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National parliamentary scrutiny of intervention abroad by armed forces
engaged in international missions: the current position in law

REPORT

submitted on behalf of the Committee for Parliamentary and Public Relations
by Mrs Troncho, Rapporteur

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TABLE OF CONTENTS

RESOLUTION 108

on national parliamentary scrutiny of intervention abroad by armed forces engaged in international missions: the current position in law

EXPLANATORY MEMORANDUM

submitted by Mrs Troncho, Rapporteur

- I. Introduction
 1. International military missions
 2. The European security system
 3. Existing arrangements for parliamentary scrutiny
 4. Legal problems
- II. The position in law in European countries
 1. Germany
 2. Belgium
 3. Denmark
 4. Spain
 5. Finland
 6. France
 7. Greece
 8. Italy
 9. Luxembourg
 10. Netherlands
 11. Portugal
 12. United Kingdom
 13. Sweden
- III. The role of Parliament in defining participation in the war on international terrorism
- IV. Conclusions

¹ Adopted unanimously by the Committee on 12 November 2001.

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N.B. *The names of those taking part in the vote are printed in italics.*

RESOLUTION 108¹

on national parliamentary scrutiny of intervention abroad by armed forces engaged in international missions: the current position in law

The Assembly,

- (i) Noting the increased frequency with which national military contingents are deployed abroad in the context of international missions;
- (ii) Noting that often the most important information is broadcast in the media and the fact that the pressure of public opinion makes itself felt directly rather than through political intermediaries means that parliaments are being sidelined;
- (iii) Recalling that the European Union has taken over responsibility for the Petersberg missions without the Community institutions having developed suitable plans for democratic scrutiny;
- (iv) Recalling that national defence, including management of the armed forces, falls within each European country's national area of responsibility;
- (v) Aware of the debate going on in several parliamentary assemblies on the search for a procedure, compatible with the principle of the separation of powers, that will allow parliaments to formulate political guidelines for government decisions regarding the deployment of armed forces abroad,

INVITES PARLIAMENTS OF MEMBER COUNTRIES

1. To reflect on the fact that the democratic scrutiny they are supposed to exercise over government decisions on the use of armed forces for international missions is not being adequately provided;
2. To compare the current initiatives and debates going on in several parliaments in Europe and the legislative and procedural solutions being put forward;
3. As necessary, to draft legislation or statutory amendments that make it possible to institute regular procedures for consulting and informing Parliament that cannot be circumvented by the executive under pressure of political events;
4. Support initiatives of international assemblies calculated to strengthen the dissemination of information among parliamentarians from a number of countries and a comparison of ideas, in order to create a common basis for democratic scrutiny attuned to the new reality of the European Security and Defence Policy.

¹ Adopted unanimously and without amendment by the Assembly on 4 December 2001 (ninth sitting).

EXPLANATORY MEMORANDUM
submitted by Mrs Troncho, Rapporteur

I. Introduction

1. International military missions

1. The aim of the present report is to present a round-up of the position in law as regards military intervention abroad undertaken in the framework of international missions and to draw attention both to the legislative and procedural arrangements enabling parliaments to provide effective scrutiny of such intervention and to the thinking behind the various reforms to that end in progress in the various countries of Europe.

2. In point of fact, until after the second world war, most states made no provision for any form of collective military intervention other than in the event of war. Examples of joint intervention under the aegis of international organisations are of relatively recent origin. Thus constitutional charters continue to lay down the procedures that apply in the event of war being declared, for which parliamentary approval must be sought, often by qualified majority voting. Fortunately, war is a state that no longer obtains in present-day Europe. However, alliances and international organisations now provide for the collective use of armed force in the event of a threat to world stability, assuming the responsibilities of an international police force. Thus there is now a firm commitment to provision of this kind, embodied in international treaties, signed and ratified by the states parties.

3. The use of armed force at international level is permissible today on one ground only, to protect world security, as set out in the United Nations Charter. Member states have conferred on the UN Security Council the exclusive responsibility of determining whether such intervention should take place, binding themselves to providing the necessary economic and technical wherewithal. Until the Berlin Wall came down, there were few instances where this applied, owing to individual member states' right of veto. However, with the ensuing regional crises that emerged along with the new world order a different situation arose. The formation of the United Nations "Blue Helmet" forces with international policing tasks but no offensive capability, thus representing a watered-down version of a true international army, enabled mediation to take place in areas of crisis, this frequently being inadequate to cope with the demands of the situation in question.

4. During the second half of the 20th century the Security Council, carrying out its own assessments, identified a series of threats to peace and world order, giving international and regional organisations alike the authority to intervene militarily to undertake peacekeeping or peacemaking tasks. The military means introduced were for the most part the use of blue helmeted troops for international police actions. In situations where military combat action is required, the Security Council has called on the forces of NATO. It has also asked particular States or coalition forces to intervene on its behalf.

2. The European security system

5. Following the changes that occurred in Europe post 1990, defence of the universal values of international peace and stability became part and parcel of the European project, so that European countries, by policing their own region, could preserve the stability of their continent. Following a number of conferences and summits, WEU member states announced at Petersberg, in 1992, that they were prepared to support conflict prevention and crisis management in Europe, in particular OSCE and UN Security Council peacekeeping actions, by developing their operational capabilities. For the first time, European military action was envisaged in highly specific circumstances, as set out in the Petersberg Declaration, namely that "military units of WEU member states, acting under the authority of WEU, could be employed for:

- humanitarian and rescue tasks;
- peacekeeping tasks;
- tasks of combat forces in crisis management, including peacemaking".

6. The intention was not, in the initial stages, to create a true European army but for each country to make available its resources. The Petersberg Declaration provided for individual states to contribute to joint operations as follows: “Decisions to use military units answerable to WEU will be taken by the WEU Council in accordance with the provisions of the United Nations Charter. Participation in specific operations will remain a sovereign decision of member states in accordance with national constitutions”. The Petersberg missions were subsequently included in the Amsterdam Treaty thus constituting one of the components of the European Union’s Common Foreign and Security Policy.

7. At Nice, in December 2000, the European Council finally decided to transfer the conduct of the Petersberg missions from WEU to the EU. Pending the setting up of a permanent institutional structure, a Political and Security Committee has been set up at the intergovernmental level with somewhat limited power of decision in terms of the administration of Petersberg operations. This Committee is currently working under cover of secrecy, out of the public eye and without any kind of parliamentary supervision.

8. The relevant texts nevertheless make reference to decision-making regarding the involvement of armed forces in Petersberg missions as falling within the purview of national governments and subject to domestic arrangements governing democratic debate. However, it quickly became apparent that the establishment of a Common Foreign and Security Policy, straddling decision-making at national level and compliance with international undertakings – involving the requirement for confidentiality in negotiations and the need for rapid action, not to mention the technicality of the subject-matter – presented difficulties in terms of the use of the general run of parliamentary procedure for scrutinising government activity.

3. Existing arrangements for parliamentary scrutiny

9. While international military forces were not involved in combat action, parliaments frequently left the day-to-day administration of such matters to the defence ministers, who, each in their own country, dealt with the arrangements for scrutiny of commitments entered into, under the terms of the relevant international treaties. Problems began to arise with the public response to the build-up of crises in the world: in the Middle East, the Balkans and Africa, and it became clear that decisions regarding collective intervention, notwithstanding their having been approved by international assemblies or their specialist bodies, suffered from a lack of democratic accountability and parliamentary oversight, which became increasingly obvious as the numbers of such interventions increased.

10. Given the political nature of each particular armed intervention, countries not represented on the UN Security Council found themselves committed to missions which they did not always feel were relevant to their national interests. This in turn fuelled the feeling among the public at large of being under an obligation to send troops and assets in compliance with international treaties to which their countries were signatories, and of thus being subject to decisions taken elsewhere. A gulf opened up between sections of the electorate and the political establishment, whose leaders, those of the majority especially, found their hands tied by commitments undertaken at international level.

11. Nowadays, one should not underestimate the part played by the media in international affairs, over and above the political supervision undertaken by parliaments. There can be strong public reaction to government decisions and consequently a risk of the parliamentary scrutiny stage, hampered by slower, less visible procedures, being completely overtaken. Live broadcasts feature commentary and interviews where ministers talk readily to journalists who have now publicly appropriated the functions of opinion formers and “whips” that historically have been the prerogative and *raison d’être* of democratic parliamentary systems – thus relegating the elected representatives of the people to the sidelines.

12. In the face of such developments, legislative assemblies have adopted empirical solutions so as to be able to carry out their functions. Depending on the case, governments have, so political sources inform us, adopted a strategy of informing and consulting Parliament, although once decisions are taken it is often difficult to go back on them. In almost all instances, political debate has taken place under pressure of events and public opinion in the glare of media attention. It should be said that at times governments too appear to be overtaken by the speed of decisions taken regarding

international interventions, news of which first breaks in the press, and have in turn informed parliaments only once the initial stages of an action were already underway, adding little by way of information to televised newscasts.

13. The most frequently used procedure has been information debates in Parliament or in the relevant special committees on foreign policy and defence. A political choice is often involved here since debates cannot always be wound up with a vote on a text (motion or recommendation) as this is not necessarily provided for under certain types of procedure, particularly question and answer sessions. Once military action is underway, however, governments usually do report back on the successive stages. Regular information briefings take place on events as they unfold. In point of fact, it is both more practical and achievable, given the upset caused by interventions of this type, for Parliament to have oversight of an operation that has already got off the ground than to influence the decision to intervene in the first place. At this point it has been possible to introduce a degree of political influence over military intervention although there is no question of influencing strategy in the longer or shorter term.

14. As to how nations fund their involvement, the arrangements are different for each. If a special budget is involved this is dealt with under *ad hoc* legislation or by an amendment to the finance bill which has to be approved by Parliament. In this way, parliamentary scrutiny acquires significance as voting on the budget often has a political impact on the choice and purpose of the intervention. In other cases, defence budgets already cover the expenditure required for any missions to be undertaken though international bodies and the matter can only be discussed at the time of the annual debate on the budget.

15. The international assemblies within the various organisations have played a not inconsiderable part during the unfolding of such external operations. Thus the UN, NATO, WEU and OSCE Assemblies first and foremost instituted a parliamentary debate. Although these assemblies cannot directly influence national governments, they provide a forum for the dissemination of information and multilateral interplay of ideas, and within that framework, a number of documents are approved for transmission to member states. Obviously this is no substitute for scrutiny by national parliaments, but it does facilitate the free flow of ideas and provides a framework of reference for parliamentarians who are otherwise left out on a limb.

4. Legal problems

16. Political relations aside, there is an underlying legal problem. Once an international treaty has been signed which provides for the use of armed force in particular instances and in accordance with specific internal decision-making procedures, is it then possible to take different decisions or modify those taken collectively that countries may act upon? International treaties have the same force in their signatory states as domestic law and can only be amended by denunciation of the text or in line with reservations entered at the time of signature. Within this framework, what latitude do governments and national parliaments have in the face of an international decision to intervene militarily? Treaties are directly enforceable. It would be unthinkable for example for the 180 member states of the United Nations to discuss further what had already been decided in the General Assembly or the Security Council in accordance with the agreed procedures. When it comes to taking decisions the buck has to stop somewhere – logically if not legally. The force of this argument is such that many governments hide behind the dictum “*pacta sunt servanda*” in order to circumvent any intervention by Parliament in the supervision of troops deployed abroad. However, times have changed and shifts in the community’s perception of the use of armed force, and its psychological impact, mean that today it is no longer possible to gain acceptance by the public at large of decisions, binding on nations, that are taken at several removes, without their parliaments having a say in the matter. Channels of information, and criticism, are to such a degree open that account has to be taken of public opinion both at home and among the international community.

17. There is no doubt that as far as military intervention goes, striking a balance between the various demands is an even more difficult and sensitive exercise, since the initial decision to intervene needs to be followed up by asset deployment of an effectiveness not open to challenge, rapid implementation and close conjunction of decision-making and command. Parliaments are severely

handicapped by their normal methods of scrutiny since these are of their nature too long drawn out, not backed by hard, reliable information, and their decisions are hedged about by the need to comply with signed agreements which leave little scope for any rethink.

II. The position in law in European countries

18. Before proceeding to analyse each individual position on the basis of the response to a questionnaire sent to the parliaments of WEU and EU member countries, one must first situate each of those countries in the context of its constitutional history. Hence countries with a monarchy traditionally accord a lesser role to parliamentary scrutiny over foreign and defence policy, which is the prerogative of the sovereign and his/her appointed foreign and defence ministers. The traditions of the colonial powers also admit of a variant, as these are countries which, having in the past waged many military campaigns on foreign soil, are invariably prepared to intervene in other countries' affairs and have retained the necessary military structures to do so. They can also rely on the support of a public opinion among which there is more ready acceptance of this type of operation.

19. Moreover, the newer democracies have tended to react to the excesses that drew our own part of the world into two world wars by giving Parliament significant powers of scrutiny over the use of the armed forces. Governments' experience of having recourse to arms has led to an often major realignment of powers. Lastly, it is worth highlighting the case of the numerous "neutral" nations, which have no real armed forces and confer a key role on Parliament in respect of a very limited contribution to international operations. Last but not least, there are the smaller countries who fear being dragged into missions in defence of the interests of larger powers, where they themselves have none. Below are the results of this inquiry.

1. Germany

20. The Basic Law did not provide for the formation of a German army until 1969, when an amendment was brought in to Article 115:

(1) The determination that federal territory is being attacked by armed force or that such an attack is directly imminent (state of Defence) shall be made by the Bundestag with the consent of the Bundesrat. Such determination shall be made at the request of the Federal Government and shall require a two-thirds majority of the votes cast, which shall include at least the majority of the members of the Bundestag.

(2) Where the situation imperatively calls for immediate action and where insurmountable obstacles prevent the timely assembly of the Bundestag, or where there is no quorum in the Bundestag, the Joint Committee shall make this determination with a two-thirds majority of the votes cast, which shall include at least the majority of its members ...

(5) Where the determination of the existence of a state of Defence has been promulgated and where the federal territory is being attacked by armed force, the Federal President may, with the consent of the Bundestag, issue declarations under international law regarding the existence of such state of Defence. Where the conditions mentioned in paragraph (2) of this Article apply, the Joint Committee shall act in substitution for the Bundestag."

21. The involvement of Bundeswehr forces in the peacekeeping operations of various international missions has, however, given rise to confusion, until legally approved in a decision handed down by the Constitutional Court on 12 July 1994. Basing itself on Article 24.2 of the Basic Law, which provides that the Federation may belong to a reciprocal collective security system for peacekeeping, the Court issued a settled legal opinion. As far as the procedural aspect was concerned, it would be possible to apply, by analogy, the provisions of Article 115, which deals with the recourse to armed forces under the authority of the Ministry of Defence, answerable to Parliament under the arrangements set out therein.

22. The parliamentary arrangements feature a Defence Committee functioning along somewhat unusual lines. It possesses special powers enabling it to consider any defence-related matter, of its own motion, and under such circumstance turn itself into a committee of inquiry. It is able to meet *in*

camera. Moreover, in the Bundestag, there is a parliamentary commissioner for the armed forces, the only occurrence of such an appointment in Western institutions. S/he is a kind of mediator elected for a five-year term from among the members of the Defence Committee, whose job it is to reconcile democratic scrutiny with armed forces requirements, particularly in regard to compliance with the civic principles that must govern military action. The Commissioner submits an annual report to the Committee which may then make recommendations to the Minister.

23. During the Kosovo crisis, Chancellor Kohl tabled a motion in Parliament on the involvement of German armed forces, the detail of which was clearly non-negotiable. It meant voting for or against the Government's foreign policy, in the knowledge that a "no" vote would call NATO membership into question. This in turn raised questions over the nature of parliamentary intervention. Discussions are currently in progress on codification of parliamentary power.

24. More recently, during the intervention in FYROM in August 2001, other objections arose and the Government had difficulty in carrying the day over the involvement of German troops in the NATO operation "Essential Harvest". The debate was then widened to institutional aspects and the former Chairman of the CDU, Wolfgang Schäuble, and one of the party's foreign affairs experts, Karl Lamers, proposed embarking on a constitutional reform to reduce Parliament's role in military missions abroad. Chancellor Schröder felt that there was some interest in this idea, which ran completely counter to the previous position, but the SPD was largely against it and the Liberals were clearly opposed to any reform in that direction, feeling that Parliament should have the last word. There was, however, some consensus on the usefulness of streamlining procedures.

25. For the time being then, Germany – together with the Netherlands – is the only country in the European Union where Parliament is virtually in a position to take decisions, jointly with the executive, as regards the use of the armed forces beyond the country's borders. This power has meant that Germany, where memories of both the Third Reich and the cold war serve to fuel strong pacifist tendencies, is rent by highly charged disputes over Atlantic Alliance operations, a situation which, paradoxically, has led the leadership to adopt a more realistic solution, in order to dispel the uncertainties that invariably surround German involvement alongside the Allies. The leadership is in fact influenced both by the fact that it is bound to comply with its undertakings by virtue of the treaties it has entered into and by the feeling, common to all political factions, that the country should preferably maintain a non-aligned stance towards missions which to an extent smack of Western imperialism.

2. Belgium

26. Article 167 of the Constitution stipulates that "The King manages international relations (...) commands the armed forces, and determines the state of war and the cessation of hostilities. He notifies the Chambers as soon as State interests and security permit and he adds those messages deemed appropriate". The King, then, is responsible for the armed forces and for commanding operations, but his action here, as in other fields, is subject to ministerial approval.

27. Articles 182 and 183 stipulate that army recruitment methods are determined by law and that military quotas are voted annually by the Chamber of Representatives.

28. Since national defence is a matter for the executive, parliamentary scrutiny is exercised retrospectively by the two Chambers. But the final decision is taken by the Chamber of Representatives alone. Parliamentary scrutiny of national defence is exercised in the same way as in other areas of government activity (through oral and written questions, inquiries, hearings and debates in plenary or committee).

29. The Government submits an annual report to Parliament on Belgium's exports of armaments for military purposes. An *ad hoc* parliamentary committee on military procurements has some degree of control over the procurement procedures used by the Ministry of Defence.

30. Parliament is not required to authorise the deployment of Belgian troops abroad. Ten Belgian soldiers were killed during the operations in Rwanda, triggering a debate on the way in which the mission was being conducted. Given the reluctant stance taken by the Government, a petition with 200 000 signatures was filed. This prompted the setting-up of a parliamentary commission of enquiry

which, in its final report, stressed the need for an institutional framework in which to monitor such operations. This led finally to the creation of a special Senate committee for the purpose of monitoring operations abroad, the members of which and their colleagues are bound by a strict oath of secrecy. It should be noted that Parliament has set up a Federal European Affairs Consultative Committee with oversight of decisions concerning Petersberg operations, which now come under the responsibility of the European Union.

31. The budgetary adjustments required for the funding of operations abroad also often call for substantive debates on Belgium's participation in certain international missions.

3. Denmark

32. In pursuance of paragraph 19 (1) of the Danish Constitutional Act, the Government acts on behalf of the Realm in international affairs. The general rule is thus that the Government is responsible for Danish foreign policy. According to paragraph 19 (3) of the Danish Constitutional Act, the Danish Parliament appoints a Foreign Policy Committee from among its members, which the Government consults before making any decision of major importance to foreign policy. The Act on the Foreign Policy Committee lays down the further rules governing that Committee. With regard to foreign policy, the Government is, moreover, subject to the same general and specific parliamentary control and possible sanctions as in all other areas. However, the Constitutional Act and the Danish Act on the Foreign Policy Committee give the elected assembly a wide range of formal ways in which to influence foreign policy. Paragraph 19 (1) of the Constitutional Act stipulates that the Government's competence to pursue foreign policy is subject to the restriction that in certain cases the consent of the Danish Parliament is required. According to paragraph 19 (2) of the Constitutional Act such consent is necessary when the Government intends to use military force against any foreign state. The wording of this provision is so general that it demands a practical evaluation of the content of the duty in question in relation to the prevailing domestic and foreign policy situation, and therefore allows for changes in practice to the extent that developments make this necessary. A rule of thumb at present might be that the Constitution and current constitutional and political practice require the consent of the Danish Parliament prior to Denmark's making any contribution to an international military operation, be it peacekeeping or peace enforcement.

33. Because of the Danish opt-out on defence, Denmark cannot contribute to an EU-led military operation. It is important to stress that Denmark has opted out of defence within the European Union in accordance with Protocol No 5 to the Treaty of Amsterdam. Consequently, as far as measures adopted by the Council under articles 13 (1) and 17 of the Treaty on the European Union are concerned, Denmark does not participate in the elaboration and implementation of decisions and actions of the Union which have defence implications, but will not prevent the development of closer cooperation between member states in this area. Denmark has therefore no say in the adoption of such measures and is not obliged to contribute towards operational expenditure incurred as a result. The development of the ESDP in the EU does not change the decision-making process in the Danish Parliament on foreign and security policy issues. It also means that there have been no changes in the Danish Parliament's role dealing with questions in this specific area.

34. The effect of the duty upon it to consult with the Foreign Affairs Committee is to place the Government (usually the Prime Minister, the Minister for Foreign Affairs and/or the Minister for Defence) under an obligation to attend committee meetings, listen to comments from the members and answer any questions. The Government is not bound by the views of the Foreign Affairs Committee but the Committee may give an indication of whether the Government's foreign policy has the support of a majority of the members of the Danish Parliament. The point of the debate in committee is to ensure that there is a parliamentary discussion before the debate is concluded and before the matter, as necessary, goes before the Danish Parliament to obtain its consent or a parliamentary resolution is passed. In addition to the duty of consultation referred to above, the Act on the Foreign Policy Committee stipulates that the Committee must receive information from the Government on foreign policy matters. This duty to provide information is aimed, in particular, at ensuring that the Committee is able to advise the Government on a proper basis of information.

35. In practice the Government briefs the Committee by providing it with oral (and written) information (usually through the Prime Minister, the Minister for Foreign Affairs or the Minister for Defence) regarding current foreign policy concerns and the view the Government intends to take for instance at international and bilateral meetings or regarding requests from the UN or NATO for contributions of forces to international military operations. In addition, the Committee is subsequently briefed orally on the progress of such meetings, or on developments in the area where Denmark is to deploy troops as part of an international military operation. It is important to be aware of the fact that Denmark has predominantly had minority (coalition) governments. To remain in power, therefore, the Government must constantly pursue a policy, the main lines of which have the support of the Danish Parliament. In this way the Foreign Policy Committee has a preventive, and thus more indirect, influence on the responsibilities shouldered by the Government under its foreign policy remit. Against this background, the Danish Parliament is always involved when the Government considers Denmark's possible contribution to an international military operation. Depending on the specific issue, consultation with the Foreign Policy Committee may be sufficient. However, as a general rule, the Government consults with the Committee prior to bringing a resolution before Parliament for its approval. As mentioned earlier, the Government is not bound by the views of the Committee, but the Committee may give an indication of whether the Government's foreign policy has support among a majority of the members of the Parliament – in other words; whether or not Parliament is likely to consent to Denmark's contributing troops to an international (UN or NATO) operation somewhere in the world.

36. This decision-making process was also the one used as the basis for the Danish contribution to the UN operation in Kosovo in 1998. The Government consulted the Foreign Policy Committee and afterwards asked Parliament for its consent. Parliament passed a resolution on the subject entitled "Danish contribution to an international force in Kosovo". The resolution was subject – like all other parliamentary resolutions – to two readings in Parliament. In the interval, the resolution was referred to the Defence Committee, which issued a report providing the basis for the second reading and vote.

4. Spain

37. Since Spain first started participating in peacekeeping and humanitarian missions in 1989, Spanish troops have been involved in a wide spectrum of missions (peacekeeping and peace-building operations, post-conflict reconstruction, humanitarian aid) entailing a whole range of tasks such as election monitoring, demobilisation and disarmament of paramilitary forces, ceasefire monitoring, provision of buffer forces, technical assistance for the maintenance of law and order, organisation of refugee camps, distribution and escort of humanitarian aid and supervision of protected areas.

38. Spain upholds its commitment to making a significant contribution to international peace and security as set out in national defence guideline 1/2000 (Madrid, 1 December 2000).

39. On 11 June 1999, to help enhance the effectiveness of the United Nations, the Spanish Government adopted a decision authorising a Spanish contribution to the UN system of standby forces for peacekeeping operations. Spain has negotiated heads of agreement with the UN setting out the terms of its possible involvement in UN operations.

40. Article 63 of the Constitution reads as follows: "It is incumbent on the King, after authorisation by the Parliament, to declare war and make peace". As Article 64 provides that all acts by the King shall be countersigned by the Prime Minister, it can fairly be stated that this responsibility rests with the Head of Government who "directs domestic and foreign policy, civil and military administration, and the defence of the State"(Article 97). In the event of war the consent of the Cortes Generales would therefore be required but there is still a legislative vacuum since the internal rules of the two Chambers sitting together as the Cortes Generales have not yet been drawn up and the procedure is still to be defined.

41. The case of military operations in the framework of an international mission is not explicitly provided for by law but forms part of the foreign policy responsibilities of Government. First of all, the Council of Ministers must take the formal decision (*acuerdo*) authorising the participation of Spanish military units in humanitarian and peacekeeping missions. Those decisions are normally taken

on the basis of a proposal from the defence and foreign affairs ministries. They specify the number of troops and types of equipment to be mobilised, as well as the initial duration of Spain's involvement. The Defence Ministry then has the task of defining precisely which units and equipment are to be deployed.

42. In fact the Government has always acted on its own initiative, but its decisions are invariably accompanied by a parliamentary debate, almost always after the event, without the adoption of instruments binding on the Government in regard to the measures adopted. Ministers have frequently addressed the foreign affairs and defence committees and several plenary sittings, in the form of information briefings and general policy debates, have been held during all the crises that have occurred in recent years.

5. Finland

43. Under the Finnish Constitution the President, with the consent of Parliament, declares war or makes peace.

44. The country's involvement in international peacekeeping missions is based on a special law. Missions have to be mandated by the UN or the OSCE. The President takes a decision on the basis of a proposal from the Government after prior consultation with Parliament's Foreign Affairs Committee. If it is anticipated that the mission requires more forces than normally deemed necessary for peacekeeping missions, the full Parliament has to be consulted on the basis of a report from the Government. Missions are funded from the normal state budget, or as necessary through a supplementary budget.

45. During the Kosovo crisis, Parliament was consulted through a report submitted to it by Government.

6. France

46. In France, cooperation between the executive and legislative powers over defence is organised so as to accommodate the urgency and, as necessary, secrecy required in the management of international crises as well as the democratic character of decision-making on essentially serious issues, in other words keeping parliamentary representatives informed about and seeking their approval of actions agreed or being planned. Given the origins of the 1958 Constitution, the balance tends rather to be weighted against parliamentary scrutiny, since General de Gaulle deeply resented the powerlessness of the executive during the years of mounting crisis leading up to the start of the 1939-45 war.

47. Article 35 of the Constitution provides that: "A declaration of war shall be authorised by Parliament". This means that that such declaration is approved by Parliament according to the usual procedures (simple majority voting).

48. Article 36 deals with the declaration of a state of emergency in the event of imminent danger or resulting from serious threat to public order either in all or part of metropolitan France or the Overseas Départements. It could, for example, be invoked in the event of major terrorist threat. It is decreed in the Council of Ministers (the approval of the President and the Government is required) and its extension beyond 12 days may be authorised only by Parliament.

49. Article 16 reflects most closely the thinking of General de Gaulle regarding possible threats to the Nation:

"Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted, the President of the Republic shall take the measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the assemblies and the Constitutional Council.

He shall inform the Nation of these measures in a message.

The measures must stem from the desire to provide the constitutional public authorities, in the shortest possible time, with the means to carry out their duties. The Constitutional Council shall be consulted with regard to such measures.

Parliament shall convene as of right.

The National Assembly shall not be dissolved during the exercise of the emergency powers.”

50. It is clear that although the Constitutional Council is consulted, Parliament, while admittedly in full session for the duration of the state of emergency, still has no power of scrutiny over either the decision to invoke this article nor of any action taken under it. Government approval, in the form of the Prime Minister’s countersignature, is not even required. This is therefore the discretionary power on the part of the Head of State that was missing from the earlier constitutions to enable the legitimate Government to deal with the gravest of threats.

51. Lastly Article 53, governing France’s international commitments, provides that they are to be submitted to Parliament which authorises their ratification by the President. Unless otherwise specified, this procedure should constitute the rule, including for military agreements involving engagement of troops in external operations.

52. It would appear that the practice of every government since 1958, including those not sympathetic to the Gaullist tradition, has not been such as to present a challenge to the very weak form of scrutiny exercised by Parliament over the security and defence policy of the French administration.

53. Thus Mr François Lamy (a Socialist Member of Parliament) expounds the view in a recently published² information report:

“Deployment of French forces abroad occurs in the majority of cases without any form of parliamentary scrutiny being exercised.

While France’s involvement in the Gulf war in 1991 was a result of an undertaking on the responsibility of the Government, this form of proceeding was an isolated exception. Operations in former Yugoslavia (UNPROFOR, IFOR then SFOR), in Albania (Alba in spring 1997) and in Kosovo (“Allied Force” and KFOR since 1999) were instigated, executed and extended without Parliament having any say in the decisions.

Under the Constitution of 4 October 1958, there is no procedure for parliamentary authorisation of forces outside France when such forces are not engaged in war operations. Indeed the Constitution limits the area over which Parliament exercises scrutiny over the deployment of our forces in external operations, since this invariably occurs in situations where there is no declaration of war.

Consequently, consultation of Parliament as regards military intervention outside national territory for the time being is dependent, formally, on an initiative by the Prime Minister, who can, under the terms of Article 49, first indent, of the Constitution decide to make “a statement of its general policy an issue of its responsibility before the National Assembly”. He may also ask the Senate to approve such a statement (Article 49, fourth indent). This was the procedure followed by Mr Michel Rocard in regard to France’s contribution to the multinational coalition mandated by the United Nations to re-establish Kuwaiti sovereignty following the invasion by Iraq in August 1990.

The Prime Minister may also make a declaration before the National Assembly, without a vote being taken subsequently (Article 132 of the Rules of the National Assembly). Thus on 26 March 1999, two days after the bombings began on the Federal Republic of Yugoslavia (in which France played a part), Mr Jospin availed himself of that power for the first time on the subject of Kosovo. There was no voting in the National Assembly even when French forces’ deployment in theatre was by definition a case of armed combat.

² “Contrôler les opérations extérieures”, Rapport 2237, Onzième législature, 8 March 2000.

More generally, it cannot be denied that Parliament is informed of the numbers and nature of troops deployed abroad. However such information is normally given after the event (in particular at the time of voting amendments to the budget) and piecemeal (hearing of the Defence Minister by the members of the relevant committee or in concise replies to oral or written questions).

Furthermore, while the merits of international debate on the various operations undertaken in different parts of the world are acknowledged by the vast majority of States, back home it is not normal for France to be conducting a number of military actions abroad without Parliament having a say in the matter.

Parliament is not even always aware of the agreements and treaties under which such operations are conducted.

Article 53 of the 1958 Constitution does not necessarily require authorisation by Parliament of the ratification or approval of treaties and international defence or military cooperation agreements. In practice, the Government submits them to Parliament whenever, for example, they are of major importance to the nation's defence, such as, for example, the protocols providing for NATO enlargement. However Parliament is not always informed of the content of those that do not come before it, which is all the more unfortunate as such agreements or treaties are liable to involve deployment of forces in a foreign theatre without Parliament's being in a position to assess the likely repercussions."

54. It should be noted that no vote was taken in Parliament to authorise France's contribution to the intervention or buffer forces in Kosovo or its more recent involvement in international disarmament operations in Macedonia, nor did the Government give Parliament any formal commitment of responsibility. However, if French military assets were to be used for an intervention, Parliament would be consulted and elected members would be regularly informed of the progress of operations as was the case throughout the entire Kosovo conflict.

7. Greece

55. Under Article 82 of the Greek Constitution, the Government is in charge of determining and implementing general policy in compliance with the country's laws and Constitution. According to Article 3, paragraph 10 of Law 2292/95, the Council of Ministers has competence, in matters of national defence, for the decision to deploy the armed forces in the framework of Greece's obligations under international agreements.

56. The Defence Minister is in charge of implementing such decisions involving the participation of Greek military personnel or units in operations pursuant to those international obligations, as well as of defining the priorities and arrangements for such missions. The Major General of the Defence Staff is responsible during peacetime for managing operations abroad and for the deployment and monitoring of peacekeeping missions approved by the Government.

57. Missions are funded from the State's general budget, which contains a heading for defence spending and is debated and voted each year by Parliament in accordance with the regular budgetary procedures.

8. Italy

58. Regarding the constitutional basis for participation in military operations abroad, Article 10 of the Constitution stipulates that, "Italy's legal system shall conform with the generally recognised principles of international law", while Article 11 states that, "Italy shall repudiate war as (...) a means for settling international disputes", but that "it shall promote and encourage international organisations" whose aim is to "ensure peace and justice between nations". Furthermore, Article 78 stipulates that, "The Chambers shall resolve upon the state of war and confer the necessary powers on the Government". Article 1 of the Law of 18 February 1997, No 25 provides that "The Minister for Defence ... shall act upon decisions in the defence and security sphere adopted by the Government, subject to scrutiny by the High Council for Defence, and approved by Parliament".

59. This set of provisions provides the framework in which the various institutions of the Republic exercise their powers but in practical terms there is no formalised procedure for precise application of the law. The Defence Committee and the Chamber of Deputies, aware that it would be appropriate to specify the arrangements whereby Parliament can take on the decision-making role that it rightly should have in relation to the deployment of armed forces, especially in the case of international operations, on 16 January unanimously approved a resolution setting forth the decision-making process to be followed:

Resolution on deployment of military contingents abroad (7-01007)

“The Committee commits the Government to ensure compliance with the following procedures:

(...)

3. The Government deliberates on any involvement in missions abroad and reports immediately to Parliament.

4. Parliament – both chambers or one only, or the relevant parliamentary committees – approves, on the basis of government communications on the unfolding of the crisis and any initiatives taken – the decisions taken, within a time limit compatible with the international undertakings given.

5. Once Parliament has taken its stance, the Government may either (a) enact by decree the accompanying financial arrangements for the approved measures or (b) lay draft legislation with the same content before Parliament.

6. The Minister for Defence carries out the decisions adopted by Government by giving instructions to the Joint Chief of Staff.

60. Notwithstanding the explicit intention underlying this Resolution, the way things work is somewhat less clear and well-defined, especially in regard to the juncture at which the first communication is delivered to Parliament. It is true that in practice Government automatically consults Parliament. Since any military operation requires funding, Government is obliged to submit to both Chambers a decree (law which is directly applicable, approved retrospectively under the legislative procedures, in which the limits and framework of any national involvement are laid down) defining the scope and nature of the Italian contribution. This leads to a substantive debate allowing Parliament to exercise scrutiny over the choice and scope of the mission, as well as giving it a say in the mission objectives and practical arrangements. The Government keeps both Chambers informed of events, very often by reporting to joint meetings of their foreign affairs and defence committees. Although no formal provision for this system is made in the bicameral system, it is becoming increasingly widespread because it saves time. It does not of course enable a document to be voted on, but is more akin to a lecture followed by a debate. For a motion or resolution to be voted, they must be submitted to each of the Chambers.

61. For the recent military mission in the FYROM, this lengthy route to political dialogue and scrutiny over the general aim of Italy’s involvement in “Essential Harvest” was the one followed. In August the Foreign Affairs and Defence Committees of both Chambers meeting together, discussed the broad outlines of the NATO mission, without being able to vote. It was not until the end of September that the Government laid the decree authorising Italy’s involvement before Parliament. The Rapporteur, as is often the case, analysed the political content of Italy’s contribution and the part it would play in the Western alliances, expressing regret over the delay to the vote in Parliament which did not take place until the mission was virtually up and running.

9. Luxembourg

62. According to Article 37 of the Constitution of the Grand Duchy of Luxembourg, “the Grand Duke commands the armed force; he declares war and the cessation of hostilities after having been authorised by a vote in the Chamber taken under the conditions laid down in Article 114(5)”. According to Article 114, at least three quarters of the members must be present in the Chamber and at least two thirds must take part in the vote for a proposal to be adopted.

63. As regards the participation of the national armed forces in multinational missions abroad, the Government is authorised under the revised law of 27 July 1992 to make arrangements for Luxembourg to participate in peacekeeping operations under the auspices of international organisations of which it is a member. The decision to participate is taken by the Government meeting in Council, after having consulted the foreign affairs and defence committees of the Chamber of Deputies. Each peacekeeping mission requires the drafting of a “Grand Duchy regulation” with compulsory consultation of the Council of State and Conference of Presidents of the Chamber of Deputies, with a view to defining the implementing arrangements.

64. Participation in a peacekeeping mission may consist of financial contributions, contributions in kind, logistic support or the dispatching of civil contingents or units of the *Force publique*. The Government may decide to attach the Luxembourg contingents to those of another state or group of states. As far as the funding of missions is concerned, the ministers responsible must report regularly to the relevant committees on the cost of operations.

10. Netherlands

65. Article 96 of the Constitution contains the rules according to which the Kingdom of the Netherlands declares war. It reads: “A declaration that the Kingdom is in a state of war shall not be made without the prior approval of Parliament.” This provision does not apply to political decisions on deployment of Dutch military personnel for peace operations. Nor were the political decisions on Dutch participation in recent peace-enforcing operations such as “Desert Storm” in 1991 and “Allied Force” in 1999, taken in accordance with the procedure described in Article 96, as there was no declaration of war. It should be noted that declarations of war between states have in fact fallen into disuse since the Second World War.

66. From the end of the 1970s onwards, the House of Representatives requested the Government, in a number of motions, to notify it in good time of the deployment of Dutch military personnel on peace missions. In subsequent years, it became the practice for the Government to inform Parliament prior to deployment. This was formalised in July 2000 by the inclusion of a new article in the Constitution (Article 100): “The Government shall provide Parliament with information in advance on the posting or making available of the armed forces for the maintenance or promotion of the international legal order, including information on the posting or making available of the armed forces for the provision of humanitarian assistance in the case of armed conflict”. Although this provision of the Constitution does not constitute a formal right of assent, it does mean that Parliament has a substantive right of assent in practice. The Government would never post Dutch military personnel abroad without the assent of a (large) majority in Parliament.

67. The extra expenditure necessary for participation in an international peace mission is financed from a separate “peace operations” item in the annual international cooperation budget. This budget item and any interim increases in it must be approved by Parliament.

68. Extensive debates were held in the House of Representatives on the participation of Dutch military units in NATO’s “Allied Force” operation in 1999, both before and during the military operation. In October 1998, a large majority of the House of Representatives gave their assent to the possible deployment of NATO airpower against Serbia and the participation of the Dutch air force in this operation. The House of Representatives assented in June 1999 to the participation of Dutch military units in KFOR.

11. Portugal

69. Article 163(j) of the revised 1997 Constitution reads as follows:

“The Assembly of the Republic has the following powers in relation to other organs:

(...)

(j) To monitor, in accordance with the law and Standing Orders, the involvement of Portuguese military contingents abroad.”

In pursuance of this Article three pieces of draft legislation are currently before the Portuguese Parliament: Draft law No 61/VIII, submitted by the Portuguese Government, Draft law No 352/VIII, submitted by the Social Democratic Party and Draft Law No 379/VIII submitted by the People's party CDS-PP.

70. The three draft bills were submitted to the Defence Committee in February 2001 and are currently subject to simultaneous scrutiny by that Committee, which held a series of expert hearings in May.

71. One member, Mr Carlos Encarnação (PSD), (Rapporteur for N.61/VIII) noting the greater number of military engagements in connection with globalisation of security problems and the increase in actions to intervene on humanitarian grounds in many parts of the world in which Portuguese armed forces were involved, stated the problem in hard and fast terms: while the Portuguese Government was compelled to comply with international agreements entered into, there was no definition anywhere of either the choice of levels of engagement or the framework policy directives for such actions and up to now the government had confined itself to keeping the Assembly informed of the technical and budget decisions that had been taken. The intention of the drafters of the bill was to enact the legislative provisions made in Article 163 indent (j) of the Portuguese Constitution concerning the Assembly's powers (...) with the aim of engaging in serious advance public debate, leading to clear and rigorous scrutiny over Portuguese armed forces. Between the two extreme ends of the spectrum (mandatory consultation in advance and joint preparation on the part of the Assembly and the government and the government merely passing information to the Assembly after the event) there had to be a democratic golden mean (...).

“The Assembly and the government can only gain by the proposed arrangement. Under the present circumstances, open demonstration of the formation of the widest possible national consensus through serious public debate can be to the government's credit. It is incomprehensible that nowadays in like situations any government should feel it can dispense with this type of consensus.

72. Mr João Rebelo (CDS-PP), Rapporteur for another bill (379/VIII) spoke on the issue of scrutiny over external military missions. He noted the need for this aspect to reflect more closely the situation where more interventions were taking place under international agreements, “taking account of the European defence project which is currently taking shape, notwithstanding the difficulties, and requires all member states to prepare to face up to these new developments (...) at the same time responding to the requirement from civil society for information and transparency”. The bill proposes to “strengthen the role of the Assembly in the preparatory, decision-making and executive phases of the process of Portugal's engagement in international missions (...) by ensuring transparency and developing stronger links between the parliament and the wider public opinion”. It also takes account of the problem of documents classified confidential through the proposal that these should only be seen by Parliament's Defence Committee.

73. Mr João Amaral (MP), supporting the need to strengthen the Assembly's role, challenged the accusation that the intention was to interfere with the government's powers to manage the military. He felt rather that the use of parliamentary resolutions was a means of conveying political will which at the same time allowed the citizenry to monitor the activity of those whom they had elected. Taking an extreme example, he recalled that the Portuguese Parliament had approved two resolutions for the extension and completion of missions in Bosnia and Kosovo, without ever having discussed the initial deployment of the military contingents involved! He also complained of a total lack of hard information taking as an example the use of depleted uranium weapons which parliamentarians had learned about through the foreign media.

74. Mr José Medeiros Ferreira, a Socialist member, convinced that parliamentary scrutiny over defence policy was “characteristic of democratic regimes” observed that “in the face of the supremacy of international law there should be a corresponding deepening of democracy within states”. He drew attention to new developments in security and defence policy over recent years.

“The question this raises is hardly ever put to this Assembly. Rather it has given rise in recent years to various measures both in the parliaments of each of those countries most involved in

such operations and in the parliamentary bodies of collective security institutions such as NATO and Western European Union. Every country has attempted to adjust to the new requirement for scrutiny in its constitutional and political practices. In Portugal we are faced with two new areas of development where we have little past experience on which to rely: international military action and democratic scrutiny on the part of the country's parliament over defence matters. (...) Developments in regard to international missions have had a very positive influence on the status of Portugal's armed forces during the 1990s and lent credibility to the country's foreign policy."

75. At the close of the debate the Defence Minister summarised the views of the Portuguese Government as follows:

"The Government is convinced that the legislative initiative which will undoubtedly emerge from the discussion in the regard will be a doubly formative one, in view of the fact that the government is well aware that, firstly, it needs to have the elected representatives of the nation as one behind its defence policy objectives and secondly in reference, as Mr Medeiros Ferreira is aware from our discussion of the subject on many occasions, to Europe's constitutional requirement for a scrutiny regime involving a parliamentary dimension – an area which, at the present stage in the definition of a common foreign and security policy, is as yet not very well-worked out."

76. On 16 May 2001, the National Defence Committee (of the Portuguese Parliament) invited two experts, Professor Adriano Moreira and Professor Jorge Miranda, to attend. The legal issues discussed with them dealt essentially with the legitimisation of military intervention in the new international context and on framing draft legislation on a new balance of responsibilities within government in line with Portugal's constitution.

77. Having noted that since the second world war there had not been a single case of a Declaration of War in the strict sense of the term and that the only likely scenario for Portugal's engaging in a war was under the NATO Treaty, reference was made to the broad framework of the United Nations Charter, which provides for the use of force in the event of a threat to world stability. The various conflicts that have arisen around the world led NATO to establish an Agenda for Peace that examined the different forms of intervention – peacekeeping, restoring stability, support to the development of new democracies, rescue of nationals, humanitarian missions – which could require engagement on the part of national armed forces. According to the Charter, it is for the Security Council to decide on such interventions but the fact that its activity has often been paralysed by its members' right of veto has meant recourse has been had to a vote in the General Assembly, thus creating a new source of legitimacy supported by the majority of the governments of the industrialised countries and public opinion in those countries. The two bodies do not however have the same authority, for Security Council decisions are mandatory, while the Assembly can only pass resolutions indicating a line of conduct to be followed. It was on the basis of this new procedure that NATO's intervention in Kosovo was undertaken, which, by its innovative interpretation of international law, created a new scenario:

"The intervention in Kosovo caused a massive upheaval in regard to legitimacy because it constituted a break with the criteria of legitimacy used in the United Nations. It is the fact of having departed from this legitimacy relationship without which ... The point being that legitimacy is not just a purely legal issue but one of major importance politically, because without it there is no "back-up" support for military intervention and soldiers are quite well aware of the fact. Legitimacy is necessary, otherwise civil society will not accept the sacrifice that it is being asked of it.

This break with legitimacy has a consequence which I find is not fully appreciated but which needs to be taken into consideration in the matter of the issues that Parliament is currently facing. This is the fact that, when it comes to intervention, NATO has arrogated to itself its own form of legitimacy in regard to military intervention. It has in fact taken it upon itself to redefine legitimacy in the same way as it redefined the strategic concept and is now no longer a defence organisation."

78. Alongside the notion of international legitimacy, a rigorous distinction also needs to be established between peace enforcement missions and military intervention properly speaking. Political opportunism can lead to differential assessments of like situations and small countries not represented at world summits end up bearing the brunt of the choices made there and their practical consequences.

79. As far as the division of responsibilities within Portugal's constitutional framework goes, the question arises as to whether or not the now largely symbolic role of the President as Commander in Chief of the Armed Forces, should not be reviewed. As to Parliament, it is a matter of defining whether its supervision of military action should be confined within the ambit of the various international treaties that have been signed or whether its role should be extended to an assessment of events which might lead to changes in government policy. There is a need too to define the scope of parliamentary supervision and the timing of its exercise, taking account of the fact the demands of the military command (speed, secrecy, technical options) cannot be continually open to discussion. There is a need in short for government to be sure that it can exercise its responsibility unhindered.

80. On the 18 May, then, the Defence Committee invited Professor Blanco de Morais, author, *inter alia* of a legal treatise on national defence and the armed forces, and Professor Luis Nunes de Almedia to attend. Attention focused on the problem of state secrecy, constitutionally a responsibility of the President, which the drafters of the proposed new legislation wish to change so as to make it possible for Parliament to be in possession of all the information needed for any assessment. This limitation on presidential powers has, moreover, been challenged in connection with draft law No. 379/VIII by Presidential Order (despacho) No 85/VII, for Article 6 provides for an autonomous decision from the Committee in this connection, a provision which runs counter to the Portuguese Constitution. An original solution has been suggested by Professor de Morais in order to enable Parliament also to have access to information involving changes to the membership of the Council of State for National Defence so as to include a number of members from the Defence Committee.

81. On 23 May 2001, the Committee heard opinions from other experts: Professor Marques Guedes and Professor Diego Freitas do Amaral. Pondering the terms of Article 163.j of the Constitution, which provides only for "monitoring" (*acompanhar*) by Parliament of international commitments, unlike Article 163.f, which states that as far as the implementing the European Union is concerned Parliament has powers to "monitor and evaluate" (*acompanhar e apreciar*) European defence commitments, the question arises as to whether the intention was that Parliament's role should continue to be a fairly passive one in regard to international missions undertaken by Government, since no powers of scrutiny are explicitly provided for. In a political context, oversight (monitoring) without scrutiny (evaluation) has little meaning and instead of creating a parallel with the wording of Article 163.f on the European Union, it is suggested that the appropriate reference should be to Article 135 which provides that on a proposal from government Parliament authorises the President to declare war or peace.

"The content of Articles 136 or 137, which make it a personal power of the President of the Republic to declare war or make peace, seems to me to be surprising, but I also find the position attributed to the Assembly difficult to go along with on account of its going too far the other way. The President, who is, when all is said and done, Supreme Commander of the Armed Forces, arrives at his decision subject to supervision, exercised in the form of authorisation or permission granted by Parliament. In other words, like the 1911 Constitution, it again identifies the fulcrum of all political activity – especially in regard to the very serious question of military hostilities, which might even call the nation's very survival into question if the adversary were much more powerful than ourselves – as being the sovereign Parliament and not the Head of State. Not to put too fine a point on it one might ask what the latter in fact does as Supreme Commander of the Armed Forces? At the end of the day he is subject to parliamentary supervision. Whereas Parliament for its part, in the face of the new solutions of peacekeeping and peace enforcement is now nothing but a passive spectator."

82. The conclusion to be drawn might then be that those with the greatest power can do least with it. In line with the principle of the separation of powers, however, it is not a matter of taking direct responsibility, as the decision to intervene militarily within the scope of international agreements that

have been signed lies with government. The Constitution does not provide for authorisation, approval or shared management of the operations involved as oversight applies to the implementation of decisions already taken and the political aims to be achieved. As to the timing of when Parliament should be informed, it seems logical and acceptable that this should be before troop deployment or, failing this, as soon as possible, without compromising any advantage of surprise might give, and therefore requiring the utmost confidentiality.

83. The PCP then submitted an amendment to limit military engagements abroad uniquely to the two cases provided for under the United Nations Charter, namely that of legitimate self defence and where a mandate has been obtained from the Security Council. The very wide interpretation given in NATO's New Strategic Concept approved by member states in Washington in 1999 is seen by the authors of the amendment as a violation of those provisions and NATO interventions outside that framework would definitely be contrary to international law. They also express their surprise that the government should have supported the new concept, which does not take the form of an international treaty, requiring parliamentary ratification. The legal paradox this creates is in their view merely a reflection of the fact that the Washington agreement is contrary to the United Nations Charter.

84. Parliament was suspended for the summer recess and the Committee has not yet resumed its deliberations on the three pieces of draft legislation.

12. United Kingdom

85. The United Kingdom has no constitutional or legal rules regarding declarations of war. Deployment of United Kingdom troops and the issuing of orders to engage in hostilities are regarded as matters of Royal Prerogative. This means that the Government is not required to consult Parliament before taking such decisions. The UK Parliament does not vote a specific budget for such operations; they are financed from the Government's resources or Government borrowing. Should the Government wish to raise additional taxation it would, of course, need Parliament to pass the required legislation.

86. Although the Government is not required to consult Parliament before taking decisions with regard to deployment, it would be practically impossible for a Government to act in this respect contrary to the wishes of a majority of the House of Commons. If it sought to do so, it would be likely that a "no confidence motion" would be tabled; if the Government was defeated on this, it would be strongly bound by convention to call an election.

87. The UK's engagement in the Kosovo crisis was the result of Government decisions. Parliament was not formally consulted, although on 23 March 1999, the Prime Minister announced a readiness for NATO to take action in a statement to the House of Commons. Parliament was informed of action in a statement by the Deputy Prime Minister to the House of Commons on the evening of 24 March.

88. A full debate was scheduled for the following day on the motion that "This House do now adjourn". An "adjournment debate" of this type is a debate proposed by the Government on a general topic in which no substantive motion is before the House. The House may not amend this procedural motion and can therefore not express its view formally. A number of backbench Members of Parliament argued that the House of Commons should be given the opportunity to indicate its view on events in Kosovo, by debating a substantive motion. If the Government had accepted this argument, it would still not have been legally bound by a decision of the House, even if it were itself defeated in a formal vote. In addition to the debate on 25 March mentioned above, further debates were held on the crisis on motions for the adjournment on 19 April and 18 May.

89. Otherwise, parliamentary involvement was primarily through statements by Ministers to the House of Commons (and corresponding statements to the House of Lords). This procedure also provides for Members of the House to put questions to the Minister concerned.

90. Other than these exchanges, Members of Parliament put down a large number of questions for both oral and written answer. The subject of Kosovo was an important feature in the regular parliamentary question times for the Foreign Secretary, the Secretary of State for Defence and also the Secretary of State for International Development.

91. A number of the House of Commons Select Committees also undertook enquiries into different aspects of the crisis. Formal evidence was taken from Ministers and others, and the International Development Committee visited the Macedonian border and refugee camps in Albania during the crisis.

13. Sweden

92. Provisions concerning declarations of war are laid down in one of the four constitutional laws of Sweden – the Instrument of Government (IG)³. Chapter 10, article 9 of the Instrument states that “a state of war may not be declared without the consent of the Riksdag, other than in the event of an armed attack upon the Realm”. Relations with other states and proceedings in the event of war or in danger of war are regulated in chapters 10 and 13 of the Instrument of Government.

93. The basic provisions concerning the deployment of Swedish troops abroad are laid down in the Instrument, chapter 10, article 9 – which reads as follows:

“The Government may commit the Realm’s armed forces, or any part of them, to battle in order to repel an armed attack upon the Realm. Swedish armed forces may otherwise be committed to battle or despatched abroad only provided:

1. the Riksdag consents thereto;
2. such commitment is permitted under an act of law which sets out the pre-requisites for such action;
3. a commitment to take such action follows from an international agreement or obligation which has been approved by the Riksdag.

A state of war may not be declared without the consent of the Riksdag, other than in the event of an armed attack upon the Realm.

The Government may authorise the armed forces to use force in accordance with international law and custom to prevent violation of Swedish territory in time of peace or during a war between foreign states.”

According to points 2 and 3 above, the Government does not require the approval of the Riksdag under certain conditions.

94. Firstly, there are two acts authorising the Government to send armed forces abroad:

- the Act on armed forces on duty abroad (1992:1153) authorises the Government to make an armed force available for peacekeeping activities by request of the United Nations or according to decisions made by the Organisation for Security and cooperation in Europe (OSCE). This force may not exceed 3 000 persons serving abroad at the same time. Notice that this law is only applicable to peacekeeping – not in peace-enforcement activities;
- according to the Act on training for peace-promoting activities (1994:588) the Government may send armed forces abroad to participate in training for peace-promoting activities within the framework of international cooperation. This act came into force to authorise the Government to send armed forces for training within the framework of Partnership for Peace (PFP) cooperation.

95. Secondly, as stated in the Constitution (IG 10:9 point 3) Swedish armed forces may also be deployed abroad where there is an obligation under an international agreement, which has been approved by the Riksdag. This regulation came into force in consideration of article 43 of the UN Charter⁴.

³ Sweden has four constitutional (fundamental) laws : the Instrument of Government (IG), the Act of Succession (AS), the Freedom of the Press Act (FPA) and the Fundamental Law on Freedom of Expression (FLFE).

⁴ “All members of the United Nations (...) undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including right of passage, necessary for the purpose of maintaining international peace and security”.

96. In most cases to date, the Government has based its decisions on sending troops abroad on the Act on armed forces on duty abroad (1992:1153) although in recent years the Government has submitted questions concerning military efforts abroad to the Riksdag for political reasons. A decision by the Riksdag on sending troops abroad is adopted by simple majority.

97. The Government needs the approval of the Riksdag for funding missions abroad. Such funding comes from the budget of the nation. There is a subhead in the budget of the Department of Defence for “peace-promoting troop missions”. The amount allocated for the current year is about 1 billion Swedish crowns (110 million euros).

98. At the time of the Kosovo crisis, Parliament took a decision on Sweden’s participation and the mandate for the Swedish force in KFOR, in June 1999. The decision was based on a Government Bill and prepared by a joint committee – the Committee on Foreign Affairs and the Committee on Defence. In March 2001 the force’s mandate was extended by a new parliamentary decision.

99. The Swedish Armed Forces Overseas Force is currently involved in several peacekeeping missions. It consists of personnel serving in various staffs and units, individuals appointed to specific posts, military observers, military instructors and experts, as well as monitors and delegates. More than 1 000 men and women from the Overseas Force are currently serving in different missions the world over. Almost 1 000 are stationed in Bosnia and Kosovo/Macedonia and 1-10 people are on mission in the following countries/areas: Korea, Cambodia, Georgia, Croatia, Prevlaka (Croatia/Serbia), Ethiopia/Eritrea, Middle East, Kashmir, East Timor, Kuwait, Guatemala, Congo, Sierra Leone and Afghanistan.

III. The role of Parliament in defining participation in the war on international terrorism

100. Over the period of the preparation of this report, the world was in shock over the appalling events that shook the United States on 11 September. Thus parliaments unfortunately had the opportunity to put into practice the procedures envisaged for the supervision of national policy-making on action against international terrorism.

101. All parliaments met in extraordinary session to discuss the events and expressions of solidarity were forthcoming from the benches of parliaments all over Europe. Matters became more complicated when the United States military action started, for neither parliaments nor the public at large were clearly informed about the plans for engagement being drawn up by governments. Notwithstanding numerous debates and questions put to governments, few parliaments were able to express any political preference by voting on the handling of that engagement. Rather the reverse was true. Governments seemingly ruled out the possibility, taking cover behind legal and procedural constraints.

102. Thus in the French National Assembly on 10 October, Prime Minister Lionel Jospin replied to questions put from the opposition benches by Mr Debré, regarding the provisions the Government intended put into effect to combat terrorism both internationally and within the country:

“ ... If decisions ought to be taken, parliament should be involved in them. The Government intends first and foremost that full and regular information will be provided, out of respect, naturally, for parliament as representative of the nation and in order to ensure that both the opposition and the majority are behind any government decision. Parliament will then be consulted on the specific commitments to be entered into and again at each successive stage.

I would draw to your attention the fact that the fight against terrorism, even in its military form, cannot be compared to the Gulf war or the Kosovo conflict. We see this as a global engagement in a global conflict. The forms that this struggle takes, the nature of our commitment, depending on what is asked of us and what we agree to, will vary. The channels by which Parliament is kept informed will similarly be diverse: meetings with your special committees, like this morning’s, meetings of the chairmen of parliamentary groups or committees and plenary sessions as necessary. I shall ensure that information provided is real time information. Regular meetings between your committee and group chairmen and the relevant ministers and myself would seem desirable and I am ready to hold the first of them tomorrow.

The preparatory work for any engagements we undertake will take place in a select committee, chaired by myself, and decisions will also be taken in a select committee, comprising the relevant ministers and myself, chaired by the President (...).

As far as Parliament is concerned, I have outlined the essential points. You are well aware that we cannot use Article 35 of the Constitution which makes provision for declarations of war, since in this instance this is not the case. Recourse to Article 49-1 would require a vote of confidence. Mr Rocard made use of this at the time of the Gulf war but under the circumstances a vote of confidence in the Government could raise difficulties. We have therefore resorted to Article 38 of our internal rules and I can guarantee that I shall see to it that Parliament is kept informed, though regular timely contact with those group and committee chairmen most directly concerned”.

103. Members’ disappointment found expression in Mr Hage’s comment: “‘kept informed’ – is that all?”.

104. The British system, as explained in the section devoted to the United Kingdom, gives parliamentarians even fewer powers in regard to the country’s involvement in missions abroad and relations between Parliament and Government are often replaced by direct contact with the political parties representing the majority and the opposition. After the terror attacks, Prime Minister Blair called a meeting of the political party leaders for emergency consultations well before Parliament was convened. At the end of September, he addressed the Labour Party Congress in Brighton, at the same time releasing a certain amount of confidential information to the opposition leaders. It was not until 4 October that the Prime Minister informed a special session of the House of Commons about the UK’s imminent involvement in a military operation and no vote was taken in the ensuing debate.

105. Maximum use has been made in the parliaments of Europe of information briefings and current affairs debates. There have been very few opportunities to vote on political instruments of topical relevance. In several countries, such as Greece or Spain, a vote in Parliament cannot be taken on anything other than draft legislation, except a vote of confidence in the Government. Even where there is provision for voting, political difficulties slow down the process: thus the Bundestag, although it has the right to vote in this regard, has not yet had the opportunity of doing so because of the shakiness of the government coalition, where a balance has to be found between commitments in the framework of international alliances and the pacifist and ecology movements within the majority.

106. In Italy, the country whose legislation is the most amenable to parliamentary democracy, Parliament made a more decisive contribution to government policy and following numerous information briefings and debates, both Chambers approved two resolutions agreeing to any form of action, military or otherwise, that might be taken in support of international undertakings entered into by that country. In particular Resolution 4, approved by the Senate on 9 October 2001, without amendment to the text approved in the Chamber of Deputies, requested the Government to keep Parliament informed at all times as the crisis unfolded and to ask for a new vote in Parliament if a military or financial contribution was required in application of international decisions. The Minister for Defence gave the foreign affairs and defence committees of the two Chambers meeting jointly on 23 October 2001, technical details about the availability of the Italian armed forces, equipment and assets to be used in the event of Italy’s taking part in action against terrorism. On 7 November, the Chamber of Deputies and the Senate passed a resolution in favour of Italy’s involvement in military intervention against terrorism alongside the Americans.

107. In accordance with constitutional procedures, the German Parliament also authorised the deployment of armed forces for the fight against terrorism. The issue became so politically sensitive for the internal balance of the coalition holding power that the Chancellor was obliged to table a motion of confidence in the government in order to secure the number of votes needed to approve this foreign policy decision.

IV. Conclusions

108. The Committee originally conceived the present document as an information report on the position in law and the relevant procedures in individual countries for ensuring parliamentary scrutiny over deployments of national armed forces within the framework of international missions. While it was in the process of being drafted, two cases of military intervention abroad occurred: one in FYROM, the other in Afghanistan. Yet again, we have been forced to bow to the fact that national parliaments have had practically no part to play at all. Prisoners of procedures which do not allow for real supervision and scrutiny, they are at best the recipients of information, variable in terms of its timeliness or fullness. Our aim is to encourage WEU parliamentarians to take action to change this state of affairs by submitting proposals for constitutional or statutory reform in order to establish procedures that are clear and impossible to circumvent, in order to restore a democratic process which, at present, seems to have fallen by the wayside in the majority of European countries.

