¹⁰³ This double control can cause significant difficulties because each control can be organised according to a particular logic and purpose. Clarification is also needed, as to which State (or body) is internationally responsible for the acts of the armed forces in question.

142. These changes within military systems, caused in turn by the evolving national and international situation, result in extra powers for armed forces. As a result, they adopt new and more complex decisions. Within this group of decisions, one can identify those that have always pertained to the military institutions, such as those related to the administration of armed forces personnel (appointments, incorporations, retirements, sanctions), or those related to supply of military material. Examples of the new type of decision include decisions on participation in peacekeeping missions, or the settlement of common defence techniques between several States or inside an international defence organisation.

143. In summary, a study of how to control the armed forces has to take into account not only who is the organ or institution that has the competence to control them, but also the abovementioned changes in the traditional functions of the military sphere and the existing control mechanisms, both in the domestic and international sphere.

B. Domestic Level

144. In the domestic sphere, control is exercised by the three powers (executive, legislative and judiciary), and by other supervisory entities such as the ombudsmen, the audit offices and the courts of auditors. The competences of these organs vary among the different legal systems, as do the mechanisms used by them to control the acts of armed forces. Having briefly developed some preliminary ideas related to the context of national democracies, forms of government, and the constitutional framework, the following paragraphs will set these issues out in some detail, mainly from a constitutional perspective.

1. Preliminary Issues

a. Historical context of national democracies

145. The analysis of the democratic oversight of the military cannot be separated from its contextual dimension. The need to take into account the diverse historical and political backgrounds of the military systems of each State led some scholars to group ten European countries, according to the kind of democracies they are, into consolidated democracies (like Belgium, Denmark, Luxembourg, the Netherlands, France, United Kingdom), and post-authoritarian democracies (like Germany, Italy, Poland, Spain). This classification explains why, in some countries the constitutional regulation of the military is weak in comparison with stronger powers in others. In consolidated democracies, there is a lack of specific constitutional provisions related to the military, contrary to the situation in post-authoritarian democracies, where there are more specific regulations related to the military realm, besides the general constitutional regulations applicable to state institutions and their personnel (general subjection to the rule of law, legality principle, and fundamental rights).¹⁰⁴

¹⁰³ HALTINER K. (2002), "Democratic control of Armed Forces: Renaissance of an old issue?", BORN H., CAPARINI M., FLURI P. Security Sector Reform and Democracy in Transitional Societies, Baden-Baden, Nomos, p. 76.

¹⁰⁴ NOLTE G., KRIEGER H. (2003a), "European Military Law Systems: Summary and Recommendations", Nolte G. (ed.), European Military Law Systems, Berlin, De Gruyter Recht, p. 3, and the chapter of both authors in the same book, "European Military Law Systems: General Comparative Report", pp. 23-29.

b. Forms of government

146. As well as political and historical considerations, the different forms of government existing in the democracies under study determines the leading role of Parliament or the government in defence command and decisions, despite certain common features which occur irrespective of the type of system. Monarchies, parliamentary republics, and presidential systems, as will be shown below, can also show common patterns on the oversight of armed forces, which reproduce or link with the general check-and-balance design of the power and the distribution of competences among organs.

c. Constitutional rules

147. The constitutional framework is of particular importance within the general framework of democratic control over the armed forces. It clearly makes a difference, whether or not a control mechanism, a competence, a decision or a sanction concerning the military is fixed at constitutional level in a particular legal system. Where a monitoring power has constitutional status, procedures to reform that norm would probably need a qualified quorum. Any legislation doing so would have to respect the limits imposed by the basic law. Constitutions in democracies are the founding sovereign legal documents. They set forth the procedural rules, division of competences or powers between public authorities, and fundamental rights of the citizens.

148. Almost all of the member States of the Council of Europe, (except those that do not have a standing army, such as Andorra, Iceland, Liechtenstein, Monaco and San Marino), have constitutional provisions governing directions and decisions concerning the military. Only a few of them, however, make explicit reference to a “democratic” or “civil” control over armed forces. The Constitution of Croatia, for example, states that the Constitution and the law shall regulate the organisation of defence, command, administration and *democratic control* over the armed forces of the Republic (Art. 7), and that the realisation of *civil control* over the armed forces and the security services of the Republic of Croatia are within the competence of Parliament (Art. 80). The Polish Constitution provides that the armed forces shall be subject to civilian and democratic control (Art. 26(2)). A different nuance is the one presented by the Portuguese Constitution, which states that the armed forces shall obey the competent bodies that exercise sovereign power (Art. 275 (3)).

149. The constitutions of the countries under study contain rules that impose weak restrictions on the use of force, or which have no explicit limit, as in the case of France.¹⁰⁵ Examples of the general limitations they introduce include statements to the effect that the use of force has for its purpose the defence and the protection of the State, its interests, sovereignty, or territory, or that it has to respect international law. An exception is Germany. Its Constitution establishes clearer limits to the use of force in Art. 87a (2). This article states that armed forces may be deployed for defence purposes and also to the extent expressly permitted by the Basic Law. Limitations on the use of force can reduce the sphere of decision making over the use of force at international level, as will be seen below. In Italy, Article 11 of the Constitution- specifying that war as an instrument of aggression against freedoms of other people and as a means for settling international controversies – is interpreted as a clear limitation to the use of force.

¹⁰⁵ In the case of France, only the preamble to the Constitution of 1946, incorporated into the Constitution of 1958, mentions that armed forces may not be used against the freedom of other people. NOLTE, KRIEGER, “European Military Law Systems: General Comparative Report”, (note 104), p. 32.

150. Concerning the accountability of decision-makers in military matters, it is not usual for the constitution to mention specific mechanisms separated from the general accountability channels for each state institution, and (particularly in this field), for the executive and the Parliament. The Constitution of Portugal does make specific provision for the personal responsibility of the President of the Republic in several cases, and special mention is made here of the performance of duties as Commander-in-Chief of the armed forces (Art. 134 a). The government is also stated to be “administratively responsible” for the direction of the State’s military departments and services (Art. 199 d). Finally, the Assembly shall be responsible, in relation to other bodies, for supervising the involvement of military contingents and security forces abroad (Art. 163 i). In France, the Government is accountable to the National Assembly for the conduct of armed forces that are under its disposal, in accordance with the general terms and procedures of censure motions, set out in articles 49 and 50 (Art. 20).

d. The control organ

151. The control and oversight of the defence sector can be carried out by the three branches of the State (executive, Parliament, and judiciary), by independent institutional actors (ombudsmen and auditors), and by the civil society and media. From a democratic point of view, control by State organs (especially by Parliament), is the most important type of control. The following sections will deal with the role of Parliaments, the role of the executive, the role of the judiciary, and the role of other oversight entities. The international dimension of the control of the military opens the study to the international standards that rule or are applicable to armed forces, and the international organisations in which the States of the Council of Europe take part. The democratic control of armed forces acting in international mission under the command of these organisations is of relevance, if one considers the progressive transition of military actions to the international sphere of collective security. It will be argued, in accordance with the existing literature, that the subordination of soldiers or units to the command of foreign armed forces alters or undermines the power of the Parliament or other democratic body to control the military decisions and make the servicemen and commanders accountable. When command is transferred or shared, the possibility of controlling the international performance of the troops is weaker. The access information, the decision-making, and way of executing the orders, are beyond the reach of national authorities.

2. The role of Parliaments

152. The importance of the role parliaments play in the democratic oversight of the military have already been explained. Scholars have identified four reasons to entrust Parliaments with the oversight of the security sector in general. These reasons are also applicable to control over armed forces:

- 1) Parliaments are a cornerstone of democracy, there to prevent autocratic rule;
- 2) The principle ‘no taxation without representation’;
- 3) Parliaments can create legal parameters for security issues;
- 4) They are a bridge to the public.¹⁰⁶

153. There is general consensus as to the paramount role of Parliament in the execution of these controlling functions over security and defence, and about the need to enhance public accountability of this sector. Both requirements are considered keystones of democracy.

¹⁰⁶ BORN H., FLURI P., JOHANSSON A. (eds.) (2003), *Parliamentary Oversight of the Security Sector. Principles, mechanisms and practices*, Geneva & Belgrade: Inter-Parliamentary Union & Geneva Centre for the Democratic Control of Armed Forces, pp. 6 ff.

154. Regardless of the system of government chosen by specific States, decisions concerning the use of force must be accounted for before Parliament.¹⁰⁷ Parliamentary powers over the military sector comprise powers to legislate, to approve the budget, to advise, to penalise, and to approve certain issues or actions.¹⁰⁸ The functions that a certain Parliament actually has, and their extent and intensity, depend on national rules. They also depend on the general checks and balances system that operates in a State, which is also applicable to the military sphere. In this sense, Parliaments review and exercise oversight over executive decisions and policy-making concerning defence and security policy. In order to achieve this control, Parliaments tend to employ three types of mechanism: debates, questions and interpellations, and inquiries.¹⁰⁹

a. Organs involved

i) Parliamentary Committees for oversight and control of armed forces

155. For the control to be effective, Parliaments should have specialist staff and structures in place, to develop the monitoring functions, and the necessary resources for their correct exercise. Most Parliaments have, over the years, created special committees to deal with the various parliamentary dimensions involved in the oversight of armed forces. The institutionalisation of Defence or Security Committees can be explained by several factors, including the renaissance of the subject of democratic control of armed forces, increasing democratic efforts towards specialisation and transparency in Parliaments, the tendency towards in-depth study (thus improving decision-making by creating committees or commissions with defined spheres of action¹¹⁰), and the general process of reforming the security sector.¹¹¹ The latter, in turn, has three main objectives: democratisation, adaptation to the new security environment, and internationalisation.¹¹² The right and practice of questioning the acts of the government – a characteristic of the democratic control of Parliaments over the executive – becomes specific and more accurate through the work of the committees.

¹⁰⁷ BORN H., HÄNGGI H. (2005), "The Use of Force under International Auspices: Strengthening Parliamentary Accountability", Policy Paper N° 7, Geneva, Democratic Control of Armed Forces, p. 3.

¹⁰⁸ These functions have been also classified as legislative, budgetary, elective, representative, scrutiny and oversight, and applied to decision making as to the use of force under the auspices of international institutions. BORN H., HÄNGGI H., "The Use of Force under International Auspices..." (note 107), pp. 4 ff.

¹⁰⁹ BORN H., FLURI P., JOHNSSON A., Parliamentary Oversight of the Security Sector (note 106), p. 77.

¹¹⁰ One point of inflexion related to the growing role of parliamentary committees was the conference "The Changing Role of Parliamentary Committees", held in Budapest, on 20-22 June 1996. LONGLEY L., DAVIDSON R. (1998), "Parliamentary Committees: Changing Perspectives on Changing Institutions", The New roles of parliamentary committees, Longley L., Davidson R. (eds.), London /Portland OR., Frank Cass, p. 7ff. This book provides information on the gradual institutionalisation of parliamentary committees in Europe, The United States and certain specific countries, together with a global perspective.

¹¹¹ Security Sector Reform, and by this way, democratic control of armed forces as an specific feature of it, is part of the overarching concept of democratic governance, as defined by the guidelines of the OECD Security Sector Reform and Governance. A DAC Reference Document, OECD, 2005 (online: <http://www.oecd.org/dataoecd/8/39/31785288.pdf>). BORN H., LAZZARINI C. (2006), "Civilian command authority over the armed forces in their national and international operations: A preliminary Study", Study on the request of the Council of Europe Venice Commission, DCAF, p. 3, available online: http://www.dcaf.ch/pcaf/venice_study.pdf.

¹¹² BORN, FLURI, JOHNSSON, Parliamentary Oversight of the Security Sector (note 106), p. 51.

156. The Committees on Defence and Security are created to advise and recommend to the plenary of the Parliament issues related to decision-making on the defence and security sector. They can be permanent (or standing), or created for a specific task (*ad-hoc*). The general key functions of Defence and Security Committees include security policy, legislation, expenditure, management and administration.¹¹³ Together with Committees on Defence, Security, or Armed Forces, focused on specific security sector issues, committees such as Foreign Affairs, Budget, Industry and Trade, Science and Technology, also have a role to play in issues related to the security sector,¹¹⁴ depending on the national regulations and the powers delegated to these expert groups.

157. Each Committee of Defence and Security exercises the powers and functions fixed by the particular legislation (i.e. rules of procedure of the chamber) or delegated by Parliament. The general powers mentioned above can be broken down as follows: a) development of legislation on defence matters, b) advice on the defence budget and monitoring of expenditure c) review of government defence policy d) consultation over international treaties, e) advice to Parliament about the use of force and deployment of troops, and f) monitoring of defence procurement. These powers can be developed through several mechanisms and activities, such as hearings, inquiries, questions to the Ministry of Defence or the government, requesting documents, requests for audits, scrutiny of transparency and efficiency in spending, examining petitions and complaints, from both military personnel and civilians.¹¹⁵

158. An interesting study of the powers of the Defence Committees of lower chambers of North Atlantic Treaty Organisation countries was carried out by the Democratic Control of Armed Forces Working Group on Parliamentary Control of Armed Forces, by means of a questionnaire distributed among these countries. Apart from posing questions on the existence of general oversight powers, the areas of consultation included the powers of the Committees to a) legislate, b) initiate legislation on defence issues, c) amend or rewrite proposed defence laws, d) question the Minister of Defence, e) summon the Minister of Defence to attend Committee/Plenary meetings and to testify, f) summon military and other civil servants to attend committee meetings and to testify, g) summon experts of society, h) obtain documents from the Ministry of Defence and military, i) carry out investigations (inquiries) on defence issues, and j) hold hearings on defence issues. The answers which could be chosen were that power pertains to: the committee, the plenary, both, to none.¹¹⁶

¹¹³ VAN EEKELEN W. (2002), "Democratic Control of Armed Forces: The National and International Parliamentary Dimension", DCAF Occasional Paper no. 2, pp. 19-21.

¹¹⁴ BORN, FLURI, JOHNSSON, Parliamentary Oversight of the Security Sector..., (note 106), p. 84.

¹¹⁵ These functions and activities are summarised in DCAF (2006), "Parliamentary Committees on Defence and Security", Backgrounder, online: <http://www.dcaf.ch/publications/kms/details.cfm?lng=en&id=18419&nav1=4>. A different list based on the areas covered by the Defence Committees is provided by VAN EEKELEN, "Democratic Control of Armed Forces...", (note 113), p. 18. He includes the following: Military doctrines and strategies; Long-term planning of the security sector, including high-level documents such as the concept of regional and national security or defence planning; Missions, tasks and objectives of the military; General organisation of the defence sector, including defence reform issues; International cooperation and treaties in the military/security/international humanitarian law realm; Peace missions: decision to participate in, or accept on national territory, international peace missions (peace-making, peace-keeping or peace enforcement), mandate, rules of engagement, type of troops and equipment (armaments); Disaster relief operations of the armed forces; Control of the execution of the defence budget; Industries involved and employment aspects; National service and military recruitment policy (civil and military staff); Gendarmerie and Paramilitary organisations, sometimes only during exceptional circumstances; Military justice.

¹¹⁶ VAN EEKELEN, "Democratic Control of Armed Forces..." (note 113), Annex iii, 'Powers of the Defence Committee'.

ii) Constitutional status of defence committees

159. With a few exceptions, a statute, a rule of the Parliament (rules of procedure), or a customary work division regulates the institutionalisation of the oversight function of Parliaments through committees. Only a few constitutions mention Defence Committees, these include Austria, Germany and Denmark.

- a) Under the Austrian Constitution, the competent committees of the National Council shall elect two standing sub-committees of inquiry to review measures to safeguard constitutionally established agencies as well as their operative capacity and intelligence measures to secure the country's military defence (Art. 52 a) (1)). These sub-committees have the power to request relevant information from the competent Federal Ministers and to inspect relevant materials, apart from material or sources whose disclosure would endanger national security or the safety of individuals (Art. 52 a) (3)).
- b) The German Defence Committee is, as are all the *Bundestag* Committees, a cross-party body that deals with defence matters, and prepares the decisions to be taken in the plenary sessions together with assisting Parliament in the function of controlling the government. This committee has as its main task the parliamentary oversight of the German armed forces. This committee also engages in matters related to international security policy resulting in a degree of overlap with the functions of the Committee on Foreign Affairs, which makes close cooperation between them necessary. This closed-door committee¹¹⁷ works on bills and motions referred to it by the plenary, or on its own initiative. An important task is the approval of the defence budget and major procurement projects.¹¹⁸ It is the only committee with the right to convene as a committee of inquiry (without the necessity for a parliamentary decision to that effect), according to the constitutional status and competences attributed to it by Art. 45a)(2) of the Basic Law.¹¹⁹ The committee of inquiry scrutinises the actions of the government, by collecting evidence and information and arranging hearings. The Defence Committee influences the preparation of the budget, including deliberations on it within the Budget Committee. The latter generally takes into account the recommendations of the former.
- c) Before December 2004, there was no specific Act that required the consent of the Parliament for the deployment of troops abroad. Nevertheless, a decision of 12 July 1994 of the Federal Constitutional Court¹²⁰ already required the consent of the Parliament in those decisions that had to be given, in principle, in advance. The Parliamentary Participation Act of 2005¹²¹ explicitly laid down the rights of the Parliament regarding the international deployment of troops.

¹¹⁷ Because of the nature of the matters involved, the meetings of this committee are held behind closed door, and access is restricted to the committee members.

¹¹⁸ This information has been taken from the Bundestag's page: http://www.bundestag.de/htdocs_e/committees/a12/index.html.

¹¹⁹ Article 45 a) (2): The Committee on Defence shall also have the powers of an investigative committee. On the motion of one quarter of its members, it shall have the duty to make a specific matter the subject of investigation.

¹²⁰ BVerfG, [90] of [12 July 1994].

¹²¹ Parlamentsbeteiligungsgesetz vom 18. März 2005 (BGBl. I S. 775), available online: <http://www.gesetze-im-internet.de/parlbq/BJNR077500005.html>.

- d) The Danish Foreign Policy Committee is a further example of a defence committee with constitutional status. This Committee is regulated by Section 19 (3) of the Constitutional Act¹²² and by a special Act (Danish Act no. 54 of 5 March 1954). The other parliamentary committees are governed by the Standing Orders of the *Folketing*. According to these rules, the Government has the duty to consult the Committee prior to any decision of major importance to foreign policy. The Committee, on the other hand, shall discuss with the Government matters of importance to Danish foreign policy and shall receive information from the Government about foreign policy affairs.¹²³ Additionally, it can address written questions to the government. When dealing with European matters, the functions of the Foreign Affairs Committee overlap with the European Affairs Committee. In practice, as in the case of Germany, they operate in close cooperation.

iii) Other peculiarities of defence committees

160. Other States in which defence committees have interesting functions and *modus operandi* are Finland, Spain, Romania and Great Britain. The Finnish Defence Committee, formed by 17 members, handles matters that fall within the sphere of the Ministry of Defence insofar as they are not handled by the Foreign Affairs Committee, such as military service, the Defence Forces, legislation pertaining to emergencies and peacekeeping activities. For this purpose, the committee hears testimony from experts from time to time, and follows national and international defence policy discussions. At the European level, this committee monitors European Union security and defence policy, and influences Finland's European Union position on these issues.¹²⁴

161. In Spain, both the Congress of Deputies and the Senate have a Defence Commission. They are standing legislative committees comprising a number of parliamentarians that reflect on a small scale the composition of the Chamber. Their functions are to propose and study bills of law related to the defence sector, to address questions to the government, for example, on the participation of the Spanish soldiers in international missions, and to request the presence of the Minister of Defence to give information on specific defence issues.

162. Romania has two permanent committees for defence, public order and national security, one in the Senate and the other in the Chamber of Deputies, created according to the constitutional provision that entitles each chamber to create standing, inquiry, special and joint committees (Art. 64 (4)).¹²⁵ Their functioning and activities are ruled by the Standing Order of the Chamber and the Standing Order of the Committee. Both committees for defence have the same competences and functioning, and they sometimes work together. They carry out legislative, approval, monitoring, and investigative functions related to defence and security. These committees, for example, approve the National Security Strategy, the White Paper on Security and Defence, and the State budget for the defence, security and public order sector. The deployment of troops abroad to participate in international military operations is considered by these committees, and they regularly monitor peace support operations. It also holds hearings of the Minister of Defence, the General Staff, and the commanders, and can invite

¹²² Section 19(3) states: "The Folketing shall appoint from among its members a Foreign Policy Committee, which the Government shall consult before making any decision of major importance to foreign policy. Rules applying to the Foreign Policy Committee shall be laid down by statute".¹²² The text of the Danish Constitution is available at: <http://www.folketinget.dk/?/samling/20061/menu/00000005.htm> (Publications in English on the Danish Parliament).

¹²³ See http://www.folketinget.dk/pdf/foreign_policy_committee.pdf.

¹²⁴ Information extract from the Parliament's page:

<http://web.eduskunta.fi/Resource.phx/parliament/committees/defense.htx>.

¹²⁵ The Constitution of Romania is available at: <http://www.cdep.ro/pls/dic/site.page?id=371>

civilian experts to assess their work. In addition, the defence committees can name special sub-committees for specific investigations on procurement of arms or military expenditures, and for exercising control over the governmental institutions that act in the defence, public order and security spheres.¹²⁶

163. The Defence Committee of the House of the Commons of the British Parliament monitors and holds accountable the Ministry of Defence and associated bodies, as armed forces.¹²⁷ It is elected by the Commons, composed of different political parties, and seeks to report by unanimity. The main way of developing its monitoring function is the undertaking of inquiries. They report on the basis of written evidence, as well as by testimonies, evidence that almost always takes place in public. The Report expresses the conclusions and the recommendations, and the government has to reply to the Committee within two months. The reports and the replies are public, and available on the website, as well as in printed format. The Committee can also hold informal meetings and visit the armed forces.

164. In some States, the Committee on Defence and Security has wide functions, delegated by Parliament in exercising the function of dividing up work and specialist areas. An example of this is the Committee on Defence and Security from the Assembly of "the former Yugoslav Republic of Macedonia",¹²⁸ which works in the areas of security and defence policy and defence plans of the State.¹²⁹

165. A special feature of parliamentary control may be seen in Belgium. Both chambers have committees in charge of foreign affairs and defence.¹³⁰ After the involvement of Belgian armed forces during the Rwanda crisis, a commission of inquiry was established, that recommended the formation of a special working group within the Senatorial Foreign Affairs Commission whenever Belgian troops are engaged abroad. This suggestion has been implemented.¹³¹

¹²⁶ See FUIOR T. (2003), "Parliamentary Oversight Over National Defence", (Romania. A Self Assessment Study), Trapans J., Fluri P. (eds.), Defence and Security Sector Governance and Reform in South East Europe: Insights and perspectives Volume I and II Albania, Bulgaria, Croatia, Republic of Moldova, Romania, "the former Yugoslav Republic of Macedonia", Democratic Control of Armed Forces (DCAF) & Center for Civil-Military Relations, online: <http://www.dcaf.ch/publications/kms/details.cfm?lng=en&id=21335&nav1=4>, pp. 52ff.

¹²⁷ See http://www.parliament.uk/parliamentary_committees/defence_committee.cfm.

¹²⁸ This excessively wide scope of functions covers the protection of the order stipulated by the Constitution; performing control in the field of defence and security; defence of the country and civil defence; co-operation with the collective defence and security systems to which the country has acceded; integration of the country in the Euro-Atlantic organisations and the relations of the country with these organisations; protection of the lives, personal security and property of the citizens guaranteed under the Constitution; production, sale, purchase, possession and carrying of weapons, parts of weapons and ammunition; protection of persons and property; citizenship; maintenance of public order; public gatherings and demonstrations; security of road, air, railway and lake transport; protection against natural disasters and epidemic diseases; registration of place of domicile and residence; border crossing and movement along borderlines; movement and length of stay of foreigners; and identification and resolution of border incidents and other violations of the state borders. These functions are listed in the website of the Assembly, online:

<http://www.sobranie.mk/en/default.asp?vidi=komisii&MandatID=6&NazivA=Committee+on+Defence+and+Security>.

¹²⁹ GAREVA R. (2003), "The Parliament, Defence Development and Security Sector Reform" (Macedonia. A Self Assessment Study), Trapans J., Fluri P. (eds.), Defence and Security Sector Governance and Reform in South East Europe... (note 126), pp. 44-45.

¹³⁰ Commission des Relations extérieures et de la Défense (Sénat); Commission de la Défense nationale and Commission des Relations extérieures (Chambre des représentants).

¹³¹ D'ARGENT P. (2003), "Military Law in Belgium", Nolte G. (ed.), European Military Law Systems, (note 104), pp. 201-202. See also Session de 1997-1998, 6 décembre 1997, Commission d'enquête parlementaire concernant les événements du Rwanda, Rapport fait au nom de la commission d'enquête par MM. Mahoux et Verhofstadt, Recommandation N° 54. "Lorsque notre pays participe à une mission à l'étranger, un groupe de travail de la commission des Affaires étrangères du Sénat en suivra les développements de près et en informera le Parlement", Document législatif no. 1-611/7, online:

b. Acts and issues under control

i) Approval and control of the military budget

166. One important competence is the decision over the military budget that derives from the general budgetary power of the Parliament. Defence budgeting is the process of allocating financial resources for defence ministry equipment, infrastructure and programmes. The defence budget and national military expenditure are not always the same thing. The total annual cost of maintaining a defence establishment is, in almost all countries in the world, higher than the official data provided by governments as the defence budget.¹³² For example military constructions, arms procurement, military pensions, received military aid, and paramilitary forces, may all come under other chapters and ministries than defence. Alternatively, at times, the official figure for the national defence budget also includes the civil defence.¹³³

167. The power to fix the military budget allows Parliament to decide to spend more on one issue than on another. In this way, it can make conditional the decisions adopted by the commanders of armed forces.

168. The importance of this type of decision is quite evident, when one examines the high amount of the defence budget in some countries.¹³⁴ Such data reinforces the idea that democratic legitimacy is a must in terms of the decision-making process when assigning these sums of money to defence activities.

169. The way of exercising decisions varies from state to state, especially with regard to the procedure for adopting the military budget. Correspondingly, the efficiency of the control will also vary. For a better-informed decision, Parliaments should have access to all the documents related to the defence budget. In fact, in some countries like Denmark or Luxembourg, the Parliament is given information on each item of the budget, in other words, with the most detailed level of the budgeting. However, in other countries such as France, Greece and Poland, only the parliamentary committee on defence, rather than Parliament as a whole (which is the body which takes the decision in the end), can manage information on the detailed defence budget items.¹³⁵

<http://www.senate.be/www/?Mlval=/Registers/ViewReg&COLL=S&POS=1&PUID=16778222&TID=16778570&LANG=fr>.

¹³² In many African or Middle Eastern countries the military has sources of income outside the formal state budget. In Nigeria for example, under General Sani Abacha, a large part of the Petroleum fund went to the armed forces. These outside sources, and frequent extra-budgetary activities on the part of the army, gives the army considerable liberty in spending and makes the budget virtually impossible to control. From UNDP Human Development Report 2002, p. 89.

¹³³ In Sweden for example, the defence budget includes allocations for economic defence (measures to protect oil reserves, food supplies, other important economical functions) and psychological defence (defence from hostile enemy propaganda). Information from the Stockholm International Peace Research Institute (SIPRI), www.sipri.org/contents/milap/milex/skoens.pdf/download.

¹³⁴ In 2005, for example, the budget of the US Defense Department was raised to a total of US\$ 478.2 billions, while the United Kingdom assigned US\$ 48.3 billions and France US\$ 46.2 billions. See the data of the Stockholm International Peace Research Institute [on line].

http://www.sipri.org/contents/milap/milex/mex_major_spenders.pdf.

¹³⁵ BORN H., FLURI P., JOHNSON A. (2003) Parliamentary Oversight of the Security Sector. Principles, mechanisms and practices, Geneva/Belgrade, Inter-Parliamentary Union/Geneva Centre for the Democratic Control of Armed Forces, p. 131.

170. The Constitution of Latvia states that the budget and laws concerning the military may not be submitted to national referendum (Art. 73). Other constitutions also make special mention of the military budget. In this sense, Chapter 9, Art. 3(3) of the Swedish Constitution prescribes that in fixing the military budget the Parliament shall take into account the need for funds for defence of the realm in time of war, danger of war, or other exceptional circumstances. The German Constitution states that the numerical strength and general organisation structure must be shown in the budget (Art. 87a(1)).

171. The examples mentioned above demonstrate the considerable differences in national practices in budgeting. However, one rule remains constant: *the executive proposes and the Parliament disposes*.¹³⁶ The degree to which Parliament is able to perform its control in this field is essentially dependant on the quality and comprehensiveness of the information it receives, and on its actual power to amend the budget. The budget proposal can consist of a document of a few pages in length containing general information about the overall sums of money allocated to different agencies, or it can span hundreds of pages of complex and very detailed information. The essential indicator of the impact of Parliament in the budgeting process is the extent to which it can influence the content of the budget through the amendment process. In broad terms, there are three models for parliamentary involvement in defence budgeting.¹³⁷

172. Budget-making Parliaments have the capacity to amend or to reject budget proposals, and the capacity to formulate alternative budget proposal. The US Congress is a notorious example of a Parliament which plays an important role in the development of the defence budget. The President's draft budget serves only as a proposal in the strictest sense and has no compulsory character. The Congress holds the Department of Defence firmly accountable, often to a level of detail described by some as excessive micro-management. Such powers require substantial supporting infrastructure in Parliament in terms of staff, experts and money.

173. Budget-influencing Parliaments can amend or reject the budget, but lack the capacity to put forward their own proposals. Many Parliaments in Europe fall into this category. When ministers fail to convince the legislature of the necessity for certain expenditures, cuts of relevant items can free up additional resources to address more urgent needs elsewhere. The German Bundestag, the Netherlands and the Danish Parliaments initiate hundreds of budgetary amendments every year and consider the most intricate details of the budget.

174. Parliaments with little effect on budget formulation: may reduce existing items, but not include new ones nor increase the number of items. Westminster type Parliaments are representative of this model. Traditionally, they give their consent to the defence budget as a global figure and individual amendments are not easily achieved (e.g. Australia, Canada, India, New Zealand, South Africa, the United Kingdom and Zambia). However, even if these Parliaments exert little influence over the budget formulation, they play a vibrant role in auditing defence expenditures, through hearings, inquiries and public reports aimed at informing public opinion. If Parliament's recommendations and the conclusions of parliamentary debates are effectively taken into account during budget formulation, this might diminish the need for amendment activity.

¹³⁶ The principle of legislative authorisation of all public spending and taxation is called the "rule of law" in public finance.

¹³⁷ WEHNER J. "Back from the Sidelines? Redefining the contribution of Legislatures to the Budget Cycle", World Bank Institute Working Papers 2004, p. 5.

Table 1: Budgetary practice of Parliaments

Approve the budget	Country
– with significant changes	Czech Republic, Denmark, Germany, Hungary, US.
– with minor changes	Austria, Finland, France, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden, Switzerland, Turkey.
– without changes	Canada, United Kingdom, Greece.

Source: The OECD Budgeting Database 2002 and DCAF survey 2006

175. Once the budget is adopted, Parliament may enforce its *ex post* oversight, including audit functions. The accounts and annual reports of the security services are an important source in aiding Parliaments to assess how money was spent in the previous budget year. The ministries that are key with regard to security – traditionally defence, interior, trade and industry and more recently communications and finance – regularly present the Parliament with fully documented reports on how they spend the money allocated to them.

176. In the *ex post* oversight of the budget, Parliaments are always assisted by an independent institution, a national audit office (sometimes called the Auditor General, National Audit Office, Budget Office or the Chamber of Account), that undertakes the detailed and professional financial audit of all government departments. The United Kingdom's National Audit Office has won recognition for its efficiency and good relations with Parliament. Its detailed scrutiny of departmental spending produces some 50 reports a year which are destined for Parliament. The annual Major Projects Report provides details of the largest 25 defence procurement projects of the Ministry of Defence.¹³⁸ The Ministry of Defence also provides Parliament with an annual statement of the top 20 new defence works projects. Ideally, the audit process should enable Parliaments to evaluate the legality, efficiency and effectiveness with which the departments in question have used their resources.

177. Defence procurement is an important part of the overall defence budget,¹³⁹ representing the process by which national security authorities acquire the equipment and services that are necessary to fulfil their mission. Given that defence contracts represent large amounts of public money, they have a political nature, long term consequences for national industry and are prone to corruption.¹⁴⁰ They are increasingly attracting public attention.

178. Generally, parliamentary responsibility in this matter is two-fold:

- *a priori*: to ensure a clear legislative framework for the whole process, from tender procedures to off-set clauses;
- *post facto*: to monitor the transparency and the legality of the process through the use of traditional oversight instruments, and thus prevent parochial concerns from harming the national interest. In many countries defence procurement represents one of the main topics of Defence Committee hearings and inquiries.

¹³⁸ See http://www.nao.org.uk/publications/nao_reports/05-06/0506595_II.pdf

¹³⁹ Procurement may represent a large part of defence expenditures: in 2003 North Atlantic Treaty Organisation countries allocated an average 2% GDP to defence, of which 17% was allocated to procurement.

¹⁴⁰ Transparency International's Global Bribe Payers Index rates the defence sector as one of the top three sectors for bribery and corruption, along with the oil sector and major infrastructure projects. The IMF report on corruption and military spending explains, "Procurement is an important channel through which corruption affects military expenditures." Moreover, according to the same report, "bribes account for as much as 15% of the total spending on weapons acquisition." The U.S. Department of Commerce estimates that 50% of all bribes in global transactions are paid for defence contracts; numerous single source defence contracts have been awarded for operations in Iraq.

179. Attempts by Parliament to oversee defence procurement go much further in a few countries in which important contracts have to be submitted to the approval of the defence committees. In Germany and the Netherlands this is the case for contracts exceeding 25 million Euros, and in Poland for contracts above 28 million Euros. In other Parliaments, even if the defence committee's approval is not mandatory, the Minister of Defence is obliged to inform the committee and give details about all contracts above a certain value (Hungary and United Kingdom). Sometimes, Parliament or the defence committee can even be involved in specifying the need for equipment, in comparing and selecting a supplier or a product, and in assessing offers for off set arrangements (the Czech Republic and the United States).¹⁴¹

ii) Sending troops abroad¹⁴²

180. National participation in international peace missions has become an important foreign policy and defence issue, which is of direct concern for the Parliaments.

181. Some constitutions make explicit reference to authorisation for sending troops to participate in missions outside of their border. The Constitution of the Czech Republic states that armed forces can be sent only with consent of both Chambers, with a special quorum (Art. 43(3) b), Art. 39(3)). The Croatian Constitution has the same requirement, except when their national armed forces join an international mission of an organisation of which Croatia is part with the purpose of offering humanitarian aid (Art. 7).¹⁴³ Georgia has a similar rule that emphasises the prohibition of using armed forces for honouring international obligations without the consent of the Parliament (Art. 100 (1)), and so has Lithuania (Art. 67.20), Republic of Moldova (Art. 66 I)), Norway (Art. 25(2)), Russian Federation (Art. 102 d)), Slovakia (Art. 86 I), Sweden (Chapter 10, Art. 9(1)) and Ukraine (Art. 85(23)). The Hungarian constitution awards to Parliament the power of deciding on the use of armed forces abroad in all kinds of missions (Art. 19(3) j)). Furthermore, issues related to the use of Hungarian armed forces are expressly excluded from referendums (Art. 28/C (5) h)).¹⁴⁴ In the case of Sweden, the above mentioned article also requires that the sending of troops to other country be permitted under a law, which sets out the prerequisites for such action. The Turkish Constitution (Art. 92) requires prior parliamentary authorisation for sending troops abroad or permitting the stationing of foreign troops in Turkey, except in cases required by international treaties to which Turkey is a party, or by international rules of courtesy.

182. Some countries have developed tighter legislative regulation on the deployment of troops abroad. Spain is a case in point. Spanish armed forces have the mandate to guarantee the national sovereignty and independence of Spain, and to defend the territorial integrity and the constitutional order. At international level, they contribute to the collective security in the international organisations in which Spain takes part. National defence in Spain is regulated by the Organic Act 5/2005, 17 November, of National Defence. This Act includes missions not expressly covered in the previous law of 1980 (Art. 16), and stricter rules as to the respect of the international legality of missions abroad, together with new mechanisms of control. In this sense, Parliament adopts a "protagonist" role regarding missions abroad. In the latter regard,

¹⁴¹ For more information see Democratic Control of Armed Forces Backgrounder Parliaments' Role in Defence Procurement, at <http://www.dcaf.ch/publications/kms/details.cfm?lng=en&id=25266&nav1=4>

¹⁴² KU C. and JACOBSON A. Democratic Accountability and the Use of Force in International Law, 2003. Hans BORN and Heiner HÄNGGI, The Use of Force under International Auspices: Strengthening Parliamentary Accountability, 2005; Ingrid Beutler and H. Born, 'Between Legitimacy and Efficiency: A Comparative View on Democratic Accountability of Defence Activities in Democracies', in G. Caforio, Social Sciences and the Military: An Interdisciplinary Overview, London, Routledge, 2006.

¹⁴³ This constitution also fixes a temporal limit to the decision of the government on sending troops abroad (up to 60 days, Art. 43.4).

¹⁴⁴ Article 73 of the Constitution of Latvia has a comparable prohibition.

Art. 4 (2) requires prior authorisation by Congress of the participation of the armed forces in missions beyond the national borders. For the participation of the armed forces abroad in missions that are not directly related to the defence of Spain or the national interest, the government shall make a consultation and request authorisation from the Congress (Art. 17). The government shall periodically inform the Congress as to the progress of the operations abroad (Art. 18). Several conditions must also be fulfilled in these cases: a) express petition of the government of the State or the territory where they develop or authorisation of the Security Council, or agreement by the European Union and the North Atlantic Treaty Organisation; b) the goals must be defence, humanitarian, or peacekeeping c) they must adjust to and respect the principles of conventional international law incorporated in the Spanish legal order (Art. 19). In Italy, regarding the issue of sending troops abroad the recent practice gives signs of change: in 2003 (Iraq) and in 2006 (Lebanon) the deployment of troops abroad has been previously approved by the Parliament while in the past parliamentary debates took place after the troops had been deployed. This new orientation of the procedure can be interpreted as a follow up of a specific deliberation of the Defense Commission of the Chamber of Deputies, on 16 January 2001.

183. Decision-making on international peace support operations goes hand in hand with the rules of engagement that settle issues such as the aims of the operation, the chain of command, the duration of the mission, the level of force, the types of troops, and the financial consequences of the mission.

184. The degree and the instruments at the disposal of Parliaments to direct and to guide the policy of the national government on this matter differ from the traditions and constitutional provisions. The main indicator of the role of a particular Parliament in the deployment of troops abroad is the power to formally approve national participation in an operation, before national personnel are deployed to the mission.

185. Using this indicator, the following table ranks Parliaments within three bands of involvement in sending military troops abroad: *High*, for Parliaments with the power of prior approval, *medium*, for Parliaments whose power of prior approval is limited by significant exceptions, and *low*, for Parliaments without the power of prior approval.

Table 2: The level of parliamentary involvement in authorising national participation in international missions abroad before troops deployment, as defined by national legislation (see Annex A).

Level of parliamentary involvement	Country
High – power of prior approval	Austria, Denmark, Finland, Germany, Ireland, Slovakia, Spain, Sweden, Turkey.
Medium – important exceptions from prior approval	Bulgaria, Czech Republic, Hungary, Italy, Luxembourg, Netherlands, Romania.
Low – no prior approval	Belgium, France, Greece, Poland, Portugal, Slovenia, United Kingdom

Source: DCAF survey 2007 as amended by the Secretariat

186. Only a few Parliaments possess the power of prior approval in all situations, regardless of the diverse nature of international missions. This is the case in Austria, Denmark, Finland, Ireland, Luxembourg, Slovakia and Sweden, where the legislation in place gives the national Parliament the authority to approve participation in all international operations.

187. In analysing the national legislation in place in some of the European States, several types of *exceptions* and situations that limit parliamentary involvement in authorising national participation in international missions are discernible. These exceptions and situations may potentially create a space for a democratic deficit. The three main types of such exceptions appear below:

- Some Parliaments have the legal power to approve participation in military operations, while their approval for civilian operations is either unnecessary or remains unclear. In Germany for example, Parliament has to give prior approval for military operations, but can only *post facto* oversee civilian operations. The Spanish Parliament was routinely marginalised in decisions relating to authorised use of force, but, following the unpopular decision to participate in the war in Iraq and the terrorist attacks in Madrid that led to the change of government in the March 2004 elections, a new law was adopted¹⁴⁵ to give Parliament the power to give prior approval for military missions abroad. Still, the law makes no reference to civilian operations.
- In “new” European democracies like Bulgaria,¹⁴⁶ the Czech Republic,¹⁴⁷ Hungary¹⁴⁸ and Romania¹⁴⁹ the legislation defines important exceptions from prior parliamentary approval. The decision to participate in operations which are legitimised by a treaty or an international organisation of which the country is a member, is considered to be an executive responsibility. Therefore these exceptions cover all North Atlantic Treaty Organisation and European Union operations.¹⁵⁰
- In some countries the legislation allows for exceptions from parliamentary approval in the event of limited national participation in a mission. This applies for example in Denmark,¹⁵¹ Germany,¹⁵² and Ireland.¹⁵³ Sometimes the decision to participate in an operation may only be taken by a parliamentary committee, if few personnel are deployed, or if the operation is not considered to be very important. Examples of this are the Foreign Affairs Committee in Finland¹⁵⁴ and the Defence Committee in Spain.¹⁵⁵

¹⁴⁵ Ley Organica no 5, 2005.

¹⁴⁶ Law on deployments, December 2005, The Council of Ministers is authorised to send armed forces abroad, under obligations from a treaty of a political-military character, and also for humanitarian missions.

¹⁴⁷ Constitution amendment Art. 43 1999, The Government decides on deployments when they concern the international contractual obligation of common defence and PSOs under the decision of the international organisation of which the Czech Republic is a member.

¹⁴⁸ Constitution amended in February 2006.

¹⁴⁹ Law on troops deployment 42/2004, The president takes the decision to send troops as part of operations deployed on the basis of a treaty to which Romania is a party.

¹⁵⁰ A double legislative trend may be noted in the last years: mature democracies aim to increase the level of parliamentary oversight of international operations while young democracies have tended to lessen parliamentary authority in the matter. During their first years of democracy South East European countries established a high level of parliamentary control, because of the uncertainty over the future government's composition, policy, and, above all, to restrain the appetite of the executive for taking decisions without consulting people's representatives. This trend was reversed while the countries began the process of joining the North Atlantic Treaty Organisation and the European Union, when all the mentioned Parliaments adopted new legislation that decreased their level of involvement.

¹⁵¹ Observer missions are very small in number.

¹⁵² For missions of low intensity and importance a government request is circulated among the members of Parliament and is considered to be approved unless one fraction or a minimum of five per cent of parliamentarians call for a formal procedure within a seven day period.

¹⁵³ For less than 12 persons deployed.

¹⁵⁴ For less than 10 persons deployed.

¹⁵⁵ The importance of the mission remains to be appreciated by the Standing Bureau.

188. At the other end of the spectrum, in countries such as Belgium, France, Greece, Poland, Portugal, Slovenia, and the United Kingdom, parliamentary approval is not necessary for national participation in any missions abroad. Although government may ask for prior parliamentary approval, it remains the prerogative of the executive to determine whether this request is appropriate. In some of the “old” European democracies, like France or United Kingdom,¹⁵⁶ members of Parliament are no longer at ease with the current state of deployment legislation or with its inconsistent interpretation. Therefore they try to compensate for the lack of power of approval by developing procedures for parliamentary information and consultation in the early stages of the decision-making process.¹⁵⁷

189. Even when the Parliament is excluded from the decision-making process, it may seek to hold the government accountable through the usual methods of ex post oversight such as questions, interpellations, debates, hearings and inquiries.¹⁵⁸ Additionally, parliamentarians often visit the troops deployed abroad. Despite using all these oversight instruments, the information national Parliaments receive about international missions can be considered to be insufficient for an effective involvement. This increases the potential for a democratic deficit. Parliaments are dependent on their national governments to provide them with information about missions abroad. However, many other relevant actors, playing a significant role at intergovernmental level, are not very well known within national Parliaments, and it is impossible to call them to account.

190. The better informed Parliaments appear to be those with the power of prior approval. The competent committee, usually the one charged with defence matters, develops awareness and accumulates knowledge on the matter. Debates about national participation in international operations usually involve the presence of Minister of Defence representatives and a detailed discussion of the mission’s mandate, budget and duration. Occasionally, operational implications such as rules of engagement, command and control, type of weapons and equipment to be used and risk assessment, come up for discussion. However, the mission details represent only collateral information, used to consolidate MPs’ general views on the operation.

191. In many Parliaments there is a lack of information about the general national financial contributions to international missions. Scrutiny by most parliaments of the funds for external operations is limited to the annual approval of this expenditure, as part of the overall national defence budget. When participation in individual operations is considered by Parliaments, an estimate of financial costs may be presented by the government, but the real cost of each mission is very difficult to calculate, given that all the costs involved for personnel, training and equipment spread over several budgetary chapters and appropriations, and over several years. In some countries the budget for international operations is made up from the budget of different ministries. In Finland for example, the budget of the Ministry of Foreign Affairs covers personnel costs, and the budget of the Ministry of Defence covers the material costs. In Spain, the funds initially forecasted for international operations in the Minister of Defence budget are

¹⁵⁶ See the House of Lords Constitution Committee’s report “Waging War: Parliament’s role and responsibility”, and its follow up, published February 2007

<http://www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/236/23602.htm>;
<http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/51/51.pdf>.

¹⁵⁷ Good examples in this regard are Committees for European Affairs which, in several Parliaments, hold a scrutiny reserve power or give the government mandates for negotiations at European Union level. The case of Portugal is notable as the Chairman of the Defence Committee and another two MPs are members of the Superior Council for National Defence, which advises the Government on matters related to national defence and organisation of the Armed Forces.

¹⁵⁸ BORN H and HÄNGGI H., *The Use of Force under International Auspices: Strengthening Parliamentary Accountability*, 2005.

supplemented from the Emergency Fond administered by the Ministry of the Economy throughout each year i.e. no parliamentary approval would be required when money is transferred from this Fund.¹⁵⁹

c. Mechanisms of control

i) Legislation

192. Legislation is one of the principal ways in which Parliament controls military activity. Through different kinds of rules, it defines the mission, functions, structure, and competences of armed forces, specifying the constitutional mandate; in other words, it shapes the legal framework within which the military develops its defence and security activities.

193. Several constitutions explicitly mention the legislative powers of the Parliament on military and defence issues.¹⁶⁰ The normative delimitation of the mission of the armed forces at constitutional level can act as a limit to the exercise of the power to legislate, since Parliament must respect the Constitution when developing the related legislation. Not all the constitutions settle the missions of armed forces, although some of them do.¹⁶¹ In other legal systems, the mission of armed forces is defined by means of parliamentary statutes.¹⁶²

194. Nevertheless, and as a general feature, the legal framework of the mission and permissible activities of the armed forces, whether fixed by the Constitution or by statute, remains relatively open. This means that their powers and competences are only relatively limited. This openness means, for example, that, in Belgium, all missions abroad which conform to certain political conditions and which do not violate the general rules of public international law are permissible. The same pattern exists in France, where the only constitutional limitation is that armed forces may not be used for "conquest" and "against the freedom of any people."¹⁶³ Only in a few countries, such as Germany or Spain, do their constitutions make specific reference to the permissibility of certain missions.

¹⁵⁹ The difference between the amount initially allocated for international operations in the Ministry of Defence's budget and the final costs covered from the Emergency Fond is significant: more than 400 million Euros in 2005.

¹⁶⁰ Examples of this are Austria (Art. 10(1), (15)), Azerbaijan (Art. 94 (18)), Estonia (Art. 126), France (Art. 34), Georgia (Art. 98(3)), Germany (Art. 87b(2), by federal statutes), Lithuania (Art. 139), Luxembourg (Art. 96), Republic of Moldova (Art. 108(2), requires an organic law), Portugal (Art. 163(i)), Romania (Art. 118 (2), requires an organic law), Slovenia (Art. 124, two-thirds majority), Spain (Art. 8(2)), Switzerland (Art. 60(1), federal matter), "The former Yugoslav Republic of Macedonia" (Art. 122, with a special majority of the two-thirds), Turkey (Art. 72), and Ukraine (Art. 17).

¹⁶¹ Cases of the later are Austria (Arts. 9A and 79), Germany (Art. 87a), Italy (Art. 52), the Netherlands (Art. 97), Poland (Arts. 5 and 26(1)), Portugal (Art. 275) and Spain (Art. 8 (1)). One can argue that Germany has a Constitution which limits and delineates in a better form the mission of armed forces (for defence purposes only), and, thereby, the permissible operations.

¹⁶² This is the case in Belgium, Denmark, Luxembourg and Poland. In Belgium, the Law of 20 May 1994, on the "mise en oeuvre des forces armées, à la mise en condition, ainsi qu'aux périodes et positions dans lesquelles le militaire peut se trouver", sets out an administrative classification of permissible operations (See D'ARGENT P. (2003), "Military Law in Belgium", Nolte G. (ed.), European Military Law System, Berlin, De Gruyter Recht, p. 191). For this reason, Parliaments do not have additional constitutional restrictions on settling the functions of the military sphere, other than that exercised by the principle of legality, common to both public and private spheres. In the cases of France and United Kingdom, the exercise of the power of the Parliament to regulate the military is quite general. In both States, the mission of the armed forces is defined not by statutes, but by Government Administrative Acts (NOLTE G.; KRIEGER H. (2003) "Comparison of European Military Systems", Nolte G. (ed.), European Military Law System, Berlin, De Gruyter Recht, pp. 34ff.)

¹⁶³ NOLTE G., KRIEGER H. (2003) "Comparison of European Military Systems", Nolte G. (ed.) European Military Law System, Berlin, De Gruyter Recht, p. 39.

195. The definition of competences through statutes, then, acts as a first filter and mechanism of control over military acts and decisions, since Parliament fixes and delineates the sphere inside which the decisions are adopted. Only decisions adopted within this legal framework will be legitimate. Those outside it are liable to challenge before the courts or corresponding channels.

196. Military law systems, as we have come to know them, are also the result of the exercise of the power of the Parliament to legislate in this area. Military law systems provide the overall framework through which the actions of all members of the armed forces are regulated. These systems serve as the primary mechanisms of internal accountability and are designed to promote discipline, uniformity and efficiency, and to safeguard the reputation of the armed forces. According to Georg Nolte and Heike Krieger's study on European military law systems, two basic models of military law systems exist in Europe. The most common framework distinguishes between military disciplinary law and criminal law, whereas the second model (which is found only in the United Kingdom and Denmark) does not make this distinction.

197. Military disciplinary law regulates the conduct of members of the armed forces and serves as the bedrock of internal regulation. The infringement of disciplinary law does not necessarily entail the breach of criminal law. There are many actions that breach military discipline but are not criminal offences. Criminal law also regulates actions by members of armed forces who may be prosecuted in either military or civilian courts for criminal offences committed whilst on duty. In most Council of Europe member States special criminal legislation applies to the military. This is either included in general criminal law or in codes of criminal procedure specific to the military. Military law systems regulate a broad range of relationships and activities including the relationship between superiors and personnel, complaints procedures, the structure of armed forces and the social rights of personnel.

ii) Decisions taken by the Parliament in the military field

198. Some relevant military decisions correspond directly to the Parliament. In this sense, they are not properly mechanisms of control or oversight over armed forces, but the execution or direct exercise of its own competences in the military field. Examples of such decisions include the approval of military budget (described overleaf), declaration of war, or the power to ratify, modify or renounce international treaties on military issues.

199. A further example is the resolution to declare war, when this is exclusively within the remit of Parliament. Some cases of co-decision on this issue are mentioned below. The declaration of war is within Parliament's remit in Armenia (Art. 81(3)), Austria (Art. 38), Georgia (with reinforcing quorum, Art. 62)), Latvia (Art. 44), Republic of Moldova (Art. 66 m), Serbia (Art. 73 (6)) and Turkey (Arts. 87, 92)). Nevertheless, it should be kept in mind that the contemporary practice of armed conflicts abandoned the issuance of formal declaration of war¹⁶⁴ (nowadays, armed hostilities are, from the legal point of view, armed conflicts, and not necessarily wars), which makes this specific form of control less efficient in practical terms.

200. Other decisions related to the military are also within the competence of Parliament. Examples include the decision to declare a state of emergency, in those States in which the latter is not the prerogative of the Head of the State or of the government, or the power to ratify, modify and renounce international treaties on military and defence issues. Examples of constitutional provisions for the latter include Albania (Art. 120(1)a)), Bulgaria (Art. 85 (1)1)), Croatia (Art. 139), Estonia (Art. 121(4)), and Georgia (Art. 100(1)). Usually, constitutions or domestic laws bestow on Parliament the power to control treaties concluded either by the State and/or the government in the military field. However, military and defence agreements

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Dennis ALLAND, *Droit international public*, Paris, PUF, 2000, p. 541.

concluded between or among ministries of defence are normally submitted for the approval of the government itself.¹⁶⁵

iii) Direct control

201. The democratic control of military decisions is that exercised over decisions adopted by organs with military competences. The most important are the decisions taken by the armed forces themselves, through their commanders, and those adopted by the Head of State or the government.

202. Decisions and acts by the armed forces can be subjected to several types of control. Parliamentary oversight can be classified as direct and indirect control, based on the type and impact of the interference on the decision of the organ exercising military competences.

203. Direct control consists of the possibility assigned to an organ democratically composed or elected to substitute the decision of the competent organ in military or defence affairs. Within this type of control, one can distinguish the following sub -sections:

1) Co-participation in the decision

204. Co-participation in a military decision means that the democratic body participates in the decision-making. In fact the decision is adopted jointly by the Parliament and the body with military competence.

205. Regarding the declaration of war, the Danish Constitution states that “except for purposes of defence against an armed attack upon the Realm or Danish forces, the King shall not use military forces against any State without the consent of the Parliament”. In France, parliamentary authorisation is also needed for a declaration of war and the continuation of domestic state of emergency. The same co-participation is a constitutional requirement for declaration of war or state of emergency in Germany (Art. 115a), Italy (Art. 87), Luxembourg (Art. 37), the Netherlands (Arts. 96.1 and 103), and Spain (Arts. 63.3 and 116).

206. Decisions to send troops abroad in countries such as Czech Republic, Denmark, Germany, Hungary, Italy, Netherlands, Norway, Sweden or Turkey (Art. 92) require parliamentary approval. The Constitution of the Czech Republic states explicitly that parliamentary authorisation is necessary to deploy Czech military forces outside the territory of the Czech Republic, unless these decisions have been reserved to the government. This latter power of the government refers to the deployment of military forces to comply with international obligations against aggressions or for rescue operations in case of national disaster. It has a temporal limit (up to 60 days) and may be revoked by Parliament (Art. 43).

2) Control *a posteriori* of military decisions with the possibility to revoke or substitute them

207. This type of control implies that Parliament can review decisions by the competent organ, but only once they have been adopted. This is the case, for instance, of the declaration of martial law and state of emergency in Poland. Such a decision is taken by the President, but he or she must submit the regulation to Parliament within 48 hours of signing such a regulation. The *Sejm* may annul the regulation of the President (Art. 231).

¹⁶⁵ This is, for instance, the case in Romania, where Law no. 590/2003 on treaties provides in its Art. 19 that treaties at state level (in any field), and treaties concluded at intergovernmental level concerning, inter alia, military cooperation are to be ratified by Parliament. See Irina NITA, Bogdan AURESCU, Commentary on the Romanian Act no. 590/2003 on treaties (Articles 13-24), Romanian Journal of International Law, no. 2 (January-June 2006), pp. 143-144.

208. The same applies to urgent decisions. In Germany, for example, it is possible to take a decision to deploy armed forces to combat danger in cases of natural disaster (Art. 35) or internal emergency (Art. 91). In both cases, the decision can be revoked by the *Bundesrat*.

209. To the cases mentioned above, one can add the general procedures of impeachment and mechanisms to make the government legally accountable for its acts and military decisions which are in breach of or *ultra vires* its competences.

iv) Indirect control

210. Indirect control carried out by a democratic organ consists of some degree of interference in military decisions or the addition of conditions to decisions. It is possible to identify several mechanisms of indirect control.

1) Appointment and dismissal of top commanders

211. In the case of the appointment of high commanders by the head of the State or by government, this type of indirect control is not really present. However, there is an indirect control when Parliament intervenes in the appointment of high commanders. Under the Constitution of Estonia, for example, high commanders are to be appointed by Parliament upon the proposal of the President of the Republic (Art. 127). Similarly, Art. 84(14) of the Constitution of Lithuania requires the assent of Parliament to the appointment and dismissal of high commanders.

212. A decision by Parliament to remove a decision-maker or high commanders could also be considered a case of indirect control of military decisions. It is a way of government responsible, when the decision-maker it has appointed adopts an unlawful or inconvenient decision.

2) Participation of the Parliament in general defence policy

213. Parliament has neither the means nor the vocation to place itself as “co-manager” of defence policy. Nor should Parliament seek to run or decide on actions in parallel with the executive, in the matter of defence policy. However, Parliament can play an important role in defining general defence policy. Indeed, by using fully the range of means of its legislative authority, by launching sound analyses or research on topics of its choice, by performing its institutional role of proposals and reflection, not simply those of control, Parliament enjoys an effective power of influence which has proved to be significant. Furthermore, the participation of Parliament in general defence policy can also be provided for in legislation. For instance, in France, the Law on Military Programming 2003-2008 provides that every other year, a debate within Parliament must be organised in order to discuss future plans for defence policy and their implementation.¹⁶⁶

3) Taking decisions of special interest to the armed forces

214. Other types of indirect control can be seen when Parliament takes decisions of special interest to the functioning of armed forces. Through them, the democratic body can influence the decision of the competent organ, deciding issues that are important and relevant to the development of the military sphere. Within this mechanism of control, one can identify, for example, control of the budget and expenditure, control over equipment decisions, inspections and visiting of troops abroad, and the control of arguments.

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See CDL-DEM(2007)004 for a detailed analysis of the situation in France i.e.

215. Control of the budget and of expenditures: as mentioned above, budgeting comes within Parliament's remit. The approval of the budget can be also considered an indirect control, when some bargaining takes place between the amounts of money fixed to carry out the defence mission and to cover the military expenditure, and a policy that Parliament is trying to implement. For example, the budget could include special items to promote the incorporation of women within the armed forces. In this way, Parliament is exercising indirect control over the functioning of the military.

216. In the Netherlands the approval of the budget is subject to a written phase, in which the relevant committee asks questions and obtains written answers before an oral debate takes place, usually in the plenary. Policy questions are discussed in committees and, if sufficiently controversial, also in plenary.¹⁶⁷ Parliament can deal with other questions over its decisions in this discussion.

217. Another indirect mechanism of control is the power of Parliament to control the expenditure of the military budget after its approval. Parliament can request specific information and documentation about the spending, and carry out inquiries if necessary.

218. Control over equipment decisions: Parliament can review contracts for arms equipment. In the Netherlands, for instance, the Parliament can consider contracts above €50 million before the contract is signed. It has a right to place the item on the agenda of the Second Chamber for plenary discussion and vote.¹⁶⁸ Armament procurement and equipment can also be reflected in the budget, and some constitutions mention them as issues that require regulation by parliamentary statute (Portugal (Art. 163 (d)), Italy (Art. 117(2)d), and Switzerland (Arts. 60(1) and 170 (1) (2)).

219. Inspections and visiting troops abroad: Parliament, and especially the specialised committees in defence and military affairs, can carry out inspections in military institutions. Additionally, in many cases the Parliament has the right to visit troops whilst they are engaged in international support operations.

220. Control of arguments: a further mechanism is the control of arguments, which is a more diffuse kind of control. The grounds of the working plans and strategies that the armed forces usually present to the government or to Parliament each year can be viewed as a control parameter of military decisions, in the sense that the latter must be coherent with the former.

221. The same type of control of arguments takes place when Parliament summons military personnel or commanders to explain or to give reasons for certain decisions. Comparably, in the Netherlands, Art. 100 of the Constitution states that the Government, "prior to the engagement or making available of the armed forces for the maintenance or promotion of the international rule of law, shall provide Parliament with information concerning the intended action".

222. The designation of direct interlocutors between Parliament and the armed forces falls within this same line of control. Thus, for example, in Germany the *Bundestag* appoints a Parliamentary Commissioner for the Armed Forces who works very closely with the Defence Committee and attends its meetings.

¹⁶⁷ VAN EEKELEN W. (2002) "Democratic Control of Armed Forces: The National and International Parliamentary Dimension", DCAF Occasional Paper, (2), p. 22.

¹⁶⁸ VAN EEKELEN W. (2002) "Democratic Control of Armed Forces: The National and International Parliamentary Dimension", DCAF Occasional Paper, (2), pp. 24-25.

223. Some decisions of the government in urgent or emergency situations must be communicated to Parliament as quickly as possible, so that it can review the arguments and the way the need for the decision arose. An example can be seen in the declaration of war that the King can make in Belgium (Art. 167.1.2 of the Constitution)

3. The role of the Executive

224. The role of the Executive in the control of armed forces varies in the different member States of the Council of Europe. A priori, the executive commands the armed forces although the form of government adopted (parliamentary monarchy, presidential republic or parliamentary republic) determines the role played by either of the two branches of the executive (i.e. Head of State and government). Accordingly, this role can be more or less active, symbolic or effective, formal or substantial.

225. At constitutional level, mentions of the power of the executive over the military sphere are related to the position and the competences of the Head of the State, the government, and the Minister of Defence, depending on the State. Sometimes, the powers are more precisely expressed. In other cases, there are vague references, which are complemented at legislative or administrative level. The existence of a National Security Council is also regulated, on some occasions, in the Constitution, which normally works with the Ministry of Defence or the government.

226. In many of the states under study, the president, the monarch, or the government as a collective holds the position of Commander-in-Chief of the armed forces. But in some States, (most of them presidential regimes), the president of the republic has the power to conclude international treaties on defence and security, the power to declare a state of emergency and war. He or she also has the power to appoint or dismiss high commanders and to make decisions about sending troops for international peacekeeping or enforcement missions.

a. Organs involved

i) Position of the Head of the State

227. Nolte and Krieger divided ten European States according to their form of government into monarchies (Belgium, Denmark, Luxembourg, the Netherlands, Spain, and the United Kingdom), parliamentary republics (Germany and Italy), and presidential systems (France and Poland). They identified some common patterns among them with respect to the position of the Head of the State. In the case of monarchies and parliamentary republics, the monarchs and the presidents have symbolic or formal control over the military, while the presidents of presidential regimes have substantial powers.¹⁶⁹

1) Monarchies

228. Generally speaking, monarchs cannot act independently in their command powers over armed forces, neither can they exercise any form of veto powers. In the United Kingdom, the government exercises the royal prerogative in military matters as the Crown, according to the general understanding, and there is no specific rule in the unwritten constitution of the United Kingdom concerning armed forces. The government is, however, subject to general forms of parliamentary control.¹⁷⁰ Nevertheless, there is settled jurisprudence from the courts that “the disposition and armament of the armed forces [are] within the exclusive direction of the

¹⁶⁹ NOLTE, KRIEGER, “European Military Law Systems: General Comparative Report”, (note 104), pp. 51ff.

¹⁷⁰ NOLTE, KRIEGER, “European Military Law Systems: General Comparative Report”, (note 104), p. 32.

Crown,”¹⁷¹ which means that “a person cannot challenge in the courts a decision of the crown to deploy British forces in any place ... nor can a decision as to the armament with which it is supplied be challenged.”¹⁷²

229. The Belgian Constitution requires counter-signature by a minister for acts of the King, as a result of which the former assumes responsibility for those actions (Art. 106). The formal powers of the King within the military sphere are limited to those expressly recognised by the Constitution. The King commands the armed forces, determines the state of war and the cessation of hostilities, and concludes treaties that are beyond the responsibility of communities and regional governments and which require approval from the Council (Art. 162).¹⁷³

230. In Denmark, the King holds executive powers, and exercises this supreme authority through the ministers (Arts. 3, 12). The King conducts international affairs, but needs Parliament's consent to enter into obligations of major importance and for undertaking acts in the international sphere, as well as for concluding treaties (Art. 19). The use of force against foreign States requires prior consent by Parliament. An exception here is defence against armed attack upon the State, in which case the measure must be submitted immediately to Parliament.

231. Luxembourg is another example of a monarchy in which the monarch has only formal powers over the armed forces. The Duke concludes international treaties, which only come into force once they have been sanctioned as a law and published in the same way as any other legislation. He also commands the armed forces, and declares war and cessation of hostilities. In the latter situation, he needs authorisation by two thirds of the votes of the chamber (Art. 37).¹⁷⁴

232. In the Netherlands, supreme authority over the armed forces is vested in the government (formed by the King and the ministers, Art. 42), and not in the King alone, under Art. 97(2) of the Dutch Constitution.¹⁷⁵ Responsibility for the command of the military rests upon the ministers. Consequently, the Head of State only has a very limited role in defence matters, confined to a few decisions adopted by royal decree which require the King's signature.¹⁷⁶

233. In Spain, the government (comprising the President, Vice-President and ministers) conducts military administration, and the defence of the State (Art. 97) The King formally exercises the supreme command of the armed forces (Art. 62 h). In common with some of the monarchs mentioned above, the acts of the King require the countersignature of the competent minister, or of the President of the government, in order to be valid (Arts. 56(3) and 64).

¹⁷¹ Chandler v. Director of Public Prosecution (1964) AC 736.

¹⁷² ROWE P. (2003), “Military Law in the United Kingdom”, Nolte, G. (ed.), European Military Law Systems, (note 104), pp. 833-834.

¹⁷³ The text of the Belgian Constitution was taken from: http://www.fed-parl.be/constitution_uk.html.

¹⁷⁴ The Constitution of Luxembourg can be found at: <http://www.igp.public.lu/legislation/constitution.pdf>.

¹⁷⁵ The text of the Dutch Constitution is available at: <http://www.houseofrepresentatives.nl/procedures/constitution/index.jsp>.

¹⁷⁶ BESSELINK L. (2003), “Military Law in the Netherlands”, Nolte G. (ed.), European Military Law Systems, (note 104), p. 563.

2) Parliamentary Republics

234. In the parliamentary republics mentioned above, the presidents have only formal or ceremonial powers in the military sphere. This means that Parliament has effective decision-making and controlling powers over armed forces. In Germany, the Federal President only has the power to appoint officers. (Art. 60 (1)).¹⁷⁷ In Italy, the President of the Republic is the commander of the armed forces, presides over the Supreme Council of Defence, and declares war where this decision has previously been taken by the Chambers (Art. 87).¹⁷⁸ In Turkey, the commander-in-chief is an integral part of the Grand National Assembly and is represented by the President of the Republic. Under the Constitution of Malta though the Executive authority is vested in the President (Article 78 (1)) it can and in fact is exercised by the Prime Minister and his Cabinet who shall have the general direction and control of the Government of Malta and the cabinet is responsible collectively to Parliament (Article 79(2)). The President is bound to act according to the advice of the Prime Minister, with exceptions that do not include the control of the Armed Forces. In actual fact the portfolio of the Armed Forces is held usually personally by the Prime Minister though certain duties are delegated to a Parliamentary Secretary.

3) Presidential Republics

235. Presidential systems give more powers to the Head of the State. In France, the President has several powers, such as the role of commander-in-chief, presiding over higher national defence council and committees (Art. 15), and appointing military posts of the State (Art. 13).¹⁷⁹ These powers, nonetheless, require counter-signature by the ministers of the government (Prime Minister or the competent minister). The President has also emergency powers in cases of serious and immediate threat to the national institutions, the independence of the Nation, the integrity of the territory or the fulfilment of international commitments (Art. 16).

236. The President of Poland is commander-in-chief of the armed forces, appoints and dismisses military commanders of the armed forces, and confers military ranks as specified by statute (Art. 134). The Council of Ministers, in turn, ensures the internal and external security of the state, and exercises general control in the field of national defence (Art. 146).

ii) National Defence Council

237. Only a few constitutions designate a specific Council for the National Defence. Some examples are Georgia, Lithuania, Poland, Romania, Turkey and Ukraine. Under the Constitution of Georgia, the Council of National Security is in charge of the military apparatus to defend the country (Art. 99). The President of Georgia appoints the members of the Council of National Security (Art. 73(4)), and an Organic Law determines its authority and procedure. The Council of National Security shall submit proposals as to the structure and strength of the armed forces, for approval by the President and Parliament respectively (Art. 98(3)).¹⁸⁰

¹⁷⁷ This power is part of the general power to appoint and dismiss federal judges, federal civil servants, and military officers; and to grant pardons. The text of the German Constitution can be consulted at: http://www.bundestag.de/htdocs_e/parliament/function/legal/germanbasiclaw.pdf

¹⁷⁸ The text of the Italian Constitution is available at: http://www.camera.it/cost_reg_funz/345/copertina.asp.

¹⁷⁹ The text of the French Constitution is available at: <http://www.assemblee-nationale.fr/english/8ab.asp>.

¹⁸⁰ Available online: http://www.parliament.ge/index.php?lang_id=ENG&sec_id=68.

238. Lithuania has a State Defence Council, consisting of the President of the Republic, the Prime Minister, the Speaker of the *Seimas*, the Minister of National Defence, and the Commander of the Armed Forces. The President of the Republic heads this council. Its main task is to coordinate and consider the main issues related to defence. Legislation is in place to regulate the way of developing this task, its activities and powers (Art. 140).¹⁸¹

239. Poland also has a National Security Council that is an advisory body to the President of the Republic regarding internal and external security of the State (Art. 135). The President of the Republic appoints and dismisses the members of this council (Art. 144(26)).

240. In Romania, the Constitution provides for the Supreme Council of National Defence, presided over by the President of Romania as Commander-in-Chief of the armed forces (Art. 92 (1)). This organ organises and coordinates the activities of defence and security of the State, and its participation in international peacekeeping and collective defence alliance systems (Art. 119). It also reports to the Chambers about its functions (Art. 65 (2) g)).

241. The Constitution of Turkey establishes a National Security Council. The President of the Republic has the power to convene meetings of this Council, and to preside over it (Art. 104b). The Constitution imposes a duty on this Council, to “submit to the Council of Ministers its views on the advisory decisions that are taken and to ensure the necessary coordination with regard to the formulation, establishment, and implementation of the national security policy of the State”. The Council of Ministers has to evaluate the decisions of the National Security Council, in relation to the principles of preservation of the existence and independence of the State, integrity and indivisibility of the country, and peace and security of society. The rest of its duties and rules of organisation are settled by law.¹⁸²

242. The President of the Ukraine is Head and Chairman of the Council of National Security and Defence of Ukraine (Art. 106). Provision is made for this body in Art. 107 of the Ukrainian Constitution and by law.¹⁸³ The Council is a co-ordinating body that controls the activity of the executive on issues of national security and defence. However, these controlling functions are not as strong as they seem, because the President appoints the members of the Council, and the decisions of the latter come into force by a decree of the President of Ukraine.¹⁸⁴

iii) The Minister of Defence

243. Ministers of Defence are not usually commanders-in-chief. Nevertheless, some constitutions make provision for the functions and competences of the Minister of Defence, without going into detail. These include Albania, France, Germany, Lithuania, and Poland. Under the Albanian Constitution, the President of the Republic, through the Prime Minister and the Minister of Defence, commands the armed forces in peacetime (Art. 169(1)). The Minister of Defence proposes to the President the names of candidates for commanders of the army, navy, and air force (Art.169(3)). In France, it is the Prime Minister who is responsible for the national defence (Art. 21). The German Constitution establishes that the Federal Minister of Defence has the command of the armed forces (Art. 65a). In Poland, the Constitution provides that the President, in times of peace, shall exercise command over the armed forces through the Minister of National Defence (Art. 134(2)). The Minister of National Defence requires the

¹⁸¹ The Constitution of Lithuania is available at: <http://www3.lrs.lt/home/Konstitucija/Constitution.htm>.

¹⁸² Article 118 of the Turkish Constitution was amended on October 17, 2001. The text of the Constitution of Turkey is available at: <http://www.byegm.gov.tr/mevzuat/anayasa/anayasa-ing.htm>.

¹⁸³ See the Constitution of Ukraine at: http://gska2.rada.gov.ua:7777/site/const_eng/e_const_contents.html.

¹⁸⁴ Further information about the Ukrainian system of democratic control over armed forces can be found in SHERR J. (2001), “Security, Democracy and ‘Civil Democratic Control’ of Armed Forces in Ukraine”, G 90 The Conflict Studies Research Centre, online: <http://www.globalsecurity.org/military/library/report/2001/G90.pdf>.

President to confer military ranks (Art. 134(4)). Finally, in Lithuania the Minister of Defence forms part of the State Defence Council, and, as such, considers and participates in the co-ordination of the issues of defence, and is responsible to Parliament (*Seimas*) for the administration and command of the armed forces, together with the government and the Commander of the armed forces (Art. 140).

b. Acts and issues under control, and mechanisms of control

i) Requesting and controlling the use of armed forces in states of emergency¹⁸⁵

244. The study will concentrate on the issue of state of emergency, martial law has consequently been expressly excluded from this study since it should be regulated by specific standards. A state of emergency derives from a declaration made in response to an extraordinary situation posing a fundamental threat to a country. Examples include natural disasters, civil unrest, an epidemic or an economic crisis. The declaration may suspend certain normal functions of government, or may authorise government agencies to implement emergency preparatory measures, and to limit or suspend civil liberties and human rights. In some situations, martial law is declared, allowing the military greater authority to act.¹⁸⁶ The defence department acquires special powers through the declaration of a state of emergency, which allows the Ministry of Defence to bypass most of the parliamentary procedures.¹⁸⁷ For this reason, mechanisms for preventing the abuse of emergency powers by national authorities should be provided for in legislation. This fundamental principle is reaffirmed in Parliamentary Assembly of the Council of Europe Recommendation 1713(2005), stating that 'exceptional measures in any field must be supervised by Parliaments and must not seriously hamper the exercise of fundamental constitutional rights.'¹⁸⁸

245. Each country has its own definition of the circumstances that might give rise to a state of emergency,¹⁸⁹ the procedures to be followed, the limits on the emergency powers or the rights that can be suspended. However, international norms have been developed that can provide useful guidance.

246. For example, Article 15 of the European Convention on Human Rights provides for derogations in times of emergency:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when

¹⁸⁵ FINER E., *The man on horseback : the role of the military in politics*, New York : F.A. Praeger, 1962.

¹⁸⁶ DCAF Backgrounder, *States of Emergency*, October 2005.

¹⁸⁷ VAN EEKELLEN W., *Democratic Control of Armed Forces. The National and International Parliamentary Dimension*, DCAF Occasional Paper no. 2, October 2002, p. 14.

¹⁸⁸ Parliamentary Assembly of the Council of Europe Recommendation 1713(2005), *Democratic oversight of the security sector in member States*, point Vb.

¹⁸⁹ E.g. Articles 35(2), 87a (a) and 91 of the German Constitution: internal emergency, natural disasters or humanitarian catastrophes at home; or Article 8 of the Spanish Constitution providing that armed forces have it as their mission to defend Spain's constitutional order, which is interpreted to mean, inter alia, that armed forces may act in cases of internal and external emergency. Nolte G. (ed.), *European Military Law Systems*. Berlin: De Gruyter Recht, 2003, pp. 46-47.

such measures have ceased to operate and the provisions of the Convention are again being fully executed.

247. Similar principles are established in the International Covenant on Civil and Political Rights, Art. 4. The United Nations Special Rapporteur on Human Rights and States of Exception stipulates that States are to observe the following principles:¹⁹⁰

- temporality, which refers to the exceptional nature of the declaration of a state of emergency;
- exceptional threat, which requires the crisis to present a real, current or at least an imminent danger to the community;
- declaration, which refers to the need for the state of emergency to be announced publicly;
- communication, which refers to the obligation to notify other States and relevant treaty-monitoring bodies of the measures taken;
- proportionality, which refers to the need for the gravity of the crisis to be proportioned to the measures taken to counter it;
- legality: human rights and fundamental freedoms during a state of emergency must respect the limits provided for by the relevant instruments of international and national law; furthermore, a state of emergency does not imply a temporary suspension of the rule of law, nor does it authorise those in power to act in such a way that the principle of legality is disregarded, as they are bound to these principles at all times;
- intangibility, which concerns those fundamental rights from which there can be no derogation, even during times of emergency. These are the right to life; the prohibition of torture; freedom from slavery; freedom from *post facto* legislation and other judicial guarantees; the right to recognition before the law and the freedom of thought, conscience and religion.

248. The constitutions of certain states, such as Denmark, contain no provision for states of emergency.¹⁹¹ However, most States have legal mechanisms governing the declaration of a state of emergency and the implementation of derogations in their constitution. As concerns the prerogative to declare a state of emergency, the three most common approaches are the following:

249. The executive declares the state of emergency without parliamentary involvement. The French Constitution, for example, authorises the President to declare and maintain an emergency unilaterally.¹⁹² Poland, by contrast, does not always require explicit legislative approval, but has created a compensating formula involving strict time limits. Upon the recommendation of the Council of Ministers, the President can declare an emergency for a period of not more than ninety days. Should he require a “one-off extension”, he can obtain sixty more days with the express approval of a majority of the Sejm.¹⁹³

¹⁹⁰ BORN H. and FLURI P. Parliamentary Oversight of the Security Sector, Handbook edited by Democratic Control of Armed Forces and the Inter-parliamentary Union, 2003, p. 101.

¹⁹¹ Nolte G. (ed.), European Military Law Systems. Berlin: De Gruyter Recht, 2003, p. 46.

¹⁹² Article 16 of the French Constitution authorises the President of the Republic to exercise emergency powers “[w]hen the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments are under serious and immediate threat, and when the proper functioning of the constitutional public powers is interrupted.”. The President not only decides whether a particular threat qualifies under the two conditions, but also how long the state of emergency lasts. See B. ACKERMAN, The Emergency Constitution, The Yale Law Journal, Vol. 113(5), 2004, p. 1038.

¹⁹³ Polish Constitution, Art. 230(1). While the President does not require the affirmative approval of the Sejm during the first ninety-day period, this assembly can annul the emergency by an absolute majority vote in the presence of at least half the statutory deputies. Id. Art. 231.

250. The executive declares the state of emergency but must have this ratified by Parliament before it can proceed with emergency measures, e.g. Germany,¹⁹⁴ Spain¹⁹⁵ and Turkey (Arts. 121, 122).

251. Parliament itself declares the state of emergency (e.g. Hungary, which requires a two-thirds majority before an emergency takes effect.)¹⁹⁶

252. It is crucial that Parliament and the judiciary exercise oversight over the government, so as to avoid abuses. The first available control mechanism is to provide for parliamentary ratification of the decision of the executive to declare a state of emergency.¹⁹⁷ As a general rule, governments must provide a well-considered justification both for their decision to declare a state of emergency and the specific measures to address the situation. Most Parliaments also have the power to review the state of emergency at regular intervals and to suspend it as necessary. Furthermore, the *post hoc* general accountability powers of Parliament, i.e. the right to conduct inquiries and investigations on the execution of emergency powers, are extremely important for assessing government behaviour.

253. Next to Parliament, the judicial system plays a crucial role in the control of the executive's prerogatives during states of emergencies, taking decisions on the legality of a declaration of a state of emergency as well as reviewing the legality of specific emergency measures. Moreover, the judicial system must continue to ensure the right to fair trial. It must also provide individuals with effective recourse in the event that government officials violate their human rights. In order to guard against infringement of non-derogable rights, the right to take proceedings before a court on questions relating to the lawfulness of emergency measures must be safeguarded through the independence of the judiciary.

ii) Appointment of top commanders

254. The Constitution and legal framework should define which State body appoints and promotes the top-commanders of the armed forces, in particular, the commander-in-chief and the commanders of the army, navy and air force. It must be underlined that some countries do not have a military commander-in-chief (e.g. Austria, Germany, and Switzerland). In these countries, a so-called 'inspector-general' heads the armed forces.

255. The appointment of top commanders can be subject to the approval of the Head of State (president or monarch), prime minister, minister of defence, the cabinet and Parliament, or a combination of these actors. However, as the table in Annex B shows, Parliament is only rarely involved in this decision; only in a few countries is Parliament required to approve the names proposed by the executive. Examples are Estonia and Lithuania.

256. Parliament should be given the power to express its consent to important appointments, in order to keep the executive accountable and to ensure that the rule of law is respected in the appointment procedures. Furthermore, parliamentary involvement is crucial to ensure transparency.

¹⁹⁴ In exceptional cases, in Germany the military can be called upon by the government of a regional State to render support to the police (constitution, Art. 35.2).

¹⁹⁵ NOLTE G., p. 42. Article 116 of the Spanish Constitution.

¹⁹⁶ Hungarian Constitution, Art. 19(4), ACKERMAN B., The Emergency Constitution, p. 1054.

¹⁹⁷ Democratic Control of Armed Forces Backgrounder, States of Emergency, October 2005, available at www.dcaf.ch/publications.

4. The role of the Judiciary

257. The real function of the judiciary is to guarantee respect for the rule of law, that is, to protect the rights and freedoms of citizens and of other persons within the State's jurisdiction, and to ensure respect for the principles and rules of procedure set out by the legal order. The courts act when a violation of rights or conflict of principles both by the State authorities, the public personnel, and the citizens, is submitted to them, and judge according to the evidence and the Law.

258. Each State defines the structure, competences, and functioning of their judicial system. As a general rule, the judicial systems divide their jurisdiction according to the matters or issues under review. The division is sometimes made according to the personal status of the individual involved in the case. There may be provision in the Constitution for the judging of breaches of the law committed by military personnel, commanders, and organs that take decisions in the military sphere, or which are concerned with armed forces missions and activities. The jurisdiction of the court sometimes depends on the military sphere or subject (for example, a civilian who threatens national security, or who commits an act which is defined as a crime in the criminal military code. The State judicial system can have special military jurisdiction to judge one or both of the possibilities described above, or may use the channels of the established common or ordinary jurisdiction. The military courts, as special courts that can be inside or outside the structure and hierarchy of the common judicial system, can be competent to judge only criminal subjects, or both disciplinary and criminal actions. Within the special military courts, one can also distinguish between standing courts and courts *ad-hoc*.¹⁹⁸

259. The European Court of Human Rights stated in various cases that the European Convention on Human Rights does not prohibit military courts from trying military personnel if the conditions of independence and impartiality set out in Art. 6 (1) of the Convention are respected.¹⁹⁹

a. The role of the Constitutional Courts

260. Constitutional Courts play a central role in the constitutional structure of contemporary democracies. Their judicial review function is the ultimate legal remedy within the boundaries of the territory of the State. Recent English cases have imposed human rights standards even upon military acts outside the country.²⁰⁰ Their role as guardians of the constitutional order, specifically of the rule of law, democratic procedures, and the rights and freedoms of citizens, make the Constitutional Courts a key part of the mechanisms of checks and balances.

261. Military affairs reach Constitutional Courts when some act or decision by the armed forces violates fundamental or constitutional rights, undermines the rule of law, or challenges the democratic order. The role of the Constitutional Court in defence and security matters depends not only on the legal practice and culture of each State, but also on the confidence and contribution of this organ to the consolidation of the rule of law. More particularly, the Constitutional Court has a greater impact in some countries than others on the configuration of binding jurisprudence and the interpretation of the military law.

¹⁹⁸ NOLTE G., KRIEGER H., "European Military Law Systems: General Comparative Report", (note 104), p. 161.

¹⁹⁹ *Morris v. United Kingdom*, no. 38784/97, § 59, CEDH 2002-I, *Cooper v. United Kingdom* [GC], no. 48843/99, § 106, CEDH 2003-XII, et *Önen v. Turkey*, (Dec.), no. 32860/96, 10 February 2004), *Maszni v. Romania*, no. 59892/00, § 42.

²⁰⁰ *R(on the application of Al Skeini) v. Secretary of State for Defence* [2007] UKHL 26. The case concerns the ill-treatment accorded Iraqi civilians in a United Kingdom military facility in Iraq.

262. The *Bundesverfassungsgericht* has played an important role in military affairs. In the Somalia Case (1994), for example, the German Constitutional Court made an interpretation of the Basic Law (*Grundgesetz*) under which the use of the military in armed forces operations required approval of the Bundestag. The Basic Law does not explicitly cover this possibility. Regarding the use of force in international operations, the same judgment adopted a broad concept of 'system of mutual collective security', that included the actions under North Atlantic Treaty Organisation implementing resolutions by the United Nations-Security Council.²⁰¹

263. Some other examples of the role of the Constitutional Court in the military sphere can be quoted. The *Corte Costituzionale* in Italy has contributed to the interpretation of the 'democratic spirit clause' and the principle of political neutrality. It also encouraged reform legislation in the seventies, such as the Conscientious Objection Act.²⁰² Political neutrality of armed forces was also an important issue of constitutional interpretation in Poland.²⁰³ The Spanish Constitutional Court has discussed, *inter alia*, the duty to obey,²⁰⁴ and the military jurisdiction. In the latter, an evolution in its position on this issue is discernible.²⁰⁴

264. By contrast, in other countries, such as Denmark, there are restrictions on the review of administrative decisions (for instance, a claimant with legal standing must bring the case to the courts). As a result, in practice there is no judicial control over the use of military force, or participation of troops in multinational. operations.²⁰⁵

b. Constitutional provisions referring to military jurisdiction

265. At constitutional level, the situation within the member states of the Council of Europe. can be summarised as follows. There are constitutions that 1) settle military courts, 2) establish the possibility of creating military courts by law, 3) forbid the existence of military courts, or 4) are silent on this issue, or grant a general mandate to the legislator to create different types of courts. The last example does not rule out the possibility of these special types of courts. Further review of the relevant legislation would be necessary, to determine whether or not military courts exist. In the case of 1) and 2), the constitution can indicate the military jurisdiction as a general rule for military servicemen, or as an exceptional tribunal that is established only in wartime or in time of martial law.

i) Constitutional regulation of military courts

266. Armenia (there shall be military courts established by law, Art. 92), Belgium (specific laws cover the organisation of military courts, Art. 157(1)), Czech Republic (only until 31 Dec. 1993, Art. 110), Greece (special statutes provide for military, naval and air force courts which shall have no jurisdiction over civilians (Art. 95 no. 4 a)), Italy (military courts in time of war have jurisdiction according to the law. In time of peace they only have jurisdiction over military offences committed by members of the armed forces (Art. 103 (3)), Luxembourg (special laws regulate the organisation of military tribunals, their duties, and the rights, obligations, and terms

²⁰¹ NOLTE G., KRIEGER H. (2003), "Military Law in Germany", Nolte G. (ed.), European Military Law Systems, (note 104), pp. 346ff.

²⁰² LUTHER J. (2003), "Military Law in Italy", Nolte G. (ed.), European Military Law Systems, (note 104), p. 433.

²⁰³ KOWALSKI M. (2003), "Military Law in the Republic of Poland", Nolte G. (ed.), European Military Law Systems, (note 104), p. 653.

²⁰⁴ COTINO HUESO L. (2003), "Military Law in Spain", Nolte G. (ed.), European Military Law Systems, (note 104), pp. 773, 811.

²⁰⁵ JENSEN J.A. (2003), "Military Law in Belgium", Nolte G. (ed.), European Military Law Systems, (note 104), p. 247.

of office of their members (Art. 94 (1)), Poland (military courts (Art. 175 (1)),²⁰⁶ Malta (court-martials, Art. 93(2)(a)), Portugal (the composition of courts of any instance that try crimes of a strictly military nature shall include one or more military judges, as laid down by law (Art. 211 no. 3); in time of war, courts martial with jurisdiction over crimes of a strictly military nature shall be formed (Art. 213)), Spain (the principle of jurisdictional unity forms the basis of the organisation and operation of the courts. The law shall make provision for the exercise of military jurisdiction strictly within a military framework and in cases of state of siege (martial law), in accordance with the principles of the Constitution (Art. 117 (5)), and Turkey (military justice shall be exercised by military courts and military disciplinary courts (Art. 145); the Military High Court of Appeals is the last instance court for reviewing decisions and judgments given by military courts (Art. 156); The High Military Administrative Court is competent to review the legality of administrative acts and actions concerning military personnel and military service (Art. 157)).²⁰⁷

ii) Constitutional remission to law for the creation of military courts

267. Bulgaria (martial courts by law, Art.119), Georgia (establishment of a court martial shall be permissible at war and exclusively within the system of the courts of general jurisdiction) Art. 83 no. 3), Germany²⁰⁸ (the Federation may establish military criminal courts for the Armed Forces as federal courts. They may only exercise criminal jurisdiction while a state of defence exists, and otherwise only over members of the Armed Forces serving abroad or on board warships (Art. 96 (2)); With the consent of the Bundesrat, a federal law may provide for the exercise of federal jurisdiction over criminal proceedings arising under paragraph (1) of Article 26 [acts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression or involving national security] by courts of the Länder (Art. 96 (5)), Ireland (military tribunals may be established for the trial of offences against military law alleged to have been committed by persons while subject to military law and also to deal with a state of war or armed rebellion (Art. 38 no. 4.1)), Italy the legislation (law. N° 561/1988) provides for the establishment of a Council of the military judiciary which has functions which are similar to those of the Superior Council of the ordinary judiciary, Latvia (in the event of war or a state of emergency, court cases shall be heard by military courts and they shall act on the basis of a specific law (Arts. 82 and 86)), and the Netherlands (different rules may be established by Act of Parliament for martial law (Art 113(4)).

iii) Constitutional prohibition of military courts

268. Austria (general prohibition, except in time of war, Art. 84), Portugal (without prejudice to the provisions concerning courts martial, courts with the exclusive power to try certain categories of crime shall be prohibited (Art. 209 no. 4), Romania (general prohibition of establishing extraordinary courts, while admitting specialised courts of law (Art. 126(5)), and Slovenia (extraordinary courts may not be established, nor may military courts be established in peacetime (Art. 126)).

²⁰⁶ For violations of the Constitution or of a statute committed within their office or within its scope, the Commander-in -Chief of the Armed Forces shall be constitutionally accountable to the Tribunal of State (Trybunał Stanu) (Art. 198 (1)). The Tribunal of State (different from the Constitutional Tribunal) rules for the constitutional accountability of the highest officers of state, and it is composed of a chairperson, two deputy chairpersons and 16 members chosen by the House of Representatives (Sejm) for the current term of office of the House of Representatives (Sejm) from amongst those who are not Deputies or Senators (Arts. 198-201 of the Polish Constitution)

²⁰⁷ The above-mentioned articles of the Turkish Constitution regulate in detail the competences of these special military courts.

²⁰⁸ Although the German Constitution establishes the possibility of creating them, the Federal Parliament has not made use of this competence. NOLTE G., KRIEGER H., "European Military Law Systems: General Comparative Report", (note 104), p. 161.

iv) Constitutions with no specific provisions on military courts

269. Albania, Andorra, Azerbaijan, Bosnia and Herzegovina, Croatia, Cyprus, Denmark, Estonia, Finland, France, Hungary, Iceland, Liechtenstein, Lithuania, Republic of Moldova, Monaco, Norway, Russian Federation, San Marino, Serbia, Slovakia, Sweden, Switzerland, "The former Yugoslav Republic of Macedonia", Ukraine, and United Kingdom.

270. From an analysis of the constitutional provision concerning the role of the judiciary in exercising control over armed forces, two cases deserve attention because of the explicit constitutional limitation to the possibility of judicial review, or the accountability of the President of the Republic or related governmental bodies with military competences. In Romania, acts by the military command are beyond the scope of competences of the administrative courts that generally carry out judicial control of administrative acts by public authorities (Art. 126 (6)). This exemption, however, refers only to administrative courts, (and not to the jurisdiction of ordinary courts). In 2007, the military section of the High Court of Cassation and Justice was abolished and following a decision of the Constitutional Court, it was decided that the military courts and military prosecution offices only have competence over military personnel (not over civilians).

271. In the case of Turkey, acts by the President of the Republic not requiring the counter-signatures of the Prime Minister and the ministers concerned, as well as decisions by the Supreme Military Council regarding high level military appointments and expulsions from the officer corps are outside the scope of judicial review (Art. 125).

5. Other oversight entities

272. Complementary to the control exercised by the executive, Parliament and judiciary at the domestic level, other entities also possess the power to control or revise military acts or decisions. The institutional architecture, position, functions and power of these entities that monitor and enforce compliance with laws and regulations within the military varies greatly among the Council of Europe member States.

a. The Ombudsmen

273. The ombudsman is an independent institutional actor, defending and guaranteeing citizens' rights against acts of public powers or administration. It normally falls within the parliamentary structure, but it may also be found in the executive branch, depending on who appoints its members, whether this be Parliament or the executive (Minister of Defence). The complaints presented by citizens in cases of violations of their rights and freedoms are channelled through inquiries and reports.

274. The degree of control also varies between States. Some States confer few competences to parliamentary ombudsmen over complaints related to armed forces. Examples are France and the United Kingdom.²⁰⁹

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NOLTE G., KRIEGER H., "European Military Law Systems: General Comparative Report", (note 104), p. 71.

i) Non specialist Ombudsmen without specific competences

275. Most States do not have a specialised ombudsman for military issues, but the general ombudsperson has competences to deal with them, even if there is no explicit mention of such competences. The Ombudsmen Acts of certain States, like the Netherlands and Austria, do not have specific competences in defence matters.²¹⁰

ii) Non specialised Ombudsmen with specific competences

276. Other States, on the contrary, give the general ombudsman explicit powers to deal with armed forces issues, either at statutory or at constitutional level. An example of the latter is Denmark. The Danish Constitution states that the *Folketing* shall appoint one or two persons extraneous to the Parliament “to supervise the civil and military administration of the State” (Art. 55).²¹¹

277. At statutory level, legislation on ombudsmen in Finland, Poland, Portugal and Spain make specific mention of competence in defence matters.

278. The Finnish Parliamentary Ombudsman ensures that public authorities and officials observe the law and fulfil their duties. He controls all acts of public authorities, except the legislative work and actions of members of the Parliament and the acts of the Chancellor of Justice (who is responsible to the Government). The constitutional provisions deal, *inter alia*, with the appointment of the Ombudsman by the Parliament (Art. 38), his right to attend and participate in the debates of the plenary (Art. 48), his duties (Art. 109), and the right to receive information (Art. 111). The Parliamentary Ombudsman Act (197/2002) specifies the competences, rights and duties of the Parliamentary Ombudsman. Section 5 (1) confers expressly on the Ombudsman the function of carrying out on-site inspections of public offices and institutions, and specifically, to inspect units of the Defence Forces and Finnish peacekeeping contingents, to monitor the treatment of conscripts, other military personnel and peacekeepers.²¹²

279. After 1991, and through an amendment of the Statute on the Ombudsman of 17 July 1987, a Polish governmental Department for Protection of Soldiers’ and Public Officials’ Rights was created (Art. 20 (3) of the Ombudsman Act).²¹³

280. The *Provedor de Justiça* in Portugal is an independent body appointed by the Assembly (Art. 23 Portuguese Constitution), that examines complaints about acts and omissions by public authorities. It represents a non-jurisdictional remedy for the resolution of disputes between citizens and public powers. The Ombudsman can visit and inspect military public services, hear

²¹⁰ Thus, the Dutch Constitution establishes the National Ombudsman (Art. 78a), regulated by the Ombudsman Act, without specific mentions to defence matters. This Act can be consulted at: <http://www.ombudsman.nl/english/ombudsman/act/nationalombudsmanact.pdf>. The Austrian Ombudsman Board, in turn, although it has effective defence mechanisms, does not have either specific function in the defence arena. This Board is an independent institution composed of three national ombudsmen that checks alleged abuses in the administration, and makes recommendation on specific matters. It makes also an annual report on its activities to the National and Federal Councils. Its members are entitled to participate in the debates on the report, and in their committees and sub-committees. More information can be found at: <http://www.volksanw.gv.at/>, and at the page of the European Ombudsmen Institute: <http://members.aon.at/eoi/index.htm>.

²¹¹ For more information, consult the http://www.ombudsmanden.dk/english_en/.

²¹² Source: <http://www.oikeusasiamies.fi/Resource.phx/ea/english/index.htm>

²¹³ KOWALSKI M. (2003), “Military Law in the Republic of Poland”, Nolte G. (ed.), European Military Law Systems (note 104), p. 673. The text of the Ombudsman Act is available in English at: <http://www.rpo.gov.pl/index.php?md=1372&zaznaczenie=1#znalezienie>

officials or representatives of these bodies, and ask them for information (Art. 21 (1) a) Statute of the Ombudsman).²¹⁴ The Ombudsman's office divides its work into six departments, one of which is concerned with national defence.²¹⁵

281. In Spain, the general Ombudsman (*Defensor del Pueblo*), which has constitutional status (Art. 54),²¹⁶ has the power to protect fundamental rights and freedoms in the field of military organisation (Art. 14 of the Organic Act 3/1981).²¹⁷

iii) Specialised (military) Ombudsmen

282. Some countries have a military ombudsman. This institution represents an explicit mechanism of oversight over the armed forces.²¹⁸ The general tasks of military ombudsmen are to attend to complaints by military servicemen; to protect soldiers' rights, to investigate cases of arbitrary decisions or abuses committed by the military, and to ensure the compliance of the armed forces with constitutional principles. The office of ombudsman has its origins in Sweden, as does the institution of a specialised ombudsman exclusively for the military. The *militieombudsman* was created in 1915 through a constitutional reform, and lasted until 1968, this being the year in which the Parliament unified this institution in the *Justitieombudsman* (JO).²¹⁹ The *militieombudsman* was appointed for a four-year term by the Parliament, and exercised his/her competences independently from the government and Parliament. His/her main duties were to ensure the observation of statutes and rules by the military officials. He/she proceeded by investigating the complaints received, or by carrying out inspections of military institutions, and had the duty to submit an annual report of his or her activities to Parliament.²²⁰

283. The next Scandinavian military ombudsman was created in Norway in 1952, through Instructions adopted by the Storting's Military Committee, for the establishment of an Ombudsman and its board.²²¹ The *Stortingets Ombudsman for forsvaret* of Norway (Parliamentary Ombudsman for the Armed Forces), exists within the Standing Committee on Defence as the Committee of the Ombudsman for the Armed Forces in Norway. The Ombudsman shall assist in safeguarding the civil rights of personnel of armed forces and shall try to increase their efficiency. His/her work is divided in four main tasks: 1) to keep in close contact with the work of the representative committees, 2) to deal with applications from individuals (civilian or military) 3) to consider matters of his own initiative, and 4) to act as advisory organ for the chief military and civil authorities.²²²

²¹⁴ Law no. 9/91, April 9, (as amended by Law no. 30/96, August 14, and Law no. 52-A/2005, October 10).

²¹⁵ <http://www.provedor-jus.pt/Ingles/Index.htm>.

²¹⁶ See http://www.congreso.es/ingles/funciones/constitucion/const_espa_texto.pdf.

²¹⁷ Information on the legal basis of the Spanish ombudsman can be found at: http://www.defensordelpueblo.es/web_ingles/index.asp.

²¹⁸ PEÑARRUBIA J. M. (2001), *Ombudsman Militar y Defensor del Pueblo*. Estudio de Derecho Comparado y Español, Madrid, Dilex; and VERGOTTINI G. de (1974), "L'Ombudsman per gli affari militari", MORTATI C. (ed.), *L'Ombudsman (Il Difensore Civico)*, Turin, UTET, pp. 273-295.

²¹⁹ See the information of the JO at: <http://www.jo.se/Page.aspx?Language=en>.

²²⁰ See KENKOW H. (1968), "The Ombudsman for Military Affairs" (Chapter 1, *Sweden's Guardians of Law*), ROWAT D., *The Ombudsman: citizen's defender*, 2nd. ed., London, George Allen & Unwin Ltd, pp. 51-57.

²²¹ The instructions in English can be found at RUUD A. (1968) "The Military Ombudsman and his Board", (Chapter 4, *Norway's Ombudsmen*), ROWAT, *The Ombudsman: citizen's defender*, (note 220), pp. 114-115.

²²² RUUD, "The Military Ombudsman and his Board" (note 221), p. 116. Information about the Norwegian Ombudsman for the Armed Forces can be found at: <http://www.ombudsmann.no/mil/english.asp>, and about the committees, in the page of the Stortinget: <http://www.stortinget.no/english/committees.html>.

284. Germany has an ombudsman especially concerned with the military, provided for in the Constitution (Art. 45b). The Parliamentary Commissioner for the Armed Forces (*Wehrbeauftragter des deutschen Bundestages*) is a defence commissioner who works closely with the Defence Committee of the Bundestag, assisting it in parliamentary oversight over armed forces. The tasks of this commissioner are to protect the basic rights of service personnel and to ensure compliance in the armed forces with the principles of *Innere Führung* (a very important concept within the German military, which means moral leadership, and seeks to combine the military mission with the rights of the personnel within a democratic state). He or she can exercise these tasks upon submission from service personnel, of his or her own initiative, or under instruction from the Bundestag or the Defence Committee.²²³

285. In Ireland, the Ombudsman (Defence Forces) Act 2004 (no. 36)²²⁴ established the office of the Ombudsman for Defence Forces. The President, on recommendation of the Government, appoints the Ombudsman. The Ombudsman is independent in the performance of his or her functions. He or she may investigate actions of the Defence Forces, investigate complaints, make reasoned reports, and may recommend to the Minister measures to be followed. The Ombudsman can request information and documents that will be useful in order to decide upon the complaint. He or she is also subject to the duty of secrecy of information, and can only disclose it in certain cases specified by the Act (Section 10).

286. Similar institutions can be also found in non-European States such as Canada,²²⁵ Australia²²⁶ and Israel.²²⁷

b. Audit Offices and Courts of Auditors

287. The control of the legality and appropriateness of the spending of public institutions is an important element in the transparency and accountability of democracies. The military is generally answerable to a national accounting body, except in some countries, like the United Kingdom.²²⁸ In Denmark, for example, the National Auditing Office is an independent body, which reports directly to the Parliament which also elects some of its members (Art. 47 of the Constitution). This office checks the public expenditure and the management of the budget from all public institutions, not only those of the military. The control of the budget of the State in

²²³ Information from the Bundestag's website:

http://www.bundestag.de/htdocs_e/committees/a12/aufgaben/aufg07.html.

²²⁴ <http://www.odf.ie/>.

²²⁵ The Canadian ombudsman investigates complaints and serves as a neutral third party on issues related to the Department of National Defence and the Canadian Forces, and reports directly to the Minister of National Defence. The authority and competences of the ombudsman are fixed through Ministerial Directives and the National Defence Act. Information available in its website: www.ombudsman.forces.gc.ca.

²²⁶ Australia has a Defence Force Ombudsman (DFO), which is regulated in detail by the Ombudsman Act of 1976 (Act no. 181, part IIA). The text of this Act can be consulted at:

<http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/framelodgmentattachments/366187295D5A8EEFCA25702E000482FE?OpenDocument>. For further information, visit their website: <http://www.ombudsman.gov.au>

²²⁷ The Israel Defence Force (IDF) has a special ombudsman, the soldier's complaints commissioner, appointed by the Minister of Defence with the approval of the Knesset Foreign Affairs and Defence Committee. The Law of Reform to the Military Justice Law, from 24 July 1972, created this special military ombudsman. The law grants a general right of complaint to soldiers, when their rights are infringed. The commissioner investigates grievances received by the Complaints Commission of the Ministry of Defence, according to Articles 542-558 from the Military Justice Law, 5715-1955. See FAIREN GUILLEN V. (1982), *Temas de ordenamiento procesal*, Tomo III, Madrid, Tecnos, p. 1388, no. 17, p. 1401, and PEÑARRUBIA, *Ombudsman Militar y Defensor del Pueblo*, (note 218), pp. 47-56; LASKOV H. (1983), "The Military Ombudsman in Israel", CAIDEN G.E. (ed.), *International Handbook of the Ombudsman*, Vol. 1, Westport, Conn., Greenwood Press, pp. 129-135.

²²⁸ NOLTE G., KRIEGER H., "European Military Law Systems: General Comparative Report", (note 104), p. 71.

France is made by the *Cour des comptes*. Similar general institutions exist in Germany (*Bundesrechnungshof*, Art. 114 of the Constitution), in Italy (*Corte dei conti*, Art. 100(2) of the Constitution), in the Netherlands (*Algemene Rekenkamer*, General Chamber of Audit), in Poland (Supreme Chamber of Control, Arts. 208-212 of the Constitution), in Spain (*Tribunal de Cuentas*, Art. 136 of the Constitution), and in Turkey (Art. 160).

288. There is a specific provision in the Greek Constitution, which places within the jurisdiction of the Court of Auditors, “the trial of cases related to liability of military servants of the State, for any loss incurred, through malicious intent or negligence, upon the State, the local government agencies or other legal entities of public law” (Art. 98 No. 1 g)).

289. The Netherlands also has a special institution of control of the executive type. The Inspector-General of the Armed Forces (IGK) is an independent body which has been in existence since 1813, and has competences over all matters concerning the armed forces.²²⁹ He advises and informs the Minister of Defence in defence issues. This institution is considered to be the “military ombudsperson”, even though the National Ombudsman has competences to receive complaints concerning the Minister of Defence, to investigate them, and to give reports.

6. Internal control mechanisms on armed forces

290. The internal control of the acts of the armed forces takes place, first of all, inside the hierarchal military structure. Internal accountability mechanisms are a crucial component in the democratic oversight of armed forces. These controls serve to regulate the conduct of the armed forces from the inside, thereby facilitating executive control over the military, as well supporting external accountability mechanisms. Indeed, internal accountability instruments may be seen as the first layer of oversight of the military because they are designed to regulate the conduct of personnel prior to the involvement of external oversight bodies. Accountability mechanisms exist in order to ensure that armed forces are both professional and committed to democracy, the rule of law and human rights, as well as to relevant international law.

291. Without entering into detail (since it is beyond the scope of this study), one can say that as citizens in uniform, members of the armed forces are entitled to enjoy the same human rights and fundamental freedoms as other citizens, subject to requirements of military duty.²³⁰ The rights of armed forces personnel can only be qualified subject to specific conditions and requirements: limitations must be necessary within a democratic society, provided for by law, and any restrictions must be proportionate to military or national security needs.²³¹ Thus, the statute of armed forces personnel and the respect of human rights inside the military corps functions as a background to the democratic control over its acts, even if it is not, strictly speaking, a mechanism of control.

²²⁹ <http://www.mindef.nl/ministerie/igk/english/index.html>

²³⁰ In this regard, at its 984th meeting (17-18 January 2007), the Ministers' Deputies of the Committee of Ministers of the Council of Europe asked the Steering Committee for Human Rights (CDDH) to elaborate a “Recommendation on human rights of members of armed forces”. This Recommendation should follow the guidelines proposed under § 10 of the Recommendation of the Parliamentary Assembly 1742(2006). The DH-DEV (Committee of Experts for the Development of Human Rights) Group on Human Rights of members of the armed forces in charge held its first meeting on 14-15 June 2007.

²³¹ Some fundamental rights are non-derogable, including the right to life; the right to protection against cruel or degrading treatment; and the prohibition of slavery, servitude, and forced labour. Nevertheless, members of armed forces are generally restricted in their freedom of expression, freedom of association, or in undertaking political activities. See the study on Rights of Military Personnel, Human Rights Commission, Doc. See also Annex C.

a. Codes of conduct or professional ethics

292. Many armed forces have codes of conduct or ethics, as well as military laws. These codes do not form part of military disciplinary law but are frameworks of values to which it is hoped that members of armed forces will assent. These guidelines are conveyed to members of the armed forces through training, and if they are successfully internalised they can serve as an additional constraint on the actions of personnel. Military training may also provide increasing awareness of the constitutional rights and duties of military personnel and their instruction in democratic values.²³²

b. Command responsibility

293. Command responsibility refers to the duty of superiors to promote and maintain professional standards throughout the military chain of command. This represents an important mechanism of internal accountability and is a key structure in all Council of Europe member State armed forces. Military commanders have both a moral duty and the legal responsibility to ensure that their subordinates adhere to all applicable laws and regulations. In fulfilling this role military superiors serve preventative, investigative and disciplinary functions.

294. Commanders serve a preventative role by providing their subordinates with an awareness of laws and instilling particular values in their personnel, in the hope that this training will prevent disciplinary infractions from occurring. Superiors also fulfil an investigative function, examining complaints that are filed within the armed forces. This is particularly important in States such as Slovakia and the United Kingdom which do not have an ombudsman for the armed forces. Finally, commanders may take disciplinary action for offences which are committed by personnel under their command; however, more serious infractions are likely to be dealt with by military courts. In this regard the role of the judiciary and more precisely of military courts, whose regulations may vary considerably within the State judicial system, are to be taken into account (see above §§ 217-223)

295. Under most military law systems, commanders have specific responsibilities with regard to their subordinates. These duties commonly include: the responsibility for the discipline of subordinates, the duty to set a good example to one's subordinates, the duty to look after subordinates and the duty not to mistreat or abuse them. In some States, such as Italy, superiors are also responsible for ensuring that personnel are provided with good working and living conditions.

296. In addition to the notion of individual accountability, commanders are accountable for the orders that they give. Criminal responsibility may arise from illegal or improper orders.

C. International dimension of the control

297. The internationalisation of the defence and security, or more specifically, the emergence of collective security and collective defence organisations, has moved the focus of attention of the control and oversight of armed forces from the national to the international level. Properly speaking, democratic control is that practiced by democratic institutions. The question is, then, whether this type of control is sought and possible within international institutions. In an extreme opinion, it has been said that no oversight of the security and intelligence services exists on the international level.²³³ In literal terms, this statement may hold true for intelligence and security

²³² In Germany, for example, this is part of the Innere Führung programme.

²³³ BORN H., LEIGH I. (2005), Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies, Oslo, DCAF / Human Rights Centre, Department of Law, University of Durham / Norwegian Parliamentary Intelligence Oversight Committee, p. 15.

services but it may require some qualification when referring to armed forces. Most of the international organisations for defence and security do not have a truly democratically elected institution (i.e. a Parliament). Often, they lack the power to control the armed forces carrying out the peacekeeping or peace enforcement operation. However, some oversight exists especially at intergovernmental level in authorising international missions and in following up their development. The European Court of Human Rights also plays a role in judging petitions and complaints made by individuals against actions by government bodies.

298. Thus, to understand the general framework of the democratic oversight of the military, it is important to take into account the international dimension of the use of force, together with the problems and deficits inherent in the design of the control mechanisms. .

299. When deploying troops to attend international peacekeeping missions, questions of democratic accountability arise, as to “authority and responsibility for decisions to deploy military forces, select objectives, incur risk, and implement mandates in the field”. Some scholars identify five issues of democratic accountability related to the use of force under international auspices: 1) international authorisation to use military forces; 2) national authorisation to use military forces; 3) democratic civilian control of military personnel and operations; 4) civilian responsibility to the military for the safety of deployed personnel; and 5) responsibility to comply with norms governing the conduct of military and other international personnel in the field.²³⁴ Moved by these same concerns, some scholars have applied the notion of ‘double democratic deficit’²³⁵ to name this lack of effective internal and international mechanisms of democratic control of the military in the development of international missions.

300. In connection with the above issues, the question of foreign command over national soldiers or units is an important and unresolved one. The subordination of soldiers or units to the command of the superior of foreign armed forces is an important issue related to the control of armed forces, unfortunately not debated in depth by scholars.²³⁶ Moreover, generally speaking, States do not raise constitutional questions about the transfer of the command of troops in multinational military cooperation, effectively transferring the exercise of their sovereign rights in the field of defence.²³⁷ In fact, constitutions do not have rules concerning this issue. Furthermore, the debate of the permissibility of subordination of armed forces to foreign command is also poor. Nevertheless, in Germany specific rules exist and debate over this topic has arisen.²³⁸

²³⁴ KU C., JACOBSON H. (2003), “Introduction”, Ku C., Jacobson H. (ed.), *Democratic Accountability and the Use of Force in International Law*, Cambridge, Cambridge University Press, pp. 25-26. This study covers nine countries: Canada, France, Germany, India, Japan, Norway, Russian Federation, United Kingdom and United States.

²³⁵ BORN H., HÄNGGI H., *The “Double Democratic Deficit”*.

²³⁶ NOLTE G., KRIEGER H., “European Military Law Systems: General Comparative Report”, (note 104), pp. 120ff.

²³⁷ NOLTE G., KRIEGER H., “European Military Law Systems: Summary and Recommendations”, (note 104), p. 3.

²³⁸ According to Art. 24(1) of the German Constitution, the Federation may by a law transfer sovereign power to international organisations. The same article entitles the Federation to enter into a system of mutual collective security, and where this competence is exercised, it shall consent to the limitations upon its sovereign powers. In a similar way, the Danish Constitution permits the delegation of constitutional powers vested in the authorities of the Realm to international authorities involved in the promotion of international rule of law and cooperation (Art. 20 (1)). The Italian Constitution permits the limitations of sovereignty that may be necessary to ensuring international peace and justice (Art. 11).

301. A further problematic topic is the transfer of powers of command to international collective security entities. In the case of the North Atlantic Treaty Organisation, for example, this transfer of powers has been limited to certain powers of command,²³⁹ according to the constitutional law of some countries. The German legal system, for example, requires that a soldier needs to receive an order from his superior, which is revocable and limited in time and scope, if he is to follow the order of a foreign commander.²⁴⁰ The question about the need to approve specific legislation for a general transfer of power to foreign commander remains open.

302. The international dimension can be studied from different points of view. Hereinafter, only certain aspects, which are considered the most significant, will be discussed. First, a quick revision of some preliminary issues related to the international dimension of the control will be given. Secondly, reference will be made to the organs involved in the control over armed forces taking part in international missions. There are three dimensions involved here: the intergovernmental dimension, the inter-parliamentary dimension, and the role of international courts. Concerning the first two dimensions, the study will focus on the United Nations, the North Atlantic Treaty Organisation, and the European Union, as the international organisations that have a degree of influence over the defence policy of part or all of the member States of the Council of Europe. Next, the general international standards applicable both to military personnel and their actions will be considered.

1. Preliminary issues

a. Legal and illegal foreign military presence

303. In order to establish with accuracy what acts and issues should be under the democratic control of armed forces, it is necessary to analyse the various types of presence of armed forces in foreign territory. For identifying who – at international level – should exercise this control, it is important to clarify the State or international body responsible for the acts of the armed forces in foreign territory, taking into account the specific situations likely to occur, and the international legal rules and principles applicable to each situation. The identification of which State is responsible at international level is also relevant for the domestic dimension of the control, as the allocation of responsibility to a certain State gives the possibility for its internal mechanisms of control, as described above in this report, to be used for this purpose.

304. The following situations of presence (either legal, or illegal, according to international law) of armed forces in foreign territory can be identified:

A. Illegal:

- Occupation by armed forces of a foreign territory,
- Illegal acts committed by armed forces in a foreign territory, in situations other than occupation (during a military intervention in a foreign territory which does not fulfil the conditions of legitimate self-defence).

²³⁹ A distinction can be made between the North Atlantic Treaty Organisation 'full command', on the one hand, and 'operational command' and 'operational control', on the other. The last two concepts do not need, in the opinion of most of the countries, a transfer of governmental authority, which would need to comply with the constitutional requirement of passing a law. Full command, then, remains with the national authorities, as well as disciplinary powers.

²⁴⁰ NOLTE G., KRIEGER H., "European Military Law Systems: General Comparative Report", (note 104), pp. 120ff. An important German court decision about the North Atlantic Treaty Organisation and transfer of command powers is the "Somalia-Decison", BVerfGE 90, 1994.

B. Legal

- Foreign military bases / joint military exercises,
- Armed forces placed under disposal of a State by another State,
- Peace-keeping forces (or multinational coalitions) decided or authorised by the United Nations Security Council.

A. 1. Occupation by the armed forces of a foreign territory:

305. In the case of acts committed by armed forces of a State during the occupation of a foreign territory by the said armed forces, the European Court of Human Rights decided in several cases that international responsibility belongs to the occupying State provided that its armed forces exercise *effective overall control* over the said foreign territory. Of relevance to this type of foreign military presence are the cases *Loizidou v. Turkey*,²⁴¹ *Cyprus v. Turkey*,²⁴² *Ilascu and others v. Russian Federation and Republic of Moldova*.²⁴³ In *Issa and*

²⁴¹ *Loizidou v. Turkey* (Application no. 15218/89; Judgment of 18 December 1996). According to para. 52, "(a)s regards the question of imputability, the Court recalls in the first place that in its above-mentioned *Loizidou* judgment (preliminary objections) (pp. 23-24, para. 62) it stressed that under its established case-law the concept of "jurisdiction" under Article 1 of the Convention (Art. 1) is not restricted to the national territory of the Contracting States. Accordingly, the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory. Of particular significance to the present case the Court held, in conformity with the relevant principles of international law governing State responsibility, that the responsibility of a Contracting Party could also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration (see the above-mentioned *Loizidou* judgment (preliminary objections), *ibid.*). The Court also added: "56. The Commission found that the applicant has been and continues to be denied access to the northern part of Cyprus as a result of the presence of Turkish forces in Cyprus which exercise an overall control in the border area (see the report of the Commission of 8 July 1993, p. 16, paras. 93-95). (...) It is not necessary to determine whether (...) Turkey actually exercises detailed control over the policies and actions of the authorities of the "TRNC". It is obvious from the large number of troops engaged in active duties in northern Cyprus (...) that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the "TRNC" (see paragraph 52 above). Those affected by such policies or actions therefore come within the "jurisdiction" of Turkey for the purposes of Article 1 of the Convention (Art. 1). Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus."

²⁴² *Cyprus v. Turkey* (Application no. 25781/94; Judgment of 10 May 2001). After repeating the previous dictum of *Loizidou* case, the European Court of Human Rights stated: "[i]t is to be observed that the Court's reasoning is framed in terms of a broad statement of principle as regards Turkey's general responsibility under the Convention for the policies and actions of the "TRNC" authorities. Having effective overall control over northern Cyprus, its responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey's "jurisdiction" must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey."

²⁴³ *Ilascu and others v. Russian Federation and Republic of Moldova* (Application no. 48787/99; Judgment of 8 July 2004). The European Court of Human Rights noted as follows: "382. In the light of all these circumstances, the Court considers that the Russian Federation's responsibility is engaged in respect of the unlawful acts committed by the Transdniestrian separatists, regard being had to the military and political support it gave them to help them set up the separatist regime and the participation of its military personnel in the fighting. In acting thus, the authorities of the Russian Federation contributed both militarily and politically to the creation of a separatist regime in the region of Transdniestria, which is part of the territory of the Republic of Moldova. The Court also notes that even after the ceasefire agreement of 21 July 1992 the Russian Federation continued to provide military, political and economic support to the separatist regime (see paragraphs 111-61 above), thus enabling it to survive by strengthening itself and by acquiring a certain amount of autonomy vis-à-vis Moldova. (...) 384. The Court considers that on account of the above events the applicants came within the jurisdiction of the Russian Federation within the meaning of Article 1 of the Convention, although at the time when they occurred the Convention was not in force with regard to the Russian Federation. This is because the events which gave rise to the responsibility of the Russian Federation must be considered to include not only the acts in which the agents of that State participated, like the applicants' arrest and detention, but also their transfer into the hands of the Transdniestrian police and regime, and the subsequent ill-treatment inflicted on them by those

others v. Turkey,²⁴⁴ the European Court of Human Rights reiterated the same reasoning. So, in the case of acts committed in the case of occupation by the armed forces of a foreign territory, control is to be exercised at international level by international forums, such as the United Nations Security Council and international courts, and at domestic level, by the authorities of the occupying State.

A. 2. Illegal acts committed by the armed forces in a foreign territory, in situations other than occupation (during a military intervention in a foreign territory which does not fulfil the conditions of legitimate self-defence):

306. The responsibility in case of illegal acts committed by armed forces in a foreign territory, in situations other than occupation (during a military intervention in a foreign territory which does not fulfil the conditions of legitimate self-defence) was assessed by international courts and tribunals. *Inter alia*, the case of the International Court of Justice *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*; Judgment of 27 June 1986), the International Criminal Tribunal for the former Yugoslavia case *Prosecutor v. Dusko Tadic* (Judgment of Appeals Chamber of 15 July 1999), and the European Court of Human Rights case *Issa and others v. Turkey* are of relevance here. Naturally, the responsibility belongs to the intervening State for the direct²⁴⁵ acts of its armed forces.²⁴⁶ So, in such situations, the control is to be exercised at international level by international forums, such as the Security Council and international courts, and, at domestic level, by the authorities of the intervening State.

police, since in acting in that way the agents of the Russian Federation were fully aware that they were handing them over to an illegal and unconstitutional regime.(...) 385. In the Court's opinion, all of the acts committed by Russian soldiers with regard to the applicants, including their transfer into the charge of the separatist regime, in the context of the Russian authorities' collaboration with that illegal regime, are capable of engaging responsibility for the acts of that regime."

²⁴⁴ *Issa and others v. Turkey* (Application no. 31821/96, Judgment of 16 November 2004).

²⁴⁵ As far as the responsibility for acts committed in the foreign territory by other (paramilitary) forces supported by the intervening armed forces, if the United Nations International Court of Justice (ICJ) established, in *Nicaragua* case, a high degree of effective control requirement, International Criminal Tribunal for the former Yugoslavia (as the European Court of Human Rights) opted for an overall control requirement.

²⁴⁶ However, in *Bankovic and others v. Belgium and 16 other contracting States* (Application no. 52207/99, Grand Chamber, Decision as to the admissibility of 12 December 2001), where the applicants considered that the bombing of the Serb Radio-Television (resulting in the death of their relatives) by the respondent States was an extra-territorial act within the notion of jurisdiction set forth in Article 1 of Convention, the European Court of Human Rights adopted a more restrictive approach as to jurisdiction. The European Court of Human Rights stated, in paragraph 60, that "(...) a State may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence, unless the former is an occupying State in which case it can be found to exercise jurisdiction in that territory, at least in certain respects (...)" It added: "62. The Court finds State practice in the application of the Convention since its ratification to be indicative of a lack of any apprehension on the part of the Contracting States of their extra-territorial responsibility in contexts similar to the present case. Although there have been a number of military missions involving Contracting States acting extra-territorially since their ratification of the Convention (*inter alia*, in the Gulf, in Bosnia and Herzegovina and in the FRY), no State has indicated a belief that its extra-territorial actions involved an exercise of jurisdiction within the meaning of Article 1 of the Convention by making a derogation pursuant to Article 15 of the Convention." Moreover, the Court considered (para. 75) that "the applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention."

A. 3. Foreign military bases / joint military exercises:

307. Regarding the situation of foreign military bases, the Venice Commission examined the issue in its opinion on the international legal obligations of Council of Europe member States in respect of secret detention facilities and inter-state transport of prisoners.²⁴⁷ The responsibility of armed forces located in a foreign military base for acts committed in the receiving State belongs to the sending State, but the distribution (between the two States) of the competences of control is regulated essentially by the bilateral agreement between the two States (a defence cooperation agreement or a status of forces agreements, if a multilateral status of forces agreements is not applicable). According to paragraph 110, "in any case, the national and international law that is applicable to military bases cannot, and does not claim to, diminish the obligations and responsibilities of the member States of the Council of Europe under human rights treaties".

308. The defence cooperation agreements or the status of forces agreements normally also regulate the distribution of the competences of control in the cases of joint military exercises/applications on the territory of a State.

A. 4. Armed forces placed under disposal of a State by another State:

309. The situation of armed forces of a State placed under disposal of another State is covered by the rule set forth in Article 6 of the Draft Articles on State Responsibility adopted by the United Nations General Assembly International Law Commission in 2001:

"The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed."

310. In the commentary on this article, the International Law Commission (ILC) stressed that "mere aid or assistance offered by organs of one State to another on the territory of the latter is not covered by Article 6. For example, armed forces may be sent to assist another State in the exercise of the right of collective self-defence or for other purposes. Where the forces in question remain under the authority of the sending State, they exercise elements of the governmental authority of that State and not of the receiving State. Situations can also arise where the organ of one State acts on the joint instructions of its own and another State, or there may be a single entity which is a joint organ of several States. In these cases, the conduct in question is attributable to both States under other articles of this chapter." So, in the case of armed forces of a State placed under disposal of another State, the control is to be exercised, at domestic level, by the authorities of the State under whose disposal the forces were placed, provided that the conditions set forth by Article 6 of the International Law Commission Draft Articles on State Responsibility are met. If the forces in question remain under the authority of the sending State, exercising elements of the governmental authority of that State rather than that of the receiving State, the control is to be exercised, at domestic level, by the authorities of the sending State. If the armed forces of one State act on the joint instructions of its own and another State, the control is to be exercised, at domestic level, by the authorities of both States. At international level, the control is to be exercised by the competent international bodies.

A. 5. Peace-keeping forces (or multinational coalitions) decided or authorised by UN Security Council:

311. The responsibility for acts committed by armed forces taking part in peace-keeping operations (or multinational coalitions) decided or authorised by United Nations Security Council was also examined by various international forums, including international courts.

²⁴⁷ See CDL-AD(2006)009 adopted at the 66th Plenary Session, paragraphs 105-110.

312. In *Saddam Hussein v. Albania, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Turkey, Ukraine and United Kingdom*,²⁴⁸ the European Court of Human Rights found that

“(...) there is no basis in the Convention’s jurisprudence and the applicant has not invoked any established principle of international law which would mean that he fell within the respondent States’ jurisdiction on the sole basis that those States allegedly formed part (at varying unspecified levels) of a coalition with the US, when the impugned actions were carried out by the US, when security in the zone in which those actions took place was assigned to the US and when the overall command of the coalition was vested in the US.

Accordingly, the Court does not consider it to be established that there was or is any jurisdictional link between the applicant and the respondent States or therefore that the applicant was capable of falling within the jurisdiction of those States, within the meaning of Article 1 of the Convention.”

313. In *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*,²⁴⁹ the European Court of Human Rights concluded that

“149. In the present case, Chapter VII allowed the UNSC to adopt coercive measures in reaction to an identified conflict considered to threaten peace, namely UNSC Resolution 1244 establishing UNMIK and KFOR.

Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member States, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself. This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim.

(...)

151. (...)In the present cases, the impugned acts and omissions of KFOR and UNMIK cannot be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities. (...)As the Court has found above, UNMIK was a subsidiary organ of the UN created under Chapter VII and KFOR was exercising powers lawfully delegated under Chapter VII of the Charter by the UNSC. As such, their actions were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective.”

314. In the above mentioned case, the European Court of Human Rights based its reasoning *inter alia* on the works of the United Nations International Law Commission. In Article 5 of the draft Articles adopted in 2004 during the 56th session of the International Law Commission and entitled “Conduct of organs or agents placed at the disposal of an international organisation by a State or another international organisation”, the International Law Commission stated as follows:

²⁴⁸ Applications no. 71412/01 and 23276/04, Decision as to the admissibility of 14 March 2006.

²⁴⁹ Application no. 78166/01, Decision as to the admissibility of 2 May 2007

"The conduct of an organ of a State or an organ or agent of an international organisation that is placed at the disposal of another international organisation shall be considered under international law an act of the latter organisation if the organisation exercises effective control over that conduct."²⁵⁰

315. The relevant International Law Commission Commentary on Article 5 provides:

"When an organ of a State is placed at the disposal of an international organisation, the organ may be fully seconded to that organisation. In this case the organ's conduct would clearly be attributable only to the receiving organisation. ... Article 5 deals with the different situation in which the lent organ or agent still acts to a certain extent as organ of the lending State or as organ or agent of the lending organisation. This occurs for instance in the case of military contingents that a State placed at the disposal of the [UN] for a peacekeeping operation, since the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent. In this situation the problem arises whether a specific conduct of the lent organ or agent has to be attributed to the receiving organisation or to the lending State or organisation. ... Practice relating to peacekeeping forces is particularly significant in the present context because of the control that the contributing State retains over disciplinary matters and criminal affairs. This may have consequences with regard to attribution of conduct. ...

Attribution of conduct to the contributing State is clearly linked with the retention of some powers by that State over its national contingent and thus on the control that the State possesses in the relevant respect.

As has been held by several scholars, when an organ or agent is placed at the disposal of an international organisation, the decisive question in relation to attribution of a given conduct appears to be who has effective control over the conduct in question."²⁵¹

316. The European Court of Human Rights also based its reasoning, in the above-mentioned case, on the works of the Venice Commission. In the Opinion on human rights in Kosovo: Possible establishment of review mechanisms,²⁵² the Venice Commission stated that

"KFOR contingents are grouped into four multinational brigades. KFOR troops come from 35 NATO and non-NATO countries. Although brigades are responsible for a specific area of operations, they all fall "under the unified command and control" (United Nations Resolution 1244, Annex 2, para. 4) of [COMKFOR] from NATO. "Unified command and control" is a military term of art which only encompasses a limited form of transfer of power over troops. [TCNs] have therefore not transferred "full command" over their troops. When [TCNs] contribute troops to a NATO-led operation they usually transfer only the limited powers of "operational control" and/or "operational command". These powers give the NATO commander the right to give orders of an operational nature to the commanders of the respective national units. The national commanders must implement such orders on the basis of their own national authority. NATO commanders may not give other kinds of orders (e.g.

²⁵⁰ See the Report of the International Law Commission, General Assembly Official Records, 56th session, Supplement No. 10 A/59/10 (2004) and Report of the Special Rapporteur on the Responsibility of International Organisations, United Nations, Official Documents, A/CN.4/541, 2 April 2004.

²⁵¹ The above mentioned report also noted that it would be difficult to attribute to the United Nations action resulting from contingents operating under national rather than United Nations command and that in joint operations, international responsibility would be determined, absent an agreement, according to the degree of effective control exercised by either party in the conduct of the operation. It continued: What has been held with regard to joint operations ... should also apply to peacekeeping operations, insofar as it is possible to distinguish in their regard areas of effective control respectively pertaining to the [United Nations] and the [TCN]. While it is understandable that, for the sake of efficiency of military operations, the [United Nations] insists on claiming exclusive command and control over peacekeeping forces, attribution of conduct should also in this regard be based on a factual criterion." As regards United Nations peacekeeping forces (namely, those directly commanded by the United Nations and considered subsidiary organs of the United Nations), the Report quoted the United Nations's legal counsel as stating that the acts of such subsidiary organs were in principle attributable to the organisation and, if committed in violation of an international obligation, entailed the international responsibility of the organisation and its liability in compensation. This, according to the Report, summed up the United Nations (UN) practice in respect of several United Nations peacekeeping missions referenced in the Report.

²⁵² See CDL-AD(2004)033.

those affecting the personal status of a soldier, including taking disciplinary measures) and NATO commanders, in principle, do not have the right to give orders to individual soldiers In addition, [TCNs] always retain the power to withdraw their soldiers at any moment. The underlying reason for such a rather complex arrangement is the desire of [TCNs] to preserve as much political responsibility and democratic control over their troops as is compatible with the requirements of military efficiency. This enables States to do the utmost for the safety of their soldiers, to preserve their discipline according to national custom and rules, to maintain constitutional accountability and, finally, to preserve the possibility to respond to demands from the national democratic process concerning the use of their soldiers.”

317. So, in the case of acts committed by armed forces taking part in peace-keeping operations (or multinational coalitions) decided or authorised by United Nations Security Council, control is to be exercised, at international level, by the United Nations, if the armed forces are placed at the disposal of UN or UN exercises effective control over them. At the same time, the contributing State retains control over disciplinary matters and criminal affairs, and the power to withdraw its soldiers at any time.

b. International organisations

318. There are different types of international organisations whose mission is to safeguard and contribute to international collective defence, security and peace. Each State has its own mechanisms for becoming part of international organisations, according to their legal system.²⁵³ Most of these organisations are created by an international treaty, and can be regional or worldwide in character. The model of the latter is the Charter of the United Nations as a treaty for protecting, maintaining and reaching world security. Regional agreements on military cooperation and mutual defence assistance include the North Atlantic Treaty Organisation and the Western European Union.

319. The North Atlantic Treaty Organisation, the European Union and the Council of Europe member States “have committed themselves to strong principles relating to democratic governance, human rights and the rule of law”, that are the basis for norms of democratic control over the military.²⁵⁴ Adherence to these principles has accordingly become a basic requirement for membership of international organisations of democratic states.²⁵⁵

320. For the purposes of this study, we will focus on the United Nations, the North Atlantic Treaty Organisation, the Organisation for Security and Co-operation in Europe and the European Union.²⁵⁶ The first two have common powers related to the use of military forces authorised by them, consisting of a) monitoring and observation, b) traditional peacekeeping, c)

²⁵³ The Swiss Constitution, for example, requires a referendum to join this type of organisations. Art. 140. Mandatory Referendum: 1. The following shall be submitted to the vote of the People and the Cantons: b) The entry into organisations for collective security or into supranational communities.

²⁵⁴ Greene, O. (2003), “International Standards and Obligations: Norms and Criteria for Democratic Control in European Union, OSCE and OECD Areas”, Germann W. N., and Edmunds, T. (eds.), *Towards Security Sector Reform in Post Cold War Europe. A Framework for Assessment*, Baden-Baden, Nomos, p. 113.

(available online: <http://www.dcaf.ch/publications/kms/details.cfm?lng=en&id=20278&nav1=4>).

²⁵⁵ HÄNGGI H. (2004), “The Use of Force Under International Auspices: Parliamentary Accountability and ‘Democratic Deficits’”, BORN H., HÄNGGI H., *The “Double Democratic Deficit”: Parliamentary Accountability and the Use of Force Under International Auspices*, Aldershot, Ashgate, p. 4.

²⁵⁶ For the comparative table of use of force in the international field under the auspices of the United Nations, the North Atlantic Treaty Organisation, and the European Union, see HÄNGGI H. (2004), “The Use of Force under International Auspices: Parliamentary Accountability and the ‘Democratic Deficits’”, Born H., Hänggi H. (eds.), *The “Double Democratic Deficit”: Parliamentary Accountability and the Use of Force Under International Auspices*, Aldershot, Ashgate, p. 9.

peacekeeping plus institution-building, d) use of force to ensure compliance with international mandates, and e) enforcement.²⁵⁷

c. Legitimate character of the use of force and the international body authorising it

321. The international use of force must be legitimate. States can carry out individual or collective self-defence, but in order for their (re)actions to be legitimate they must comply with certain conditions (see *supra* paras. 87 and 89). The United Nations Charter entrusts the task of assessing compliance with these conditions to the Security Council (Art. 51). Also, the Security Council may decide or authorise an intervention for restoring or maintaining international peace and security (Arts. 39 and 42). Other security regional organisations, such as the North Atlantic Treaty Organisation, can deploy troops in case of a threat to international peace and security, but they need, as a general rule, the prior authorisation of the Security Council.

2. Organs involved

a. Intergovernmental Institutions

322. At the intergovernmental level, the control basically consists of the authorisation for collective security or defence missions by the Security Council. This means that the Security Council is still the principal provider of legitimacy of the use of force in the international sphere, also for the North Atlantic Treaty Organisation and the European Union, since these missions must be subjected to it. Provided that the armed actions are duly authorised according to the United Nations Charter such decisions are taken by the representatives of the governments in the respective international bodies,²⁵⁸ even if at domestic level the competence to take such decisions belongs or should belong to the national parliaments, thus producing a *certain* transfer of competences from the (domestic) parliamentary level to the (international) intergovernmental level. On the other hand, parliamentary control remains with the national Parliaments, to which their ministers are accountable, in respect of positions taken in international forums.²⁵⁹

323. Concerning the responsibilities derived from the international use of force, it should be said that beyond the general frameworks of the respective treaties of these international organisations, they are generally fixed through special instruments. The participating States draw up the content, plan, procedure, and duty of information. For example in the Joint Action on the European Union military operation in the Democratic Republic of Congo,²⁶⁰ there are provisions for political control and strategic and military direction of the mission, conferring authority for political and strategic control upon the Political and Security Committee and responsibility for conducting the operation under the Operation Commander.

²⁵⁷ KU Ch. (2004), "Using Military Force under International Auspices: A Mixed System of Accountability", Born, Hänggi, The "Double Democratic Deficit"..., (note 256), p. 36.

²⁵⁸ See Venice Commission document CDL-DEM(2006)003 of 5 October 2006, Preliminary Report on Civilian Command Authority over the Armed Forces in their National and International Operations, by Hans BORN (expert, Netherlands) and Cecilia LAZZARINI (expert, Netherlands), p. 4.

²⁵⁹ VAN EEKELLEN W. (2004), "Decision-Making and the Parliamentary Dimension of North Atlantic Treaty Organisation", Born H., Hänggi H. (eds.), The "Double Democratic Deficit": Parliamentary Accountability and the Use of Force Under International Auspices, Aldershot, Ashgate, p. 115, 11. In another chapter of the same book, it is argued in the same sense that "political legitimacy of multinational military activities is to be derived solely from the national Parliaments as no international control bodies exists within the context of multinational units". SCHMIDT-RADEFELDT R. (2004), "Parliamentary Accountability and Military Forces in North Atlantic Treaty Organisation: The Case of Germany", p. 160.

²⁶⁰ Council Joint Action 2003/423/CFSP of 5 June 2003 on the European Union military operation in the Democratic Republic of Congo.

i) United Nations-Security Council

324. The United Nations, as an international organisation with the purpose of maintaining international peace and security, has a broad mandate from its member States to authorise the adoption of collective measures for the prevention and removal of threats to international peace. The United Nations has developed a wide range of instruments for maintaining international peace and ensuring security. These include a) preventive diplomacy and peacemaking; b) peace-keeping; c) post conflict peace-building; d) disarmament; e) sanctions; and f) peace enforcement.²⁶¹ Peacemaking “is action to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in Chapter VI of the Charter of the United Nations”. Peace-keeping “is the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well.”²⁶² Peace-building consists of preventing conflict and healing the wounds after conflict has occurred, through actions such as demilitarisation, control of small arms, institutional reform, improvement of police and judicial systems, monitoring of human rights, etc. There is a special Peace-Building Commission at the United Nations that advises and proposes integrated strategies for post-conflict recovery.²⁶³ Disarmament, arms control, and non-proliferation measures are directed mostly at weapons of mass destruction. Sanctions are measures not involving the use of armed force in order to maintain or restore international peace and security (such as partial interruption of economic relations and of means of communication, Art. 41 Charter of the United Nations).

ii) North Atlantic Treaty Organisation

325. The North Atlantic Treaty Organisation has a military structure²⁶⁴ responsible for planning the multinational use of force and establishes a commander system. The North Atlantic Council (NAC) is the principal decision-making body within the North Atlantic Treaty Organisation. It is formed by high-level representatives of each member country, and discusses policy or operational questions before adopting decisions.

326. The North Atlantic Treaty Organisation represents a consultation channel on security issues, where Canada, United States and European countries can exchange opinions and plan joint common actions. It is also committed to the mutual defence of its members from aggression or threats of violence. A further competence is crisis management, aimed at helping to end conflicts and violence on the international scene, and bringing stability. Finally, the North Atlantic Treaty Organisation established the instruments of partnerships, to facilitate dialogue and cooperation with NATO and non-NATO countries. The Partnership for Peace, for example, is a programme of practical bilateral cooperation between individual partner countries and the North Atlantic Treaty Organisation that allows the former to choose their own priorities for cooperation.²⁶⁵

²⁶¹ Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, A/50/60 - S/1995/1, 3 January 1995, Report of the Secretary-General on the Work of the Organisation, Paragraph 23. This paragraph continues: “The first three [peacemaking, peace-keeping and peace-building] can be employed only with the consent of the parties to the conflict. Sanctions and enforcement, on the other hand, are coercive measures and thus, by definition, do not require the consent of the party concerned. Disarmament can take place on an agreed basis or in the context of coercive action under Chapter VII”. Online: <http://www.un.org/Docs/SG/agstpp.html#INSTRUMENT>.

²⁶² An Agenda for Peace, SC Doc. A/47/277 - S/24111, 17 June 1992, online: <http://www.un.org/Docs/SG/agpeace.html>, Paragraph 20.

²⁶³ Information on this commission is available at: <http://www.un.org/peace/peacebuilding/>.

²⁶⁴ The military structure consists of the Military Committee, and two strategic military commands: the Allied Command Operations (ACO), and the Allied Command Transformation (ACT).

²⁶⁵ This information is on the web page of this organisation: <http://www.nato.int>.

327. Together with the founding Treaty, the legal framework of this organisation consists of Agreements on Status of Forces and Military Headquarters and the above-mentioned Partnership programmes. The status of forces agreements settles the rules of such forces while in the territory of another Party.

iii) Organisation for Security and Co-operation in Europe

328. The Organisation for Security and Co-operation in Europe is a regional security organisation with 56 member States.

329. The Organisation for Security and Co-operation in Europe traces its origins to the détente phase of the early 1970s, when the Conference on Security and Co-operation in Europe was created to serve as a multilateral forum for dialogue and negotiation between East and West. Meeting over two years in Helsinki and Geneva, the Conference on Security and Co-operation in Europe reached agreement on the Helsinki Final Act, which was signed on 1 August 1975. This document contained a number of key commitments on politico-military, economic and environmental and human rights issues that became central to the so-called 'Helsinki process'. It also established ten fundamental principles (the 'Decalogue') governing the behaviour of States towards their citizens, as well as towards each other.

330. As part of this institutionalisation process, the name was changed from the Conference on Security and Co-operation in Europe to the Organisation for Security and Co-operation in Europe by a decision of the Budapest Summit of Heads of State or Government in December 1994.

331. The Organisation for Security and Co-operation in Europe deals with three dimensions of security - politico-military, economic and environmental, and human. It addresses a wide range of security-related concerns, including arms control, confidence- and security-building measures, human rights, national minorities, democratisation, policing strategies, counter-terrorism and economic and environmental activities. All 56 participating States enjoy equal status, and decisions are taken by consensus on a politically, but not legally binding basis.

332. The Forum for Security Co-operation, which is the main OSCE body dealing with politico-military aspects of security, meets weekly in Vienna to discuss and make decisions regarding military aspects of security in the OSCE area, in particular confidence- and security-building measures. In the field of arms control it has launched activities aimed at developing documents regulating transfers of conventional arms and establishing principles governing non-proliferation. With regard to the military the Forum for Security Co-operation provides a framework for dialogue between the participating States, leading to politically binding commitments on military conduct and democratisation of the armed forces.

333. Practical activities to assist States in reforming their legislation; downsizing and/or conversion of their armies; training personnel on the rights of servicemen and humanitarian law; and other areas related to military reform are also conducted by OSCE field operations.

iv) European Union

334. The second pillar of the European Union is the Common Foreign and Security Policy. The process of creating a European Security and Defence Policy within the Common Foreign and Security Policy started in the nineties, with the Saint-Malo Declaration of 1998, and continued through other declarations and reports from European Councils, and the modifications introduced by the Nice Treaty.²⁶⁶

335. The Treaty on European Union settles provisions on a Common Foreign and Security Policy under title V (Art. 11-28). The principles and objectives are fixed by Art. 11, and they focus on the protection of the common values, interest and integrity of the Union, the protection and promotion of international peace, security and cooperation, and the development and consolidation of democracy, the rule of law and fundamental human rights and freedoms. The European Union member States shall support it with the spirit of mutual solidarity.²⁶⁷ The European Security and Defence Policy operations have been characterised, since its inception, by a large civilian component.²⁶⁸ Even though the European Security and Defence Policy pertains to the intergovernmental second pillar, some activities, such as civilian aspects of crisis management, and anti-terrorism cooperation, pertain to the first and third pillar.

336. The Treaty on European Union states that the Common Foreign and Security Policy will progressively frame a common defence policy that might lead to a common defence (Art. 17.1). Policies on these issues shall respect the obligations of certain member States under North Atlantic Treaty Organisation, and the cooperation between them in the framework of the Western European Union and the North Atlantic Treaty Organisation. The Petersburg Tasks are incorporated in Art. 17.2: "humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking".

337. The European Union assumes, in this way, the competences the Western European Union used to have in defence issues. It currently has only some residual functions, related to crisis management. However, the asymmetric membership of the Western European Union and the European Union makes it difficult to claim that the European Union is the proxy of the Western European Union in defence issues.²⁶⁹

338. Decision-making about Common Foreign and Security Policy is within the remit of the Council and shall be taken unanimously (Art. 23 Treaty on European Union). However, it may act by qualified majority in some cases (decisions based on a common strategy, decisions implementing an European Union joint action or common position, appointment of a special European Union representative).

²⁶⁶ For the antecedents of the European Security and Defence Policy see TRYBUS M. (2005), *European Union Law and Defence Integration*, Oxford and Portland Oregon, Hart Publishing.

²⁶⁷ The Constitution of Austria makes explicit reference to the Common Foreign and Security Policy of the European Union in Art. 23f.

²⁶⁸ See Brian CROWE, *Towards a European Foreign Policy*, in *The Hague Journal of Diplomacy*, Vol. 1, no. 1, 2006, pp. 110-111. The author also reminds us that the 1999 Helsinki European Council decided to establish a European Security and Defence Policy (ESDP) Civilian Committee (Civcom).

²⁶⁹ TRYBUS, *European Union Law and Defence Integration*, (note 266), p. 104. Denmark, for example, "is not obliged to participate in the military cooperation of the European Union", according to Art. 6 of Denmark Protocol 5 to the Amsterdam Treaty in 1997, in which it makes reservations to Arts. 13(1) and 17 of the European Union Treaty.

339. One further problem is that Art. 46 Treaty on European Union excludes the Common Foreign and Security Policy from the jurisdiction of the European Court of Justice. The intergovernmental character of the security and defence policy, together with the lack of judicial and Parliament scrutiny, produces a deficit in the democratic control of armed forces within the European Union.

b. Inter-parliamentary dimension of the control

340. The existence of inter-parliamentary institutions within (or related to) international organisations in charge of international security and defence issues does not automatically imply that they have some role to play in the control over armed forces or troops participating in international missions. Furthermore, with the notable exception of the European Parliament, they are not directly elected assemblies and they lack or have marginal control powers over the executive at international level.²⁷⁰

341. Some scholars have recommended several measures to strengthen the capacity of national Parliaments to oversee multinational peace support operations, such as inter-parliamentary cooperation, adjustment of the legal framework, effective rules of procedure, and cross party-responsibility. At the international level, a solution would be to make the existing international assemblies more representative and to improve their procedures.²⁷¹ An inter-parliamentary structure with increased competences in control and decision-making, including in the military affairs, would ensure better decision-making, and more democratic oversight.

i) United Nations General Assembly²⁷²

342. Under the United Nations Charter, the United Nations General Assembly only makes recommendations on these issues, and approves the budget of the United Nations, under which the international missions and operations are financed (Art. 17 Charter). Exceptionally, when the Security Council was unable to adopt decisions for political reasons, the United Nations General Assembly enlarged its competence by assuming tasks belonging primarily to the Security Council (that is to assess situations that appear to be a threat to peace, a breach of peace or an act of aggression, and to make recommendations to United Nations member States for collective measures, including the use of armed forces). The basis of this extension of competence was the United Nations General Assembly Resolution no. 377 A (V) of 3 November 1950 ("Uniting for Peace" Resolution)²⁷³ and it was used on several occasions (1956, 1958, 1980, 1981). The fact that the United Nations General Assembly is intergovernmental in nature, together with the absence of a controlling parliamentary body, has led some scholars to consider that United Nations decision-making suffers democratic deficit.²⁷⁴ The Assembly has recommended, for example, that in authorising or endorsing the use of military force, the Security Council should always follow five criteria of legitimacy: a)

²⁷⁰ BORN, H. (2004), "The Use of Force under International Auspices: Strengthening Parliamentary Accountability", Born, H., Hänggi H., The "Double Democratic Deficit"..., (note 256), p. 210.

²⁷¹ BORN, HÄNGGI, "The Use of Force under International Auspices..." (note 107), p. 20.

²⁷² The United Nations General Assembly is not an inter-parliamentary structure of the United Nations (UN). It is examined in this section for reasons of symmetry with the assessment on the United Nations Security Council in the previous section.

²⁷³ See, for the text of this resolution,

<http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/059/75/IMG/NR005975.pdf?OpenElement>.

²⁷⁴ HÄNGGI, "The Use of Force under International Auspices: Parliamentary Accountability and the 'Democratic Deficits'", BORN H., HÄNGGI H., The "Double Democratic Deficit"..., (note 256), pp. 4ff.

Seriousness of the threat; b) Proper purpose; c) Last resort; d) Proportional means; and e) Balance of consequences.²⁷⁵

ii) Parliamentary Assembly of the Council of Europe

343. The Parliamentary Assembly consists of a number of individual representatives from each member State, with a President elected each year from among them for a maximum period of three sessions. The Assembly can adopt three different types of texts: recommendations, resolutions and opinions:

- Recommendations contain proposals addressed to the Committee of Ministers, the implementation of which is within the competence of governments;
- Resolutions embody decisions by the Assembly on questions, which it is empowered to put into effect or expressions of view for, which it alone is responsible;
- The Assembly can also express opinions on questions put to it by the Committee of Ministers, such as the admission of new member states to the Council of Europe.

344. The Parliamentary Assembly, said to be the driving force of the Council of Europe, has been behind many of the Organisation's major initiatives. The Parliamentary Assembly has launched several reports in the field of armed forces in members States which have resulted in several Resolutions or Recommendations. In addition to Recommendation 1713(2005) "on democratic oversight of the security sector in member states", which brought about the request by the Committee of Ministers to launch the current study, the Parliamentary Assembly in the field of armed forces made i.e. the following resolutions: Resolution 903 (1988) on the right to association for members of the professional staff of the armed forces, Resolution 642 (1976) on the control of the manufacture and trade of arms, Resolution 1215 (2000) on the campaign against the enlistment of child soldiers and their participation in armed conflicts, Recommendation 1382 (1998), Drawing up a European code of conduct on arms sales, Recommendation 1742 (2006) Human rights of members of the armed forces, Recommendation 1572 (2002), Right to association for members of the professional staff of the armed forces, Recommendation 945 (1982) on international humanitarian law. It also adopted on 4.10.2007 a Resolution 1578 (2007) on the concept of preventive war and its consequences for international relations.

iii) North Atlantic Treaty Organisation Parliamentary Assembly

345. The North Atlantic Treaty Organisation Parliamentary Assembly is inter-parliamentary in character and stands as a link between national Parliaments and the Alliance. It functions through committees, searching to build consensus, and adopting resolutions and recommendations that pass to the Secretary General and the North Atlantic Council. One of the aims of the North Atlantic Treaty Organisation Parliamentary Assembly is "to assist in the development of parliamentary mechanisms, practices and 'know-how' essential for the democratic control of armed forces".²⁷⁶ The North Atlantic Treaty Organisation Parliamentary Assembly would like to strengthen parliamentary oversight over European Security and Defence Policy, and promotes in this respect the need for dialogue with the European Parliament and the national parliaments. It sees itself as a "visible manifestation of the Alliance's shared commitment to parliamentary democracy. Its activities enhance the collective accountability of the North Atlantic Treaty Organisation. They also contribute to the

²⁷⁵ Doc. General Assembly UN A/5965, Report of the High-level Panel on Threats, Challenges and Change, entitled "A more secure world: our shared responsibility", Adopted in the Fifty-ninth session, 2 December 2004, online <http://www.un.org/secureworld/report.pdf>, pp. 57-58.

²⁷⁶ See <http://www.nato-pa.int/default.asp?SHORTCUT=1>.

transparency of the North Atlantic Treaty Organisation and its policies and to improving public scrutiny and awareness".²⁷⁷

iv) European Parliament

346. The competences of the European Parliament in the Common Foreign and Security Policy are restricted to being informed by the Presidency and the Commission of the development of this policy, posing questions to the Council and making recommendations, and holding an annual debate on progress in its implementations (Art. 21 Treaty on European Union). Within the European Parliament, there is a Security and Defence Subcommittee.

347. According to the Treaty amending the Treaty on European Union and the Treaty of European Community, the European Parliament should be regularly consulted and informed on the main aspects and fundamental choices regarding the European Security and Defence Policy. The views of the European Parliament are to be duly taken into account. Also, Protocol no. 1 on the Role of the National Parliaments in the European Union (annexed to the Treaty amending the Treaty on European Union and the Treaty of European Community, provides in its Article 10 the possibility for a "conference of the (domestic parliamentary) bodies charged with European Union affairs" to organise inter-parliamentary conferences to debate particular subjects, including European Security and Defence Policy.

v) Western European Union Assembly

348. The Western European Union Assembly was founded in 1954, as the first European inter-parliamentary assembly for security and defence matters. It represents the parliamentary dimension of the Western European Union based on its consultative powers vis-à-vis the Western European Union Council as laid down in Article IX of the 1954 modified Brussels Treaty. It scrutinises the full implementation of the collective defence obligation laid down in Article V of the Treaty, it scrutinises intergovernmental cooperation in the field of armaments and armaments research and development and, following the transfer of Western European Union's operational activities to the European Union in 2000, it acts as the Inter-parliamentary European Security and Defence Assembly, focusing on the European Security and Defence Policy and the further development of the European Union's civil and military crisis-management capabilities.

349. The Defence Committee of the assembly is concerned with European security and defence issues from an operational and military standpoint. The Political Committee of the Assembly addresses the political aspects of European security and defence, and the Technological and Aerospace Committee, is concerned with matters pertaining to defence and dual technologies and to cooperation in the field of armaments. The Committee for Parliamentary and Public Relations is responsible for cooperation with national parliaments and monitors and analyses security and defence debates in national parliaments as well as parliamentary questions put to national governments. Members of the Assembly meet twice a year for plenary sessions and throughout the year in committee meetings, conferences and colloquies. Each committee appoints Rapporteurs from among its members, who present draft reports and recommendations on current security and defence issues to the competent committee. Committee members vote on the final texts which are then submitted to the plenary session for amendment and adoption by the Assembly. Assembly Recommendations are sent to the Western European Union Council, which is obliged to give written replies. Parliamentarians also have the right to put questions to the Council.

²⁷⁷ Para. 15.1 of the North Atlantic Treaty Organisation Parliamentary Assembly Declaration. For the full text of the Declaration of 17 November 2006, see <http://www.nato-pa.int/Default.asp?SHORTCUT=1007>.

350. Because the European Union's High Representative is also the Western European Union Secretary-General and the members of the European Union's Political and Security Committee make up the Western European Union Permanent Council, there is already some structured dialogue on European Security and Defence Policy issues between the national parliamentarians represented in the Assembly and the European Security and Defence Policy executive. The Council is obliged to provide an annual written report on its activities and to respond to parliamentary recommendations and questions.

351. The Western European Union Assembly considers democratic legitimacy as one of the three fundamental pillars of developing the European Security and Defence Policy and would like to play an increasing and decisive role in the process of parliamentary democratic scrutiny of the European Security and Defence Policy.²⁷⁸ The Protocol on the Role of National Parliaments in the European Union, which is appended to the European Union Reform Treaty, is considered by the Western European Union Assembly as capable of opening up additional possibilities for inter-parliamentary dialogue on European Security and Defence Policy, but still insufficient.²⁷⁹ Since the Lisbon Treaty provides for the possibility of a parliamentary control of the European Security and Defence Policy, a body could deal with this issue. Such a body could be for instance composed of representatives from national parliaments and the European Parliament to whom the activity report of the High Representative and his/her future projects would be presented twice a year.

vi) Organisation for Security and Co-operation in Europe Parliamentary Assembly

352. The Parliamentary Assembly of the Organisation for Security and Co-operation in Europe is the parliamentary dimension of the Organisation for Security and Co-operation in Europe, with 56 participating States. The Assembly's primary task is to facilitate inter-parliamentary dialogue, in order to meet the challenges of democracy throughout the OSCE area. The Assembly adopts final annual reports, resolutions and recommendations, works through committees and sends delegations on special missions to areas of latent or active crisis. Among the General Committees of the Assembly, the General Committee on Political Affairs and Security and the General Committee on Democracy, Human Rights and Humanitarian Questions might be involved in aspects related to the subject of this report.

353. Among the resolutions adopted by the annual sessions of the Assembly, some of them refer to issues like the ban on cluster bombs (Kiev, 2007), the illicit air transport of small arms and light weapons and their ammunition (Kiev, 2007; Brussels, 2006; Washington, 2005), control of police and security services in OSCE participating States (Brussels, 2006), the Code of Conduct for participants in OSCE missions (Brussels, 2006; Washington, 2005), strengthening the effective parliamentary oversight of security and intelligence agencies (Brussels, 2006), on a total ban on anti-personnel landmines (Edinburgh, 2004) etc. In its Edinburgh Declaration of 2004, the Assembly stressed "the importance of democratic control and integration of armed forces as an essential aspect of regional security" and recommended support for the joint initiatives of the Assembly and of the OSCE Conflict Prevention Centre to hold seminars on this issue (para 15).²⁸⁰

²⁷⁸ Assembly of the Western European Union, The Inter-parliamentary European and Security and Defence Assembly, The Message from Berlin to the Heads of State and Government on the Way Ahead for the European Security and Defence Policy for their consideration ahead of the European Council meeting to be held on 25 March 2007 on the occasion of the 50th anniversary of the Treaty of Rome, adopted in Berlin, on 7 February 2007. For the full text of the Message, see http://www.assembly-weu.org/en/presse/espace_presse/documents/Berlin%20AssemblyMessage%20FINAL%20ENG%20pres.pdf.

²⁷⁹ See http://www.assembly-weu.org/en/presentation/assemblee_en_bref.php.

²⁸⁰ See <http://www.oscepa.org/index.aspx?articleid=+376>.

vii) Inter-Parliamentary Union

354. The the Inter-Parliamentary Union is an international organisation of Parliaments of sovereign States, established in 1889. The Union defines itself as the focal point for world-wide parliamentary dialogue which works for peace and co-operation among peoples and for the firm establishment of representative democracy. Among the Standing Committees of the Union, the Standing Committee on Peace and International Security, the Standing Committee on Democracy and Human Rights and the Ad Hoc Committee to Promote Respect for International Humanitarian Law might be involved in aspects related to the subject of this report.²⁸¹

355. Disarmament is a constant theme on the agenda of the Union. Disarmament questions are regularly placed on the agendas of the Inter-Parliamentary Union statutory conferences, which have discussed such important issues as a global register of arms transfers, peace in the Middle East, nuclear non-proliferation, protection of minorities as a prerequisite for stability, security and peace, Comprehensive Test Ban Treaty and ban on nuclear weapons testing, as well as the fight against terrorism.²⁸²

c. International courts

356. Three international courts are relevant for this study, and will be briefly examined in the next paragraphs: the European Court of Human Rights, the International Court of Justice, and the International Criminal Court. As regards the European Court of Justice, it is to be noted that Art. 46 of the Treaty on European Union excludes the Common Foreign and Security Policy, including the European Security and Defence Policy, from its jurisdiction.

i) The European Court of Human Rights

357. The High Contracting Parties to the European Convention on Human Rights are subject to the judicial review of the European Court of Human Rights. The control of the European Court of Human Rights over the military is limited to violations of the Convention and its Protocols. Judgments about military issues are usually related to violations of fundamental rights of military personnel, but may also relate to the violation of fundamental rights in the context of military occupation of foreign territory, of acts committed by armed forces in foreign territory in situations other than occupation, in situations related to peace-keeping operations or multinational coalitions.²⁸³ In both cases, the Court aims to strike the correct balance between national security and individual rights. Armed forces exist to protect democratic values, and have, consequently, to respect the rule of law and fundamental rights in performing its missions.

358. Since the *Engel* case,²⁸⁴ the Court has ruled on the protection of the individual rights of military personnel. The Court has also considered some actions committed by armed forces as torture or degrading or inhuman treatment. Unlawful actions by the military entail responsibilities of the contracting parties involved, and the Court has awarded compensation to the person

²⁸¹ See <http://www.ipu.org/strct-e/comtees.htm#C1>.

²⁸² See <http://www.ipu.org/iss-e/peace.htm#Disarmament>.

²⁸³ See, for the second type of cases, the examples quoted in the section above on foreign military presence.

²⁸⁴ *Engel and Other v. Netherlands*, 8 June 1976, (Applications no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72).

affected or to their family. Other issues of disputes brought before the Court are the maintenance of discipline within the military structure, and the nature of military justice.²⁸⁵

ii) United Nations International Court of Justice²⁸⁶

359. The United Nations International Court of Justice was established by the Charter of the United Nations (Arts. 92-96), and is also regulated by the Statute of the Court and the Rules of the Court. The members of the Charter are *ipso facto* part of the Statute of the United Nations International Court of Justice. The competences of the Court are *inter alia* to decide upon infringements of the Charter, and to give advisory opinions on legal questions by request of the General Assembly or the Security Council, or other United Nations organs and specialised organs authorised by the General Assembly. In settling contentious cases, this court examines issues such as the legality of the use of force in specific missions, frontier disputes, arrest warrants, application of conventions, interpretation questions of a rule, etc. On the other hand, some of the advisory opinions have settled important directives concerning the application of international humanitarian law, or the legality of the threat or use by a State of nuclear weapons in armed conflicts.²⁸⁷

iii) The International Criminal Court

360. The Parliamentary Assembly of the Council of Europe Recommendation 1713(2005) states that "The conduct of the troops should be subject to the jurisdiction of the International Criminal Court in The Hague". Accordingly, the member states of the Council of Europe that are at the same time ratifying parties of the Treaty establishing the International Criminal Court, are under its jurisdiction. The Rome Statute²⁸⁸ settles the International Criminal Court as an independent, permanent and last resort court, which has jurisdiction to judge serious international crimes, such as genocide (Art. 6), crimes against humanity (Art. 7), war crimes (Art. 8) and the crime of aggression (to be defined and included in the Rome Statute following an amendment to it). Articles 28 and 33 of the Rome Statute of the International Criminal Court deal with the responsibility of commanders and other superiors, and the responsibilities of military personnel for superior orders and prescription of law. There is an Assembly of States Parties that makes recommendations, provides management oversight regarding the administration of the Court, and acts as a legislative body of the International Criminal Court (Art. 112). Almost all Council of Europe member States are parties to the Rome Statute (out of 47, only 8 have yet to ratify it).²⁸⁹

²⁸⁵ All these issues are identified by ROWE, P. (2001), "Control over Armed Forces exercised by the European Court of Human Rights", Vankovska, B. (ed.), Legal Framing of the Democratic Control of Armed Forces and the Security Sector: Norms and Reality/ies, Geneva, DCAF / Centre for Civil-Military Relations, online: <http://se2.dcaf.ch/serviceengine/FileContent?serviceID=DCAF&fileid=E4FBA54C-73A7-8050-4230-A42842B61B4B&lng=en>

²⁸⁶ Information extracted from the website of the United Nations International Court of Justice: <http://www.icj-cij.org>.

²⁸⁷ See, for some examples of judgments and advisory opinions, the section above on foreign military presence.

²⁸⁸ The Rome Statute dates from 17 July 1998 (document A/CONF.183/9), and was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The Rome Statute, as adopted by the conference, entered into force on 1 July 2002.

²⁸⁹ The following Council of Europe member States are states which are party to the Rome Statute: Albania, 31 January 2003; Andorra, 30 April 2001; Austria, 28 December 2000; Belgium, 28 June 2000; Bosnia and Herzegovina, 11 April 2002; Bulgaria, 11 April 2002; Croatia, 21 May 2001; Denmark, 21 June 2001; Estonia, 30 January 2002; Finland, 29 December 2000; France, 9 June 2000; Georgia, 5 September 2003; Germany, 11 December 2000; Greece, 15 May 2002; Hungary, 30 November 2001; Iceland, 25 May 2000; Ireland, 11 April 2002; Italy, 26 July 1999; Latvia, 28 June 2002; Liechtenstein, 2 October 2001; Lithuania, 12 May 2003; Luxembourg, 8 September 2000; Malta, 29 November 2002; Montenegro, 3 June 2006; Netherlands, 17 July 2001; Norway, 16 February 2000; Poland, 12 November 2001; Portugal, 5 February 2002; Romania, 11 April 2002; San Marino, 13 May 1999; Serbia, 6 September 2001; Slovakia, 11 April 2002; Slovenia, 31

361. Only a few cases have reached the International Criminal Court.²⁹⁰ Three States Parties, in turn, have referred situations to the Court, and so has the United Nations Security Council.²⁹¹ The public can also send communications to the Office of the Public Prosecutor.

3. International Standards

362. Although there are no internationally agreed standards for democratic oversight over armed forces, some regional attempts have been made in this field.²⁹² International Organisations such as Organisation for Security and Co-operation in Europe, the Parliamentary Assembly of the Council of Europe, the European Union, the Inter-parliamentary Union, the Assembly of the Western European Union, the Organisation for Economic Co-operation and Development, the United Nations and the North Atlantic Treaty Organisation, have fixed and recommend some standards concerning the democratic oversight of the military, that are frequently immersed in the broader context of oversight of the security sector.²⁹³ These standards apply to the member states of the corresponding organisation.

363. The various agreements between States, including those that created the said organisations, and the international standards produced by these organisations have different legal force – from binding (in the case of international treaties) to soft law documents. Even in the absence of sanctions provided by treaties (which are still binding on their contracting parties) in the cases of infringement of the provisions of the respective international legal instruments, the compliance with their provisions (which is a proven reality in most instances) is highly important for the maintenance of sustainable international relations among States that are more interdependent than ever, particularly in issues such as defence and security. Some types of international standards are provided for by international treaties, Codes of Conduct, Model Laws, Recommendations,²⁹⁴ Resolutions,²⁹⁵ Guidelines,²⁹⁶ Documents,²⁹⁷ and Framework documents.²⁹⁸ The first three will be analysed here.

December 2001; Spain, 24 October 2002; Sweden, 28 January 2001; Switzerland, 12 October 2001; "The former Yugoslav Republic of Macedonia", 6 March 2002; United Kingdom, 4 October 2001. So, from the Council of Europe member States, only eight States have not yet ratified the Rome Statute: Armenia, Azerbaijan, Czech Republic, Republic of Moldova, Monaco, Russian Federation, Turkey and Ukraine. Information from the website: <http://www.icc-cpi.int>.

²⁹⁰ ICC-01/04-01/06, The Prosecutor v. Thomas Lubanga Dyilo (Democratic Republic of the Congo); ICC-02/04-01/05, The Prosecutor v. Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen (Uganda); ICC-02/05-01/07, The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") (Darfur, Sudan).

²⁹¹ For the situation in Darfur, Sudan, by UN-SC Resolution no. 1593 of 31 March 2005.

²⁹² BORN, FLURI, JOHNSSON, Parliamentary Oversight of the Security Sector..., (note 106), p. 23.

²⁹³ A view of these standards applied to intelligence agencies can be found in BORN H., LEIGH I. (2005), Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies, Oslo, DCAF / Human Rights Centre, Department of Law, University of Durham / Norwegian Parliamentary Intelligence Oversight Committee.

²⁹⁴ See the Parliamentary Assembly of the Council of Europe Recommendation 1713 (2005).

²⁹⁵ An example is UN Resolution 687, of the Security Council, adopted by the Security Council at its 2981st meeting, on 26 March 1991. According to paragraph 8, "Iraq shall unconditionally accept the destruction, removal, or rendering harmless, under international supervision" of all chemical and biological weapons, and all ballistic missiles with a range greater than 150 kilometres. Available online: <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0596/23/IMG/NR059623.pdf?OpenElement>.

²⁹⁶ One recent Guideline is that proposed by OECD "Security System Reform and Governance", DAC Guidelines and Reference Series, 2005, online: <http://www.oecd.org/dataoecd/8/39/31785288.pdf>.

²⁹⁷ Vienna Documents (1990 and 1992) on Confidence and Security Building Measures (CSBMs), adopted within the Conference on Security and Co-operation in Europe, The Forum for Security and Cooperation, as part of the Organisation for Security and Co-operation in Europe, has continued the negotiations on the CSBMs

a. International Treaties

364. Starting with the first category, two types of international treaty play a special role regarding the use of force: treaties protecting human rights in general (of armed forces personnel,²⁹⁹ of civilians, of prisoners of war), and treaties related to armament procurement, arms control, and disarmament (including prohibition on use and non-proliferation of certain types of armaments).

i) Treaties on human rights and humanitarian law

365. The treaties protecting human rights that must be observed by the Council of Europe member States are diverse, the following being the most significant:

- Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by its subsequent Protocols (European Convention on Human Rights),
- Charter of Fundamental Rights of the European Union,³⁰⁰
- Geneva Conventions of 1949 and their Additional Protocols (about amelioration of the condition of the wounded and sick in armed forces, treatment of prisoners of war, and protection of civilian persons in time of war),
- International Covenant on Civil and Political Rights,
- Convention on the Prevention and Punishment of the Crime of Genocide.

366. Some of the above-mentioned instruments are part of international humanitarian law,³⁰¹ while others are classical human rights documents. Some of them refer to the rights of soldiers, the sick and injured in armed forces, the civilian or non-combatant, and prisoners of war.

ii) Treaties on armament control

367. Significant international treaties have also been concluded with reference to arms control. They refer to the general use and control of arms, to non-proliferation of certain types of arms, like weapons of mass destruction (WMD), to reduction of armaments, and to prevention of accumulation of arms by a state. The United Nations has produced the bulk of these agreements, and has a special office for disarmament affairs. Among the several treaties related to arms control, the most important ones are the following:

- Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Geneva Protocol, 1925, entered into force February 8, 1928),
- The Antarctic Treaty (Washington, 1959, entered into force June 23, 1961),

(Vienna Document 1994, and other documents like a Framework for Arms control (FSC.DEC/8/96)). Information can be found at: <http://www.osce.org/fsc/>.

²⁹⁸ The North Atlantic Treaty Organisation has also proposed partnership action programmes, like the Partnership Action Plan on Defence Institution Building (PAP-DIB), online: <http://www.nato.int/docu/basicxt/b040607e.htm>, and the Partnership for Peace (PfP). The legal texts and work programmes of the latter can be consulted at: <http://www.nato.int/issues/pfp/off-text.html>.

²⁹⁹ For a complete view about ROWE P., (2006), *The Impact of Human Rights Law on Armed Forces*, Cambridge, Cambridge University Press. The Parliament of the Council of Europe has also make a Recommendation on this issue. See Recommendation 1742 (2006), adopted by the Assembly on 11 April 2006 (11th Sitting), about Human rights of members of the armed forces, online: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/EREC1742.htm>.

³⁰⁰ Does not yet have legally binding force.

³⁰¹ Some of the treaties related to arms control are also included under this label, and will be listed below.

- Treaty on the Non-Proliferation of Nuclear Weapons (NPT, 1968, entered into force 5 March 1970),
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC, 1972, entered into force March 26, 1975),
- Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD, 1977, entered into force 5 October 1978),
- Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCWC, 1981, entered into force 2 December 1983),
- Treaty on Conventional Armed Forces in Europe (CFE, 1990, entered into force 9 Nov. 1992),
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (CWC, 1993, entered into force 29 April 1997),
- Comprehensive Nuclear-Test-Ban Treaty (CTBT, 1996, not yet in force),
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (APM Convention or Mine-Ban Convention, Ottawa, 1997, entered into force 1 March 1999).

b. Codes of Conduct

368. The second category is the Codes of Conduct applicable to armed forces personnel. The most well-known in the military field is the OSCE Code of Conduct on Politico-Military Aspects of Security (1994).³⁰² Sections VII and VIII of the Code regulate the democratic control of armed forces. This control is considered an indispensable element of stability and security of democracies. Under this regulation, each participating State shall provide control mechanisms to ensure that military authorities fulfil their constitutional and legal responsibilities, whose role and missions must be defined in a clear way. These sections also require that the legislature approve the defence expenditures. Concerning the members of the armed forces, each State will ensure the exercise of their rights and their political neutrality, and will instruct the personnel in international humanitarian law, and in the respect of human rights and fundamental freedoms. The State has to adopt mechanisms to hold individually accountable for their actions under national and international law both the personnel and the commanders. Each State must also ensure that its armed forces are, in peace and in war, commanded, manned, trained and equipped in ways that are consistent with the provisions of international law.

369. The Code of Conduct for Law Enforcement Officials, adopted by the General Assembly through the Resolution 34/169 of 17 December 1979, is also applicable to military authority or state security forces when they exercise police powers.³⁰³

³⁰² Adopted at the 91st Plenary Meeting of the Special Committee of the Conference on Security and Co-operation in Europe (CSCE) Forum for Security Co-operation in Budapest on 3 December 1994 (FSC/Journal No. 94). Available online: http://osce.org/documents/fsc/1994/12/4270_en.pdf.

³⁰³ Article 1: "Law enforcement officials shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession". The commentaries to this article clarifies that the term "law enforcement officials" includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention. Online: http://www.unhchr.ch/html/menu3/b/h_comp42.htm.

c. The CIS Model Law: a comparative perspective

370. CIS Model Law on the Parliamentary Oversight of the State Military Organisation³⁰⁴ is a recommendation on the forms of implementing the powers and functions of the Parliament oversight of armed forces. This law defines parliamentary oversight of state military organisations as “activities aimed at the establishment and the insurance of the adequate application of the system of legal provisions and administrative measures put in place by the Parliament in cooperation with other bodies of State power and institutions of the civil society pursuing” to ensure effective oversight of armed forces, political neutrality and de-ideologisation of armed forces, to shape the military as an integral part of the law-abiding State, and to ensure the maximum permissible transparency of the organisation (Art. 1(2))

371. The Parliaments of the CIS countries shall execute the oversight by means of: a) adoption of laws specifying mechanisms and procedures of administration of the State military organisation; b) approval of the budget of armed forces; c) approval of the composition, structure, and manpower of servicemen and personnel of armed forces; d) ratification and denunciation of international agreements and treaties related with the military sector; e) assessment of key issues in ensuring the security of individual, society, and State; f) legislative regulation of the respect of civil, social, and personal rights and the interests of servicemen and personnel of armed forces; g) assessment and evaluation of military and political situations, approval of imposition and lifting of the state of emergency and martial law, declaration of the state of war and the conclusion of peace; and h) legislative regulation of the use of armed forces (Art. 2) The implementation of each of these mechanisms is further developed in the Model Law.

VI. Conclusions

372. The primary duty of the armed forces in a democratic society is to protect and ensure the security of society from exterior threats and to safeguard democratic values, the rule of law and the human rights and freedoms of all persons subject to that national jurisdiction.

373. However, the lessons learned from history - including the recent one - of European States has shown that democracy and its values can be affected by abuse when the military seizes power in a military coup or threatens civilian leaders with such conduct, or attacks the civilian leaders with such conduct or decides to impose its will by means of supporting a certain government.

374. It appears from the study that grounds for democratic oversight over armed forces can be found at the domestic and international level, both being inter-related.

375. At the domestic level, the need to align the interests of the military with the interests of a democratic society has grown significantly over the decades, as have democratic constitutional values such as democracy, the rule of law, fundamental rights and freedoms.

376. Additionally, it should be ensured that the policies decided by parliament and/or governments are carried out as planned (including by the military), and that they are in line with public interest in public spending for military purposes as well as the citizens' increasing interest in, and their right to know, how the State is planning and applying policies for their security.

³⁰⁴ 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), edited by Fluri P., Nikitin A., Geneva, DCAF, 2002, online: <http://www.dcaf.ch/publications/kms/details.cfm?lng=en&id=20136&nav1=4>.

377. Furthermore, armed forces as a component of the executive branch and power are also subject to the implementation of the basic democratic principle of separation and balance of powers. This implies a necessary accountability of the military before the society. Moreover, armed forces should always be kept away from involvement in the political process.

378. At the international level, the use of force by states is prohibited in contemporary international law, the only exceptions - relevant in the framework of this study - being self-defence and the use of force as decided or authorised by the United Nations Security Council on the basis of Chapter VII of the United Nations Charter. Thus, where military officials ignore the strict conditions allowing for the use of force to be legitimate, the responsibility of the State is engaged.

379. Democratic control over armed forces represents a guarantee that human rights and fundamental freedoms be respected both within the armed forces and by the armed forces during their operation.

380. Democratic control over armed forces constitutes an international confidence-building measure likely to avoid international conflicts and to consolidate international peace and security.

381. Each Council of Europe member State enjoys the sovereign entitlement to define the mandate of its armed forces, subject to the constraints of international law, the national constitution, national law and national democratic decision-making procedures.

382. Since the end of Cold War, there has been also a refocusing of defence and security policy in many Council of Europe member States in response to a changed international strategic environment and a new range of threats. There has been a move away from the focus on traditional military security to embrace a more comprehensive approach to security. Consequently, armed forces have an increasingly wide-ranging mandate, encompassing external and domestic security roles, beyond their traditional task of the territorial defence of the State.

383. While carrying out domestic security tasks (which might include military assistance in maintaining public order, in case of disasters etc.), decisions concerning armed forces should always remain in civilian hands, and, if force is used, it should be commensurate with the security needs, in accordance with the principles of subsidiarity and proportionality, and should observe fundamental rights in accordance with the European Convention on Human Rights, and democratic standards.

384. The most significant external security roles of the armed forces of Council of Europe member States include: defence against external threats (individual self defence), collective self defence, peacekeeping and crisis management operations, and peace building operations.

385. The external roles played by armed forces have steadily expanded since the end of the Cold War. The armed forces of Council of Europe member States now fulfil a diverse range of functions in which they collaborate with groups of other States, intergovernmental organisations, non-governmental organisations and the private sector. Although national militaries are making valuable contributions to peace operations and crisis management around the world, it is imperative that the missions in which they participate are duly mandated, and enjoy international legitimacy.

386. Military decisions have some special features (speed or urgency, efficacy, secrecy, discretion) that need to be balanced with the democratic control over them. The following acts or issues should be particularly under control: the sending of troops abroad, the use of armed forces in domestic issues during a state of emergency, the use of public funds with regard to the military budget and military expenditure, the appointment of top commanders.

387. The mechanisms for exercising control can adopt several combinations, ranging from systems of minimal control to maximum or more comprehensive oversight of military decisions. The analysis of the existing types of control – ex ante, ex post or both – demonstrates that a combination of both is desirable for an effective oversight.

388. Whilst this is not a generalised feature, the constitutional regulation of control is common among countries experiencing a post-authoritarian, post-totalitarian or post-civil war transition to democracy. Thus, the constitutional regulation of control goes further than its functional dimension (i.e. securing that armed forces and command are accountable) to introduce an additional value: it ensures the commitment of armed forces to the new constitutional and democratic order.

389. At the same time, it rules out any eventual identification between armed forces and the pre-democratic regimes. In new democracies and new constitutions, a positive regulation of control and its parameters is highly recommended.

390. Constitutional rules or laws should clearly identify the organs exercising control and oversight over armed forces, as well as the acts or issues under control and the mechanisms to achieve it.

391. Domestic democratic oversight over armed forces is conducted by parliaments, the executive, the judiciary and other entities.

392. There are diverse mechanisms of control that imply different degrees of intervention or influence of the Parliament in military decisions. Irrespective of the political regime, Parliaments should always have a major role in monitoring, scrutinising and controlling armed forces. Whilst Parliament may not be the only democratic organ in a given State, it is the one that links democratic representation and the function of controlling executives. The absence of significant forms of parliamentary control over armed forces is inconsistent with democratic institutions.

393. The creation of specialised defence committees within Parliaments, insofar as it enables democratic control, is to be welcomed.

394. Among the mechanisms of parliamentary control, the most relevant are the approval and control of the military budget, sending troops abroad, adoption of legislation and other decisions regulating the military field, and direct (co-participation or *a posteriori*) control or indirect control over decisions adopted by organs with military competences - such as those regarding the appointment or dismissing of top commanders and participation in shaping the general defence policy.

395. As regards the role of the executive (head of State, government, National Defence Council), the mechanisms of control include *inter alia* decision-making and control over the use of force in states of emergency and appointment and dismissal of top commanders.

396. The role of the judiciary is also of paramount importance. Judicial control always reinforces the guarantee of armed forces involvement, and anchors it firmly within the principle of the rule of law.

397. Constitutional Courts, as well as military courts, where they exist, bring an important contribution to the control of armed forces.

398. Other oversight entities, such as ombudsmen, including military ones, audit offices and courts of audit complement and reinforce oversight over armed forces.

399. Part of domestic control, internal military mechanisms also play a supervisory role. Military disciplinary law, criminal law and code of conducts provide the internal regulatory framework for ensuring that orders of civilian command authorities are executed from the top down; they also ensure that members of armed forces have clear standards and norms for fulfilling their duty.

400. Internal accountability mechanisms are complementary to executive, parliamentary and judicial oversight of the armed forces. These accountability mechanisms can only function if professionalism and internal accountability of the armed forces are guaranteed. Members of armed forces have specific duties which they must fulfil. Respect for military discipline and the duty to obey are fundamental duties for all personnel. However, they also have the duty to disobey illegal or improper orders. This is particularly important given that all personnel are personally accountable for their actions, and may be liable for breaches of either national or international laws. Commanders at every level play a crucial role in ensuring the discipline of those under their command. Superiors have the responsibility to take the necessary steps to prevent, investigate, and address disciplinary infractions or crimes committed by subordinates.

401. Controlling organs at domestic level should always have, as parameters for their acts, international standards and guidelines. Domestic standards and guidelines should not contradict the international ones. Given the specific characteristic of this sector (in which the use of legitimate violence is involved), the underlying question is how to balance, or better, how to optimise the public good, value or end involved in the decisions or acts of the military, taking into account the principles of democracy.

402. As a general rule, the controlling organs must obey the principles of respect for human rights, rule of law and democratic accountability, as well as international law.

403. The international dimension of the control involves issues related to international responsibility in case of acts committed by the armed forces during their military presence in foreign territory (which is important in order to establish which State or international body is entitled to control). It also implies full observance of the international standards regarding the legitimate use of force, as well as the other international treaties related to the use of force, the conduct of hostilities, international humanitarian law and human rights, as well as other non-binding documents adopted in the framework of various international organisations, some of them referring expressly to the democratic oversight of the military. This dimension also implies and involves intergovernmental, inter-parliamentary and judicial international forums which exercise various types of control.

404. The analysis shows that the international intergovernmental dimension prevails in terms of decision-making (and, implicitly, in terms of control) in issues involving the international use of armed forces. Moreover, decisions in this field are taken within the competent international bodies of these international organisations by government representatives, even if, at domestic level, the competence to take such decisions belongs or should belong to national Parliaments, thus producing a certain transfer of competences from the domestic parliamentary level to the international governmental one.

405. The international inter-parliamentary bodies have weak competences and mechanisms for the oversight of armed forces, which are still to be enhanced and developed. It is necessary that member States adopt measures of reform aimed at increasing the oversight functions of these international bodies.

406. Also, cooperation of these bodies with national Parliaments, and cooperation between national parliaments in this area, should be strengthened.

407. International jurisdictions (like the United Nations International Court of Justice, the European Court of Human Rights, the International Criminal Court) play an important role in the oversight of the armed forces. Some of them already contribute a lot and they should contribute further to developing and implementing standards in this field. The classic international courts (for instance, the United Nations International Court of Justice), however, depend upon consent by the parties to an international dispute in order for their competence to be engaged. It would be appropriate that more Council of Europe member States make declarations accepting the jurisdiction of the United Nations International Court of Justice, in accordance with Art. 36 (2) of this Court's Statute. It is equally important that all Council of Europe member States which have yet to ratify the International Criminal Court Statute do so as soon as possible.

408. At the European Union level, the intergovernmental character of the security and defence policy, together with the lack of judicial competence of the European Court of Justice on European Security and Defence Policy issues and the insufficient competence of scrutiny by the European Parliament, produce a deficit in the democratic control of armed forces. Greater involvement of the European Parliament, as well as the granting of competences in this field to the European Court of Justice, would improve the democratic credentials of armed missions under the European Union flag.

409. Regarding the control of the use of force in international missions, the existence of an evolving mixed system of accountability, with procedures and actions both at national and international level, can be observed.

410. The growing use of military forces in international missions calls undeniably for development and reinforcement at national and international level of the variety of legal tools of control as described above in this report.

411. The analysis shows that actors, acts and mechanisms involved in the democratic control over armed forces, both at national and international level, in Council of Europe member States are various and that the national dimension of the democratic control is sounder than the international one.

412. The variety of models of control, alone or interrelated, reveals that democratic control over armed forces can be shaped and improved in order to meet efficiently both the needs of the State and the increased concerns linked to democratic values and principles.

Annex A: Overview of national legislation on the authority to decide participation in missions abroad

	Country	The authority to decide participation in missions abroad, as provided in national legislation	Level of parliamentary oversight
1.	Austria	Law on deployments 1997 Prior approval given by the Main Committee of the Austrian Nationalrat (there is no competence for the Upper Chamber, the Bundesrat, which also has competence on European affairs). It is composed of 32 MPs out of 183, proportional representation of political spectrum	HIGH
2.	Belgium	Art. 167 of the Constitution and Royal Decree of July 6, 1994 governmental decisions taken by consensus.	LOW
3.	Bulgaria	Law on deployments, December 2005 Authority depends on the character of the mission, ➤ National Assembly shall decide on the dispatch and use of Bulgarian armed forces abroad for political-military purposes ➤ Council of Ministers is authorised to send armed forces abroad, under obligations from membership of a treaty of a political-military character and also for humanitarian missions. ➤ In case of doubt or disagreement as to the 'character' of the proposed mission, the National Assembly should take the lead in determining the nature of the proposed mission.	MEDIUM (was HIGH between 1991-2005)
4.	Cyprus	No information was available	
5.	Czech Republic	Constitutional amendment Article 43. 1999 ➤ Parliament approves the dispatch of armed forces abroad ➤ Exceptions: Government decides on deployments when they concern: ○ An international contractual obligation of common defence ○ PSOs under decision of international organisation CR member of ○ Rescue operations following a natural disaster ➤ Government shall inform Parliament without delay, and Parliament may revoke such decision	MEDIUM (was previously HIGH)
6.	Denmark	Constitution ➤ Prior approval ➤ Exceptions: observer missions which are very small in number	HIGH
7.	Estonia		
8.	Finland	Crisis Management Law 211/2006 (previously Peacekeeping Act 1984, revised 2001) ➤ Triple-lock system: United Nations resolution, Decision agreed both by executive and legislative. Government submits proposals to the President only after consulting the Parliament's Foreign Affairs Committee ➤ If an operation presents a particularly demanding military challenge or it is not based on a mandate of UNSC, the Government must consult the parliamentary plenary and provide it with a report on the matter.	HIGH

		➤ parliamentary plenary must be consulted when establishing a <i>stand by</i> unit. For using stand by units in missions, the Foreign Affairs Committee must be consulted. ➤ If less than 10 persons are assigned to a mission, the government must provide a report to the Foreign Affairs Committee, before submitting its proposal to the president.	
9.	France	not specified in constitution or laws	LOW
10	Germany	Deployment Law 2004 ➤ Prior approval of Parliament required. Exceptions: ○ humanitarian missions ○ For missions of low intensity and importance a government request is circulated among the members of Parliament and it is considered to be approved unless, one faction or a minimum of five per cent of parliamentarians call for a formal procedure, within seven days,. Parliament may demand withdrawal of troops.	HIGH
11	Greece	Law 2292/1995, Art. 3 ➤ Council of Ministers decides on deployments under obligations of international agreements ➤ The Ministry of Defence informs the Committee on Defence and Foreign Affairs	LOW
12	Hungary	Constitution amended 2003 ➤ Prior approval of Parliament required <i>Art. 19: Within this sphere of authority, the Parliament shall</i> <i>(3. j). with the exceptions laid down in the Constitution, rule on the use of the armed forces both abroad and within the country, the deployment of foreign armed forces in Hungary or in other countries from the territory of Hungary, the participation of the armed forces in peacekeeping missions, humanitarian operations in foreign theatres, and the stationing of the armed forces abroad or of foreign armed forces in Hungary.</i> <i>(6) A majority of two-thirds of the votes of the Members of Parliament in attendance shall be required for the decision specified in point j) of Paragraph (3).</i> ➤ Exceptions: North Atlantic Treaty Organisation deployments and European Security and Defence Policy missions (exempt from prior approval since February 2006)	MEDIUM (was HIGH before)
13	Ireland	Constitution, Defence Act (1954, 1960) ➤ Triple-lock system: 3 conditions for any deployment: UN mandate, agreed by government, approved by Parliament. ➤ exceptions from prior approval: ○ invasion of the country ○ deployments of fewer than 12 armed soldiers	HIGH

14	Italy	➤ Law 25/1997 - Prior approval for all decisions on defence and security matters prior to their implementation. ➤ Constitution - emergency clause, decrees can be made that must then be converted in Law within 60 days. Parliamentary debates used to take place after troops have been deployed, in 2003 (Iraq) and 2006 (Lebanon) the deployment of troops abroad was previously approved by the Parliament.	MEDIUM to HIGH
15	Latvia	No information was available	
16	Lithuania	No information was available	
17	Luxembourg	Law on PSOs 1992 ➤ Participation decided by government after consultation of competent parliamentary committees.	MEDIUM
18	Malta	The Armed Forces Act (Chapter 220 of the Laws of Malta). Article 3 provides that <i>it shall be lawful for the President of Malta to raise by voluntary enlistment and maintain an armed force, consisting of a regular and of a territorial force or of either of such forces (including the reserve of such force) and consisting of such units of any arm and subject to such designation of title as maybe prescribed or as the President of Malta may direct.</i>	
19	Netherlands	Constitution amended 2000, Art. 100 ➤ Government shall inform Parliament in advance (on the basis of a letter)	MEDIUM
20	Poland	Statute on rules of deployment 1998 ➤ Parliament to be informed immediately a deployment decision is made by government	LOW
21	Portugal	➤ Law on foreign deployments 46/2003. Government has to communicate to Parliament its decisions ➤ Law of the Armed Forces and National Defence 29/1982, modified March 2007: The Chairman of the Defence Committee plus two other MPs are members of the Superior Council for National Defence, which is an advisory body of the Government that takes decision on sending troops abroad.	LOW
22	Romania	Law on troop deployments 42/2004 ➤ the President takes decision and informs Parliament within 5 days ➤ Prior approval of Parliament is required for missions which are not deployed on the basis of a treaty to which Romania is a party.	MEDIUM
23	Slovakia	Constitution, Art. 86 ➤ Prior parliamentary approval required for all deployments	HIGH
24	Slovenia	➤ Government takes decision and informs Parliament at a later date	LOW
25	Spain	Ley Organica 5/ 2005 ➤ Prior approval of Parliament for missions not directly related to the defence of Spain or national interests. When rapid reaction needed, Parliament consultation and approval will be carried out according to emergency procedures. ➤ In situations of "maximum urgency" where prior consultation is not possible, government has to submit its decision to Parliament as soon as possible, for ratification.	HIGH (was LOW before)

26	Sweden	“The Instrument of Government”, Law on deployment ➤ Prior approval of Parliament ➤ Exceptions: ○ Up to 3000 troops for UN or OSCE peace keeping missions, Chapter VI (not peace enforcement, Chapter VII!). Parliamentary approval must still be sought by government. ○ Armed attack upon the country	HIGH
27	Switzerland	Law on the Armed Forces and Military Administration - Prior approval by parliament necessary for armed deployments if planned duration of deployment exceeds 3 weeks or if number deployed exceeds 100. In cases of urgency retroactive approval possible. - Prior approval by parliament not necessary when deployment is for up to 100 persons for up to 3 weeks, or when deployment occurs unarmed.	HIGH
28	Turkey	Constitution - Parliamentary prior approval	HIGH
29	United Kingdom	Royal prerogative Government may ask for parliamentary approval, but it is its decision when to consider this request appropriate. (It did so in March 2003, for Iraq)	LOW

Sources: Wolfgang WAGNER “Parliamentary Control of Military Missions: Accounting for Pluralism” - DCAF Occasional Paper No. 12, August 2006 as well as additional research on internet, legislation and information provided by parliamentary staff. Amended by the Secretariat of the Venice Commission in 2008.

Annex B: Overview of the constitutional rules of appointment of top commanders in selected Council of Europe member States

COE Member States	overview of the constitutional rules on appointment of top commanders in Selected Council of Europe members States (Who is the military commander in chief , which authorities are involved in the appointment of military top commanders)	
	Legislative oversight	Executive oversight
Albania		The President of the Republic is the General Commander of the Armed Forces, and he exercises this command through the Prime Minister and Minister of Defence (Art. 168-169)
Austria		Commander-in-Chief of the Federal Army is the Federal President (Art. 80 N°1)
Azerbaijan		-The President of the Azerbaijan Republic is the Supreme Commander-in-Chief of Military Forces of the Azerbaijan Republic (Art. 9 N°3)
Belgium		-The King may give military orders within the limits prescribed by law (Art. 114) -The King commands the armed forces, and determines the state of war and the cessation of hostilities (Art. 167(1.2))
Bulgaria		-The President is the Supreme Commander-in-Chief of the Armed Forces of the Republic of Bulgaria; -appoints and dismisses the higher command of the Armed Forces; proclaims general or partial mobilisation on a motion from the Council of Ministers in accordance with the law; proclaims state of war (Art. 100)
Croatia	- organisation of defence and command shall be regulated by the Constitution and law (Art. 7)	- The President is commander in chief of the armed forces - He appoints and relieves of duty military commanders
Czech Republic		- The President of the Republic is commander in chief of the armed forces Art. 63 (1)c
Estonia	- The Commander and the Commander-in-Chief of the Defence Forces shall be appointed to and released from office by the Riigikogu, on the proposal of the President of the Republic (Art. 127)	- The supreme commander of national defence is the President of the Republic
Finland		- The President of the Republic is the commander-in-chief of the defence forces (Section 128) - The President makes decisions on military appointments and matters pertaining to the Office of the President of the Republic (S.58)

France	- Statutes shall determine the rules concerning the general organisation of national defence (Art. 34)	- The President of the Republic shall make appointments to military posts (Art. 13) - The President shall be commander-in-chief of the armed forces. He shall preside over the higher national defence councils and committees (Art. 15)
Germany		- Power of command in respect of the Armed Forces is be vested in the Minister of Defence (Art. 65a))
Greece		- The President of the Republic is the commander in chief of the Nation's Armed Forces, the command of which shall be exercised by the Government, as specified by law (Art. 45)
Hungary		- The President of the Republic is the Commander in Chief of the Hungarian Armed Forces (Art. 29 (2)) - The President of the Republic shall appoint and promote Generals of the armed forces (Art. 30/A (1) i))
Ireland	- The exercise of the supreme command of the Defence Forces shall be regulated by law (Art. 13 N°5.1°)	- The supreme command of the Defence Forces is hereby vested in the President (Art. 13 N°4)
Italy		The President of the Republic is the commander of the armed forces and chairman of the supreme defence council constituted by law;(Art. 87 (9))
Latvia	- The Saeima shall determine the size of the armed forces of the State during peacetime (Art. 67)	- The President shall be the Commander-in-Chief of the armed forces of Latvia. During wartime, the President shall appoint a Supreme Commander (Art. 42)
Lithuania	- The Seimas shall give consent to the appointment and dismissal of Commander of the Armed Forces and the Head of the Security Service (Art. 84 N°14) - The Government, the Minister of National Defence, and the Commander of the Armed Forces shall be responsible to the Seimas for the administration and command of the armed forces of the State. (Art. 140)	- The President of the Republic shall appoint and dismiss, upon the assent of the Seimas, the Commander of the Armed Forces and the Head of the Security Service (Art. 84 N°14) - The President of the Republic shall be the Commander-in-Chief of the Armed Forces of the State (Art. 142)
Luxembourg	All matters connected with the armed forces are regulated by the law (Art. 96)	- The Grand Duke appoints to civil and military posts, in compliance with and subject to any exceptions made by the law (Art. 35.1)

Moldova		- The President of the Republic of Moldova is the Commander-in- Chief of the armed forces.
Netherlands		- The Government shall have supreme authority over the armed forces (Art. 92 N°2)
Norway		- The King is Commander-in-Chief of the land and naval forces of the Realm. These forces may not be increased or reduced without the consent of the Parliament [Storting] (Art. 25 (1)) - The King shall choose and appoint, after consultation with his Council of State, all military officials (Art. 21) - The King can dismiss commanders of regiments and other military groupings (Art. 22)
Poland	- The authority of the President of the Republic, regarding his supreme command of the Armed Forces, shall be specified in detail by statute (Art. 134 (6))	- The President of the Republic shall be the Supreme Commander of the Armed Forces of the Republic of Poland. - he shall, in times of peace, exercise command over the Armed Forces through the Minister of National Defence - he shall appoint the Chief of the General Staff and commanders of branches of the Armed Forces - in time of war, he shall appoint the Commander-in-Chief of the Armed Forces on request of the Prime Minister. He may dismiss the Commander-in-Chief of the Armed Forces in accordance with the same procedure (Art. 134)
Portugal		- The President of the Republic shall be ex officio Commander-in-Chief of the Armed Forces (Art. 120) - In relation to other bodies the President of the Republic shall be responsible, upon a proposal from the Government, for appointing the Chief of the General Staff of the Armed Forces and, after consulting the Chief of the General Staff of the Armed Forces, the Deputy Chief of the General Staff of the Armed Forces if any, and the Chiefs of Staff of the three armed services (Art. 133 p)) - The President of the Republic shall be personally responsible for performing the functions of Commander-in-Chief of the Armed Forces (Art.134 a))
Romania	- The structure of the national defence system, the preparation of the population, economy and territory for defence, as well as the military shall be regulated by an organic law.(Art. 118 (2))	- The President of Romania shall be Commander-in-Chief of the Armed Forces and preside over the Supreme Council of National Defence

Russian Federation		- The President of the Russian Federation appoints and dismisses the supreme command of the Armed Forces of the Russian Federation (Art. 83 h), k)) - The President of the Russian Federation shall be the Supreme Commander-in-Chief of the Armed Forces of the Russian Federation (Art. 87 N°1)
Serbia		The President of the Republic shall command the Armed Forces in peacetime and in war (Art. 83 N°5)
Slovakia		- The president acts as supreme commander of the Armed Forces Art.102 - If no president is elected, the supreme command of the armed forces is also transferred to the prime minister in this period (Art. 105 (l))
Slovenia		- The President of the Republic represents the Republic of Slovenia and is commander-in-chief of its defence forces (Art. 102)
Spain	- The basic structure of military organisation shall be regulated by an Organic Act in accordance with the principles of the Constitution	- It is incumbent upon the King, following authorisation by the Cortes Generales, to declare war and to make peace (Section 63 (3)) - It is incumbent upon the King to exercise supreme command of the Armed Forces (Section 62 h))
Switzerland	The Federal Assembly elects (...) the General (Art. 168, 1) (The title of full General is reserved for the Commander-in-Chief of the armed forces if substantial parts of the armed forces have been mobilised.)	The Federal Council conducts the elections or appointments which are not the prerogative of any other authority (Art. 187, 1c). (This includes the appointment of all top commanders, with the exception of the General.)
Turkey		- The Chief of the General Staff is appointed by the President of the Republic upon the proposal of the Council of Ministers, and he is responsible to the Prime Minister”
Ukraine	- the organisation and operational of procedure military formations is determined by law (Art. 17) - Verkhovna Rada also confirms the general structure and numerical strength, and defines the functions of the Armed Forces of Ukraine, the Security Service of Ukraine and other military formations created in accordance with the laws of Ukraine, and also the Ministry of Internal Affairs of Ukraine (Art. 85 N°22)	- The President of Ukraine is the Commander-in-Chief of the Armed Forces of Ukraine; appoints and dismisses from office the high command of the Armed Forces of Ukraine and other military formations; (Art. 106 N°17)

United Kingdom		The Queen is commander-in-chief of all the Armed Forces of the Crown
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Source: Hans BORN and Ian LEIGH, Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel, published by DCAF and the Inter-parliamentary Union (IPU), 2007. Amended by the Secretariat of the Venice Commission in 2008.

Annex C: Overview of civil and political rights for armed forces personnel: selected examples

Council of Europe Member States	Right to vote	Right to stand for elections	Right to join a political party	Right to freedom of association	The right to freedom of expression	Total
Austria	Yes	Yes	Yes	Yes	Yes	5
Azerbaijan	Yes	Yes	No	No	Yes	3
Belarus	Yes	Yes	No	No	Yes	3
Belgium	Yes	Yes	Yes	Yes	Yes	5
Bosnia and Herzegovina	Yes	No	No	No	No reply	1
Croatia	Yes	No	No	Yes	Yes	3
Czech Republic	Yes	Yes	No	Yes	Yes	4
Denmark	Yes	Yes	Yes	Yes	Yes	5
Estonia	Yes	Yes	No	Yes	Yes	4
Finland	Yes	Yes	No	Yes	Yes	4
France	Yes	Yes	No	Yes	Yes	4
Georgia	Yes	Yes	No	Yes	Yes	4
Germany	Yes	Yes	Yes	Yes	Yes	5
Ireland	Yes	No	No	Yes	Yes	3
Latvia	Yes	Yes	No	No	Yes	3
Lithuania	Yes	No	No	Yes	Yes	3
Luxembourg	Yes	Yes	Yes	Yes	Yes	5
Malta	Yes	No	No	No	No	1
Norway	Yes	Yes	Yes	Yes	Yes	5
Poland	Yes	Yes	No	Yes	Yes	4
Portugal	Yes	No	Yes	Yes	Yes	4
Russian Federation	Yes	Yes	No	Yes	Yes	4
Serbia and Montenegro	Yes	No	No	Yes	Yes	3
Slovakia	Yes	No	No	No	Yes	2
Slovenia	Yes	Yes	No	Yes	Yes	4
Spain	Yes	No	No	No	No	1
Sweden	Yes	Yes	Yes	Yes	Yes	5
Switzerland	Yes	Yes	Yes	Yes	Yes	5
Turkey	Yes	No	No	No	No	1
Ukraine	Yes	Yes	No	Yes	Yes	4
United Kingdom	Yes	No	Yes	Yes	Yes	3

Source: Hans BORN and Ian LEIGH, Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel, published by DCAF and the Inter-parliamentary Union (IPU), 2007. Amended by the Secretariat of the Venice Commission in 2008.