a constitutional treaty, known as the 'Penelope'. Proposals have also been put forward for creating special bodies for amending the secondary treaty, and for making a more frequent recourse to the mechanisms of enhanced cooperation and flexibility.

Although it is beyond the scope of this study to examine the amendment process further, one possibility to explore in future could be the use of national constituent bodies, perhaps to be called 'national conventions', in the process of ratification. These 'national conventions' could be composed of members of national Parliaments, as well as of representatives of regional and local governments and of civic society. The advantage of such expanded fora lies in providing a higher legitimacy than normal parliamentary ratification to future treaty amendments, which is important given the far-reaching constitutional implications of EU Treaties, in comparison with ordinary international treaties. A further advantage of such a mechanism is that it would help to avoid the well-known shortcomings of national referendums: populism, EU debates' being hijacked by domestic issues or even (un)popularity of national governments, as well as the constant threat of a new treaty being blocked by one or two countries.

8

Membership of NATO and other international organisations

NATO

In the wake of regime change, the countries of Central and Eastern Europe have also become members of various other international organisations. In terms of the strict protection of sovereignty in the CEE constitutions, the participation in the North Atlantic Treaty Organisation (NATO) is of particular interest. The Czech Republic, Hungary and Poland joined NATO in 1999; Slovakia, Slovenia, Romania, Bulgaria and the Baltic countries received their invitation to join in the autumn of 2002.

The main restrictions on a state's sovereign action by membership of NATO could be summarised as follows. As regards autonomy of external action, the state is constrained in making decisions upon war – it has to join in collective defence in the event of an aggression against one of the allied countries, under the North Atlantic Treaty concluded in 1949 in Washington. In terms of inviolability of state borders, a NATO member has to grant the right of passage or manoeuvre to certain foreign troops within its territory. In financial terms, a member country has an obligation to spend at least 2 per cent of its budget on defence. In addition, the need for fast decision-making effectively means that cumbersome and lengthy parliamentary decisions are to be replaced by the speedier decisions of domestic governments. Overall, however, membership of NATO has predominantly not been perceived as a restriction of sovereignty in the political rhetoric or constitutional theory of most CEE countries – on the contrary, it has formed a long-standing foreign policy goal and a key guarantee for the countries' security. There has been consistently high public support for joining NATO in most countries, in contrast to controversial sentiments in respect of accession to the EU. However, the situation was different in Slovenia, Slovakia and the Czech Republic, where public opinion has been less supportive of accession to NATO, especially as regards the financial burden on the state budget.

In CEE constitutional theory, debate has been scarce on membership of NATO's constitutional implications, compared with debates concerning EU membership. For instance, it has been reported that in the Czech Republic and Slovakia, membership of NATO has not been regarded as a constitutional problem, and this issue was not publicly addressed by Czech or Slovak scholars and officials.[1] This holds equally true for the three Baltic countries.

At the time the Vishegrad countries joined NATO in 1999, only the new Polish constitution contained a general clause on delegating powers to 'international organisations' (articles 90 and 91), which was aimed at both the EU and NATO. At the same time, all Vishegrad countries adapted their constitutions at an early stage with regard to some specific issues concerning NATO obligations. In Poland, the new constitution provides that the Sejm (the lower house of Parliament) may make a resolution on war 'when an obligation of common defence against aggression arises by virtue of international agreements' (article 116). Article 117 provides that the use of armed forces outside the state territory, and the presence and movement of foreign troops in Poland, shall be specified by a ratified international agreement or by a statute. This relates to the participation of Polish armed forces in NATO peace-keeping operations, such as the Bosnian mission, as well as the participation of NATO forces in common manoeuvres, and their stationing on Polish territory.[2] The Czech Republic adopted in 2000 the so-called 'peace-keeping amendment', which allowed the government to send Czech soldiers abroad without consulting Parliament. In 2001, this was complemented with the general clause on delegating powers to 'international organisations', which, introduced as part of the EU amendments, was also aimed at accommodating membership of NATO.[3] In Hungary, the NATO amendment was adopted in 2000. Articles 40B and 40C permit foreign armed forces to cross the country without the prior consent of Parliament, where this derives from international treaties or peace-keeping missions at the request of the United Nations. International treaties on defence matters require parliamentary

[1] M. Hoskova, 'Legal Aspects of the Integration of the Czech Republic and Slovakia into European Security and Economic Structures' (1994) 37 *German Yearbook of International Law* 86.

[2] See further A. Wasilkowski, 'International Law and International Relations in the New Polish Constitution of 2 April 1997' (1997–98) 23 *Polish Yearbook of International Law* 16.

[3] I. Slosarcik, 'The Reform of the Constitutional Systems of Czechoslovakia and the Czech Republic in 1990–2000' (2001) 7 *European Public Law* 544.

approval by a statute. Article 19(3) provides that Parliament decides on the deployment of armed forces abroad by a two-thirds majority of all deputies.

Hungary additionally held a referendum on NATO on 16 November 1997, being the only first-wave country to do so. Czech politicians decided against doing so, as an 'incorrect result' was feared by politicians.[4] As seen in the previous chapter, Hungary reduced the required minimum turnout by a constitutional amendment before the referendum. The newly established threshold majority – approval by 25 per cent of the total electorate – was met, as 49 per cent of voters participated, of whom 85 per cent approved accession. The issue of amending the constitution in respect of NATO came up again in 2003: the government submitted to Parliament an amendment proposal under which the Cabinet would be empowered to authorise the deployment of military forces for peace-keeping and humanitarian missions under the aegis of NATO, the United Nations and the EU.[5] Hungary has been recurrently criticised by NATO for being slow to commit troops abroad.[6]

Amongst the second-wave NATO accession countries, Slovenia, Slovakia and Romania have specifically amended their constitutions to authorise NATO membership. Slovakia's 2001 amendments authorise the accession to NATO in article 7(3), which provides that 'with the aim of maintaining peace, security and democratic order', Slovakia may join 'an organisation of mutual collective security'. The ratification of the pertinent treaty requires the consent of at least one-half of all deputies (article 84(3)). Furthermore, the 2001 amendments include new subparagraph (p) of article 119, which provides that the government decides on sending armed forces outside Slovakia 'within commitments ensuing from international treaties on common defence against an attack', for a maximum of sixty days and after notifying Parliament. Article 86 subsections (j), (k) and (l) enumerate the NATO-related competences of Parliament: adoption of decisions on the declaration of war and those resulting from commitments arising from international treaties on common defence; expression of consent to sending armed forces outside

[4] A. Stroehlein, 'Weaknesses of the Czech Media', *Central European Review*, 17 January 2000, www.ce-review.org/00/2/stroehlein2.html

[5] 'Hungarian Government Proposes Constitutional Amendment', *RFE/RL Newsline*, vol. 7, no. 143, Part II, 30 July 2003.

[6] 'Hungarian Opposition Wary of NATO Constitutional Amendment', *RFE/RL Newsline*, vol. 7, no. 151, Part II, 11 March 2003; 'Hungarian Politicking Delays Vote on NATO Deployment', *RFE/RL Newsline*, vol. 7, no. 181, Part II, 23 September 2003.

Slovakia and to the presence of foreign armed forces in the country. Article 119 further provides that the government's responsibility includes the following: sending armed forces outside Slovakia for the purposes of humanitarian aid, military manoeuvres or peace-keeping missions; and granting consent to the presence of foreign armies in Slovakia for the same purposes. In Slovenia, the package of 2003 amendments includes an authorisation to 'enter into a defence alliance' which is based on respect for human rights, democracy and the rule of law (article 3a). In Romania, new article 145.2, introduced in 2003, subjects the country's accession to NATO to a law, to be approved by two-thirds of the number of deputies and senators in a joint session. NATO membership is further regulated in article 117(1), which provides that the army shall contribute to 'collective defence in military alliance systems, and participate in peace keeping or peace restoring missions'. Paragraph 5 allows foreign troops to enter, carry out operations or pass through the country under the terms of the law or international treaties.

All three countries have additionally held referendums on NATO. Slovenia's referendum was held together with the referendum on the EU on 23 March 2003. As mentioned, public support in Slovenia for NATO has been rather cool, and the organisation was seen by the population as an unnecessary burden on the state budget. Eventually, just 66 per cent supported NATO membership in the referendum, compared with 90 per cent of the votes cast in favour of EU membership. In Romania, the referendum was held on 18–19 October 2003 on the constitutional amendments, central to which were the provisions both on the EU and NATO; 91 per cent of voters supported these amendments. In Slovakia, a NATO referendum had in fact been held in 1997, but it remained unsuccessful due to an insufficient turnout rate (9.5 per cent). A new referendum has been requested by various parties such as the Communist Party (opposed to NATO membership), the National Party, Vladimir Meciar's Movement for Democratic Slovakia, as well as by an initiative of thirty-eight Slovak writers, politicians and other prominent personalities.[7] However, the referendum proposal was rejected by Parliament in January 2003, for the reason that all other political parties backed NATO membership, and accession had formed a priority for every government in Slovakia since

[7] 'Slovak Communists Oppose Joining NATO', *RFE/RL Newsline*, vol. 6, no. 187, Part II, 3 October 2002; 'Prominent Slovak Personalities Back NATO Referendum', *RFE/RL Newsline*, vol. 7, no. 4, Part II, 8 January 2003.

the country's independence.[8] Public support for NATO membership has been rather modest: 34 per cent supported NATO and 52 per cent opposed membership in March 2003.[9]

In Bulgaria, President Georgi Parvanov asked the Constitutional Court on 2 January 2003 to determine whether the constitution required amendment for the country's entry into NATO, especially in respect of the provisions regulating the presence of foreign troops on Bulgarian territory, which require Parliament's permission on a case-by-case basis (article 84).[10] The Court ruled in February 2003 that the government is entitled to let foreign military forces use Bulgarian territory and to send Bulgarian troops abroad without Parliament's permission, provided that such actions are taken under the auspices of an international agreement.[11] The constitutional mechanisms for cooperation with NATO were earlier assessed by the Constitutional Court, in connection with the use of Bulgaria's airspace by NATO aircraft during the Kosovo conflict.[12]

In the Baltic countries, no specific steps were taken to legitimise NATO membership. The Lithuanian Constitution was the only one amongst the ten constitutions in question which contained from its adoption a provision permitting Lithuania to participate in international

[8] 'Slovak Parliament Rejects NATO Referendum Proposal', *RFE/RL Newsline*, vol. 7, no. 10, Part II, 16 January 2003.

[9] 'As Support for NATO Membership Wanes', *RFE/RL Newsline*, vol. 7, no. 60, Part II, 28 March 2003.

[10] 'Bulgarian Court to Decide if NATO Accession Necessitates Constitutional Amendment', *RFE/RL Newsline*, vol. 7, no. 1, Part II, 3 January 2003.

[11] 'Constitutional Court Rules in Favour of Foreign Troops on Bulgarian Soil', *Central European and Eurasian Law Initiative: Bulgaria* (February 2003), www.abanet.org/ceeli/countries/bulgaria/feb2003.html

[12] Decision No. 5/99, 22 April 1999, summary in English at www.infotel.bg/juen/resh/summaries99.htm. The Constitutional Court found that if a general provision were included in an international agreement ratified by Parliament, the courts' earlier interpretation of article 84(1), which required a separate authorisation for each entry of a foreign military aircraft, would not be applicable. As a result of this judgment, the Agreement between Bulgaria and NATO regarding Transit of NATO Aircraft was concluded, followed by ratification by Parliament. The opposition deputies challenged the Agreement in the Constitutional Court (Decision No. 6/99, 3 May 1999, summary in English at www.infotel.bg/juen/resh/summaries99.htm; 'Constitution Watch: Bulgaria' (1999) 8 *East European Constitutional Review*, no. 3), claiming that it would diminish Bulgaria's sovereignty and push the country towards a war. The Court held that the constitution explicitly provides for the transit of foreign troops via the country's territory. Parliament grants its permission by ratification of international instruments of a military nature. When Parliament exercises such power, there is no violation of the constitution or usurpation of sovereignty.

organisations, and, in addition, article 138 provides that Parliament ratifies and denounces treaties related to national defence. An amendment concerning the possibility of stationing foreign military troops on the territory of Lithuania has been under debate, but to no avail.[13] Problems may be additionally posed by articles 138(4) and 142, which respectively require a parliamentary decision for stationing Lithuania's armed forces abroad and for their use in fulfilling Lithuania's international obligations. In addition, article 137 may need amendment due to the prohibition on the stationing of weapons of mass destruction and foreign military bases on Lithuania's territory. In Estonia, the *travaux préparatoires* in the Constitutional Assembly envisaged that Estonia's accession, *inter alia*, to 'military unions of states' could only take place by amending article 1 by referendum.[14] However, ahead of accession, the constitutional impact of NATO was not specifically discussed amongst Estonian legal scholars and politicians. NATO entry was accommodated under article 121, which subjects treaties on joining international organisations to parliamentary ratification, by a majority of votes in favour. In addition, article 128 provides that Parliament decides on declaring war and on the use of the army in the fulfilment of Estonia's international obligations. As mentioned in chapter 5, there are plans to start work on the drafting of a new constitution, which is expected to include provisions regarding obligations deriving from NATO membership. In Latvia, the constitutional amendment of 2003 was addressed more broadly to 'international organisations', thus legitimising also membership of NATO. The Latvian Constitution is generally laconic and does not regulate defence matters. A referendum for accession to NATO has been under consideration only in Lithuania, but the initiative failed to gain the required 300,000 signatures.[15]

Other international organisations

Membership of other international organisations, such as the United Nations, International Criminal Court and World Trade Organisation, have been accommodated in CEE countries under broader constitutional provisions which regulate parliamentary ratification of international

[13] G. Steponavicius, 'Amending or Adjusting? Comments on Lithuania' in E. Smith (ed.), *The Constitution as an Instrument of Change* (SNS Förlag, Stockholm, 2003), p. 102.

[14] L. Hänni in *Põhiseadus ja Põhiseaduse Assamblee* [Constitution and Constitutional Assembly] (Õigusteabe AS Juura, Tallinn, 1996), p. 530.

[15] 'Initiative to Hold Referendum on NATO Membership Fails in Lithuania', *RFE/RL Newsline*, vol. 7, no. 6, Part II, 10 January 2003.

treaties pertaining to membership of international organisations (not involving a significant delegation of powers), as well as under the provisions on application of international law.

One of the organisations of major importance is the Council of Europe, which the CEE countries joined soon after the breakdown of Communism. By membership of the Council of Europe, the Member States undertake an obligation to respect the basic rights as established in the European Convention on Human Rights and Fundamental Freedoms (ECHR). In case of non-respect, the citizens of the Member States are entitled to bring a claim to the European Court of Human Rights in Strasbourg, provided that all domestic judicial resorts have been exhausted. Even though this system restricts to some degree the Member States' autonomous action, it has not been perceived so in CEE constitutional theory, and the question of sovereignty has not arisen with regard to the membership of the Council of Europe. This is because obligations deriving from membership of this organisation have rather been regarded as the application of international law. As discussed in chapters 3 and 5, the CEE constitutions are generally favourable and open towards international law; they provide in many cases expressly for direct applicability and supremacy of international law, and several make specific reference to the higher position of human rights treaties. The courts are readily applying the ECHR, whether directly or by using the interpretation given to certain provisions by the European Court of Human Rights. A more indirect means of influencing the constitutional systems of CEE is that in the process of joining the Council of Europe, the Commission of Venice on Democracy through Law has issued recommendations, which have become an integral part of the opinions of the Parliamentary Assembly of the Council of Europe. Under these, the countries wishing to join have had to make various adjustments, for instance in respect of the independence of the judiciary.[16] In terms of specific constitutional provisions, it has been reported that Bulgaria had to give a corrective interpretation to article 11(4) of the constitution that bans ethnic, racial and religious parties.[17]

[16] Reported in D. Maus, 'The Influence of Contemporary International Law on the Exercise of Constituent Power' in A. Jüränki (ed.), *National Constitutions in the Era of Integration* (Kluwer Law International, The Hague, 1999), pp. 52–3.

[17] *Ibid.*