

PARLIAMENTARY CONTROL OVER THE USE OF ARMED FORCES AGAINST TERRORISM – IN DEFENCE OF THE SEPARATION OF POWERS*

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1. INTRODUCTION

Following the 9/11 terrorist attacks on the World Trade Center, the Bush Administration launched its so-called ‘war on terrorism’.¹ Equally facing terrorist threats,² other states enacted special legislation and committed their troops to military operations abroad. The balance between individual liberty and security, effective international co-operation and democratic accountability became of crucial importance

1. ‘Global War on Terror’ is the label attached by the Bush administration to the struggle against Al-Qaeda and other terrorist groups. Attempts by the Pentagon to relabel the term as the ‘global struggle against violent extremism’ (G. Packer, ‘Name Calling’, *The New Yorker*, 8 August 2005, available at <http://www.newyorker.com/archive/2005/08/08/050808ta_talk_packer>, visited 10 September 2007) appear to have failed to convince the US President, see R.W. Stevenson, ‘President Makes It Clear: Phrase is ‘War on Terror’’, *New York Times*, 4 August 2005, p. 12. See also J.B. Bellinger, ‘Prisoners in War: Contemporary Challenges to the Geneva Conventions’, Lecture at the University of Oxford, 10 December 2007, available at <<http://www.state.gov/s/l/rls/96687.htm>>, visited 20 December 2007.

2. UN Secretary-General K.A. Annan, ‘Fighting Terrorism on a Global Front’, *New York Times*, 21 September 2001, p. 35.

to constitutional democracies around the world.³ This development raises new questions related to the separation of powers among the executive and legislative branches of government. In modern constitutional democracies, the separation of powers, based on the principles of democratic self-government and individual freedom, does not constitute a rigid concept⁴ and can accommodate a wide range of functional solutions. It is true that transboundary terrorism often requires rapid and decisive governmental action, leaving no time for lengthy parliamentary deliberations. One may, however, confidently argue that renouncing the main constitutional values in the face of the terrorist threat may well play into the hands of terrorists.⁵ In the long run, the participation of legislatures in the most crucial decisions leads to a much more stable and sustainable use of executive power. The executive branch of government arguably tends to strive for more security at the expense of individual liberty.⁶ One may thus call into question the executive's suitability to prosecute the so-called war on terror. The legal situation is somewhat more complicated, however.

First of all, we want to make clear that we do not attach any legal significance to the terminus 'war on terror'. There are various definitions of the crime of terrorism within domestic legal orders⁷ and a universally accepted definition in international law continues to be elusive.⁸ In striving to retain broad discretion in the fight against

3. U. Blaschke, A. Förster, S. Lumpf and J. Schmidt, eds., *Sicherheit statt Freiheit?* (Berlin, Duncker & Humblot 2005); O. Lepsius, 'Liberty, Security and Terrorism: The Legal Position in Germany', 5 *German LJ* (2004) p. 435. See also 'Counter-terrorism Powers: Reconciling security and liberty in an open society', at <<http://www.homeoffice.gov.uk/documents/cons-count-terror-powers-310804>>.

4. See C. Möllers, *Gewaltengliederung* (Tübingen, Mohr Siebeck 2005). See also B. Ackerman, 'The New Separation of Powers', 113 *Harvard LR* (2000) pp. 633, at p. 640; U. Di Fabio, 'Gewaltenteilung', in J. Isensee and P. Kirchhof, eds., *Handbuch des Staatsrechts*, Vol. II, § 27 (73).

5. As Lord Hoffmann put it '[t]he real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these [Anti-terrorism, Crime and Security Act 2001]. That is a true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.' *UK House of Lords, A (FC) and others (FC) v. Secretary of State for the Home Department*, [2004] UKHL 56, para. 97.

6. J. Steyn, 'Guantanamo Bay: The Legal Black Hole', 53 *ICLQ* (2004) p. 1.

7. Ch. Walter, S. Vöneky, V. Röben and F. Schorkopf, eds., *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Heidelberg, Springer 2004).

8. See the Draft Comprehensive Convention on International Terrorism, UN Doc. A/59/894, 12 August 2005, Appendix I. The most problematic issue to be resolved is the issue of the applicability of the Convention. See also M. Hmoud, 'Negotiating the Draft Comprehensive Convention on International Terrorism', 4 *Journal of International Criminal Justice* (2006) p. 1; P. Klein, 'Le droit international à l'épreuve du terrorisme', 321 *RdC* (2006) pp. 203, at pp. 231 et seq. and pp. 305 et seq.; G. Guillaume, 'Terrorism and International Law', 53 *ICLQ* (2004) pp. 537, at p. 541; Cassese's observa-

all kinds of extremists and militants, states label a wide range of offences as terrorist acts and often tailor the notion of the 'war on terror' to their particular national and foreign policy objectives. Some governments use the notion of the 'war on terror' to impose drastic limitations on basic rights and to take military action against insurgents or to suppress political opponents. The international community faces the challenge of keeping states' 'counterterrorist' measures within legal limits while not threatening their necessary freedom of action. This article does not aim to define terrorism or to discuss the issue of transboundary terrorism from an international law perspective. We rather analyse the existing legal situation in the countries under review. At the same time, we attempt to show how difficult it is to identify common features of different 'battles' fought by states in the so-called 'war on terror'.

Transboundary terrorism constitutes a major challenge to the effective functioning of legislatures in democratic societies. International law allows governments to rely on the notion of self-defence, mutual security, intervention upon invitation or, arguably, even 'humanitarian intervention' while launching counterterrorist military operations.⁹ At the domestic level, the ambiguity of the legal framework may reduce the role of parliaments in controlling the executive's counterterrorist military operations to a minimum. Whereas the emergency and martial law clauses of national constitutions often determine the legislature's role in times of crisis, the existence and destructive activities of international terrorist networks give rise to new security threats, while the role of parliaments has still to be properly determined. The creation of a special 'anti-terrorist emergency' in domestic law which is exempt from parliamentary scrutiny is not a viable solution and may well erode the main constitutional values of a democratic society, such as the rule of law and individual rights.

This article attempts to clarify whether parliaments effectively control the executive's use of military force against terrorist groups and organizations. In this regard, we shall review the existing division of labour between the branches of government in times of the global terrorist threat and assess it within the conceptual framework of the separation of powers. This approach will lead us to arrive at a normative conclusion as to whether the existing institutional framework shall be revised with respect to the struggle against transboundary terrorism. In particular, we will look at the 'hard core' of parliamentary control within this framework.

tion from 1989 that 'we appear to be moving closer toward consensus on a definition of terrorism' had still not turned into reality. See A. Cassese, 'The International Community's "Legal" Response to Terrorism', 38 *ICLQ* (1989) pp. 589, at p. 605.

9. On the government's options to justify the use of military force in self-defence see M. Byers, 'Terrorism, the Use of Force and International Law after 11 September', 51 *ICLQ* (2002) p. 401.

While reviewing the relevant state practice we shall deal with the parliamentary authorization of the use of military force for counterterrorist purposes and explore the boundaries these authorizations set for military action by the executive branch in a comparative perspective.¹⁰

This article concentrates on the constitutional practice in the United States, Germany and Russia – countries with different legal traditions and systems of government. The United States has a presidential system of government; Germany is a parliamentary republic; and Russia has often been regarded as a ‘super-presidential republic’¹¹. There are certain similarities, too. All three states are facing terrorist threats and have taken external and internal counterterrorist measures, including the adoption of new legislation. The scope of parliamentary power to control the executive’s use of military force has been controversially debated in all three countries. The state practice discussed in this comparative analysis may provide a more representative picture of the role of parliaments in controlling the executive’s use of military force for counterterrorist purposes. The United States, a leading nation in ‘fighting terror’, has developed a rich practice and case law on the parliamentary control of governmental military powers. Following the Constitutional Court’s landmark ruling on military operations abroad (1994),¹² Germany substantially improved its legislative framework for the parliamentary control of executive power. Russia, a relatively young constitutional democracy, has been developing its constitutional practice on the use of military force against the background of a fierce armed confrontation in Chechnya and a painful process of transformation from an empire to a modern state.

The degree of parliamentary involvement in the countries under consideration varies. A comparative analysis of the role of parliaments is not a useless effort, however, provided that it contains not only empirical information but draws some general normative conclusions as well.¹³ The existing differences in the constitutional and political experience of the countries under review do not undermine the credibility of the conclusions drawn on the basis of a comparative analysis. On the contrary, comparing different governmental systems may contribute to a useful exchange of constitutional practices and know-how.

10. Cf., L. Damrosch, ‘Constitutional Control of Military Actions: a Comparative Dimension’, 85 *AJIL* (1991) p. 92; S. Ku and H.K. Jacobson, *Democratic Accountability and the Use of Force in International Law*, (Cambridge, Cambridge University Press 2003).

11. V. Usanov, ‘Razdelenie vlastej kak osnova konstitucionnogo stroja i ego rol v formirovanii parlamentarizma v sovremennoj Rossii’, 12 *Gosudarstvio i pravo* (2005) pp. 13, at p. 15.

12. Decisions of the Federal Constitutional Court (BVerfGE 90, p. 286).

13. M. Tushnet, ‘The Possibilities of Comparative Constitutional Law’, 108 *Yale LJ* (1999) p. 1225; see also N. Bamforth, ‘Separation of Powers, Public Law Theory and Comparative Analysis’, in K. Ziegler, D. Baranger and A. Bradley, eds., *Constitutionalism and the Role of Parliaments* (Oxford, Hart Publishing 2007) p. 167.

The role of parliaments will be evaluated within the context of the underpinning constitutional structure of each country under consideration. In chapter 2 of this article we deal with the constitutional framework for the use of armed forces in the Federal Republic of Germany. In addition to clarify the legislature's role regarding the use of force for defence purposes, the role of Parliament in the event of 'internal emergency' and the Parliamentary Participation Act adopted in 2005 must be addressed. In chapter 3, we discuss the US legal framework and practice. The chapter deals with the 1973 War Powers Resolution, the 2001 Congressional Authorization for Use of Military Force (AUMF), and the 1878 Posse Comitatus Act that regulates the internal use of military force. In this chapter we will deal with the existing legal basis for governmental action against terrorism, the limits imposed on the government by parliamentary authorization of force and the use of armed force in the event of an internal emergency. In chapter 4, we will discuss the constitutional framework for the use of Russian armed forces for counterterrorist purposes, the role of Parliament in times of internal emergency and the anti-terrorism law of 2006 that significantly altered the relation between governmental powers with respect to the fight against terrorism. Chapter 5 of the article contains a comparative analysis and chapter 6 presents our main conclusions.

In concluding this article we will identify the purpose of parliamentary review and how far it may go in controlling the executive's counterterrorist action in a modern constitutional democracy. Furthermore, we intend to show the impact of existing differences between presidential and parliamentary systems¹⁴ on parliamentary control over counterterrorist military operations. We will attempt to demonstrate that the principle of the separation of powers shall not be renounced in the face of the global terrorist threat or replaced by the fusion or shift of powers. On the contrary, the separation of powers as the basis for a modern constitutional democracy may serve the purpose of strengthening democratic control and of enhancing individual liberties, while not putting into question the government's flexibility in times of global threats.

14. On the characteristics of parliamentary and presidential systems of governments in a comparative perspective see A. Lijphart, ed., *Parliamentary versus Presidential Government* (Oxford, Oxford University Press 1992).

2. FEDERAL REPUBLIC OF GERMANY: IS TERRORISM DISRUPTING THE MODEL OF A 'PARLIAMENTARY ARMY'?

2.1 Constitutional framework

Germany's experience in using military force after the Second World War is rather limited. Although the German Basic Law contains provisions on the organization and the use of armed forces, the legal framework for the democratic control of the military now in force has been developed in the 1990s, primarily through the means of constitutional jurisprudence.¹⁵ The German *Grundgesetz*¹⁶ and the law on the participation of Parliament in the decision to deploy armed forces abroad (Parliamentary Participation Act)¹⁷ constitute the legal framework for the government's counterterrorist military action. Although the *Grundgesetz* does not explicitly determine parliamentary competencies regarding such deployments, Parliament has, due to the principle of democracy, a prerogative to legislate and to decide 'all essential matters, especially those relating to the exercise of fundamental rights'.¹⁸ Constitutionally the German Parliament is in a position to exert political pressure on the government through the means of general parliamentary control, e.g., questioning the Ministers, the use of budgetary powers,¹⁹ and the election of a new Government by a vote of no confidence. Furthermore, the Standing Committee on Defence has the mandate to inquire into governmental activities related to the armed forces (Art. 45a).²⁰ The *Grundgesetz* is the primary legal basis for the use of force

15. On foreign affairs as a special governmental responsibility see BVerfGE 67, p. 100; 68, p. 1; 90.

16. Basic Law for the Federal Republic of Germany, 23 May 1949, Federal Gazette 1949 I, p. 1, last amended 26 July 2002, Federal Gazette 2002 I, p. 286.

17. Gesetz über die parlamentarische Beteiligung bei der Entscheidung über den Einsatz bewaffneter Streitkräfte im Ausland (ParlBG) (Parliamentary Participation Act), BGBl (Fed. Gazette) I 2005, pp. 775-776.

18. BVerfGE 49, p. 89; G. Nolte, 'Ermächtigung der Exekutive zur Rechtsetzung', 118 *Archiv des Öffentlichen Rechts* (1993) pp. 378 at p. 399.

19. The budget shall determine the structure and future development of the armed forces according to Art. 87a (1) and (2). Parliament did not make use of its budgetary powers to ensure the government's accountability or to prevent the executive from extending the antiterrorist military operation so far. An important tool to ensure parliamentary participation is the standing of parliamentary groups in the name of the Bundestag in the Constitutional Court. The Court does not rule, however, on the conformity of the government's actions with the Constitution, it rather deals with the alleged violation of Parliament's right to participate in decisions on military deployments. The distribution of competencies between the executive and legislative branches of government is a primary concern of the Court (*Organstreitverfahren*). See e.g., the *European Arrest Warrant*, BVerfGE 113, 273, English translation at <http://www.bverfg.de/entscheidungen/rs20050718_2bvr223604en.html>.

20. There is a Parliamentary Ombudsperson for Defence whose primary task is to protect the fundamental rights of military personnel (Art. 45b).

in self-defence (Art. 87a(1) and (2)), within a system of mutual security (Art. 24(2)), in an ‘internal’ emergency (Art. 87a(3) and (4)), and in the event of a catastrophe where the *Bundeswehr*, under certain circumstances, may assist the police force in averting immediate danger (Art. 35). The Parliamentary Participation Act of 2005²¹ specifies the procedure and rules of parliamentary involvement in military operations abroad.

2.2 External use of armed forces

2.2.1 *Use of force for defence purposes: a special governmental responsibility?*

According to Article 87a(1) of the German Basic Law, ‘the Federation creates armed forces for the purpose of defence’. Article 87a(2) of the German Basic Law further states: ‘Except for defence, the Armed Forces may be employed only to the extent explicitly permitted by this Basic Law’.²² The Constitution does not contain explicit provisions on military deployments for counterterrorist purposes.²³ Although the notion of defence in Article 87a(1) may be interpreted broadly, such an interpretation must be kept in conformity with the international law on self-defence.²⁴ In its landmark decision of 1994, the Constitutional Court established a requirement of ‘constitutive’ parliamentary approval for *every armed deployment outside the German borders*²⁵. The Constitutional Court developed the legal framework for military deployments abroad by a broad construction of Article 24(2) of the Basic Law, which allows the Federation to enter into a system of mutual collective security and to consent to certain limitations upon its sovereign powers. The Court

21. *Supra* n. 17.

22. Our translation.

23. M. Baldus, ‘Braucht Deutschland eine neue Wehrverfassung?’, 4 *NZWehrr* (2007) p. 133.

24. After the attacks on the World Trade Center on 11 September 2001, Germany declared its readiness to provide troops for the American-led ‘war on terror’ in Afghanistan. The German Chancellor Gerhard Schröder submitted a motion to Parliament to approve German participation (7 November 2001), combining it, however, with a vote of confidence with respect to his government (Art. 68 of the Basic Law). This process brought weighty political considerations into play, as the fate of the Red/Green coalition government was at stake. In the end, the Bundestag gave its consent to the troops’ deployment in Afghanistan. A considerable number of members of parliament voted for the government in spite of their continuing opposition to the military deployment. We cannot say that the members of the *Bundestag* completely disregarded the issue of the legality of Germany’s participation. However, this simply was not a decisive point and domestic inter-party considerations played much more important roles in generating an affirmative parliamentary vote than the issue of the international legality of the military deployment. See, for example, Bundesminister J. Fischer in Bundestag, Official Record, 4th term 202nd meeting, 16 November 2001, pp. 19877 et seq.

25. BVerfGE 90, p. 286.

derived the requirement of constitutive parliamentary approval from the general constitutional framework and from a rather peculiar interpretation of constitutional history.²⁶ When clarifying the issue of military deployments abroad, the Court attempted to strike a balance between executive effectiveness and parliamentary participation. Parliament must consent to introducing the armed forces in situations where imminent involvement in hostilities is likely. However, Parliament may neither determine ‘the modalities, the dimension and the duration of the operations, nor the necessary coordination within and with the organs of international organizations’.²⁷

The decision of the Court and the Parliamentary Participation Act of 2005 provide for a possibility of *ex post facto* authorization of urgent military deployments.²⁸ The question to be raised concerns the reach of parliamentary approval of the use of armed forces.²⁹ The question as to the details of a military operation can hardly be answered by the legislature alone in a professional and effective manner.³⁰ However, the Bundestag may give a relatively broad authorization of force: Parliamentary authorization for the participation of German troops in the operation ‘Enduring Freedom’ in Afghanistan, based on Article 51 of the UN Charter, was valid for 12 months and was mainly defined by the goal of combating terrorists, terrorist structures and the support of terrorism by third parties.³¹ The parliamentary authorization further required the consent of the territorial state as a precondition for German military deployments.³²

The role and ability of Parliament to prevent the executive from using armed force should not be overestimated, however. A single terrorist attack of a limited scale is unlikely to trigger the government’s power to use force in self-defence³³ as long as such an attack is not directed at the elimination of the community organized within the state or of the rule of law and of basic constitutional freedoms. The use

26. *Ibid.*, at pp. 383 et seq.

27. *Ibid.*, at p. 389.

28. § 5 (1), Parliamentary Participation Act, *supra* n. 17.

29. The emergency powers of Parliament and its competence to authorize the use of armed force are two separate issues. Although Parliament has the authority to decide on whether an attack with armed force triggers a ‘state of defence’ (Art. 115a (1)), parliamentary determination does not constitute the primary legal justification for the government’s use of force for defence purposes. A determination of a state of defence by Parliament triggers the powers of domestic emergency legislation which may lead to significant internal rearrangements for the duration of the state of emergency.

30. BVerfGE 68, pp. 1 at p. 106.

31. Decision of the German Bundestag on the proposal of the Government to deploy troops in the framework of the operation Enduring Freedom, *BT-Doc.* 14/7296, 16 November 2001.

32. *Ibid.*; the mandate of the of German Armed Forces covered NATO countries, the Arab Peninsula, Middle and Central Asia, North-East Africa and the adjacent sea area.

33. *Cf.*, Judgment of 15 February 2006, BVerfGE 115, p. 118.

of military force in self-defence may only be justified in situations where the intensity and scale of terrorist attacks require a military response.³⁴ However, the level of severity of terrorist acts to be qualified as armed attacks has not been clarified so far. It can be assumed that the government will decide on these issues if need be and will attempt to justify its decision in Parliament *ex post facto*.

Political discretion in situations where a rapid military response to the existing terrorist threat is required remains rather limited, however. Parliament may also face political hurdles in bringing the government to account *ex post facto* for overstepping constitutional limits while taking military action. The legislature's capacity to adequately assess the situation may be questionable. Thus, it is essential to have the legislature involved in some way in the decision-making process before military force is actually employed. Parliamentary scrutiny of governmental actions after the fact may prevent the government, however, from justifying military operations by unspecified allegations of a threat to national security in violation of the Constitution and the principles of international law.

2.2.2 *Parliamentary Participation Act of 18 March 2005: How far shall parliamentary oversight go?*

The Parliamentary Participation Act of 2005³⁵ specifies the conditions for parliamentary approval of military deployments abroad.³⁶ It left some important issues unresolved, however, and raised new questions as to the effectiveness and reach of parliamentary control in general.

According to the law, a prior parliamentary authorization for the use of armed forces is required (§ 1(2)). The military may be employed without such authorization in situations of immediate danger (§ 5(1)). In this case, Parliament needs to give its approval *ex post facto*. The law adopted the definition of armed deployments given by the Constitutional Court in 1994³⁷: If the circumstances indicate

34. See Ch. Lutze, 'Abwehr terroristischer Angriffe als Verteidigungsaufgabe der Bundeswehr', 3 *NZWehrr* (2003) p. 101.

35. *Supra* n. 17.

36. On the background discussion see S. Spies, 'Parlamentsvorbehalt und Parlamentsbeteiligung bei Einsätzen der Bundeswehr im Ausland – ein Beitrag zur Diskussion um ein Parlamentsbeteiligungsgesetz', in H. Fischer, U. Froissart, W. Heintschel von Heinegg and Ch. Raap, eds., *Crisis Management and Humanitarian Protection: In Honour of Dieter Fleck* (Berlin, Berliner Wissenschafts-Verlag 2004) p. 531. See also C. Safferling, 'Terror and Law – German Responses to 9/11', 4 *Journal of International Criminal Justice* (2006) p. 1152; W. Weiß, 'Die Beteiligung des Bundestags bei Einsätzen der Bundeswehr im Ausland – eine kritische Würdigung des Parlamentsbeteiligungsgesetzes', 47 *NZWehrr* (2005) p. 100.

37. See A. Fischer-Lescano, 'Konstitutiver Parlamentsvorbehalt: Wann ist ein AWACS-Einsatz ein 'Einsatz bewaffneter Streitkräfte'', 12 *Neue Zeitschrift für Verwaltungsrecht* (2003) p. 1474.

that the armed forces may be engaged in hostilities, the military deployment has to be approved by the legislature (§ 2(1)).

It appears somewhat difficult to identify situations in which military personnel participating in counterterrorist military operations are not expected to be involved in hostilities. On the other hand, the deployment of armed forces in a relatively peaceful environment in order to deter terrorism does not necessarily presuppose a threat of actual hostilities, even less so deployments of military personnel for training purposes.³⁸ The law does not spell out how to understand immediacy,³⁹ and leaves it to the executive branch to choose a reasonable interpretation which has to be justified in Parliament after the fact (§ 5).

A governmental decision to employ armed forces without prior parliamentary authorization in an emergency situation does not relieve the executive of its duty to immediately inform Parliament (it has not been established by law how detailed the information provided by the Government should be, however) (§ 6). If the armed forces accomplish their mission before parliamentary approval as was the case during a rescue mission in Albania in 1997,⁴⁰ the legislature may give its subsequent approval or use the general tools of democratic control in order to ensure governmental accountability.⁴¹ It can be argued, however, that the parliamentary approval *a posteriori* may also influence the government's action during counterterrorist military operations and prevent it from conducting certain operations.⁴²

According to the approval procedure established by law the government has to specify the modalities of the military deployment in a motion which will be submitted to Parliament for approval. § 3 (2) states that the government's motion shall specify the operational mandate, the operational area, the legal basis of the mission, the maximum number of service personnel to be deployed, the capabilities of the armed forces, the planned duration of the mission and the anticipated costs and funding arrangements. Parliament may approve or reject the motion. Amendments to the motion shall not be permissible. This does not exclude, however, lengthy

38. See the arguments presented by the parties in the case of AWACS II/Turkey decided by the Federal Constitutional Court, BVerfGE 108, 34 (36-39).

39. M. Rau, 'Auslandseinsatz der Bundeswehr: Was bringt das Parlamentsbeteiligungsgesetz?', 44 *Archiv des Völkerrechts* (2006) pp. 93, at p. 105; see also H.-H. Klein, 'Rechtsfragen des Parlamentsvorbehalts für Einsätze der Bundeswehr', in H.-D. Horn, ed., *Recht im Pluralismus – Festschrift für Walter Schmitt Glaeser zum 70. Geburtstag* (Berlin, Dunker & Humblot 2003) p. 262.

40. In this case, the government informed the political groupings in Parliament and the Chairmen of the Foreign Affairs and Defence Standing Committees in advance.

41. W. Hermsdörfer, 'Einsatz bewaffneter Streitkräfte vor Zustimmung des Deutschen Bundestages', *UBWV* (2003) p. 404.

42. Klein, *supra* n. 39, at p. 263.

negotiations on details of the government's application between the government and Parliament.

The duty on the part of the government to give detailed information to Parliament will presumably lead the executive to seek a parliamentary authorization for a broad range of issues related to military deployments. Taking into account the limited capabilities of Parliament to appropriately pre-evaluate the modalities of the military operation⁴³ and the specificity and finality of parliamentary authorization, the issue of shared responsibility and how it should be handled in practice must be raised. Indeed, once Parliament has granted its approval, it has a limited influence on the modalities of the military deployment. The executive is responsible for its implementation. Parliamentary involvement in the details of a military operation may undermine its later ability to control the exercise of governmental authority on the ground.

As a matter of principle, Parliament may recall troops (§ 8) when the modalities of military deployment are changed to a significant extent so that the limits on the military's actions set out in the respective parliamentary authorization are violated.⁴⁴ In practice, however, the government is entitled to take a decision on the duration and discontinuation of the military operation. A parliamentary decision to recall troops may put into question the international reputation of the Federal Republic and public confidence in the government. Thus, Parliament will presumably be reluctant to pay such a high price unless there are compelling reasons to discontinue the military operation even against the will of the government. Such a measure would almost certainly also result in the fall of the government.

2.2.3 *Does the multilayered international military cooperation against terrorism transform Parliament into a rubber-stamp body?*

The discretionary power of Parliament is directly affected by the increasingly multilayered military cooperation among states.⁴⁵ The *Grundgesetz* does not contain a

43. As Barber put it '[t]he legislature is a good forum for enabling representatives of the population to test expert opinion. It is a bad forum for the initial formulation of expert opinion.' See N.W. Barber, 'Prelude to the Separation of Powers', 60 *Cambridge LJ* (2001) pp. 59, at p. 85.

44. D. Wiefelspütz, 'Der Einsatz der Streitkräfte und die konstitutive Beteiligung des Deutschen Bundestages – zugleich eine Besprechung des AWACS-Beschlusses vom 25. März 2003', 45 *NZWehrr* (2003) p. 133; K. Hummel, 'Rückrufrecht des Bundestages bei Auslandseinsätzen der Streitkräfte', 43 *NZWehrr* (2001) p. 221.

45. R. Schmidt-Radefeldt, *Parlamentarische Kontrolle der internationalen Streitkräfteintegration* (Berlin, Duncker & Humblot 2005); see also R. Schmidt-Radefeldt, 'Parliamentary Accountability and Military Forces in NATO: The Case of Germany', in H. Born and H. Hänggi, eds., *The 'Double Democratic Deficit'. Parliamentary Accountability and the Use of Force under International Auspices* (Aldershot, Ashgate 2004) p. 147.

clear distribution of powers among the branches of government in this respect and there is no special statutory basis for the participation of German armed forces within integrated military missions abroad. The executive branch is primarily responsible for conducting foreign and security policy.⁴⁶ Parliament, however, has an important share of the authority in the decision-making process on foreign policy issues.

This raises the question of how far the general rule of parliamentary approval can be tailored to the use of armed forces within the framework of multilateral military operations. Due to the international process of decision-making that cannot easily be influenced by Parliament, its real impact on military operations abroad carried out within a system of mutual security is rather limited.⁴⁷ This conclusion would be equally applicable to a German involvement in the 'NATO Response Force' and 'European Battle Groups' that are set to be effectively engaged in military operations in the different conflict zones around the world and should enjoy the necessary flexibility. Parliament cannot control all the operational activities of these integrated military units. Although the legislature may lay down detailed conditions for military deployments in its prior authorization of force, this is not the best possible solution, since it cannot oversee the changing modalities of military operations and is not capable of shouldering the burden of responsibility for their failures or successes. The principle of the separation of powers suggests that the

46. BVerfGE 68, p. 1 (89, 106); BVerfGE 104, p. 151 (207); see A. Paulus, 'Quo vadis Democratic Control? The Afghanistan Decision of the Bundestag and the Decision of the Federal Constitutional Court in the NATO Strategic Concept Case', 3 *German LJ* (2002); M. Rau, 'NATO's New Strategic Concept and the German Federal Government's Authority in the Sphere of Foreign Affairs: The Decision of the German Constitutional Court of 22 November 2001', 44 *GYIL* (2001) p. 544.

47. In its *AWACS/Somalia* decision (BVerfGE 90, p. 286), the Constitutional Court reached the conclusion that parliamentary consent to the German NATO membership authorized the integration of German armed forces into international military structures. The Court has not established, however, that parliamentary approval of German membership in a self-defence organization is a generalized substitute for parliamentary authorization of the concrete deployment of armed forces under international auspices. On 22 November 2001, the German Constitutional Court decided that the 1999 NATO Strategic Concept, which prepared the way for the deployment of NATO troops out of the North Atlantic area to counter terrorism, did not require the assent of the German Parliament (BVerfGE, 104, p. 151). The Court emphasized the primary responsibility of the government for taking foreign policy decisions and referred to the general tools of parliamentary control. According to another recent decision of the German Constitutional Court concerning the use of German Tornado aircraft in Afghanistan, the use of armed forces which is part of a previous military operation already agreed to by Parliament does not require fresh parliamentary approval. See Bundestag, Official Record, 16th term, 86th meeting, 9 March 2007. The judgment of the Constitutional Court, BVerfG, 2BvE 2/07 of 27 March 2007 is available at <http://www.bverfg.de/entscheidungen/es20070703_bve000207en.html>. See an English version of the decision at <http://www.bundesverfassungsgericht.de/en/decisions/es20070703_2bve000207en.html>.

legislature should be able to exercise an effective control of government without being itself responsible for the modalities of military operations.⁴⁸

2.3 Internal use of armed forces

2.3.1 *Terrorism as a danger to a free and democratic order?*

According to Article 87a(4) of the Basic Law, military force may be used to avert domestic violence without prior parliamentary authorization.⁴⁹ There is no constitutional requirement of parliamentary approval *ex post facto*, but the legislature retains the power to discontinue the use of military force. Terrorist acts have to be of a sizable scale and intensity in order to be regarded as an insurgency or to pose ‘an imminent danger to the existence or the free democratic order of the Federation’. The military may only be used if domestic violence exceeds police capabilities.

Situations where terrorists may be regarded as insurgents within the meaning of Article 87a(4) will presumably be extremely rare.⁵⁰ But there may be situations below the threshold of insurgency where the government may deem the use of military force necessary. At present there is no constitutional basis for the use of armed force in times of domestic violence⁵¹ and no sound constitutional framework exists for a functional separation of powers in times of internal crisis. In the absence of constitutional authority, the use of military forces is limited to police support (Art. 35 GG)⁵² and the rather unrealistic case of insurgencies falling under Article 87a(4) GG.

Transboundary terrorism seems to challenge the traditional distinction between domestic and international affairs.⁵³ Sometimes there may be doubts about the origin and source of terrorist threats. It may also be difficult to demonstrate with

48. Cf., A. Paulus, *Parlament und Streitkräfteinsatz in rechtshistorischer und rechtsvergleichender Perspektive* (München, Habilitationsschrift 2006) pp. 307 et seq.

49. But see Kokott, in *Sachs, GG*, Art. 87a, para. 48.

50. Dreist argues that only German citizens, not terrorists posing a threat to the community from abroad, could be considered insurgents within the meaning of Art. 87(4). P. Dreist, *Bundeswehreinsatz als Wahrnehmung materieller Polizeiaufgaben?*, 3 *UBWW* (2006) pp. 93-104, at p. 97.

51. For a critical assessment see Baldus, *supra* n. 23.

52. On its limitations see *Aerial Security Act*, BVerfGE 115, p. 118, and the discussion below.

53. And, according to some observers, also between war and peace. See O. Depenheuer, *Selbstbehauptung des Rechtsstaates* (Paderborn, Schöningh 2007) p. 51. Depenheuer speaks of the creation of ‘enemy law’ designed to respond to terrorist threats, p. 52; see also C. Schmitt, *Der Begriff des Politischen*, (Berlin, Duncker und Humblot 1963) at pp. 45-54; cf., G. Agamben, *State of Exception* (Chicago, Chicago University Press 2005). However, such hyperbole is singularly unhelpful in finding solutions for threats to the state in line with the rule of law and human rights, as required by the German Grundgesetz and international human rights.

certainty and at the right time that terrorist acts, due to their character and intensity, require a military response. Thus, there may be urgent situations where not all these doubts can be resolved, but the exigencies do not allow the executive to engage in parliamentary deliberations.⁵⁴ Beyond these urgent cases, it is impossible to explain why the use of military force within the state borders where the legislature regulates governmental intrusion into individual rights should be excluded from parliamentary scrutiny whereas every armed deployment abroad requires prior parliamentary approval.⁵⁵ A more coherent constitutional framework in this respect cannot be created without amending the Constitution, however.

2.3.2 Repelling sudden attacks – law enforcement or self-defence?

Can internal emergency situations be resolved on the basis of Article 35(3) of the *Grundgesetz*? According to Article 35(3) of the Basic Law, the armed forces may be used in support of the police if a natural disaster or catastrophe endangers the territory of more than one Land. In its Aerial Security Act case of 2006⁵⁶, the Constitutional Court held section 14(3) of this Act to be unconstitutional. Section 14(3) provided that the use of armed force is permitted when it appears that an aircraft is intended to be used for the killing of human beings, and if the use of armed force is the only available means to avert that danger. The Court declared that this provision violated human dignity insofar as it allows the armed forces to shoot down aircraft with innocent civilians aboard.⁵⁷ It was acceptable only as far as such measures are directed against unmanned aircraft or exclusively against those responsible for the attack.

After the decision of the Constitutional Court was released, the German Minister of the Interior, Wolfgang Schäuble, proposed amending the Basic Law and to reformulate Article 87a (2) of the Basic Law as follows:

‘Außer zur Verteidigung sowie zur unmittelbaren Abwehr eines sonstigen Angriffs auf die Grundlagen des Gemeinwesens dürfen die Streitkräfte nur eingesetzt werden, soweit dieses Grundgesetz es ausdrücklich zulässt (emphasis added).’(Except for de-

54. See D. Wiefelspütz, ‘Verteidigung und Terrorismusbekämpfung durch die Streitkräfte’, 49 *NZWehrr* (2007) p. 12.

55. The reasons are entirely historical: The drafters of Article 87a, paras. 3-4, could not have foreseen the case law on parliamentary participation in military operations abroad. See Paulus, *supra* n. 48, p. 388.

56. BVerfGE 115, p. 118.

57. For a critical assessment of the judgment see Baldus, *supra* n. 23, p. 133. See also Ch. Gramm, ‘Wie weit darf der Staat bei “besonders schweren Unglücksfällen” gehen?’, 4 *UBWV* (2007) p. 121; on the proposals on constitutional amendments see Ch. Gramm, ‘Bundeswehr als Luftpolizei: Aufgabenzuwachs oder Verfassungsänderung?’, 3 *NZWehrr* (2003) p. 89.

fence, and to immediately repel any armed attack on the foundations of the community, the Armed Forces may be employed only to the extent explicitly permitted by this Basic Law. Our transl.)⁵⁸

Accordingly, a special case of immediate defence should be created in which international humanitarian law (*jus in bello*) would be applicable.⁵⁹ Schäuble claimed that the laws of war prohibit only a disproportional use of military force and the principle of proportionality would be observed when targeting hijacked jets with innocent people on board if it was the only means to avert a catastrophe. Some members of Parliament sharply criticized the plans of the Interior Minister and argued that, according to the Constitutional Court's decision, such measures shall be permissible only if the existence of the entire community is at stake.⁶⁰ Others noted that the creation of a special case of self-defence would blur the distinction between law enforcement and war.⁶¹ While elaborating his plan of constitutional amendments the Minister apparently ignored the fact that most aerial incidents, in their scale and effect, will not reach the level of an armed conflict.⁶²

It is unlikely that the constitutional amendment suggested by Schäuble will gain public and parliamentary support. Nevertheless, while discussing the issue of amending the Constitution and the issue of the applicability of *jus in bello*, the relevance of the minimum standards of human rights law applicable within an armed conflict must be recognized. Human dignity and the right to life set limits on permissible military force in armed conflicts.⁶³ Additionally, the information which has to justify a military response to terrorist threats in such extreme situations would be presumably inaccurate at best. Accordingly, the Court reached the conclusion that even in the event of an interregional emergency military force may not be used.⁶⁴

58. See H. Prantl, 'Schäuble: Beim Abschuss gilt das Kriegsrecht', *Süddeutsche Zeitung*, 1 January 2007, p. 1. See also B. Schlink, 'Die Scheinwelt eines Verteidigungsministers', *Spiegel Online*, 19 September 2007, at <<http://www.spiegel.de/politik/deutschland/0,1518,506562,00.html>> visited 25 September 2007; H. Prantl, 'Der Abschuss', *Süddeutsche Zeitung*, 20 September 2007, p. 4.

59. For a similar view, see Depenheuer, *supra* n. 53.

60. See the opinion of D. Wiefelpütz (SPD), 'Im Terrorfall: Dürfen entführte Jets abgeschossen werden?', at <<http://www.n24.de/politik/article.php?articleId=91069>> visited 25 November 2007; for the passage in the judgment, see BVerfGE 115, p. 118 (para. 135).

61. V. Beck (Greens), *ibid.*

62. A catalyst of the discussion was an aerial incident in Frankfurt (2004) which turned out not to be a terrorist attack.

63. See HCJ 769/02 *Pub. Comm. Against Torture in Israel v. Gov't of Israel* (2006); O. Ben-Naftali and K. Michaeli, 'Public Committee Against Torture in Israel v. Government of Israel', 101 *AJIL* (2007) p. 459; Th. Marauhn, G. Nolte and A. Paulus, 'Possible Future Trends in International Humanitarian Law', 28 *HRLJ* (2007) p. 65.

64. BVerfGE 115, p. 118 (150); see also N. Naske and G. Nolte, 'Aerial Security Law', 101 *AJIL* (2007) p. 466; O. Lepsius, 'Human Dignity and Downing of Aircraft', 7 *German LJ* (2006) p. 761.

Some observers described the judgment as a ‘surrender’ on the part of the Constitutional Court to the extraordinary challenge of terrorism⁶⁵ and maintained that the state should have the power to use force as a last resort to avert a present danger. It is an entirely different matter, however, whether such extreme situations can be explicitly authorized by an abstract law.

2.4 Between ‘parliamentary army’ and executive effectiveness

The *Grundgesetz* established a parliamentary system of government which aimed at creating effective democratic control over the organization and the use of a ‘parliamentary army’.⁶⁶ The mission of armed forces is to defend the country against foreign military threats (or to participate in collective defence). The role of the legislature in controlling the use of military force in self-defence is limited to using general tools of parliamentary oversight and to the approval of the use of force after the fact. Moreover, Parliament will have to make effective use of the tools of democratic oversight in order to avoid the executive abuse of power. It is not however the legislature’s function to reduce the government’s flexibility in military operations to a minimum. Thus, the Parliamentary Participation Act of 2005 went very far in giving Parliament the power to approve specific details of military deployments *a priori*, reducing the executive’s margin of appreciation and flexibility to a significant extent. It would have been more consistent with the principle of the separation of powers to endow Parliament with the power to consent to the executive’s motion on troop deployments without extending parliamentary approval to operational modalities of a military operation.

3. UNITED STATES: TOWARDS AN UNLIMITED PRESIDENTIAL PREROGATIVE TO PROSECUTE THE ‘WAR ON TERROR’?

3.1 Constitutional framework

In the area of foreign and security policy, the US Constitution established a strong presidential power. President and Congress are both directly elected representatives of the people and enjoy full democratic legitimacy. Article I §1 and Article II §1 divide legislative and executive powers between Congress and the President. Congress has broad competencies regarding the military. It has the power to provide for common defence (Art. I §8 cl. 1); to define and punish ... offences against the Law of Nations (§8 cl. 10); to call forth the Militia to execute the Laws of the Union, suppress insurrections and repel invasions (§8 cls 13-16). Article I §8 cl. 11

65. Baldus, *supra* n. 23, p. 133; see also Gramm, *supra* n. 57.

66. BVerfGE 90, p. 286, at p. 382.

of the US Constitution authorizes Congress to declare war, grant Letters of Marque and Reprisal, make Rules concerning Captures on Land and Water. According to Art. I §10 cl. 3 ‘no state shall, without the Consent of Congress, ... keep Troops, or Ships of War in time of Peace ... or engage in War, unless actually invaded, or in such imminent danger as will not admit for delay’.

The President as ‘Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual Service of the United States’ (Art. II), is in charge of conducting military operations and decides ‘how’ to bring them to a successful end.⁶⁷ It has been controversial to what extent parliamentary control shall be extended to the President’s military powers.⁶⁸ The presidential power to repel sudden attacks⁶⁹ and to use force in the event of domestic violence are derived from his constitutional position as Commander-in-Chief.⁷⁰

3.2 External use of armed forces

3.2.1 War Powers Resolution and counterterrorism

The War Powers Resolution (WPR) was adopted by Congress in 1973⁷¹ as a reaction to the President’s unlimited authority in the Vietnam War based on the Gulf of Tonkin Resolution.⁷² Congress overruled President Nixon’s veto and passed the

67. J. Story, *Commentaries on the Constitution of the United States*, (1833) p. 411, para. 570: ‘The representatives of the people are to lay the taxes to support a war, and therefore have a right to be consulted, as to its propriety and necessity. The executive is to carry it on, and therefore should be consulted, as to its time, and the ways and means of making it effective’; see also L. Fisher, *The Allocation of Powers: The Framers’s Intent*, in B.B. Knight, ed., *Separation of Powers in the American Political System: the Legacy of George Mason* (Fairfax VA, George Mason University Press 1989) p. 19.

68. John Yoo questions the role of Congress, J. Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (Chicago and London, The University of Chicago Press 2005); see, however, D.J. Barron and M.S.Lederman, ‘The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding’, 121 *Harvard LR* (2008) pp. 689-804 and D.J. Barron and M.S.Lederman, ‘The Commander in Chief at the Lowest Ebb – a Constitutional History’, 121 *Harvard LR* (2008) pp. 941-1111.

69. Cf., M. Farrand, *The Records of the Federal Constitution of 1787* (New Haven, Yale University Press 1937).

70. According to Art. IV § 4 of the US Constitution, ‘[t]he United States shall guarantee to every state ... a Republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence’.

71. 87 Stat. 555, 50 USC § 1546. See T.M. Frank, ‘After the Fall: The New Procedural Framework for Congressional Control Over the War Power’, 71 *AJIL* (1977) p. 605.

72. Joint Resolution, To promote the maintenance of international peace and security in southeast Asia, P.L. 88-408, 78 Stat. 384, 10 August 1964.

Resolution that allows the employment of US armed forces for 60 days without a formal declaration of war by Congress. The constitutionality of the resolution has been called into question on several occasions,⁷³ especially with regard to the congressional power to recall the troops (Art. 5(c)). Furthermore, the idea of a legislative concretization of the Constitution has also been rejected.

The *War Powers Resolution* specifies the President's authority to use force without prior congressional authorization when the United States has suffered an attack.⁷⁴ At the same time, it established a mechanism of consultations with Congress before using military force. Although the WPR does not explicitly regulate the use of military force against terrorism, in practice the US Presidents consulted with congressional leaders before launching counterterrorist military operations. As noted elsewhere, 'consultation is not a legal substitute for full congressional action',⁷⁵ however. Congress retains its prerogative to deal with the issue of the use of force and its legality after the fact. It is questionable whether the congressional control of the government's counterterrorist military measures has been effective in practice with respect to preventing the government from launching military operations.

In his notification letter to Congress regarding air and naval strikes on Libya carried out on 14 April 1986, President Ronald Reagan wrote that he conducted these strikes pursuant to his authority under the Constitution, including his authority as Commander-in-Chief. Additionally, Reagan claimed that his actions were allowed under Article 51 of the UN Charter.⁷⁶ Only three hours before the attack, Reagan invited congressional leaders for consultation. Some Parliamentarians complained afterwards, however, that no proper consultation had taken place. Abraham Sofaer, legal adviser of the Reagan administration, argued that with regard to counterterrorism, the executive branch had unilateral authority to use force, due to the need for secrecy and because these actions fall short of total war.⁷⁷ Thus the administration has taken a somewhat inconsistent position by invoking Article 51

73. On the constitutionality of the War Powers Resolution see M.J. Glennon, 'The War Powers Resolution Ten Years Later: More Politics Than Law', 78 *AJIL* (1984) p. 571.

74. 'The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.'

75. L. Fisher, *Presidential War Power*, 2nd rev. edn. (Lawrence KS, University Press of Kansas 2004) p. 269.

76. Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate of the United States on the United States Air Strike against Libya, 22 *Weekly Comp. Pres. Doc.* 16 April 1986, p. 499.

77. US House of Representatives, Subcommittee on Arms Control, International Security, and Science, 'War Powers, Libya and State-Sponsored Terrorism', 29 April, 1 and 15 May 1986, pp. 12-32.

of the UN Charter, on the one hand, and by arguing, on the other, that the military response did not fall within the range of the WPR because it was short of war.

Similarly, after the terrorist bombings of the US embassies in Kenya and Tanzania, President Clinton conducted strikes on alleged Bin Laden outposts in Afghanistan and Sudan. Clinton notified Congress that he was entitled to use force in self-defence under Article 51 of the UN Charter.⁷⁸ He claimed, furthermore, that military strikes were undertaken pursuant to his constitutional authority to conduct US foreign relations and as a Commander-in-Chief and Chief Executive. Additionally, Clinton emphasized that he had kept Congress fully informed, consistent with the WPR.

3.2.2 *Broad congressional authorization for the use of military force after 9/11 – a carte blanche for the executive branch?*

According to the ‘Authorization for Use of Military Force’ (AUMF) adopted by Congress on 14 September 2001:

‘[t]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.’⁷⁹

The AUMF extends to ‘nations, organizations, or persons’ whom the President determines to have certain connections to the September 11 attacks. This is, however, the only textual limitation on the presidential power to use force.⁸⁰ The authorization of force resolution sets no time and clear territorial boundaries to the President’s authority to prosecute the ‘war on terror’.⁸¹ President Bush claimed the authority to decide on the scope and duration of the US military deployment, and emphasized that he intended to direct such measures in exercise of the right of

78. Letter to Congressional Leaders Reporting on Military Action against Terrorist Sites in Afghanistan and Sudan, 34 *Weekly Comp. of Pres. Doc.* 21 August 1998, p. 1650.

79. Authorization for Use of Military Force (AUMF), Publ. L. No. 107-40, 115 Stat. 224 (2001); with regard to the elaboration of the resolution see D. Abramowitz, ‘The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism’, 43 *HILJ* (2002) p. 71; N. Abrams, ‘Developments in US Anti-terrorism Law – Checks and Balances Undermined’, 4 *Journal of International Criminal Justice* (2006) p. 1117.

80. See C. A. Bradley and J. L. Goldsmith, ‘Congressional Authorization and the War on Terrorism’, 118 *Harvard LR* (2005) p. 2047, at p. 2079.

81. ‘This military action is a part of our campaign against terrorism, another front in a war ... Today we focus on Afghanistan, but the battle is broader’, Address to the Nation Announcing Strikes Against Al Qaida Training Camps and Taliban Military Installations in Afghanistan, 7 October 2001, 37 *Weekly Comp. of Pres. Doc.* 15 October 2001, p. 1432.

self-defense to protect US citizens and interests.⁸² Finally, he referred not only to the congressional authorization of force but also to the War Powers Resolution.⁸³ Thus, the President derived his broad authority to deploy armed forces abroad and to take domestic and external counterterrorist measures from his constitutional position as Commander-in-Chief,⁸⁴ and regarded congressional authorization as a welcome legitimation but not as a necessary legal prerequisite for his use of military force.

After launching the military operation in Afghanistan, the US administration went one step further and derived far-reaching powers from the congressional authorization of force, including the power to detain so-called enemy combatants without guaranteeing proper judicial supervision of detention and to intercept phone conversations of US citizens with suspected terrorists without amending the 1978 Foreign Intelligence Surveillance Act (FISA).⁸⁵ The President justified the wire-tapping programme by his authority as Commander-in-Chief and the congressional authorization of force.⁸⁶ There is, however, no indication that the authorization of force somehow affects the applicability of FISA. Otherwise, every authorization of military force would suspend peacetime legal order with potentially far-reaching consequences for the entire legal system.

Since Congress did not make use of its constitutional powers to suspend *habeas corpus*⁸⁷ when authorizing the use of force in Afghanistan⁸⁸, it must be asked

82. 'It is not possible to know at this time either the duration of combat operations or the scope and duration of the deployment of U.S. Armed Forces necessary to counter the terrorist threat to the United States. As I have stated previously, it is likely that the American campaign against terrorism will be lengthy. I will direct such additional measures as necessary in exercise of our right to self-defense and to protect U.S. citizens and interests', Letter to Congressional Leaders Reporting on Combat Action in Afghanistan Against Al Qaida Terrorists and Their Taliban Supporters, 9 October 2001, 37 *Weekly Comp. of Pres. Doc.* 15 October 2001, p. 1447.

83. 'I am providing this report as part of my efforts to keep the Congress informed, consistent with the War Powers Resolution and Public Law 107-40. Officials of my administration and I have been communicating regularly with the leadership and other members of Congress, and we will continue to do so. I appreciate the continuing support of the Congress, including its enactment of Public Law 107-40, in these actions to protect the security of the United States of America and its citizens, civilian and military, here and abroad', *ibid.*, p. 1448.

84. 'I have taken these actions pursuant to my constitutional authority to conduct U.S. foreign relations as Commander in Chief and Chief Executive', *ibid.*, p. 1447.

85. Foreign Intelligence Surveillance Act of 1978 ('FISA'), Public Law 95-511, (Oct. 25, 1978), as amended, 50 U.S.C. §§ 1801-1862 (2000 & Supp. II 2002). The Protect America Act of 2007 was a temporary amendment to FISA, which, due to a sunset clause, expired on 17 February 2008. Publ. L. No. 110-55, 121 stat. 552 (2007)..

86. Press Conference by the President, 19 December 2005, <<http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html>>, visited 3 October 2007.

87. According to Art. I §9 of the Constitution, 'the Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it'. The legislature can suspend *habeas corpus* if there is an adequate substitute for it.

88. Congress has only suspended habeas corpus four times previously, and made findings of rebellion or invasion in each case. See the *Boumediene v. Bush*, 476 F.3d 981, 994, 1007 (D.C. Cir. Feb. 20, 2007) (Rogers, dissenting), *cert. granted* 127 S.Ct. 3078 (2007).

whether there is an express or implied congressional authorization to take certain measures that directly affect the realm of individual liberty.⁸⁹ In the texts of the resolution there is no indication that Congress intended to introduce a special legal regime for counterterrorist military operations. The question of an implied congressional authorization was left to the judiciary. One of the reasons why the courts had to deal with this sensitive issue was Congress' inability to live up to its constitutional authority as the sole law-maker to adopt the required legislation itself and to introduce a balance between liberty and security.

While the case law on the separation of powers with regard to the fight against terrorism has not been consistent, the courts recently refrained from inferring implied executive powers from the congressional authorization of force. Contrary to the *Hamdi* case⁹⁰, in the 2006 *Hamdan* case the Court did not derive presidential powers from the AUMF.⁹¹ The plurality reached the conclusion that the authorization of force did not warrant the creation of special military commissions⁹² to try the detainees.⁹³ The judges did not deal with the question of how far basic rights may be considered implicitly modified in an armed conflict. The Court equally failed to recognize that by adopting the AUMF Congress maintained its compe-

89. The President's authority is at its highest when he acts pursuant to an express or implied authorization of Congress. See *Youngstown*, 343 US at 635 (Jackson J., concurring).

90. In *Hamdi*, the majority found a sufficient basis in the AUMF for the detention of suspects for the duration of active hostilities, qualifying such detentions as 'incident to war'. 'There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted as incident to war as to be an exercise of the necessary and appropriate force Congress has authorized the President to use', *Hamdi v. Rumsfeld*, 542 US 507, 518; 124 S. Ct. 2633, 2640 (2004) (O'Connor, J., plurality op.). At the same time, the Court derived certain minimal procedural guarantees from the US Constitution, including the detainees' right to contest their detention; and restricted the scope of 'implicit' congressional authorization to the immediate battlefield, that is Afghanistan. Some of the dissenters argued that the AUMF does not authorize the President to detain US citizens and there must be special legislation authorizing him to do so. '[T]here is no reason to think Congress might have perceived any need to augment Executive power to deal with dangerous citizens within the United States, given the well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorist might commit', *Hamdi*, 542 US 541 (Souter, J., dissenting in part), referring to the Non-Detention Act, 18 USC § 4001 (a).

91. *Hamdan v. Rumsfeld*, S.Ct. 2749 (2006); see also H. Keller and M. Forowicz, 'A New Era for the Supreme Court After *Hamdan v. Rumsfeld*?' , 67 *ZaöRV* (2007) p. 1; S.R. Shapiro, *The Role of the Courts in the War against Terrorism: A Preliminary Assessment*, 29 *The Fletcher Forum of World Affairs* (2005) p. 108.

92. But see Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (MCA).

93. See Art. 84 of the III Geneva Convention relative to the Treatment of Prisoners of War. In *Quirin*, the Court found such an authorization. However, this was a situation where war had been declared. 317 US at 29.

tence to introduce statutory limitations of individual rights in times of crisis.⁹⁴ The importance of the outcome of the case should not be underestimated, however, as it reinforced Congress's role in its relation to the executive branch of government. It remains to be seen whether the Court will follow this line of reasoning in the pending *Boumediene* case.⁹⁵

The detention of enemy combatants and the wire-tapping programme show quite plainly how far a vague statutory authorization to use military force may be stretched by the executive branch when it is implemented without effective parliamentary control. Although the implementation of war powers in practice remains a primarily executive responsibility, to amend the law is the prerogative of the legislative branch. The government is not entitled to create a special legal order tailored to its war objectives.

3.2.3 *Exploring the boundaries of the scope of congressional authorization of force*

The congressional authorization of force provides a special but vague legal framework for presidential action in the 'war on terror'.⁹⁶ Although the Constitution implicitly recognized the presidential power to repel sudden attacks without congressional authorization,⁹⁷ it cannot be argued that additional preventive and law-enforcement measures taken within the context of the war in Afghanistan are also covered by the presidential war powers.⁹⁸ However, the issue as to whether 'nec-

94. But see *Hamdi*, 542 US 547, 578 (Scalia, J., dissenting): 'If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this Court.' Still, Scalia fails to see that, at times, the Courts need to press the legislature to live up to its responsibilities.

95. *Boumediene v. Bush*, see all the relevant materials at <<http://www.mayerbrown.com/probono/commitment/article.asp?id=3706&nid=3193>>, visited 10 October 2007). According to the Amicus Curiae Brief of the United Nations High Commissioner for Human Rights in support of petitioners in the *Boumediene* case, '[t]he procedures and evidentiary rules employed by the Combatant Status Review Tribunals frustrate subsequent effective judicial review of the lawfulness and reasonableness of a prisoner's detention. These processes, even combined with the scope of review by the Court of Appeals, do not satisfy the obligations of the United States under the Covenant.' The Brief is available at <http://www.mayerbrown.com/public_docs/probono_Amicus_Brief_UNHCHR.pdf>.

96. AUMF, *supra* n. 79.

97. Cf., Farrand, *supra* n. 69, at pp. 318-319.

98. R. Goldstone argues that '[p]art of the problem is the approach by the Bush Administration in using the analogy of "war" in combating terrorism', R. Goldstone, 'The Tension between Combating Terrorism and Protecting Civil Liberties', in R.A. Wilson, ed., *Human Rights in the 'War on Terror'*, (Cambridge, Cambridge University Press 2005), at pp.164-165; see also M. Kotzur, 'Krieg gegen den Terrorismus' – politische Rhetorik oder neue Konturen des 'Kriegsbegriffs' im Völkerrecht?', 40 *Archiv des Völkerrechts* (2002) p. 454; J. Meierhenrich, 'Analogies at War', 11 *Journal of Conflict and Security Law* (2006) p. 1.

essary and appropriate force' was employed by the President remained outside parliamentary scrutiny.⁹⁹

Some lawyers suggested recognizing a special character of certain antiterrorist measures taken by the government¹⁰⁰ and regard the use of extra-constitutional measures during a state of emergency as defensible. The Constitution itself, however, should not pay the price of self-destruction for the sake of survival. It appears equally questionable how far a special emergency legal regime¹⁰¹ would strengthen Congress' position in its relation with the government, as there are considerable presidential emergency powers enshrined in the US Constitution.¹⁰² The most important limitations of governmental authority in the 'war on terror' are certainly Congress' constitutional power to codify human rights limitations in an emergency and the power of the purse regarding the financing of military and other anti-terrorist measures. Since it is unlikely that Congress will activate its power of the purse to stop the government from using force against terrorist groups, other means of democratic oversight need to be employed in order to make the government accountable.

A necessary prerequisite for an effective parliamentary control is Congress' readiness to live up to its constitutional authority.¹⁰³ Many observers expected that after their take-over of Congress in 2007, the Democrats would make it difficult for the

99. '[T]here is a long tradition ... of courts and political branches referring to *jus in bello* to give content to both congressional authorizations and to use force and the President's constitutional war-time powers. There is no similar tradition with respect to *jus ad bellum*', Bradley and Goldsmith, *supra* n. 80, at pp. 2089-2091. Dealing with the applicability of international humanitarian law to the AUMF, Bradley and Goldsmith note that 'Presidents have ordered the use of military force without congressional authorization and arguably in violation of the U.N. Charter. The limited attention Congress has given to these actions has focused primarily on their constitutionality and not their consistency with *jus ad bellum* rules. Nor has Congress sought affirmatively to incorporate *jus ad bellum* rules into U.S. domestic law, even though it has incorporated a number of *jus in bello* rules through, for example, the War Crimes Act of 1996.'

100. See M. Tushnet, 'Emergencies and the Idea of Constitutionalism', in M. Tushnet, ed., *The Constitution in Wartime: Beyond Alarmism and Complacency* (Durham NC, Duke University Press 2005), p. 39. Gross suggests that this would preserve a constitutional order's integrity without the risk of 'emergency' powers becoming permanently entrenched, see in V. Ramraj, M. Hor and K. Roach, eds., *Global Anti-terrorism Law and Policy* (Cambridge, Cambridge University Press 2005) at pp. 90-92. See also O. Gross, 'Chaos and Rules: Should Responses to Violent Crisis Always be Constitutional?', 112 *Yale LJ* (2003) p. 1011.

101. See B. Ackerman, 'This is Not a War', 113 *Yale LJ* (2004) pp. 1871 at 1873, 1877; see also B. Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Haven, Yale University Press 2006) at pp. 13-38.

102. See for example, W. McCormack, 'Emergency Powers and Terrorism', 185 *MLR* (2005) p. 69.

103. The US commission of inquiry recommended that a non-partisan committee of Congress should monitor the invasion of civil liberties by the executive branch of government. Goldstone suggests that all democratic nations should take that kind of initiative, Goldstone, *supra* n. 98, at p. 166.

President to take unilateral measures while further prosecuting the ‘war on terror’.¹⁰⁴ Although Congress, as expected, took a more critical stance, the legislature was unable to stop the administration’s controversial policy. Democrats in Congress have tried, without success so far, to restore the federal courts’ jurisdiction to hear the detainees’ challenges to their confinement.¹⁰⁵ Critics suggested that giving detainees access to the federal courts would amount to ‘a terrorist bill of rights that would put the nation at risk’.¹⁰⁶ The Senate blocked an effort to give terrorist detainees the right to appeal their detention to the federal courts.^{106a} The opposition’s reluctance or inability to take action against the US administration’s use of executive power certainly affects the effectiveness of congressional control.

3.3 Internal use of armed forces: The Posse Comitatus Act of 1878¹⁰⁷

As we already demonstrated above, the United States does not have a separate and detailed emergency constitution.¹⁰⁸ As historical experience shows, this state of affairs has been extensively exploited by the executive power.¹⁰⁹ After the Civil War, Congress expanded the role of the military.¹¹⁰ However, the growing influence of the military in the internal affairs of the state led to the enactment of the Posse Comitatus Act in 1878 (PCA)¹¹¹ to end military excesses and subordinate military power to civilian authority. The PCA prohibits the use of armed forces within US borders except in cases and under circumstances explicitly authorized

104. J. Weisman, ‘Terrorism policies split Democrats: Anger Mounts Within Party Over Inaction on Bush Tactics’, *Washington Post*, 30 August 2007, p. A01; J. Zeleny, ‘Democrats Hope to Expand Rights to Guantánamo’, *New York Times*, 6 June 2007, p. 16.

105. See also C. Hulse, ‘Senate Republicans Block Detainees Right of Appeal’, *New York Times*, 20 September 2007, p. 18; D. Marty’s Report, Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report (Parliamentary Assembly of the Council of Europe, 11 June 2007), at <<http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf>>; Venice Commission Opinion on the international legal obligations of Council of Europe member states in respect of secret detention facilities and inter-state transport of prisoners, March 2006, accessible at <[http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)009-e.pdf](http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.pdf)>.

106. Hulse, *ibid*.

106a. Congressional Record, Daily Digest, 19 September 2007, pp. S11736-11739.

107. Literally ‘the force of the county’.

108. On the emergency see B. Ackerman, ‘The Emergency Constitution’, 113 *Yale LJ* (2004) p. 1029. For a comparative analysis see K.L. Scheppelle, ‘North American emergencies: The use of emergency powers in Canada and the United States’, 4 *IJCL* (2006) p. 213.

109. Abraham Lincoln used federal emergency powers during the Civil War without prior congressional authorization and Congress approved Lincoln’s actions after the fact. W.C. Relyea, ‘National Emergency Powers’, CRS Report for Congress, November 2006, at pp. 5 et seq.

110. Between 1866 and 1877, federal troops in the South guarded polling places, arrested members of the Ku Klux Klan, disrupted illegal whiskey production and put down labour unrest.

111. Posse Comitatus Act of 18 June 1878, Ch. 263 §15, 20 Stat. 152, 18 USC 1385.

by the Constitution or an Act of Congress.¹¹² Several exceptions have been enacted since, which affected its legal significance.¹¹³ The courts make a distinction between the military's active and direct participation in civilian law enforcement (making arrests and conducting searches), which is prohibited, and a largely passive assistance, like providing equipment, training and advice that is permissible under the PCA.

After 11 September 2001, Congress in its 'Sense of Congress reaffirming the continued importance and applicability of the Posse Comitatus Act'¹¹⁴ emphasized that the 'Act [*Posse Comitatus*] has served the Nation well in limiting the use of the Armed Forces to enforce the law,' and went on to note that 'nevertheless, by its express terms, the Posse Comitatus Act is not a complete barrier to the use of the Armed Forces for a range of domestic purposes, including law enforcement functions, when the use of the Armed Forces is authorized by Act of Congress or the President determines that the use of the Armed Forces is required to fulfil the President's obligations under the Constitution to respond promptly in time of war, insurrection, or other serious emergency.'¹¹⁵

112. After September 11, 2001, there have been proposals in Congress to amend the PCA to give the military more power in counterterrorist operations. President Bush, in his National Strategy for Homeland Security, stressed that 'the threat of catastrophic terrorism requires a thorough review of the laws permitting the military to act within the United States in order to determine whether domestic preparedness and response efforts would benefit from greater involvement of military personnel and, if so, how'. Lawyers expressed concerns about the proposal by referring to the possible abuse of civil liberties. See N. Canestaro, 'Homeland Defense: Another Nail in the Coffin for Posse Comitatus', 12 *Washington Univ. JL & Pol.* (2003) p. 99, at p. 141; M. C. Hammond, 'The Posse Comitatus Act: A Principle in Need of Renewal', 75 *Washington Univ. LQ* (1997) p. 953.

113. For example, Congress allowed the military to play a role in putting down insurrections, in assisting the Secret Service with its protective duties and in providing limited help in drug interdiction. In 1995, under Clinton, the military have been allowed to help in terrorism cases involving chemical and biological weapons of mass destruction. The military personnel were, however, restricted from making arrests or collecting evidence for law enforcement purposes. On the PCA see G. T. Trebilcock, 'The Myth of *Posse Comitatus*', October 2000, at <<http://www.homelandsecurity.org/journal/articles/Trebilcock.htm>>; see also J.R. Brinkerhoff, 'The *Posse Comitatus Act* and *Homeland Security*', February 2002, at <<http://www.homelandsecurity.org/journal/Articles/brinkerhoffpossecomitatus.htm>>; T.A. Gizzo and T.S. Monoson, 'A Call to Arms: The Posse Comitatus Act and the Use of the Military in the Struggle against International Terrorism', 15 *Pace ILR* (2003) p. 150; Canestaro, *supra* n. 112, p. 99; G. Felicetti and J. Luce, 'The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding before Any More Damage is Done', 175 *MLR* (2003) p. 87; Hammond, *supra* n. 112, p. 953; S.J. Kealy, 'Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement', 21 *Yale L & Pol. R.* (2003) p. 383; C.J. Schmidt and D.A. Klinger, 'Altering the Posse Comitatus Act: Letting the Military Address Terrorist Attacks on U.S. Soil', 39 *Creighton LR* (2006) p. 667.

114. US Code, Title 6, Section 466.

115. *Ibid.*

The PCA does not clearly determine the situations where the use of armed forces shall be permissible¹¹⁶ and does not draw the line between crimes and acts of war. As pointed out elsewhere, some ‘members of the armed forces have expressed concerns about whether a military response in the form of shooting down the hijacked jets during the September 11 attacks would have been permissible under the PCA.’¹¹⁷ There are suggestions to strengthen the role of the military by introducing a ‘narrow exception’ according to which the ‘military respond only to emergencies that civilian authorities cannot handle and only for a maximum of forty-eight hours – unless the situation requires continued civilian-authorized involvement’.¹¹⁸ The goal is to ‘limit military action to quick and forceful response to attacks, the restoration of order’ and to achieve ‘swift departure (of the military) from the picture’ after the attacks have been averted.¹¹⁹

Such an authorization would not be in conformity with the principle of continuous civilian supremacy, however. Furthermore, it is questionable whether such an amendment is really needed. The Constitution and legislation in force already provide the executive with a broad authorization to use military force in times of crisis. This is true especially after the US President signed the *John Warner National Defense Authorization Act* for the Fiscal Year 2007 in October 2006,¹²⁰ which empowered the President to employ military forces for counterterrorist purposes. Section 1042 amends *Posse Comitatus* and modifies the exemptions to it that were enacted by the *Insurrection Act* of 1807.¹²¹ The legislation broadened the presidential power to use the military domestically.¹²² The President may use the armed forces in response to a natural disaster, a disease outbreak, a terrorist attack or ‘other conditions in which the President determines that domestic violence has

116. After analyzing the current legislation on the domestic use of military force against terrorism, some lawyers reach the conclusion that ‘most of the applicable statutes and the Constitution do not provide clear, explicit guidelines for when the military may act’, Schmidt and Klinger, *supra* n. 113, pp. 667, at p. 673.

117. *Ibid.*, at p. 672.

118. *Ibid.*, at p. 692.

119. *Ibid.*

120. Public Law 109-364, the ‘John Warner Defense Authorization Act of 2007’ (H.R.5122). In April 2002 a revision of the military’s command structure took place which included a new unified component command, the US Northern Command (NORTHCOM). This command is responsible for homeland defence and for assisting civilian authorities.

121. According to the *Insurrection Act* the President has the power to use the military domestically in cases of insurrection or conditions where ‘rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings’.

122. See also National Defense Authorization Act for Fiscal Year 2000, Public Law 106-65, which permits the Secretary of Defense to authorize military forces to support civilian agencies, including the FBI, in the event of a national emergency, especially one involving nuclear, chemical and biological weapons.

occurred to the extent that state officials cannot maintain public order'.¹²³ The new law requires the President to notify Congress 'as soon as practicable after the determination and every 14 days thereafter during the duration of the exercise of the authority'.

However, President Bush modified the requirement of the law to keep Congress informed in his signing statement, which states that 'the executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, the national security, [and] the deliberative processes of the Executive.' Thus, the Bush administration reserves the power to keep a wide range of issues related to an internal military operation outside congressional scrutiny.¹²⁴ It is unclear what the congressional share of authority really is and if Congress will be in a position to exercise a substantial and continuous control of the implementation of domestic military policies in such an emergency situation. It is unlikely that the courts will be actively engaged in determining legislative and executive prerogatives based on the new regulations. Past experience shows that the judiciary has been continuously reluctant in finding a violation of the PCA by the executive branch.

3.4 Congressional approval and independent presidential authority: The need for a balance of powers

There is no separate emergency constitution in the United States. The President has the primary responsibility for conducting foreign and security policy and as Commander-in-Chief of the Armed Forces may take immediate action in case of emergency without prior congressional approval. The congressional authorization of force strengthened the President's role. 'Congress' authorization for the use of force against terrorists responsible for the September 11 attacks ... has mooted some of the limitations on the use of the military for law enforcement purposes by recasting them as military operations.'¹²⁵ The executive has been granted the authority to employ the armed forces without parliamentary deliberation and continuous con-

123. According to an editorial in the *New York Times*: 'Changes of this magnitude should be made only after a thorough public airing. But these new presidential powers were slipped into the law without hearings or public debate. The president made no mention of the changes when he signed the measure, and neither the White House nor Congress consulted in advance with the nation's governors', *New York Times*, 19 February 2007, p. 14.

124. 'Bush paves the way for martial law: 2007 National Defense Authorization Act overturns Posse Comitatus Act', at <<http://www.inteldaily.com/?c=117&a=1431>>, 22 March 2007 (visited 22 September 2007).

125. Ch. Doyle and J. Elsea, 'Terrorism: Some Legal Restrictions on Military Assistance to Domestic Authorities Following a Terrorist Attack', *CRS (Congressional Research Service) Report for Congress*, 27 May 2005, p. 4.

gressional control. Congress has no clear-cut competence to determine when the military may be used for law enforcement purposes domestically. The PCA leaves it to the executive to decide as to whether, when, and where to use force within the borders of the United States.

We may conclude that Congress did not live up to its constitutional authority to make the government accountable for its counterterrorist action. The legislature was unable or unwilling to assume its *habeas corpus* prerogative and set limits to the exercise of presidential powers. The President, relying on his Commander-in-Chief authority, extensively exploited the uncertain legal situation created by the congressional authorization of force as well as congressional ineffectiveness and largely tailored it to his war objectives. It must also be noted that the courts have been reluctant to determine the functions of the executive and legislative branches of government, and to establish a duty on the part of the legislature to assert its constitutional authority which, according to the principle of the separation of powers, cannot be delegated to the executive branch. The courts were initially unable to reinforce Congress' role with respect to the government's counterterrorist action. Recent decisions show, however, that the Supreme Court has overcome its initial reluctance to enforce Congress' role. Time will tell whether the change in the judiciary's approach will lead to a more consistent jurisprudence in the years to come.

4. RUSSIA: THE FIGHT AGAINST TERROR IN A 'SUPER-PRESIDENTIAL' REPUBLIC?

4.1 Constitutional framework

After the collapse of the Soviet Union in 1991 the Russian Federation was a parliamentary republic. The power struggle between the legislative and executive branches of government that shaped Russian political life in 1991-93 ended with President Yeltsin's use of force against the legislators in October 1993.

The Russian Constitution of 1993 has established a strong presidential power. Some observers describe Russia as a 'super-presidential' Republic.¹²⁶ The President is the dominant force in foreign and security policy¹²⁷ with far-reaching military powers,¹²⁸ and can rely on a supportive majority in the State Duma that, according to Article 105

126. See Usanov, *supra* n. 11, at p. 15.

127. Art. 80(3) of the Russian Constitution.

128. R.V. Barylski, *The Soldier in the Russian Politics 1988-1996: Duty, Dictatorship and Democracy under Gorbachev and Yeltsin* (New Brunswick NJ, Transaction 1998) pp. 227 et seq.; J.P. Moran, *From Garrison State to Nation-State: Political Power and the Russian Military under*

of the Constitution, has the legislative power. The upper chamber of the bicameral Parliament, the Federation Council, comprised of the representatives of Russian regions,¹²⁹ is largely under presidential influence, especially after President Putin had strengthened the executive's 'vertical of power'¹³⁰ in the wake of the hostage-taking in Beslan in September 2004. The principle of the separation and independence of powers (Art. 10 of the Constitution)¹³¹ is affected by an apparent imbalance of powers¹³² within the present constitutional framework.¹³³ The Russian President is the head of state, the guarantor of the Constitution and civil rights. Furthermore, he ensures the sovereignty, territorial integrity and unity of the country. The President determines the main directions of domestic and foreign policy. The Prime Minister is appointed by the President and lays down the basic directions of the activities of the government.¹³⁴ Some constitutionalists even assume that the President does not constitute an integral part of the executive power¹³⁵ and embodies

Gorbachev and Yeltsin (Westport CT, Praeger 2002); D.R. Herspring, *The Kremlin and the High Command: Presidential Impact on the Russian Military from Gorbachev to Putin* (Lawrence KS, Univ. Press of Kansas 2006).

129. See E. Barkhatova, *Komentariij k Konstitucii Rossiskoj Federacii* (Moscow, Prospekt 2008) Art. 96, pp. 146 et seq.

130. According to the amendment of 11 December 2004 the Law 'On General Principles Governing the Organization of Legislative/Representative and Executive State Authorities of Constituent Entities of the Russian Federation' of 6 October 1999, the President nominates governors who should be confirmed by provincial legislative assemblies. If the assembly refuses to accept the nominee, it may be dissolved by the President. The President can dismiss a governor if the incumbent has lost the confidence of the President.

131. 'State power in the Russian Federation shall be exercised on the basis of the separation of legislative, executive and judicial powers. The organs of legislative, executive and judicial power shall be independent.' For an English translation of the Russian Constitution see <<http://www.constitution.ru/en/10003000-03.htm>>.

132. The suggestions on the modification of the existing power-sharing have so far remained unimplemented. See, for example, R. Sharlet, 'Russian Constitutional Change: Proposed Power-Sharing Models', in R. Clark, F. Feldbrugge and S. Pomorski, eds., *International and National Law in Russia and Eastern Europe* (The Hague, Kluwer Law International 2001) p. 361.

133. The Russian Constitutional Court decided on 21 December 2005 that the unity of executive power as proclaimed in Art. 77(2) of the Constitution indicates that the provincial administration heads are directly subordinated to the President. The Court emphasized that nothing prevents the federal legislator from giving the President such competence by law. 50 *Sobranie zakonodatel'stva Rossiskoj Federacii* (2004) item 4950.

134. According to Art. 110(1) of the Constitution, the executive power in Russia shall be exercised by the Government of the Russian Federation. Para. 2 goes on to specify that the Government of the Russian Federation consists of the Chairman of the Government, the Deputy Chairman of the Government and federal ministries. According to Art. 11(1) of the Constitution, the state power in the Russian Federation shall be exercised by the President of the Russian Federation, the Federal Assembly (the Council of Federation and the State Duma), the Government of the Russian Federation, and the courts of the Russian Federation.

135. See V.D. Karpovich, V.V. Lazarev, L.A. Okun'kov and O.E. Kutafin, Commentary on Art. 11(1) of the Russian Constitution, at <http://www.constitution.garant.ru/DOC_3866952.htm#sub_para_N_11>, visited 9 September 2007.

instead the independent *fourth power* coordinating the other three branches of government. The President's role cannot be discussed here in detail.¹³⁶ We rather focus on the distribution of competencies between executive and legislative powers with respect to counterterrorist military deployments.

4.2 External use of armed forces

4.2.1 Article 102 (1) d of the Constitution

One of the important provisions regarding the division of competencies among the branches of government¹³⁷ is Article 102 of the Russian Constitution, according to which the Council of Federation approves presidential decisions on the deployment of Russian armed forces abroad (Art. 102, 1(d)). Moreover, the Council approves presidential decrees on the proclamation of a state of emergency (102, 1(c)) and martial law (102, 1(b)). The authority of the Federation Council to approve the presidential motion on military deployments abroad is specified in Article 162(7) of the Rules of the Federation Council, according to which, if the motion has not been voted for by the majority of the members of the chamber, the armed forces may not be deployed outside the territory of the Russian Federation.¹³⁸ Although Article 102, 1(d) merely speaks of the use of Russian armed forces outside the borders of the Russian Federation and does not specify in what kind of military operation the Russian armed forces may be engaged,¹³⁹ it has so far only been invoked to authorize deployments (or extensions of deployments) of Russian armed forces participating in operations under international auspices¹⁴⁰ and has been interpreted restrictively by the Constitutional Court,¹⁴¹ which indirectly limited its applicability to peace-keeping operations.

136. See V.E. Čirkin, 'Prezidentskaja vlast', 5 *Gosudarstvo i pravo* (1997) at p. 15.

137. On the separation of powers among the branches of government with respect to the armed forces see I. G. Tomilov, *Realizacija principa razdelenija vlastej v dejatelnosti gosudarstvennykh organov po rukavodstvu voozuzennimi silami Rossijskoj Federacii* (Moscow, 1999).

138. See the Rules of the Federation Council at <<http://www.akdi.ru/sf/reglam/reg.HTM#g21>>.

139. See also the commentary on Art. 102(4) by Karpovich et al., *supra* n. 135.

140. See B. Tuzmukhamedov, 'Russian Federation: the pendulum of powers and accountability', in Ch. Ku and H.K. Jacobson, eds., *Democratic Accountability and the Use of Force in International Law* (Cambridge, Cambridge University Press 2003) p. 257.

141. In June 1995, the Federation Council requested the Constitutional Court to clarify the meaning of Art. 102, 1(d) of the Constitution. According to the Court the consideration of the merits would have amounted to a 'review of the constitutionality of the new law on peacekeeping in an improper procedure', *ibid.*, p. 268.

4.2.2 The Anti-terrorism Law of 6 March 2006

According to the new anti-terrorism law of 6 March 2006¹⁴² the President determines the main directions of the state policy on terrorism (Art. 5 (1, 1)).¹⁴³ The military may take part in domestic counterterrorist operations and the fight international terrorism abroad. The President has the authority to decide on the use of armed force from the territory of the Russian Federation against terrorists and their sites located abroad without parliamentary approval.¹⁴⁴

However, the presidential decision on the *deployment* of armed forces outside the Russian borders can only be taken after approval by the Federation Council.¹⁴⁵ Similar to the German model, the motion of the President to the Federation Council includes information on the strength of troops, on their places of deployment, on the time-limit for the deployment and on the order of its extension in cases of necessity.¹⁴⁶ However, he unilaterally determines the tasks that the troops must accomplish during the deployment, decides to recall the troops and informs the Federation Council about his decision.¹⁴⁷ He also has the authority to change the modalities of the military operation without involving Parliament. It seems questionable whether the Federation Council, which is under presidential influence and whose members are not directly elected representatives of the people, can ensure an effective democratic control over the use of armed forces abroad. Taking into account the modern weapons systems Russia possesses it appears questionable if their extra-territorial use is less important than the sending of Russian troops abroad

142. II Sobranie zakonodatel'stva Rossijskoj Federacii (2006) item 1146, text at <<http://duma.consultant.ru/doc.asp?ID=32608>>, visited 30 September 2007). See also, S.I. Gir'ko et al., *Kommentarij k Federalnomu Zakonu o Protivodejstvii Terrorizmu* (Moscow, Justicinform 2007). O. Luchterhandt, 'Das neue Terrorbekämpfungsgesetz Russlands vom 10. März 2006' [sic], 48 *WGO-Monatshefte für osteuropäisches Recht* (2006) pp. 106, at p. 112.

143. The President issued a decree on counterterrorist measures on 15 February 2006 to enter into force on the day of the entry into force of the new antiterrorist law. Some observers argued that the President, through the adoption of this decree, exerted pressure on the legislature to adopt the anti-terrorist law. See L. Levinson, 'O protivodejstvii terrorizmu': zakon, prinijatii po ukazu, at <<http://www.hro.org/docs/expert/2006/03/levinson.php>>, visited 3 November 2007. Some deputies also noted that the presidential decree 'accelerated the legislative process' and 'simplified' the deputies' work on the draft. See the contribution of the member of Parliament *Kulikov*, the stenographic protocol of the sitting of Parliament of 22 February 2006, at <http://www.akdi.ru/gd/PLEN_Z/2006/02/s22-02_u.htm>, visited 3 November 2007.

144. The Anti-terrorism Law, Art. 10(2).

145. *Ibid.*, Art. 10(3).

146. *Ibid.*, Art. 10(5).

147. *Ibid.*, Art. 10(6).

that must be authorized by the legislature.¹⁴⁸ The absence of democratic control in the first case can hardly be justified by considerations of secrecy alone.

4.3 **Internal use of armed forces**

4.3.1 *Parliamentary powers in times of internal emergency – the Role of Parliament in the Chechnya conflict*

After the collapse of the Soviet Union, Moscow was confronted with an armed secessionist movement in Chechnya. On 11 December 1994, according to President Yeltsin, a military operation was launched to protect the territorial integrity of the Russian Federation and basic rights of Russian citizens in the conflict zone. The Russian Government did not regard the first military intervention in Chechnya that lasted until 1997 as a counterterrorist operation. Although Yeltsin referred to the Constitution as a general legal framework for military intervention, he did not proclaim a state of emergency and the Russian Parliament did not participate in the decision to deploy military forces to Chechnya. As some observers already emphasized, declaring a state of emergency would have required more transparency and accountability of executive power¹⁴⁹ and would obviously have exposed the government to more criticism and pressure.¹⁵⁰

On 8 December 1994, the Federation Council passed a resolution that no force was to be used in Chechnya until that time as the executive took another decision in accordance with the Constitution.¹⁵¹ In its resolution of 17 December 1994, the Federation Council criticized the President for disregarding the resolution of 8 December 1994 on the non-use of force and condemned the military operation as an unacceptable means of conflict resolution. The Federation Council requested the President to account for his action in Chechnya and emphasized that the use of armed force within the Russian borders should be regulated by law.¹⁵² The

148. The Kremlin proclaimed the readiness to use force extraterritorially against terrorist groups that threaten the security of the Russian Federation (Central Asia and Georgia present two examples). See C. Schmidt, 'Die Reaktion des russischen Staates auf den 11. September 2001', in B. Rill, ed., *Terrorismus und Recht – Der wehrhafte Rechtsstaat* (Munich, Hans-Seidel-Stiftung 2003) p. 70.

149. In the event of emergency, the President has to submit a detailed plan of measures to be taken during the emergency rule. Moreover, the state of emergency must be lifted after 60 days from its proclamation, and the President has to seek a fresh parliamentary approval in order to prolong it. Additionally, the United Nations and the Council of Europe must be informed about the proclamation of the state of emergency and about its duration.

150. According to Art. 56(1) of the Russian Constitution, '[i]n conditions of a state of emergency ... certain limitations may be placed on human rights and freedoms with the establishment of their framework and time period'.

151. 33 *Sobranie zakonodatel'stva Rossijskoj Federacii* (1994) item 3418.

152. *Ibid.*, item 3666.

State Duma equally called on the government to resolve the conflict by political means.¹⁵³ However, at the same time, the Duma qualified a critical statement of the European Parliament on Chechnya¹⁵⁴ as interference in Russian internal affairs.¹⁵⁵ The Parliamentarians stated that the military force was used against illegal armed groups because it was impossible to disband them without using military means.¹⁵⁶

In January 1995, the State Duma drafted constitutional amendments and legislative acts to impose explicit restrictions on the presidential ‘war powers’. One of the draft laws that did not receive a majority in Parliament prohibited the use of armed forces within the Russian territory without the prior proclamation of a state of emergency. Another draft law prevented the Government from using budget funds for financing the military operation in Chechnya. In its resolution of 13 January 1995, the State Duma stressed that no efficient and coordinated cooperation between the branches of government was possible in a critical situation, and that no legal basis for the internal use of armed forces existed.¹⁵⁷

Despite its legislative and investigative activities¹⁵⁸ the Russian Parliament failed to restrict the presidential ‘war powers’, to prevent the Government from continuing the military operation and to ensure an effective accountability of the executive branch for its actions in Chechnya.¹⁵⁹

The use of military weapons by the Russian Government was an indication that the conflict had acquired a military nature, and it can be concluded that there was an internal armed conflict going on in Chechnya. However, the government did not qualify the ongoing hostilities in Chechnya as an armed conflict and recently claimed that international humanitarian law is not applicable to anti-terrorist operations,¹⁶⁰ regardless of their scale. The standard of proportionality in human rights law which is stricter and applies not only to the protection of civilians, but, as the ECHR

153. 1 Sobranie zakonodatel'stva Rossijskoj Federacii (1995) item 35; see also the Duma resolution of 13 January 1995, *ibid.*, 5 (1995) item 370.

154. R. Parsons, ‘Russia: Council of Europe Condemns Human Rights Violations in Chechnya’, *Radio Free Europe/Radio Liberty*, 25 January 2006, at <<http://www.rferl.org/featuresarticle/2006/01/db6660d3-511a-407b-a489-f3c8e833a6c6.html>>, visited 30 September 2007).

155. Statement of the State Duma of 23 December 1994, 1 Sobranie zakonodatel'stva Rossijskoj Federacii (1995) item 31.

156. *Ibid.*

157. 5 Sobranie zakonodatel'stva Rossijskoj Federacii (1995) item 370.

158. On 13 January 1995, the State Duma set up a commission to investigate the circumstances that had led to the Chechnya crisis.

159. Cf., E. Schneider, ‘Die nationalistische und kommunistische Fraktionen der rußländischen Staatsduma’, 28 *Berichte des Bundesinstituts für ostwissenschaftliche und internationale Studien* (1995) at pp. 20-23.

160. *Isayeva, Yusupova and Bazayava v. Russia*, ECtHR, Application Nos. 57947/00, 57948/00 and 57949/00, Judgment of 24 February 2005 (final 6 July 2005); *Isayeva v. Russia*, ECtHR, Application No. 57950/00, Judgment of 24 February 2005 (final 6 July 2005).

emphasized in the *McCann* case in 1995,¹⁶¹ also of alleged terrorists, has not been invoked by the authorities as a limitation to the executive's military powers. Parliament failed to induce the government to bring the military intervention into conformity with the emergency constitution of the Russian Federation¹⁶² and international law standards that constitute a part of the Russian legal order.¹⁶³

The terrorist attacks in Dagestan and the blowing up of the apartment buildings in Moscow in 1999 provided the reasons for launching the second military intervention in Chechnya. On 23 September 1999, the Russian President issued a secret decree on Chechnya.¹⁶⁴ Since the military operation was a response to the apartment bombings, it was seen as a campaign against terrorism. Parliament played a limited role in this campaign. The anti-terrorist law of 1998 provided for a limited use of police forces against terrorists¹⁶⁵ but did not allow for a large-scale deployment of military forces for counterterrorist purposes.¹⁶⁶ Moreover, the Russian government adopted a somewhat contradictory position, asserting, on the one hand, that the Chechen conflict was a case of 'banditry' and terrorism rather than an armed conflict,¹⁶⁷ but reverting, on the other, to its internal military manuals to demonstrate that the actions of the armed forces were in accordance with the main legal restrictions on the use of force.¹⁶⁸

4.3.2 *The Chechnya decision of the Constitutional Court 1995: an uneasy path from necessity to constitutionality*

On 9 December 1994, the President of the Russian Federation authorized the Russian Government to apply all means at the disposal of the state to ensure state

161. *McCann and Others v. United Kingdom*, ECtHR, Series A No. 324, Judgments of 27 September 1995, in particular paras. 156 et seq.; see also Marauhn et al., *supra* n. 63.

162. The initiative of a group of deputies to adopt a resolution on the introduction of the state of emergency in Chechnya in September 2001 failed (NEWSru.com, 20 September 2001, at <http://palm.newsru.com/russia/20sep2001/gosduma_sps.html>, visited 13 October 2007). The State Duma recommended that the Russian President should introduce a state of emergency in Chechnya in December 2002. However, the presidential administration did not share the view of the Duma on the situation in Chechnya (NEWSru.com, 18 December 2002, at <<http://palm.newsru.com/russia/18dec2002/duma1.html>>, visited 13 October 2007). Finally, the Duma members withdraw their recommendation (NEWSru.com, 24 December 2002, at <<http://palm.newsru.com/russia/24dec2002/nochp.html>>, visited 13 October 2007).

163. Art. 15(4) of the Russian Constitution; see G.M. Danilenko, *Primenenie meždunarodnogo prava vo vnutrennej pravovoj sisteme Rossii*, 11 *Gosudarstvo i pravo* (1995) p. 115.

164. Quoted from NEWSru.com, 20 September 2001, *supra* n. 162.

165. On the definition of counterterrorist operations under the Anti-terrorism Law of 25 July 1998 see T. Beknazar, 'Country Report on Russia', in Walter et al., eds., *supra* n. 7, at p. 511.

166. Federal Anti-terrorism Law of 25 July 1998, 31 *Sobranie zakonodatel'stva Rossijskoj Federacii* (1998) item 3808.

167. Quoted from W. Abresh, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya', 16 *EJIL* (2005) pp. 741-767, at p. 754.

168. *Isayeva v. Russia*, judgment of 24 February 2005, paras. 95-98, 105-106.

security, legality, citizens' rights and freedoms, public order protection, to combat crime and to disarm all illegal armed formations in Chechnya. In a case brought before the Constitutional Court in 1995¹⁶⁹ the Federation Council maintained that the 1993 Constitution did not permit the internal use of armed forces without the declaration of a state of emergency¹⁷⁰ or martial law, and claimed, among other things, that the administration's measures imposed illegal restrictions on and violated the constitutional rights of Russian citizens.¹⁷¹ Additionally, a group of deputies of the State Duma¹⁷² argued that the use of the armed forces in Chechnya resulted in considerable casualties among the civilian population and violated Article 15 of the Constitution¹⁷³ and the international obligations of the Russian Federation. The Court's decision has already been discussed in detail elsewhere.¹⁷⁴ This article focuses on the Court's reasoning regarding the respective competencies of Parliament and the President.

While looking for a constitutional and statutory justification of presidential action in Chechnya, the Constitutional Court reached the conclusion that there were constitutional means to deploy the armed forces within the Russian borders in order to preserve the country's territorial integrity. According to the Court, this kind

169. The Federation Council challenged the constitutionality of the following executive acts: the Decree of the President of the Russian Federation of 2 November 1993 on the Main Provisions of the Military Doctrine of the Russian Federation; the Decree of the President of the RF of 30 November 1994 on Measures to Restore Constitutional Legality and Law and Order on the Territory of the Chechen Republic; the Decree of the President of the RF of 9 December 1994 on Measures to stop the Activities of Illegal Armed Formations on the Territory of the Chechen Republic and in the Zone of the Ossetian-Ingush Conflict; and the Resolution of the Government of the Russian Federation of 9 December 1994 on Ensuring State Security and Territorial Integrity of the Russian Federation, Legality, the Rights and Freedoms of Citizens and Disarmament of Illegal Armed Formations on the Territory of the Chechen Republic and Adjacent Areas of the Northern Caucasus.

170. On the Russian law on the State of Emergency of 17 May 1991 see T. Keber, *Das Recht des Ausnahmezustands in der Russländischen Föderation* (Münster, LIT 2004) pp. 138 et seq.

171. *Postanovlenie Konstitutsionnogo Suda Rossijskoj Federacii* (Decision of the Constitutional Court of the Russian Federation of 31 July 1995), para. 1. An unofficial English translation of the decision has been published by the European Commission for Democracy through Law of the Council of Europe, CDL-INF (96) 1.

172. The group of deputies of the State Duma challenged the constitutionality of two documents: the Presidential Decree of 9 December 1994 and the Resolution of the Government of 9 December 1994.

173. According to Article 15(1): 'The Constitution of the Russian Federation shall have the supreme juridical force, direct action and shall be used on the whole territory of the Russian Federation. Laws and other legal acts adopted in the Russian Federation shall not contradict the Constitution of the Russian Federation.'

174. See W.E. Pomeranz, 'Judicial Review and the Russian Constitutional Court: The Chechen Case', *23 Review of Central and East European Law* (1997) p. 9; see also P. Gaeta, 'The Armed Conflict in Chechnya before the Russian Constitutional Court', *7 EJIL* (1996) p. 563.

of deployment did not require a formal declaration of a state of emergency or a special approval of the Federation Council. The Court based its decision on several constitutional provisions relating to presidential powers¹⁷⁵ and stated that the Constitution and the laws on defence and on security do not necessarily link the use of armed forces to the proclamation of an emergency or martial law.¹⁷⁶

The Court invoked the President's powers as Commander-in-Chief¹⁷⁷ and established that the Russian President has a *constitutional duty* to take immediate action without consulting Parliament in order to preserve the territorial integrity of the Russian Federation.¹⁷⁸ Accordingly, the President's authority to act within a concrete procedural framework when authorizing the Government's use of force was limited only by the Constitution, and when the Constitution was unclear, the President was required to act in conformity with the principle of the separation of powers, as defined by Articles 10 and 90(3) of the Constitution.¹⁷⁹ The Court did not reach the conclusion that the Head of State was under an obligation to consult Parliament after the fact, even not in the event of a protracted military operation.

Nevertheless, the Constitutional Court assumed that there was a lack of legal regulation, and emphasized that 'in the course of the examination of the case, the sides repeatedly pointed to gaps, contradictions and outdated provisions in the legislation on ensuring the country's defence and security (...). That was to be rectified by the law-maker, but it was not done in good time.'¹⁸⁰ However, the Court did not refer to the right of initiative of the President to submit a draft law to Parliament and to the absence of an unequivocal *constitutional* regulation of the

175. Postanovlenie, para. 4. The Court referred to Arts. 71, 78(4), 80(2), 82, 87(1), 90(3) of the Russian Constitution.

176. Ibid., para. 6.

177. Art. 87(1) of the Russian Constitution. However, para. 2 of this Article further states: 'In case of an aggression against the Russian Federation or of a direct threat of aggression the President of the Russian Federation shall introduce in the territory of the Russian Federation or in its certain parts a martial law and immediately inform the Council of the Federation and the State Duma about this.'

178. Postanovlenie, para. 4.

179. Ibid., 'In the case of instances when this procedure is not stated in detail, and also in respect of the powers not listed in Arts. 83-89 of the Constitution of the Russian Federation, their common framework is determined by the principle of the separation of powers – Art. 10 of the Constitution, and the requirements of Art. 90(3) of the Constitution, according to which decrees and orders of the President should not contradict the Constitution, and the laws of the Russian Federation. In addition to this, the implementation by the President of his competence in the manner stipulated by the Constitution of the Russian Federation presupposes also the charging of the Government of the Russian Federation in accordance with para. g of Part I of Art. 114 of the Constitution with the task of carrying out the Decrees of the President.'

180. Ibid.

presidential authorization of the internal use of armed forces.¹⁸¹ The Constitutional Court upheld the constitutionality of presidential decrees on military intervention in Chechnya¹⁸² and largely based its reasoning on the inherent constitutional powers of the President.¹⁸³

The Constitutional Court's construction of presidential powers may be interpreted as a general authorization for the Russian Head of State to take special measures in cooperation with the Government in the event of an internal emergency, including large-scale military operations within the Russian borders and drastic limitations on individual freedoms. After the suspension of its activities between 1993 and 1995, the Court in its 1995 Chechnya decision showed an unwillingness to legally restrict the executive's use of force¹⁸⁴ and gave the executive *carte blanche* to use military force without any significant parliamentary involvement.

4.3.3 *The Anti-terrorism Law of 2006: stretching the executive's powers in the struggle against terrorism*

After the terrorist attacks and the hostage-taking in an elementary school in Beslan, North Ossetia, in 2004, President Putin initiated fundamental reforms.¹⁸⁵ The Russian authorities decided to revise the existing anti-terrorist legislation adopted in 1998 to ensure a better coordination between the authorities in the struggle against terrorism and to create a centralized anti-terrorist system.¹⁸⁶ On the basis of a new

181. J. Deppe, 'Das "Tschetschenien-Urteil" des Verfassungsgerichts der Russischen Föderation und das Sondervotum des Verfassungsrichters Luč'in', 45 *Osteuropa Recht* (1999) pp. 109, at p. 124.

182. The Court concluded that some of the human rights limitations prescribed by the governmental resolution and presidential decree of 9 December 1994 were not in accordance with the Constitution.

183. In his dissenting opinion Judge *Zorkin* emphasized that referring to hidden [presidential] powers may have dangerous consequences.

184. As Judge *Luchin* indicated in his dissenting opinion (para. 2), the President's use of special powers without control and the delegation of these powers (that he does not possess) to the Government is in conflict with the principle of the separation of powers (Art. 10 of the Russian Constitution). On constitutional interpretation after 1995 see A. Fogelklou, 'Interpretation and Accommodation in the Russian Constitutional Court', in F. Feldbrugge, ed., *Russia, Europe, and the Rule of Law* (Leiden, Brill 2007) p. 29.

185. Putin decided to place the executive agencies of the subjects of the Federation under central control. Additionally, he sought to ensure sufficient political backing for his anti-terrorist measures and suggested introducing a proportional system of representation in the State Duma. See R. Lemaître, 'The Rollback of Democracy in Russia after Beslan', 31 *Review of Central and East European Law* (2006) p. 369, at p. 401.

186. The parliamentary commission created to clarify the circumstances surrounding the Beslan tragedy and to identify those responsible for the failure to save hostages' lives emphasized in its final report that there was a lack of coordination between the authorities during the counterterrorist operation in Beslan. See the report of 2006 at <<http://www.council.gov.ru/files/download/doklad7dec.pdf>>, p. 223.

statutory framework, the security authorities took a leading role in counterterrorist operations.

Small units of the armed forces may be called upon to participate in anti-terrorist military operations by the head of the operation, who will presumably be one of the top representatives of the Federal Security Service.¹⁸⁷ If the anti-terrorist operation requires the mobilization of a significant amount of resources and forces and covers wide parts of the Russian territory, the head of the anti-terrorist operation will inform the President, the Prime Minister, the heads of both chambers of Parliament, the General Prosecutor and other officials if necessary (Art. 12(3)). However, the President decides on the participation of the armed forces in anti-terrorist operations if the exigencies of the situation require a more serious military response. Parliamentary authorization is not required in this case (Art. 9(1) and (2)).¹⁸⁸

The law makes a distinction between the internal use of force and the deployment of Russian armed forces outside the borders of the Russian Federation. Recent experience has shown, however, that it could prove difficult to identify the real source of terrorist threats in geographical terms. Under certain circumstances, this situation will require rapid action from the executive without the previous information of Parliament. On the other hand, this situation further strengthens the executive branch at the expense not only of Parliament, but also of the protection of fundamental rights.

At the domestic level, the competencies to conduct military, semi-military and security operations are divided between the armed forces, the security forces and the police. Parliamentary capabilities to evaluate the situation are limited. On the other hand, the internal use of the military in combination with security operations may have a significant impact on individual liberty, and a certain degree of democratic control appears to be necessary to give effect to the principle of the separation of powers enshrined in Article 10 of the Russian Constitution and for the protection of human rights. Parliament should be responsible for establishing a sound legal framework for executive action in times of emergency. This cannot be substituted by executive law-making.¹⁸⁹

The 2006 anti-terror law introduced a special kind of ‘anti-terrorist’ emergency – the legal regime of anti-terrorist operations¹⁹⁰ – which is not subordinated to the

187. The law does not determine who the head of anti-terrorist operation is. Within the National Anti-terrorist Committee, there is a Federal Operational Command that shall direct and carry out counterterrorist operations.

188. It must be noted that the amendments to Art. 10 of the Federal Law on Defence of 4 April 2005 allowed the military to use force for purposes other than defence, 15 *Sobranie zakonodatel'stva Possijskoj Federacii* (2005) item 1276.

189. On the so-called ‘Decree Law’ in the Russian Federation see V.O. Luchin, ‘*Ukaznoe pravo*’ v *Rossii* (Moscow 1996).

190. Gir'ko et al., *supra* n. 142, p. 27. The draft law established a special legal regime triggered by the *threat* of terrorist attacks. This provision had not been included in the final text adopted in 2006

emergency constitution and can be introduced in any part of the country where the government deems it necessary to counter terrorism. It must be noted that a single terrorist act can trigger the legal regime created by the law of 2006, followed by the imposition of significant limitations on individual liberties.¹⁹¹ Thus the law lowered the threshold for imposing legal limitations on individual liberty and citizens' rights.¹⁹²

This legal situation raises questions regarding the proportionality of means. According to Article 15 of the ECHR, an emergency imposing certain limitations on basic rights may only be declared if the life of the nation is at stake. This high standard has been recognized within national legal orders.¹⁹³ By creating a special legal regime for anti-terrorist operations, which significantly interferes with citizens' ability to enjoy their basic rights and is comparable to emergency rule, the anti-terrorist law supersedes the high standards of European human rights law for proclaiming a state of emergency,¹⁹⁴ which is part of Russian law.¹⁹⁵ Further, the Anti-terrorism Law undermines the existing emergency legislation, adopted on 30 May 2001,¹⁹⁶ which allowed, under certain circumstances, the internal use of armed forces in the event of an emergency and provided for parliamentary participation in the proclamation and the implementation of the legal regime of the state of emer-

because of its vagueness. See the stenographic protocol of the sitting of Parliament of 17 December 2004, at <http://www.akdi.ru/gd/PLEN_Z/2004/12/s17-12_d.htm>. See especially, the position taken by the Member of Parliament *Baburin* who pointed out that the notion of the 'terrorist danger' may be used to suppress political opponents or social protest.

191. During the anti-terrorist military operation basic rights may be restricted, including the freedom of thought, freedom of speech, freedom of press and information, freedom of religion, free entrepreneurship and others. There is also a Law on Extremism of 25 July 2002 that imposes certain restrictions on the freedom of information.

192. Member of Parliament *Sergey Baburin* suggested setting time limits to the legal regime of a counterterrorist operation (5 days). According to his proposal, the President would have the power to prolong the counterterrorist operation for another 5 days if necessary. After 10 days Parliament (Council of Federation) would enter the scene and proclaim a state of emergency. This proposal was not adopted. See the stenographic protocol of the sitting of Parliament of 22 February 2006, at <http://www.akdi.ru/gd/PLEN_Z/2006/02/s22-02_u.htm>. On 26 February 2006, the draft was adopted on third reading. The Council of Federation approved the law on 1 March 2006.

193. See for example, *UK House of Lords, A (FC) and others (FC) v. Secretary of State for the Home Department*, [2004] UKHL 56, (Lord Hoffmann): 'I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation [...] Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community' (para. 96). See S. Shah, *The UK's Anti-Terror Legislation and the House of Lords: The First Skirmish*, 5 *HRLR* (2005) p. 403.

194. Cf., I. Cameron, *National Security and the European Convention on Human Rights* (The Hague, Kluwer Law International 2000).

195. Danilenko, *supra* n. 163.

196. Federal Law on the State of Emergency of 30 May 2001, 23 *Sobranie zakonodatel'stva Rossijskoj Federacii* (2001) item 2277. The original text is available at <<http://www.akdi.ru/gd/proekt/083172GD.SHTM>>.

gency.¹⁹⁷ The compatibility of the new legislation with the Constitution may also be put into question, since the Constitution makes a clear distinction between a time of emergency and a time of normality, with significant legal consequences attached to each legal regime.

Pursuant to the law, the armed forces are allowed to shoot down hijacked jets (Art. 7(3)) and to destroy ships being used by terrorists in the internal and territorial sea of the Russian Federation.¹⁹⁸ The legality of such measures equally appears questionable from a human rights perspective and from the perspective of the Russian Constitution.

The legal regime created by the law¹⁹⁹ confers key competencies on the security agencies, which are widely detached from parliamentary scrutiny, and empowers the executive branch to fight terrorism without a clear statutory limitation. Moreover, the new legislation limits individual liberties during anti-terrorist operations to a significant extent. Parliament has no authority to approve such limitations or to oversee the proportionality of the means used. Its role in controlling the executive's intrusion into individual liberty is largely diminished. In general, there is a lack of appropriate procedures to control the implementation of anti-terrorist legislation. It appears questionable whether the tools of general parliamentary control can ensure effective democratic oversight over security agencies and the military establishment.

4.4 **Fighting terrorism – a shared responsibility of armed forces and security agencies: what remains of parliamentary control?**

Legislation on counterterrorist military operations passed in 2006 strengthened the role of the executive branch of government in its relation to the legislature.²⁰⁰ The military forces and security agencies received additional authority in their fight against alleged terrorists which largely remains outside parliamentary scrutiny. Parliament has not been granted the authority to approve domestic military operations that may have far-reaching human rights implications in large parts of Russia. The interpretation of the separation of powers enshrined in Article 10 of the Rus-

197. Keber, *supra* n. 174.

198. Some members of the Federation Council emphasized that this provision not only has a normative but also a psychological value in deterring terrorists. See the statements of members of the Federation Council *V. Ozerov* and *R. Altinbaev*, at <http://www.akdi.ru/sf/PO06/5_1.htm>.

199. A range of amendments to the anti-terrorist legislation were adopted on 27 July 2006, 31 *Sobranie zakonodatel'stva Possijskoj Federacii* (2006) item 3452.

200. This is an example of legislative action that broadens the power of the executive branch of government in the struggle against terror through the means of detailed statutory provisions. Subsequently, the internal emergency powers of Parliament have been put into question. By contrast, in the United States, there is no statutory basis for the executive's counterterrorist military action except the Authorization to Use Military Force (AUMF), *supra* n. 79.

sian Constitution given by the Constitutional Court in its Chechnya decision in 1995 seems to be still the dominant one. It significantly curtails Parliament's ability to effectively control the executive's use of military force and to counterbalance presidential power.

The legislation now in force does not make a clear distinction between single terrorist acts as crimes to be dealt with by the police and large-scale terrorist attacks that may only be averted by military means. The executive retains full authority to determine the cases where military forces may be employed. The involvement and role of the security agencies in the fight against terrorism will make it even more difficult for Parliament to bring to account those responsible for a disproportional use of force and human rights violations.

5. COMPARATIVE ANALYSIS

Although state practice shows that the fight against transboundary terrorism creates a fertile ground for executive abuse, the so-called 'war on terror' does not and should not create a 'space devoid of law'²⁰¹ or a space for an abusive interpretation of law and executive self-empowerment. Democratic control over the use of armed forces should be extended to the government's counterterrorist operations so as to avoid the emergence of legal 'black holes'²⁰² and abusive governmental action which, in the long run, erodes the fundamentals of a democratic society. On the other hand, the supremacy of parliaments over the executive's counterterrorist military action may undermine the effectiveness of the fight against transboundary terrorism. While comparing the legal systems of the countries under review, the following analysis concentrates on the three main and interrelated rationales of the principle of the separation of powers: democratic self-government, individual human rights and the rule of law.

Parliaments of constitutional democracies bear primary responsibility to create a sound legal framework for counterterrorist governmental action. Furthermore, legislatures have to exercise control over the use of armed forces while retaining their institutional independence and contributing to a sustainable and effective exercise of executive power in the fight against terrorism. A further task of parliaments is to monitor and, if necessary, to limit the executive's prerogative to impose limitations on individual rights in times of crisis. Additionally, parliaments may withhold means from the government with a view to preventing an illegal military operation. These functions are interrelated and should be accommodated within the constitutional framework of each society.

201. The terminus used by Agamben, *supra* n. 53, at p. 50 to describe the state of exception.

202. Steyn, *supra* n. 6.

The degree of parliamentary involvement in the government's 'war on terror' varies in the countries under review. One reason for these differences lies in the structural distinction between parliamentary and presidential systems. In the United States and Russia, the Head of State enjoys far-reaching constitutional authority to use military force against terrorism without prior parliamentary approval. By contrast, the prerogatives of the German Government to deploy armed forces for counterterrorist purposes without prior parliamentary approval are significantly restricted, especially since the adoption of the Parliamentary Participation Act in 2005.

There is, however, no clear-cut separation of powers as regards counterterrorist military measures in the legal systems reviewed in this article. Although the US Constitution contains provisions on the participation of Congress in the military decisions of the government, their interpretation remains controversial. Parliamentary involvement is seen as a source of legitimacy but not as a constitutional precondition for counterterrorist military action. The adoption of the Authorization for Use of Military Force by Congress after 9/11, containing a rather broad authorization of military force for counterterrorist purposes, hardly contributed to a clear division of labour between the executive and legislative branches of government. In the Russian Federation, the deployment of armed forces abroad must be constitutionally approved by the Federation Council. However, it appears questionable whether the Federation Council, whose members are not directly elected by the people, could guarantee the sufficient democratic legitimacy of governmental action. Although the German Parliament may have a strong mechanism of democratic control at its disposal, legislative involvement in a wide range of issues related to counterterrorist military operations, based on the new legislation enacted in 2005, may well prevent Parliamentarians from exercising effective control.

Thus, it becomes clear that parliaments have to stick to the middle ground: the legislatures should not erect unnecessary obstacles to the executive effectiveness in the fight against terror by claiming far-reaching powers in approving every detail or operational modalities of the military operations; they rather have to bring an abusive government back within the confines of law by means of legislative action, democratic oversight, and the protection of human rights and fundamental freedoms even in times of crisis.

Parliaments cannot take anti-terrorist action *proprio motu* – they, as a rule, do not have the right of initiative – but they shall have a role to play in launching, implementing and terminating counterterrorist military operations. The parliamentary involvement may not be the same in launching the military operation as in implementing such an operation and bringing it to a successful end. Parliaments may effectively answer only the principal question as to whether, when and where to take military action. The legislatures cannot be expected to determine *how* to carry out the respective military operation in order to achieve its goals. Implement-

ing counterterrorist measures remains an executive domain and parliamentary intrusion into the operational executive decision-making process is not consistent with the principle of the separation of powers.²⁰³ Only the governments are equipped to decide on the modalities of the military operation: the operation command over the troops and any strategy change on the ground fall under sole governmental responsibility. The executive shall equally decide whether to extend the military operation and submit a motion to parliaments for approval.

The *intensity* of parliamentary control may vary in accordance with the type of the military operation, as the German example demonstrates. Furthermore, the parliaments shall be kept informed even in cases where no full parliamentary participation (authorization) is required. One of the means to ensure a continuous parliamentary participation may be to establish a simplified approval procedure, similar to the German model, with special parliamentary committees that will be endowed with the power to request from the government any information related to the counterterrorist military operations and will provide its reports to the rest of parliament at regular intervals. Within a functional framework of the separation of powers there may be certain counterterrorist military operations that do not require prior parliamentary approval, operations where the government has to report to parliament without obtaining its formal endorsement, and operations that need full parliamentary participation and fresh legislative authorization. In certain cases, where the participation of the legislature is not viable for different reasons, the parliamentary committees could be engaged that would guarantee continuous parliamentary oversight.

All three countries reviewed in this article make a distinction between the *internal* and the *external* use of armed forces. At the same time, all three parliaments have the power to approve external military deployments. The role of parliaments in participating in the decision to use the military force *internally* is largely diminished. In Germany, there is no explicit constitutional provision on parliamentary approval of internal military operations; in the United States, recent legislative enactments strengthen the presidential power at the expense of congressional participation; and in Russia, internal military operations largely remain outside parliamentary oversight.

In practice, however, internal military operations may lead to significant (legal or illegal) limitations of human rights. Not without difficulty a clear distinction can be made between the internal and external prerogatives regarding the fight against

203. Story, *supra* n. 67, at p. 411, para. 570: ‘The representatives of the people are to lay the taxes to support a war, and therefore have a right to be consulted, as to its propriety and necessity. The executive is to carry it on, and therefore should be consulted, as to its time, and the ways and means of making it effective.’

terrorism. They are becoming blurred, but, at the same time, they have to be separated from each other in order to maintain legal restrictions on the use of force. Otherwise, a vague legal framework may lead to executive abuse of power and abrogate the role of parliament. Legislatures should determine the legal boundaries of counterterrorist military operations through their legislative action, authorization of force or subsequent control of the government.

Parliamentary control should be extended not only to military operations conducted abroad but also to counterterrorist military undertakings within the state. There is no rationale for excluding the parliaments from exercising effective internal control. On the contrary, *any emergency modification of individual liberties shall require parliamentary involvement* according to the principle of the separation of powers. Moreover, parliaments shall be engaged at *the domestic level* in the decisions to deploy troops and need to authorize any internal rearrangements. However, parliamentary participation in decisions on the counterterrorist deployment of armed forces *abroad* should be limited to the principal decision as to whether the troops have to be employed, and to exercising *ex post facto* control of urgent military deployments.

In practice, parliaments remain reluctant to force their governments to *terminate* a counterterrorist military operation or to withhold the financial resources necessary to launch and conduct military operations. The powers of parliaments to terminate an anti-terrorist military operation cannot be realized without difficulty since the legislatures are generally reluctant to expose their governments to such political pressure. Therefore, it seems reasonable to strengthen the parliaments' ability to *prevent* the executive's use of force and to establish a practicable mechanism of continuous democratic oversight over such military operations (standing committees). In extreme cases, a parliamentary prerogative to discontinue a military operation is an important device to put pressure on the executive branch of government.

There is a distinction to be made between *presidential* (Russia, United States) and *parliamentary* (Germany) systems of government. In a presidential republic a directly elected head of state enjoys the same degree of democratic legitimacy as the legislatures do. The constitutions of presidential republics like the United States or Russia provide the head of state with a broader discretion in the field of foreign and security policy and in the event of an emergency, and do not establish a 'parliamentary army' as in the German constitutional practice where the legislature has a wide range of constitutional tools, including a vote of no confidence, at its disposal to keep up pressure on the government.

However, the general conclusion that parliamentary review has to be extended to the most important executive decisions regarding the deployment of armed forces is applicable not only to the parliamentary but even more so to the presidential systems of government. In presidential systems, where a strong head of state or

head of government makes important decisions on troop deployments, parliaments should be given additional powers, including the power to withhold consent to (external and internal) troop deployments in certain circumstances and to delegitimize the military deployment, in order to ensure one of the main rationales of the separation of powers – *an effective self-government by the people*. A high degree of legitimacy shall not insulate directly elected Presidents from parliamentary scrutiny, especially in times of internal crisis.

As far as the *rule of law* is concerned, which is another rationale of the principle of the separation of powers, it must be noted that parliaments can shape the counterterrorist military policies of the governments only to a certain extent. There are no clear statutory limitations to presidential constitutional authority to employ armed forces for counterterrorist purposes in the countries with a presidential system under review. The US President has a wide margin of appreciation and may determine the circumstances allowing him to use military force.²⁰⁴ As the State Department's legal adviser once noted: 'We do not [...] believe that any such list (of situations in which the President may use the military forces) can be a complete one, just as we do not believe any single definitional statement can clearly encompass every conceivable situation in which the President's Commander-in-Chief authority could be exercised'.²⁰⁵ In Russia, too, the presidential power to use the military forces internally is not clearly determined and limited in the legislation. The Constitutional Court, through the means of structural interpretation, derived from the constitutional position of the Head of State the presidential power to use force against insurgents to guarantee the territorial integrity of the Russian Federation. In Germany the legal situation of parliamentary control over the executive's use of force in a state of internal emergency remains vague.

As state practice further shows, not every conceivable situation in the struggle against terrorism may be regulated by an abstract law. In Germany, the discussion on the possible amendments to the Constitution to enable the government to shoot down civilian jets hijacked by terrorists demonstrated the limits of counterterrorist legislative action. In the United States, the question of how to react to a terrorist danger that has not yet amounted to an attack on US territory has also so far remained open. Russia is the only country which gave a clear answer to this question in the Anti-terrorist Law of 2006 by allowing the military to shoot down hijacked civilian jets with innocent civilians on board. The questions related to the consis-

204. See W.G. Howell and J.C. Pevehouse, 'When Congress Stops Wars – Partisan Politics and Presidential Power', 86 *Foreign Affairs* (2007) at p. 95.

205. 'War Powers: A Test of Compliance Relative Denang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident', Hearing Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations, 94th Cong., 1st Sess. 85 (1975) at pp. 90-91.

tency of this provision with the Russian Constitution and international human rights standards remain open, however.

While authorizing the government's military action against terrorist groups and organizations, parliaments have to assert certain constitutional prerogatives that cannot be delegated to the other branches of government. Parliament's role is especially crucial when human rights or other foundations of a democratic society are at stake. If the legislatures do not live up to their constitutional role accorded to them in a democracy, the *courts* must induce them to do so by requiring parliamentary consent for executive action. The role of the general public in electing and maintaining responsive and accountable parliaments must not be underestimated in this respect either.

The *judiciaries* in all three countries under consideration show reluctance in interpreting the role of parliaments in the 'war on terror'. The US courts broadly interpreted the presidential counterterrorist powers. There has been, however, a change of course in the recent practice of the Supreme Court towards a more restrictive interpretation of congressional authorization of force. The German Constitutional Court, playing a prominent role in the constitutional interpretation of parliamentary military powers, left it to the legislature to lay down the modalities of parliamentary participation in a separate law which, as noted above, goes beyond the limits of the Court's decision from 1994. The Russian Constitutional Court initially assumed an active position in interpreting the constitutional powers of the branches of government. There was, however, a setback after the Court ceased its activities in late 1993 against the background of a deep state crisis. It must also be kept in mind that the process of the separation of powers often leads to intense and fierce political debates and sometimes to a constitutional crisis. It is not the function of the judiciary to become directly engaged in the political debates, as was the case in Russia immediately after the collapse of the Soviet Union. Although the judiciary may certainly provide guidance as to how to divide the powers among the branches of government, parliaments should play a primary role in shaping the practices of the separation of powers which meet the requirements of a modern constitutional democracy. It is not for the judiciary to develop a parallel legislative framework for counterterrorist purposes; it may only delimit and clarify the constitutional competencies of the branches of government.

As to the *form* of parliamentary authorization: In Germany, Parliament may take a single vote by a simple majority on a motion by the Government to approve the military deployment abroad. In Russia, parliamentary approval of external military deployments is given in the form of a parliamentary act which does not possess the force of law. In the United States, by contrast, the authorization for the use of military force against terrorists is of a statutory character. The most appropriate form of giving parliamentary consent to counterterrorist military deployments seems to be an ordinary parliamentary act which is subject to statutory law in the hierar-

chy of norms. Such authorization ensures sufficient flexibility of parliaments to decide on military deployments and does not prevent the legislatures from exercising effective democratic control. Moreover, such authorizations of force should not be invoked by the executive branch of government to justify the derivation of additional governmental competencies in the struggle against terrorism styled as ‘incidents of war’.

6. GENERAL CONCLUSIONS

Within a functional framework of the separation of powers parliaments shall decide the principal question as to *whether* the armed forces must be used for counterterrorist purposes. The executive shall retain its core competence to decide on *how* the counterterrorist military operation must be conducted.

Parliamentary control shall be extended not only to counterterrorist military deployments abroad, but also to the internal use of armed forces against terrorist groups and organizations. At the same time, parliamentary competencies regarding internal and external uses of armed forces shall not be blurred in order to maintain clear legal restrictions on the executive’s use of force.

While imposing practicable legal restrictions on the executive’s use of force, parliaments should inform their decision-making process through the application of international legal principles. Therefore, independent parliamentary expertise in international law should be strengthened to ensure consistency of governmental actions with international law.

Only those legal limitations may be practicable which do not significantly restrict the government in its operational effectiveness on the ground. The parliamentary options to prevent counterterrorist military operations must be broadened since legislatures may face a significant difficulty in subsequently ensuring the effective democratic accountability of the government or in terminating a military operation.

At the domestic level, parliaments shall retain the power to approve any emergency modification of individual liberties, which is often inextricably linked to the internal use of armed forces. On the other hand, parliaments shall authorize only those principal military deployments abroad that entail a risk of involvement in the use of military force.

One of the most important functions of parliaments in the struggle against terror is to ensure the *rule of law* through legislative action. This power shall be assumed by parliaments and cannot be delegated to the executive branch of government. If the parliaments do not assume their constitutional responsibility regarding emergency restrictions of human rights, the courts need to induce them to do so.

However, not all extreme situations in the fight against terrorism may be cov-

ered by legislative enactments. Therefore, the mechanism of continuous democratic control over the executive's counterterrorist military action shall re-establish the balance between the powers in critical situations to prevent the emergence of 'legal black holes'. The role of parliamentary standing committees should be strengthened in order to ensure governments' responsiveness and accountability.

Courts shall control the *proportionality* of any governmental response to the threat of terrorism and shall not remain silent when the high standards of a democratic society to introduce any kind of emergency are undermined by governmental action.

Parliaments, through their legislative action, shall draw a line between criminal action and military operations that may be launched when the very foundations of a democratic society are put into question.

It is not the sole responsibility of parliaments to decide on the state of exception. But they have to ensure that the use of emergency powers, or powers comparable to an emergency, is *not a rule but an exception*. The global terrorist threat should not abrogate the principles of a modern democratic society and its ability to repel the existing terrorist threats by ordinary means of law enforcement. Any extra-legal or disproportionate emergency means are incompatible with the values of a democratic society. Emergencies are too important to be left to one branch of government alone.

ABSTRACT

After 9/11 a number of governments committed their armed forces to military operations abroad and introduced far-reaching emergency restrictions of individual rights without substantial parliamentary scrutiny. In many cases, the executive branch argued that it needed considerable leeway to counter terrorist threats, and most legislatures followed suit. The article looks at the operational difficulties of parliamentary involvement from a comparative perspective, focusing on the legal situation in Germany, the United States and the Russian Federation. It identifies the purpose of parliamentary review and demonstrates that the principle of the separation of powers shall not be renounced in times of global threats or replaced by the fusion or shift of powers. On the contrary, the separation of powers as the basis of a modern constitutional democracy strengthens democratic control and enhances individual liberties, while not putting into question the executive's flexibility. The legislatures' participation in the most important decisions leads to a stable and sustainable use of executive power. However, the division of competences must observe the respective strengths and weaknesses of the branches of government. Thus, it is not the function of Parliament to regulate the operational details of military operations.