



## ARTICLES

### SHAPING THE FUTURE OF EUROPE – SECOND PART

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# AN ARMY OF PEOPLES? A DEMOCRATIC PERSPECTIVE ON A FUTURE EUROPEAN ARMY

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ABSTRACT: In this *Article*, I combine political theory and defence-related institutional design in order to suggest what a future EU army could look like. I begin by explaining the main differences between national and international armed forces as well as the EU's current defence architecture. As a result, I observe that armed forces necessarily reflect the constitutional identity and theoretical architecture of their home political community. I then explain why, in my view, the idea of *demoicracy* best describes the EU's theoretical nature. On that basis, I discuss various questions of institutional design for a future EU army, for which the democratic nature of the EU both prescribes and constrains the available options. Apart from concrete design proposals, the two key take-aways are *i)* that there is conceptual space for autonomous armed forces beyond the nation-state, and *ii)* that any proposal for an EU army needs to be aware of its reflexive relationship with the nature of the EU as a political community.

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KEYWORDS: European army – EU constitutional theory – democracy – military and constitutional design – Common Security and Defence Policy – EU defence integration.

## I. INTRODUCTION

At the dawn of a new decade, the constitutional discourse on the future of the EU gains momentum from two interrelated phenomena: the challenges unearthed by a cycle of crises, and a new generation of political leaders. Many initiatives, new and old, are on the table. One particularly dynamic field is defence. The current turmoil in Afghanistan in wake of the chaotic departure of international troops in August 2021 only adds to the ever-louder calls on Europe to find its role in the 21st century. Only very recently, High Representative Borrell opined: “Strategic autonomy is a way of framing our choices: we must be able to defend our interests, by ourselves if necessary”.<sup>1</sup> One of the hot potatoes in the discussions about the future of EU defence integration is the old idea of creating a self-standing European army.<sup>2</sup> For example, several European leaders, notably French President Macron, German Chancellor Merkel, and former Commission President Juncker, have openly supported the idea of a European army and thereby revived the debate.<sup>3</sup>

Due to these developments, I agree with Kucera that “the time is ripe for theoretical thinking about the prospect of European defence integration”.<sup>4</sup> In the following reflections, I contribute to the academic debate on how to shape the future of Europe by combining the idea of an EU army with EU constitutional theory.<sup>5</sup> I argue that reflecting on self-standing EU armed forces is impossible without attention to the EU’s theoretical nature, since the design of a polity’s armed forces necessarily touches on its constitutional *ethos*. For example, a state’s use of armed forces is tied to state sovereignty and, ultimately, popular self-determination. That is, the *raison d’être* of a state’s military is to serve and defend a (however defined) territorially-organised people. By contrast, the case of the EU seems more complicated since the EU’s theoretical *Gestalt* itself continues to be controversial. It is far more difficult to capture the nature and design of armed forces in the EU,

<sup>1</sup> J Borrell, *Discussion at the European Council on Foreign Relations Annual Council Meeting 2020* (29 June 2020) [www.eeas.europa.eu](http://www.eeas.europa.eu).

<sup>2</sup> For an analysis of recent initiatives in EU defence integration see S Duke, ‘The Enigmatic Role of Defence in the EU: From EDC to EDU?’ (2018) *European Foreign Affairs Review* 63 ff.; see also G Butler, ‘The European Defence Union and Denmark’s Defence Opt-out: A Legal Appraisal’ (2020) *European Foreign Affairs Review* 146.

<sup>3</sup> E Macron, *Initiative pour l’Europe* (speech of 26 September 2017) [www.elysee.fr](http://www.elysee.fr); A Merkel, *Speech to the European Parliament* (13 November 2018) [www.bundesregierung.de](http://www.bundesregierung.de). Juncker’s remarks are cited in T Kucera, ‘What European Army? Alliance, Security Community or Postnational Federation’ (2019) *International Politics* 331 ff.

<sup>4</sup> T Kucera, ‘What European Army?’ cit. 335.

<sup>5</sup> I use the concept *constitution* in relation to the EU in a weak sense, related to the fundamental laws and institutions ordering the EU as a political community. For but one discussion see R Schütze, *European Constitutional Law* (Cambridge University Press 2016) 1 ff.

which escapes such a clear-cut purpose and description. Put simply, a *people's* army in a sovereign state must look different from a *peoples'* army in a supranational polity.

One of the main advantages of a theoretical lens is that it goes beyond the widespread focus on economic benefits and efficiency in EU integration discourse. As I aim to show below, a purely efficiency-based approach is problematic because it distracts from the underlying constitutional questions. This is especially troublesome in a salient sector like defence.

In a sense, this *Article* is an exercise in hands-on political theory. Not unlike a new recipe, it combines the ingredients of democratic theory and military architecture to explore whether they, if combined, result in a presentable dish. You can see it as an attempt to counter the criticism according to which democratic theory often fails to spell out institutional implications.<sup>6</sup> For that reason, it will be necessary to explore the concrete possibilities and limits EU law and national constitutional law provide for the individual design questions. Thereby, we not only get a clearer understanding of whether the current EU Treaties could accommodate an EU army or whether such a step would require Treaty amendment. More fundamentally, law operates as the main bridge between abstract political theory and the concrete design of armed forces. Consequently, only the comparison of individual legal-institutional design options enables us to evaluate the theoretical upshot of each model.

More broadly, I assess whether it is possible for the EU to have armed forces without becoming a state, without tipping the scales a bit further towards statehood.<sup>7</sup> I conclude that there is indeed conceptual space for autonomous armed forces beyond the nation-state. This realisation comes with the warning that any proposal for an EU army needs to be aware of its reflexive relationship with the nature of the EU as a political community. If we (rightly in my view) understand the EU as a democracy, we can deduce important guidelines for the design and limits of a potential European army. Below, I propose an EU army that complements national armies, leaves options for Member States to opt-out (differentiated integration), accommodates national and supranational accountability, and foresees qualified majority voting with special safeguards for the participation of one's own nationals.

Let me address these matters in turn.

<sup>6</sup> See only M Ronzoni, 'The European Union as a Democracy: Really a Third Way?' (2017) *European Journal of Political Theory* 217.

<sup>7</sup> Fears regarding that development are voiced in M Trybus, 'The Legal Foundations of a European Army' (2016) *Institute of European Law Working Papers* (Birmingham Law School) 1. For hopes, by contrast, see ND White, *Democracy goes to War: British Military Deployments under International Law* (Oxford University Press 2009) 114 ff.

## II. THE CONSTITUTIONAL DIMENSION OF ARMED FORCES

The theoretical nexus between armed forces and the constitutional nature of a polity today emanates from the nation state (II.1). Due to state sovereignty, international military cooperation constitutes but an *ad hoc* aggregation of national military forces (II.2). Despite far-reaching integration in other sectors, even the EU's current relationship to military integration remains faithful to the international model (II.3).

### II.1. THE MILITARY AS PART OF STATE AUTHORITY

Why could the development of an independent EU army (in whatever form) create a constitutional moment? For the reason that a standing army has been at the heart of every epoch-defining political community, long before the emergence of sovereign states.<sup>8</sup> Ever since states have become the dominant form of political community in the world, their (claimed) monopoly of the legitimate use of force seems to necessitate police forces (used internally) and a military (used *primarily* externally). In a sense, it is part of a state's job description to maintain armed forces.<sup>9</sup> As a result, an EU army is associated with a decisive move towards statehood.

Besides, there is a cultural, identity-related aspect to military forces on the national level, namely protecting and defending your compatriots, your fellow citizens. The diverse interpretation of this mission illustrates widespread cultural differences. Think only of the public celebration of the military in some states (USA, Russia) or the constitutional neutrality and non-alignment obligations in others (to varying extents, for example, in Malta, Austria, Ireland, or Switzerland). The point is that a nation's attitude towards its armed forces tells you something about the character of the polity as a whole. Relatedly, conscription and drafting foster a certain allegiance between citizens and an individual state. For example, one reason why many states consider dual nationality problematic is the difficult decision of recruiting dual nationals for armed forces of only one of the involved states.<sup>10</sup>

Admittedly, due to the risk of coups, the interest of the public in armed forces is usually more pronounced in unstable and less democratic states. But the constitutional anchor for the role of the military in a democracy is the army's political accountability to the elected representatives in Parliament.<sup>11</sup> Although the demanding German notion of

<sup>8</sup> Aristotle, *Politics*, book 6, ch. IV contains one of the earliest discussions of the nexus between armed forces and political institutions.

<sup>9</sup> Note, however, that the decision not to have an army also affects and reflects the identity of a state (related to its history, size, geopolitical influence etc.). See C Barbey, 'Non-Militarisation: Countries Without Armies. Identification Criteria and First Findings' (October 2015) Åland Islands Peace Institute Working Paper.

<sup>10</sup> See, for example – among the Members of the Council of Europe – the Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality of 6 May 1963, European Treaty Series n. 43.

<sup>11</sup> See only ND White, *Democracy goes to War* cit. ch. 11.

*Parlamentsarmee* (parliamentary army)<sup>12</sup> cannot serve as a blueprint here, it provides a helpful buzzword for the idea of linking a state's armed forces to its democratic representatives, e.g. by requiring parliamentary approval for individual missions, their funding and size. Mirroring the cultural differences discussed above, the role of parliament varies considerably among states, from weak control (for example under the controversial War Powers Resolution in the USA) to parliament taking centre stage (e.g. in Germany). The relationship between military and parliament accordingly illustrates the constitutional dimension of armed forces.

In short, a state's relationship to its armed forces is a unique prism through which to assess its broader constitutional architecture, the relation to its citizens as well as its civic identity.<sup>13</sup> Two conclusions emerge for the EU. First, while there are some voices in the literature that portray the EU's authority claim in terms of sovereignty,<sup>14</sup> the EU does not claim the monopoly of force as one of sovereignty's core elements. As long as that remains the case, EU military forces would have to fulfil different functions than to protect a self-determined *demos*. Second, the various examples given above suggest that if the EU were to have proper armed forces, they would exert a significant influence on the EU's theoretical nature. In that sense, the relationship is reflexive, because theoretical nature and military architecture influence each other. That, in turn, raises the stakes for military design in the first place.

## II.2. INTERNATIONAL MILITARY FORCES

The focus on nation-states thus far seems to suggest that military forces beyond the state are unthinkable. But that would neglect both the military history before the advent of states as well as the various contemporary fora for international military cooperation. What, then, characterises today's international armed forces?

The UN is the traditional *locus* for assembling armed forces in an international setting. While art. 43 of the UN-Charter provides formal means to delegate national military for UN missions, hitherto this provision has never been invoked. Instead, the UN has developed various other mechanisms, such as peacekeeping and *ad hoc* missions.<sup>15</sup> And yet, none of them creates an independent international army. Rather, states *voluntarily* dispatch forces to support a specific mission. Accordingly, in line with the portrayal of sover-

<sup>12</sup> For a concise overview of the German model see RA Miller, 'Germany's Basic Law and the Use of Force' (2010) *IndJ Global Legal Studies* 197.

<sup>13</sup> For an in-depth treatment SE Finer, *The Man on Horseback: The Role of the Military in Politics* (Penguin 1976).

<sup>14</sup> References in M Avbelj, 'Theorizing Sovereignty and European Integration' (2014) *Ratio Juris* 344.

<sup>15</sup> N Krisch, 'Article 43' in B Simma, D-E Khan, G Nolte, A Paulus and N Wessendorf (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press 2012) vol. I 1351 para. 10.

eign states and their exclusive hold over military forces, international missions remain a combination of national troops, lent temporarily to the international body.<sup>16</sup>

Structurally similar (and particularly important in the European context), NATO requires troops from its Member States in order to carry out any mission the Northern Atlantic Council plans. During this “force generation process”, NATO members *voluntarily* offer troops and equipment and might even stipulate caveats for individual missions.<sup>17</sup> In short, NATO forces are a combination of voluntarily dispatched national forces, assembled *ad hoc* for each mission. The states remain responsible for their soldiers.

These reflections complement the above picture: only nation states have independent armies under their full and exclusive control. They sometimes make them available voluntarily to international organisations for mission-specific cooperation. In that case, national (parliamentary and legal) and international (legal) accountability regimes are combined.<sup>18</sup> Crucially, the respective international organisations do not thereby incorporate or become themselves responsible for the armed forces in a theoretically meaningful way. The troops remain politically accountable to their home peoples and states; in turn, national<sup>19</sup> courts increasingly hold states legally liable for international wrongs committed with their troops’ contribution.<sup>20</sup>

Succinctly, there are international troops, but their design stands in stark contrast to national armies. How can one characterise the EU’s role in this national-international dichotomy?

### II.3. THE EU AND DEFENCE: FROM FAILURE TO INCREMENTAL INTEGRATION

The EU’s relationship to military forces is not very subtle. After all, the historic momentum for European integration resulted directly from World War II and the widespread desire to secure the so long so fragile peace among European nations. In 1952, in the wake of the Schuman Declaration, the founding Member States envisaged nothing less than the merging of their national armed forces into a single European military apparatus (European Defence Forces) under exclusively supranational accountability and

<sup>16</sup> *Ibid.* para. 12; A Hofsommer, ‘Die Anfänge der völkerrechtlichen Organleihe’ (2011) Archiv des Völkerrechts 312.

<sup>17</sup> Consult the helpful explanations at NATO, *Troop Contributions* www.nato.int.

<sup>18</sup> See for a comprehensive survey C Ku and HK Jacobson, ‘Toward a mixed system of democratic accountability’ in C Kuand and HK Jacobson (eds), *Democratic Accountability and the Use of Force in International Law* (Cambridge University Press 2003).

<sup>19</sup> See, however, ECtHR *Behrami and Saramati* App n. 71412/01 and 78166/01 [5 May 2007], where the Court held the UN accountable for the Kosovo Force. See also W Cremer, ‘Art. 42 EUV’ in C Calliess and M Ruffert (eds), *EUV/AEUV* (Beck 2016) para. 24.

<sup>20</sup> Insightful H Krieger, ‘Addressing the Accountability Gap in Peacekeeping: Law-Making by Domestic Courts as a Way to Avoid UN Reform?’ (2015) NILR 259.

administration.<sup>21</sup> The proposal was too ambitious at the time and failed in the French Parliament.<sup>22</sup> In that context, the ensuing communitarisation of crucial defence-related industries in the European Coal and Steel Community seems almost modest. Yet, in combination with economic integration from 1957 onwards, it proved to be a more acceptable and viable path among key European nations. Notice, however, how peace and the future of armed forces thereby became part of the constitutional DNA of European integration in the broadest sense of the term.

Since then, the EU has never become a military power itself. And yet, the failure of the European Defence Community did not mark the end of defence integration. After staying clear of it for decades, the frequent Treaty amendments since the late 1980s allowed for a greater role of the EU in, for example, coordinating military personnel provided by Member States. The EU started to contribute to missions and even took over security responsibilities from the international community.<sup>23</sup> Yet, the old pillar structure represented a cautious, non-judiciable and overall purely intergovernmental process in the defence sector, with the Member States wary of the sovereignty-related salience of defence. Indeed, the post-Maastricht Treaty (art. L) outright excluded the Court's jurisdiction in relation to the Common Foreign and Security Policy (CFSP). In addition, the European Parliament (EP) played no part in the decision-making process, which was left to the European Council and the Council of the EU (meeting as General Affairs and External Relations Council).<sup>24</sup>

After the Lisbon reforms, Title V of the TEU lays out the CFSP, including carefully regulated defence cooperation under the Common Security and Defence Policy (CSDP). While these reforms mark the as yet most advanced defence integration as well as an effort to align defence with the broader treaty regime, the CFSP – as the only policy area in the TEU regulated in some detail – remains not only visibly distinct from the rest of the *acquis communautaire*.<sup>25</sup> The largely political process, entrusted to mostly unanimous Council decisions (art. 31 TEU), and the lack of legislative acts prevail as an anom-

<sup>21</sup> M Trybus, 'The Legal Foundations of a European Army' cit. section 2.1. Regarding the historical and political background see D Klemm, 'An Attempt to Establish the European Army: The Pleven Plan' (2016) *Journal on European History of Law* 105 ff.

<sup>22</sup> P Koutrakos, *The EU Common Security and Defence Policy* (Oxford University Press 2013) 5 ff.; M Trybus, 'The Vision of the European Defence Community and a Common Defence for the European Union' in M Trybus and ND White (eds), *European Security Law* (Oxford University Press 2007) 28 ff.

<sup>23</sup> KR McNamara, *The Politics of Everyday Europe: Constructing Authority in the European Union* (Oxford University Press 2015) 8. A short summary of EU defence integration can be found in ND White, *Democracy goes to War* cit. 114 ff.

<sup>24</sup> For a critique see A Stie, 'Decision-making Void of Democratic Qualities? An Evaluation of the EU's Second Pillar Decision-making Procedure' (2010) *European Integration Online Papers* www.eiop.or.at 1.

<sup>25</sup> See P Koutrakos, 'Foreign Policy Between Opt-outs and Closer Cooperation' in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Elgar 2017) 411. For an argument against CFSP-exceptionalism see RA Wessel, 'Integration and Constitutionalisation in EU Foreign and Security Policy' in R Schütze (ed.), *Globalisation and Governance: International Problems, European Solutions* (Cambridge University Press 2018).

ally in the Treaties.<sup>26</sup> The current system is couched in terms of cooperation among the Member States and the main emphasis is on gaining economic advantages by pooling resources and harmonizing equipment.<sup>27</sup>

As a result, *de lege lata* the EU has no self-standing army and no way of unilaterally requesting troops from its Member States. Instead, the EU's current defence architecture maintains the Member States' grip on armed forces and relies on voluntary national contributions for any mission (art. 42(1) and (3) TEU).<sup>28</sup> That holds true even in relation to the most advanced elements of defence integration, such as the enhanced-coordination-based Permanent Structural Cooperation (PESCO) among 25 Member States (arts 42(6) and 46 TEU),<sup>29</sup> or the EU Battlegroups, not yet deployed 1500-soldier strong units for rapid reaction under the command of a lead-Member State.<sup>30</sup> Admittedly, art. 42(2) TEU leaves room for further integration and eases the conditions for Treaty amendment. But due to its ambiguity (for example regarding the precise difference between "the progressive framing of a common Union defence policy" and the "common defence" to which it leads) it is up to debate just how much change it could legitimately cover.<sup>31</sup>

Departing from this *status quo*, one of the goals of this *Article* is to urge the discourse in EU defence integration away from the familiar narrative of economic benefits and efficiency. For example, former Commission President Juncker complained that the current "scattergun approach" is "inefficient and costly".<sup>32</sup> In a similar tone, the EP wants to "create synergies" and commends the EU for beginning to "stimulate efficiency" in defence integration.<sup>33</sup> This understandable argumentative strategy of efficiency that builds on the current model and favours incremental steps over bold visions is risky, however. It deliberately clouds the constitutional salience of the defence sector for all the participants. Perhaps the current reluctance to use the various EU tools described above results, in part, from the relatively weak constitutional foundation and legitimacy of the current defence architecture, as well as from the ambiguous role of the Union

<sup>26</sup> However, Lisbon opened a small window for judicial review (arts 40 TEU and 275 TFEU), which the Court of Justice pushed open a little wider in case C-72/15 *Rosneft* ECLI:EU:C:2017:236. More generally C Hillion, 'A Powerless Court? The European Court of Justice and the EU Common Foreign and Security Policy' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law* (Hart 2014).

<sup>27</sup> For a summary of current initiatives see European Parliament, 'Defence: is the EU creating a European army?' (24 June 2019) [www.europarl.europa.eu](http://www.europarl.europa.eu). See also M Trybus, 'The Legal Foundations of a European Army' cit. section 4.

<sup>28</sup> For the underlying principles of recourse and voluntarism see generally S Graf von Kielmansegg, *Die Verteidigungspolitik der Europäischen Union: eine rechtliche Analyse* (Boorberg 2005).

<sup>29</sup> Decision 2017/2315/CFSP of the Council of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States.

<sup>30</sup> For details see EEAS, 'EU Battlegroups' [eeas.europa.eu](http://eeas.europa.eu).

<sup>31</sup> W Cremer, 'Art. 42 EUV' cit. para. 9 ff.

<sup>32</sup> J-C Juncker, 'Speech by President Jean-Claude Juncker at the Defence and Security Conference Prague: In defence of Europe' (9 June 2017) [ec.europa.eu](http://ec.europa.eu).

<sup>33</sup> European Parliament, 'Defence: is the EU creating a European army?' cit.



interest in primary law. While art. 32(1) TEU obliges the Member States to ensure that “the Union is able to assert its interests [...] on the international scene”, it remains unclear how to articulate and reconcile these interests with those of its Member States. As I mentioned earlier, the EU has to do a lot of soul-searching to define its strategic interests and, as yet, has not succeeded in escaping its characterisation as a “soft power”.<sup>34</sup> In essence, efficiency may be a useful side-effect of an EU army, but it should not constitute its main justification. Instead, constitutional cohesion in the sense discussed below adds a necessary and enriching perspective to the familiar, purely efficiency-driven discourse.

#### II.4. INTERIM CONCLUSION

This *tour d'horizon* highlighted the intrinsic relationship between constitutional nature and military architecture in today's states as well as the comparatively loose cooperation-based forms of international troops. In a political community, armed forces and constitutional identity stand in a reflexive relationship and impact each other.

Despite (or because of?) an early failed attempt to supranationalise armed forces, the EU's model of defence integration remains faithful to this duality with its markedly international design. Despite the existence of CSDP-missions, the EU's military power (so far) does not determine its global influence. Nevertheless, defence integration already affects the very identity of the EU and will continue to do so in the future.<sup>35</sup>

Next, I want to briefly outline the idea of demoiocracy and endorse it as the correct theoretical description of the EU's nature and normative ambition. This will allow me in the remainder of the paper to judge military design proposals against demoiocratic ideals for institutional architecture and appropriate accountability regimes.

### III. THE EU AS A DEMOICRACY

Instead of providing a comprehensive account of the analytical and normative advantages of demoiocracy here, my brief defence of demoiocracy as appropriate theoretical framework for the EU is instrumental for this *Article*. It serves to develop design guidelines for a potential EU army.

<sup>34</sup> See only SB Anderson, 'The EU defence debate: What kind of power is it?' in KE Jørgensen, ÅK Aarstad, E Driessens, K Laatikainen and B Tonra (eds), *The SAGE Handbook of European Foreign Policy* (SAGE Publications 2015) 935 ff.

<sup>35</sup> RA Wessel, 'Integration and Constitutionalisation in EU Foreign and Security Policy' cit. 343. For decades, the discussion of the EU's relationship to armed forces has been conducted in relation to Duchêne's concept of “Civilian Power Europe”. See only F Duchêne, 'The European Community and the Uncertainties of Interdependence' in M Kohnstamm and W Hager (eds), *A Nation Writ Large? Foreign-Policy Problems before the European Community* (Palgrave Macmillan 1973).

Democracy describes a specific model of democratic rule beyond the state. It applies democratic ideals, such as popular authorisation and accountability, to supra-state political communities. The main difference to other discussions of democracy beyond the state stems from conceiving a plurality of *demoi* as ultimate subjects of democratic rule. In short, a democracy is a polity in which several peoples “govern together but not as one”.<sup>36</sup> Democracy thus shifts from *demos* to *demoi*, from people to peoples as constituent entities of a political community. This focus expresses the theoretical nexus between each people’s independence as well as their reciprocal interdependence.<sup>37</sup> The constitutional (not ethnic) peoples of the EU Member States underwrite the EU’s theoretical architecture without, however, constituting a single (theoretically meaningful) *demos*. Upon reviewing the way in which the EU Treaties operationalise democratic ideals, Lenaerts rightly concludes that the “idea of democracy is incorporated into the constitutional fabric of the EU”.<sup>38</sup> Through the EU, the EU peoples exercise their popular self-determination jointly in a sophisticated institutional framework in order to address issues transcending state boundaries.<sup>39</sup> While remaining constituted in statist political communities, these distinct peoples erect, author and legitimise a supranational governance architecture that is accountable to them separately but jointly.

While there is considerable disagreement about how to operationalise democracy institutionally, there are several core features all democrats support. They all commit to the idea that the EU neither is nor should be an international union of sovereign states or a state in the making.<sup>40</sup> Rather, the EU is a union of peoples where the individual peoples retain their competence-competence (e.g. right to exit) and the immunity against having essential power-structures altered without their consent (principle of conferral).<sup>41</sup> The EU is ultimately accountable to the EU peoples. In this framework, (national) democracy and EU democracy are compatible with each other. Indeed, they complement each other. On the one hand, the political institutions of a demo(s)cracy are accountable to their independent people; on the other, the political institutions of a democracy are accountable to the interdependent peoples jointly. Both levels of political communities realise the self-determination of their peoples in separate ways. A democratic framework allows us to

<sup>36</sup> K Nicolaïdis, ‘European Democracy and Its Crisis’ (2013) *JComMarSt* 351 ff.

<sup>37</sup> F Cheneval and K Nicolaïdis, ‘The social construction of democracy in the European Union’ (2017) *European Journal of Political Theory* 244.

<sup>38</sup> K Lenaerts, ‘Democracy, Constitutional Pluralism and the Court of Justice of the European Union’ in L Van Middelaar and P Van Parijs (eds), *After the Storm: How to Save Democracy in Europe* (Lannoo 2015) 129.

<sup>39</sup> See F Cheneval, *The Government of the Peoples: On the Idea and Principles of Multilateral Democracy* (Palgrave Macmillan 2011), for a theoretical model of a democracy based on Rawlsian methodology.

<sup>40</sup> K Nicolaïdis, ‘The Idea of European Democracy’ in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 254.

<sup>41</sup> F Cheneval ‘Democratic Self-Government in the European Union’s Polycentric System: Theoretical Remarks’ in J van Zeben and A Bobić (eds), *Polycentricity in the European Union* (Cambridge University Press 2019) 66 ff.

inject the normative benefits of democratic rule to a political community beyond the state. We should, accordingly, judge the EU against democratic standards.

To test the accuracy of democratic theory applied to the EU, think of Brexit. From a *legal-constitutional* perspective, Brexit reminds the Member States that membership in the EU is ultimately about the choices the peoples of Europe make about how to govern themselves.<sup>42</sup> Furthermore, *public discourse* reflects the EU's democratic constitutional arithmetic, where the individual citizen as such is not the main duty-bearer of the European project. Brexit was not argued based on the autonomy of the individual. Instead, it was about the autonomy of the British people to determine their fate as a collective "freed from" supranational authority. Conceptualising the EU as a democracy allows us then to assess the EU's actions according to theoretical standards that fit its current theoretical identity.

#### IV. TAKING STOCK: THE COMBINATION OF POLITICAL THEORY AND MILITARY ARCHITECTURE

So far, I have argued that any proposal for an independent EU army should not be severed from deliberations about the EU's nature as a political community. In a first step, I explained the duality between national and international armed forces and explored the many ways in which the existence and design of armed forces sheds light on and is simultaneously informed by the underlying constitutional arrangement of the polity/organisation in question. Armed forces, in short, stand in a reflexive relationship to the constitutional DNA of their home polity. In a second step, I advocated for a democratic perspective on the EU's accountability regime and normative architecture. In a nutshell, that means to allow the individual peoples of Europe – in both their manifestations as state institutions and citizens – to play a significant role in the constitutional arithmetic of the EU, while leaving enough room for them to maintain their separate existence, constituted in states.

A word of caution before I move on. Firstly, there is already a variety of different democratic models available on the theoretical level.<sup>43</sup> Concrete institutional implications will inevitably differ among them (based on the individual theory's position on the spectrum between more intergovernmental and more federal features). Accordingly, some *democrats* may legitimately disagree with my conclusions below. Secondly, today's EU is a far from perfect democracy by any standard whenever we encounter executive dominance, lack of accountability and disrespect for popular self-determination.<sup>44</sup> Compliance

<sup>42</sup> Case C-621/18 *Wightman* ECLI:EU:C2018:999 para. 61 ff.; UK Supreme Court judgment of 24 January 2017 *Miller I* [UKSC] 5 para. 78 ff.

<sup>43</sup> See the helpful categorisation in R Schütze, 'Models of Democracy: Some Preliminary Thoughts' (2020) EUI Working Papers table 5.

<sup>44</sup> F Cheneval, 'Democratic Self-Government in the European Union's Polycentric System' cit. 74.

with democratic ideals is gradual. This is why the discussion of design-options for potential EU armed forces below sometimes allows for various models with different degrees of congruence with democratic ideals.

Crucially, the following reflections are hypothetical. They are conditional on the political will to follow the call of prominent European leaders (like the ones mentioned in the introduction) to build an EU army. That is the *if*-question which I will not discuss further.<sup>45</sup> Instead, I examine individual design questions related to the creation of an army for a democratic polity. That is the *how*-question. How can an army of peoples, which govern “together but not as one”, look like? Put differently, how should one design a democratic army that is accountable to the peoples of Europe?

## V. AN ARMY OF PEOPLES: DESIGN QUESTIONS

In what follows, I attempt to reconcile the EU’s current constitutional architecture as a democracy with the development of a European army by looking at important questions of legal-institutional design for armed forces.

### V.1. REPLACING OR REINFORCING NATIONAL TROOPS?

Due to its repercussion for national military forces, a pivotal design question relates to the future of Member State armies. Should a potential EU military replace national forces and thereby remove a central element of state sovereignty from the Member States?<sup>46</sup> Or should a European army merely complement national forces and either contribute to missions alongside them or take over some of their responsibilities, such as the humanitarian and peace-keeping “Petersberg-tasks”?

Habermas’ proposal illustrates the significance of this question for the EU’s constitutional nature. It is no accident that Habermas – who has repeatedly called for the development of a European *demos* and a truly European democracy –<sup>47</sup> proposes a European army that *replaces* national armies.<sup>48</sup> Removing a core element of statehood (armed forces) from Member States and replacing it at the EU level necessarily moves the EU towards a more federal entity and – one could argue – towards federal statehood. Habermas thus uses military integration as a means to serve his ultimate end of an EU demo(s)cracy.

<sup>45</sup> On the current political climate in relation to this question see AT Nguyen, ‘Macron’s Call for a European Army: Still Echoing or Forgotten?’ (22 June 2020) European Law Blog [europeanlawblog.eu](http://europeanlawblog.eu).

<sup>46</sup> O Dupuis, ‘It’s Time for a Common EU Army’ (4 February 2017) Voxeurop [voxeurop.eu](http://voxeurop.eu), calls that model a “single, joint European army”. See the matrix in Annex I.

<sup>47</sup> J Habermas, ‘Why Europe Needs a Constitution’ (2011) *New Left Review* 5.

<sup>48</sup> J Habermas, B Rürup, R Koch, F Merz, H Eichel and B Zypries, ‘Time to wake up’ (25 October 2018) *Handelsblatt* [www.handelsblatt.com](http://www.handelsblatt.com). For a discussion of Habermas’ *Postnational Federation* as template for an EU army see T Kucera, ‘What European Army?’ cit. 328 ff.

The answer from a democratic perspective is clear, and it is a different one: a European army must be complementary to national armies. The very point of a democratic polity is that – while binding the participating peoples together in an elaborate institutional framework – its source of authority remains the autonomy of national *demos* and their continuing capacity to self-determine crucial affairs. Not unlike national authority theory's concern for the autonomy of the individual citizen, the exercise of authority by a democracy puts its legitimacy at risk if it curtails the breathing space for its member-peoples too much.

These considerations are ever more salient in a sensitive sector like defence, which – for the reasons given (*supra*, II.1) – is linked to the constitutional identity of a state. Art. 4(2) TEU (fleshed out for defence in art. 42(2) TEU) acknowledges this sensitivity by mandating that the Union shall respect the Member States' "essential state functions, including [...] safeguarding national security". Replacing national armies with a single European army would not only push the EU far away from traditional international military cooperation. It would also dilute the democratic character identified as appropriate theoretical framework. To mention one particularly striking example, consider that, after Brexit, France is the EU's only remaining nuclear power. A replacing EU army could thus make the EU a nuclear power. This scenario is not only at odds with the French vision of an EU army. It also seems a most unrealistic proposal in light of the cautions steps EU integration has hitherto taken.

Admittedly, the actual tasks of a hypothetical EU army contribute to its effect on the EU's constitutional architecture. There is a significant difference between a mandate to defend EU citizens or, alternatively, to merely build on the current support practice (related to, for example, the Petersberg tasks). For present purposes, however, the precise configuration of the mandate is secondary to the institutional design questions, since the latter predetermine and shape the compliance with democratic ideals. In other words, a far-reaching mandate like the defence of EU citizens presupposes an appropriate institutional design, especially an accountability framework. Discussing the constitutional implications of the design of EU armed forces is crucial for the very reason that soldiers might be involved in missions that involve risking their life for the defence of the European peoples.

To sum up, for both theoretical and pragmatic reasons, an EU army should complement rather than replace national armies. This remains true independently of its concrete mandate and tasks.

## V.2. ALL IN VCOALITION OF THE WILLING

Even if there were an EU army that merely complemented national military forces, an equally delicate question would arise in the debate about participation. This field, known as differentiated integration, has yielded many fruits, ranging from opt-outs to enhanced coordination. As a rule of thumb, the more salient the area of integration, the more likely there will be some built-in leeway for the Member States. This is usually

done through granting opt-outs (common currency, Charter of Fundamental Rights), or by allowing for discretion in implementing certain measures (the provision of non-military aid to fulfil solidarity obligations, art. 42(7) TEU, provides an example in the defence sector). Due to the sovereignty-related significance of defence for the Member States, the current CFSP architecture already serves as playground for a variety of differentiated integration-related instruments.<sup>49</sup> The question is, should every Member State have an obligation to join a European army?

Naturally, democratic theory seems to militate against such an obligation and for the possibility of opt-outs. This would leave far-reaching military integration to a “coalition of the willing”. That is due to democracy’s emphasis on the autonomy of the national people and the in-built capacity to accommodate identity-related concerns (such as some Member States’ emphasis on neutrality/non-alignment) as well as practical obstacles (e.g. financial difficulties).<sup>50</sup> The EU army would, consequently, constitute an organic development of today’s PESCO (art. 42(6) TEU). Depending on the concrete proposal, it could, in principle, also be realised using enhanced cooperation under art. 20 TEU and art. 329(2) TFEU.<sup>51</sup> Since the Council of the EU would have to decide unanimously in that case (art. 329(2) TFEU), an EU army based on enhanced cooperation would nevertheless profit from support and legitimation by every Member State.

And yet, to my mind, it is compatible with democracy to impose the obligation to supranationalise *part of* the national military on every Member State. Note that a mandatory EU army excludes the use of enhanced cooperation, which logically requires the option not to participate. Consequently, the Treaty amendment required to create a mandatory EU army would allow each Member State and their people(s) to veto the proposal if deemed unacceptable. That holds true independently of whether such a step towards defence integration could be based on the simplified procedure of art. 42(2) TEU or requires recourse to art. 48 TEU.<sup>52</sup> In any case, having argued that only a complementary army is compatible with pure democratic theory, the question of mandatory or voluntary participation is secondary, given that neither would necessitate to give up national forces entirely.

Whereas democratic theory is thus open to both, voluntary or mandatory participation, the benefits of a differentiated integration-model in my view outweigh the problematic fragmentation and complexity that necessarily result from differentiated integration.<sup>53</sup> Essentially, the sovereignty-related salience and weight of defence integration, the

<sup>49</sup> See P Koutrakos, ‘Foreign Policy Between Opt-outs and Closer Cooperation’ cit. 418 ff.

<sup>50</sup> M Trybus, ‘The Legal Foundations of a European Army’ cit. section 5.

<sup>51</sup> See also O Dupuis, ‘Advocating for a European Army: The alternative to new Maginot lines’ (28 March 2019) Voxeurop voxeurop.eu.

<sup>52</sup> For the related discussion see W Cremer, ‘Art. 42 EUV’ cit. para. 9 ff.

<sup>53</sup> Even if such opt-outs are difficult to manage in practice, especially if non-participating states are NATO members. For the current Danish example see G Butler, ‘The European Defence Union and Denmark’s Defence Opt-out’ cit. 134.

exclusion of enhanced cooperation in case of a mandatory army, and the lack of political will for further defence integration in some Member States tip the scales in favour of a voluntary army. In short, participation in an EU army should not be compulsory.

### V.3. DECISION-MAKING RULES AND PARLIAMENTARY ACCOUNTABILITY

Suppose there is the political will to create a European army. How should the decision-making rules be fleshed out if the underlying ideal remains a democracy? In other words, who should decide according to which majority requirement about the deployment, mandate, size and financing of EU missions? The next two sections address these questions in relation to parliamentary involvement (V.3) as well as the role of the (European) Council and possible command structures (V.4).

The current European Defence Framework in art. 42 ff. TEU is overtly political and intergovernmental (which, paradoxically, is secured via ever more complex and detailed legal rules). That is, it is characterised by informal negotiations and non-legislative decision making in the two Councils. However, this architecture and the ensuing loose accountability structure would be theoretically unacceptable if we created a self-standing European army. Not only the functional comparison to armed forces in national western democracies, where the salience of military matters makes parliamentary involvement mostly mandatory,<sup>54</sup> militates for parliamentary participation of some sort. What is more, a developed supranational army would constitute such a delicate step in European integration that a tighter reconnection to the peoples seems a plausible legitimacy concern. It would therefore be appropriate to establish a decision-making mechanism involving parliament.

In the EU, the coexistence of the EP and national parliaments makes the question of parliamentary decision-making and accountability more complex. Is there a distinct role for national parliaments – representing the separate individual peoples – in the design of a potential European army? The question is theoretically significant, since parliamentary accountability provides a direct link between those who fight, defend and help, and those in whose name and to whose benefit these actions are taken.<sup>55</sup> If a European army defends European citizens who are simultaneously citizens of a state, what constitutes the appropriate parliamentary accountability framework?

I argue for a separation between the initial deployment of national troops to a potential EU army and the adoption of decisions for individual missions. With regard to the first (the actual supranationalisation of some national troops) the accountability re-

<sup>54</sup> Ranging from prior authorisation requirements in some states to mere budgetary questions in others. See L Damrosch, 'The interface of national constitutional systems with international law and institutions on using military forces: changing trends in executive and legislative powers' in C Ku and HK Jacobson (eds), *Democratic Accountability and the Use of Force in International Law* cit. 51 ff. Also C Ku and HK Jacobson, 'Toward a mixed system of democratic accountability' cit. table 15.6.

<sup>55</sup> Space constraints prevent me from elaborating on the various manifestations of accountability as a fundamental notion of constitutional theory. See ND White, *Democracy goes to War* cit. ch. 11.

gime should be modelled according to the recently very prominent art. 50 TEU, which requires the notification to leave the EU to be in accordance with national “constitutional requirements”. In our case, that means that national troops entering into the service of an EU military unit would be accountable to their national institutions in the moment they cease to be controlled by purely national means. In other words, the supranationalising act itself should be underwritten by the institutions and procedures foreseen in national constitutions. This will involve parliamentary decisions in most Member States, but not necessarily in all. In turn, no troops could be requested (additionally) by the EU without the approval of the respective national institutions. That would go a long way towards mitigating what one could call the “Lincoln risk”, namely the situation where the federal level could somehow arbitrarily claim troops from its lower entities. Remember that US President Lincoln summoned and federalised state forces in 1861 to prevent and combat the secession attempts of the southern Confederates.<sup>56</sup> Admittedly, the repetition of such a scenario in Europe must sound highly unlikely and even surreal to most readers. Surely, were there an EU army, no one would suggest sending troops in to prevent a Member State from leaving. And yet, the inability of a potential EU army to request unlimited troops from its Member States would send a signal of constitutional design towards those afraid of a European superpower.

However, once the troops will have been supranationalised with the blessing of the national institutions, their approval, especially the involvement of national parliaments, should not be required for every mission EU troops intend to engage in. Instead, the second decision, *i.e.* the mandate for individual missions, their size, equipment and funding, ought to be in the hands of the EP.<sup>57</sup> For the directly elected EP represents the plurality of European peoples, that is, the EU citizens as individually constituted in their respective statist polities, rather than as a single collective *demos* of roughly 500 million citizens.<sup>58</sup> The EP provides palpable input-legitimacy as decision-making forum for the representatives of the EU *demoi*. Obviously, this architecture would entail a radical departure from the current system with no role for the EP in the CSDP and a very limited

<sup>56</sup> M Les Benedict, ‘Abraham Lincoln and Federalism’ (1988) *Journal of the Abraham Lincoln Association* 36 ff. The important question whether the secession attempts at the time were unconstitutional is complex and controversial. See only P Radan, ‘Lincoln, the Constitution, and Secession’ in DH Doyle (ed.), *Secession as an International Phenomenon: From America’s Civil War to Contemporary Separatist Movements* (University of Georgia Press 2010) 56. The *Continental Army* created in 1775 in the USA marks an even earlier example of requesting troops from US-states for a common cause. For a concise overview see C Cox, ‘The Continental Army’ in J Kamensky and EG Gray (eds), *The Oxford Handbook of the American Revolution* (Oxford University Press 2012) 161.

<sup>57</sup> Which, *inter alia*, distinguishes my proposal from O Dupuis, ‘It’s Time for a Common EU Army’ *cit.*, and his option of a “single, intergovernmental army”. See Annex I.

<sup>58</sup> Case C-138/79 *Roquette v Council* ECLI:EU:C:1980:249 para. 33 (emphasis added). Later also case C-300/89 *Commission v Council* ECLI:EU:C:1991:244 para. 20; case C-263/14 *Parliament v Council* ECLI:EU:C:2016:435 para. 70.



role in the other CFSP areas.<sup>59</sup> And yet, the EP is a democratic parliament and therefore an appropriate forum for holding potential European troops accountable and for authorising their missions.<sup>60</sup>

Such a division of accountability at individual stages of constructing an EU army would not only reflect the constitutional *ethos* of the EU. It would also take into account practical considerations. Imagine every EU mission needed the approval of each national parliament from which soldiers are deployed. Military missions are intrinsically characterised by a certain urgency, independently of whether they are a reaction to war, humanitarian catastrophes or a project of peacekeeping. Hence, timely reaction and operational readiness is vital. Since the EP's approval is theoretically sufficient in my view, these are then additional sector-specific and pragmatic reasons for not involving national parliaments.

This perspective on parliamentary decision-making and accountability excludes the creation of an EU army outside the institutional framework of the EU Treaties. By contrast, Nguyen has recently discussed the use of the Aachen-Treaty between Germany and France, which contains several elements of closer defence cooperation between the two Member States, as international starting point for an EU army outside the EU Treaties.<sup>61</sup> Yet, as I explained, such a step in defence integration has enormous impact on the constitutional configuration of the EU as a polity. Building an EU army outside the EU Treaty framework would not only transpose the various normative problems of the international solutions to the 2008 financial crisis to another salient area of integration. Such problems are, for example, executive dominance, the lack of democratic institutions or procedures, and diminished transparency and accountability.<sup>62</sup> What is more, it would undermine the democratic character of the EU as a polity with sophisticated accountability framework and decision-making institutions that involve the peoples both directly and indirectly.

#### V.4. OPERATIONAL DECISION-MAKING: THE COUNCIL(S) AND THE COMMANDER

Not least because it currently controls the EU Battlegroups, it is very likely that the Council of the EU (assembling national defence ministers) will play a decisive role in any decision-making regarding a potential EU army. Alternatively, the European Council, *i.e.*

<sup>59</sup> P Koutrakos, *The EU Common Security and Defence Policy* cit. 51 ff. And yet, Framework Agreement of 20 November 2010 on Relations between the European Parliament and the European Commission, para. 10 already foresees the EP's involvement.

<sup>60</sup> Nonetheless, even scholars of democracy focus predominantly on national parliaments for providing input-legitimacy to the EU's actions. See only R Bellamy, *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (Cambridge University Press 2019) ch. 4. For criticism see R Schütze, 'Models of Democracy' cit. 33 ff.

<sup>61</sup> AT Nguyen, 'Macron's Call for a European Army Still Echoing or Forgotten?' cit.

<sup>62</sup> See only EO Eriksen, *The Normativity of the European Union* (Palgrave Macmillan 2014) 118 ff.; S Garben, 'The Constitutional (Im)balance Between "the Market" and "the Social" in the European Union' (2017) *EuConst* 55 ff.; S Weatherill, *Law and Values in the European Union* (Oxford University Press 2016) 411 with further references.

the Heads of State/Government themselves, could act as a “European High Security Council”.<sup>63</sup> The following reflections are suitable for either. The crucial question is whether either Council's operational decisions should require unanimity or (qualified) majority voting among representatives of the participating Member States. Currently, most of the CFSP (art. 31 TEU) and the entire CSDP (art. 42(4) TEU) are subject to unanimity rules, underlining yet again the salience of the area for the Member States. But would that still be appropriate in case of independent EU forces?

From a theoretical perspective, there is a lot to say against unanimity rules in the Council. Many have emphasised the immorality of veto-powers for a single player in national democracies, enabling them to block even overwhelming majorities.<sup>64</sup> As Waldron explained, the normative difference between majority voting and tossing a coin is the respect which the former encapsulates for the participating stakeholders.<sup>65</sup> The theoretical value of such procedures thus stems from the equal participation in the process, instead of the guarantee of an outcome in one's favour. Therefore, majority voting is preferable to unanimity in democracies. Whereas democratic decision-making urges to respect the voices and views of each people as equal participant in the debate in the Council of the EU, for example in the current qualified majority system,<sup>66</sup> unanimity requirements grant each people more, namely immunity against being outvoted. Furthermore, efficient and prompt decision making – especially in light of the urgency built into military deployments – pulls towards majority voting.

It should be recalled, however, that the underlying value of a democracy is the self-determination of its constituent peoples. Hence, the forceful arguments against unanimity in a national democracy, where parliaments represent a *demos*, cannot all too easily be extrapolated to the EU context. In the EU, outvoting one people automatically means to deprive it from having its own democratically formed will implemented.<sup>67</sup> Consider only changes in primary law. They require the consent of all the Member States and their peoples (art. 48 TEU). That procedure – *pace* more federalist voices –<sup>68</sup> does not violate de-

<sup>63</sup> O Dupuis, 'It's time for a common EU Army' cit.

<sup>64</sup> D Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press 2008) p. 17 and 172; T Christiano, 'A Democratic Theory of Territory and Some Puzzles about Global Democracy' (2006) *Journal of Social Philosophy* 103. On how this stopped the early European Defence Community see F De Witte, 'Interdependence and Contestation in European Integration' (2018) *European Papers* [www.europeanpapers.eu](http://www.europeanpapers.eu) 482.

<sup>65</sup> J Waldron, *Law and Disagreement* (Oxford University Press 1999) 107 ff.

<sup>66</sup> Art. 16(3)(4) TEU. One Member State has one vote. The double majority requirement under the qualified majority system (55 per cent of the Member States representing at least 65 per cent of the EU population) is a sophisticated system to ensure that a majority decision is also supported by a majority of the EU citizens.

<sup>67</sup> J Von Achenbach, *Demokratische Gesetzgebung in der Europäischen Union* (Springer 2013) 444 ff.

<sup>68</sup> K Lenaerts and M Desomer, 'New Models of Constitution-Making in Europe: The Quest for Legitimacy' (2002) *CMLRev* 1232.

mocracy. Instead, it institutionalises the respect for the individual peoples and their national democracy.<sup>69</sup> In short, majority voting has the potential to force Member States and their troops to participate in defence measures that they reject.

As desiderata from these reflections, I want to propose the following design regime for a future EU army: decision-making in the Council (whichever Council is chosen) with regard to the deployment, funding and size of a potential free-standing EU army should be subject to majority voting among the participating Member States. However, such majority voting should be qualified in order to allow national peoples a veto in relation to the participation of *their* nationals. Whereas reluctant Member States would be unable to stop the deployment of EU troops as such, they could veto the participation of their own nationals.<sup>70</sup> Notice that such a scheme works independently of whether an EU army will be compulsory for all Member States or open to differentiated integration. These limited veto-options would constitute a compromise which respects the self-determination of a national people and its constitutional identity on the one hand, while not allowing the veto to obstruct entire missions (or use the threat of a veto for other political means) on the other. The options of qualified abstention (art. 31(1) TEU, also applicable to the CSDP) and qualified majority voting (art. 31(2) TEU), as well as the handling of the Danish opt-out show that the Treaty already knows how to accommodate such concerns in the defence sector.<sup>71</sup> This balance between functioning supranational institutions and respect for the underlying architecture of the polity in question is, in my opinion, one of the success criteria for any democracy.

A related issue of first and foremost practical importance is the command structure. Who will ultimately call the shots?<sup>72</sup> In that regard, however, democratic theory cannot offer specific guidelines but merely tentative suggestions. Especially in relation to military command structures below the political level. In my view, the chief military commander should be an official position at the top of the then to be created institutional structure of the EU army, not unlike NATO's Supreme Allied Commander Europe. On the political level, the first question is whether there should be a distinct commander in chief at all. It follows from the above that an EU army requires an EU commander in chief, precisely to underline the qualitative difference to international collaborations (like NATO). The second question is who should occupy the role of commander in chief. The intuitive choice for many would be the Commission President as office closest to a Head of the EU executive. In my view, however, the European Council President ought to be the first choice for democrats. Simply because they head the EU institution that

<sup>69</sup> F Cheneval, *The Government of the Peoples* cit. 138 ff.

<sup>70</sup> This nuanced veto option puts my proposal in the theoretical space between the "common-intergovernmental" and "joint-common" European army in O Dupuis, 'It's time for a common EU army' cit. annex I.

<sup>71</sup> G Butler, 'The European Defence Union and Denmark's Defence Opt-out' cit. 148.

<sup>72</sup> I am grateful to an anonymous reviewer for pressing me on this point.

assembles the Heads of State/Government of the EU Member States and thus the elected leaders of the participating peoples. As commander in chief, the European Council President would not only represent the heads of the national executive as traditionally core decision-makers in military affairs. Moreover, tying the role of commander in chief to the European Council presidency instead of the rotating presidency of the Council of the EU (art. 16(9) TEU) guarantees stability and avoids the awkward situation of a (national) commander in chief holding office in a non-participating Member State (assuming the possibility to opt-out). Finally, this choice for the role of commander in chief would maintain the nexus to the plurality of the EU peoples via the collegiate European Council. Instead of the European Council President, one could always create a new position in the EU's political leadership for a commander in chief. For example, if there were to exist a body along the lines of Dupuis' High Security Council (see *supra*, section V.4), one could create a separate presidency with the role of EU Commander in Chief. Rather than agreeing on who should occupy the position, it is more important – for present purposes – to emphasise that the choice of command structures itself ought to reflect the EU's theoretical nature and is, accordingly, not merely organisational.

#### V.5. NATIONAL CONSTITUTIONAL RESERVATIONS: DEMOS V DEMOI?

In addition to abstract theorising about a democratic army, national constitutional law has already specified some red lines, especially in Member States with defence-related neutrality/non-alignment obligations or constitutional courts wary of too much EU integration.

Here, we can leave out Denmark, which already opted-out of any EU measures with defence implications and is thus unlikely to join an EU army.<sup>73</sup> But there are other Member States for the peoples of which military neutrality/non-alignment is a precious good. For them, the introduction of the obligation of aid and assistance in art. 42(7) TEU (solidarity clause) already caused a headache.<sup>74</sup> In various Member States, neutrality – although not part of their national identity as understood in art. 4(2) TEU – plays a prominent role in public discourse and constitutional debates.<sup>75</sup> Whereas the Treaty of Lisbon tried to alleviate any concerns by installing various protective mechanisms, it is clear that further defence integration would be hard to stomach for these Member States and their peoples, not only politically, but constitutionally. This provides a compelling argument for differentiated integration (see *supra*, section V.2).

<sup>73</sup> Comprehensively G Butler, 'The European Defence Union and Denmark's Defence Opt-out' cit.

<sup>74</sup> See S Duke, 'The Enigmatic Role of Defence in the EU' cit. 75.

<sup>75</sup> Explicitly for Austria G Lienbacher and M Lukan, 'Constitutional Identity in Austria' in C Calliess and G van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 51. On the identity-debate more generally K Devine, 'Neutrality and the development of the European Union's common security and defence policy: Compatible or competing?' (2011) *Coop&Conflict* 334.

In contrast to the German voices discussed above, who support an independent EU army (especially Chancellor Merkel, Jürgen Habermas and the politicians supporting his proposal), the German Constitutional Court (*BVerfG*) is more cautious. The Court's reservations are motivated by a concern for the preservation of Germany as a sovereign, democratic state. In its seminal Lisbon-decision, the *BVerfG* scrutinised whether the Treaty of Lisbon violates the fundamental conception of the German military as a parliamentary army.<sup>76</sup> According to the *BVerfG*'s (highly peculiar)<sup>77</sup> doctrine of necessary state functions (*Staatsaufgabenlehre*), the current German Constitution prohibits the replacement of the German military with an EU-only military as well as the erosion of the parliamentary reservation (*Parlamentsvorbehalt*).<sup>78</sup> This demanding doctrine goes well beyond the general consensus, according to which guaranteeing national security is a necessary state function.<sup>79</sup> Since my democratic angle argues for a complementary rather than replacing EU army, however, that particular hurdle *per se* constitutes no obstacle for my design proposals.

Yet, the *BVerfG* went on to emphasise that the deployment of German troops needs to remain voluntary and must not bypass the parliamentary reservation of the *Bundestag*, which is *integrationsfest* and can, consequently, never be abandoned through EU integration.<sup>80</sup> Under the proposals discussed here, the German *Bundestag* will be involved. Once as part of the necessary treaty amendment (under art. 42(2) TEU or art. 48 TEU) in order to establish an EU army of any kind.<sup>81</sup> Moreover, it will be involved in the decision about the supranationalisation of specific troops, which relinquishes them from the grip of the German Parliament and transfers them to EP control (*supra*, V.3). Whereas the Lisbon judgment allows for further voluntary supranationalisation in the defence sector,<sup>82</sup> it seems indeed questionable whether a *Bundestag* decision to supranationalise part of the German army that – not unlike Framework Decisions – entails a general permission to engage in military operations would satisfy the *BVerfG*'s yardsticks. Put differently, would the exclusive responsibility of the EP for the concrete mission-specific deployment of future EU troops be compatible with the *BVerfG*'s reservations?

<sup>76</sup> German Federal Constitutional Court judgment of 30 June 2009 2 BvE 2/08 paras 381-382.

<sup>77</sup> See only C Möllers and D Halberstam, 'The German Constitutional Court says "Ja zu Deutschland!"' (2009) *German Law Journal* 1241.

<sup>78</sup> German Federal Constitutional Court judgment of 30 June 2009 cit. paras 249, 252-255.

<sup>79</sup> See only J Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford University Press 2016) ch. 1. Notice how this mirrors the discussion *supra*, section II.1, regarding the nexus between state sovereignty and armed forces.

<sup>80</sup> See German Federal Constitutional Court order of 17 September 2019 2 BvE 2/16 para. 52. Rightly critical of the status elevation D Thym, 'Integrationsziel Europäische Armee? Verfassungsrechtliche Grundlagen der Deutschen Beteiligung an der Gemeinsamen Sicherheits- und Verteidigungspolitik (GSVP)' (2010) *Europarecht Beiheft* 175.

<sup>81</sup> Admittedly, this will not necessarily be the case if an EU army is realised via enhanced cooperation.

<sup>82</sup> See D Thym, 'Integrationsziel Europäische Armee?' cit. 187 ff.

So far, the *BVerfG* doesn't consider the EP a Parliament (capital P) capable of providing any viable input-legitimacy.<sup>83</sup> The court evaluates the EP based on the standards of a national majoritarian democracy (defined by an equal vote for each citizen, its role as main forum for legislative decisions, holding a government accountable etc.). Obviously, the EP doesn't satisfy these standards. The *BVerfG* fails to see the distinct qualities of the EP as parliament for a political community beyond the state. It is not based on an *equal* vote by each EU citizen (art. 14(3) TEU) precisely because it assembles multiple peoples rather than a single *demos*. The fate of my proposal depends on whether the *BVerfG* continues to view the EU theoretically in the same terms as any other international organisation, or whether it accepts the independent legitimising force of its democratic elements, especially of the EP.

## VI. ON COMPLEXITY

Before I conclude, I want to pause after this survey of individual military design questions and reflect on the notion of complexity. A broad-brush summary of my proposals results in the following picture: EU armed forces, which complement national armies, leave options for Member States to opt-out (differentiated integration), involve the participation of both national institutions/parliaments as well as the EP, and foresee qualified majority voting in the Council with an in-built veto for the participation of one's own nationals. All of that serves to balance the independence and interdependence of the peoples in the EU as a democracy.

Is it worth it? Does it help to provide a complex web of decision-making and accountability structures that require another layer of meticulous legal rules, seeing that the current CSDP-regime seems overcomplex and underused? I admit that the law can only take us so far, while what we need most is confidence in the EU's role in defence as well as in the operability of its tools. The option to pursue security and defence policy through the EU needs to be a credible one. For this reason, the following reflections necessarily blur the line between the if-question (if there should be an EU army) and the how-question (how to design it).

Despite the ensuing complexity, several reasons indicate that the development of an independent EU army along the lines of the present proposal helps rather than hinders progress in the EU's security and defence policy. Firstly, as I suggested above (*supra*, II.3), increasing the legitimacy of the EU's defence policy by establishing an accountable and operational EU army might end the current state of limbo and contribute to its more frequent use. Secondly, the development of an EU army reduces complexity elsewhere. Instruments like the battlegroups and even PESCO are not needed anymore, because they

<sup>83</sup> See only German Federal Constitutional Court judgment of 9 November 2011 2 BvC 4/10; German Federal Constitutional Court judgment of 26 February 2014 2 BvE 2/13.

should be merged with the EU army. Thus, the focus on the army with reduced overall complexity provides a clear and operational tool for EU involvement in defence missions. Thirdly, the establishment of a transparent and clearly defined EU army takes away some of the fears regarding a creeping loss of sovereignty in the defence sector. This transparency might make the stakeholders less reluctant to envisage and integrate an EU response to security and defence issues. Whereas one could argue that it would be preferable to keep the *status quo*, given that Member States are happy with it, the question is: are they? I have mentioned national and European leaders, who openly call for a significant step forward in defence integration. Furthermore, in practice, we see overwhelming reluctance to use the fragmented groups, mechanisms and tools of the current EU defence architecture. Thus, a transparent and clearly defined framework for EU armed forces plus consolidation of the CSDP elsewhere could contribute to an increased activity of the EU in defence policy. Finally, fourthly, there is the current geopolitical climate.<sup>84</sup> It asks for a more independent and active role of the EU in defence that allows the EU leaders to join forces with their Member States and make a demonstrable contribution in the international security and defence arena, for example through stronger ties with NATO.

Consequently, complexity as such is not problematic. Remember that the necessity for complex rules stems from the fact that the EU is a non-state political community that is best understood as a democracy. Those rules are there to safeguard and reflect the nature of the EU as a democratic political community.

## VII. CONCLUSION

In 1991, then Belgian Foreign Secretary (and later Prime Minister) Mark Eyskens famously remarked that “Europe is an economic giant, a political dwarf, and, even worse, a military worm until it concerns itself with elaborating a defence capability”.<sup>85</sup> Few would doubt that the three parameters have shifted considerably in the decades since. Think only of the underlying constitutional shifts (major Treaty revisions and judicial developments), tectonic changes in membership (enlargement from 12 to 28, then 27 Member States) and existential crises (financial crisis, eurozone crisis, refugee “crisis”, rule-of-law crisis, COVID-19-crisis). Even if we disagree with Eyskens’ position, however, in 2020 the key take-away should be that major political, economic and defence-related changes are closely intertwined and affect the constitutional DNA of a polity, even if that polity defies statist characteristics. But if today’s EU Treaties and policies tell us something about the EU’s nature as a polity, I argue that we should inverse this perspective and suggest that future reforms should in turn be aware of and continue to

<sup>84</sup> For but one discussion from an Eastern-European perspective see D Duna and R-C Dancuta, ‘The Common European Army Project between the National Defence Preferences of the Member States and the Geostrategic Challenges at the Eastern Borders’ (2014) *Eurolimes* 55 ff.

<sup>85</sup> Cited in M Trybus, ‘The Legal Foundations of a European Army’ cit. 14.

reflect the EU's constitutional identity. Doing so takes this reflexive relationship seriously and grants us more control of constitutional moments. You do not necessarily have to agree with me on democracy as the appropriate theoretical lens. But it is vital to bear in mind the links between theoretical nature and military architecture when designing an EU army. In other words, the recipe only works if it includes both ingredients.

In this *Article*, I proposed design-features for a hypothetical future European army, based on the concept of the EU as a democracy. It is important, to my mind, that the "best system is the most efficient system as chosen by the constituent parts, not simply the most efficient system".<sup>86</sup> Designing a European army is about more than the current focus on economic gains through avoiding inefficient parallel structures in all the Member States. It is about the identity of the EU as a political community. Not only the *if*-question, *i.e.* the political will to advance the project of a European army, represents a cardinal constitutional choice for the peoples of the EU. The *how*-question, in my view, does so likewise.

According to my argument, there is conceptual space for military forces beyond the state, which have the capacity to operate effectively while reflecting their accountability to the peoples of Europe in the plural. In the matrix following Dupuis,<sup>87</sup> my proposal is closest to the "joint-common" European army, though with nuanced attention for democratic concerns. Consequently, there is no need to fear that the creation of a European army necessarily stumbles into a constitutional moment, that it pushes the EU towards statehood. A true *Union of Peoples* has to prevent this by constitutional design, not by historical accident.

More dramatically, democracy helps to explain why the question "Who will die for Europe?"<sup>88</sup> is misleading. The soldiers of a potential EU army along the above lines do not sever the ties to their own people completely. Instead, they continue to serve their own people as one element of the combined peoples that participate in and theoretically underpin the EU. A democratic perspective replaces vague and identity-loaden references to Europe with the idea that EU soldiers bring sacrifices not only for their own people, but also for the other EU peoples, "not because those others have always been part of us but because we understand that interests of those people [...] have in fact become part of us".<sup>89</sup> Only time will tell whether this suffices for the European leaders and the public to undertake this significant step of defence integration.

Finally, I am aware that defence integration in the EU so far has been incremental and cautious. In light of that, my proposals may appear radical. However, I am not arguing that an EU army is necessary for the survival of the EU or that the current defence architecture

<sup>86</sup> F Cheneval, 'Democratic Self-Government in the European Union's Polycentric System' cit. 70.

<sup>87</sup> O Dupuis, 'It's time for a common EU army' cit.

<sup>88</sup> AD Smith, *Nations and Nationalism in a Global Era* (Polity Press 1995) 139.

<sup>89</sup> D Innerarity, *Democracy in Europe: A Political Philosophy of the EU* (Palgrave Macmillan 2018) 107. Innerarity himself does not (explicitly) endorse democracy.



is entirely inadequate. My small *Article* should rather be seen in an argument according to which any EU army ought to reflect the constitutional identity of the EU, and in an exercise in hands-on political theory how to realise that. As a consequence, this principled argument provides a basis for discussing other questions that are either related to or follow from the points discussed here (among others: what tasks should an EU army perform? Should EU citizens be able to enlist directly in an EU army?).

My proposal embraces the EU as a democracy and treats the defence sector as the constitutional laboratory for European integration it has been since the 1950s. Realising the prospect of an EU army with due regard to its nature and *ethos* would, in short, be an important contribution to the overarching idea of the 3<sup>rd</sup> *Young European Law Scholars Conference*, which sparked this *Article: Shaping the Future of Europe*.

### ANNEX I: MATRIX OF OLIVER DUPUIS’ MODELS FOR AN EU ARMY

Dupuis helpfully discusses four different models of a future EU army.<sup>90</sup> He calls these single-intergovernmental, single-joint, common-intergovernmental, and joint-common. The main characteristics are the following:

	Joint	Intergovernmental
Single	<p>National armies would be replaced and incorporated into a larger EU-only army</p> <p>Full decision-making authority lies with EU institutions</p> <p>Role model: national armies</p>	<p>National armies would nominally be incorporated into a larger EU-only army</p> <p>Intergovernmental EU umbrella, full practical Member State control</p> <p>Role model: European Defence Community</p>
Common	<p>Newly erected EU army, complementary to national armies</p> <p>Full Decision-making authority lies with EU institutions</p>	<p>Made up of segments of national armies</p> <p>Member States can withdraw their troops without problem</p> <p>Role model: EU Battlegroups</p>

<sup>90</sup> Drawn from O Dupuis, ‘It’s time for a common EU army’ cit. The Scientific Service of the German Bundestag discusses these models in Wissenschaftlicher Dienst des Deutschen Bundestages, ‘Die Europäische Armee 1948–2018, Konzepte und Ideen zur Vertiefung der Gemeinsamen Europäischen Sicherheits- und Verteidigungspolitik und zur Erhöhung des Grades der Streitkräfteintegration’ (18 October 2018) [www.bundestag.de](http://www.bundestag.de).

