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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

D R A F T R E P O R T

THE LEGAL FOUNDATION OF FOREIGN POLICY

PRELIMINARY OBSERVATIONS

1. This report, after being adopted by the Sub-Committee on International Law, on the basis of a draft report prepared by Mr Stanko Nick with the assistance of the Secretariat of the European Commission for Democracy through Law, was approved by the Commission at its ... meeting on ... and ...

2. A questionnaire (CDL-DI (95) 3) was first drawn up for submission to members, associate members and observers of the Commission. The Rapporteur subsequently considered it necessary to ask certain supplementary questions (CDL-DI (96) 2) to provide further insights into certain matters covered by this study.

3. The Commission has received replies to the first questionnaire from the following countries: Albania, Germany, Argentine, Austria, Belarus, Bulgaria, Canada, Croatia, Denmark, Spain, Estonia, Finland, France, Georgia, Greece, Hungary, Italy, Kirghizistan, Latvia, Liechtenstein, Lithuania, Malta, Netherlands, Norway, Portugal, Czech Republic, Romania, Russia, Slovakia, Slovenia, Sweden, Switzerland, Turkey and Ukraine.

4. It has received answers to the new questions from Austria, Belarus, Bulgaria, Croatia, Czech Republic, Finland, France, Hungary, Netherlands, Portugal, Russia, Slovakia and Turkey.

5. This study is mainly intended to cast light on what distinguishes and underlies the legal foundations of foreign policy, in a wide range of countries. Admittedly, the theme is not a new one and much has already been said and written on the subject. However, what is particularly novel about this study is that it has been supported by more than thirty countries - European and non-European - whose detailed replies form the main basis of this report. Using a largely, though not uniquely, comparative approach to constitutional provisions, the report examines a series of legal and institutional arrangements which sometimes differ very widely but are also often very similar.

6. Moreover, now that the constitutional law of the eastern european countries has become sufficiently stable, it is possible to undertake a broader comparison of constitutional laws relating to foreign policy and highlight the similarities and principal differences between the countries concerned. Naturally, the study makes no claims to be exhaustive, particularly given the breadth of the subject matter, but it does provide a useful overview containing a range of valuable information.

7. The Venice Commission considered it interesting and useful to undertake a study on the legal foundation of foreign policy in particular due to the fact that during the last century, and more specifically since the second world war, there have been many changes in this field. The Commission considered that emphasis should be in particular be placed on aspects related to developments in foreign policy concerning relations between the executive power and other state powers. This latter point is a constant factor throughout this study, which aims consequently to make clear the fact that there is no longer a monopoly of executive power in foreign policy and that other officials play a more and more active role in this field.

I. THE PRINCIPLES

8. One of the first constitutional principles governing international relations that is shared by the great majority of European states is the one that requires those states to comply with the generally recognised rules of international law: Germany (article 25 of the Basic Law), Austria (article 9 of the Federal Constitutional Law), Belarus (article 8 of the Constitution), Bulgaria (article 24), Croatia (article 134), Estonia (article 3), France (sub-paragraph 14 of the Preamble), Georgia (article 6), Greece (article 2), Hungary (article 7), Italy (article 10), Kirghizistan (article 9), Liechtenstein, Lithuania (article 135), Portugal (article 8.1), Romania (article 10), Russia (article 17), Slovenia (article 8), Ukraine (article 18).

9. This principle therefore establishes the constitutional status of customary international law. In general, the latter's incorporation into domestic legal systems is "automatic" and continuous[1]. In Anglo-Saxon countries' legal systems, the principle is expressed by the saying: "International law is part of the law of the land". The general principles of international law that are thereby incorporated into domestic law take precedence over that law. This means that all domestic legislation must comply with the generally recognised rules of international law. The general principles of international law are therefore directly applicable in national law, immediately establish rights and obligations for individuals and may be relied on in domestic courts.

10. Turning to international conventions, it should be noted that duly ratified or approved treaties and agreements generally have equal status with, or sometimes take priority over, domestic laws. In Bulgaria, article 5 (4) of the Constitution expressly provides that "any international instruments which have been ratified by the constitutionally established procedure ... shall be considered part of the legislation of the country. They shall supersede any domestic legislation stipulating otherwise". In Croatia, article 134 of the Constitution provides that international agreements are part of the internal legal order and then states that with respect to their legal effect they are above the law. In France, article 55 of the Constitution establishes the same principle[2]. Similarly, in Greece article 28 provides that "... international conventions as of the time they are sanctioned by law .... shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law". Many other current constitutions contain almost identical provisions.

11. Thus there is a second principle of international relations which is common to all European states. International treaties, and the decisions of international organisations of which those states are members, may be deemed to constitute the legal foundations for the conduct of a country's foreign policy, in so far as they lay down the principles and objectives of that policy.

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[1] *According to the definition of Perassi, an Italian legal theorist and one of the fathers of article 10 of the Italian Constitution, this involves the "permanent transfer" (transformatore permanente) of general international law into domestic law.*

[2] *Although this article does not grant treaties constitutional status, this does not mean that the law must not respect treaties. The latter therefore take precedence in the event of conflict. French courts are now unanimous in recognising the superiority of treaties over the law, even retrospectively.*

A. The role of values such as democracy, the rule of law and the protection of human rights and individual freedoms in foreign policy

12. The general principles governing the constitutional rules relating to democracy, the rule of law and the protection of human rights are incorporated into all European countries' national legal systems and in so far as they are translated into specific legal provisions, whether in domestic or international law, they can be tested in the domestic courts. In Germany, for example, article 1, paragraph 3 of the Basic Law reads "the following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law"[3]. The first paragraph of article 2 of the Greek constitution provides that "respect and protection of the value of the human being constitutes the primary obligation of the state", while article 10.2 of the Spanish constitution states that "the principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain". Under article 2 of the Russian constitution: "Man and his rights and freedoms shall be the supreme value. The recognition, observance and protection of human and civil rights and freedoms shall be an obligation of the state."

13. In addition, nearly all European constitutions open with a formal declaration giving key roles to democracy and the rule of law. In Croatia, for example, article 1 says that "the Republic of Croatia is a ... democratic ... state"; article 2 of the Portuguese constitution describes the Republic as "a democratic state based on the rule of law", while article 1 of the Georgian constitution describes the country as a "law-based state" and its political regime as a "democratic republic".

14. More than ever before, these principles play an extremely important role in international relations, since respect for them is a key condition for states' full acceptance into the international community. The same phenomenon is therefore occurring in the international community as would normally be the case in individual national societies: any person wishing to be part of a community governed by law must accept the rules under which it operates. If not, that person will be excluded from it. This is why these values are becoming increasingly prominent in relations between states; all European countries agree that foreign policy must be conducted in accordance with these values.

15. The protection of human rights has a particularly determining influence on the conduct of foreign policy. In Europe, the principle of the inviolability of human rights is one of the main pillars of the integration process within the various international institutions. Countries' constitutions form the basis of the application of human rights at national level and include provisions governing the enforcement of relevant international safeguards. Under article 4 of the Czech constitution, fundamental rights and freedoms are protected by the judicial authorities, while article 10 states that treaties on human rights and fundamental freedoms that have been ratified and promulgated and are binding on the Czech Republic are immediately enforceable and take precedence over domestic law. In Slovenia, the penultimate paragraph of

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[3] *When international rules governing human rights take the form of "general rules of international law", they "shall be an integral part of federal law" and "shall override laws" (article 25 of the Basic Law). However, they are not superior to the Basic Law.*

article 15 reads: "Human rights and fundamental freedoms shall be guaranteed judicial protection. Moreover, this protection shall extend to the right to obtain redress for the abuse of such rights and freedoms." Under article 18 of the Russian constitution, "human and civil rights and freedoms shall have direct force ... and shall be guaranteed by law". In Georgia, article 42, paragraph 1 reads: "Each individual has the right of appeal to the courts to protect his rights and freedoms."

16. At national level, responsibility for monitoring the observation of values such as democracy, the rule of law and human rights devolves on domestic, and especially constitutional, courts. In the particular case of human rights and fundamental freedoms, international supervisory and protective machinery has been established under international conventions, particularly, in the European case, the European Convention on Human Rights[4]. This has been incorporated into numerous European countries' domestic law. In some countries, its provisions have constitutional status. It has had a great influence on the drawing up of constitutional charters in the new central and east European democracies. At all events, nearly all European constitutions contain similar, or at least equivalent, provisions to those of the European Convention on Human Rights.

17. In principle, all national authorities - legislative, executive and judicial - must comply with the rules in question and their observation is scrutinised by the ordinary, administrative and constitutional courts. Domestic legislation or regulations which conflict with the rules governing the protection of human rights may be annulled by constitutional courts.

B. The influence of moves towards integration in the conduct of foreign policy

18. For the majority of the countries of central and eastern Europe, particularly those which for historical reasons feel closer to western culture, integration into west European political, economic and military organisations such as the European Union, WEU and NATO remains their number one strategic foreign policy objective. It has therefore had a decisive influence on these countries' international relations. Many of them have already concluded association agreements with the European Union[5] and have also lodged official applications for membership.

19. As the integration of the member States of the European Union progresses, more and more departements of public care with respect to which the individual States in former days were free to act independently, now come under the control of the institutions of the Union. This development also sets bounds to the freedom of the Governments of the member States in the field of their foreign policies.

20. For the European Union member states, participation in the organisation has involved significant legislative changes and/or modifications to their institutional and decision making structures. Firstly, certain countries - Germany, Spain, France, the United Kingdom, Ireland and

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[4] *In principle, domestic and international human rights protection operate in parallel. In practice, in accordance with article 26 of the Convention, "the [European] Commission [of Human Rights] may only deal with the matter after all domestic remedies have been exhausted ...".*

[5] *Bulgaria, Czech Republic, Hungary, Romania, Slovak Republic and Slovenia.*

Portugal - have revised their constitutional arrangements. In each case, other than Spain, where article 13.2 is solely concerned with European citizens' eligibility to take part in local elections, these involve provisions authorising the transfer of powers (particularly article 7.6 of the Portuguese constitution). Likewise, Denmark has established a special parliamentary committee - the European Affairs Committee. The government is required to inform the committee of any European Council decision which could be directly applicable in domestic law or for whose application parliamentary involvement is necessary[6]. In Finland, the European Union's common external and security policy has necessitated measures to strengthen the Foreign Affairs Committee's right of access to information in this field. In Germany, in accordance with article 23 of the Basic Law and the legislation adopted to give effect to this provision, the *Bundesrat* is much more involved in formulating Germany's policy within the institutions of the European Union than in any other area of foreign policy.

21. Reference should also be made to the numerous other international organisations in Europe such as the European Economic Area, the OSCE, the CSCE or the Black Sea Economic Co-operation Region[7]. Among these, the Council of Europe plays a key role because it has the largest number of members - today, practically all European countries. Since international relations are now mainly conducted on a multilateral basis, the participation of the different countries in these organisations has an increasing influence on the application of their foreign policies.

II. MAIN FACTORS

22. In current systems operating in the democratic and parliamentary traditions, no one has a monopoly of the conduct of foreign affairs. The executive collaborates with parliament and sometimes the people participate directly in countries' decisive foreign policy decisions. All those who form the state's political structure - the head of state, the government and its prime minister, parliament, the judicial authorities and the people - contribute to and co-operate in the development of international relations.

23. More specifically, where the legislative and executive functions have concurrent foreign policy responsibilities, the former usually has the authority to conclude treaties - at least the more important ones - while the latter conducts foreign relations. In principle, therefore, the executive negotiates and signs international treaties but parliament authorises their ratification. Meanwhile, the judiciary plays a fundamental role by reviewing the lawfulness of international actions. Finally, the people may be called on to express their views, in referendums, on certain foreign policy issues which are particularly important for the country.

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[6] *Since 1973, all the major issues relating to Denmark's European policy are debated in the European Affairs Committee. Before each Council meeting, the minister concerned presents a memorandum setting out the issues to be considered. Following the discussion, the committee supplies the minister with a negotiating mandate for the Council meeting.*

[7] *This organisation was set up in 1992 and has ten members: Albania, Armenia, Azerbaijan, Bulgaria, Greece, Moldova, Romania, Russia, Turkey and Ukraine.*

A. The head of state

24. Every country has a particular conception of its head of state's duties and role, reflecting its own history, culture and political and institutional traditions. The result is a series of significant differences. Some heads of state enjoy extensive powers, others are ound to varying extents by the decisions of the executive while yet others are mainly confined to representing their country and are deprived of all independent decision making power. These variations in the way the head of state's role is viewed apply equally to foreign policy.

25. Certain countries grant their head of state wide-ranging prerogatives. France is one such, and is even the main example, since foreign policy in the broad sense is effectively a presidential responsibility, to the extent that one can speak of the head of state's *domaine réservé*, or special preserve. The general principle is laid down in article 5 of the Constitution which states that the President shall be the guarantor of respect for Community agreements and treaties. More specifically, articles 14 and 15 state that he shall accredit ambassadors and be commander-in-chief of the armed forces, while under article 52 he negotiates and ratifies treaties. Article 9 says that the head of state shall preside over the Council of Ministers, which determines and directs general policy, and thus the conduct of international relations. The result is that in France, the President of the Republic is the leading force in foreign policy. Moreover, the increasing personalisation of international relations is accentuating the concentration of foreign policy powers on the presidency. The resumption of nuclear tests[8] and European construction are the best examples.

26. In other countries, such as Russia and Ukraine, the head of state has important foreign policy powers. Under article 80 of the Russian constitution, "the President of the Russian Federation shall be the head of state", he "shall determine the basic objectives of the ... foreign policy of the state" and "shall represent the Russian Federation ... in international relations". In practice, the President directs Russian foreign policy; he negotiates and signs international treaties, signs the instruments of ratification[9] and receives letters of credence and letters of recall of diplomatic representatives accredited to his office. Similar provisions are to be found in the constitution of the Republic of Belarus (art 100, no 15, 16 and 17); moreover, section 22 of the President of the Belarus Republic Act empowers the President to initiate legislation in the Supreme Soviet, which considerably extends his opportunities to take part in drawing up foreign policy.

27. Other countries grant their head of state significant constitutional prerogatives, both generally and more specifically in the field of foreign policy. However, these presidential prerogatives tend to be offset by the wide powers enjoyed by the government. In these cases, their presidential powers do not leave these heads of state with much scope for initiative because they are all subject to tight constitutional and political constraints. Under article 65 of

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[8] *It was Mr Mitterrand who decided in 1994 to suspend French nuclear tests. A year later, in identical circumstances, Mr Chirac decided to resume them.*

[9] *In accordance with the International Treaties Act, the President of the Russian Federation takes decisions on the organisation of negotiations and the signing of international treaties concluded on behalf of the Federation, grants the corresponding powers and submits such treaties for ratification (articles 11, 13 and 16 of the Law).*

the Austrian constitution, the President represents the Republic externally, concludes international treaties (through officials to whom he has delegated this task), authorises the appointment of diplomatic and consular representatives abroad and receives foreign representatives. However, he can only act on the advice of the government. Article 36 of the Greek constitution provides that "The President of the Republic ... shall represent the state internationally, declare war, conclude treaties of peace and alliance, of economic co-operation and of participation in international organisations or unions ..." He exercises all the powers granted to him by the constitution, but to do so he must always seek the consent of the government in the form of the countersignature of the relevant minister, in this case the minister for foreign affairs

28. Finally, there are countries where the head of state has very few powers regarding the conduct of foreign policy. One such is Germany, where the President of the Republic fulfils essentially representative functions. His decisions require a ministerial countersignature (article 58 of the Basic Law), which means that his diplomatic responsibilities are almost exclusively ceremonial. All foreign policy decisions are taken by the federal government. In Turkey, the President of the Republic has no wide-ranging powers or specific responsibilities in the foreign policy arena. Although article 104 of the Constitution empowers him to ratify and promulgate international treaties and accredit Turkish representatives abroad, these are purely formal responsibilities since they can only be exercised with the agreement of the Council of Ministers. In practice, however, if the President is the former leader of the majority party (as was the case with Turgut Özal), he may enjoy much greater influence in the conduct of foreign policy.

B. The Government

29. Governments, and in particular prime ministers and ministers for foreign affairs, play a major role in foreign policy. Governments determine and direct their countries' overall policies, including of course foreign policy. This principle is enshrined in several countries' constitutions and/or constitutional legislation: Albania (article 36); Germany (art 62 of the Constitution and article 1 of the Federal Government Regulations); Austria (article 69); Bulgaria (article 105); Denmark (article 1 of the Foreign Service Act); Spain (article 97); Estonia (article 87); France (article 20); Greece (article 82); Lithuania (article 5 of the Government of the Lithuanian Republic Act); Portugal (articles 185 and 200); Republic of Belarus (article 106 of the Constitution and article 11 of the Republic of Belarus Act); Romania (article 101); Russia (article 114.e); Slovakia (article 119.d); Sweden (Chapter 1, article 6, of the Instrument of Government); Switzerland (article 102 ch 8); Turkey (article 112).

30. All major foreign policy initiatives are taken by the executive, in conjunction with and/or under the supervision of the relevant parliamentary bodies. Governments are responsible for conducting negotiations, signing international treaties and - except in cases where parliamentary approval is required - ratifying such treaties. This is quite logical since the executive has the necessary resources for this task.

31. In Netherlands, for exemple, the chief rule in this fiels is embodied in Article 90 of the Constitution :"The Government shall promote the development of the international rule of law. This rule, firstly, means that the administration of the foreign relations of the Kingdom is, in principle, the exclusive competency of the excecutive power. The most important exception to this rule is the requirement of Parliamentary approval of treaties (Article 91).

32. As already noted, heads of government and ministers of foreign affairs are particularly concerned with the executive's foreign policy activities. Admittedly, ministers of foreign affairs' powers have been considerably reduced in recent years, as ministers with other responsibilities have become increasingly involved in the foreign policy aspects of their fields. Nevertheless, even if they no longer enjoy their former monopoly - with the head of state - of the conduct of foreign affairs, ministers of foreign affairs are still among the leading protagonists in this domain. As the members of their governments directly charged with conducting foreign policy, it is they who carry the political responsibility; they countersign instruments of ratification and accession signed by their heads of state.

III. OTHER FACTORS. THE SYSTEM OF PARTICIPATION IN FOREIGN POLICY DECISIONS

A. Parliamentary scrutiny

33. Over the last century, parliaments' powers to supervise executive activities in general, and foreign policy decisions in particular, have greatly increased. There have been two main contributory factors to this development: the distinct democratisation of parliamentary institutions, making them more representative of the popular will, and the end of secret diplomacy.

34. The question of who had the power to conclude international agreements first arose in the last century - the age of the constitutional monarchy - with the emergence of the principle that parliamentary assemblies must have a role in the conduct of foreign policy, hitherto the exclusive preserve of sovereigns. As parliamentary systems evolved, oversight of foreign policy by the people's representatives was to become even more significant. Moreover, the disappearance of secret diplomacy[10], thus offering parliaments, and in particular parliamentary committees, access to information on governments' foreign policy activities, has been a decisive factor in increasing parliamentary supervision.

35. Today, all European constitutions contain provisions of varying degrees of explicitness giving parliaments the power to scrutinise governments' conduct of foreign policy. This power forms part of the more general authority granted to parliaments to monitor all the activities of the executive.

36. As a result, parliaments are making more and more use of their right to oversee the conduct of external relations, particularly through more active participation in the conclusion of international treaties. Starting with the end of the First World War and continuing to the present day, the requirement that the most important treaties should be subject to parliamentary approval has been incorporated into all European constitutions.

37. Constitutions often contain fairly detailed lists of the treaties that require prior parliamentary assent. For example, in Bulgaria article 85 (1) states that the National Assembly "shall ratify or denounce all international instruments which are of a political or military nature, concern the country's participation in international organisations, envisage adjustments to the Republic's borders or alter the law". In France, article 53 provides that "peace treaties, commercial treaties, treaties or agreements relative to international organisation, those that commit the finances of the state, those that modify provisions of a legislative nature, those relative to the status of persons and those that call for the cession, exchange or addition of territory may only be ratified or approved by an act of Parliament". Similarly, under article 36.2 of the Greek constitution: "Agreements on trade, as well as taxation, economic co-operation and

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[10] *The beginning of the end of secret diplomacy may be traced back to President Woodrow Wilson's address of 8 January 1918 to the American Congress, in which he enumerated his so-called fourteen points, setting out the United States' peace programme. The first point called for "open covenants of peace, openly arrived at" and stated that there should be "no private international undertakings of any kind", and that diplomacy should proceed "always frankly and in the public view".*

participation in international organisations or unions and any other containing concessions for which, under the provisions of this constitution, no provision can be made without a law, or which may be onerous to the Greeks as individuals, shall not be operative without ratification by a law voted by Parliament". In the Czech Republic, parliamentary approval is required not only for "political treaties", "general economic treaties" and "treaties which can only be executed by legislation" but also for "treaties on human rights and fundamental freedoms" (article 49).

38. Similar provision exist in many other countries' constitutions. Examples include Albania (article 16); Germany (article 59.2); Austria (article 50); Belarus (the International Treaties of the Belarus Republic Act); Croatia (article 133); Denmark (article 19); Spain (article 94); Estonia (article 121); Georgia (article 65); Hungary (article 19.3); Italy (article 80); Liechtenstein (article 8); Lithuania (article 138); Norway (article 26); Portugal (article 164 (j)); the Slovak Republic (article 86 (e)); Sweden (chapter 10 of The Instrument of Government); Switzerland (article 85 ch. 5); Turkey (article 90).

39. In general, prior parliamentary approval is required for two main types of treaty, which are common to all states: those of a political and/or military nature and those that modify existing legislation. These are considered to be the most important treaties in the conduct of international relations. Treaties on these subjects therefore need to be scrutinised by the people's representatives and this scrutiny is provided for in national constitutions: the supreme expressions of the fundamental principles of the rule of law.

40. Aside from this direct form of supervision, parliaments have other means of monitoring the executive's conduct of foreign policy: the motion of censure and budgetary control. These are examples of indirect supervision since they simply represent particular examples of general parliamentary scrutiny of all the activities of government. Moreover, regarding censure motions in particular, while it is true that foreign policy normally forms at least one chapter of governments' political programmes and is the subject of regular parliamentary debate, it is unlikely that any government would be censured on the basis of its international policy or the way it was conducted.

41. In Estonia, under section 5.7 of the International Relations Act, Parliament must debate the country's foreign policy at least twice a year. In France, following discussion in the Council of Ministers, the Prime Minister asks the Assembly for a vote of confidence in his programme, or alternatively in a general policy statement, which includes foreign policy. In Germany, Article 23 (2) and (3) of the Basic Law and the legislation on co-operation between the federal Government and the *Bundestag* on matters relating to the European Union require the federal Government to seek the *Bundestag's* opinion before commencing any negotiations with legislative implications within the European Union.

42. In all European countries, there exists a parliamentary committee for foreign affairs whose fonctions is normally established by the Rules of the Parliament and within which all political parties are represented proportionally according ti their presence in Parliament. This committee discusses the main approaches to foreign policy including the drawing up conventions which may have major political significance (the decisions adopted by the committe are normally followed uo by the Parliament).

B. Judicial review

43. The majority of European constitutions provide for judicial review of international affairs. It is particularly exercised by constitutional courts and generally takes two separate forms: firstly, and more directly, ensuring that international treaties are compatible with the constitution and, secondly, determining the constitutionality of legislation, as part of a broader process under which constitutional courts are empowered to ensure that legislation is consistent with constitutional principles and international conventions.

1. Reviewing the constitutionality of legislation

44. This form of review is one of the highest expressions of the principles governing the rule of law. The vast majority of European constitutions provide for constitutional courts to decide whether laws are constitutional. As far as countries' international relations are concerned, this form of machinery is applicable whenever a legislative or administrative provision has direct or indirect international implications. In such cases, the provision in question, like any other, is subject to constitutional scrutiny. In Germany, article 93 (1) 2 of the Basic Law, on the jurisdiction of the Federal Constitutional Court, deals with the "formal and material compatibility of federal or *Land* legislation with [the] Basic Law"; in the Czech Republic, article 87 (1) provides that the Constitutional Court shall rule on the setting aside of legislation and associated provisions if they conflict with constitutional laws; in Italy, under article 134, the Constitutional Court "decides on controversies concerning the constitutional legitimacy of laws and acts having the force of law, emanating from central and regional government".

2. Judicial review of foreign policy decisions

45. All domestic courts - constitutional, judicial and administrative - have to decide whether government decisions taken in the context of international relations are compatible with the law of the land. Their exercise of these responsibilities is closely bound up with how domestic law ranks the various international legal rules. The ranking of international legal rules that have been incorporated into domestic law corresponds in principle to the status that the rule acquires in the hierarchy of domestic sources under the adaptation procedure, whether ordinary or special. For example, a customary rule would generally have constitutional status in the domestic legal order and as such would be reviewed by the constitutional court of the country concerned to establish its compatibility with the national constitution. In fact, it is unlikely that such a situation would arise in practice[11], although the reverse case, that is reviewing the constitutionality of a domestic law for non-compliance with general international law, could occur more frequently[12].

46. Turning to the rules laid down in conventions, inasmuch as the ratification of formal treaties is effected by legislation (the authorising legislation), the treaties' provisions are incorporated into domestic law and their status or ranking in domestic law is determined by the

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[11] *In France, for example, the Conseil constitutionnel has never ruled on the compatibility of international commitments with the fundamental principles of the laws of the Republic.*

[12] *In Italy, the Constitutional Court has already examined the issue of whether certain legislative provisions conflicted with general international law on a number of occasions (see, for example, judgments 18.4.1967 no 48 and 8.4.1976 no 69).*

status of the authorising legislation, that is the same status as ordinary domestic legislation or something higher[13]. As a result, an alleged violation by a treaty or other international agreement of a domestic legal provision - whether or not constitutional - may be brought before any court with jurisdiction to hear the complaint. If that jurisdiction is established, the court can then rule on whether or not national legislation has been breached.

47. Determining the constitutionality of international treaties is the responsibility of constitutional courts. Some countries' constitutions or legislation governing their constitutional courts make explicit provision for such a role. In Austria, article 140 (a) of the Constitution stipulates that the Constitutional Court shall rule on the legality and constitutionality of international treaties. Article 125.2 of the Russian Constitution states that "the Constitutional Court of the Russian Federation ... shall decide on cases on conformity with the Constitution of the Russian Federation of ... international treaties of the Russian Federation which are not in force".

48. Article 54 of the French Constitution is even more explicit about decisions that are subject to the jurisdiction of the Constitutional Council, and the consequences of this supervision: "If the Constitutional Council, the matter having been referred to it by the President of the Republic, by the Prime Minister, by the President of one or the other assembly, or by sixty deputies or sixty senators, declares that an international agreement contains a clause contrary to the Constitution, the authorisation to ratify or approve this international commitment may be given only after amendment of the Constitution". This was the procedure followed with regard to the Treaty of Maastricht. The Head of State referred the matter to the Constitutional Council in accordance with article 54. The Council declared that the Treaty conflicted with the Constitution in three respects: monetary union, the policy on visas at frontiers and foreigners' right to vote in local elections. The Constitution was therefore amended to take account of these points in a joint session of Parliament at Versailles. The result was Title 15 of the Constitution on the European Communities and the European Union.

49. This scrutiny by the main constitutional court, as provided for in article 54, enshrine a principle that seems to be common to most European states - that of the non-applicability of international provisions deemed to be incompatible with the constitution. Section 36 of the Hungarian Constitutional Court Act, for example, states that if the Court declares a provision of an international treaty unconstitutional, the treaty cannot be ratified until the unconstitutional element has been removed[14]. Similarly, article 95 of the Spanish Constitution states that "the conclusion of an international treaty containing stipulations contrary to the Constitution shall require prior constitutional amendment", while Title VI of the Constitutional Court Implementing Act contains provisions regarding the procedure for the declaration on the constitutionality of international treaties.

50. The consequences of the constitutional review of international treaties are obvious and emerge clearly from the constitutions and/or constitutional laws of many countries. Apart from

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[13] *Formal treaties and agreements not requiring ratification do not differ with regard to their value in the domestic legal order. They are equally binding in the domestic legal system.*

[14] *In practice, the Hungarian Constitutional Court has on a number of occasions declared that it lacked jurisdiction to determine the constitutionality of legislation containing international treaties.*

the cases of France, Hungary and Spain already cited, article 140a of the Austrian Constitution provides that "... international treaties whose illegality or unconstitutionality has been found by the Constitutional Court shall not be applied ... by the authorities entrusted with their execution ..."[15]. In Portugal, article 279.4 states that "where the Constitutional Court rules to the effect that a provision of a treaty is unconstitutional, that treaty shall be ratified if the Assembly of the Republic approves it by a two-thirds majority of the members present ...". Similar provisions exist in Belarus (article 128 of the Constitution), while in Russia, article 125.6 of the Constitution states that "international treaties which do not correspond to the Constitution ... shall not be implemented or used".

51. The same situation applies to countries that do not provide explicitly for their constitutional courts to scrutinise foreign policy decisions since this scrutiny still occurs, but in the wider context of the judicial supervision of all law-making activities, including those in the field of international relations. In Georgia, for example, article 89.1 of the Constitution provides that "the Constitutional Court of Georgia ...: ... considers disputes connected with the constitutionality of international treaties and agreements", while article 89.2 states that "normative acts or their parts recognised as unconstitutional have no legal force from the moment of the publication of the appropriate decision of the Constitutional Court". Article 136 of the Italian Constitution provides that "when the Court declares a norm of law, or an act having force of law, to be unconstitutional, the norm ceases to have effect from the day following the publication of the decision".

52. Constitutional courts can therefore decide whether the rules laid down in international treaties are consistent with - or better, do not conflict with - the provisions of the constitution. This represents an ultimate form of supervision of governments' foreign policy activities. However, such supervision is confined - at the very most - to ensuring, albeit at the highest judicial level, that treaties are compatible with constitutional principles. This implies that constitutional courts can declare international agreements unconstitutional but only have fairly limited and indirect powers over states' conduct of foreign policy. The latter remains, in practice, the exclusive province of the executive and parliament, which therefore retain a wide margin of discretion in foreign policy matters.

53. Nevertheless, it is clear that when, as part of their responsibility for determining the constitutionality of legislation, constitutional courts review the compatibility of foreign policy decisions with the constitution they can exercise varying degrees of influence over governments' and parliaments' foreign policy options. Through their rulings on constitutional matters, supreme courts can, in practice, censure all the measures adopted by the executive or parliament. The latter cannot therefore conduct foreign policy just as they wish: they are always subject to the supervision of constitutional courts, at least with respect to the fundamental principles of state.

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[15] *This provision has, however, remained a dead letter as to date the Austrian Constitutional Court has never ruled on the legality of international treaties.*

C. The influence of the people

54. In many European countries, direct citizen participation in domestic and foreign policy matters has become, or is starting to become, increasingly significant. This participation is the most practical and authentic form of direct democracy which, in the majority of modern democracies, expresses itself when the people are called on to exercise other functions than the traditional ones of electing representatives and, in certain cases, their head of state.

55. The main instrument by which the people can influence fundamental political choices is the referendum. European countries vary greatly in their constitutional provision for referendums on foreign policy matters.

56. Some countries' constitutions offer the people the opportunity to decide on certain foreign policy issues through referendums. Article 11 of the French Constitution states that "the President of the Republic, on the proposal of the Government ... may submit to referendum any bill ... providing for authorisation to ratify a treaty that, without being contrary to the Constitution, would affect the functioning of the institutions"[16]. In Portugal, according to article 118.2, "the subjects of the referendum shall only be matters of relevant national interest ... by way of approval of an international convention or a legislative act". In Belarus, article 73 and the Referendums Act provide that referendums may be held to resolve the most important issues of state, which may include the undertakings arising from international treaties[17]. Article 17 of the Croatian Constitution says that decisions relating to treaties of alliance are subject to referendum. Article 20 of the Danish Constitution provides, under certain conditions, for referendums on legislation concerning the transfer of sovereignty to international institutions "for the promotion of international rules of law and co-operation"; in such cases, if a majority of five-sixths of the members of the *Folketing* is not obtained "whereas the majority required for the passing of ordinary bills is obtained, and if the Government maintains it, the bill shall be submitted to the electorate for approval or rejection ...".

57. But the best known example of the exercise of direct (or semi-direct) democracy in the field of foreign policy is Switzerland, where referendums were extended to foreign treaties in 1921. There are two types of referendum in Switzerland: the compulsory referendum and the optional referendum, the latter being applied to ordinary legislation (when 50 000 citizens or eight cantons demand a vote). Under article 89 of the Constitution, accession to "collective security organisations or to supranational bodies" must be submitted to referendum while referendums are optional for international treaties which "provide for accession to an international organisation" or "entail a multilateral unification of the law". Finally, the Federal

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[16] *Such referendums have been used three times in recent years: on 23 April 1972 when the French people were asked to approve by referendum "given the prospects opening up in Europe ... the ratification of the treaty on the accession of Great Britain, Denmark, Ireland and Norway to the European Communities"; on 6 November 1988 on New Caledonia and on 20 September 1992 on the ratification of the Maastricht Treaty.*

[17] *A practical example of Belarus citizens' direct participation in the formulation of the country's foreign policy was the referendum of 14 May 1995. Among other things, voters were asked whether they approved the steps taken by the President to bring about closer economic integration with the Russian Federation.*

Assembly may decide to submit other treaties to an optional referendum[18].

58. In Hungary, under the Referendum Act (no XVII of 1989), referendums may be held on any subject falling within parliament's jurisdiction, subject to a number of exceptions specified in law (finance bills, for example, or the fulfilment of obligations arising from commitments in international law or legislation promulgating international treaties or conventions). In principle, then, issues relating to general foreign policy may be submitted to referendum. In fact, the Hungarian National Assembly recently rejected an initiative on NATO membership signed by more than 100 000 people. The question asked would have been "do you want Hungary to become a member of NATO?". The National Assembly refused to authorise this referendum, on the grounds that it was not possible to hold a referendum whose purpose was to take a decision. Since parliament took this decision by decree (which does not constitute legislation), the Constitutional Court was unable to exercise its power of review.

59. Issues relating to the conduct of foreign policy considered important for a country's future may also be the subject of referendums. Thus certain countries' constitutions provide for referendums on "crucial national issues" (Greece - article 44.2), "matters of national interest" (Romania - article 90) or "the most significant issues concerning the life of the state and people" (Lithuania - article 9)[19]. In the Greek and Romanian cases, the President of the Republic can ask the people to express their views through a referendum, "upon the proposal of the Council of Ministers, following a vote by an absolute majority of the deputies" in Greece and "after consulting Parliament" in Romania.

60. On the contrary, according to the article 75 of the Italian Constitution, popular abrogative referenda are not allowed to abrogate the parliamentary statutes authorizing the ratification of the international treaties : as it was stated by the Constitutional Court in one of the first decisions concerning the calling of popular referenda (n. 16/78), the exclusion of the possibility of an abrogation by referendum of these statutes is aimed at preventing the State from being liable to the other contracting parties for the inapplicability of the treaties, which would originate as a consequence of the abrogation of the implementing law. From the explicit provision of article 75, the Constitutional Court has eventually drawn the consequence that also the parliamentary statutes aimed at executing the international engagements in the internal order cannot be abrogated by referendum. One such an example is provided by the decision n. 30/81, where the Court declared the inadmissibility of a popular referendum referring to a statute which concerned the use of drugs : an abrogation of the statute would have implicitly determined the violation of an international convention which had been previously ratified by the Italian Government.

61. In other countries as well, i.e. Germany, Latvia, Netherlands, Poland, Turkey, referendum or popular initiative is not available in the determination of foreign policy.

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[18] *For example, the decision to ratify a treaty which does not come into any of these categories, which is not simply an executive agreement but which the Federal Assembly decides not to submit to referendum does not require popular sanction, though it may still require that of the Federal Court.*

[19] *Lithuanian citizens have voted in three referendums: on 9 February 1991 on the country's independence, 8 June 1992 on Lithuania's non-alignment with the post-Soviet alliances and 14 June 1992 on the withdrawal of former-Soviet troops from Lithuanian soil.*

CONCLUSIONS

62. If scientific observation is confined to the law and to constitutional provisions relating to foreign policy in the various European countries covered by this study, many strong similarities immediately emerge. Nor is it coincidental that these similarities are most marked in the areas where the basic values of society and the state acquire major significance.

63. Europe as a whole is the cradle of constitutional law, particularly concerning the safeguarding of the fundamental principles governing the organisation of contemporary society, such as democracy, the rule of law and the protection of human rights. The first important lesson to be drawn from this exercise is that it is now quite feasible to consider the constitutional rights of the countries of western Europe and of central and eastern Europe in one single study.

64. The differences that separated the two blocs of countries during the post-war years have diminished significantly and in the majority of cases have disappeared completely. The sample of more than thirty states considered in this survey may be considered sufficiently representative to allow us to reach an initial conclusion: that significant similarities exist between the various European constitutional systems, at least with regard to the legal foundations of foreign policy.

65. Nevertheless, it must also be emphasised that the similarities and differences that emerge from this study are the result of a comparative approach that is confined to an analysis of constitutional provisions. It would therefore be utopian and fanciful to conclude definitively that there exists a common body of European constitutional law.

66. A comparative study of constitutional texts can certainly highlight the main features of positive law and explain its fundamental elements. However, it would be appropriate, and perhaps even essential, to supplement the information in this report with a more thorough analysis of how in practice the organs of state conduct their foreign policies and make use of the legal instruments which their constitutions make available to them.

67. With a view to gaining a complete overall picture of states' practice in the foreign policy field, it would be useful to examine not only the institutional and legal machinery provided for in the various constitutions but also the way in which the main institutional protagonists operate this machinery in practice.