European Military Law Systems

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Edited by

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Foreword

The European Union has intensified its efforts towards the creation of a common security policy. In 1999, the European Council decided in Helsinki that European armed forces structures should be created to take over the duties of the so-called "Petersberg Tasks" within the context of operations conducted by the EU. The prospect of constructing common European armed forces structures requires a better understanding of the various national military legal systems of the European member states.

A number of multinational units with a higher level of integration have come into being in recent years, including the Eurocorps, the First German-Netherlands Corps, and the Multinational Corps Northeast. These units occasionally experience internal conflicts which can be traced back to differences in the applicable legal systems. The Defence Ombudsperson of the German Bundestag declared in his report for the year 2000 that differences in the military legal systems were in fact creating friction which led to inefficiency and damaged the soldiers' ability to work as a team.[1] The German Ombudsperson has been encouraging the creation of a European military legal system since 1995.[2]

It is against this background that the German Ministry of Defence decided in 2000 to commission a study comparing various European systems of military law. This study has been undertaken by the editor with the help of Dr. Heike Krieger (University of Göttingen) and a number of colleagues from different European states. The original study consists of a General Report which gives an overview and compares nine different European military law systems. This General Report has been published separately in German.[3] The present book contains not only the original study (the General Report) but also all national reports in English. Originally, the study was limited to examining the military legal systems of those eight partner states with which Germany has formed permanent multinational units, namely Belgium, Denmark, France,

[1] German Parliament, Report by the Ombudsperson for the Armed Forces, annual report 2000, *Bundestags-Drucksache* (German Parliamentary minutes) 14/5400, p. 41.

[2] German Parliament, Report by the Ombudsperson for the Armed Forces, annual report 1995, *Bundestags-Drucksache* 13/3900, p. 33.

[3] G. Nolte/H. Krieger, Europäische Wehrrechtssysteme. Ein Vergleich der Rechtsordnungen Belgiens, Dänemarks, Deutschlands, Frankreichs, Luxemburgs, der Niederlande, Polens, Spaniens und des Vereinigten Königreichs (Baden-Baden, 2002).

Luxembourg, the Netherlands, Poland, Spain, and the United Kingdom. In view of the importance of Italy as a large founding member of the European Communities and its notable involvement in the process of multi-national military integration, the editor has decided to commission a report on the Italian military law system.

1. Preparation of the Study

The General Report and the Summary and Recommendations by the editor and Dr. Heike Krieger (University of Göttingen) are based on state reports for Belgium by Professor Dr. Pierre d'Argent (Catholic University of Louvain-la-Neuve), for Denmark by Professor Jørgen Albæk Jensen (University of Aarhus), for France by Professor Jörg Gerkrath (University of Avignon), for Germany by the editor and Dr. Heike Krieger (University of Göttingen), for Italy by Professor Jörg Luther (University of Eastern Piemont, Turin), for Luxembourg by Dr. Frédéric Dopagne (Catholic University of Louvain-la-Neuve), for the Netherlands by Professor Leonard Besselink (University of Utrecht), for Poland by Dr. Michał Kowalski (University of Krakow), for Spain by Dr. Lorenzo Cotino Hueso (University of Valencia), and for the United Kingdom by Professor Peter Rowe (University of Lancaster).

The study was commenced in January of 2001. In March 2001, a questionnaire was sent to all members of the research group along with a model answer on the German military legal system. The questionnaire focussed on the constitutional elements of military law and the legal position of the soldiers, particularly on the form of the superior-subordinate relationship, disciplinary law, institutional representation, and guard duties. The national reporters assembled in workshops in March and September of 2001, which were also attended by representatives of the German Ministry of Defence.

2. Purpose and Object

The primary goal of the study is to provide an outline of comparative military law in Europe. The study does not purport to identify the minimum requirements of applicable international or European law for the purposes of harmonisation or unification of military law. Obviously, the recommendations for harmonisation take the general framework into account which is provided by the applicable international and European legal principles. The study is not, however, designed to describe the minimum requirements that the European Convention on Human Rights, EU law, or general public international law

might require for every area of military law. Due to this fact, neither the implications of the European Court of Human Rights' decision in the case of *Waite and Kennedy v. Germany*[4] for the possible creation of military organisations with their own personality under international law, nor the jurisprudence of the European Court of Justice on the applicability of social legislation in European Community law to military law shall be closely investigated in this book.[5]

The book is also not a comprehensive treatise of comparative military law. Its purpose is rather to offer a comparative overview of individual areas of the various national military legal systems. Other areas, such as employment law, the right to compensation, the guarantee of subsistence-level living, and the right to security in the workplace, are left out entirely. Unfortunately, not all possible areas of interest could be discussed in depth within the given framework. In addition, the limited degree of scientific study of military law in certain states placed restrictions on some of the national reporters.

3. Method

The book is not based on unmitigated observation of practical problems. It is rather the result of work based on texts and documents. As a result, several questions relevant to current practice may not be treated in sufficient depth, while other questions, which may not become relevant until a later date, are discussed more thoroughly than the present situation seems to warrant. Thus, this book is not primarily designed to discover which differences in the various legal systems are most important for current practice. Examples of this could include situations such as the German system of institutional representation being found disquieting by French officers, or the scale of political rights afforded to German soldiers causing envy in their French counterparts. Even the question of how to deal with homosexual soldiers is a question of law only to a certain extent. In the end, many problems arising in day-to-day practice pose no questions appropriate to examination by a jurisprudential study. This is true, for example, of the various regulations on holidays, which are easy to ascertain, but difficult to harmonise for practical reasons.

During the preparation of this book it became clear that the extent to which military law has been subjected to scientific and academic study varied greatly among the states under examination. While the academic literature in Ger-

[4] ECHR, *Case of Waite and Kennedy v. Germany*, judgement of 18 February 1999, No. 26083/94, (1999) *Europaeische Grundrechte Zeitschrift*, pp. 207–213.

[5] ECJ, Case C-285/98, *Tanja Kreil v. F.R.G.*, [2000] E.C.R. I-69.

many, Italy, the Netherlands, Spain, and the United Kingdom has grappled with questions of military law rather intensively, Belgium, Denmark, France, Luxembourg and Poland seem to be lacking a general in-depth discussion of such questions among academics. It is noteworthy that, despite the increased participation of the various armed forces in multinational structures, there has been very little attempt in the individual states to reform legislation on the military. The Netherlands is an exception to this rule, having implemented a number of reforms which relate to the participation of soldiers in multinational structures. To a certain extent, the same is true for Italy.

4. Acknowledgments

The publication of this book would not have been possible without the support from many sides. Lindsay Cohn (Duke University) and Roslyn Fuller (University of Göttingen) have each worked with great dedication, diligence, and sensitivity on the linguistic revisions. Anna-Jule Arnhold, Anna von Gall, Seyda Emek and Maxim Kleine (all University of Göttingen) have supported this book in various ways, but each with the same enormous enthusiasm and determined competence. Christiane Becker has performed an almost titanic task in completing all the necessary secretarial work. The Geneva Centre for the Democratic Control of the Armed Forces (DCAF) has provided generous financial support to cover printing expenses. The Centre's aims and activities are explained on the following page.

Georg Nolte Göttingen, April 2003

The Geneva Centre for the Democratic Control of Armed Forces (DCAF)

The Geneva Centre for the Democratic Control of Armed Forces (DCAF) was established in October 2000 on the initiative of the Swiss government as an international foundation under Swiss law. The Centre encourages and supports states and non-state institutions in their efforts to strengthen democratic and civilian control of their armed and security forces.

In order to implement these objectives, the Centre collects information, undertakes research and engages in networking activities in order to identify problems, establish lessons learned and to propose best practices in the field of democratic control of armed forces and civil military relations. Secondly, the Centre provides its expertise and support to all interested parties, in particular governments, parliaments, military authorities, international organisations, non-governmental organisations, and academic circles.

Partnerships form the basis of the Centre's engagement in the security field. The Centre works in close cooperation with national authorities, international and non-governmental organisations, academic institutions and individuals experts. In its operational and analytical work, DCAF relies on the support of the forty-two governments represented on its Foundation Council, the fifty-plus renowned defence and security experts on its International Advisory Board, its Think Tank and its Working Groups. The Centre has established partnerships or concluded cooperative agreements with a number of research institutes and also with several international organisations and inter-parliamentary assemblies.

In order to thoroughly address specific subjects relating to the democratic control of armed forces, DCAF has established or is in the process of establishing eleven dedicated working groups to implement its work programme: Security Sector Reform; the Legal Dimension of Democratic Control of Armed Forces; Parliamentary Control of Armed Forces and the Security Sector; the Democratic Control of Police and other Internal Security Services; the Role of Civilian Experts in National Security Policy; Transparency Building in Defence Budgeting and Procurement; the Military and Society; Civil Society; the Criteria for Success and Failure of the Democratic Control of Armed Forces; the Democratic Control of Armed Forces in the African Context; and the Partnership for Peace Consortium Working Group on Civil-Military Relations. The planning, management and coordination of the working groups is centralised in the Centre's Think Tank.

Moreover, DCAF provides its expertise on bilateral and multilateral levels, and also addresses the interests of the general public. A number of bilateral projects in the area of security sector reform and parliamentary oversight over the defence and security sector are underway within other states of South Eastern and Eastern Europe. At the multilateral level, DCAF implements several projects in association with the Council of Europe, European Union, NATO, OSCE, and the Stability Pact for South Eastern Europe.

For further information please contact DCAF via www.dcaf.ch.

Overview

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Abbreviations

Abbreviation	Original	English Translation
AC	Appeal Cases	
ACE	Allied Command Europe	
ACM	Actions civilo-militaires	
ADEFDROMIL	Association de défense des droits des militaires	(First) Association for the Defence of Soldiers' Rights
All ER	All England Law Reports	
AMAR	Algemeen militair ambtenarenreglement	Dutch Service Regulation on the Status of the Soldier
ANFASOCAF	Association Nationale et Fédérale d'Anciens Sous-Officiers de Carrière de l'Armée Française	Association of Former Servicemen in France
APRONUC	L'Autorité provisoire des Nations Unies au Cambodge (1992–1993)	United Nations Transnational Authority in Cambodia (UNTAC)
ARRC	ACE Rapid Reaction Corps	
Awb	Algemene Wet Bestuursrecht	Dutch General Administrative Law Act
BELUKOS	Mixed Belgium-Luxembourg Battalion in Kosovo	
BGBl.	Bundesgesetzblatt	Official Gazette, Germany
BGH	Bundesgerichtshof	Federal Court of Justice, Germany
BIMS	Bureau Internationale Militaire Sport	Service unit of the DICO
Biul. RPO	Biuletyn Rzecznika Praw Obywatelskich	Ombudsperson's Bulletin, Poland
BRvC	Bijzondere Raad van Cassatie	Special Court of Cassation, Netherlands, (1945–1952)
BVerfG	Bundesverfassungsgericht	Federal Constitutional Court, Germany

BVerfGE	Entscheidungen des Bundesverfassungsgerichts	Collection of Judgements of the Constitutional Court, Germany
BVerwG	Bundesverwaltungsgericht	Federal Administrative Court, Germany
C.A.	Cour d'arbitrage	Belgian Court of Arbitration
C.C.	codice civile	Civil Code, Italy
C.P.	codice penale	Criminal Code, Italy
C.P.M.G.	Codici penale militare di guerra	Military Criminal Code for Wartime, Italy
C.P.M.P.	Codice penale militare die pace	Military Criminal Code for Peacetime, Italy
C.P.P.	codice di procedura penale	Criminal Procedure Code, Italy
CASD	Centro Alti Studi per la Difesa	Higher Defence Studies Center, Italy
Cass.	Cour de cassation	Belgian Court of Cassation
CDS	Chief of Defence Staff, Netherlands	
CE	Conseil d'État	Highest Administrative Court, France
CEMA	Chef d'État Major des Armées	Chief of the Defence Staff, France
CEMISS	Centro Militare di Studi Strategici	Military Center for Strategic Studies, Italy
CFM	Conseil de la fonction militaire	Councils for the Military, France
CGB	Commissie gelijke behandling	Dutch Commission for Equal Treatment
CIS	Centro de Investigaciones Sociológicas	Sociological Investigations Centre, Spain
CiU	Convergència i Unió	Nationalist Catalan Party, Spain
CJ	Chief Justice	
CJM	Code de Justice Militaire	French Military Justice Code
CLYB	Current Law Year Book	
Cm	Command Paper	
COBAR/ COCER	Consiglio di Base di Rappresentanza/ Consiglio Centrale di Rappresentanza	Guard of Soldiers Representatives, Italy

COIA	Centre opérationnel inter-armées	Joint Operations Centre
COIR	Consigli Intermedi di Rappresentanza	Guard of Soldiers Representatives, Italy
Cols.	Columns	
COM	Commander	
COMELEF	Commandement des éléments francais	Commander of French Forces
COMMLF	Commander of the Multinational Land Forces, Spain	
Comn.	Command Papers	
COMSEEBRIG	Commander of the SEEBRIG	
Coord.	Coordinador	Editor
COS	Commandement des opérations spéciales	Special Operations Command
CPM	Código Penal Militar	Spanish Code of Military Justice
Cr.App.Rep.	Criminal Appeal Reports	
Crim. L.R.	Criminal Law Review	
CRvB	Centrale Raad von Beroep	Dutch High Court of Appeals
CSCE	Conference on Security and Cooperation in Europe	
CSFM	Conseil Supérieur de la Fonction Militaire	High Counsel of the Military Function
CSMD	Capo di Stato Maggiore della Difesa	Commander-in-Chief of the Armed Forces
CSME	Capo di Stato Maggiore dell'Esercito	Commander-in-Chief of the Army
CUK	Commissie gelijke behandling	Commission for Equal Treatment, Netherlands
CZMCARIB	Commandant der Zeemacht in het Caraïbisch gebied	Dutch Commander of the Navy in the Caribbean Area
Dab	Directie algemene beleidszaken	Directorate for General Policy Affairs, Netherlands
DAG	Direction des affaires générales	General Administration Directorate
DARIC	Defensie Archieven-, Registratie- en Informatiecentrum	Service Unit of the DICO

DATF	Deployable Air Task Force, Netherlands	
DBwV	Deutscher Bundeswehr-verband	German Association of Soldiers
DCOM	Deputy Commander	
DCOS	Deputy Chief of Staffs	
Defac	Defensie Accountantsdienst	Directorate for the Audit Service, Netherlands
DFP	Direction de la fonction militaire et du personnel civil	Military and Civil Human Resources Directorate
DGA	Délégation générale pour l'armement	French Procurement Agency
DGEFC	Director-General for Finance and Control, Netherlands	
DGMP	Director-General for Material and Personnel, Netherlands	
DGV	Diensten voor Geestelijke Verzorging	Service Unit of the DICO, Netherlands
DGW & T	Dienst Gebouwen, Werken en Terreinen	Agency of the DICO, Netherlands
DICO		Defence Interservice Commando, Netherlands
DJZ	Directie Juridische Zaken	Directorate for Legal Affairs, Netherlands
DMC	Defensie Materieel Codificatiecentrum	Service Unit of the DICO, Netherlands
DMP	Dienst Militaire Pensioenen	Service Unit of the DICO, Netherlands
DRM	Direction du renseignement militaire	Defence Intelligence Directorate
DSCD	Diario de Sesiones del Congreso de los Diputados	Congress Sessions Daily Bulletin, Spain
DSF	Direction des services financiers	Financial Services Directorate
DTO	Defence Telematica Organisatie	Agency of the DICO
DV	Directie Voorlichting	Directorate for Public Information, Netherlands
DVVO	Defensie Verkeer- en Vervoersorganisatie	Service Unit of the DICO

DW	Ustawa o dyscyplinie wojskowej	Military Disciplinary Law of Poland
DWS	Defensie Werving en Selectie	Service Unit of the DICO
EAG	European Air Group	
EC	Constitución Española	Spanish Constitution
EC Treaty	Treaty of the European Community	
ECHR	European Convention on Human Rights	
ECJ	European Court of Justice	
ECMM/EUMM	European Community/ European Union Monitor in Former Yugoslavia	
ed.	editor, edition	
EHHR	European Human Rights Reports	
EK	Eerste Kamer	Upper House, Netherlands
EMA	État Major des Armées	Central Defence Staff
EMIA	Etat major interarmées de planification	Joint Planning Staffs in France
ESC	European Social Charter	
ETA	Euskadi Ta Askatasuna	Basque Terrorist Organisation
ETS	European Treaty Series	
EuGRZ	Europäische Grundrechte-Zeitschrift	
EUROFOR	European Rapid Operational Force	
EUROMARFOR	European Maritime Force	
EUROMIL	European Organisation of Military Associations	
EUROSAI	European Organisation of Supreme Audit Institutions	
F.I.D.E.	Fédération International pour le Droit Européen	International Federation for European Law
FAS	Fuerzas Armadas	Armed Forces, Spain
FINUL	Force intérimaire des Nations Unies au Liban	United Nations Interim Force in Lebanon (UNIFIL)
FJ	Fundamento jurídico	Grounds (Paragraphs) of Spanish Judgements

FYROM	Former Yugoslav Republic of Macedonia	
G2S	"Groupe deux sexes"	Mixed Working Group of Officers in the French Armed Forces
Gazz. Uff	Gazzetta Ufficiale	Official Gazette, Italy
GDP	Gross Domestic Product	
GG	Grundgesetz	German Constitution
HC	House of Commons	
HL	House of Lords	
HMSO	Her Majesty's Stationary Office	
HR	Hoge Raad	Supreme Court, Netherlands
ICC	International Criminal Court	
ICCPR	International Covenant on Civil and Political Rights	
ICESCR	International Covenant on Economic, Social and Cultural Rights	
ICJ	International Court of Justice	
IDL	Instituut Defensie Leergangen	Service Unit of the DICO
IFOR	Implementation Force in Bosnia	
IGK	Inspecteur-Generaal voor de krijgsmacht	Inspector-General of the Armed Forces, Netherlands
ILM	International Legal Materials	
IMT	International Military Tribunal	
INTOSAI	International Organisation of Supreme Audit Institutions, Italy	
IPTF	International Police Task Force	
ISAF	Enduring Freedom and International Security Assistance	
ISC	Indemnité de service en campagne	Allocation for Service during Campaign

ISFAS	Instituto Social de las Fuerzas Armadas	Independent Spanish Military Institute for the Management of the Social Security of Members of the Military
ISSE	Indemnité de sujétions de service à l'étranger	Allocation for Service Submission Abroad
ISSMI	Istituto Superiore di Stato Maggiore Interforze	Joint Services Staff High School, Italy
JNCO	Junior Non-Commissioned Officer	
JORF	Journal Officiel de la République Française	Official Gazette, France
KB	Law Reports: King's Bench Division	
KFOR	Kosovo Force	
KwDpl	Kaderwet Dienstplicht	Framework Act on Military Service, Netherlands
let.	letter	
LFO	Lov om forsvarets formål, opgaver og organisation m.v.	Danish Defence Act on the Purpose, Task and Organisation of the armed forces Law No. 122 of 27 February 2001
LITPOLBAT	Lithuanian-Polish Battalion	
LOMP	Loi relative à la participation du Grand-Duché de Luxemburg à des opérations pour le maintien de la paix dans le cadre d'organisations internationales	Law on the Participation of the Grand Duchy of Luxembourg in Peace-Keeping Missions in the Framework of International Organisations
MAPE	Multinational Advisory Police Element	
MAw	Militaire Ambtenarenwet 1931	Dutch Act on Military Public Servants, Netherlands
MAWKLA	Militaire Ambtenarewet Koninklijke Landmacht	Act on Military Public Servants Royal Netherlands Army
MDD	Maatschappelijke Dienst Defensie	Social Service for the Ministry of Defence, Netherlands
MFO	Multinational Force and Observers, Sinai	

MGFB	Militair Geneeskundig Facilitair Bedrijf	Service unit of the DICO
MINUAR	Mission des Nations Unies pour l'assistance au Rwanda	United Natios Assistance Mission for Rwanda (UNAMIR)
MINUBH	Mission des Nations Unies en Bosnie-Herzégovine	United Nations Mission in Bosnia and Herzegovina
MINURCA	Mission des Nations Unies en République Centrafricaine	United Nations Mission in Central Africa
MINURSO	Mission des Nations Unies pour l'organisation d'un référendum au Sahara Occidental	United Nations Mission for the Organisation of a Referendum in Western Sahara
MIPONUH	Mission de la police civile des Nations Unie en Haïti	United Nations Civilian Police Mission in Haiti
ML	Martial Law	
MLF	Multinational Land Force	
MND	Multinational Division Central	
MoD	Minister of Defence/ Ministry of Defence	
MON	Minister Obrony Narodowej	Polish Ministry of (National) Defence
Mon b.	Moniteur belge	Official Gazette of Belgium
MONUA	Mission d'observation des Nations Unies en Angola	United Nations Observer Mission in Angola
MONUG	Mission d'observation des Nations Unies en Géorgie	United Nations Observer Mission in Geogia (UNOMIG)
MONUIK	Mission d'observation des Nations Unies pour l'Iraq et le Koweït	United Nations Iraq-Kuwait Observation Mission (UNIKOM)
MP	Military Police	
MPC	Military Penal Code, Denmark	
MRPL	Militær Retsplejelov	Danish Administration of Military Justice Act
MRT	Militair Rechtelijk Tijdschrift	Dutch Military Law Journal
MSL	Militær Straffelov	Danish Military Penal Code, Law No. 642 of 30 September 1987

MSr	Wet militair strafrecht	Military Criminal Code, Netherlands
MSU	Multinational Specialized Unit	
n.	note/footnote	
N.J.	Nederlandse Jurisprudentie	Netherlands Law Reports
N.J.B.	Nederlands Juristenblad	Law Journal of the Netherlands
N.L.J.	New Law Journal	
NAAFI	The Navy, Army, Air Force Institutes	
NATINADS	NATO Integrated Air Defence System	
NATO	North Atlantic Treaty Organisation	
NCO	Non-Commissioned Officer	
NCP	Nouveau Code Pénal	New Penal Code, France
NI	Northern Ireland Law Reports	
NIOD	Nederlands Instituut voor Oorlogsdocumentatie	Dutch Institute for the Historical Study of World War II
NIPO	Nederlands Instituut voor Publieke Opinie en Marktonderzoek	Netherlands Institute for Public Opinion and Market Research
no.	Number	
OFC	Objetivo de Fuerza Conjunto	Joint Force Goal, Spain
OLG	Oberlandesgericht	Regional Court of Appeals, Germany
OMD	Ustawa o urzedzie Ministra Obrony Naradowej	Polish Statute on the Office of the Ministry of Defence
ONUST	Organisme des Nations Unies charge de la surveillance de la trêve	United Nations Truce Supervision Organisation (UNTSO)
OPEX	Opérations extérieures	Foreign Operations
OR	Reales Ordonanzas para las Fuerzas Armadas	Royal Ordinances for the Armed Forces, Spain
ORE	Reales Ordonanzas del Ejército de Tierra	Royal Decree for the Army
ORSEC (plan)	Organisation des secours	French (Executive Plan for the) Organisation of Rescue
OSCE	Organisation for Security and Cooperation in Europe	

OVG	Oberverwaltungsgericht	Regional Administrative Court of Appeals, Germany
PEC	Plan Estratégico Conjunto	Joint Strategic Plan, Spain
PFP	Partnership for Peace	
PKO	Peace-keeping Operation	
POLMAR	Pollution maritime	Executive Control Mission to Prevent Pollution on the French Coast Line
POOP	Ustawa z 1967 r. o powszechnym obowiazku obrony Rzeczpospolitej Polskiej	Polish Defence Act of 1967
PSA	Dienst Personeelsen Salarisadministratie	Service Unit of the DICO
QB	Queen's Bench Division	
RAF	Royal Air Force	
RDF	Loi du 14 janvier 1975 portant règlement de discipline des forces armées	Military Disciplinary Law of Belgium, Moniteur belge (Official Gazette) of 1 February 1975
RDFA	Régimen Disciplinario de las Fuerzas Armadas	Military Disciplinary Law of Spain
RDGA	Règlement de Discipline Général dans les Armées	Military Disciplinary Law of France
RDM	Regolamento di disciplina militare	Regulation on Military Discipline, Italy
RDP	Revue de Droit Public	
Rec.	Receuil	Collection
REIA	Raad voor Europese en Internationale Aangelegenheden	Council for European and International Affairs, The Netherlands
REME	Royal Electrical and Mechanical Engineers	
RFA	British Reserve Forces Act 1996	
ROAF	Reales Ordonanzas para	Royal Ordinances of the Army les Fuervzas Armadas
ROMP	Loi du 2 août 1997 portant réorganisation de l'armées et modification de la loi du 27 juillet 1992 relative a la participation du Grand-Duché de Luxembourg à	Law on the organisation of the Armed Forces, Luxembourg

	des opérations pour le maintien de la paix dans le cadre d'organisations internationales	
RPR	Rassemblement pour la Republic	French political party
RSG	Règle du service de garnison	French General Service Regulation
RSZMO	Rozporzadzenie Rady Ministrow sprawie szczegolowego zakresu dzialania Ministra Obrony Narodowej	Polish Regulation of the Council of Ministers
s./sect.	section	
SACEUR	Supreme Allied Commander Europe	
SBG	Soldatenbeteiligungsgesetz	Law on Institutional Representation of Soldiers, Germany
SDC	State's Defence Committee, Poland	
SEEBRIG	South Eastern Europe Brigade	
Sess.	Session	
SE-Statute	Polish Statute on the State of Emergency	
SEW	Tijdschrift voor Europees en economisch recht	Dutch Journal for European and Trade Law
SFOR	Stabilization Force in Bosnia	
SG	Soldatengesetz	Law on the Rights and Duties of Soldiers, Germany
SGDN	Sécretariat Général de la Défense Nationale	French General Secretary of National Defence
SGM	Statut Général des Militaires	French General Statute of the Military
SISDE	Servizio per le informazioni e la sicurezza democratica	Review
SISMI	Servizio per le informazioni e la sicurezza militare	Military Service for Information and Security, Italy
SND-Statute	Statute on the State of Natural Disaster, Poland	
SOFA	Status of Forces Agreement	
SOFRES	Société française d'enquêtes par sondages	French Polling Institution

Sr	Wetboek van Strafrecht	Criminal Code, Netherlands
SSA	Service de santé des armées	French Military Medical Service
Stb	Staatsblad	Dutch Official Gazette
Suppl.	Supplement	
SWZZ	Ustawa o sluzbie wojskowej zolnierzy zawodowych	Polish Law on the Legal Status of Soldiers
TAR	Tijdschrift voor Ambtenarenrecht	Dutch Journal on the Law of Civil Servants
TEU	Treaty on the European Union	
TIPH	Temporary International Presence in Hebron	
TK	Tweede Kamer	Parliamentary Documents of the Lower House, Netherlands
UMD	Unión Militar Democrática	Democratic Military Union, Spain
UNED	Universidad Nacional de Educación a Distancia	National University for Open Education
UNFICYP	United Nations Peacekeeping Force in Cyprus	
UNIFIL	United Nations Interim Force in Lebanon	
UNIPTF	United Nations International Police Task Force	
UNMAC/ BHMAC	United Nations Mince Action Centre/Bosnia-Herzegovina Mince Action Centre	
UNMEE	United Nations Mission in Ethiopia-Eritrea	
UNMIK	United Nations Interim Administration Mission in Kosovo	
UNPROFOR	UN Protective Force	
UNSAS	United Nations Standby Arrangements System	
UNTS	United Nations Treaty Series	
UNTSO	United Nations Truce Supervision	

UzwGBw	Gesetz über die Anwendung unmittelbaren Zwanges und die Ausübung besonderer Befugnisse durch Soldaten der Bundeswehr und verbündeter Streitkräfte sowie zivile Wachpersonen	Law on Guard Duties, Germany
VVHO	Regeling voorziening bij vredes – en humanitaire operaties	Dutch Regulation for Peace and Humanitarian Operations
WBO	Wehrbeschwerdeordnung	Law on Complaints of Soldiers of 1956, Germany
WDO	Wehrdisziplinarordnung	Law on Military Discipline, Germany
WEU	Western European Union	
WLR	Weekly Law Reports	
WMS	Wet militaire strafrechtspraak	Dutch Law on Military Criminal Procedure
WMSr	Wetboek Militair Strafrecht	Dutch Military Criminal Code
WMT	Wet Militair Tuchtrecht	Dutch Act on Military Discipline
WStGB	Wehrstrafgesetzbuch	Military Criminal Code, Germany
ZDv	Zentrale Dienstvorschrift	Joint Service Regulation, Germany
ZMS	Zone militaire sensible	Sensitive Military Zone
ZUPSZ	Ustawa o zasadach uzycia lob pobytu Sil Zbojnych Rzeczpospospolitej Polskiej poza granicami panstwa	Polish Statute on the Employment and Stationing of Polish Armed Forces Abroad

Chapter 1

European Military Law Systems – Summary and Recommendations

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In the process of comparing the various military legal systems of Belgium, Denmark, France, Germany, Italy, Luxembourg, the Netherlands, Poland, Spain, and the United Kingdom, a number of differences have arisen. It should be noted here, however, that not all of the differences indicate a need for harmonisation.

1. Object and Goal of the Recommendations for Harmonisation

The starting point of all considerations on how to harmonise European military legal systems must be the standards that the European Convention on Human

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Rights, and to a certain extent European Community law, provides for member states. These standards must be met by all military legal systems. The examination showed that only the military legal systems of Denmark, Italy, Spain, and the United Kingdom still prompt certain doubts as to the conformity of some of their individual elements with the ECHR.

Harmonisation need not be left to inter-governmental initiatives. The immediate interaction of military legal systems in the multinational units can also lead to the participants' mutual influence on one another, and to individual or group initiatives within the domestic political process. Indications of the possibility of this route appear, for example, in domestic reform initiatives in France and Spain.

The possibilities for harmonisation are subject to legal and politico-legal constraints. Suggestions for the harmonisation of constitutional legal regulations seem particularly unpromising. The socio-political consensus necessary for the modification of constitutional law may at present be impossible to reach in any or all of the examined states.

A common harmonisation technique which ought to be kept in mind is the opening up of national military law to special regulations for multinational units. So, for example, the Dutch law provides that the national rules on hairstyle during duty and those on institutional representation are inapplicable to soldiers serving in multinational units. Independent sets of rules for multinational units generally represent a justified infringement on Article 3 paragraph 1 of the German Constitution (the right to equal treatment) since even when comparable groups under common regulations are treated differently, much of this differential treatment can be justified by the goal of safeguarding the functional capabilities of the national armed forces in the context of participation in multinational operations and multinational units. It is noteworthy in this context that the relevant regulations in the Netherlands are not subject to any doubt with respect to the principle of equal treatment.

It must also be kept in mind, as we strive to harmonise military law, that, of the states included in the study, only Denmark, Germany, and Poland still have conscription systems. In Italy, conscription is scheduled to end in 2007. In Belgium, France, Luxembourg, the Netherlands, Spain, and the United Kingdom, conscription has been either *de jure* or *de facto* abolished. The effects of this situation on the military legal system are not necessarily immediate, but many regulations and concepts are nonetheless more or less meaningfully linked to the notion of a conscript or professional army. The German principles of "*Innere Führung*" and the citizen in uniform, for example, are heavily influenced by the idea of a conscript army (although these concepts may not inevitably be connected with one another).

2. Separation of Powers and State Organisation

Since it does not seem appropriate at present to introduce harmonisation into the constitutional rules of inner-state organisation, this study will restrict itself to the presentation of the respective frameworks of organisational law in which the military legal systems are to be found. At this point, therefore, we will merely present a summary of those pertinent regulations which will receive a more thorough treatment in Chapter 2 under section II.

The historical and political backgrounds of each of the examined military legal systems are very diverse. Broadly speaking, one can make a distinction between small traditional democracies (Belgium, Denmark, Luxembourg, the Netherlands), large traditional democracies (France, UK), and post-authoritarian democracies (Germany, Italy, Poland, Spain). From a constitutional law perspective, the greatest differences lie between the traditional democracies side and the post-authoritarian democracies. The traditional democracies are characterised by a relative lack of specific provisions of military constitutional law; in other words, by an implicit trust in the appropriateness of the general constitutional law provisions for the military sphere. By contrast, the post-authoritarian states are much more particular about how constitutional provisions relate to the military realm. Among the traditional democracies, the smaller states have tended to regulate the military through constitutional law and parliamentary legislation in a more precise way than have the larger states.

The position of the formal commander-in-chief of the armed forces is very differently regulated in the various states under study. This position can be occupied by the monarch, the president, the government as a collective, or the Minister of Defence. The purpose of Article 65a of the German Constitution – to ensure the accountability of the Commander-in-Chief to the Parliament – is not reflected in the constitutional law of any of the other states under study. The Minister of Defence is not the commander-in-chief of the armed forces in most of the states, and he or she generally possesses no particular constitutional status.

With the exception of Germany, none of the states included in the study saw fit to precisely define the possible uses of the armed forces, or to limit those uses substantially. Instead, most of these states rely on the presumption that the general (and sometimes also particular) constitutional provisions will lead to appropriate uses of the armed forces. The question of what kinds of uses of the armed forces are constitutionally allowed apparently has practical significance only in Germany. The question of transferral of command/sovereign rights does not appear to give rise in any of the states involved to any constitutional questions which would be specific for multinational military cooperation.

Since 1990, the role of national parliaments and the scope of parliamentary activities has intensified in all of the examined states. Only Germany, Italy and Denmark have a genuine requirement that the parliament consent to the deployment of armed forces, and the Danish requirement is quite modest compared to Germany's and Italy's requirements. An attempt to amend the Constitution to require parliamentary assent for military deployments failed in the Netherlands in 2000. However, a provision was written into the Dutch Constitution requiring the government to give parliament prior notification of any intended deployment intended to "further the international rule of law". Constitutional duties to inform the parliament of certain military deployments also exist in Belgium, Denmark, Italy, and Poland, but not in France, Spain, or the UK. As far as parliamentary powers of control are concerned, the German institutions of a constitutionally required parliamentary defence committee, which can upon the motion of a minority become a fact-finding committee, and of a particular Ombudsperson for the military, have no parallels in other states.

Overall, the picture yielded by a comparison of organisational law in terms of the framework for using the armed forces shows that Germany occupies a somewhat exceptional position.

3. The Model of the Citizen in Uniform

German military law is indelibly stamped with the image of the citizen in uniform. The concept, introduced by Count Baudissin, forms the basis of the military constitution. The rights of the soldier as citizen must be reconciled to the furthest extent possible with the duties of the soldier as soldier. Despite its particular historical genesis in Germany, the model of the citizen in uniform is hardly a specifically German phenomenon. The model of the citizen in uniform as a politico-military concept is simply held in particularly high regard in Germany. That being said, the core legal concept is common to all the European states studied. In every state, the soldiers are generally entitled to fundamental rights, and those rights may be derogated only on the basis of legislation (in Denmark and the UK, only on a "legal basis"). In none of the states surveyed are soldiers conceived as being integrated into a special legal relationship (*besonderes Gewaltverhältnis*) which would exclude or generally diminish their fundamental rights. In fact, all of the states allow limitations only if they are in the interests of the functional capability of the armed forces. This is not terribly surprising if one considers the European Convention on Human Rights. The European Court of Human Rights has already recognised the character of soldiers as bearers of fundamental rights in the *Engel* case in 1976, and since then,

a series of further judgements on cases having to do with military law have been handed down. At the same time, the Court continued consistently to emphasise that the members of the armed forces *can* be made subject to special limitations on their rights, which could never be imposed on civilians.

4. Fundamental Rights

Considerable differences among the various military legal systems surveyed were especially obvious in the areas of the duty of political neutrality and the freedom of association. However, not all of these differences necessarily indicated a general or urgent need for harmonisation.

a. Political Neutrality

All of the states studied require a certain neutrality with regard to the political activities of their soldiers. While the scope of the duty of neutrality within the armed forces is largely equivalent in all states, the duty of neutrality with respect to activities outside duty hours varies greatly. Three groupings of states may be distinguished: France, Poland, and Spain treat the military as "*La Grande Muette*" – the Great Mute. In these states, the political neutrality of soldiers is actually a constitutional value. Belgium, Italy and the United Kingdom take a more moderate position, and in Denmark, Germany, and the Netherlands, political activity outside of the service is not only tolerated, but actually (to a certain extent) encouraged.

In concrete terms, this means the following: in Poland and Spain, soldiers must abstain from every political activity both on and off duty. Membership in political parties is prohibited. This is also the case in France, although French soldiers are allowed to express political opinions as long as they are off-duty and have obtained the permission of the Ministry of Defence in advance. In Belgium, soldiers may be members of political parties only in the capacity of a technical expert. If they do engage in political activities, they may not indicate or use their status as soldiers. In the UK, soldiers have the same scope of rights as civilians to be active in politics, on the condition that the activities do not violate any provisions of military criminal law, including, for example, the good conduct rule. Soldiers may be members of political parties, but are not allowed to take an active role in the party's organisation or activities.

In Denmark, Germany, and the Netherlands, soldiers have the right to be active in politics in their off-duty hours. This includes membership and activities in political parties. In Denmark, the soldiers are not even obligated to be particularly loyal to the democratic system. Their activities are limited only by

the provisions of military disciplinary/criminal law. In the Netherlands, soldiers are even permitted to prepare and take part in demonstrations on military installations, as long as the permission of the responsible authorities has been obtained.

The rights to vote and to stand for office are intimately tied to the question of political neutrality. Soldiers in all states under study have the right to vote. Technically, they all have the right to stand for office, as well, but there are significant practical difficulties involved in the form of incompatibility provisions (*inter alia*), especially in France and the UK. In France, soldiers who would like to become a member of parliament or of a local assembly must take unpaid vacation during their time in office. Since the local assemblies, at least, are not able to reimburse their elected officers sufficiently, in practice this means that soldiers do not become local elected officials. In the UK, the *House of Commons (Disqualification) Act 1975, s.1 (c)* forbids the membership of a soldier in the Lower House. The soldier who wishes to stand for office in the House of Commons must offer to resign. That resignation will be accepted only if the needs of the service allow it. If the candidate is unsuccessful, he has no right to resume his former place in the armed forces.

The different specifications for the political neutrality of the soldier are based to a significant extent on historical experience. From the German perspective, it is interesting to note that the limitation of soldiers' political rights in other post-authoritarian states is supposed to serve to strengthen democracy: in Spain, the military's frequent political interventions of the nineteenth and twentieth centuries prompted the authors of the 1978 Constitution to codify a strict political neutrality in that document. In the 1970s, the youthful Spanish democracy considered it a matter of life and death to restrict the political rights of soldiers to a great degree. In Poland, too, the duty of political neutrality is designed to secure democracy. These attitudes are in direct opposition to the German attempt to style the soldier as the citizen in uniform, who takes on his responsibilities as a citizen – including those of political activities outside the realm of duty.

However, it is not likely that the various regulations regarding the political neutrality of the soldier will stand in the way of cooperation in multinational units for long. There are already signs that the restrictive stance in those states with strict political neutrality is changing, and also that these states see in their insistence on neutrality a peculiarity of their own constitutions, which does not necessarily need to be replicated in the structures of the multinational units. In 2002, the Constitutional Court in Poland, decided on a case in which the Polish Ombudsman challenged the constitutionality of the prohibition on membership in political parties. However, the court considered the rules on political neutrality to be in conformity with the constitution. In Spain, the rule on politi-

cal neutrality is considered to be an essential provision for the survival of the states' constitutional structure, but it is not considered to be an issue that should hinder cooperation with multinational units. The purpose of the Spanish regulation is to prevent the armed forces and their unique clout from interfering with the political life of the state. In Germany, on the other hand, the regulations on political neutrality serve the purpose of ensuring camaraderie and mutual respect among the troops, which in turn serves to preserve the discipline and functional capacity of the armed forces.

b. Freedom of Association

A further important difference in the area of guaranteeing fundamental rights are the regulations regarding the freedom of association. This is true particularly with respect to the question of whether soldiers have the right to join professional or trade associations (*i.e.* unions). Here, too, two different basic approaches can be distinguished: In Belgium, Denmark, Germany, Luxembourg, the Netherlands, and Poland, soldiers have the right to form trade and professional unions and to take part in their activities. On the other hand, soldiers in France, Italy and Spain are absolutely forbidden to form or join such organisations. In these states, the dominant conviction is that the activities of professional organisations mitigate the discipline and loyalty of the armed forces. It is rather the place of the responsible commanding officer to protect the interests of the soldiers in his or her care. In multinational units, the activities of soldiers in unions may very well lead to tensions with those soldiers for whom such activities are strictly forbidden. A middle road has been taken by the United Kingdom, in which membership in professional organisations is prohibited by the *Queen's Regulations*, but soldiers may remain or become members of civilian trade organisations. This is allowed partly in order to ease the transition back into civilian life.

On a political level, one will notice that in those states where membership in professional organisations is prohibited, criticism of this policy is growing. At a meeting of EUROMIL, members of the French Parliament showed open interest in the German model of regulation and specifically in the *Deutscher Bundeswehrverband* (the German Association of the Federal Armed Forces). Moreover, in those states in which the representation of soldiers' interests in the framework of a professional organisation is forbidden, some functional equivalents have been allowed through other forms of worker participation. Spain and France have both passed laws regarding official representatives for soldiers' interests. Given the direction of the political movement which seems imminent in this area, harmonisation measures at an international level may in fact be premature at this point in time.

5. Duties of Soldiers

There does not seem to be a need for harmonisation in the area of soldiers' duties. The duties having an impact on the *esprit de corps* are to a large extent similarly regulated in the various military legal systems. The few anomalous regulations tend to spring mostly from peculiar historical experiences or political circumstances, indicating that they would be very resistant objects of harmonisation attempts.

One might want, on political grounds, to consider the possibility of following the examples of Luxembourg and the Netherlands, where the duties of soldiers serving in international units are actually precisely defined in law. In Spain, too, many particular – often symbolic – indications of the duties of soldiers in international units or deployments are to be found in the *Royal Ordinances for the Armed Forces* (OR). By contrast, these considerations are not manifestly present in section 7 of the German Law on Soldiers.

The question of soldierly duties respecting multinational units or in the context of multinational deployments is of particular interest. The (European) Council Decision of 25 June 2001 on the rules applicable to national military staff on secondment on the General Secretariat of the Council in order to form the European Union Military Staff (2001/496/CFSP), creates a multitude of special duties toward the Council enumerated in its Article 7. The transferred member of the armed forces must restrain himself from every action, and particularly from every public expression of opinion, which might detract from the reputation of his office. Furthermore, he has a particular duty to be discreet and to refrain from publishing sensitive information. A draft for a common disciplinary code for the armed forces of the European Defence Community (the project of 1952) formulates these obligations even more precisely. Article 39 of this draft code forbids soldiers to publish texts, hold public lectures, or to speak on radio shows in any context in which the reputation or the capability and readiness of the European armed forces or the individual partner states could come under discussion. Since indiscretions have often caused problems in multinational operations, it might be worthwhile to consider whether a similar passage might be adopted for multinational units or operations.

6. The Power of Command and the Duty to Obey

The question of command and obedience is of central importance to every system of military law. Special attention must be paid to this issue in multinational structures. Significant differences among the examined states are to be

found in this area, and conflicts between the various military codes of justice are likely to arise here.

In the UK, the soldier's duty to obey extends only to lawful commands. In Denmark, Italy and France, soldiers are *obligated* to refuse to obey all *manifestly illegal* orders. In addition, they have the *right* not to follow *other illegal* orders. In Belgium, Germany, Luxembourg, the Netherlands, Poland, and Spain, soldiers are *obligated* to refuse obedience to any order which would require committing a criminal offence. Although soldiers in the Netherlands have the right to disobey all illegal orders, soldiers in Germany, Luxembourg, and Spain have the right to disobey only those illegal orders falling within a stricter definition, including for instance those commands which violate human dignity.

The differing national regulations on this issue could definitely lead to conflicts in multinational structures. Superior officers in multinational units have at present no right to issue real orders to their subordinates, and complete integration does not exist. As a result, the following suggestions can, for the moment, only apply to the levels of the higher ranks. These suggestions are, nonetheless, directed by the consideration of future developments, including the likelihood that command authority or a functional equivalent thereof will be conferred on foreign commanders. Two examples may illustrate the difficulty:

A German officer orders a British soldier to cross a red traffic light with his vehicle. According to German law, this order would be illegal but still binding, while according to British law (the *Army Act 1955*) it is illegal and non-binding. Since the British soldier is obligated to act according to British law, he must refuse to carry out the order which, according to German law, he is obliged to obey.

A Belgian officer orders a German soldier to clean the floor with a toothbrush. According to German law, the soldier would have the right to refuse any order which violated human dignity, even if the order did not require him to commit a punishable offence. A Belgian commander, however, would expect the order to be carried out, because according to Belgian law, soldiers have no right to refuse to obey such orders as they do not seem to lead to a criminal offence.

It is possible that these differences would not intrude significantly in the everyday practice of multinational units, but in principle there exists a need to harmonise these regulations.

One possibility would be to adopt a common text in the international agreement creating a multinational unit. Such a text would have to be so composed as to be acceptable for all involved states from the viewpoint of the soldiers' reliance interests. The complete adoption of the British approach (which in theory accords best with the model of the citizen in uniform) seems to be a step too far. According to the German understanding, at least, the commander is responsible for the legality of the order. Soldiers expect to be able to follow a command

except when it would lead to the commission of a criminal offence. It is possible that a text which would obligate soldiers to refuse to carry out orders which would *manifestly* require committing a criminal offence, and at the same time give them the right to refuse any illegal order, would be internationally acceptable. Such regulations can be found in Denmark, the Netherlands, and France.

Such a text might read as follows: "The soldier is obligated to obey his superior. The soldier is obligated to refuse to obey a command, if that command manifestly requires the soldier to commit a punishable offence. The soldier is not obligated to obey illegal orders."

Such a proposal would mean that the superior would continue to carry the burden of responsibility for the legality of the order. In a multinational unit, however, the commander could no longer expect soldiers to obey an illegal order. The fact that Denmark, France, Italy, the Netherlands, and the United Kingdom all have such rules shows that such a model does not dilute the punch of the armed forces. However, it remains questionable whether such a regulation would be politically acceptable to Belgium and Poland, since it grants soldiers wider discretion for disobeying orders than either of these states allows. Since such a text would change the legal position of soldiers in Belgium, Germany, Poland, and Spain to the extent that it increases their risk of committing an illegal act by disobeying an order, it would have to be an integral part of an international treaty which is ratified by parliamentary statute. The UK, which (at least in theory) places many more obligations on its soldiers could retain the option of pursuing violations of its disciplinary laws according to national regulations.

In the end, however, it cannot be overlooked that even this suggestion for harmonisation would not bring about full or real harmonisation, because the question of what kind of behaviour constitutes a punishable offence will continue to be a matter of national law. The legal systems of the various states under study contain differing catalogues of offences punishable under civil and military criminal law.

7. Working Time, Compensation for Overtime, and Leave

The regulations on working time, compensation, recovery-leave, and emergency leave differ significantly from each other in several ways, both in principle and in practice. The model of the constant availability and readiness of the soldier, as it is understood in France and Spain, stands in stark contrast with the model in Denmark or the Netherlands, where the rules affecting soldiers are closer to common labour law.

The more intensive the integration of multinational units, the more salient the differences of the various military legal orders become – especially in the

area of the rules governing every-day work practice. Therefore it should be carefully considered whether special regulations for multinational units regarding working time, compensation, and leave should be created. In German law, this would mean that a special text would need to be inserted into the appropriate ordinances, which simply indicates that certain provisions of German law do not apply to soldiers in multinational units. The Netherlands already uses such an approach.

8. Administrative Appeals Law

A harmonisation of the rules governing administrative appeals might make sense with respect to multinational structures, in order to give the soldiers, who, if they are in the same unit, must carry out the same orders and undertake the same risks, a single course of action to follow in case of abuse. A soldier could easily feel himself disadvantaged or disenfranchised by the behaviour of a foreign commander or fellow soldier. The higher the level of integration among the troops, the greater the danger that the soldiers' access to protections for their rights will be curtailed. This is especially true if the soldiers do not have access to a process of defending themselves against the behaviour of their foreign counterparts. Thus, it is necessary to consider possible solutions to this problem. An easily realisable measure would be to open the national system of administrative appeals law to foreign soldiers. If this were to be conditioned on reciprocal openness, this would create the possibility that a soldier could appeal against the behaviour of his foreign superiors or fellow soldiers. In order to afford the soldiers a comprehensive system of protection for their rights, the possibility of institutional representation in these cases should be created for multinational units. The legal position of German soldiers would in fact still not be attained, to the extent that neither Belgium, Italy, nor the United Kingdom allows soldiers the possibility to appeal against the behaviour of peers (as opposed to superiors). If one were to attempt more far-reaching measures, it would have to be done through the creation of a common multinational administrative appeals system.

With respect to the office of Ombudsperson, the wishes of the German Ombudsperson for Defence that any national Ombudsperson also have the right to investigate the activities of multinational units, should also be considered. This could be accomplished on the basis of an international agreement. The clause would have to make clear that the Ombudsman's authority extended only to the actions of soldiers of his own state participating in multinational units. Moreover, a call for cooperation with foreign Ombudspersons could conceivably be included. As long as the nondisclosure regulations were strictly

observed in such relations, such a clause should be acceptable even to France and the UK.

9. The Law of Institutional Representation

The question of institutional representation is also an area revealing significant differences among the various military legal systems. Since Germany exhibits the system with the most far-reaching rights, it is probably not the best model for compromise. A better possible harmonisation model might be found in the Dutch system. The Dutch approach would suggest that a regulation should be inserted into the laws on institutional representation which suspends the applicability of the law to those units which are operating outside the respective borders or are under the orders of foreign officers. It might be much harder to come to agreement even with the states which already have some form of institutional representation on a common form which could be adopted for multinational units. For Germany, this sort of agreement is likely to be reached with the Netherlands before it is reached with any other state.

10. Disciplinary Law

Some of the most significant differences are to be found in the areas of disciplinary and criminal law. It should be noted in this context that Denmark and the United Kingdom are unique among the surveyed states, in that they make no distinction between disciplinary and criminal law. Thus, in these states, there is a unified sanctions system for all violations of military legal duties.

Present practice for dealing with soldiers who commit a disciplinary offence while participating in multinational units or operations is to remove them from the multinational structure, send them back to their sending state, and allow them to be disciplined according to their own national military disciplinary law. In spite of very different catalogues of infractions and sanctions, few major problems with this method of operation have arisen. However, if integration continues apace, a need for harmonisation could indeed raise its head. According to reports, commanding officers in multinational operations often find it a handicap to have to take recourse to the national commander in order to keep proper discipline in the ranks. It should also be taken into consideration that the responsible disciplinary superior is not, in all military legal systems, always also the immediately responsible superior. The disciplinary superior is not even always present or active in the multinational unit, and may not even know the soldier involved. For this reason the Spanish have introduced a text into their

disciplinary law that declares the commanding officer of whatever troop unit finds itself taking part in multinational operations to be the disciplinary superior for those troops.

Several possible harmonisation measures suggest themselves. First, the foreign commander could be granted a right to be present in national disciplinary proceedings, so that the interests of the multinational unit can be brought to bear on the proceeding. Second, a way could be chosen which reaches more deeply into the framework of the legal systems of the partner states. If in fact such a course seemed politically necessary or desirable, a special disciplinary procedure process could be implemented for multinational units enjoying a high degree of integration. Such a process should not, however, be of a nature to require changes in the respective constitution. In a few states, the transferral or contraction of sovereign rights would require a constitutional amendment. A need to transfer sovereign rights could be avoided by composing the new rules in such a way that they are oriented on the distinction between "full command" and "operational command" which is customary in the practice of transferring command authority. Under this distinction, the exercise of disciplinary authority by a (foreign) commander of the multinational unit would have to be subject to the interference of the national commander, and be validated through a national authority. The competence to make final decisions on disciplinary measures would remain with the national authorities. Such a rudimentary sanctions system could regulate several different aspects of the disciplinary process:

a. Elements of Disciplinary Infractions

The possible objects of a multinational disciplinary procedure should comprise only a very short list. It should relate to the typical minor and moderate disturbances in the course of everyday life of the multinational unit, which can be rectified by means of a relatively swift reaction. More serious infractions should not be included in multinational disciplinary law, and should continue to be handled only by the national authorities.

A comparison of the general duties of soldiers in the various states under study shows that they are largely similar. Duties which are the results of particular historical experiences – such as the duty of loyalty to the German political system – should certainly be kept out of any multinational disciplinary law. The following typical infractions, on the other hand, seem to be appropriate material for a common disciplinary procedure:

- deliberate absence from duty without official leave
- disobeying a command
- infractions of the duties of discretion and honesty

- infractions of military discipline and order
- unbecoming conduct
- misconduct in the course of sentry or guard duty

It should, of course, remain at the discretion of the national authorities to pronounce further sanctions which are compatible according to national law with the sanctions imposed by this system. This would apply especially with respect to the applicable criminal law which, in Germany and several other states, runs parallel with the disciplinary law. Regulations on any fines assessed would remain a matter for national law.

b. Disciplinary Superiors

A multinational disciplinary system would also have to specify the responsible disciplinary superior. The comparison of the various systems does not provide a uniform pattern with regard to how to do this. In general, commanding officers hold disciplinary power, but disciplinary supervisors often do not have the same rank. The responsible disciplinary authority could be responsible for the imposition of all disciplinary measures, as in the UK, or different superiors could be responsible for different disciplinary measures, depending on the rank/category of the offender and the desired measure, as in Germany. The draft of a common disciplinary code for the armed forces of the European Defence Community includes specifications (in Articles 62–67) on how the disciplinary superior is to be determined.

c. Procedure and Appeals

Every disciplinary procedure in a multinational framework must fulfil the basic requirements set forth in the procedural regulations of the partner states. These include firstly the investigation of the facts by the disciplinary superior or another authority responsible for that undertaking. The accusations must be communicated to the suspect in writing, and the soldier must have the opportunity to respond to the accusations. The national disciplinary superior must be promptly informed of the initiation of a disciplinary procedure. Further, the soldier must be granted a legal assistant or other assistant from the armed forces, through the elected representative (*Vertrauensperson*) if necessary. After an oral hearing, the (foreign) disciplinary superior should impose the sanction without further delay. The national disciplinary superior should have at all times the right to transfer the proceedings *ex officio* to his own authority if he believes that national interests are at stake. Finally, the system should include a clause (such as the one in Article 75 of the draft of a common disci-

plinary code for the armed forces of the European Defence Community) which allows the execution of the punishment imposed by the disciplinary superior to be suspended in the event of hostilities. In order for the system to avoid the need for the transfer of sovereign rights, the decision to enact punishment must be validated by a national authority in order to confer legal effect on it. All national appeal routes would then, of course, be open against this kind of action.

This suggestion naturally involves the danger that it will complicate the disciplinary procedural law and thus vitiate its own goal of strengthening discipline in multinational units through simple measures taken on-site. How likely this danger is to emerge would depend on the exact form and administrative practices of the system.

d. Sanctions

Although the catalogues of punishable offences in the various military disciplinary codes are largely similar, the punishments considered appropriate for each of them differ widely from state to state. Only a few out of the countless conceivable sanctions are similarly envisioned in the laws of the states under study. Among them are: the reprimand, the restriction of free movement, and arrest. The draft for the common disciplinary code for the armed forces of the European Defence Community had already taken this result into account: Article 52 laid down the permissible disciplinary punishments for the European armed forces, and they would have been restricted to various forms of reprimand, confinement to barracks, and arrest.

As long as common disciplinary measures must be implemented without a transferral of sovereign authority, the following must be kept in mind: from the German point of view at least, a judge must be involved in the imposition of the punishment of arrest. Thus, the only sanctions which could be available to an international disciplinary superior would be the reprimand and the restriction of free movement. Even these sanctions presuppose agreement on a common conception, because here, too, significant differences appear. In France, only officers can be reprimanded. In Belgium, only conscripts can be subject to a restriction on their freedom of movement. Several states, including Spain, consider a simple warning to be a disciplinary measure. Even the permissible maximum length of time of the restriction on free movement varies. In the Netherlands, it may not last for more than four days in a row, while in Spain, it can run for eight days. In Denmark, it can last for up to two weeks. The regulation in Germany, which allows such a restriction to last up to three weeks, has no parallels in other legal orders. In the draft of a common disciplinary code for the armed forces of the European Defence Community,

the parties managed to agree in Article 54 that the maximum length of time for such restrictions should be limited to one week, and in Article 55, that a complete prohibition on free movement (house arrest) may last for up to two weeks.

In addition, certain disciplinary measures are obviously less appropriate for certain multinational operations. This is true, for example, of restrictions on freedom of movement in the context of operations in crisis areas. For this reason, the Netherlands have, as an express legal measure substituted a higher monetary fine as a disciplinary measure in the context of multinational operations. For a multinational disciplinary procedure, the idea of a monetary fine as a disciplinary action might be a prudent consideration. It is also worth mentioning that Article 59 of the Draft Common Disciplinary Code of the European Defence Community foresaw that it might be better to replace arrest with a reduction or cancellation of war-bonus-pay, if it would be impossible to implement an arrest – for example during hostilities. Since the pay levels of the participating soldiers are likely to differ significantly, one may have to consider implementing a daily rate system. It must also be considered that not all states in the study are already familiar with the use of monetary fines as military disciplinary sanctions. In Belgium, Italy and Spain, the imposition of such a punishment would be considered incompatible with the notion of soldierly honour. In any case, the imposition of instructional measures in multinational contexts also seems to be particularly inappropriate, since the acceptability of such measures would be highly conditioned by historical and social contexts.

The creation of a common disciplinary code, as it was embodied in the Draft Common Disciplinary Code for the Armed Forces of the European Defence Community, is only possible through the transferral of sovereign authority to an inter-governmental institution. If multinational units were to be organised in this form, the Draft Common Disciplinary Code represents an important starting point for that process, since it still – despite its date of origin – reveals a few similarities between of the various military legal orders involved in this study.

11. Military Criminal Law

The goal of the regulations in disciplinary law, namely ensuring the functional capabilities of the armed forces, should also be attainable on a multinational level through a disciplinary authority unique to the multinational Commander. In contrast, however, there is no comparable need in the field of military criminal law. Firstly, the goal of criminal law is to determine individual guilt. More-

over, violations having criminal relevance are as a rule so serious that the soldier involved is by common practice removed from the multinational unit and sent home to be tried there. Finally, harmonisation efforts are confronted with the special problem that military criminal law is always *lex specialis* to general criminal law. Every suggestion for harmonisation would therefore also have to take into account the retroactive effects on the general criminal law of the given legal system. Harmonisation in this area, then, could be implemented only with great difficulty.

12. Guard and Sentry Duty

With respect to the question of the use of weapons on guard or security duty, three different systems of regulation could be distinguished: those where the use of force against civilians is comprehensively regulated by a statute, those where the concrete form of the competencies of the guard are regulated on the level of ordinances, but the right to use firearms is based on general criminal law, and finally those which provide no circumscribed preconditions, but rather envision only an *ex post* justification through means of general criminal law. The greatest difficulties arise with respect to the United Kingdom. The assumption there that a comprehensive circumscription of the pre-conditions defining the permissible use of a firearm is not legally possible is diametrically opposed to the German system.

In terms of possibilities for harmonisation, it is clear that the exercise of guard and sentry duties as it works, for instance, in the German-Dutch relationship, would be very difficult to achieve with other states, because it involves the question of a transferral of sovereign authority. In Belgium and Denmark, at least, the transferral of guard and sentry duties to German soldiers, or the perception of carrying out guard duties under German command would be considered as the transferral of sovereign authority to another state, and would raise serious problems of constitutional law in both states.

Admittedly, it appears questionable whether the common performance of guard and sentry duties should be uniformly regulated without addressing the issue of exercise of sovereign authority. This could happen within the framework of rules of engagement. In view of the principle of proportionality, which is enshrined in all of the legal codes under consideration, that principle may serve as a guide for the concrete design.

Chapter 2

Comparison of European Military Law Systems

Georg Nolte and Heike Krieger

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The following synthesis proceeds from general questions concerning the background of the different military law systems, and then moves to constitutional issues and to more specific questions of administrative law.

I. The Historical and Political Backgrounds of the Different Military Law Systems

1. Parliamentary Control and the Dignified Role for the Individual Soldier

It is not easy to categorise and summarise the different historical and political circumstances which have influenced the various military law systems under review. In particular, it would seem hardly possible to classify the legal systems under review according to the concept of "legal families" (*Rechtskreise*) (*e.g.* Anglo-Saxon, Germanic, Roman, Scandinavian, Slavic), a concept which is sometimes used in comparative law studies. There exist significant differences between the "Roman" military law systems of France, Italy and Spain, whereas the military legal systems of France and the United Kingdom have much in common, due to their strong orientation towards the executive and their emphasis on efficiency. Today, it would hardly make sense to talk of a Slavic "legal family", at least with respect to military law. In addition, the concepts of "Slavic" and "Germanic" legal family raise definitional and historical problems (*e.g.* with respect to the Netherlands and, perhaps, Hungary) which would not be fruitful to address in the context of this study.

Despite these difficulties it nevertheless seems to be possible to broadly classify the states under review into three not merely formal categories: small traditional democracies (Belgium, Denmark, Luxembourg and the Netherlands); large traditional democracies (France, United Kingdom) and "post-authoritarian" democracies (Germany, Italy, Poland, Spain). The distinction

between "large" and "small" democracies and the notion "post-authoritarian" do not imply a value-judgement. The notion "post-authoritarian" merely serves to emphasise that the military law system of a particular state has at some point been consciously reformed in the light of significant experiences with a domestic non-democratic regime.

a. Small Traditional Democracies

The four small traditional democracies have many points in common: They all happen to be monarchies with a parliamentary system. Their unbroken constitutional tradition dates back to at least the first half of the nineteenth century. They have all experienced a development according to which the (largest part of) the royal prerogative (which included the realm of the military) was sooner (Netherlands) or later (Belgium) no more considered to be a personal prerogative of the monarch but to depend on the agreement of the government (countersignature by the responsible minister). Until the Second World War all four small democracies followed a policy of neutrality which they abandoned in favour of a policy of alliance within NATO, taking into account the experience of the two German aggressions in the twentieth century. In none of the four small democratic states have the armed forces ever in the past two hundred years played an independent domestic political role. The constitutional loyalty of the armed forces is taken for granted. Their existence is unquestioned and they enjoy broad popular support. Traditionally, the constitutions in these four states do not contain special rules which are designed to ensure the democratic legitimacy of the armed forces or a dignified role for the individual soldier.

The constitutional amendments in the Netherlands of 2000, according to which Parliament must be informed before the armed forces are employed "for the maintenance or promotion of the international rule of law" (Article 100 of the Constitution), happen to be an exception. The political process in which this constitutional amendment came about demonstrates that the question of the democratic accountability of the armed forces is not a divisive, or ideological issue but that it is a matter which is being dealt with pragmatically in the Dutch political environment: A parliamentary committee had put forward a demand that Parliament receive the power to authorise military operations abroad which was rejected by the government. Ultimately, a compromise was found according to which the government had the duty to inform Parliament beforehand of military operations "for the maintenance or promotion of the international rule of law" (Article 100 of the Constitution). In Denmark, the special constitutional duty to inform Parliament of military operations (Article 19 of the Danish Constitution) is, in practice, uncontested.

There are certainly differences between the four small democratic states. Belgium and the Netherlands, for example, due to their history as colonial powers, have more often used their armed forces abroad, while Denmark and Luxembourg have only sent their armed forces to participate in certain UN operations. In addition, the focus in the Netherlands on the issue of the draft and a certain constitutional distrust against the legislature (not the government) in military matters does not seem to find an equivalent in Belgium, Denmark and Luxembourg. Such differences, however, do not seem to be as important for the assessment of the historical and political background of the legal situation as those points which the four states have in common.

b. Large Traditional Democracies

At first sight, the two large traditional democracies seem to be very different with respect to the historical and political circumstances which have influenced their armed forces and their military law system. While France is a republic (since 1870), the United Kingdom is a monarchy. While France has a presidential system, the executive in the United Kingdom depends exclusively on the confidence of Parliament. While France, since the times of the French Revolution, traditionally conceives the armed forces as an emanation of the nation, the United Kingdom has, for the most part, relied on professional soldiers and not on conscripts. France is a European land power, while the United Kingdom is the classical sea power.

At closer inspection, however, it becomes clear that the two large democracies have much in common with regard to the historical and political circumstances of the democratic accountability of the armed forces and with regard to the ensuring of a dignified role for the individual soldier. Both states traditionally lack legal restraints for the executive with regard to the use of the armed forces. In France, the presidential prerogative in military matters has been guaranteed by the Constitution since 1958. The role of the Parliament is reduced to legislating certain aspects of the military and to exercising general parliamentary instruments of control (budget, questioning). In the United Kingdom, Parliament is less restricted and seems to control governmental decisions with respect to the military more actively than in France. Nevertheless, the prerogative of the executive in military matters (which in the United Kingdom derives from the unwritten constitutional rule that the government exercises the royal prerogative) is undisputed in both states in theory and in practice. The strong role of the executive is probably influenced by the traditional role of both states as world powers with global military interests. Flexible internal structures as well as unwritten constitutional law seem to be perceived as preconditions for being able to perform this role.

Another point which France and the United Kingdom have in common is the relative lack of attention which is traditionally given to the role of soldiers and their rights. This may be partly due to the fact that the armed forces have not played an independent political role for quite some time. In France, the armed forces are considered to be "*La Grande Muette*" (the Great Mute). As the army is traditionally conceived as an emanation of the nation, the single soldier is regarded as a "citizen serving under the flag". In the United Kingdom the involvement of the armed forces in national politics has been out of the question since the 17th century. The primacy of the political system is exemplified by the British constitutional tradition since 1689 of considering the existence of "a standing army" to be exceptional to requiring annual confirmation by an Act of Parliament. In addition it is perhaps the traditional absence of a draft system which explains the comparative lack of attention to the issue of legal rights of soldiers in the United Kingdom. In a professional army every soldier has volunteered and has considered the general conditions to be sufficiently attractive beforehand. Still another factor for this relative lack of attention to soldiers rights may be that they have been taken for granted in the United Kingdom for a long time: As early as 1812 the Chief Justice of England stated in a case that "it is highly important that the mistake should be corrected which supposes that an Englishman, by taking upon him the additional character of a soldier, puts off any of the rights and duties of an Englishman".[1] This phrase has often been repeated and it is understood to express the idea that "a soldier is a citizen in uniform".

In sum, the two large traditional democracies, despite their different historical experience and their different political systems, have much in common with respect to the political control of the military and the relative unimportance of the legal status of soldiers.

c. Post-authoritarian Democracies

The historical and political circumstances which have influenced the military law systems of the four post-authoritarian democracies have led to significant differences (compared to the large and small traditional democratic states under review) with respect to the democratic accountability of the armed forces and with regard to the ensuring of a dignified role of the individual soldier.

In order to understand the differences between the four post-authoritarian democracies, it is important to see how the historical role of the armed forces was perceived at the time when their respective democratic constitutions were created.

[1] *Burdett v. Abbott* (1812) 4 Taunt, pp. 401, 405.

After 1989, the armed forces in Poland were not strongly identified with the past authoritarian system in which they had played a loyal, but no strongly ideological role. A large part of the Polish population, including parts of the elite, saw the communist regime as one of foreign domination. It is still a matter of public discussion how the Polish armed forces would have reacted in the case of a Soviet intervention. The relative neutrality of the Polish armed forces may have been reinforced by the fact that Polish troops have, since 1953, served as UN peacekeepers. The regulation of the role of the armed forces was, therefore, not one of the main issues for the new Polish democracy. However, emphasis was put on ensuring the neutrality of the armed forces.

In Spain, on the other hand, the armed forces were considered as the centre of the past authoritarian system. At first, they could not be relied upon as being loyal to the new democratic system. They still possessed of a cohesiveness and institutional strength which enabled them to influence the constitution-making in favour of the introduction of a general provision which ensures a special dignified role of the armed forces within the Spanish constitutional system. The threat of a coup d'état which persisted for some years after the transition to democratic rule in 1976 led to an uneasy coexistence between the practice of civilian control of the military and independence of the military.

In Germany, the armed forces were neither considered to have been at the heart of the past authoritarian system nor were they considered to have been satisfactorily neutral. In fact, the past role of the armed forces had been ambiguous. On the one hand, the independent cooperation of the *Reichswehr* with the Soviet Red Army during the Weimar Republic had shown that the armed forces had been able and willing to escape from civilian and parliamentary control. On the other hand, the revolt by high *Wehrmacht* officers in 1944 had demonstrated that the armed forces were the only institution during the Nazi time which was willing and capable to organise serious resistance against the Hitler regime. Another factor which distinguishes the German situation from that of Poland and Spain is the fact that in Germany the armed forces no longer existed at the time of the making of the pertinent constitutional rules. Therefore, these rules could be developed free from existing institutional interests and constraints and be derived from more abstract considerations. The most important among these was the analysis of "what caused" the establishment of the Nazi regime and "how to prevent" the repetition of such an event. The most influential explanation was that the legacy of a monarchical executive had formed the military in an authoritarian spirit and left it largely free of parliamentary control. This had been important for preserving the *Reichswehr* of the Weimar Republic as an anti-republican institution and providing the ground for the Nazi *Wehrmacht* becoming a willing instrument of a criminal regime. This explanation led the political majorities which produced the consti-

tutional rules for the new *Bundeswehr* (which included the social-democratic opposition) to establish a system of strong parliamentary control and the government to favour a doctrine according to which the *Bundeswehr* should be composed of, and produce, "citizens in uniform", thus preventing the preservation of a mentality of "*Befehl ist Befehl*" ("an order is an order" = an order must be obeyed under any circumstances). The concept of soldierdom "citizens in uniform" implies, *inter alia*, that soldiers are provided with a legal status which is compatible with the image of a responsible and largely autonomous person, i.e. that his fundamental rights are restricted only as far as military efficiency requires, and that he enjoys the rights to file a complaint and to participate in institutions.

In Italy, as in Germany, the armed forces were neither considered at the heart of the past authoritarian system nor were they considered to have been satisfactorily neutral. The Italian Constitution requires that the "order of the armed forces complies with the democratic spirit of the Republic" (Article 52 (2)). Among the most important implications of this democratic-spirit-clause are the duty of the armed forces to remain neutral and the goal that "the Armed Forces, while preserving the principle of unity and discipline ... should never lose respect for human dignity and freedom". Article 52 (2) marks a conscious break with an authoritarian tradition within the armed forces and with respect to their role in society which extends back to before the time of Mussolini. In 1999, the Italian Constitutional Court has held that "the Constitution (Articles 11 and 52 (1)) imposes a conception of Italy's military machinery which is no more inspired by the idea of a powerful position of the state or, as in the past, of a "power state" (*stato di potenza, Machtstaat*), but by the idea to guarantee the freedom of the people and the integrity of the national order".[2]

The developments in Poland and Spain, and to a certain extent in Italy, demonstrate that the break from an authoritarian past does not naturally imply an emphasis on the creation of more (fundamental and democratic) rights for soldiers. This is of particular interest for German observers. In Poland, the primary interest of the new democratic leadership was, at first, to ensure the neutrality of the armed forces which meant the assertion of the power to restrict the fundamental rights of soldiers. After a few years of democratic rule in Poland, the need for this assertion is no longer perceived to be as strong. In Spain, the new democratic leadership was interested in possessing legal means to restrict the powers of the armed forces and it did not insist on interfering to a large extent into the inner functioning (including the education) of the armed

[2] Corte costituzionale, Judgement No. 172/1999.

forces. It is further to be noted, that differences between the legal bases of the armed forces in the different post-authoritarian democracies find an explanation in the fact that the democratic reestablishment of the armed forces in Germany was influenced to a degree by their role in two wars, while in Poland, Italy and Spain the domestic role of the armed forces was a more important factor.

2. Democratic Control and Rights and Duties of Soldiers

The role of the armed forces in regard to democratic control and the rights and duties of soldiers can be regarded from the perspective of the constitution, from the perspective of the respective present governments and from the perspective of the public.

a. The Constitution

The constitutions of the different states under review can be classified into two groups. The first group consists of those states whose constitutions contain very few rules which specifically address the armed forces (Belgium, Denmark, France, Luxembourg, the Netherlands, and the United Kingdom). On the constitutional level, these states basically only regulate which state organs have the power to command the armed forces, which organs have the power to declare war, and certain functions of their respective parliaments with respect to the armed forces. They rely on the general constitutional rules in order to determine the status and the functioning of the armed forces (mainly the parliamentary budgetary power, parliamentary control through questions and commissions, and parliamentary responsibility of the government). Such constitutional frameworks take the democratic legitimacy of the armed forces for granted, and they rely on the democratic parliamentary process to appropriately determine the rights and duties of soldiers.

The second group consists of those states whose constitutions contain specific rules on the armed forces which evoke or recognise a particular role for them (Germany, Italy, Poland, Spain). It is probably not accidental that this group consists of all the post-authoritarian states under review. Among those states, the German Constitution possesses the most elaborate specific rules to ensure the democratic accountability and legitimacy of the armed forces and to determine the possibilities to restrict the rights and duties of soldiers. The constitutions of Italy, Poland and Spain, on the other hand, put an emphasis on the general role of the armed forces. In Spain, the mission of the armed forces is located prominently among the general provisions of the constitution

(Article 8). In Poland, the obligation of the armed forces to remain neutral is stressed (Article 26 para. 2). Italy emphasises the democratic character of the armed forces.

It is arguable that the Netherlands belong not to the first but to the second group due to a constitutional amendment in the year 2000 which now obligates the government to inform Parliament prior to, or in connection with, "the engagement of the armed forces for the maintenance or promotion of the international rule of law" (Article 100). This provision, however, does not extend to all engagements of the armed forces and, therefore, does not seem to be characteristic of the constitutional role of the Dutch armed forces as such. It rather seems due to specific experiences during the nineties.

In summary, the constitutions of the traditional (small and large) democratic states do not elaborately regulate the role of the armed forces in their constitutions and rather rely on the general constitutional procedures for their control. The constitutions of those states presuppose the democratic legitimacy of the armed forces and rely on the general procedures to determine the rights and duties of soldiers. The post-authoritarian states, on the other hand, have more specifically defined the role of the armed forces in their constitutions. Among them, Germany goes furthest in setting up special constitutional rules for the armed forces. The constitutions of the post-authoritarian states set more specific conditions for the use of the armed forces and thereby attempt to enhance their democratic legitimacy.

b. The Government

As of 2003, the governments of all states under review seem to perceive the role of the armed forces as being unproblematic and satisfactory in terms of democratic legitimacy and with regard to soldiers rights. In Belgium, the government's decision to change the army from a conscript to a professional army has not given rise to any public debate over the democratic nature of the military. In Denmark, the government was able to forge a consensus among the major political parties that the Danish armed forces should take up more international tasks and created an "International Brigade" within the Danish armed forces whose members are volunteers (professionals and former conscripts) who have committed themselves to taking part in multinational operations. In France, the situation of the military depends very much on whether a President governs with a supporting or an opposing majority in Parliament, but the political differences have – so far – not called into question the democratic legitimacy of the armed forces. In Germany, the Government is no longer concerned with a possible lack of democratic legitimacy of the armed forces as such, but rather with the question of how to reform particular aspects of it and

how to secure the necessary authorisation of the *Bundestag* for certain controversial operations.

In Italy, the government is in the process of restructuring the armed forces, including by abolishing the draft by 2007, without engendering significant public opposition. In the Netherlands, the government has successfully resisted demands from within Parliament for a constitutional change to the effect that every engagement of Dutch armed forces in international peacemaking missions should be made subject to parliamentary approval. This controversy has not called into question the democratic legitimacy of the Dutch armed forces. In Poland, one of the main foreign goals of the government was the admission to NATO, which implied recognition and reform of the armed forces. It seems that the introduction of civilian control of the military after 1990 initially proved difficult, but it has been achieved in the meantime. In Spain, the government could not be sure of the loyalty of the armed forces from the beginning of the democratic regime in 1976 until the middle of the eighties. Today, the situation is much more relaxed. In the United Kingdom, the control of the government over the armed forces is so well established that no question exists with respect to their democratic legitimacy. Similarly to the situation in the Netherlands, the British government successfully resisted a recommendation by a Parliamentary Committee "that the Government should table a substantive motion in the House of Commons at the earliest opportunity after the commitment of troops to armed conflict allowing the House to express its view, and allowing the Members to table amendments".[3] After a few lost cases before the European Court of Human Rights, the British government is conscious that the question of soldiers rights may have to be taken more seriously.[4]

c. The Public

It seems that a large majority of the respective public in every state under review perceives the armed forces to be in a satisfactory condition with respect to their democratic legitimacy and soldiers rights. This is true despite the fact that political controversies have surrounded the armed forces in some states. In Belgium the change from a conscript army to a professional army has not provoked much discussion. The same is true for France, Italy and the Netherlands. In Denmark, Luxembourg, Poland, and the United Kingdom the armed forces

[3] *Fourth Report to the Foreign Affairs Committee*, Session 1999–2000, Kosovo (23 May 2000, HC 28-I), at p. ix.

[4] See more detailed sub VI. 1. e. dd).

enjoy full public confidence. It seems that only in Germany, Italy and Spain pacifist and anti-militarist manifestations reach levels which are politically relevant. Such manifestations do not usually concern the role of the armed forces as such but their possible involvement in certain operations.

II. Basic Rules Concerning the Use of Armed Forces

1. General Constitutional Framework

With the exception of the United Kingdom, all states under review possess a written constitution. The unwritten constitution of the United Kingdom does not contain specific rules concerning the armed forces. It is generally understood that the armed forces are subject to the "royal prerogative", which means that they are at the disposal of the government which is itself subject to the general forms of parliamentary control.

The constitutional rules concerning the armed forces in those states which possess written constitutions may be divided in two groups. The first group consists of those rules which relate to the role and the tasks of the armed forces. The second group comprises those rules which relate to the division of competences of the various state organs with respect to the military. Both kinds of rules will be dealt with specifically below.[5] However, one general observation must be made at this point:

All states under review (except the United Kingdom) have in common that their constitutions contain rules which somewhat limit the possible uses of the armed forces, but – if compared to Germany – only to a very limited extent. In Belgium, Article 167 (1.2) of the Constitution is interpreted to mean that the armed forces may be used only in accordance with the general rules of public international law. No other limitations exist. In Denmark, no substantive constitutional limitations for the use of the armed forces exist, but Parliament must agree if military force is used "against any foreign state" (Article 19 (2)). In France the text of the current Constitution of 1958 itself contains no explicit limits for the use of the armed forces, but the preamble to the Constitution of 1946 (which is incorporated into the Constitution of 1958) requires that "the French Republic shall not enter into war for reasons of conquest, and shall never use its armed forces against the freedom of any people". This limitation is not considered to be of much practical importance.

[5] See sub II. 2.–6.

In Germany, the Constitution provides for significant limitations of the mission of the armed forces. Apart from self-defence, the German armed forces may only be used according to what is explicitly provided for in the Constitution (Article 87a (2) of the Constitution). Since there are serious differences of opinion over the scope of this provision and over the range of the "explicit" provisions enabling the use of the armed forces, and since these differences of opinion can under certain conditions be brought before the Constitutional Court, there is still considerable uncertainty with regard to the range of possible uses of the German armed forces. In Italy, although the majority opinion does not interpret the constitutional mission of the armed forces to defend the state (Article 52 (1)) as implying *e contrario* a substantive limitation for other tasks, it is nevertheless understood that the performance of other tasks requires an explicit basis in parliamentary legislation. Apart from the agreement on this point, serious controversies exist in Italy about what types of armed forces missions are constitutionally admissible. These controversies, however, do not seem to have much practical importance, since it appears to be practically impossible to seize the Constitutional Court on such questions. In Luxembourg, the mission of the armed forces is not defined in the Constitution. The Constitution only contains a rule (Article 37) according to which the Grand Duke needs the approval of parliament (by two thirds majority) for the declaration of war and the end of war.

In the Netherlands, the tasks of the armed forces are explicitly outlined in Article 97 of the Constitution and include "the defence and the protection of the interests of the Kingdom, as well as the maintenance and promotion of the international rule of law". Although the task of protecting of the international rule of law was included by a constitutional amendment in the year 2000, it has been judicially clarified that the previous version of Article 97 did not exclude the use of the armed forces for peacekeeping missions. There seems to be agreement in the Netherlands that Article 97 of the Constitution permits all operations abroad which are "in the interest of the State". In Poland, Article 26 (1) of the Constitution defines the task of the armed forces as being "to safeguard the independence and the territorial integrity of the State and the inviolability of its borders". As in the Netherlands, this positive definition is not considered to substantially restrict the possible uses of the armed forces, in particular not to prevent the use of the armed forces for peacemaking missions. This conclusion is fortified by Article 117 of the Constitution according to which the rules concerning the use of the Polish armed forces abroad are to be specified in a ratified international treaty or in a statute. In addition to Articles 26 (1) and 117, the Polish Constitution requires in its Article 26 (2) that the armed forces be neutral on political matters, and in Article 85 (1) decrees the duty of every national to defend his/her homeland. Spain is the third state under review

(besides Germany and Italy) in which the general constitutional provision which describes the role and the task of the armed forces has given rise to serious controversies: Article 8 (1) of the Spanish Constitution states that "the armed forces ... have as their mission the guarantee of the sovereignty and independence of Spain, and the defence of its territorial integrity and constitutional order".[6] Article 87a (2) of the German Constitution states that "other than for defence purposes, the armed forces may only be employed to the extent explicitly permitted in the *Grundgesetz*". This includes operations within the framework of "systems of mutual collective security".

In short, in all states under review, except Germany, Spain, and (possibly, but then only theoretically) Italy, the constitutional rules provide only very slight, if any, substantive limits to the possible uses of the armed forces.

2. The Mission of the Armed Forces

The states under review can be classified according to whether they define the mission of their armed forces on the constitutional level, or on the level of a parliamentary statute, or solely by way of governmental or executive acts.

a. Mission Provided for the Constitution

Germany, Italy, the Netherlands, Poland, and Spain have defined the missions of the armed forces on the constitutional level. In Italy, the Netherlands, and Poland these definitions are interpreted so broadly that they hardly place substantive limits on the use of the armed forces. Thus, in Poland, the Constitutional Court decided in 2000 that Article 26 (1) of the Constitution ("Armed Forces are to safeguard the independence and the territorial integrity of the State, and to ensure the security and inviolability of its borders") does not exclude that the armed forces "also play an important role in assuring the State's internal security, although their involvement here might turn out to be of an auxiliary character".[7] It appears to be undisputed that the aims and tasks of the Polish Armed Forces, as they are described in Article 3 (1a) of the Polish Defence Act of 1967, as amended in 1997, and by Article 2 of the Statute on the Employment and Stationing of Polish Armed Forces abroad of 1998

[6] More details sub II. 3. a) – h).

[7] Trybunal Konstytucyjny, Judgement No. K 26/98 of 7 March 2000.

(ZUPSZ) are constitutionally permissible.[8] It is less clear whether certain domestic missions of the armed forces, which are defined in the Police Law of 1990 in its amended version are in accordance with the constitution.[9] The situation in Italy is comparable to that in Poland. While Article 52 (1) of the Italian Constitution only speaks of "the defence of the Fatherland" (in connection with the duty of citizens to serve) and Article 11 contains a war-repudiation and a limitation-of-sovereignty clause, these provisions are in constitutional practice not considered to significantly limit the power of parliament to attribute additional missions to the armed forces. This means that, in practice, Italy is a state which defines the mission of its armed forces by way of a parliamentary statute. It is true that a significant and very diverse debate among Italian constitutional lawyers exists about the limits of the possible missions of the Italian armed forces. However, these debates do not seem to be of great practical importance since there are no procedures by which this issue could be brought before the Constitutional Court. The significance of the debate also seems to be mitigated by the fact that the Italian Parliament must specifically authorise most operations of the armed forces abroad. This leaves Germany and Spain as those states in which serious constitutional objections have been raised with respect to the permissibility of certain uses of the armed forces. Article 8 (1) of the Spanish Constitution states that "the Armed Forces, comprised of the Army, the Navy, and the Air Force, have as their mission the guarantee of the sovereignty and independence of Spain, and the defence of its territorial integrity and constitutional order".[10]

b. Mission Defined in a Parliamentary Statute

In Belgium, Denmark, Italy, Luxembourg, and Poland the missions of the armed forces are mainly defined by way of parliamentary statutes. In all four states, however, the pertinent statutes do not place substantial limitations on the use of the armed forces:

In Belgium a law[11] states that in time of peace, the members of the armed forces can either (i) take part in an operation which is listed among the different operational modalities (*modes d'engagement opérationnels*) that have been deter-

[8] For details see *infra*, n. 15, at II. 2. b.

[9] For further details see at II. 2. b.

[10] See sub II. 3 a.–h., in particular 3. a.

[11] Law of 20 May 1994 on the "*mise en œuvre des forces armées, à la mise en condition, ainsi qu'aux périodes et positions dans lesquelles le militaire peut se trouver*" – *MOFA, Moniteur belge*, 21 June 1994.

mined by royal decree[12] or (ii) take part, at home or abroad, in a mission of assistance to a civil population. The different operational modalities listed by this royal decree are: maintenance of public order in Belgium, observation missions (*i.e.* operations conducted abroad where troops have to control the implementation of agreements, conventions, or agreed cease-fires, with the consent of all the parties concerned), protection missions (*i.e.* operations conducted abroad where troops have to protect people in order to secure their safety and free movement), passive armed engagement (*i.e.* operations conducted abroad in which troops have to keep public order or peace, guarantee the respect for agreements and conventions, and prevent conflicts), active armed engagement (*i.e.* operations conducted abroad in which troops have to control violence or impose a cease-fire, if necessary by use of force). The list of these modalities does not seem to be exhaustive. In any case, their definition is sufficiently wide to cover nearly any kind of military engagement, provided it does not contradict the *jus ad bellum*. Belgium's ratification of the Amsterdam Treaty, incorporating the so-called "Petersberg Tasks", confirms that Belgian armed forces can be legally engaged in any of the operations covered by those tasks.

In 2001, the Danish Parliament passed an Act on the Purpose, Tasks, and Organisation of the armed forces (hereafter referred to as the Defence Act – LFO).[13] According to Articles 1 and 2 of the Defence Act "the armed forces shall contribute to the promotion of peace and security," and "the armed forces constitute an important mean of security policy and has the purpose of 1) preventing conflicts and war, 2) upholding the sovereignty of Denmark and securing the continued existence and integrity of the state, and 3) promoting the peaceful development of a world with respect for human rights." The more detailed tasks of the armed forces are outlined in Articles 3 to 6 of the Defence Act.[14] This legislative definition of the tasks of the armed forces is, however, reduced in its importance by Article 7 of the Defence Act, according to which "the defence forces shall, according to the specified decisions of the Minister of Defence and after negotiations with the other ministers involved, be allowed to undertake other tasks." This article implies that the specified tasks in Articles 3 to 6 do not prevent the defence forces from taking part in other tasks, and generally this means that participation in the tasks described sub. 3 is not excluded by either the Constitution or the Defence Act, but is left to the decision of the Government and Parliament.

[12] Decree of July 6 1994, Arrêté royal portant détermination des formes d'engagement opérationnel et des activités préparatoires en vue de la mise en œuvre des forces armées, Moniteur belge, 20 juillet 1994.

[13] Act No. 122 of 27 February 2001.

[14] See below II. 3. a.–h.

In Italy, the Law of 14 November 2000, No. 331 on "Rules for the Institution of the Professional Military Service" provides that the armed forces have the task, apart from their priority function of defence, of participating in operations "for the realisation of peace and security in conformity with the rules of international law and according to the decisions of the international organisations to which Italy belongs", of "safeguarding free institutions", and of "carrying out specific tasks in circumstances of public calamity and in other cases of extraordinary necessity and urgency". In addition, the Italian Parliament defines missions *ad hoc* when authorising specific operations.

In Luxembourg, the mission of the armed forces has been recently defined by parliamentary legislation. On 2 August 1997 the Parliament amended the law on the Organisation of the Armed Forces from 23 July 1952 (OMP). The new Article 2 of this Law provides that the armed forces shall "participate in the defence of the territory of the state", "in the defence of living quarters on the state's territory", "protect other public institutions and services and the population in case of public interest or a catastrophe", participate "in the collective or common defence in the framework of international organisations to which the Grand Duchy is a member", "contribute in the same manner to humanitarian missions, evacuation missions, peace keeping missions, and armed crisis prevention missions including peace enforcing missions", and "contribute to the control and monitoring of the implementation of international treaties to which Luxembourg has acceded".

In Poland, the tasks of the armed forces are not only laid down in the broadly interpreted Article 26 (1) of the Constitution (see II. 1. and 2 a. above), but also in the Statute on the General Duty to Defend the Republic of Poland of 21 November 1967, the Statute on the Employment and Stationing of Polish Armed Forces Abroad of 17 December 1998 and in the Police Statute of 1990 in its amended version. Article 3 (1) of the Defence Act states that the Polish Armed Forces are to safeguard the sovereignty and independence of the Polish Nation, as well as its security and peace. Article 3 (1a) of the Defence Act, which was added in 1997, states that the Polish Armed Forces may also take part in combating the effects of natural disasters and extraordinary threats to the environment, as well as in search and rescue missions. The Statute on the Employment and Stationing of Polish Armed Forces Abroad entered into force on 1 January 1999. This statute distinguishes between the employment and the stationing of the Polish Armed Forces abroad. According to Article 2 (1) of the Statute on the Deployment of the Polish Armed Forces Abroad means their presence abroad in order to take part in: armed conflict or the support of the forces of an allied state or states (Article 2 (1) (a), peace operations (Article 2 (1) (b), and missions against terror attacks or their effects (Article 2 (1) (c). In

addition, Article 2 (2) of the same statute permits the stationing of Polish armed forces abroad for them to take part in: military training or manoeuvres (Article 2 (2) (a)), rescue, search, and humanitarian missions (Article 2 (2) (b)), and representative events (Article 2 (2) (c)). Since Article 117 of the Polish Constitution states that rules concerning the use of the Polish Armed Forces abroad are to be specified in a ratified international treaty or in a statute it appears that, taken together, the Defence Act of 1967 as amended, and the Statute on the Use of the Polish Armed Forces Abroad of 1998 limit, for the time being, the possible uses of the Polish armed forces. Finally the Polish Police Statute of 1990 (in its amended version) prescribes in Article 18 (3) that "armed forces may be used if the use of armed police units appears to be inefficient". Such a mission requires a decision of the President at the request of the Prime Minister.

c. Mission Defined by Way of a Governmental or Administrative Act

Only in France and the United Kingdom is the mission of the armed forces is defined exclusively by way of governmental acts. These governmental acts do not appear to substantially limit the mission of the armed forces:

In France, an ordinance[15] defines the "objective" of defence in very general terms, as "to ensure at all times, under any circumstances, and against any form of aggression, the security and the integrity of the territory as well as the life of the population. Further principles of defence are determined by the authorities as invested by the Constitution". In addition, the mission of the French armed forces is defined by the French Ministry of Defence in a White Paper[16] dating from 1994 as being: 1) to protect the vital interests of France against all forms of aggression, 2) to contribute to the security and defence of Europe and the Mediterranean, with the prospect of a common European defence policy ultimately being implemented, 3) to contribute to actions conducive to peace and the respect of international law, 4) to carry out public service tasks, particularly by strengthening means and organisations normally responsible for the civil defence of the state. These four basic missions are elaborated upon in more detail in the White Paper.

In the United Kingdom, the Ministry of Defence has outlined the mission of the armed forces as follows: "The purpose of the Ministry of Defence and the armed forces is to: 1) defend the United Kingdom and Overseas Territories,

[15] Article 1 of the Ordinance No. 59–147 from 7 January 1959.

[16] Livre blanc sur la défense, La documentation française, March 1994.

our people and interests, 2) act as a force for good by strengthening international peace and security".[17]

3. Permissible Operations

Sections II. 1. and 2. have demonstrated that the majority of the states under review do not differentiate, on a constitutional level, between different types of missions abroad. This is true for Belgium (all missions which conform to certain political conditions and which do not violate the general rules of public international law are permissible), Denmark (permissible missions are described in a parliamentary statute which includes a general clause according to which "other tasks" are allowed according to specified decisions of the Minister of Defence), France (the only constitutional limitation is that the armed forces may not be used for "conquest" and "against the freedom of any people", a wide range of possible missions is defined in a governmental ordinance and in a White Paper), Italy (the Constitution is interpreted to permit Parliament to define the tasks of the armed forces within the limits of international law), Luxembourg (no substantial limitations on the constitutional level), the Netherlands (constitutional rule is interpreted broadly), Poland (no substantial constitutional limitations, but missions abroad must be based on a statute or a ratified international treaty), and the United Kingdom (only ministerial statement of mission). This leaves Germany and Spain as the only states under review whose constitutions seem to play a significant role in determining whether or not certain missions are permissible. Some of the following points can therefore be answered rather summarily:

a. Crisis Management Abroad

Crisis management abroad includes all forms of observation, peacekeeping and peace enforcement missions, be they on the basis of a mandate of the UN Security Council, or a regional organisation, or upon an invitation by a foreign government, or a determination by the government itself that the need for a humanitarian intervention exists. The use of the armed forces for such forms of crisis management is permissible on the basis of a governmental decision in Belgium (provided the mission does not violate the general rules of public inter-

[17] Ministry of Defence Website: <http://www.mod.uk/>; see also The Government's Expenditure Plan and Main Estimates, Ministry of Defence, (2001) at pp. 5–6, The Role of the Ministry of Defence and the Capabilities of the Armed Forces.

national law), Denmark (Articles 3 and 6 LFO explicitly mention "crisis management" within and outside NATO as one of the possible missions of the Danish armed forces; Article 6 LFO provides that "Danish defence forces may contribute, with military means, to the prevention of conflict, and to peacekeeping, peace-making, humanitarian and other tasks"), France (provided the mission is not undertaken for reasons of conquest or used against the freedom of another people), Luxembourg[18], the Netherlands (if the operation can be considered as being "for the purpose of defence and the protection of the interests of the Kingdom, as well as for the maintenance and promotion of the rule of law", terms which are interpreted rather widely), Poland (Article 2 (1) (b) ZUPSZ explicitly allows "taking part in armed conflict ..." , and "peace operations"), and the United Kingdom (royal prerogative, mission statement of the Ministry of Defence).

The constitutional situation in Germany, Italy and Spain is more complicated. In Germany, all crisis management operations abroad which take place within a collective security arrangement are, in principle, permissible. It is an open question, however, whether unilateral crisis management operations, e.g. on the basis of the invitation of a foreign government, are permissible. So far, the issue has not been brought before the Constitutional Court. In Italy, the participation of the armed forces in operations "for the realisation of peace and security in conformity with the rules of international law and according to the decisions of the international organisations in which Italy takes part" is covered by the Law of 14 November 2000, No. 331 and thereby rendered constitutional. It is controversial whether this law, or the constitution, covers operations which do not have a basis in the UN-Charter. Thus, operations which are merely based on bilateral or multilateral agreements or on a national decision are not considered by all authors to have a "clear and unequivocal basis". It must, however, be kept in mind that the Italian Parliament usually gives a specific authorisation to crisis management operations abroad, and that the question of constitutionality cannot be brought before a court.

In Spain, Article 8 (1) of the Spanish Constitution states that "the Armed Forces, comprised of the Army, the Navy, and the Air Force, have as their mission the guarantee of the sovereignty and independence of Spain, and the defence of its territorial integrity and constitutional order". There are important differences of opinion regarding the interpretation of this clause. These differences of opinion, however, mainly relate to the domestic role of the Spanish armed forces. This may at first sight appear surprising since a simple (or strict) reading of Article 8 (1) would seem to suggest that crisis management

[18] Art. 2 OMP.

missions abroad are excluded *e contrario*, at least as far as they do not relate to the sovereignty and independence of Spain. Constitutional scholars, political actors and public opinion, however, agree today that Article 8 does not exclude at least certain crisis management missions abroad. This interpretation is justified by three considerations: First, a royal ordinance which was approved at the time of the making of the Constitution affirmed that "when Spanish military units collaborate in such missions which aim at the maintenance of peace and international security, their service to such elevated purposes will cause them to become noble instruments of their mother country".[19] This royal ordinance was approved by Parliament and has never been questioned. Secondly, it is said that the preamble of the Spanish Constitution which discusses "collaboration in peaceful relations" leaves clear room for the constitutionality of peacekeeping and peace-making operations and that this has been confirmed by Spain's participation in the Kosovo operation by NATO states. Thirdly, the fact that the present Spanish Constitution does not contain a clause which restricts the use of the armed forces to operations which are lawful under international law (as was the case with the former Spanish Constitution of 1931) is interpreted to mean that the Constitution does not prohibit uses of the armed forces that are in contradiction with international law. Today it seems to be widely agreed that the Spanish armed forces may at least participate in such crisis management missions which take place under the auspices and authority of the United Nations.

b. Humanitarian Aid at Home and Abroad

Provision of humanitarian aid is a use of the armed forces which does not involve the use of arms and which therefore takes place with the agreement of the parties concerned. Provision of humanitarian aid at home may raise different constitutional questions than the provision of humanitarian aid abroad since at home the delimitation of the jurisdiction of other state organs and the domestic role of the armed forces are at stake. Still, other than in situations which have formally been declared a state of emergency,[20] there exist no specific constitutional rules for the provision of humanitarian aid at home in any of the countries under review and only very few legislative provisions.

[19] Art. 9 OR.

[20] See below e.

aa. Humanitarian Aid Missions Abroad

Provision of humanitarian aid abroad is considered, in all states under review, to be a lesser form of crisis management abroad. Therefore, the considerations mentioned above (see sub a.) largely also apply here. Thus, to use the armed forces for the provision of humanitarian aid abroad is permissible on the basis of a governmental decisions in Belgium (provided the mission does not violate the general rules of public international law), Denmark (Article 6 LFO explicitly mentions that "Danish defence forces may contribute, with military means, to the prevention of conflict, and to peace-keeping, peace-making, humanitarian and other tasks"; Article 4 of the same Act authorises the armed forces to "attend to tasks of public authority"), France (provided the mission is not undertaken for reasons of conquest or used against the freedom of another people), Germany (unarmed provision of aid is not considered to be a relevant restricted "use" of the armed forces in the sense of Article 87a (2) of the Constitution), Luxembourg,[21] Italy (the Law of 14 November 2000, No. 331 provides that the armed forces have the task of "carrying out specific tasks in circumstances of public calamity and in other cases of extraordinary necessity and urgency" which includes humanitarian aid missions abroad; in addition, the law permits operations "for the realisation of peace and security in conformity with the rules of international law and according to the decisions of the international organisations in which Italy takes part"), the Netherlands (such operations are considered to be "for the purpose of defence and the protection of the interests of the Kingdom, as well as for the maintenance and promotion of the rule of law" in the sense of Article 97 (1) of the Dutch Constitution), Poland (Article 2 (1) (a) and (b) ZUPSZ explicitly allow taking part in "armed conflict or the support of the forces of an allied state or states" and "in ... peace operations", Article 3 (1) (a) POOP, as amended, permits the armed forces to take part in rescue missions), Spain (uncontested interpretation of Article 8 (1) of the Spanish Constitution) and the United Kingdom (royal prerogative, mission statement of the Ministry of Defence).

bb. Humanitarian Aid Missions at Home

In Belgium no constitutional and statutory provisions concerning the provision of humanitarian aid at home exist but it is clear that the armed forces may be used for such purposes when the exceptional case arises that the normal civilian

[21] Art. 2 OMP.

means are not sufficient. In Denmark, no constitutional provision exists which would restrict the use of armed forces for domestic purposes and there are no specific rules on states of emergency. The unwritten constitutional principle of legality (rule of law, similar to *Gesetzesvorbehalt* in German law) has been fulfilled by Articles 4 and 7 LFO which permit the use of the armed forces for humanitarian help at home. It seems that Danish courts would also recognise an unwritten *ius necessitatis* as a basis for action by the armed forces in such situations. In France, no pertinent constitutional or statutory provisions exist; with the exception of the White Paper of the Defence Ministry which lists the mission of the armed forces as including various forms of "public service tasks" (including the provision of humanitarian aid at home) at the request of the competent authorities "in order to protect the population under all circumstances". In Germany, domestic missions are very specifically regulated in different constitutional provisions which provide for certain procedures and substantial limitations on the possible uses of the armed forces for humanitarian aid missions at home. Operations which do not involve the exercise of governmental authority are, however, not restricted.

In Italy, the Law of 14 November 2000, No. 331 provides that the armed forces have the task of "carrying out specific tasks in circumstances of public calamity and in other cases of extraordinary necessity and urgency", which includes humanitarian aid missions at home. In Luxembourg, Article 2 ROMP allows such missions. In the Netherlands, civilian support and assistance tasks (including provision of humanitarian aid at home) are quite common and can be carried out on the basis of the general Police Act and the Act on Disaster and Serious Accidents (*Wet rampen en zware ongevallen*). In Poland, no pertinent constitutional provision exists but Article 3 (1) (a) POOP states that the armed forces may take part in combating the effects of natural disasters and extraordinary threats to the environment (which would seem to imply the provision of humanitarian aid in such circumstances). The Polish Constitutional Court has confirmed that the armed forces "also play an important role in securing the state's internal security".[22] In Spain, there has been a discussion until the end of the eighties in which it was doubted whether the armed forces could legally undertake such operations, but today it seems to be agreed that they may indeed constitutionally undertake "functions which at no point can require the use of arms". In the United Kingdom, the armed forces may, like any civilian and on the basis of the common law, be used "in aid of the civil power" to restore public order within the United Kingdom which means that

[22] Trybunal Konstytucyjny (Polish Constitutional Court), Judgement No. K 26/98 of 7 March 2000.

the armed forces have the same obligations and powers as ordinary citizens, including "to come to aid when the civil power requires his assistance to enforce law and order".[23]

c. Combined Operations with Civilian Aid Organisations

The same rules as under b) apply in all states under review.

d. Cooperation between the Armed Forces and Other Governmental Authorities

In Belgium, the use of the armed forces within the state's territory for purposes other than that of defence is of exceptional character. The mayors (*Bourgmestres*) and the governors of the provinces can request assistance of the armed forces in case of riots or other civil conflicts.[24] In addition, the new Statute on Federal Police empowers the commander of the federal police to request support of the armed forces in cases of emergency, if the means of the federal police are not sufficient to ensure public peace and if the armed forces have the technical and personal resources to contribute to the reestablishment of the public order.[25] In Denmark, no constitutional provision exists which would restrict the use of armed forces for domestic purposes and there are no specific rules on states of emergency. The unwritten constitutional principle of legality (rule of law, similar to *Gesetzesvorbehalt* in German law) has been fulfilled by Articles 4 and 7 LFO which permit the use of the armed forces for humanitarian help at home. It seems that Danish courts would also recognise an unwritten *ius necessitatis* as a basis for action by the armed forces in such situations. In France, no pertinent constitutional or statutory provisions exists except for the White Paper of the Defence Ministry which lists the mission of the armed forces as including various forms of "public service tasks" (*inter alia* "taking preventive measures for civil protection and rescue operations at the request of competent authorities, in order to protect the population under all circumstances", and "participating in the protection of public authorities and public services when necessary" at the request of the competent authorities "in order to protect the population under all circumstances".

[23] *The Manual of Military Law Part II* (1989) chapter 5.

[24] Article 175 of the Communal Statute and Article 129 of the Regional Statute.

[25] Art. 111.

In Germany, a number of constitutional provisions deal with issues concerning the cooperation between the armed forces and other governmental authorities. In Italy, much pertinent legislation exists for a variety of situations. The general thrust of this legislation is permissive while preserving accountability by regulating competences and reserving certain powers to civilian authorities (such as measures restraining personal freedom). In Luxembourg, Article 2 ROMP describes the mission of the armed forces as "to support the public services and the population in case of urgent public interest and catastrophes". In the Netherlands, civilian support and assistance tasks (including provision of humanitarian aid at home) are quite common and can be carried out on the basis of the general Police Act and the Act on Disaster and Serious Accidents (*Wet rampen en zware ongevallen*). In Poland, no pertinent constitutional provision exists, but Article 3 (1) (a) POOP states that the armed forces may take part in combating the effects of natural disasters and extraordinary threats to the environment. The Polish Constitutional Court has confirmed that the armed forces "also play an important role in securing the state's internal security".[26] This seems to imply that the Polish armed forces can act in support of governmental authorities at home for the purposes which are stated in Article 3 (1) (a) POOP. In Spain, Article 30 of the Constitution is understood to mean that civil defence is not incumbent on the armed forces, although collaboration with civilian authorities is not generally prohibited. This possible collaboration, however, is not seen as involving the armed capacities of the armed forces, but rather its human, material, and organisational elements. This ambiguity leaves a margin for the Legislature to make specific arrangements as it sees fit, albeit always within the bounds of the Constitution. In the United Kingdom, as has already been mentioned above,[27] the armed forces may be used "in aid of the civil power" to restore public order within the United Kingdom which means that the armed forces have the same obligations and powers as ordinary citizens, including "to come to the aid when the civil power requires his assistance to enforce law and order". This provision implies *a maiore ad minus* that the armed forces may also be requested to provide humanitarian aid at home.

e. States of Emergency at Home

In Belgium, no constitutional and statutory provisions concerning internal or external emergencies exist. The armed forces can be used on order of governmental authorities, if extraordinary conditions occur which cannot be coped with by civilian means. The mayors (*Bourgmestres*) and the governors of

[26] Trybunal Konstytucyjny, Judgement No. K 26/98 of 7 March 2000.

[27] IV. 3. b).

the provinces can request the assistance of the armed forces in case of riots or other civil conflicts.[28] In addition, the new Statute on Federal Police empowers the commander of the federal police to request the support of the armed forces in cases of emergency, if the means of the federal police are not sufficient to ensure public peace, and if the armed forces have the technical and personal resources to contribute to the reestablishment of public order.[29] In Denmark, no constitutional provision exists on internal or external states of emergency, but Articles 4 LFO ("attend to tasks of public authority") and 6 LFO ("humanitarian help at home") permit certain aspects in this context, and Article 7 LFO allows the armed forces to undertake "other tasks" "according to the specified decisions of the Minister of Defence after negotiations with the other ministers involved"). In France, no pertinent constitutional or statutory provisions exist except for the White Paper of the Defence Ministry which lists the mission of the armed forces as including various forms of "public service tasks" which include, *inter alia* "taking preventive measures for civil protection and rescue operations at the request of competent authorities, in order to protect the population under all circumstances", and "participating in the protection of public authorities and public services when necessary".

In Germany, the armed forces may only be used for those domestic purposes which are expressly provided for in the Constitution (Article 87a (2) of the Constitution). The use of the armed forces is expressly permitted (subject to certain stringent conditions) in the event of internal emergency and in the event of natural disasters or humanitarian catastrophes at home (Articles 35 (2), 87a (4) and 91 of the Constitution). In Luxembourg Article 2 ROMP describes the task of the armed forces as "to support the public services and the population in case of urgent public interest and catastrophes".

In Italy, the Constitution does not provide for rules concerning domestic states of emergency. It is a matter of debate among constitutional lawyers whether the use of the armed forces in a state of domestic emergency requires an authorisation analogous to that of a State of War (Article 78 of the Constitution) or whether this can be done on the basis of existing general legislation. In the Netherlands, Article 103 of the Constitution provides for official states of emergency and requires statutory legislation as a basis for the special powers in this situation. Under the War Emergency Act[30] and the Coordination or

[28] Article 175 of the Communal Statute and Article 129 of the Regional Statute.

[29] Art. 111 of the Statute on Federal Police.

[30] Oorlogswet voor Nederland.

Emergency Situations Act[31] the Minister of Defence enjoys wide-ranging powers in such situations. In Poland, no pertinent constitutional provision exists, but Article 3 (1) (a) POOP states that the armed forces may take part in combating the effects of natural disasters and extraordinary threats to the environment. The Polish Constitution also provides in its Article 228 (1) for the procedures to impose martial law, a state of emergency and a state of natural disaster. This provision does not, however, deal with the role and the competences of the military in such cases. So far, a statute which deals more specifically with those extraordinary measures, and the role and competences of the armed forces in this context, has not been enacted.

In Spain, Article 8 of the Constitution provides that the armed forces have as their mission not only the defence of its territorial integrity but also its constitutional order. This is interpreted to mean, *inter alia*, that the armed forces may act in cases of internal and external emergency. In this regard, a distinction has to be made between armed and non-armed tasks. Non-armed missions are permitted without any further preconditions. The majority of scholars argue that armed missions require a prior authorisation by Parliament as they necessarily involve the official declaration of a State of Defence (Article 116 of the Constitution).

In the United Kingdom, the Government has the above-mentioned power under common law to call civilians and armed forces alike to come to the aid of the civil power.[32] In addition, the Emergency Powers Act[33] enables the government to declare by way of a proclamation that a state of emergency exists, if it appears "that there have occurred, or are about to occur, events of such a nature as to be calculated, by interfering with the supply and distribution of food, water, fuel, or light, or with the means of location, to deprive the community, or any substantial portion of the community, of the essentials of life". Once a proclamation has been issued, the government may enact regulations to provide for the details of the powers it wishes to take to deal with the emergency. Under this statute the Army has been used to take over the tasks of striking fire engine crews and garbage collectors. The Emergency Powers Act of 1964[34] enables the Defence Council to authorise members of the armed forces to "be temporarily employed on agricultural work or such work as may be approved .as being urgent work of national importance, and thereupon it shall be the duty of every person [subject to service law] to obey any command given by his superior offi-

[31] Coordinatiewet uitzonderingstoestanden.

[32] See II. 3. b.

[33] Emergency Powers Act 1920.

[34] Emergency Power Act 1964.

cer in relation to such employment, and every command shall be deemed to be a lawful command ...".[35]

f. Natural Disasters or Humanitarian Catastrophes at Home

Remarks sub b) bb) and e) above apply here as well. As a result, the armed forces in every state under review may, in principle, act in such situations, provided that the pertinent provisions concerning the power to request or order the armed forces have been complied with.

g. Evacuation of a State's Nationals

The answers to these matters largely derive from the remarks sub a) above. Evacuation operations are largely considered to be a form of crisis management abroad. To use the armed forces for evacuation operations is permissible on the basis of a governmental decision in Belgium (provided the mission does not violate the general rules of public international law), Denmark (Articles 6 and 7 LFO provide for this eventuality: "Article 6 of the Danish Defence Act provides that "Danish defence forces may contribute, with military means, to the prevention of conflict, and to peace-keeping, peace-making, humanitarian and other tasks"), France (the White Paper specifically speaks of "protecting its citizens" as one of the missions of the armed forces), Luxembourg (Article 2 ROMP describes as one of the missions of the armed forces the participation in humanitarian support and evacuations missions in the framework of international organisations to which Luxembourg is a member), the Netherlands (such operations are considered as being "for the purpose of defence and the protection of the interests of the kingdom, as well as for the maintenance and promotion of the rule of law" (Article 97 of the Dutch Constitution), Poland (Article 3 (1) (a) POOP explicitly allows "search and rescue missions", and Article 2 (1) (a) and (b) ZUPSZT permit the armed forces to take part in "missions against terror attacks or their effects" and in "rescue, search and humanitarian missions), and the United Kingdom (royal prerogative, the mission statement of the Ministry of Defence includes the tasks "to respond to emer-

[35] Strictly, this Act is unnecessary since the Government could deploy the armed forces wherever it wishes, on the basis of the royal prerogative and, indeed, there is no requirement in the Act for any parliamentary oversight or control. Its value, however, is in making it clear that orders by a superior to carry out agricultural work (or other work of national importance) are lawful orders which the soldier must obey under s. 34 Army Act 1955.

gencies" and to "protect and further UK interests". The British Ministry of Defence has stated that "the Armed Forces can, at the request of the Foreign and Commonwealth Office or Department for International Development, contribute to humanitarian and disaster relief operations, either on a national basis or as part of a co-ordinated international effort".[36] In addition, according to sect. 56 of the Reserve Forces Act 1996 the Secretary of State[37] may call out members of the reserve forces "if it appears to him that it is necessary or desirable to use armed forces (a) on operations outside the United Kingdom for the protection of life or property or (b) on operations anywhere in the world for the alleviation of distress or the preservation of life or property in time of disaster or apprehended disaster".

The situation in Germany and in Italy is more complicated. In Germany, the constitutionality of rescue operations is somewhat doubtful if they are not undertaken jointly with other countries as a collective security operation. In such cases, it depends on whether one sees the unilateral operation as an exercise of the defence function. The issue was debated in regard to the operation by German forces to rescue nationals in Albania in 1997. In Italy, the Law of 14 November 2000, No. 331 provides that the armed forces have the task of "carrying out specific tasks in circumstances of public calamity and in other cases of extraordinary necessity and urgency" which probably includes evacuation missions. Since some such operations do not have a clear basis in the UN-Charter (in particular those without the consent of the government concerned), some Italian constitutional lawyers doubt their constitutionality. It must be borne in mind, however, that the question of constitutionality cannot be brought before a court.

h. Use of the Armed Forces in Other Cases

According to the remarks sub II. 1 and 2. (above) it has become clear that most of the states under review do not set specific constitutional limitations for the use of their armed forces. This means that the armed forces can in almost all cases also be used for other purposes than those which have so far been dealt with specifically (as long as this keeps within the general task of the armed forces). In Denmark, this is explicitly spelled out in Article 7 LFO which contains an omnibus clause. Belgium and the Netherlands both accept

[36] The Government's Expenditure Plan and Main Estimates, Ministry of Defence (2001) at p. 5.

[37] On the basis of the royal prerogative.

the general limitation that the armed forces may not be used in a way which violates the general rules of international law. In Luxembourg, the armed forces may only be used for the missions provided in Article 2 ROMP. This list includes practically all conceivable missions of the armed forces. Nevertheless, it restricts the non-defence missions abroad to those missions which are carried out in the framework of international organisations of which Luxembourg is a member.

The situation in Germany, Italy and Spain is more complicated. In Germany, there is a strict limitation on the possible uses of the armed forces, at least for domestic purposes, to those situations which have been expressly provided for in the Constitution (Article 87a (2)). This limitation is, however, justiciable subject to standing requirements. In Italy, the Constitution is in practice not considered to significantly limit the power of Parliament to attribute additional missions to the armed forces. It should not be forgotten, however, that a debate among Italian constitutional lawyers exists about the limits of the possible missions of the Italian armed forces. However, this debate does not seem to be of great practical importance since there are no procedures by which this issue could be brought before the Constitutional Court. In Spain, Article 8 of the Constitution, which defines the tasks of the armed forces, is subject to controversy. It seems, however, that this controversy is centred mainly on the question which forms of domestic use of the armed forces are permissible, and in particular how far the armed forces may become involved in domestic political or constitutional struggles. In the international context, on the other hand, the Spanish Constitution does not seem to be interpreted in a way which would restrict the use of the armed forces. Significantly, the Spanish Constitution is not interpreted to restrict the use of the armed forces abroad to such missions which are in conformity with international law.

4. Limitations on Operations Undertaken Jointly with the Armed Forces of Another State

There are no specific constitutional provisions in any of the states under review which restrict any of the above mentioned uses of the armed forces if they are undertaken jointly with the armed forces of another state. To the contrary, provisions which enable and encourage international cooperation would seem to facilitate such cooperation, as seems to be the case in Italy, for example. The only constitutional norms which could conceivably limit the range of possible cooperation with the armed forces from other states are the general rules concerning the transfer of sovereign rights. This is an issue which concerns the

power of command which will be dealt with more specifically below.[38] So far, there does not seem to be much discussion on the broader constitutional implications of an increased European military cooperation. In Spain, however, some commentators have addressed the issue in general terms. The most reasonable position seems to be that as long as the European defence cooperation remains compatible with "the sovereignty and independence of Spain, its territorial integrity, and its constitutional ordering" (Article 8 of the Spanish Constitution), in other words with the constitutional purposes of the armed forces, and is bound to the defence of democratic principles and fundamental rights there should be no conflict.

There also do not seem to be specific statutory provisions in any of the states under review which would limit uses of the armed forces in operations which are undertaken jointly with armed forces from other states.

III. Constitutional Powers

1. The Position of the Head of State

Six of the states under review are monarchies (Belgium, Denmark, Luxembourg, the Netherlands, Spain, and the United Kingdom), two are parliamentary republics (Germany, Italy) and two possess presidential systems (France and Poland). While the monarchs and the presidents of the parliamentary republics only possess symbolic (or formal) control over their respective armed forces, if at all, the Presidents in the presidential systems wield substantial power.

a. Monarchies

The monarchies can be subdivided into two groups. While Denmark, Spain and the United Kingdom follow the classical English model of a monarch formally exercising all executive power, but being (at least) subject to the countersignature of a responsible minister, the position of the monarch has been somewhat diminished in Belgium, Luxembourg and the Netherlands.

In Belgium, Article 167 (1.2) of the Constitution provides that "the King commands the armed forces, and recognises the existence of the state of war as well as the end of hostilities. He notifies the Chambers of those events as soon

[38] See V. 2 and 3.

as the interests and the security of the State allow, with all relevant information". According to Article 106 of the Constitution, all acts of the monarch require the countersignature of a responsible minister. In practice, however, decisions relating to the command of the armed forces are taken by the government alone. This practice is probably unconstitutional (if it cannot be justified by opposing customary constitutional law). It can be explained by the behaviour of the Belgian monarch at the beginning and during the Second World War when he alone took the decision to capitulate to Germany against the position taken by the government.

In Denmark, Article 3 of the Constitution gives the executive powers to the King (including the domestic command over the armed forces), and Article 19 confirms that the King acts on behalf of the State in international affairs (which includes the decision to use military force abroad). All powers of the King, however, must be exercised through ministers who are responsible to Parliament (Article 12 of the Constitution). This provision ensures that, in practice, the monarch does not play in independent role, and it seems that no monarch has under the Constitution attempted to use his or her powers for separate political purposes.

In Luxembourg, Article 37 of the constitution declares that "the Grand Duke commands the armed forces". Nevertheless, any acts of the monarch require the countersignature of the responsible minister. In addition, Article 1 (2) LOMP states that "the participation (in peace-keeping missions) is decided by the government in a joint session...". This procedure is compatible with the command power of the monarch as long as the decision of the government is perceived as a political decision which precedes the formal decision of the monarch (which is issued as a grand-ducal decree). In practice, several decisions of the government to dispatch peace-keeping troops have not been implemented by a grand-ducal decree. In that respect the situation seems to be comparable to the situation in Belgium.

In the Netherlands, although the King is the Head of State, the monarch has not possessed the formal command over the armed forces since the enactment of the Constitution of 1983. According to Article 97 (2) of the Constitution, the government (as a collegiate body) has the supreme authority over the armed forces. It is clear that the Dutch monarch can only exercise certain powers which he still retains (some appointments and promotions) with the countersignature of the responsible minister and therefore only with ministerial approval. This means that, in short, the monarch only plays a ceremonial role in matters which concern the armed forces.

In Spain, Article 62 h) of the Constitution states that the King is the commander-in-chief of the armed forces. Although this is not entirely free from doubt, most of the authors of academic literature agree that this royal

prerogative is a formal and purely honorary function which is, of course, subject to ministerial countersignature (Article 56 (3) of the Constitution). One must, however, consider the role which King Juan Carlos played in 1981 when he brought a military coup to collapse by publicly assuming the role of the commander-in-chief. This episode has led to an important discussion in Spain about possible residual powers of the monarch. More than a few serious commentators maintain the view that the Spanish monarch possesses independent powers in an emergency situation which are based on the principle of necessity.

In the United Kingdom, control over the armed forces is based on the unwritten royal prerogative. This means in practical terms that the government exercises this prerogative power "as the Crown", since the monarch has no executive powers in person. The monarch has not tried to use his or her formal position for independent decisions for many years.

Although the monarchies under review differ in certain details concerning the exact constitutional position of the monarch (including with respect to the military), it is clear that the respective monarchs cannot act independently with respect to the armed forces, neither in the sense that they could purport to actually exercise the power of command independently (except perhaps in marginal cases such as parades, and with the possible exception of Spain), nor in the sense that they would be in a position to exercise any form of veto power, be it for political or for legal reasons.

b. Parliamentary Republics

In the two parliamentary republics, Italy and Germany, the respective heads of state (Presidents) possess merely formal or ceremonial powers with respect to the armed forces.

In Germany, the Head of State (Federal President) does not even possess a formal power of command. Due to the ostensibly negative experience with the performance of the *Reichspräsident* under the Weimar Republic, the role of the German Federal President in military matters has been limited to nominating officers and to granting pardons (subject to countersignature). In Italy, the President of the Republic has the power of command ("high command") over the armed forces which is, however, subject to countersignature by the responsible Minister of Defence (Article 87 of the Constitution). In addition, the President can decide to convene the "Supreme Council of Defence" which is composed of the President of the Government, some ministers and some of the highest officers. The President also declares war (as determined by Parliament) and promulgates legislation.

c. Presidential Systems

In the two presidential systems under review, in France and in Poland, the respective Presidents possess important powers with respect to the military. Both Presidents are directly elected by the people. Their direct democratic legitimation gives them an independent position vis-à-vis the government. Only the French President, however, has the power to dismiss the government and to dissolve Parliament. In general, both Presidents cannot exercise their powers independently of, or against the will of the government.)

In France, the President of the Republic is the commander-in-chief of the armed forces (Article 15 of the French Constitution), he is the guarantor of national independence and territorial integrity (Article 5), and he makes appointments to the civil and military posts of the State (Article 13). He does not, however, exercise these powers alone but through decisions made by the President of the Republic in (governmental) councils, in particular in the Council of Ministers. The powers of the President can only be fully understood if they are viewed in conjunction with the powers of the government (which is appointed by him but subject to confirmation or rejection by Parliament). In general, the powers of the President are dependent of the countersignature by the Prime Minister or a responsible minister. The government implements the measures decided upon in councils and committees chaired by the President of the Republic. According to Article 20 "the government shall determine and conduct the policy of the Nation. It shall have at its disposal the civil service and the armed forces". According to Article 21, the Prime Minister is responsible for national defence, and he has the power to make regulations, and shall make appointments to civil and military posts. Article 16 of the French Constitution provides that the President "shall take any necessary measures" "after consultation with the Prime Minister, the President of the Parliament and the Constitutional Court" "in the case, that the institutions of the Republic, the independence of the nation or the territorial integrity ... are subject to a serious and present threat and when the functioning of the constitutional organs is suspended". This provision allows the President to act without the consent of any other constitutional organ. It is perceived as the legal basis for the President's prerogative to order the use of the French nuclear weapons.

Apart from Article 16 of the Constitution the following procedure applies: If the political majority in Parliament is composed of followers of the President these rules, taken together, constitute a system in which the President predominates and the government merely confirms and implements his decisions relating to national defence – either the decision to put the armed forces into action, or the decision to make military appointments and promotions. If, however, the political majority in Parliament is composed of opponents of the

President the exercise of his powers to dismiss the government or to dissolve Parliament will not be practicable if it cannot be expected that a friendly majority will be elected. In such a situation, a so-called *cohabitation* can occur in which either the government nor the President are able to impose their will onto each other and are therefore forced to compromise.

In Poland, the President is in a weaker position. His task is mainly to control the government. As in France, the Polish President is the commander-in-chief (*najwyzszy zwierchnik* = commander-in-chief) of the armed forces (Article 134 (1) of the Polish Constitution), he is the guarantor of the continuity of state authority (Article 126 (1)) and he, *inter alia*, appoints and dismisses, at the request of the Prime Minister, the military Commander-in-Chief of the Armed Forces (Article 134 (4)). He does not exercise his powers alone, but in conjunction with the Council of Ministers (Article 10). All his acts concerning defence policy are subject to countersignature. In contrast to the French President in accordance to Article 16 of the French Constitution, the President of Poland does not have any autonomous power of action or order. Thus, the powers of the President can only be fully understood if they are viewed in conjunction with the powers of the Government. As in France, the Prime Minister is designated by the President and appointed by him but the politically decisive act is the obligatory confirmation or rejection by the Parliament (Article 154 (1)). The government (Council of Ministers) implements the measures decided upon in councils and committees (Article 146 (1) and (2)). Contrary to the situation in France, the competences of the President are not designed to enable him to determine the main conduct of governmental policy but to make him serve as an additional control over governmental policy by the Council of Ministers. In the past several years, there have been substantial differences of opinion between the President and the Government with respect to their respective competences. These disagreements have prevented the enactment of a law on the delimitation of competences between the executive organs in defence matters. The President is also directly involved in the process of taking a decision concerning the employment of the Polish armed forces abroad based on the Statute on the Employment and Stationing of Polish Armed Forces Abroad of 1998 (ZUPSZ). Such decision is to be taken by the President on the request of the Prime Minister in case of a mission against terror attacks or their effects (Article 3 (1) (1) ZUPSZ), or at the request of the Council of Ministers in case of an armed conflict or the necessity to support the forces of an allied state or states as well as peace operations (Article 3 (1) (2) ZUPSZ). The Parliament is to be informed immediately by the President about the decision taken (Article 3 (2) ZUPSZ). Also, the decision is to be published in the Official Gazette (*Monitor Polski*). The decision must specify all relevant details of the use of Polish armed forces abroad in each particular case. Among other things, the decision

establishes the system of command and supervision of a military unit while abroad (Article 5 (1) ZUPSZ).

2. The Powers of the Government

"Government" in the sense of this study means the highest executive organ with the exclusion of the head of state. As stated above[39] the states under review can be subdivided into two groups: those which have a government depending solely on the parliament, and those which are dependent on both the head of state and the parliament. It happens that all the six monarchies, like the two parliamentary republics, have developed a purely parliamentary system, while France and Poland with their presidential systems fall into the second group.

a. The Six Monarchies and their Parliamentary Systems

All six monarchies have in common that the governments take the decision to send the armed forces into action, subject only to more or less intense forms of parliamentary control.[40] The monarchs, as heads of state, only exercise ceremonial, if any, functions.[41]

In Belgium, the constitutional provisions according to which the King commands the armed forces and recognises the existence of the Sate of War (Article 167 (1.2)) do not refer to the King in person or as a separate state organ, but to the King in a constitutional sense: a decision by the government as formalised by the King. In practice, it is the Council of Ministers, by consensus and without formal royal approval, which takes the decision to deploy the armed forces. This practice has been reflected in the 1994 Statute on the Use of Armed Forces (Law of 20 May 1994), but it is probably unconstitutional.

In Denmark, the government is not mentioned in the Constitution as a separate entity and therefore does not possess any formal powers with regard to the deployment of armed forces. Thus, the Danish Constitution preserves the old principle of the individual responsibility of the different ministers. Since, however, the Prime Minister, has both the power to dismiss individual ministers and the competence to determine the scope of each minister's competences, it is in practice always the government as a whole which decides in cabinet meetings on the use of the armed forces.

[39] IV. 5. a).

[40] As to the competences of Parliament see below II. 5. d. and 6.

[41] As to the competences of the monarchs see above II. 5. a.

In Luxembourg, the situation is similar to the situation in Belgium. In the Netherlands, the power of supreme command over the armed forces is given to the government which includes the Monarch and the ministers. If read in conjunction with Article 45 of the Dutch Constitution this provision means that the Council of Ministers (the cabinet) has the final decision with regard to the use of the armed forces. The only question which is discussed in this context in the Netherlands is whether and, if so, how far this power of the government may be delegated to a smaller circle of ministers within the government.

In Spain, Article 97 of the Constitution states that "the Government directs domestic and foreign policy, civil and military administration, and the defence of the State". This rule is the basis for the competence of the government in military matters, in particular with respect to the decision to use the armed forces. This competence is formally exercised by the King whose role, however, is (according to most commentators) purely ceremonial.

In the United Kingdom, finally, the government exercises the royal prerogative and acts as the Crown in which the power to employ the armed forces resides.

b. The Parliamentary Republics (Germany and Italy)

Germany and Italy have a somewhat modified parliamentary system in comparison to the six monarchies. Although the governments in Germany and Italy are subject to the same general forms of parliamentary control, and although they also have the general power to conduct foreign and defence policy, most operations of the armed forces abroad require a specific parliamentary authorisation.

In Germany, this requirement of parliamentary authorisation is not spelled out explicitly in the Constitution but was derived from the Constitution by the Federal Constitutional Court in 1994.[42] It is noteworthy that the command power is vested in the Minister of Defence in peacetime (Article 65a of the Constitution) and in the Chancellor in wartime, i.e. during an armed attack on the territory of the Federal Republic (Article 115b of the Constitution) In Italy, Article 1 of Law No. 25/1997 provides that the Council of Ministers (the government) adopts decisions on matters of defence and security. By virtue of this provision the Italian Parliament has asserted its prerogative to give approval to all decisions of the government on defence and security matters prior to their implementation by the competent minister, including the decision to employ the

[42] See below sub 3. b. bb.

armed forces. Ministers are individually responsible to Parliament. It is uncontroversial that the constitution prescribes that operations on the basis of international agreements require parliamentary authorisation since international agreements "of a political nature" need such authorisation. It is doubtful, however, whether the constitution requires parliamentary approval for other operations, as prescribed by Law No. 25/1997. In practice, however, the government has accepted that this law is binding. Urgent decisions on operations of the armed forces can be, and have been, taken by the government alone.

c. The Presidential Systems in Poland and France

The role and the competences of the government in France and Poland have already been described in the section concerning the powers of the head of state.[43]

3. The Participation of Parliament in the Decision to Deploy the Armed Forces

This subject only concerns the powers of the various parliaments with respect to the initial individual decision to put the armed forces into action. All other aspects of the role of parliament with respect to the armed forces are dealt with below.[44]

It is necessary to distinguish between the powers of parliament to decide on certain situations which are connected with the use of the armed forces in certain circumstances (declaration of war, declaration of internal emergency), on the one hand (aa) and the actual decision to put the armed forces into action, on the other (bb).

a. The Prerogative to Declare War and States of Emergency

In some of the states under review parliament possesses the prerogative to declare war or a state of emergency, or at least to authorise such declarations by the executive. Those powers, however, neither cover all conceivable cases of the use of the armed forces (in particular not all self-defence and collective security operations) nor are such declarations necessary constitutional preconditions for the actual use of the armed forces.

[43] See above II. 5. a.

[44] See II. 6.

In Belgium, the declaration of war is a prerogative of the King (the government). Parliament must only be informed as soon as possible (Article 167 (1.2) of the Constitution). The government also decides on the use of Belgian troops during internal states of emergency (on the basis of the Law of 20 May 1994) and this does not require special parliamentary involvement.

In Denmark, the Constitution does not provide for a competence to declare war or internal states of emergency, but it regulates the parliamentary participation in the decision to actually employ the armed forces for certain cases. Article 19 (2) of the Danish Constitution requires that "except for purposes of defence against an armed attack upon the Realm or Danish forces, the King shall not use military force against any state without the consent of the *Folketing* (Parliament)". This provision does not apply to domestic uses of the armed forces (which are permissible within the limits of the principle of legality). Interestingly, Article 19 (2) is generally interpreted – seemingly against its wording – to mean that the government can immediately repel an armed attack, but must seek the approval of the Parliament for further defensive action.

In France, parliamentary authorisation is required for a declaration of war and for the continuation of domestic states of emergency (*état de siège, état d'urgence*) after 12 days, but such decisions do not as such imply an authorisation to use the armed forces.

In Germany, Article 115a of the Constitution provides that Parliament must determine by a two-thirds majority that a "state of defence", i.e. an armed attack on the territory of the Federal Republic, exists. This provision, however, does not concern the permission to use the armed forces but rather to enact and apply domestic emergency rule. In addition, different constitutional provisions concern situations arising from domestic emergencies.

In Italy, the President declares war "as determined by Parliament" (Article 87 of the Italian Constitution). It is not clear whether this provision also applies to domestic emergencies.

In Luxembourg, Article 37 of the Constitution provides that "the Grand Duke declares war and the end of war after authorisation by the chambers in a vote according to Article 114 (5) of the Constitution" (two-thirds majority with presence of three quarters of the Members of Parliament). This requirement of parliamentary authorisation does not apply to today's missions of the armed forces, which are carried out without a formal declaration of war. Below constitutional level, Article 1 (2) LOMP requires, that the decision of the government on the participation of the Grand Duchy takes place "after consultation of the responsible committees of the representatives' assembly".

In the Netherlands, Article 96 (1) of the Constitution requires parliamentary authorisation for a declaration of war and Article 103 provides for domestic states of emergency. Although there have been discussions and court proceed-

ings in this respect, Article 96 has not been interpreted to require parliamentary authorisation for military operations which were undertaken without a formal declaration of war.

In Poland, Article 116 of the Constitution states that Parliament declares war and peace by resolution. In addition, the Polish Constitution also provides in its Article 228 (1) for the procedures to impose martial law, a state of emergency and a state of natural disaster. According to Article 231 of the Polish Constitution, the declaration of martial law and the state of emergency is made by the President, but must be submitted to Parliament within 48 hours. Parliament can then annul the President's decision. These provisions do not, however, deal with the role and the competences of the military in such cases. So far, a statute which deals more specifically with those extraordinary measures, and the role and competences of the armed forces in this context, has not been enacted.

In Spain, the Parliament must authorise both the declaration of war by the King (Article 63 (3) of the Constitution) and the various different states of emergency (Article 116 of the Constitution) with the exception of a "state of alarm" which the Prime Minister may declare and put into effect immediately, a subsequent authorisation by Parliament being only required to extend this state beyond 14 days. Most Spanish commentators maintain that the domestic armed use of the military, without the previous declaration of a State of Siege, would be unconstitutional. The situation is different for the use of the armed forces abroad: Although some commentators have asserted that the Spanish participation in the Kosovo operation was unconstitutional because it would have required a formal declaration of war and therefore an appropriate parliamentary authorisation, most commentators agree that this was not the case.

In the United Kingdom, finally, the declaration of war is part of the royal prerogative (which is exercised by the government). The Emergency Power Act[45] enables "Her Majesty" (the government) to declare by way of a proclamation that a state of emergency exists.

b. The Decision on the Deployment of the Armed Forces

The states under review, with the exception of Denmark, Germany, and, in a certain sense, Italy do not have constitutions which formally require their respective parliament to positively authorise the initial decision by the government to deploy the armed forces. Some states do, however, provide for a duty to

[45] Emergency Power Act 1920.

inform or consult the parliament. The actual intensity of parliamentary involvement in the decision on the deployment of the armed forces is not necessarily linked to the scope of other parliamentary rights.

aa. Denmark: A Limited Right of Parliamentary Approval

Denmark is the only state under review whose constitution provides for the requirement, under certain circumstances, of a formal parliamentary authorisation for the deployment of the armed forces. Article 19 (2) of the Danish Constitution requires the consent of Parliament for use of the armed force "against any foreign state". This provision does not apply to domestic uses of the armed forces (which is permissible within the limits of the principle of legality). Interestingly, however, Article 19 (2) is generally interpreted – seemingly against its wording – to mean that the government can immediately repel an armed attack, but must seek the approval of Parliament for further defensive action. When the use of the armed forces in collective security operations is concerned, Article 19 (2) is interpreted to mean that only if the government of the targeted state agrees to such an operation is there no use of armed force "against any foreign state". This means in turn that if the government does not agree to such an operation (*e.g.* a UN operation which is (only) based on Chapter VII of the UN Charter) the Danish Parliament must authorise the operation. In addition to Article 19 (2) of the Danish Constitution, Article 19 (1) requires the prior consent of Parliament for taking on obligations of "major importance" (which may include obligations to use the armed forces even with the agreement of the government concerned, *e.g.* for collective security operations). So far, however, this requirement has been interpreted to be satisfied by certain international treaties (UN-Charter, NATO-Treaty) as such, and did not concern individual operations which were conducted within the framework of such treaties.

bb. Germany and Italy: A Comprehensive Requirement of Parliamentary Approval

In Germany, the Constitutional Court has derived a comprehensive requirement of parliamentary approval from the Constitution for all kinds of "armed operations", regardless of their purpose. This requirement does not apply in "situations of immediate danger", but approval must be sought as soon as possible afterwards. Parliament authorises "armed operations" by a simple (majority) vote and not by way of ordinary legislative procedure. Parliament does not, however, possess a right of initiative or the power to recall the troops.

In Italy, Article 80 of the Constitution prescribes that international agreements "of a political nature" need parliamentary approval. It seems to be agreed among constitutional lawyers that this means that every operation which takes place on the basis of international agreements requires parliamentary authorisation. In addition, Article 1 of Law No. 25/1997 provides that the decision by the government to employ the armed forces requires the approval of Parliament prior to its implementation by the competent minister. It is not clear whether the constitution actually requires parliamentary approval for all operations as prescribed by Law No. 25/1997. In practice, however, the government has accepted that this law is binding. Urgent decisions on operations of the armed forces can be, and have been, taken by the government alone. It is understood that the Italian Parliament must be kept informed about all operations by the armed forces which are subject to its approval at all times.

cc. States with a Constitutional Duty to Inform Parliament

In Belgium, Parliament does not participate in the decision on the deployment of the armed forces which remains a prerogative of the executive. Article 167 of the Belgian Constitution, however, obliges the King (the government) to communicate his decision to the Parliament as soon as the interest and the security of the State allow this. In Denmark, Article 19 (2) requires the King (the government) to submit immediately to Parliament any measure taken in pursuance of this provision. This obligation to inform is not restricted to the cases in which parliamentary approval is required ("military force against any foreign state"), but also extends to deployments for the purpose of defence. In addition, Article 19 (3) of the Danish Constitution requires the government to consult with a parliamentary committee prior to undertaking any obligation of major importance. Taken together, these provisions make Denmark, apart from Germany, the state with the strongest rights of parliamentary involvement in the decision to deploy the armed forces.

In the Netherlands, after demands to introduce a formal requirement of parliamentary approval for the participation of Dutch armed forces in peace operations had failed, a new Article 100 of the Constitution was adopted according to which the government, "prior to the engagement or making available of the armed forces for the maintenance or promotion of the international rule of law, shall provide Parliament with information concerning the intended action. This includes providing information concerning the engagement or making available of the armed forces for humanitarian assistance in cases of armed conflict". Thus, although the Dutch requirement to inform concerns a much more limited area than the Belgian provision, it is stricter insofar as it requires, in general, prior information. Article 100 (2) of the Dutch Constitu-

tion provides that the first paragraph shall not apply if peremptory considerations prevent the prior provision of information. In this case, the information shall be provided as soon as possible.

In Poland, Article 3 (2) ZUPSZ requires that Parliament be informed immediately once a decision to deploy the armed forces has been made by the President (or in his name by the Minister of Defence), and that this decision be published in the Official Gazette specifying all relevant details of the use of the forces (Article 5 (1) of the Statute).

c. States with no Constitutional Duty to Inform Parliament

In France, Luxembourg, Spain, and the United Kingdom, the initial specific decision on the deployment of the armed forces can be taken without any formal participation of the Parliament and it is not even required that Parliament is informed about the deployment. However, it is worth mentioning that in such cases parliaments in those states regularly insist on their general right to be informed. The most intense communication probably takes place in the United Kingdom, followed by Spain. In France, the Parliament appears to remain somewhat on the margins although the National Assembly was requested by the Prime Minister (on the basis of Article 49 (1) of the Constitution) to approve the participation in the war against Iraq (1990) and approved the Kosovo operation (1999) on its own initiative. In addition, a recently published parliamentary report (Lamy-report) expresses the opinion that there is insufficient parliamentary control of French missions abroad. In Luxembourg, the Constitution does not provide for any role of Parliament in the decision-making process for deployments of armed forces (except in the case of declaring war). Yet, Article 1 (2) LOMP requires that the decision of the government on the participation of the Grand-Duchy in peace-keeping missions shall be made "after consulting the competent committees of the parliamentary assembly".

4. The Functions of the Minister of Defence

Article 65a of the German Constitution, according to which the Minister of Defence is the commander-in-chief of the armed forces, has no direct parallel in any of the other states under review. Only the Polish Constitution explicitly mentions the office of the Minister of Defence. Article 134 (2) of the Polish Constitution states that the President exercises command over the armed forces through the Minister of Defence. In all other states under review, the general rules of ministerial authority and parliamentary responsibility also apply to the

respective Ministers of Defence. In some countries, the functions of all or some of the different ministers are regulated by parliamentary statute, in others they are simply determined by governmental decision or decree.

In Belgium, the Minister of Defence exercises the royal prerogative of the command over the armed forces and determines their day-to-day activities. He is individually responsible before Parliament for this. Since, however, the decision to deploy the armed forces is usually taken by the government as a whole, it is also the government as a whole which is responsible for such decisions. There is no statute in Belgium which outlines the tasks of the Minister of Defence.

In Denmark, the Minister of Defence is in general individually responsible before Parliament. His tasks are formally regulated in a statute (LFO) which includes the rule that the Minister of Defence is the highest responsible authority for the armed forces (Article 9 LFO). Since, however, the Prime Minister has the constitutional power to distribute the range of executive powers to the individual ministers, he can transfer the powers of the Defence Minister to other ministers or to himself by royal decree (without changing the text of the Defence Act). This ensures that the Minister of Defence is not only individually responsible to Parliament but also that the government as a whole (which the Constitution does not mention) takes collegial decisions in important defence matters.

In France, the Minister of Defence exercises tasks which are regulated in governmental acts[46] and by delegation from the Prime Minister. In the French presidential system the role of the Minister of Defence is rather limited. Apart from the fact that the President of the Republic is commander-in-chief of the armed forces (and may exercise this prerogative in certain circumstances) the Constitution explicitly states in Article 21 that the Prime Minister "shall be responsible for national defence". This means in practice that the Prime Minister can through the use of special organs control how defence measures are "implemented" by the Minister of Defence (General Secretariat for National Defence).

In Italy, the Minister of Defence is individually responsible before Parliament (Article 94 of the Italian Constitution). His tasks must be formally outlined in a statute (Article 95 (3) of the Constitution and Law Decree of 30 July 1999, No. 300).

In Luxembourg, the Constitution does not provide for a special position for the Minister of Defence.

[46] Art. 16 of the Ordinance of 7 January 1959; decree No. 62-811 of 18 July 1962, modified.

In the Netherlands, the Minister of Defence is subject to the general rules of parliamentary control. It should be noted that, according to Article 97 (2) of the Dutch Constitution, it is the government as a whole and not the Minister of Defence, which has "supreme authority" over the armed forces. This corresponds to a practice in the Netherlands according to which important defence matters are dealt with by a special sub-council of the government as a whole (by the Council for European and International Affairs – *Raad voor Europese en Internationale Aangelegenheiden*, REIA) in which the Minister of Defence does not even seem to play the major role. Yet in practice the Minister of Defence plays an important role as the head of the ministry to which the armed forces belong.

In Poland, the President exercises command over the armed forces through the Minister of Defence (Article 134 (2) of the Constitution). The legal situation is similar to that in France, with the exception that in Poland it is the Council of Ministers, and not the Prime Minister, who exercises general control in the field of national defence (Article 146). Thus, as in France, the Polish Minister of Defence is not only responsible before parliament but also subject to a special constitutional supervision by the government as a whole and by the President of the Republic. This includes, *inter alia*, the prerogative of the President to nominate the Chief of General Staff as well as the commanders of the different forces without any formal involvement of the Minister of Defence. In addition, the competences of the Polish Minister of Defence are regulated by a Statute "on the Office of the Ministry of Defence" from 1996, and by an implementing Regulation of the Council of Ministers. Finally, the Statute on the Employment and Stationing of Polish Armed Forces Abroad (ZUPSZ) prescribes which military operations can actually be ordered by the Minister of Defence.

In Spain, a special statute provides that the Minister of Defence exercises certain powers of the government over "military administration, and the defence of the State" (Article 97 of the Constitution). This law transfers certain powers of the Prime Minister to decide which measures should be taken by the Government (Article 98 of the Constitution) to the Minister of Defence. These powers are not comprehensive, however, since the government as a whole continues to exercise certain important functions.

In the United Kingdom, no formal constitutional or legislative rules exist with respect to the function of the Minister of Defence. He is responsible to Parliament as one of the members of the government, and he exercises the command over the armed forces as far as the government does not decide otherwise.

5. The Role of the Military Leadership

The military leadership has no constitutional status in any of the states under review. It is hierarchically subordinate to the state organ which exercises supreme command over the armed forces. In Denmark, Italy, Poland, and Spain statutory legislation exists which further specifies the role of the military leadership. No statutory legislation which further specifies the role of the military leadership exists in Belgium, France, Germany, Luxembourg, the Netherlands, or the United Kingdom.

In Denmark, Article 11 LFO attributes the power of command to the "Chief of Defence" who exercises this power "on the responsibility of the Minister of Defence". Article 12 LFO gives the Chief of Defence (*Forsvarschefen*) the power to delegate some of this authority to international units or to subordinate officers of the Danish Army. These provisions do not preclude the power of the Minister of Defence to give orders concerning the exercise of these powers which must be followed by the military leadership. In Poland, Article 8 of the Statute "on the Office of the Ministry of Defence" from 1996 determines the responsibilities of the Chief of the General Staff which mainly include planning and general management tasks. In Spain, the pertinent statute provides for the possibility to designate the command for combat operations to the Chief of the General Staff which is "the military authority through whom the Minister of Defence exerts his authority".[47]

In the Netherlands, the influential sub-council of the government as a whole (the Council for European and International Affairs – *Raad voor Europese en Internationale Aangelegenheiden*, REIA) does not have a member of the military leadership as its member but it is possible that a military person can be invited to attend the meeting. The role of the Dutch Chief of Defence Staff is defined in the (published) General Organisational Decree (1992) of the Minister of Defence. In the United Kingdom, it is an established convention that the Chief of the Defence Staff has the right to direct access to the Prime Minister (thus by passing the Minister of Defence).

6. Parliamentary Control

Parliamentary control of the military can concern the initial specific decision to send the armed forces into action. As far as specific rules exist, they have been dealt with above.[48] This section deals with all other forms of parliamentary control.

[47] Royal Decree 1883/1996.

[48] IV. 5. c).

a. The Parliament's Power to Control the Armed Forces

The general legal means of parliamentary control of the military are basically rather similar in all states under review. They are based on the general principle of parliamentary responsibility of the government and on the powers of the parliament to legislate. Some important differences do, however, exist.

aa. Parliamentary Committees and Questioning

In all states under review, Members of Parliament have the right, under the constitution, to put questions to the government, including, of course, questions on military matters. In addition, all parliaments have formed committees which exercise this right and supervise military affairs more closely. These committees, however, have been formed on the basis of the general constitutional and parliamentary rules and not, as in Germany, on the basis of a special constitutional provision which requires the existence of a special parliamentary defence committee with investigatory powers (Article 45a of the German Constitution). In Denmark, however, the Foreign Policy Committee of Parliament is mentioned in Article 19 (3) of the Constitution. It also performs a certain form of parliamentary control in military matters since the government is obliged under Article 19 (3) to consult with this committee before taking any decision of major importance in the field of foreign relations. It should also be noted that no state under review acknowledges a right of the parliamentary minority to force parliamentary committees to conduct investigations, as is the case in Germany under Article 44 of the German Constitution.

In this context it appears that not only the formal rights of parliaments are important but also the culture of how they are exercised in practice. Thus, in the United Kingdom, the government is usually subject to intense parliamentary questioning and control in defence matters, in particular during armed conflicts. This was true, in particular, during the Kosovo conflict.[49] The situation is similar in Germany and Italy. In France and Spain, on the other hand, the respective parliaments and their committees typically act in a rather restrained fashion. The Kosovo crisis, however, seems to have produced higher parliamentary activities in these countries as well.

[49] *Fourth Report of the Foreign Affairs Committee*, Session 1999–2000, Kosovo (23 May 2000, HC 28-I); Defence Committee, *The Lessons of Kosovo* (2000).

bb. Censure

In all states under review, the parliaments have the right to censure the government. Censure of the government can take the mild form of the passing of critical resolutions but also the strong form of a vote of no-confidence. In Denmark, Italy, the Netherlands, and Poland, the responsibility of the Government is not merely collective; individual ministers can also be made the subject of a vote of no-confidence.

cc. Budget

In all states under review, the respective parliaments possess the general power to decide on the budget. Parliaments can thereby exercise control over the structural development of the military. In Germany, a constitutional provision stipulates that the budget must specifically determine the structure and the future development of the armed forces (Article 87a (1) (2)). It is perhaps also noteworthy that in Spain the government and the military establishment successfully resisted parliamentary control of the military budget until about the middle of the eighties.

dd. Power to Legislate

In all states under review, the parliament possesses the power to legislate. This power, however, can be of a different scope. In most states the parliament has, in principle, the power to legislate all matters it deems fit, including the military. This is true for the parliamentary monarchies (Belgium, Denmark, Luxembourg, the Netherlands, Spain and the United Kingdom) as well as for Germany, Italy and Poland. In France, on the other hand, Articles 34 and 37 of the Constitution provide for an exhaustive catalogue of issues upon which the Parliament may and must legislate (*domaine de la loi*). The enactment of all other general rules in defence matters is left to the executive. Concerning the armed forces, Article 34 of the French Constitution provides that Parliament "shall determine the rules concerning the obligations imposed for the purposes of national defence upon citizens in respect of their person and their property, the fundamental guarantees granted to civil and military personnel employed by the State, statutes shall also determine the fundamental principles of the general organisation of national defence". It appears that in practice the activities of the French Parliament in the field of military law do not even go as far as provided by the Constitution.

The general power of the parliament to legislate is complemented in some states by constitutional duties to legislate. In Belgium, the legislature must,