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STUDY ON DEMOCRATIC CONTROL OF ARMED FORCES

WHO CONTROLS?¹

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Introduction

The Parliamentary Assembly of the Council of Europe, concerned about the democratic control of security sector in general, recommended the Committee of Ministers to prepare some guidelines about political rules, standards and practical approaches of this issue². The Council of Ministers, in turn, requested the Venice Commission to carry out a study about the democratic issues involved in the oversight of armed forces, as institutions whose mission is to ensure national security, in the Council of Europe member states³.

The present report is part of a broader study (study 389) on the constitutional issues involved in the need to ensure civilian command authority over the armed forces in their national and international operations. This report analyses two of the major dimensions involved, namely *who* controls and *how* this control is exercised. It will be structured in two main blocks, which will treat sequentially these questions. The purpose is both to reconstruct the panorama of the different solutions adopted by the member states about who has to carry out the control and supervision functions over the armed forces, and to identify the direct and indirect mechanisms for controlling the decisions by which this national body develops its national security task.

The need of respecting democratic principles and fundamental rights spills over all state institutions, including those related to security sector. In general, clear, transparent and effective mechanisms of control of the armed forces (and security sector in general) passes through the involvement of democratic institutions and, among these, Parliament must have an essential role in monitoring, scrutinising and controlling them. 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 optimize, 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 of democracy.

The first section examines the different organs involved and it will stress 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 the involvement in international peacekeeping or enforcement operations, the second important focus of this section will be placed on the international organizations in which the member states take part, the international standards involved in the use of force, and the problems of control and accountability that this international missions generate to the parliamentary and/or government institutions.

In the second section, some preliminary distinctions are made. To analyse how the competent organ carries out the democratic control of armed forces, it is necessary to frame what type of decisions referring to control or oversight of armed forces. Parliament regulates decisions about the composition, competences, activities and accountability of military personnel when it exercises its natural legislative functions. The legal framework of the defence sector will provide the limits, more or less restrictive, to the use of force. Other types of decisions are taken at internal level according to the hierarchic military structure, and the superior in the chain of command supervised them, or the ordinary or military courts do so, depending on the issue under review. In other cases, the 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 these types of decisions, the parliament, as the locus of democracy, substitutes, change, affects or influence decisions of the

² PACE Recommendation 1713 (2005), *Democratic oversight of the security sector in member states*, adopted by the Assembly on 23 June 2005 (23rd Sitting).

³ 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).

defence and security sphere. There are several decisions of this last kind that goes from the appointment of high commanders, to the decision of sending troops abroad and the definitions of the contents and extent of the mission.

This report will not treat exhaustively all the control systems over armed forces of the member states of the Council of Europe, but only some representative or paradigmatic cases. For having a complete panorama, ***it is highly recommended to make and distribute a questionnaire for all the member states of the Council of Europe to complete, about those issues relevant to the democratic control of armed forces from the constitutional and legal point of view. The collection of data of the same specific points in all States, will show more precisely the different treatments, together with the particular and common problems, and, consequently, it would help to find appropriate solutions and recommendations.***

I. Who controls?

1. General Overview

The renaissance of the debate about the old question ‘who guards the guardians’⁴, both in the national and international sphere, 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 to defend the territory from external threats, through the legitimate use of force or the deployment of the coercive 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 for preventing that this power is issued to undermine democratic institutions or to break the legal or constitutional established order. This ‘someone’ has to be, in turn, a democratically elected institution. The relevance of this issue lies on the fact that the principle of democracy and the rule of law need to be ensured by democratic mechanisms and institutions, because it is a fundamental pillar of contemporary democracies. The democratic legitimacy of who 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 legitimizing 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 legality in force, appears to be a presupposition, requirement and characteristic of democratic regimes.

Several factors influence the type and characteristics of the mechanisms of control over the military in the different states, such as the historical context, the forms of government, the legal framework, and the organs responsible for the control.

a) Historical context of national democracies

The analysis of the democratic oversight of the military cannot be separated from its contextual dimension. The need of taking into account the diverse historical and political backgrounds of the military systems of each state has leads some scholars to group ten European countries, according to the kind of democracies they are, in *small traditional democracies* (Belgium, Denmark, Luxembourg, the Netherlands), *large traditional democracies* (France, UK), and *post-*

⁴ 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)

authoritarian democracies (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 other. In traditional democracies, there is a lack of specific constitutional provisions related to the military, contrary of what happens in post-authoritarian democracies, in which they have more particular regulations related to the military realm, beside the general constitutional regulations applicable to state institutions and their personnel (general subjection to the rule of law, legality principle, and fundamental rights)⁵.

b) Forms of government

As well as politico-historical considerations, the different form of government existing in the democracies under study determines the leading role of the parliament or the government concerning defence command and decisions, despite of some cross-features that can be found independent from the type of systems. Monarchies, parliamentary republics, and presidential systems, as it will be specified below, can also show common patterns on the oversight of armed forces, that reproduces or links with the general check-and-balance design of the power and the distribution of competences among organs.

c) Constitutional rules

The constitutional framework is of special importance to have a first general approach to the democratic control over the armed forces. It clearly makes difference whether a control mechanism, a competence, a decision or a sanction concerning the military is fixed or not at constitutional level in a particular legal system. Should a monitoring competence has constitutional status, the reform procedure of that norm would probably need a qualified quorum, and the legislation that develops it shall respect the limits imposed by the basic law. Constitutions in democracies are the founding sovereign legal document, and settle the procedural rules, division of competences or powers between public authorities, and fundamental rights of the citizens.

Although nearly all the states members of the Council of Europe, except those of states that do not have a standing army (Andorra, Iceland, Liechtenstein, Monaco and San Marino), have constitutional provisions related to the direction and decisions concerning the military, only few of them refer explicitly 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 organization of defense, command, administration and *democratic control* over the armed forces of the Republic (Art. 7), and that it is within the competences of the Parliament the realization of the *civil control* over the armed forces and the security services of the Republic of Croatia (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, when it rules that the armed forces shall obey the competent bodies that exercise sovereign power (Art. 275 (3)).

Concerning the accountability of decision-makers in the sphere of military decisions, it is not common that the constitution mentions specific mechanisms separated from those general accountability channels for each state institution, and particularly in this field, for the executive and the parliament. The Constitution of Portugal, however, has a special provision for ruling the personal responsibility of the President of the Republic in several cases, within which special mention is made to the performance of its functions as Commander-in-Chief of the Armed Forces (Art. 134 a)) A similar rule exists referred to the Government that shall be administratively responsible for the direction of the state's military departments and services

⁵ 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.

(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 responsible before the National Assembly for the conduction 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) Organ control

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 control. From a democratic point of view, control of state organs and, in particular, the Parliament is the most important type of control. The following sections will deal with the role of the 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 a quite relevant issue to study, if one considers the progressive transition of the 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 transfer 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 out of reach for national authorities. Finally, some notes about the so-called 'double democratic deficit' in the field of the control over the military will be made.

2. The role of Parliaments

As it has been already mentioned above, the attention on democratic oversight of the military relies on the role of parliaments in the decisions adopted within this sphere of action. Following this approach, some scholars have identified four reasons for entrusting Parliaments the oversight of the security sector in general, reasons that are also extensible to the control over armed forces: 1) parliaments are a cornerstone of democracy to prevent autocratic rule; 2) it is a consequence of the principle 'no taxation without representation'; 3) parliaments can create legal parameters for security issues; 4) they are a bridge to the public⁶. Moreover, there is a general agreement about the paramount role of parliament in the execution of these controlling functions over security and defence, and about the need of enhancing public accountability of this sector, since both requirements are considered keystones of democracy.

Regardless of the system of government chosen by specific states, decisions concerning the use of force must be accountable for in front of the parliament⁷. The powers that the Parliament has over the military can be classified in powers to legislate, to approve the budget, to advice, to penalize, and to approve certain issues or actions⁸. The functions that a certain parliament actually has and the extension and intensity of them depend on the national rules. It also

⁶ BORN, H., FLURI, P., JOHNSON, 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.

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

⁸ These functions have been also classified as legislative, budgetary, elective, representative and scrutiny and oversight, and applied to decision making of the use of force under the auspices of international institutions. BORN, HÄNGGI, "The Use of Force under International Auspices...", (note 7), pp. 4 ff.

depends 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 the executive decisions and policy-making concerning defence and security policy. For achieving this control, parliaments use commonly three types of mechanisms: debates, questions and interpellations, and inquires⁹.

2.1. Parliamentary Committees for oversight and control of armed forces

For the control to be effective, parliaments should have specialized staff and structures to develop the monitoring functions, and the resources necessary to exercise them correctly. Progressively, most parliaments have created special committees for getting involved with the different parliamentary dimensions implicated in the oversight of armed forces. The institutionalization of Defence or Security Committees can be explained through several factors, including the renaissance of the subject of democratic control of armed forces, the increasing democratic concern on specialization and transparency in parliaments, the tendency of studying in depth and, in this way improving the decision-making, through the creation of committees or commissions with defined spheres of action¹⁰, and the generalized process of reforming security sector¹¹. The latter, in turn, has three main objectives: democratisation, adaptation to the new security environment, and internationalisation¹². The right and practice of questioning the acts of the government, characteristic of the democratic control of parliaments over the executive, turns specific and more accurate through the work of the committees.

The Committees on Defence and Security are created to advice and recommend to the plenary of the parliament about issues related with decision-making on defence and security sector. They can be permanent (or standing), or created for a specific task (*ad-hoc*). As general key functions, the Defence and Security Committees deals with security policy, legislation, expenditure, management and administration¹³. 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, could have also play a role in issues related to security sector¹⁴, depending on the national regulations and the powers delegated to these expert groups.

Each Committee of Defence and Security exercises the powers and functions fixed on the particular legislation (i.e. rules of procedure of the chamber) or delegated by the parliament. The general powers just mentioned can be disaggregated in the following: a) to develop legislation on defence matters, b) to advice about the defence budget and monitor the

⁹ BORN, FLURI, JOHNSON, *Parliamentary Oversight of the Security Sector...*, (note 6), p. 77.

¹⁰ On the points of inflexion related with the growing 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 of this progressive institutionalisation of the parliamentary committees in Europe, in the US, and in some specific states, together with a global perspective.

¹¹ Security Sector Reform, and by this way, democratic control of armed forces as a 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.

¹² BORN, FLURI, JOHNSON, *Parliamentary Oversight of the Security Sector...*, (note 6), p. 51.

¹³ VAN EEKELLEN, W. (2002), "Democratic Control of Armed Forces: The National and International Parliamentary Dimension", *DCAF Occasional Paper*, N°2, pp. 19-21.

¹⁴ BORN, FLURI, JOHNSON, *Parliamentary Oversight of the Security Sector...*, (note 6), p. 84.

expenditures, c) to review the defence policy of the government, d) be consulted about international treaties, e) to advise the parliament about the use of force and deployment of troops, and f) to monitor the defence procurements. These powers can be developed through several mechanisms and activities, such as hearing, inquires, questioning the Ministry of Defence or the government, requiring documents, asking for audits to be practice, scrutinising transparency and efficiency in spending, examining petitions and complaints, both form the military personnel and the civilians¹⁵.

An interesting study of the powers of the Defence Committees of lower chamber of NATO countries was carry out by DCAF Working Group on Parliamentary Control of Armed Forces made through a questionnaire distributed among this countries. Apart from asking about the existence of a general oversight powers, the items consulted concern 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 Committee/Plenary meetings and to testify, f) summon military and other civil servants to committee meetings and to testify, g) summon experts of society, h) obtain documents from the ministry of defence and military, i) carry out investigations (inquires) on defence issues, and j) hold hearings on defence issues. The answer alternatives were that the power pertain to: the committee, the plenary, both, to none¹⁶.

2.1.1 Constitutional status of defence committees

Except some few exemptions, a statute, a rule of the parliament (rules of procedure), or a customary work division regulates the institutionalization of the oversight function of parliaments through committees. Only few constitutions mention the Defence Committees, examples of which are Austria, Bosnia and Herzegovina, Germany and Denmark.

a) In Austria, the Constitution settles that the competent committees of the National Council shall elect two standing sub-committees of inquiry to review measures for the safeguard of 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 are empowered to require relevant information to the competent Federal Ministers and to insight into the relevant materials, except for the material or sources whose disclosure would endanger national security or the safety of individuals (Art. 52 a) (3))

b) The Constitution of Bosnia and Herzegovina, in its article V. 5) b), establishes a Standing Committee on Military Matters, whose members are selected by the members of the Presidency, for the coordination of the activities of armed forces in the state. The Members of the Presidency are also members of this Standing Committee.

¹⁵ These functions and activities are summarized 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 EEKELLEN, "Democratic Control of Armed Forces...", (note 13), p. 18. He includes the following: Military doctrines and strategies; Long-term planning of the security sector, including high-level documents such as the regional and national security concept, 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 (armament); 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.

¹⁶ VAN EEKELLEN, "Democratic Control of Armed Forces...", (note 13), Annex iii, 'Powers of the Defence Committee'.

c) The German Defence Committee is, as all the *Bundestag* Committees, a cross-party body that deals with defence matters, and prepares the decisions that will be taken in the plenary sessions together with assessing the parliament in the function of controlling the government. This committee is especially concerned with the parliamentary oversight of the German armed forces. The fact that this committee also engages in matters related to international security policy produces a certain overlap with the functions of the Committee on Foreign Affairs, which makes necessary a close cooperation between them. This closed-door committee¹⁷ works or well on bills and motions referred by the plenary, or on its own initiative. An important task is the related with its approval to the defence budget and major procurement projects¹⁸. It is the only committee that has a right to convene as a committee of inquiry (and do not need a parliamentary decision), according to the constitutional status and competences attributed to it by Art. 45a(2) of the Basic Law¹⁹. The committee of inquiry scrutinises the actions of the government, by collecting evidence and information and pass hearings. Regarding the budget, the Defence Committee influence on its preparation and during the deliberations developed inside the Budget Committee. The latter generally take into account the recommendations of the former.

Before December 2004, there was no explicit 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 Court²⁰ has already assured the consent of the Parliament in these decisions that had to be given, in principle, in advance. The Parliamentary Participation Act of 2005²¹ explicitly laid down the rights of the parliament regarded to international deployment of troops.

d) The Danish Foreign Policy Committee is a further example of defence committee that has constitutional status. This Committee is regulated by Section 19 (3) of the Constitutional Act²² and by a special Act (Danish Act no. 54 of 5 March 1954), differently with the rest of the parliamentary committees that are governed by the Standing Orders of the *Folketing*. According to these rules, the Government has the duty 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 affairs²³. Additionally, they can put written questions to the government. When dealing with European matters, the functions of the Foreign Affairs Committee overlap with the European Affairs Committee. In the practice, as well as the case of Germany, they operate in close cooperation.

¹⁷ Because of the nature of the matters involved, the meetings of this committee are held behind closed door, and the access is restricted to the committee members.

¹⁸ This information has been taken from the Bundestag's page:

http://www.bundestag.de/htdocs_e/committees/a12/index.html.

¹⁹ Article 45 a) (2): The Committee on Defense 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.

²⁰ BVerfG, [90] of [12 July 1994].

²¹ Parlamentsbeteiligungsgesetz vom 18. März 2005 (BGBl. I S. 775), available online: <http://www.gesetze-im-internet.de/parlbq/BJNR077500005.html>.

²² 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".²² 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)

²³ See http://www.folketinget.dk/pdf/foreign_policy_committee.pdf.

2.1.2 Other peculiarities of defence committees

Other states in which the defence committees have interesting functions and functioning 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 periodically experts and follows national and international defence policy discussion. At the European level, this committee monitors EU security and defence policy, and influences Finland EU positions on these issues.²⁴

In Spain, both the Congress of Deputies and the Senate have a Defence Commission. They are standing legislative committees made up by a number of parliamentarians that reflect in small scale the composition of the Chamber. Their functions are to propose and study bills of law related to the defence sector, to make questions to the government, for example, related to the participation of the Spanish soldiers in international missions, and to ask the appearance of the Minister of Defence to inform about specific defence issues.

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))²⁵. 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 work sometimes jointly. They carry out legislative, approval, monitoring, and investigative functions related with 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 must be consent by these committees, and a monitoring of the peace support operations is regularly made. It also holds hearings of the Minister of Defence, the General Staff, and the commanders, and can invite civilian experts to assess their work. The defence committees can also 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 defence, public order and security spheres.²⁶

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 forces²⁷. It is elected by the Commons, composed by different political parties, and seeks to report by unanimity. The main way of developing its monitoring function is undertaking 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.

²⁴ Information extract from the Parliament's page:

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

²⁵ The Constitution of Romania is available at: <http://www.cdep.ro/pls/dic/site.page?id=371>

²⁶ See FURIOR, 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, FYROM Macedonia, Moldova, Romania*, DCAF & Center for Civil-Military Relations, online: <http://www.dcaf.ch/publications/kms/details.cfm?lng=en&id=21335&nav1=4>, pp. 52ff.

²⁷ See http://www.parliament.uk/parliamentary_committees/defence_committee.cfm.

In some states, the Committee on Defence and Security has wide functions, delegated by the own Parliament in its internal division of the work and specialization aims. An example of this is the Committee on Defence and Security from the Assembly of the Republic of Macedonia²⁸, which works in the areas of Security and defence policy and defence plans of the state²⁹.

A special figure of parliamentary control exists in Belgium. In both chambers there are committees concerned with foreign affairs and defence³⁰. After the presence of Belgian armed forces during the Rwanda crisis, a commission of inquiry was established, that recommended that a special working group should be formed within the Senatorial Foreign Affairs Commission each time Belgian troops are engaged abroad, suggestion that has been implemented³¹.

3. The role of the Executive

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) determine 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.

At constitutional level, the mentions to the executive's power in the military sphere are related to the position and the competences of the Head of the State, the Council of Ministers, and the Minister of Defence, depending the state. Sometimes the powers are more precisely settled, while others there are weak mentions that are complemented at legislative or administrative level. The existence of a National Security Council is also regulated, in some occasions, in the Constitution, which normally works coordinated with the Ministry of Defence or the government.

A general position of the president, the monarch, or the government as a collective, in many of the states under study is that 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

²⁸ These excessively wide scope of functions covers, within other questions concerning the internal policy and defence, the protection of the order stipulated by the Constitution; performing control in the filed of defence and security; defence of the country and civil defence; cooperation with the collective defence and security systems to which the country has acceded; integration of the country in the Euro-Atlantic organizations and the relations of the country with these organizations; protection of the life, personal security and property of the citizens guaranteed with the Constitution; production, sale, purchase, possession and carrying of weapons, parts of weapons and ammunition; protection of persons and property; citizenship; maintenance of the public order; public gatherings and performances; 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 the borderlines; movement and 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>

²⁹ 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 26), pp. 44-45.

³⁰ Commission des Relations extérieures et de la Défense (Sénat); Commission de la Défense nationale and Commission des Relations extérieures (Chambre des représentants)

³¹ D'ARGENT, P. (2003), "Military Law in Belgium", Nolte, G. (ed.), *European Military Law Systems*, (note 5), 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 n° 1-611/7, online:

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

international treaties on defence and security, the power to declare state of emergency and war, the appointment or dismissal of high commands, or the decision about sending troops for international peacekeeping or enforcement mission.

3.1. Position of the Head of the State

Starting from the division of 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), Nolte and Krieger have identified some common patterns between 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 a symbolic or formal control over the military, while the presidents of presidential regimes have substantial powers³².

a) Monarchies

Generally speaking, monarchs cannot act independently in their command powers over armed forces nor exercise any form of veto powers. In the UK, the government exercises the royal prerogative in military matter as the Crown, according to the general understanding, and there is no specific rule in the unwritten constitution of UK concerning armed forces. The government is, however, subjected to general forms of parliamentary control³³. Nevertheless, the courts have settled that “the disposition and armament of the armed forces [are] within the exclusive direction of the Crown”³⁴, 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”³⁵.

The Belgian Constitution requires countersignature by a Minister for acts of the King, through which the former takes responsibility of those actions upon him (Art. 106). The formal powers of the King related to the military 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 out of the scope of the responsibility of communities and regional governments which require approval from the Council (Art.162).³⁶

In Denmark, the King has the executive powers, and exercises this supreme authority through the Ministers (arts. 3, 12). The King conducts the international affairs, but needs the consent of the Parliament for enter into obligation of major importance and to undertake acts in the international sphere, as well as for concluding treaties (Art.19). The use of force against foreign states needs to be consent previously by the Parliament, unless the cases of defence against armed attack upon the state, case in which the measure must be submitted immediately to the parliament.

Luxembourg is another example of monarchy in which the monarch has only formal powers over the armed forces. The Duke conclude international treaties, that come into force only after they are sanctioned as a law and published by the ordinary means applicable to legislation. He

³² NOLTE, KRIEGER, “European Military Law Systems: General Comparative Report”, (note 5), pp. 51ff.

³³ NOLTE, KRIEGER, “European Military Law Systems: General Comparative Report”, (note 5), p. 32

³⁴ *Chandler v. Director of Public Prosecution* (1964) AC 736.

³⁵ Rowe, P. (2003), “Military Law in the United Kingdom”, Nolte, G. (ed.), *European Military Law Systems*, (note 5), pp. 833-834

³⁶ The text of the Belgian Constitution had been taken from: http://www.fed-parl.be/constitution_uk.html.

also commands the armed forces, and declares war and cessation of hostilities, but in the latter only after authorization of two thirds of the votes of the chamber (Art.37)³⁷.

The supreme authority over the armed forces in the Netherlands corresponds to the government (formed by the King and the Ministers, Art. 42), and not to the King alone, according to Art. 97(2) of the Dutch Constitution³⁸. The responsibility of the command of the military relies on the Ministers. The role of the Head of State in the defence sphere is, then, very limited, and confines to some decisions adopted by a Royal Decree that require the King's signature³⁹.

In Spain, the Government (composed by the President, Vice-President and Ministers) conducts the military administration, and the defence of the State (Art. 97) The King formally exercises the supreme command of the armed forces (Art. 62 h). As some of the cases of monarchs mentioned above, the acts of the King require the countersignature of the competent Minister, or the President of the government, to be valid (arts. 56(3) and 64).

b) Parliamentary Republics

In the parliamentary republics above mentioned, the presidents have only formal or ceremonial powers in the military sphere, which means that the Parliament has the effective decisional and controlling powers over armed forces. In Germany, the Federal President has only power to appoint officers and to grant pardons (Art. 60 (1) and (2))⁴⁰. In Italy, the President of the Republic is the commander of the armed forces, presides the Supreme Council of Defence, and declares war that has previously decided by the Chambers (Art. 87)⁴¹.

c) Presidential Republics

Presidential Systems give more powers to the Head of the State. In France, the President has several powers, like being commander-in-chief and presiding higher national defence council and committees (Art. 15), and appointing military posts of the State (Art. 13)⁴². These powers are, nevertheless, subjected to countersignature of the ministers of the government (Prime Minister or the competent one) The President has also emergency power when the institutions, the independence of the Nation, the integrity of the territory or the fulfilment of international commitments are under serious and immediate threat (Art. 16)

The President of Poland is the 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, shall ensure the internal and external security of the state, and exercises general control in the field of national defence (Art. 146).

³⁷ The Constitution of Luxembourg can be found at: <http://www.igp.public.lu/legislation/constitution.pdf>

³⁸ The text of the Dutch Constitution is available at:
<http://www.houseofrepresentatives.nl/procedures/constitution/index.jsp>

³⁹ BESSELINK, L. (2003), "Military Law in the Netherlands", Nolte, G. (ed.), *European Military Law Systems*, (note 5), p. 563.

⁴⁰ The text of the German Constitution can be consulted at:
http://www.bundestag.de/htdocs_e/parliament/function/legal/germanbasiclaw.pdf

⁴¹ The text of the Italian Constitution is available at: http://www.camera.it/cost_reg_funz/345/copertina.asp.

⁴² The text of the French Constitution is available at: <http://www.assemblee-nationale.fr/english/8ab.asp>.

3.2. National Defence Council

Only few constitutions settle a specific Council for the National Defence. Some examples are Georgia, Lithuania, Poland, Romania, and Turkey and Ukraine. The Constitution of Georgia states that the Council of National Security shall organise the military construction on defence of the country (Art. 99). The President of Georgia appoints the members of the Council of National Security (Art. 73(4)), and an Organic Law shall determine its authority and procedure. The Council of National Security shall submit proposals of the structure and strength of the armed forces, for the approval of these issues by the President and Parliament respectively (Art. 98(3))⁴³.

Lithuania has State Defence Council, which consists 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 considered the main issues related to defence. The law shall regulate the way of developing this task, its activities and powers (Art. 140)⁴⁴.

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

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

The Constitution of Turkey establishes a National Security Council. The President of the Republic has the power to call the National Security Council to meet and presides it (Art. 104b)). A main duty of this Council is fixed at constitutional level, which is to "submit to the Council of Ministers its views on the advisory decisions that are taken and ensuring the necessary condition 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, according to the principles of preservation of the existence and independence of the state, integrity and indivisibility of the country, and peace and security of the society. The rest of its duties and rules of organisation shall be settled by law⁴⁵.

The Council of National Security and Defence of Ukraine, of which the President of Ukraine is the Head and chairman (Art. 106 N^o18), is ruled in art.107 of the Constitution of Ukraine and by law⁴⁶. 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 so strong as they seem, because the President appoints the member of the Council, and the decisions of the latter come in force by a decree of the President of Ukraine⁴⁷.

⁴³ Available online: http://www.parliament.ge/index.php?lang_id=ENG&sec_id=68

⁴⁴ The Constitution of Lithuania is available at: <http://www3.lrs.lt/home/Konstitucija/Constitution.htm>

⁴⁵ 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>.

⁴⁶ See the Constitution of Ukraine at: http://gska2.rada.gov.ua:7777/site/const_eng/e_const_contents.html

⁴⁷ Further information about the Ukrainian system of democratic control over armed forces can be found 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>.

3.3. The Minister of Defence

Usually, the Ministers of Defence are not commander-in-Chief and have no constitutional status. Nevertheless, some constitutions do rule, although without detail, the functions and competences of the Minister of Defence, for example, Albania, France, Germany, Lithuania, and Poland. The Albanian Constitution states that President of the Republic, through the Primer Minister and the Minister of Defence, exercises the command of the Armed Forces in peacetime (Art. 169(1)). The Minister of Defence proposes the President names of commanders of the army, navy, and air force for their appointment by the President (Art. 169(3)). In France, 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 constitutional provisions are similar to the appointed until now: the President, in times of peace, shall exercise command over the Armed Forces through the Minister of National Defence (Art. 134(2), and the Minister of National Defence requests the President for conferring 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 the Parliament (*Seimas*) for the administration and command of the armed forces, together with the Government and the Commander of the Armed Forces (Art. 140).

4. The role of the Judiciary

The genuine function of the judiciary is to guarantee the respect of the rule of law, that is, to protect the rights and freedoms of the citizens, and to ensure 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.

Each state defines the structure, competences, and functioning of their judicial system. As a general statement, the judicial systems divide their jurisdiction according to the matters or issues under review. The division is sometimes made according to personal features of the individual involved in the case (for example, political privilege, ethnic characteristics, or membership to military institutions). Constitutional provisions may regulate the judgment of law infringements committed by military personnel, commanders, and organs that take decisions in the military sphere, or concerned with armed forces missions and activities. This means that, depending on the system, the special jurisdiction of a court can be relative to the personal characteristics of whom commits the violation of a right or duty (that is, people that perform military functions), or it can be relative to the military sphere or subject (for example, a civilian that threatens national security, or that commits an action qualified as a crime by the criminal military code). The state judicial system can have a special military jurisdiction to judge one or both of the possibilities just described, or can use the channels of the established common or ordinary jurisdiction. The military Courts, as special courts that can be inside or outside of 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 distinguish also between standing courts and courts *ad-hoc*⁴⁸.

4.1 Constitutional provisions referred to military jurisdiction

At constitutional level, the panorama seems to be the following within the member states of the Council of Europe. 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 state a general mandate to the legislator to settle different types of courts. In this last case, it does not automatically implies the prohibition of this special type of

⁴⁸ NOLTE, KRIEGER, "European Military Law Systems: General Comparative Report", (note 5), p. 161.

courts, and a further look on the particular legislations would be necessary to determinate the existence or not of military court. 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.

4.1.1. Constitutional regulation of military courts

Armenia (there shall be military courts established by law, Art. 92), *Belgium* (specific laws cover the organization 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 N°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 organization of military tribunals, their duties, and the rights, obligations, and terms of office of their members (Art. 94 (1)), *Poland* (military courts (Art. 175 (1)⁴⁹), *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 N°3); during states of war, courts martial with jurisdiction over crimes of a strictly military nature shall be formed (Art. 213)), *Spain* (the principle of jurisdictional unity is the basis of the organization and operation of the courts. The law shall make provision for the exercise of military jurisdiction strictly within 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); military High Court of Appeals is the last instance for reviewing decisions and judgements given by military courts (Art. 156); High Military Administrative Court of Appeals (Art. 157))⁵⁰.

4.1.2 Constitutional remission to law for the creation of military courts

Bulgaria (martial courts by law, Art. 119), *Georgia* (establishment of a court martial shall be permissible at war and exclusively within the system of courts the courts of general jurisdiction, Art. 83N°3), *Germany*⁵¹ (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 N°4.1°)), *Latvia* (in the event of war or a state of emergency, court cases shall be heard by military courts and they shall act on

⁴⁹ 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).

⁵⁰ The articles above-mentioned of the Turkish Constitution regulate in detail the competences of these special military courts.

⁵¹ Although the German Constitution establishes the possibility of creating them, the Federal Parliament has not made use of this competence. NOLTE, KRIEGER, "European Military Law Systems: General Comparative Report", (note 5), p. 161.

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)).

4.1.3 Constitutional prohibition of military courts

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 N°4)), *Romania* (general prohibition of establishing extraordinary courts, but admits specialized courts of law (Art. 126(5)), and *Slovenia* (extraordinary courts may not be established, nor may military courts be established in peacetime (Art. 126))

4.1.4. Constitutions with no specific provisions on military courts

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

From an analysis of the constitutional provision concerning the role of the judicial in exercising control over armed forces, two cases deserve special 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 that have military competences. In Romania, the military command acts are out of the scope of competences of the administrative courts that generally make the judicial control of administrative acts of public authorities (Art. 126 (6)). This exemption, however, refers only to administrative courts (that are within the administration of the state, and not inside the structure of the judiciary), and not to the jurisdiction of ordinary courts.

In the case of Turkey, the constitution states that both the acts of the President of the Republic in exercising his or her competence, and the decisions of the Supreme Military Council, are outside the scope of judicial review (Art. 125) These is a wider exemption that renders difficult the control of the Parliament over the military decisions taken by the President or by this Council.

4.2 The role of the Constitutional Courts

Constitutional Courts play a central role in the constitutional structure of contemporary democracies. Their judicial review practice is the last legal remedy within the boundaries of the territory of the state. The role of guardians of the constitutional order, specifically of the rule of law, the democratic procedures, and the rights and freedoms of citizens, make the Constitutional Courts a key part of the inter-organ mechanisms of checks and balances.

Military affairs reach Constitutional Courts when some act or decision of 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 in the consolidation of the rule of law. More particularly, in some countries, the Constitutional Court has a great impact in the configuration of binding jurisprudence and the interpretation of the military law, while in others they have a weaker force.

The *Bundesverfassungsgericht* has played an important role concerning the military. In the Somalia Case (1994), for example, the German Constitutional Court made an interpretation of the Basic Law (*Grundgesetz*) by 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 the NATO implementing resolutions by the UN SC⁵².

Some other examples of the role of the Constitutional Court in the military sphere can be appointed. The *Corte Costituzionale* in Italy has contributed to the interpretation of the 'democratic spirit clause' and the principle of political neutrality. It has also encouraged reform legislation in the seventies, such as the Conscientious Objection Act⁵³. Political neutrality of armed forces was also an important issue of constitutional interpretation in Poland⁵⁴. The Spanish Constitutional Court has discussed, among others, the duty to obey, and the military jurisdiction. In the later, an evolution in its position about this issue can be identified⁵⁵.

In countries like Denmark, on the contrary, restrictions to the review of administrative decisions (a claimant with legal standing must bring the case to the courts), make that in practice there is no judicial control over the use of military force, or participation of troops in multinational⁵⁶.

5. Other oversight entities

5.1. The Ombudsmen

The ombudsman is an independent institutional actor that defends and guarantees the citizens' rights against actions of public powers or administration. Usually, it is inside the parliamentary structure, but it can also stand in the executive branch, depending on who appoints its members, the parliament or the executive (Minister of Defence). The complaints presented by citizens in cases of violations of their rights and freedoms are canalized through inquires and reports.

The intensity of the control also varies between states. Some states confer few competences to parliamentary ombudsperson to attend complaints related to armed forces, for example France and United Kingdom⁵⁷.

Most states do not have a specialized ombudsman for military issues, but the general ombudsperson has competences to deal with them, even if there is no explicit mention to this competences. The Ombudsmen acts of some states, like the Netherlands and Austria, do not have specific competences in defence matters⁵⁸.

⁵² NOLTE, G., KRIEGER, H.. (2003), "Military Law in Germany", Nolte, G. (ed.), *European Military Law Systems*, (note 5), pp. 346ff.

⁵³ LUTHER, J. (2003), "Military Law in Italy", Nolte, G. (ed.), *European Military Law Systems*, (note 5), p. 433.

⁵⁴ KOWALSKI, M. (2003), "Military Law in the Republic of Poland", Nolte, G. (ed.), *European Military Law Systems*, (note 5), p. 653.

⁵⁵ COTINO HUESO, L. (2003), "Military Law in Spain", Nolte, G. (ed.), *European Military Law Systems*, (note 5), p. 773, 811.

⁵⁶ JENSEN, J.A. (2003), "Military Law in Belgium", Nolte, G. (ed.), *European Military Law Systems*, (note 5), p. 247.

⁵⁷ NOLTE, KRIEGER, "European Military Law Systems: General Comparative Report", (note 5), p. 71.

⁵⁸ 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,

5.1.1 Non specialised Ombudsmen

Others states, on the contrary, give the general ombudsman explicit powers to deal with armed forces issues, either at statutory or at constitutional level. Example of the later is Denmark The Danish Constitution states that the *Folketing* shall appoint one or two persons foreign to the parliament "to supervise the civil and military administration of the State" (Art. 55)⁵⁹.

At statutory level, the particular Ombudsman Act in Finland, Poland, Portugal and Spain make specific mentions to competences related with defence.

The Finnish Parliamentary Ombudsman controls 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 the members of the Parliament (*Eduskunta*), nor the acts of the Chancellor of Justice (who is responsible to the Government). The constitutional provisions rule, among others, 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 to the Ombudsman the function of carrying out on-site inspections of public offices and institutions, and specifically, to inspect the units of the Defence Forces and Finnish peacekeeping contingents to monitor the treatment of conscripts, other military personnel and peacekeepers⁶⁰.

Since 1991, and through an amendment of the Statute on the Ombudsperson of 17 July 1987, a Polish Office's Department for Protection of Soldiers' and Public Officials' Rights was created (Art. 20 (3) of the Ombudsman Act)⁶¹.

The *Provedor de Justiça* in Portugal is an independent body appointed by the Assembly (Art. 23 Portuguese Constitution), that examines the complaints against actions and omissions of public authorities. It represents non-jurisdictional remedy for solving of disputes between citizens and public powers. The Ombudsman can visit and inspect military public services, hear officials or representatives of this bodies, and request them information (Art. 21 (1) a) Statute of the Ombudsman⁶²). The Ombudsman's office divides its work in six departments, one of which is concern with national defence.⁶³

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 by three national ombudsmen that checks alleged abuses in the administration⁵⁸, 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>.

⁵⁹ For more information, consult the http://www.ombudsmanden.dk/english_en/.

⁶⁰ Source: <http://www.oikeusasiames.fi/Resource.phx/ea/english/index.htm>

⁶¹ KOWALSKI, M. (2003), "Military Law in the Republic of Poland", Nolte, G. (ed.), *European Military Law Systems* (note 5), p. 673. The text of the Ombudsman Act is available in English at:

<http://www.rpo.gov.pl/index.php?md=1372&zaznac=1#znalezione>

⁶² Law N^o 9/91, April 9, (as amended by Law nr.^o 30/96, August 14, and Law nr.^o 52-A/2005, October 10).

⁶³ <http://www.provedor-jus.pt/Ingles/Index.htm>

In Spain, the general Ombudsman (*Defensor del Pueblo*), which has constitutional status (Art. 54⁶⁴), has the power to protect fundamental rights and freedoms in the field of the Military organization (Art. 14 of the Organic Act 3/1981)⁶⁵.

5.1.2 Specialised (military) Ombudsmen

In the cases of countries that do have a military ombudsman, this institution represents an explicit mechanism of oversight over the armed forces⁶⁶. The military ombudsman, as general tasks, attends complaints of the military servicemen; protect the soldier's right; investigate cases of arbitrary decisions or abuses committed by the military; ensures the compliance of the armed forces with the constitutional principles. The figure of the ombudsman has its origin in Sweden, as well as the institution of a specialized ombudsman exclusively for the military. The *militieombudsman* was created in 1915 through a constitutional reform, and lasted until 1968, year in which the Parliament unifies this institution in the *Justitieombudsman* (JO)⁶⁷. The *militieombudsman* was appointed for a four-year term by the Parliament, and exercised his competences independently from the government and parliament. His main duties were to ensure the observation of statutes and rules by the military officials. He proceeded by investigating the complaints received, or by practicing inspections of military institutions, and he had the duty to submit annually a Report of its activities to the Parliament⁶⁸.

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 board⁶⁹. The *Stortingets Ombudsmann for forsvaret* of Norway (Parliamentary Ombudsman for the Armed Forces), exists inside 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 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 (private or officer), 2) to considerate matters of his own initiative, and 4) to act as advisory organ for the chief military and civil authorities.⁷⁰

Germany has an ombudsman specially concern with the military and granted in the Constitution (Art. 45b) The Parliamentary Commissioner for the Armed Forces (*Wehrbeauftragter des deutschen Bundestages*), is a defence commissioner that works closely with the Defence Committee of the Bundestag, assisting it in the parliamentary oversight over armed forces. The tasks of this commissioner are to protect 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

⁶⁴ See http://www.congreso.es/ingles/funciones/constitucion/const_espa_texto.pdf

⁶⁵ Information and legal basis of the Spanish ombudsman can be found at: http://www.defensordelpueblo.es/web_ingles/index.asp.

⁶⁶ PEÑARRUBIA, J. M. (2001), *Ombudsman Militar y Defensor del Pueblo. Estudio de Derecho Comparado y Español*, Madrid, Dilex ; and VERGOTTINI, G. de (1974), "L'Ombudman per gli affari militari", MORTATI, C. (ed.), *L'Ombudman (Il Difensore Civico)*, Turín, UTET, pp.273-295.

⁶⁷ See the information of the JO at: <http://www.jo.se/Page.aspx?Language=en>.

⁶⁸ 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.

⁶⁹ 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 68), pp. 114-115.

⁷⁰ RUUD, "The Military Ombudsman and his Board" (note 69), 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>

mission with the rights of the personnel within a democratic state). He can exercise these task by submission from the service personnel, by own initiative, or instructed by the Bundestag or the Defence Committee⁷¹.

In Ireland, the Ombudsman (Defence Forces) Act 2004 (Nº36)⁷² establishes 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 may investigate the actions of the Defence Forces matter of complaints, shall make reasoned reports, and may recommend the Minister measures to be followed. The Ombudsman can ask for information and documents that will be useful for judging the complaint. He is also subjected to the duty of secrecy of information, and cannot disclose it, except some cases specified by the Act (Section 10)

Comparative figures can be found in Canada, Australia and Israel. 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.⁷³

Australia has a Defence Force Ombudsman (DFO), which is regulated in detail by the Ombudsman Act of 1976 (Act Nº181, part IIA)⁷⁴. The Ombudsman Act gives the Commonwealth Ombudsman the function of DFO. The DFO can investigate complaints related to administrative actions or force employment issues of the Australian Defence Force, and complaints presented by ex-service personnel or their families, but cannot investigate with disciplinary proceedings. The complaints from servicemen are only considered when the internal mechanisms are exhausted⁷⁵.

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 Defense Committee. The Law of reform to the Military Justice Law, from 24 July 1972, created this special military ombudsman⁷⁶. The law grants a general right of complaint to the soldiers, when their rights are infringed. The commissioner investigates the grievances received by the Complaints Commission of the Ministry of Defence, according to articles 542-558 from the Military Justice Law, 5715-1955⁷⁷.

⁷¹ Information from the Bundestag's website:

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

⁷² <http://www.odf.ie/>

⁷³ www.ombudsman.forces.gc.ca

⁷⁴ The text of this Act can be consulted at:

<http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/frame lodgment attachments/366187295D5A8EEFCA25702E000482FE?OpenDocument>

⁷⁵ <http://www.ombudsman.gov.au>

⁷⁶ FAIREN GUILLEN, V. (1982), *Temas de ordenamiento procesal*, Tomo III, Madrid, Tecnos, p. 1388, n. 17, p.1401.

⁷⁷ PEÑARRUBIA, , *Ombudsman Militar y Defensor del Pueblo*, (note 77), 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.

5.1. Audit Offices and Courts of Auditors

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 subjected to a national accounting body, except in some states, like United Kingdom⁷⁸. In Denmark, for example, the National Auditing Office is an independent body, which reports directly to the Parliament which elects also some of its members (Art. 47 of the Constitution). This office checks the public expenditures and the management of the budget from all the public institutions, and not only the ones of the military. The control of the budget of the State in France is made by the *Cour des comptes*, and a similar general institution exists in Germany (*Bundesrechnungshof*, Art. 114 of the Constitution), in Italy (*Corte dei conti*, Art. 100(2) of the Constitution), in the Netherland (*Algemene Rekenkamer*, General Chamber of Audit), in Poland (Supreme Chamber of Control, arts. 208-212 of the Constitution), and in Spain (*Tribunal de Cuentas*, Art. 136 of the Constitution).

The Constitution of Greece has a special provision that fixes, 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 N^o1 g))

The Netherlands has also a special institution of control of the executive type. The Inspector-General of the Armed Forces (IGK) is an independent body that exists since 1813, and has competences over all matters concerning armed forces⁷⁹. 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. International Dimension of the control

The internationalisation of the defence and security, or more specifically, the emergence of collective security and collective defence organisations, has move the focus of attention of the control and oversight of armed forces from the national to the international level. Properly speaking, the democratic control is the one practiced by democratic institutions. The question is, then, if this type of control is sought and possible within international institutions. “On the international level – it had been stated - no oversight of the security and intelligence services exists”, except for the role that the European Court of Human Rights (ECHR) can play in judging the petitions and complaints addressed by individuals against the actions of the governmental bodies⁸⁰. It is true that intelligence and defence sectors differ one of other, but the just cited statement should be applicable to the defence sphere if one agree that most of the international organisations for defence and security or do not have a really democratic institution – i.e. a parliament – or this institution has no power of control over the armed forces that carry out the peacekeeping or peace enforcement operation.

Nevertheless, for understanding the general framework of the democratic oversight of the military, is important to take into account the international dimension of the use of force, together with the problems and deficits that the design of the control mechanisms have. The international dimension can be studied from different points of view. Hereafter, only some aspects, considered the most significant, will be discussed. First, a quick overview of the

⁷⁸ NOLTE, KRIEGER, “European Military Law Systems: General Comparative Report”, (note 5), p. 71.

⁷⁹ <http://www.mindef.nl/ministerie/igk/english/index.html>

⁸⁰ 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.

international standards applicable both to the military personnel and actions will be drawn. Before a briefly account of the role of some international organisations, a paragraph concerned with the foreign command of national armed forces, and further, one about the claim of an inter-parliamentary dimension (and not exclusively inter-governmental) of the control of the international defence and security decision-making will open the debate to non-pacific issues involved in the democratic control of armed forces. United Nations, the North Atlantic Treaty Organisation, and the European Union are the international organisations that influence the defence policy of part or all of the member states of the Council in a more considerable way. The last sub-section will deal with the European Court of Human Rights as an existing international control channel.

6.1. International Standards

Although there are no internationally agreed standards for democratic oversight over armed forces, some regional attempts have been made in this field⁸¹. International Organizations such as Organisation for Security and Cooperation in Europe (OSCE), the Parliament of the Council of Europe (PACE), the European Union (EU), the Inter-Parliamentary Union (IPU), the Assembly of the Western European Union (WEU Assembly), the Organisation for Economic Co-operation and Development (OECD), the United Nations (UN) and the North Atlantic Treaty Organisation (NATO), have fixed and recommend some standards concerning the democratic oversight of the military, that are frequently immerse in the broader context of oversight of the security sector⁸². These standards apply to the states members of the corresponding organisation.

The different agreements between the states, the treaties that create the organisations, and the international standards produced by these organisations are of different kind and have different binding force. The binding force is normally defined by the existence or absence of sanctions in the cases of infringement of the provisions of the international legal instrument. The coactivity, so characteristic of the national law, is weaker at the international level, but nevertheless important for the maintenance of international relations between states that are each time more interdependent, particularly in issues like defence and security. Some types of international standards are international Treaties, Codes of Conduct, Recommendations⁸³, Resolutions⁸⁴, Guidelines⁸⁵, Documents⁸⁶, and Framework documents⁸⁷. The first two will be analyse here.

⁸¹ BORN, FLURI, JOHNSON, *Parliamentary Oversight of the Security Sector...*, (note 6), p.23.

⁸² 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.

⁸³ See the Recommendation 1713 (2005), the Parliament of the Council of Europe, cited above (note 2).

⁸⁴ 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/NR0/596/23/IMG/NR059623.pdf?OpenElement>

⁸⁵ One recent Guideline is the one proposed by OECD "Security System Reform and Governance", DAC Guidelines and Reference Series, 2005, online: <http://www.oecd.org/dataoecd/8/39/31785288.pdf>

⁸⁶ Vienna Documents (1990 and 1992) on Confidence and Security Building Measures (CSBMs), adopted within the Conference on Security and Cooperation in Europe (CSCE) The Forum for Security and Cooperation (FSC), as part of the OSCE, has continued the negotiations on the CSBMs (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/>

⁸⁷ The NATO 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

6.1.1. International Treaties

Starting with the first category, the international treaties, two types of them play a special role regarding the use of force: treaties protecting human rights in general (of the armed forces personnel⁸⁸, of civilians, of prisoners of war), and treaties related to armament procurement, arms control, and disarmament (including others of prohibition of using and non-proliferation of certain types of armaments).

6.1.1.1. Treaties on human rights

The treaties protecting human rights that must be fulfilled and observed by the Council of Europe member states are diverse, being the most important ones the following:

- Universal Declaration of Human Rights
- Convention for the protection of human rights and fundamental freedoms of the Council of Europe as amended by Protocol N°11 (European Convention on Human Rights)
- Charter of Fundamental Rights of the European Union
- 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
- Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Prevention and Punishment of the Crime of Genocide

Some of the above-mentioned treaties are part of the international humanitarian law⁸⁹, while other are classical conventions on human rights. They refer to the rights of the soldiers, the sick and injured in armed forces, the civilian or non-combatant, and the prisoners of war. The international treaty binds the states that become party to them. At national level, there are several mechanisms for incorporating international treaties and agreements. Some countries require passing a law, by which the treaty is incorporated in the national legal order. Others give effect to them after they are ratified. Should the treaty be on human rights, some constitutions give them immediate constitutional rank.

6.1.1.2. Treaties on armament control

Arms control is the other field in which important international treaties have been concluded. 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

Partnership for Peace (PfP). The legal texts and work programmes of the later can be consulted at: <http://www.nato.int/issues/pfp/off-text.html>.

⁸⁸ 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 made 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>.

⁸⁹ It is also considered international humanitarian law the Rome Statute of the International Criminal Court, of 1998. Some of the treaties related to arms control are also included under this label, and will be listed below.

accumulation of arms by a state. United Nations has produced great part of these agreements, and has a special office for disarmament affairs. From 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, enter into force February 8, 1928)
- The Antarctic Treaty (Washington, 1959, entered into force June 23, 1961)
- Treaty on the Non-Proliferation of Nuclear Weapons (NPT, 1968, enter 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, enter into force March 26, 1975)
- Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD, 1977, enter into force 5 Oct. 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, enter into force 2 December 1983)
- Treaty on Conventional Armed Forces in Europe (CFE, 1990, enter 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, enter 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, enter into force 1 March 1999)

6.1.2. Codes of Conduct

The second category is the Codes of Conduct applicable to armed forces personnel. The most known in the military field is the OSCE Code of Conduct on Politico Military Aspects of Security (1994)⁹⁰. 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. According to 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 has also to 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.

⁹⁰ Adopted at the 91st Plenary Meeting of the Special Committee of the 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.

The Code of Conduct for Law Enforcement Officials, adopted by 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 powers⁹¹.

6.2. International Organisations

There are different types international organizations whose mission is to safeguard and contribute international collective defence, security and peace. Each state has its own mechanisms for becoming part of international organizations, according to their legal system⁹². Most of these organizations are created by an international treaty or agreement, 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 are the NATO and the WEU. Examples of international treaties that establish regional organizations concerning security are the Treaty of the European Union, the Final Act Conference for Security and Cooperation in Europe (Helsinki Act), and the Constitutive Act of the African Union.

For the purposes of this report, we will focus on the United Nations (UN), the North Atlantic Treaty Organization (NATO), and the European Union (EU)⁹³. The first two have common powers related with the use of military forces authorised by them, consisting of a) monitoring and observation, b) traditional peacekeeping, c) peacekeeping plus state-building, d) force to ensure compliance with international mandates, and e) enforcement⁹⁴.

Before making a brief review of these organizations, it is convenient to point out or identify some common problematic issues related to the use of force under international auspices: limitations to the use of force, legitimacy of the authority that decides the use of force, foreign command of national armed forces in international missions, democratic accountability related to the use of force, the possibility of a international inter-parliamentary dimension of the control.

a) Limitations to the use of force

The constitutions of the countries under study contain rules that restrict weakly the use of force, or have no explicit limit, like the case of France⁹⁵. They introduce general limitations, like stating that the use of force has for purpose the defence and the protection of the state, its interests sovereignty, or territory, or that it has to respect international law. An exemption is Germany. The German Constitution establishes more clear limits to the use of force in Art. 87a (2). This article states that, besides defence, Armed Forces can only be employed to the extent expressly permitted by the Basic Law. Limitations to the use of force can reduce the sphere of

⁹¹ 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

⁹² The Swiss Constitution, for example, requires a referendum to enter to this type of organizations. Art. 140. Mandatory Referendum: 1. The following shall be submitted to the vote of the People and the Cantons: b) The entry into organizations for collective security or into supranational communities.

⁹³ For the comparative table of use of force in the international field under the auspices of UN, NATO, and EU, 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.

⁹⁴ KU, Ch. (2004), "Using Military Force under International Auspices: A Mixed System of Accountability", Born, Hänggi, *The "Double Democratic Deficit"...*, (note 93), p.36.

⁹⁵ In the case of France, only the preamble of 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 5), p. 32.

decision making related with the use of force in international level were the parliamentary oversight cannot reach.

b) Legitimacy of the authority that decides the use of force

The international authority that decides the use of force in the international sphere must be legitimate. The UN Charter entrusts this task to the Security Council (SC) (Art. 39 and 42). States can carry out individual or collective defence, while the SC decides to intervene (Art. 51). Other security regional organizations, like the NATO, can also deploy troops before a threat to international peace and security, but they need, as a general rule, prior authorization of the SC.

c) Sending troops abroad

Some constitutions explicitly make reference to authorization 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 special quorum (Art. 43(3) b), Art. 39(3)). The Croatian Constitution considers the same requirement, except when their national armed forces join an international mission of an organization from which Croatia is part with the purpose of offering humanitarian aid (Art. 7)⁹⁶. 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), 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)). Hungarian constitution concentrates in the 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))⁹⁷. In the case of Sweden, the article requires also that the sending of troops to other country be permitted under a law, which sets out the prerequisites for such action.

Some countries develop more precise rules for sending troops abroad at legislative level. This is the case of Spain. The 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 organizations 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 contemplated in the previous law of 1980 (Art. 16), and more strict rules of respect of the international legality of missions abroad, together with new mechanisms of control. In this sense, the Parliament adopts a protagonist role regarding missions abroad. Related with the later, Art. 4 (2) states that the Congress shall previously authorize 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 with the defence of Spain or the national interest, the government shall make a consultation and ask for the authorization of the Congress (Art. 17). The government shall periodically inform the Congress about the development of the operations abroad (Art. 18). Additionally, several conditions must be fulfilled in these cases: a) express petition of the government of the state of the territory where they develop or authorization of the SC, or agreed by UE, OTAN; b) the ends shall be defensive, humanitarian, or for peacekeeping; c) they must adjust to the UN Charter, and respect the principles of conventional international law incorporated in the Spanish legal order (Art. 19).

⁹⁶ This last constitution also fixes a temporal limit to the decision of the government on sending troops abroad (up to 60 days, Art. 43.4).

⁹⁷ Article 73 of the Constitution of Latvia has a comparable prohibition.

The decision-making on international peace support operations goes together 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.

d) Foreign command of armed forces in international missions

The subordination of soldiers or unit to the command of the superior of foreign armed forces is an important issue related to the control of armed forces, unfortunately not deeply debated within scholars⁹⁸. Moreover, generally speaking, states do not raise constitutional questions about the transferral of the command of troops in multinational military cooperation, by this way, of their sovereign rights⁹⁹. In fact, constitutions do not have rules concern with this issue. Germany is, once more, an exemption.

According to Art. 24(1) of the German Constitution, the Federation may by a law transfer sovereign power to international organizations. The same article entitles the Federation to enter into a system of mutual collective security, and in case 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).

The transfer of power to collective security entities such as NATO has been limited to certain powers of command, according to the constitutional law of some countries. The German legal system requires that soldier need to receive an order of their superior, which is revocable and limited in time and scope, to follow order of a foreign commander¹⁰⁰. The question about the need of the approval or not of specific legislation for a general transfer of power to foreign commander remains open.

A distinction can be made between NATO 'full command', on the one hand, and 'operational command' and 'operational control', on the other. The two last concepts do not need, in 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.

e) Democratic accountability related to the use of force

When deploying troops to attend international peacekeeping missions or interventions, questions of democratic accountability rise concerning "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 authorization to use military forces; 2) national authorization 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)

⁹⁸ NOLTE, KRIEGER, "European Military Law Systems: General Comparative Report", (note 5), pp. 120ff.

⁹⁹ NOLTE, KRIEGER, "European Military Law Systems: Summary and Recommendations", (note 5), p. 3.

¹⁰⁰ NOLTE, KRIEGER, "European Military Law Systems: General Comparative Report", (note 5), pp. 120ff. An important German jurisprudence about the NATO and transfer of command powers is the "Somalia-Decision", BVerfGE 90, 1994.

responsibility to comply with norms governing the conduct of military and other international personnel in the field¹⁰¹.

The lack of effective internal and international mechanisms of democratic control of the military while developing international missions, has led the scholars to name this situation as the 'double democratic deficit'¹⁰².

f) The possibility of an international inter-parliamentary dimension of the control

Some scholar 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 procedures¹⁰³. An inter-parliamentary structure would ensure a collective decision-making, and more democratic oversight.

All these issues have to be taken into account in the following brief analysis of the international organisations mentioned above.

6.2.1. United Nations

The UN is an international organization to maintain international peace and security. To that end, the UN has a broad mandate of its member states that authorizes the adoption of collective measures for the prevention and removal of threats to the peace. The UN has developed a wide range of instruments for maintaining peace and ensuring security within the States. This instruments for peace and security are a) preventive diplomacy and peacemaking; b) peace-keeping; c) post conflict peace-building; d) disarmament; e) sanctions; and f) peace enforcement¹⁰⁴. 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"¹⁰⁵. Peace-building consists on preventing conflict and healing the wounds after the conflict has occurred, through actions such as demilitarization, 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 UN that advises and proposes integrated strategies for post-conflict recovery¹⁰⁶. Disarmament, arms control, and non-proliferation measures are directed mostly to weapons of mass destruction. Sanctions are the measures not involving the use of armed force in order to

¹⁰¹ 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, Russia, United Kingdom and United States.

¹⁰² Born, H., Hänggi, H., *The "Double Democratic Deficit"...*, (note 93).

¹⁰³ BORN, HÄNGGI, "The Use of Force under International Auspices...", (note 7), p.20.

¹⁰⁴ 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 Organization, 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/agsupp.html#INSTRUMENT>.

¹⁰⁵ *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.

¹⁰⁶ Information of this commission is available at: <http://www.un.org/peace/peacebuilding/>

maintain or restore international peace and security (such as partial interruption of economic relations and of means of communication, Art. 41 Charter of UN). Finally, peace-enforcement actions are those military actions against the aggressor beyond the ones for self-defence.

The Security Council (SC) is the organ that has the primary responsibility for the maintenance of international peace and security. The Charter of the United Nation fixes, especially in Chapter VI and VII, the powers of the SC related to pacific settlement of disputes and actions with respect to threats and breaches of peace, respectively.

The composition of the SC and the rules of voting lead to problems of legitimacy when adopting decisions about carrying out peace support operations or peace enforcement operations. The decisions are adopted by affirmative vote of nine members, and when the matter is not procedural, the concurrent vote of the five permanent members is needed¹⁰⁷. In practice, this means that the rest of the states of the SC have no right to vote, whether they are or not troop-contributing countries. Besides, the SC meets in closed-door session, to which no access to the public, or to national parliaments or non-participant governments is granted.

In turn, the UN General Assembly only makes recommendations on these issues, and approves the budget of UN, under which the international missions and operations are financed (Art. 17 Charter). The fact that the UN General Assembly is intergovernmental in nature together with the absence of a controlling parliamentary body, has led some scholars to consider that UN decision-making suffers democratic deficit¹⁰⁸. The Assembly has recommended, for example, that in authorizing or endorsing the use of military force, the SC should always follow five criteria of legitimacy: a) Seriousness of the threat; b) Proper purpose; c) Last resort; d) Proportional means; and e) Balance of consequences¹⁰⁹.

6.2.2. North Atlantic Treaty Organisation (NATO)

The NATO is an intergovernmental organisation, created in 1949, and composed of 26 countries that decide on the basis of consensus, which means that all the members shall approve the decisions. NATO has a military structure¹¹⁰ 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 NATO. It is formed by the high-level representatives of each member country, and discusses policy or operational questions before adopting decisions. The NATO Parliamentary Assembly is inter-parliamentary in character that 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 NAC.

NATO represents a consultation channel on security issues, where Canada, United States and European countries can exchange opinions and joint common actions. It is also committed to mutually defend its members from aggressions or threats of peace. A further competence is crisis management, which means to help to end conflicts and violence at the international scenery, and to bring stability to the former. Finally, NATO established the instruments of

¹⁰⁷ Art. 23 of the Charter of the United Nations.

¹⁰⁸ HÄNGGI, "The Use of Force under International Auspices: Parliamentary Accountability and the 'Democratic Deficits'", Born, H., Hänggi, H., *The "Double Democratic Deficit"...*, (note 93), pp. 4ff.

¹⁰⁹ 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.

¹¹⁰ The military structure consists of the Military Committee, and two strategic military commands: the Allied Command Operations (ACO), and the Allied Command Transformation (ACT).

partnerships, to hold dialogue and cooperation with NATO and non-NATO countries. The Partnership for Peace (PfP), for example, is a programme of practical bilateral cooperation between individual partner countries and NATO that allows the former to choose their own priorities for cooperation¹¹¹

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

6.2.3. European Union

The second pillar of the European Union is the Common Foreign Security Policy (CFSP). The process of creating a European Security and Defence Policy (ESDP) within the CFSP 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 Treaty¹¹².

The Treaty of the European Union settles provisions on a CFSP under title V (Art. 11-28). The principles and objectives are fixed by Art. 11, and they focuses on the safeguard 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 EU member states shall support it with the spirit of mutual solidarity¹¹³.

The TEU states that the CFSP 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 the NATO, and the cooperation between them in the framework of the WEU and NATO. The Petersberg Tasks are incorporated in Art. 17.2: "humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking".

The European Union assumes, by this way, the competences that before had the WEU in defence issues, which has currently only some residual functions related to crisis management. However, the asymmetric membership of the WEU and the EU makes it difficult to claim that the EU is proxy of the WEU in defence issues¹¹⁴.

The decision-making about CFSP corresponds to the Council and shall be taken unanimously (Art. 23 TEU), but it can act by qualified majority in some cases (adopting joint actions, common position or joint strategies). The competences of the European Parliament in the CFSP are, then, restricted to being informed by the Presidency and the Commission of the development of this policy, asking questions to the Council and make recommendations, and holding an annual debate on progress in its implementations (Art. 21 TEU)

One further problem is that Art. 46 TEU excludes the CFSP from the jurisdiction of the European Court of Justice. The intergovernmental character of the security and defence policy,

¹¹¹ This information is on the page of the organisation: <http://www.nato.int>

¹¹² For the antecedents of the ESDP see TRYBUS, M. (2005), *European Union Law and Defence Integration*, Oxford and Portland Oregon, Hart Publishing.

¹¹³ The Constitution of Austria makes explicit reference to the CFSP of the EU in Art. 23f.

¹¹⁴ TRYBUS, *European Union Law and Defence Integration*, (note 112), p. 104. Denmark, for example, "is not obliged to participate in the military cooperation of the EU", according to Art. 6 of Denmark Protocol 5 to the Amsterdam Treaty in 1997, in which it makes reservations to article 13(1) and 17 of the EU Treaty.

together with the lack of judicial and parliament scrutiny produces a deficit in the democratic control of armed forces within the European Union.

6.3. The control of International Courts

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.

6.3.1. The European Court of Human Rights (ECHR)

The High Contracting Parties to the European Convention on Human Rights are subjected to the judicial review of the European Court of Human Right. The control of the ECHR over the military is limited to violations of the Convention. The judgments about military issues are usually related to violations of fundamental rights of military personnel, or of individuals that have come under the control of foreign armed forces. In both cases, the Court aims to make a correct balance between national security and individual rights. Armed forces exist to protect the democratic values, and have, consequently, to respect the rule of law in performing its missions.

Since the *Engel case*¹¹⁵, the Court has ruled on the protection of the individual rights of the military personnel. The Court has also control considered some actions committed by armed forces as torture or degrading or inhuman treatment. Unlawful actions of the military arises responsibilities of the contracting parties involved, cases in which the Court has impose compensations to the person affected or to their family. Other issues of dispute brought before the Court are the maintenance of the discipline within the military structure, and the nature of military justice¹¹⁶.

6.3.2. United Nations International Court of Justice (ICJ)¹¹⁷

The UN International Court of Justice was established by the Charter of the United Nations (Art. 92-96), and its 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 ICJ. The competences of the Court are to judge the infringement of the Charter, and to give advisory opinions on legal questions by request of the General Assembly or the Security Council, or other UN organs and specialized organs authorized 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 the Vienna 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.

¹¹⁵ *Case of Engel and Other v. Netherlands*, 8 June 1976, (Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72).

¹¹⁶ All this 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>

¹¹⁷ Information extracted from the website of the ICJ: <http://www.icj-cij.org>.

6.3.3. The International Criminal Court (ICC)

The PACE 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 states members of the Council of Europe that are at the same time ratifying parties of the Treaty that establishes the ICC, are under its jurisdiction. The Rome Statute¹¹⁸ settles the ICC 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) and war crimes (Art. 8). 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 ICC (Art. 112). The following states are states parties of the Rome Statute¹¹⁹: San Marino (13 May 1999); Italy (26 July 1999); Norway (16 February 2000); Iceland (25 May 2000); France (9 June 2000); Belgium (28 June 2000); Luxembourg (8 September 2000); Germany (11 December 2000); Austria (28 December 2000); Finland (29 December 2000); Sweden (28 January 2001); Andorra (30 April 2001); Denmark (21 June 2001); Netherlands (17 July 2001); Liechtenstein (2 October 2001); United Kingdom (4 October 2001); Switzerland (12 October 2001); Portugal (5 February 2002); Cyprus (7 March 2002); Ireland (11 April 2002); Greece (15 May 2002); Spain (24 October 2002); Malta (29 November 2002); Croatia (21 May 2001); Serbia (6 September 2001); Poland (12 November 2001); Hungary (30 November 2001); Slovenia (31 December 2001); Estonia (30 January 2002); The Former Yugoslav Republic of Macedonia (6 March 2002); Bosnia and Herzegovina (11 April 2002); Bulgaria (11 April 2002); Romania (11 April 2002); Slovakia (11 April 2002); Latvia (28 June 2002); Albania (31 January 2003); Lithuania (12 May 2003); Georgia (5 September 2003). So, from the Council of Europe member states, only eight states have not yet ratified the Rome Statute: Armenia, Azerbaijan, Czech Republic, Moldova, Monaco, Russian Federation, Turkey and Ukraine.

Only few cases have reached the ICC¹²⁰. Three States Parties, in turn, have referred situations to the Court, and so has the United Nations Security Council. The public can also send communications to the Office of the Public Prosecutor.

Provisional Conclusions -Recommendations on who controls

- Constitutional regulation of control. Whilst this is not a generalised feature, it is common among countries having 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 a subtle additional value: it reassures the commitment of armed forces with new constitutional and democratic order. In parallel, it also forecloses any eventual identification between armed forces (and other security services) and the pre-democratic regimes. In new democracies and new constitutions, it is highly recommended a positive regulation of control and its parameters.

- Constitutional rules or laws should clearly identify the organs exercising control and oversight over armed forces and other security services.

- Irrespective of the political regime, Parliaments must have always some 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

¹¹⁸ 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 modified in between, entered into force on 1 July 2002.

¹¹⁹ Information from the website: <http://www.icc-cpi.int>.

¹²⁰ ICC-01/04-01/06, Case The Prosecutor v. Thomas Lubanga Dyilo (Democratic Republic of the Congo); ICC-02/04-01/05, Case The Prosecutor v. Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen (Uganda); ICC-02/05-01/07, Case The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") (Darfur, Sudan).

function of controlling executives. The absence of significant forms of Parliamentary control over armed forces and security services is inconsistent with democratic institutions.

- Since the creation of specialised defence committees within parliaments responds to enhanced democratic control, they are welcome. Whilst the rules of secrecy may be understood as a mechanism for avoiding compromising armed forces and/or state security, secrecy should not be used in a way that compromises or threatens fundamental rights and democratic principles.
- Jurisdictional control always reinforces the guarantees of armed involvement and anchors it firmly within the principle of the rule of law
- Controlling organs should 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 optimize, 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 of democracy. As a general rule, controlling organs must obey to the principles of respect for human rights, rule of law and democratic accountability.
- 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. Greater involvement of the EP would improve the democratic credentials of armed missions under the EU flag.