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The Legal And Constitutional Position of the Netherlands Armed Forces and International Military Cooperation

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I. The Historical and Political Background of the Netherlands Military Law System

The position of the armed forces in the constitutional and legal systems is to a considerable extent determined by developments in political history involving the military. Thus it is of some significance that the military have never played an important role in the government of the country as a whole, except that in the period of the Dutch Republic (1581-1793), the stadtholder (the formal head of state, who in fact never was considered sovereign) was important as commander of the armed forces.
After the turn of the 18th to the 19th century, which saw a period of constitutional instability and French occupation, the present state of the Netherlands was established.
Foreign policy in the 19th century was marked by the role of the Netherlands as one of the major colonial powers with a great stake in international trade. Dutch foreign policy was mainly informed by a strong commitment to neutrality and independence. This policy of neutrality was maintained throughout the First World War. Although the Kingdom was a member of the League of Nations, it did not officially rescind neutrality until the Second World War.
The events surrounding the Second World War are important for understanding the prominent role of international military cooperation and the present active involvement of the Dutch armed forces in multinational military operations and units. The country was swiftly occupied in the first days of May 1940 by the German armed forces. The Netherlands armed forces proved very badly prepared and even worse equipped; they were simply overrun. However, the government that fled the country to England, retained a small brigade during the World War in England, consisting of expats, refugees and some military who had managed to cross the North Sea, the Prinses Irene Brigade. This brigade was placed under British command by Royal Decree. The southern part of the country was liberated in September 1944 mainly by British, Canadian and some American troops. After a cold winter which was marked by hunger (with 16000 casualties as a consequence), the northern part was liberated by foreign troops, mainly Canadian and British and some Polish, French and Belgian armed forces, in May 1945.
In the East Indies, however, after the defeat of Japan, the Netherlands fought what was in effect a colonial war in the form of two *politionele acties* (in July 1947- January 1948 and December 1948-January 1949) against insurgents claiming for independence. This was perhaps not an enterprise entirely dominated by the ambitions of the military, but part and parcel of colonial policy like that pursued by other colonial powers. The dramatic impact of these operations has only been equalled by that of the Srebrenica tragedy in 1995.

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[1]Preliminary terminological remark. The Dutch term *militair*, which is crucial in the entire legislation, has been rendered with the English word "soldier". The word "soldier" or "soldiers" does therefore not indicate any rank or order. Although for substantive and stylistic reasons the term "service men" might have been preferred, this is not done, because in principle a service man may also be a woman. Also some terms have been translated in a non-idiomatic, literal manner. Existing idiomatic equivalents often refer to an office, institution or principle of a somewhat different legal meaning and status from the Dutch equivalent. An idiomatic translation hides these subtle, but often important, differences.

After the Second World War, foreign policy was dominated by a firm Atlantic orientation in foreign and security affairs. This has been reinforced after the final independence of Indonesia 1949, which the US had strongly favoured.
The Netherlands armed forces have participated in most post-war international operations, from Korea, various operations in the Middle East, the Gulf, Cambodia, Angola, Namibia, Haiti, Ethiopia/ Eritrea, to the Balkans and Afghanistan. At present there is an involvement in observer missions in the Middle East,[2] Cyprus[3] and Moldova,[4] and military presence in Macedonia, Bosnia, Kosovo and Afghanistan.[5] The armed forces are cooperating in a fairly large number of multinational military arrangements and units, mostly in the framework of the NATO and bilateral arrangements.[6]

1. The Armed Forces in general perspective

a. The constitutional perspective

The constitutional provisions on the armed forces in the Constitution date back to the first Constitution of the Kingdom of 1815 (and its predecessor the Constitution of 1814, when the Netherlands were formally not yet a Kingdom but a principality).
The army's character used to be that of a conscript body led by a volunteer cadre of professional officers. The draft - historically considered a foreign element introduced by the French at the turn of the 18th to 19th century - has always been unpopular.[7] Major attention in terms of constitutional and legislative drafting was focussed on the limitations within which the draft should be kept. There is no strong ideological, democratic or republican concept backing up the idea of a conscript army. The (factual) abolition of the draft in 1995/1997 did

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[2]UNTSO (United Nations Truce Supervision).

[3]UNFICYP (United Nations Forces in Cyprus).

[4]One observer in OSCE context.

[5]Macedonia, Operation Essential Harvest (NATO); Former Yugoslavia/Dayton Peace Agreement/Stabilization Force (SFOR); United Nations International Police Task Force (UNIPTF); European Community/ European Union Monitor in Former Yugoslavia (ECMM/ EUMM); United Nations Mine Action Centre/ Bosnia-Herzegovina Mine Action Centre (UNMAC / BHMAC); and Enduring Freedom and ISAF in Afghanistan.

[6]It is difficult for the outsider to acquire a complete and up to date overview. The situation is exacerbated by the fact that the legal basis is usually informal. The following I have been able to trace. All forces partipate in the United Nations Standby Arrangement System (UNSAS) and the NATO Command Structure (approx. 850 persons). The Navy (Koninklijke marine) in Admiral Benelux (the cooperation includes an integrated operational staff, a NL/B squadron, and close cooperation in the field of educational and training), Standing Naval Force Atlantic, Standing Naval Force Mediterranean, Standing Naval Force Channel, Strike-fleet Atlantic, UK/NL Amphibious Force, UK/NL Landing Force (these last mentioned force are part of the Strike Fleet Atlantic), ACE Mobile Forces Land, Combined Amphibious Force Mediterranean, Shirbrig. The Army (Koninklijke landmacht) in 1 (GE/NL) Corps, Multinational Division Central (MND(C)), ACE Rapid Reaction Corps (ARRC), Shirbrig. The Air Force (Koninklijke luchtmacht) in Deployable Air Task Force (a cooperation agreement between BENELUX countries), European Air Group, NATO Integrated Air Defence System (NATINADS).

[7]Surveys show that in 1989 some 49 % of the population supported the draft, while by 1992 this had dwindled to some 30 %, Maatschappij en Krijgsmacht, October 1992, pp. 17-20.

not meet with any strong opposition, and on the whole was met with relief. The Constitution was amended on the issue of the composition of the armed forces as follows:

> Article 98 [Amended as of 22 June 2000]
> 1. The armed forces shall consist of volunteers, and may also include conscripts.
> 2. Compulsory service in the armed forces and the power to defer the call-up to active service shall be regulated by act of parliament.
>
> [Previously:
> > Article 98
> > 1. To protect the State's interests, there shall be armed forces, which shall consist of volunteers, and which may also include conscripts.
> > [...]
> > 3. Compulsory service in the armed forces and the power to defer the call-up to active service shall be regulated by act of parliament. The obligations which may be imposed on persons not belonging to the armed forces in relation to the defence of the country shall also be regulated by act of parliament.]

In order to be precise, we must therefore say that the conscription has not been abolished, but rather the calling into active service of conscripts has been suspended. In the mean time volunteers do the job.

The Constitution does not articulate any specifically ideological view of the role of the armed forces. The task of the armed forces is formulated as follows:

> Article 97 [Amended as of 22 June 2000]
> 1. For the purpose of the defence and the protection of the interests of the Kingdom, as well as for the maintenance and promotion of the international rule of law, there shall be armed forces.
> 2. The government shall have supreme authority over the armed forces.
>
> [Previously:
> > Article 98
> > 1. To protect the State's interests, there shall be armed forces, which shall consist of volunteers, and which may also include conscripts.
> > 2. The Government shall have supreme authority over the armed forces.]

Previously, the independence of the State and the defence of the territory were mentioned in a general provision on the duty of all Dutch nationals, which preceded the provision on the task of the armed forces; the Constitution provided that this duty could also be extended to resident foreigners.
This provision has been rescinded and been replaced by a provision, which comes after the provisions on the nature of the armed forces as basically one of volonteers:

> Article 99a [Amended as of 22 June 2000]
> The obligations which may be imposed for the civilian defence of the country shall be regulated by act of parliament.
>
> [Previously:
> > Article 97

> 1. All Dutch nationals who are capable of doing so shall have a duty to cooperate in maintaining the independence of the State and defending its territory.
> 2. This duty may also be imposed on residents of the Netherlands who are not Dutch nationals.]

Thus, even the slightest traces which could lend themselves to a patriotic interpretation, have been removed from the Constitution.
Nor does the Dutch Constitution provide a democratic ideological basis to the armed forces. The provision, common to continental European constitutions that all power emanates from the people, is absent in the Constitution of the Netherlands. In fact, there is no mention of sovereignty and democracy at all in the Constitution.[8]
One of the most prominent 19th century Dutch constitutional lawyers noted that the elaborateness of the constitutional provisions on the armed forces, was surpassed only by the German Constitution, but for the opposite reason: whereas the German Constitution wished to restrain Parliament from weakening the armed force, the Dutch wished to restrain Parliament from making it too strong:

> "While there [in Germany], the main concern was the desire durably to protect the powerful army organization, to which the Empire owed its existence and its greatness, against the not unnatural disposition of the legislature to cut back on it, with us [in the Netherlands] it was the contrary fear that the legislature would place overly high ambitions on the armed forces. There the Constitution exudes a strong military spirit; here a no less forceful anti-militarism. In the interest of personal liberty and to place a limit on the sacrifices which could be imposed on the people for the purpose of the country's defence, the framers of the Constitution were led to a measure of elaborateness which they have been able to avoid elsewhere in the Constitution." [9]

For the purpose of this book, it is important to notice that the Dutch Constitution has a relatively strong international orientation, introduced by amendments of 1952 and 1956. Thus it provides in Article 90:

> The Government shall promote the development of the international rule of law [Dutch: *internationale rechtsorde*; literally: 'international legal order'].

The phrase "maintenance and promotion of the international rule of law", recurs in Article 100 of the Constitution, which was introduced in 2000:[10]

> 1. The government shall provide prior information to the States General concerning the deployment or making available of the armed forces for the maintenance or promotion

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[8] For an explanation of this state of affairs, see L.F.M. Besselink, An Open Constitution and European Integration, The Kingdom of the Netherlands. In: FIDE, XVII. Kongreß I. Nationales Verfassungsrecht mit Blick auf die europäische Integration. Fédération Internationale pour le Droit Européen. (Deutsche Wissenschaftlich Gesellfschaft für Europarecht). Berlin 9.-12 Oktober 1996, [I], pp. 361 ff and SEW Tijdschrift voor Europees en economisch recht, 996, 192 ff.

[9] J.T. Buijs, De Grondwet, vol. II Arnhem 1887, p. 623-624 (author's translation).

[10] Previously, Article 100 read: "Foreign troops shall not be employed other than pursuant to an act of Parliament." This was understood to refer to the engagement of foreign nationals as mercenaries or as a foreign legion. The provision has not been retained.

of the international rule of law. This includes providing information concerning the engagement or making available of the armed forces for humanitarian assistance in cases of armed conflict.
2. The first paragraph shall not apply if peremptory considerations prevent the prior provision of information In this case, the information shall be provided as soon as possible.

This provision had two aims, first to make clear that troops can be sent abroad for the said purpose, and secondly to create some reinforcement of the position of Parliament with regard to sending troops abroad for this kind of operation.

b. The perspective of parliamentary democracy

The relative unimportance of institutionalising a strong democratic control over the armed forces is reflected in the history of the new Article 100 into the Constitution. Its origin lay in a resolution passed with near unanimity by the Lower House,[11] calling for the introduction of a right of parliamentary approval for the decision to deploy troops abroad. The government was strongly opposed to this, and in the end Parliament acquiesced to the compromise solution imposing the duty on government to inform Parliament prior to any such action without further powers attributed to Parliament. This, as we shall have occasion to point out, is typical for the constitutional relationships in the Netherlands.

All in all, the constitutional position of the armed forces can be termed quasi-monarchical, placing primary power in the Government on which Parliament is not to make too many incursions. The task of caring for defence and the armed forces is considered a primary competence of the Government; only if there is explicit consideration of the role of Parliament in constitutional terms, a further involvement of Parliament is considered warranted. This is epitomised in the epitaph "the government is to govern and parliament is to supervise" ["*De regering regeert, het parlement controleert*"].

This, however, is not meant to detract from the principle and practice of ministerial responsibility, which renders any action by the government accountable to Parliament. As a consequence, the participation in multinational UN peace-keeping actions has been the object of a parliamentary investigation by the Tijdelijke Commissie besluitvorming uitzendingen (Temporary Committee on Decisions to Send Troops Abroad), the so-called Bakker Committee.[12] This Committee closely and critically analysed the decision-making in a number of recent cases, and came up with a large number of recommendations for improving the decision-making, and parliamentary involvement.

At the moment of writing, there is also an official parliamentary investigation, a so-called *enquête*, into the political responsibilities involved in the Srebrenica tragedy, which should lead to a final report in the autumn of 2002. This tragedy was researched in terms of fact-finding by the Nederlands Instituut voor Oorlogsdocumentatie (NIOD) - an institute with a prime focus on the historical study of the Second World War. Its report, which appeared in April 2002, led to the resignation of the cabinet a few days later. The Prime Minister considered that the findings of the NIOD concerning periods in which successive cabinets held responsibility (of which he formed part), could not remain without political consequences. He therefore resigned and was followed by the other ministers (some of whom

[11] Only the conservative liberal party VVD voted against, all other parties from left to right voted in favour.

[12] Kamerstukken T[weede] K[amer], [i.e. Parliamentary Documents of the Lower House], 26454.

had also been ministers in previous cabinets), including the relatively new minister of Defence, who added that the findings on the insufficient provision of information by the military staff to the Minister were an additional reason to resign.[13] Also the commander-in-chief of the army stepped down after much pressure being put on him to do so.
Summing up, one may say that the lack of a strong democratic ideology behind the role and functions attributed to the armed forces is to some extent compensated for by the lack of a strong military tradition and history. In saying these things, however, it is important to be aware of the nature and character of the Constitution of the Netherlands. The Constitution, that is to say the document entitled *Grondwet*, is only part of that larger constitution which contains the basic features and rules governing political society. It does not belong to the group of constitutions with a strong, exclusivist character, based on claims of sovereignty and the autonomy of political society as ordered by that document, which document is to serve as the normative and legal blueprint of public society, as is the case with the French, Italian and German Constitution. The Dutch Constitution is only one set of norms within the larger group of norms which comprise the constitution in the broader sense of the term. It is a codification which reflects certain rules present in political society rather than an instrument for controlling the political system. In this respect the constitution of the Netherlands is much more of the type of the constitution of the United Kingdom, than of the type of the countries we just mentioned. Two examples may illustrate this.
First, the new Article 100 was in the end merely intended to codify an already existing practice within the existent constitutional order. Thus it remained entirely within the rules and practices, rather than modifying existing rules and procedures. Although Parliament had originally sought for an instrument to bind government more than it had been able to under the existent rule, it was in the end easily satisfied with a symbolic expression of existing practice rather than introducing a rule which might even slightly the perception of traditional roles an institutions. But this has not prevented Parliament from keeping a fairly close political supervision over defence matters.
A second example is the most recent parliamentary discussion on reviewing the decisional criteria to be employed in determining whether to participate in multinational military enterprises, the *Toetsingskader uitzending strijdkrachten* [Framework for Decision-making for Sending the Armed Forces Abroad]. The constitutional lawyer cannot fail to be struck by the mantra, repeated ad nauseam by all members of parliament who spoke, that the discussion on the interpretation of the constitutional frame of reference, particularly of the newly introduced Article 100 of the Constitution, should not be "legalized".[14] This had as a consequence that it was taken for granted that the reading of Article 100 put forward by the government - to wit, that Article 100 does not cover actions under Article 5 of the NATO Treaty and similar international instruments - thus places a large number of important multinational operations of the armed forces, outside the reach of the duty of government first to inform Parliament about Dutch participation. But interestingly, there was also general agreement that it would be unheard of, if ever the cabinet were not to inform Parliament about such participation in multinational operations in advance.

c. The armed forces in the eyes of the public

[13]Kamerstukken, TK 28 334, nr 1.

[14]Kamerstuk 23 591, nr 9.

There have been regular public opinion polls on the armed forces since the 1960's, which show a continued support for the existence of the armed forces.[15] The question posed is what the opinion is on the necessity of the Dutch armed forces; whether they are necessary, a necessary evil, hardly necessary or superfluous (and, of course, no opinion). The numbers fluctuate, possibly under the influence of international crises, from for instance 1963 93 % which deeming the armed forces necessary or a necessary evil, to 65 or 66 % in 1989 and 1991(interspersed with an 80 % in 1990). There is also a certain increase in those who find the armed forces hardly necessary or superfluous in the 1980's, which starts with the cruise missile debate.

Also there has been ample support for participation in crisis management and peace keeping operations as a prime task of the armed forces, ranging around 40 % of those interviewed in opinion polls, to which some 20 % can be added who find (international) humanitarian assistance by the armed forces its most important task (compared to a good 30 to 35 % which considers defence of the own country the most important task).[16] At the same time the relative importance of the armed forces as compared to other public services, ranks relatively low in opinion polls: it ranks after public health, combat of criminality, education, environment, (public) transport and development aid, according to one study of 1999;[17] whereas according to another, policy priority of "the maintenance of peace through the armed forces" has recently become nearly co-equal to (transport) infrastructure and ranks as a higher policy priority than development aid.[18] This relatively low ranking is also reflected in a still relatively strong support for cutting down on expenditure for the armed forces, where more than 30 % of those interviewed in recent years say that more than average cuts should be made on the budget for defence (down from 57 % in 1989).[19]

This is Rinus Wehrmann (sic) who, in 1971, was sentenced to 2 years imprisonment for wearing long hair. This was reduced to 12 days in appeal. After demonstrations the rules on hairstyle were liberalized.

As to the rights and duties of soldiers, public opinion has changed on issues of hair dress, earrings, other piercings and jewelry and the general duty to salute superiors and outside duty hours, also while not wearing the uniform off-premise. These issues were greatly debated in the 1970's, which involved intensive demonstrations of soldiers. This had resulted in less restrictions on soldiers' rights and freedoms and the abolition of the general duty to salute. Since the abolition of the draft, opinion polls show that a majority of the general public allows greater restrictions of freedom on the relevant issues than was the case with draftees. In 1974 75 % of persons interviewed supported the abolition of the duty to salute, whereas in 1996 60 % agreed to

[15]Statistical information on this and various other opinion polls concerning the armed forces are published on http//www.smk.nl/; the information on this question was derived from this site when consulted in August 2001, which gave a table for 1963-1999, and August 2002, which gave a chart for the years 1989 to November 2001.

[16]Source: Civiel/Militair, Stichting Maatschappij en Krijgsmacht, 1 (1) 2001, p. 17.

[17]Source: NIPO, Defensie op de golven van de publieke opinie, juni 1999; also on internet site http://www.nipo.nl/

[18]Source: http: //www.smk.nl/

[19]Source: http: //www.smk.nl/

reintroducing this duty in a professional army. Also in 1996 50 % of respondents found that long hair should be forbidden to professionals against 44 % which found that hairstyle should be free (another opinion poll around the same time 52 % agreed to short hair as a rule of conduct against 42 %); a rule of conduct against "small earrings" was justified in the eyes of 47 % as against 46 % (in another opinion poll on a prohibition of "earrings and other jewelry in the face" 63 % against 31 % supported a prohibition).[20]

II. Rules concerning the Use of Military Force

1. The Mission of the Armed Forces

The tasks of the armed forces are laid down in Article 97 (see above). The previous Article 97 contained a reference to the duty of *every* citizen "to cooperate in maintaining the independence of the State and defending its territory." This mention of "independence of the State and defending its territory", together with the duty to defend it, has disappeared from the Constitution. But in the Charter of the Kingdom, *Statuut voor het Koninkrijk*, which regulates the relationship between the Netherlands and the overseas countries of the Kingdom (Netherlands Antilles and Aruba) and is of superior rank to the Constitution, the first of the matters for the whole realm (*koninkrijksaangelegenheden*) is "the maintenance of the independence and the defence of the Kingdom" (Article 3 (1) sub a). This is understood to concern the task of the armed forces.

The absence of a reference to international tasks, not constituting warfare in the traditional sense, was not considered an obstacle to participation in multinational operations. This has been confirmed in a case decided by the *Centrale Raad van Beroep*, the court of highest instance in civil servants' affairs, concerning a member of the *Koninklijke marechaussee* [Royal Military Constabulary] who refused to join UNPROFOR, and had argued that the carrying out of a police task in Bosnia cannot be considered as falling within the term "interests of the State" in the old Article 98 of the Constitution (now: "interests of the Kingdom" in Art. 97).

The state secretary (*staatssecretaris*, equivalent of undersecretary)[21] for Defence in this case relied on the view that the various operations abroad have been undertaken by the government in the "interests of the State", and claimed that Parliament went along with this interpretation. This view was endorsed by the court judging in first instance. in the case of the marechaussee,[22] and upheld by the Centrale Raad van Beroep in appeal as not being contrary to the content and objectives of the old Article 98. [23] In support of this, the Centrale Raad referred to the Explanatory Memorandum to the bill introducing the Constitutional amendment that led to the insertion of the reference to the "international legal order." Close inspection of this Explanatory Memorandum indicates that it can hardly support the finding of the Centrale Raad. It merely states that "this task of the armed forces [the maintenance and development of the international legal order] is mentioned separately, because it is true that it

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[20] Source: Maatschappij & Krijgsmacht, October 1996, p. 5-6.

[21] See Art. 46 Constitution.

[22] Arrondissementsrechtbank 's-Gravenhage, [District Court The Hague] 2 December 1997, file number AWB 96/6839 MAWKLA, published in T[ijdschrift voor] A[mbtenaren] R[echt] 1998, 38.

[23] Centrale Raad van Beroep, 7 September 2000, 98/38 MAW, TAR 2000, 144.

can be considered a facet of the interests of the Kingdom, it does not merely aim to protect these interests. [...] The proposed indication of the possibilities to deploy the armed forces is in accordance with present-day practice."[24] This last sentence reveals the in many ways pragmatic approach taken to the Constitution in the Netherlands: it follows rather than regulates practice.
However this may be, the competent Lower House Committee discussed the matter of the constitutional foundation for deployment of the armed forces abroad in the context of a discussion of the earlier version of the so-called "Toetsingskader" we already mentioned above. There the government explained the constitutional grounds for sending troops abroad in terms of the interests of the State in the sense of the then Article 98 (see above), and the general provision on the development of the international legal order as a task for the government (Article 90, quoted above). This construction was considered unsatisfactory by nearly all the spokesmen for the various political parties, both those supporting the coalition and the opposition. In the debate with the government, the Minister of Foreign Affairs summed the matter up as follows, according to the résumé of the debate: "Article 98 [old version, LB] provides so to speak the constitutional foothold to deploy the armed forces abroad to serve the interests of the state of the Netherlands. The question is whether this encompasses the subject matter of Article 90. The Minister thought it did, but if the majority of the House articulates that this is not the case, there is a constitutional problem." [25] This statement, made in January 1996, was most probably at the basis of the new formulation of the armed forces' mission statement.

2. Kinds of Permissible Operations

In principle all kinds of operations are permissible which fit within the mission as contained in Article 97 of the Constitution. This includes crisis management abroad, humanitarian aid at home and abroad, combined operations with civilian organizations and other public authorities under normal or extraordinary circumstances, such as states of emergency, natural and humanitarian disasters, evacuation of Dutch nationals abroad, and possible other cases.
According to the constitutional principle of legality (an unwritten principle), the exercise of public authority towards the general public requires a basis in an act of parliament or in the Constitution itself. A basis in an Act of Parliament has been created for most operations of the armed forces which requires the exercise of public authority towards the general public.

a. Civilian tasks for the military

Thus civilian support and assistance tasks are usually based on the *Politiewet* (Police Act), Articles 58-60 and *Wet rampen en zware ongevallen* (Act on Disaster and Serious Accidents), Article 18. They have in recent years involved cases of (danger of) floods, clearing storm damage, road blocks, assistance in the foot and mouth disease emergency, de-fusion of explosives by the Explosives Ordnance Disposal Command (the *Explosieven opruimingsdienst*).
It may be worth pointing out that the Koninklijke Marechaussee [Royal Military Constabulary] is one of the armed forces. It has a number of tasks which are semi-civilian, such as border control, police tasks at airports, protection of the royal family, the Central

[24]Kamerstuk TK 1996-1997, 25 367 (R 1593), nr. 3 p. 3-4, author's translation.

[25]Kamerstuk 23 591, nr. 6, p. 11, this author's translation.

Bank, transborder criminal investigations, and assistance of the regular police in its tasks. These tasks are regulated in the Politiewet.
Recently, the 'war against terrorism' has fuelled the discussion on the intensification of cooperation between the armed forces and the police, and on abolishing the separation between them. The regular police has been very reticent in allowing military powers to extend into the field of policing.[26]

b. States of emergency at home

There is a framework for official states of emergency, based on Article 103 of the Constitution. States of emergency allow for a role for the armed forces. This is particularly the case under the Oorlogswet voor Nederland [War (Emergencies) Act for the Netherlands], which grants the Minister of Defence and the military authorities wide ranging powers.
The Coordination Act Emergency Situations, *Coordinatiewet uitzonderingstoestanden*[27] does not distinguish between internal and external states of emergency, but distinguishes between a limited state of emergency and a general state of emergency. In the first case certain provisions of certain acts mentioned in the so-called A-list to this Act can be made operative by royal decree; while the same may happen during a general state of emergency with provisions listed in the B-list attached to this Act. As to the powers of the military authorities, the A-list allows activation of all or some of Articles 9 to 23 of the Oorlogswet, which covers powers to restrict the freedom of movement of persons, the right to evacuate areas, the duty to provide information, the right to diverge by military ordinance from the regulations of decentralized authorities, the right to empower other authorities to exercise some of the exceptional powers attributed to the military authorities. The B-list authorizes the activation of some or all of the powers referred to in Articles 9 to 53 Oorlogswet. These powers include the deprivation of liberty, the duty of civil authorities to obey the instructions of the military authorities (except ministers, members of the judiciary, and the bodies intended in chapter 4 of the Constitution (Council of State, General Chamber of Audit, National ombudsman and Permanent Advisory Bodies), and far reaching powers to restrict the exercise of fundamental rights. No state of emergency has ever been declared under Article 103 of the Constitution.

c. Other operations

As long as the criteria of Article 97 (1) of the Constitution are observed, there seems to be no definite obstacle to the use of the armed forces for other purposes, including operations of evacuating Dutch citizens from other countries, whether carried out by the Dutch armed forces alone or in cooperation with other forces. Of course, such use of the armed forces may not interfere with existing legislation and must respect the competence of all other public authorities. Public international law has to be respected as well. The principle that public international law has to be respected at all times, is an unwritten assumption. It follows from the monism which the Kingdom adheres to (which itself is another unwritten principle of the

[26] See the report by a study-group of high police officers, the commander-in-chief of the Marechaussee and a number of scholars, Politie en krijgsmacht: Hun verhouding in de toekomst. Stichting Maatschappij, Veiligheid en Politie. Dordrecht 2002; also R.P.F. Bijkerk and G.P. Hut (eds.), De krijgsmacht binnenslands: bijstand, steun- en dienstverlening door militairen. Instituut Defensie Leergangen, Den Haag 2002.

[27] Stb. 1996, 365.

constitution).[28] That this is the case, has been expressed explicitly also in the *Toetsingskader*, the decisional frame of reference for sending troops abroad.
There remains the question whether Article 97 (or even Article 90) of the Constitution can itself be considered the basis for deploying the armed forces in certain operations not covered by legislation in Acts of Parliament, particularly deploying them abroad. This question arose in the context of the question whether a soldier can be forced against his will to be sent abroad. Does the sending of troops, or forcing individual soldiers to be sent abroad, require a separate basis in an act of parliament, or does the constitutional mission of the armed forces itself grant the power to do so?
As we saw above, the *Centrale Raad van Beroep* has assumed that the tasks described in (now) Article 97 (formerly 98) and 90 of the Constitution not only restrict the power to deploy the armed forces in a regulatory sense, but also empower the government to deploy within the limits of these constitutional provisions. This reading is not uncontroversial among some lawyers. Articles 90 and 98 have never been intended to confer powers, but only as a merely regulative description of the tasks the armed forces can legitimately pursue. Moreover, the criterion of "protection of the interests of the Kingdom" is, at least when taken in the abstract, extremely broad.

3. Operations undertaken jointly with the Armed Forces of another Country

There is no explicit basis for undertaking any of these tasks jointly with foreign armed forces, nor is it explicitly forbidden. The Constitution in Article 92 provides that "legislative, executive and judicial powers may be conferred on *international organizations* under public international law, by or pursuant to a treaty, subject, where necessary, to the provisions of Article 91 paragraph 3." Article 91 paragraph 3 provides that if a treaty "departs from the Constitution or leads to departure from it, it may be approved by the Houses of the States General only with at least a majority of two thirds of the votes cast." This might suggest *a contrario* that a treaty which confers certain powers to *another state or states* are not allowed. However, the *Raad van State*, Council of State, in an advisory opinion on the constitutionality of the deployment of American Pershings on Dutch territory rejected the view that Article 92 excludes the possibility of constitutionally conferring powers on another state, though without clearly explaining why this should be so.[29] Presumably the reasoning which was put forward in a different context, applies also to Article 92: there is no constitutional claim on exclusive sovereignty which cannot be restricted by international treaty provisions. It is the view of the Council of State that relinquishing sovereign powers is not contrary to the Constitution. This view is widely shared in the Netherlands.

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[28] In a recent case the President of the District Court at The Hague in interlocutory proceedings refused to grant an injunction against the government of the Netherlands (and its allies) not to threat with or use armed force against persons or countries associated by the US with Bin Laden or the perpetrators of the attack of 11 September 2001. Allegedly, such use of force would be in contravention of Article 51 of the Charter of the UN, customary public international law and Article 90 of the Constitution. Interestingly, the President of the District Court considered the threat or use of armed force not against Article 90 of Constitution , to wit the promotion of the development of the international legal order, which - as we saw - is an element of Article 97 of the Constitution as well. This suggests that these provisions are justiciable and set limits to the use of armed force. See President Rechtbank Den Haag, 26 October 2001, KG 01/1219, at www. rechtspraak. nl/flashed.asp under number LJN AD4855.

[29] Advies Raad van State inzake grondwettlijke aspecten verbonden aan plaatsing van kruisvluchtwapens [Advisory Opinion of the Council of State concerning constitutional aspects of the deployment of cruise missiles], 23 December 1983, kamerstukken 1983-1984, 17890 A.

4. The legal relation of the armed forces to the various branches of government

a. The Head of State

The head of state is an hereditary office, which since 1815 is called the King (when a woman is head of state, as has been the case since 1890 to the present day, the King is referred to as the Queen[30]). The head of state has in general no powers that can be exercised on his own, because since 1848 the King can act only under ministerial responsibility. The Constitution expresses this as follows:

> Article 42:
> 1. The Government shall comprise the King and the Ministers.
> 2. The King is inviolable; the Ministers shall be responsible.

Primary political power, however, is concentrated in the Council of Ministers:

> Article 45
> 1. The Ministers together shall constitute the Council of Ministers
> 2. The Prime Minister shall chair the Council of Ministers.
> 3. The Council of Ministers shall consider and decide upon overall government policy and shall promote the coherence thereof.

Also under the pre-1983 Constitution, the expression "the King shall have supreme authority over the armed forces" did not confer autonomous powers on the head of state. Certain decisions take the form of a royal decree, which requires the cooperation of the head of state in the form of his signature. We must assume that this does not pose too many problems in practice nowadays, in so far as there are not many issues concerning the actual use of the armed forces where a royal decree is required. However, in some cases an appointment in the armed forces is made by royal decree;[31] also promotion can be done by royal decree.[32] Also we shall see that it is possible to equate foreign soldiers (*vreemde militairen*) with Netherlands soldiers for the application of provisions to be specified by royal decree. Previous heads of state, notably Wilhelmina (head of state from 1890-1948), have had strong opinions about the role of the armed forces (she was anti-pacifist and resented the calling of the First Hague Peace Conference; her moral authority was of major importance during the

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[30]Wilhelmina was a minor when her father, Willem III, died in 1890; her mother Emma was Queen-Regent until Wilhelmina became 18 years old and assumed the reign. The fact that the King is to be referred to as the Queen, when the head of state is a woman, has a basis in the Act on the succession of the throne to a Queen, *Wet in verband met het overgaan van de Kroon op een Koningin*, of 22 June 1891.

[31]Art. 4 paragraphs 2 and 4 Amar: when on appointment an officer's rank is granted and when it concerns a member of the 'Royal House', *Koninklijk Huis*; this includes the Queen Consort, all heirs to the thrown and their spouses; the term 'royal house' should not be confused with the 'royal family', which also comprises the family members who have lost their rights to the thrown, which - at the moment - are those who have entered into marriage without permission granted by Act of Parliament.

[32]Article 27 paragraph 1 sums up a number of promotions by royal decree; however, paragraph 2 specifies that this competence can be delegated to the Minister of Defence unless it concerns so-called 'flag- or supreme officers', *vlag- of opperofficieen* (which comprises the ranks of brigade-general – in the Navy and Airforce: commodore – to general), promotion of a member of the 'Royal House' (see previous footnote) or a member of the Royal Military Household, *Militaire Huis van de Koningin*.

Second World War, when the government resided in London); her daughter Juliana (head of state 1948-1980) to the contrary had pacifist inclinations.[33]

b. The government

Article 97(2) now reads: "The government shall have supreme authority over the armed forces." In conjunction with Article 45 (quoted above), this implies that final responsibility and competence with regard to the use of the armed forces rests with the Council of Ministers. The Rules of Procedure of the Council, however, are surprisingly lacunal with regard to military affairs. The long list of issues it contains, which need to be discussed and decided in the Council of Ministers, do not mention any defence or military matter. However, there is the possibility under § 4 of the Rules of Procedure of the Council of Ministers to set up sub-councils. These can deal with parts of the general governmental policy, such as military affairs. Once upon a time there used to be a sub-council of the Council of Ministers, the so-called *Algemene Verdedigingsraad*, the General Defence Council. This Council had as its task to prepare the decision-making by the Council of Ministers as to the military and civil defence preparation, including important decisions on investment, and as to matters of the functioning of the government under extraordinary circumstances. The General Defence Council was chaired by the Prime Minister, while the Minister of Defence was the so-called coordinating minister. It had as further members, apart from a number of ministers and state secretaries, also the Chief of Defence Staff and the commanders-in- chief of the army, navy and air force. This General Defence Council seems rarely to have met.[34] The General Defence Council has been succeeded by another sub-council of the Council of Ministers in 1996, the so-called *Raad voor Europese en Internationale Aangelegenheden (REIA)*, Council for European and International Affairs.[35] The tasks of this Council is to prepare the decision-making of the Council of Ministers with regard to (amongst other affairs) "all important internal and external questions concerning the EU, WEU, NATO and UN; … the main matters of defence policy, including important decisions on investments; the participation of the Netherlands in peace operations …".[36] This Council is chaired by the Prime Minister and the Minister of Foreign Affairs is coordinating minister of the Council; that is to say that the Minister of Foreign Affairs is to see to the proper inter-departmental preparation of the meetings of the Council. The Minister of Defence is always a member of this Council.

The government has proposed the formation of a "core group" of ministers to decide on special military operations. Special military operations include special operations for gathering information for intelligence purposes, special arrests, attacks on selected targets,

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[33]About the present Queen Beatrix there is the, possibly apocryphal, anecdote that she promoted an officer by a royal decree on a paper table napkin, when stuck in a boat in the mist on the Scheldt when visiting some of the water works, in the early 1980's. In the Netherlands, a royal decree need not to be made on the initiative of a minister, but can be taken by the King on his own initiative. She is said to have used this possibility (which is rare) when in a conversation with an officer on board the ship, she came to understand that his promotion to a higher rank was suffering under a bureaucratic hold up at the Ministry of Defence. According to the anecdote, she took a paper napkin, wrote down the decree promoting the officer and requested the Minister of Transport and Water Management, who happened to accompany her, to countersign the decree.

[34]See R.J. Hoekstra, Ministerraad en vorming van regeringsbeleid, Zwolle 1988, p. 36.

[35]Decree of the Prime Minister acting in accordance with the views of the Council of Ministers of 2 February 1996, Article 5, Staatscourant 1996, nr. 32, p. 6.

[36]Decree of the Prime Minister, Article 2 sub b, e and f.

military assistance to allied powers, evacuation of compatriots from life-threatening situations, and measures against international terrorism. [37]
As far as can presently be judged, this core group has indeed been formed, although the relevant decision has not been officially published (as was done in other cases). Although Article 17 of the Rules of Procedure of the Council of Ministers states that sub-councils can be formed "for the preparation of or the decision of certain parts of the overall government policy", it is doubtful whether a delegation of the proper decision-making powers of the Council of Ministers to such sub-councils is constitutional, as this would detract from the constitutional principle that it is the Council which decides about the overall government policy (Article 45 (3) Constituion, quoted above). To this extent the core group cannot have such decisive powers, although the Government may seem to suggest otherwise.
The Bakker Committee (mentioned above) made a general recommendation to form a sub-council with decisional powers with regard to the deployment of troops abroad.[38] This recommendation has so far not been carried out, possibly because of the constitutional implications.

c. Parliament's involvement in the decision to employ the armed forces
The Constitution contains a seemingly old-fashioned provision which we have not yet mentioned, but which potentially could give parliament considerable leverage over government decisions concerning the use of the armed forces in international operations.

> Article 96:
> 1. A declaration that the Kingdom is in a state of war shall not be made without the prior approval of the States General.
> 2. Such approval shall not be required in cases where consultation with Parliament proves to be impossible as a consequence of the actual existence of a state of war.
> 3. The two Houses of the States General shall consider and decide upon the matter in joint session.
> 4. The provisions of the first and third paragraphs shall apply *mutatis mutandis* to a declaration that a state of war has ceased.

This provision may seem a remembrance of times long past, in which heralds on horseback set out to announce war to the enemy. But this is a misconstruction, given its introduction only in 1922, its modernization in 1953 and reconfirmation during the revision of the Constitution of 1983. However, the provisions of Article 96 of the Constitution were considered to be inapplicable to situations in which an actual war was not formally declared. The issue arose in the second Gulf War and reached the President of the District Court of The Hague in summary proceedings, which followed the view put forward by the government that only when a war is formally declared, it needs parliamentary consent. This view was apparently endorsed by the Lower House.[39] The reasons to think that this is a misconstruction are several. First of all, the provision does intentionally not refer to a "declaration of war" in

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[37]Kamerstuk 26 800 X nr. 46 Letter of the Minister of Defence to the Speaker of the Lower House, The Hague 23 August 2000; see also 27 400 X 2001, nr 29.

[38]Report of the *Tijdelijke Commissie besluitvorming uitzendingen,* (Bakker Committee), Tweede Kamer, vergaderjaar 1999–2000, 26 454, nrs. 7–8, p. 495, recommendation 19.

[39]TK 1990-1991, 21 664, nr. 25 and Pres. Rb. 's-Gravenhage 11 January 1991.

the sense of classic international law, but literally only to a “declaration of being at war”, *in oorlog verklaring*. This was quite distinct meaning was emphasized during the amendment of this provision in 1953. Furthermore, the constitutional history of the provision strongly suggests that multinational operations, even those carried out under the aegis of international organizations, may also amount to "war" in the sense of the present Article 96. This was already pointed out when the provision was first introduced in 1922 with reference to the use of armed force under the Covenant of the League of Nations. In 1953 an exception to parliamentary consent in case of a restoration of the international legal order on the basis of international treaty obligations, was explicitly rejected for the reason that the procedure of parliamentary consent could also apply to a restoration of peace under either the NATO, WEU treaties or the UN Charter. Also the logic of the present interpretation is doubtful: it suggests that the lesser act (declaring war without Parliament's approval) is not allowed, while the act of major importance (fighting a war without Parliament's approval) is permitted.

In any event, the refusal to introduce a true right of parliamentary approval for the decision to send troops abroad seems to be further confirmation of the view that Article 96 is no longer considered to apply to warfare through multinational military entities and operations, but merely refers to a declaration of war. The fact that the formal declaration of war has, in the practice of public international law, disappeared in the form in which it once existed, and probably as *desuetudo* also in normative terms (notwithstanding the continued existence of the relevant Hague convention), the provision has been turned into a dead letter.

The newly introduced Article 100 obliges the government to provide prior information to the States General concerning the deployment or making available of the armed forces for the maintenance or promotion of the international rule of law. This includes providing information concerning the engagement or making available of the armed forces for humanitarian assistance in cases of armed conflict. These obligations to provide information do not apply if peremptory considerations prevent the prior provision of information. In this case, the information shall be provided as soon as possible.

Since its becoming operative, this provision has raised a number of questions as to the moment at which Parliament becomes involved in the decision-making process. Also, the scope of the type of actions covered by this provision has been the object of discussion.

As to the timing, it is unclear at which particular moment Parliament is to be informed. Various activation alerts in the NATO-procedures could be relevant moments. Also in other international operations it is not always clear when Parliament should be informed in the sense of Article 100. A problem is the extent to which the duty to provide information is in fact a duty to have the consent of Parliament. At the time of the introduction of this provision in the Constitution, both Parliament and government have spoken about a ‘material right of approval’ (though it formally does not exist). The idea was that if the government is to provide Parliament with information concerning the decision to participate in international operations, Parliament will be able to express its dissent, which makes it difficult for the government to proceed with participation in the operations. This being so, several members of Parliament have assumed that the duty to inform Parliament exists before the decision to participate is definitive; otherwise, parliament cannot fruitfully discuss the information provided by the government. But at what stage in the decision-making process is this? The government has taken the position that it has to inform parliament when the council of ministers has taken the decision to participate, but before this decision is carried out. The Bakker Committee found that parliament should be informed already before the council of ministers takes the decision to participate.

Another problem of a procedural nature related to the alleged 'material right of approval', is the question what the government is to do when one of the two Houses of Parliament disagrees with participation and the other House agrees to it.
As to the scope of the duty under Article 100, the government took the view that participation in international operations which are based on treaty obligations, fall outside the scope of this provision. Although at the time of passing Article 100, the government had suggested the opposite,[40] when it came to it in the aftermath of 11 September 2001, the government boldly stated that there was no duty to inform Parliament under Article 100 of the Constitution if the Netherlands armed forces were to participate in international military operations under Article 5 of the NATO-Treaty.
There are good reasons to reject this approach,[41] but it seems that members of the Lower House accept it, although this is not generally shared.[42]
As to the content of the information to be provided, the parliamentary debates on Article 100 of the Constitution and Article 5 of the NATO-Treaty reveal that the government is of the opinion that there is no constitutional obligation to inform parliament of the various negotiations leading up to the decision to participate in international military actions.[43]
The Bakker Committee has recommended the creation of binding regulations on this point. This could only be achieved by means of an act of Parliament. This recommendation has not been discussed seriously, although a war powers act could solve many legal uncertainties as to the role of parliament.

d. The Minister of Defence

Under Dutch constitutional law, a Minister is responsible for the ministerial department which he heads. Thus the Minister of Defence has primary responsibility with regard to the armed forces, which are formally part of the Ministry of Defence. In the Netherlands there is not only collective but also individual ministerial responsibility and individual ministers can be the object of a parliamentary vote of no confidence, which forces him to resign under an unwritten rule firmly entrenched in constitutional law since the 1860's. Also ministers of defence and their state secretaries have been the object of such votes of no confidence. The political explanation for an individual vote of censure is that the minister holds special responsibility as head of the ministry. So in cases which cannot be reduced to matters for which the government as a whole is responsible, but are merely matters of the ministry, the

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[40]Kamerstuk E[erste] K[amer] 25 367 (R 1593), nr. 226b, p. 5, where the government explicitly rejected the view expressed by a member of parliament that NATO and WEU obligations fell outside the scope of Article 100, see IK 24 367 (R 1593), 226a, p. 5; also the Minister of the Interior at Handelingen EK [Proceedings of the Upper House] 3 maart 1998, 22-1071; the Minister of Defence was more hesitant, Handelingen EK 3 maart 1998, 22-1074..

[41]See L.F.M. Besselink, Militaire acties en de rol van het Parlement, in: Nederlands Juristenblad 2001, nr. 39, pp. 1883-1887.

[42]Various statements by the spokesman for the Partij van de Arbeid (Labour) on several occasions seem to indicate his disagreement with the government's approach on this issue. Also a number of Members of the Upper House have expressed dissent; see for instance their written questions, Aanhangsel Handelingen EK [Appendix Proceedings of the Upper House], nr. 11, 5 April 2002.

[43]Handelingen Tweede Kamer 20 September 200, TK 3-107, in which the prime minister said that there is "no constitutional duty to inform parliament about the phases of international consultation and decision-making preceding the decision in the Council of Ministers. Let there be no misunderstanding about this."

individual minister is held to account and to be responsible. In fact, the threat of a motion of censure is such, that often ministers and state secretaries do not await such a vote of censure, but draw their conclusions as soon as they feel they no longer enjoy sufficient support in Parliament. Thus a secretary of state (to whom the rule of confidence applies as well) was forced to resign after it was revealed that he had bought helmets of inferior quality for the army and failed to deal with this properly – this person ended up with one of the easiest and best paid of public offices, that of Queen's Commissioner in the Province of North-Holland.[44] In the 1980's a minister of defence felt forced to resign when three affairs accumulated, first after it transpired that the cost for building a submarine had tripled over time, speculation by financial officials at the ministry with foreign currency in which many millions were lost – this minister became Secretary General of the WEU.[45] Of course, it is also possible that parliament loses confidence in a minister due to reasons connected with the personal conduct of a minister. Thus a minister of defence had to resign in 1959 because of a love affair with an American lady who was not divorced yet; he became a successful industrialist.[46]

e. The military leadership

The commanders of the various branches of the forces are represented in the meetings with the political leadership when it concerns international operations. The relevant fora are several. In the old Algemene Verdedigingsraad the CDS and commanders-in-chief of the army, navy and air force were represented (see above). The successor to this sub-council of the Council of Ministers, REIA, does not have any member of the military leadership among its members. However, according to the decision establishing this Council, each minister can be accompanied by one *ambtenaar*, which could be a military official (as these are, as will be explained below, also *ambtenaar*) such as the Chief Defence Staff or a commander-in-chief of one of the forces.[47] The Prime Minister can – depending on the item on the agenda – invite others to the meetings of the Council, of which a number are mentioned explicitly, among which the Permanent Representative at the NATO, WEU and UN.[48] Judging by the institutional framework, the representation of the military leadership has altogether decreased at the level of decision-making in the Council of Ministers. In practice, this has also meant that the Ministry of Defence and in particular the (branches of the) armed forces have not been exposed to views, input or criticism of other relevant ministries. This may well have

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[44]F.J. Kranenburg, state secretary of War in charge of material from 1 June 1951 until 1 June 1958.

[45]Dr. W.F. van Eekelen, Minister of Defence from 14 juli 1986-6 september 1988.

[46]Sydney J. van den Bergh, Minister of Defence from 19 May 1959 to 1 August 1959. The catholic prime minister De Quay did not think it necessary for Van den Bergh to resign, but the liberal vice-premier thought his position was untenable after it transpired that he had spent some time with his American lady in a hotel in the United States. Recently the view has been put forward that on that occasion Van den Bergh had brought the American lady's daughter with him to the Netherlands, which was taken to be kidnaping by American authorities because the child's mother was not divorced. This would have meant the risk of the Minister's arrest as soon as he would set ground in the United States.

[47]Decree of the Prime Minister, Article 3 paragraph 5.

[48]Article 3 paragraph 7.

contributed to the (continued) inward oriented culture of the armed forces (and the ministry of defence at large).[49]

At the level of the Ministry of Defence, the linchpin function between the political and military leadership could - at least on paper - be played by the Chief of Defence Staff (CDS), an office created in 1976 (see for his position also the organizational chart of the top of the Ministry of Defence, below). From a staff member at central level, he gradually evolved to a corporate planner and also corporate operator. Of all military officers, he holds the highest rank. According to the officially published *Algemeen organisatiebesluit Defensie 1992*, the General Organizational Decree 1992 of the Minister of Defence, the CDS directs the Defence Staff and is charged, amongst other things, with the development and advice concerning main aspects of operational policy; the attuning of operational policy to the general defence policy and its communication to the commanders-in-chief; the care for policy advise on and coordination of special operational matters, such as peace operations or other operations which should take place under the direct supervision of the Minister; at the express decision of the Minister, the directing of these operations if the nature of these operations gives rise thereto; tendering advice on international military cooperation.[50] This description of his task is the only version officially published. However, the role of the CDS has since 1992 been reinforced considerably with regard to all crisis management, peace and humanitarian operations other than those with regard to which an obligation exists under the WEU and NATO treaties. According to a letter of the Minister of Defence of 20 October 1995 to the Lower House, the CDS has the sole direction over planning, preparation and (supervision over the) execution of such operations (notwithstanding the competence to grant an executive mandate to the commanders-in-chief of the various forces).[51]

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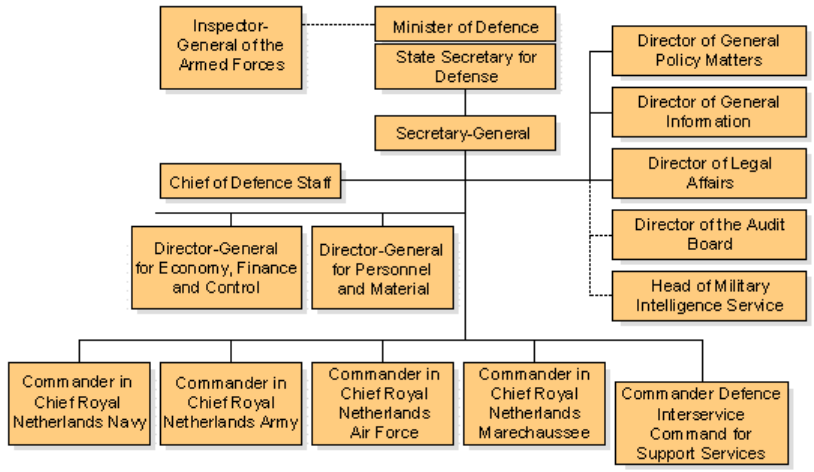
[49] See Van Wankel Evenwicht Naar Versterkte Defensieorganisatie. [From Unstable Equilibrium to a Reinforced Defence Organization]. Adviescommissie Opperbevelhebberschap Den Haag, 19 April 2002, which concludes that the inward orientation is exacerbated by the fact that the armed forces are not organized as one organization, but is no more than the sum of the highly individual and separately functioning branches of the armed forces. To the opinion of this report, the problems to which this leads "undermines the political responsibility for the functioning of the defence organization", p. 23.

[50] Algemeen organisatiebesluit Defensie 1992, Article 5, sub b,c, d and e.

[51] Kamerstuk 24 464, nr. 1, pp. 8-9; changes in this direction seem to have been made earlier in 1995, they were referred to in an unspecified manner in a letter of 28 August 1995 (on the fall of Srebrenica) Kamerstuk 22 181, nr. 115, p. 13, while a letter of the MoD of 4 september 1995 to the Lower House gives a more detailed description, Kamerstuk 22 181, nr. 121, p. 2. In the mean time the Ministry of Defence has informed the author of the changed text of the Algemeen organisatiebesluit Defensie; this text has not been published.

Although the Defence Staff always had the task to process requests for participation in various kinds of international operations, the main emphasis both in the preparation and execution of defence policy with regard to multinational tasks used to be on the commanders-in-chief of the separate branches of the armed forces. It should be remarked that the commanders-in-chief of the forces are not organizationally subordinate to the CDS (see also the organization chart).



Organization chart of the Ministry of Defence (March 2002). Source: http://www.mindef.nl (last consulted on 1 September 2002).

The CDS's staff is small and comes mainly from these separate branches towards which they remain loyal. This has led to various problems in carrying out multinational operations, which had already come to light in the aftermath of the Srebrenica affair[52]. But it was the evaluation of the planning of the UNMEE operation which revealed most acutely the problem of the various parts of the armed forces' inability to cooperate, coordinate and the unwillingness to let one's own interest prevail over the common interest of the various parts of the armed forces. These problems could not be solved under the supervision of the CDS. Also the stream of information from the military to the political leadership proved defective, as a consequence of which Parliament was not always adequately informed.[53]

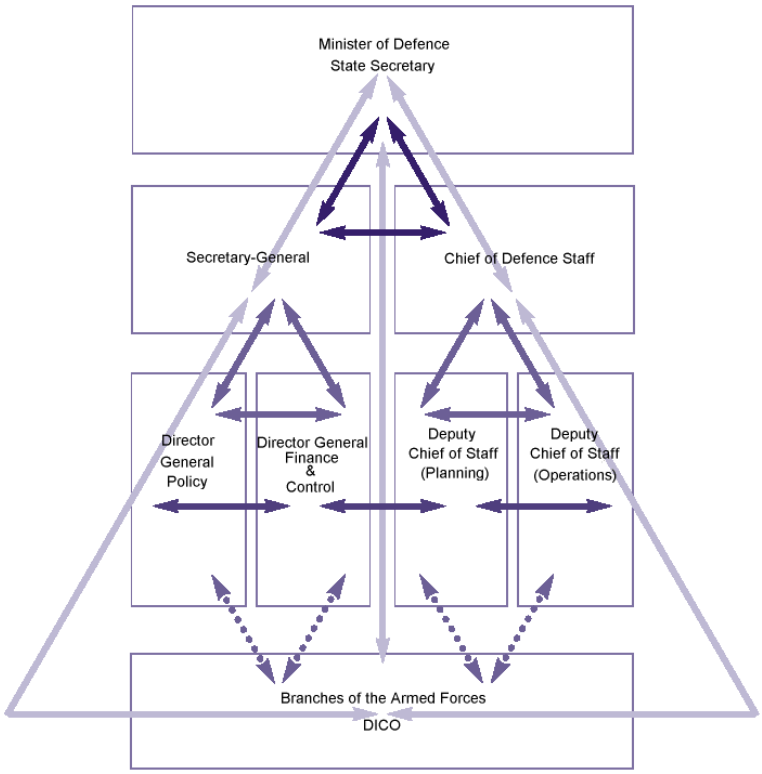
The role attributed to the CDS should be seen against the present organizational background. The ministry has been an organization in which the various branches of the armed forces operated nearly fully independently from each other, each with their own staffs at many levels, competing with each other and even with policy priorities and decisions at the central level. Since a number of years, the desirability of a development towards a more unified military control at the top of the organization has been recognized as an official policy goal. Presumably the enhanced profile of the CDS's role with regard to policy advise and decision-making in multinational operations contributed to assigning him a prominent role more generally. In August 2001, the minister of Defence decided to install a committee of four wise men to give their advice on the desirable role of the CDS, more particularly also about the question whether he should become supreme commander.[54] The committee, the Advisory Committee on the Supreme Command, presented its views in April 2002, just around the time

[52]Kamerstuk 22181, nr. 119, pp. 30-31.

[53]Kamerstuk 22831, nrs 37 and 38; Aanhangsel Handelingen TK [Appendix Proceedings of the Lower House], 2000-2001, nr. 119; Kamerstuk 27693, nr 1.

[54]Press bulletin 20-8-2001, DV/PB79, published at http: //www.mindef.nl/nieuws/perberichten; last consulted on 28/8/2001; see also the official ministerial decision of the Ministers of Defence and the Interior of 28 September 2001, Staatscourant 2001, 189, p. 7.

that the Srebrenica-report appeared, which has pushed this report into the political background.[55]



This Committee proposed to merge the staffs with operational tasks of the army, navy and air force in The Hague into one general operational headquarters under the leadership of the CDS, who acquires responsibility for the planning and execution of all operations in which the Netherlands participates. According to the Committee the CDS should have a deputy-CDS with operational competence over units and capacity used abroad, and another deputy-CDS with planning competence. The CDS should become the military equal and counterpart of the secretary general at the Ministry of Defence, while the latter should become the head of a streamlined and reorganized policy department (in which, interestingly, no legal service exists at the central level - it is unclear whether this is intentional or an omission). Although this is not part of the recommendations but only to be found in the summary of its report, the Committee holds that the CDS should not become the Supreme Commander of the armed forces in order to retain full responsibility for the government. Nevertheless, his role should become both in practice and organizationally a crucial one in an organization which should be triangular in more than one respect (see organizational chart as envisaged by the Committee).

The *Algemene Rekenkamer*, General Chamber of Audit, has been highly critical of the absence of clear legal rules and regulations concerning competence and responsibilities as between the minister, the various forces and the CDS: "This can frustrate a clear division of responsibilities between the Government and the armed forces and within the armed forces. There is no clear separation between the constitutional ultimate authority of the government over the armed forces and the military concept of 'full command'. The solution chosen (viz. a separation between political ultimate authority and military ultimate authority) has not been formalized into rules."[56]

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[55]Van Wankel Evenwicht Naar Versterkte Defensieorganisatie. [From Unstable Equilibrium to a Reinforced Defence Organization]. Adviescommissie Opperbevelhebberschap Den Haag, 19 April 2002

[56]Report General Chamber of Audit, 8 December 1999, kamerstuk 26950, nrs 1-2, pp. 10-11 (author's translation).

Apart from the hierarchical organization, it is important to know who attends which meetings in which important decisions are made or prepared.
An important role in the decision-making within the Ministry of Defence was at some stage attributed to the so-called *Defensieraad*, Defence Council. This Council comprises the Minister, the state secretary, the top civil servants and military officials, including the CDS and (representatives of) the commanders-in-chief. It seems to meet only exceptionally. We know from the Bakker-report that it met several times in connection with the question whether the Netherlands should participate in UNPROFOR in Bosnia-Herzegovina.[57] But it is – with the information at the disposal of this author – uncertain whether it still exists and how it relates to other practical procedures in decision making at top level in the ministry.
One of the major meetings is the weekly Political Council, chaired by the minister with as main members the secretary general, CDS, the directors-general for Personnel and Material and for Economy, Finance and Control, and since 1998 also the commanders in chief of the four branches of the armed forces.
There is also a so-called Small Staff Meeting, in which matters are discussed which require special confidentiality and the nomination of candidates for high posts. The attendants are the minister, the state secretary, the CDS and the secretary general.

5. Parliamentary Control

a. The Parliament's Powers to Control the Armed Forces

Above, we briefly discussed the involvement of Parliament in decisions to employ the armed forces in international operations. Summarizing the various competences of Parliament, we can say that they have the specific power to prevent the declaration that the Netherlands is at war (Article 96 Constitution) and that they have the right to be informed about the decision of the government to deploy the armed forces in a certain number of international operations (Article 100 of the Constitution).
General powers (which also exist towards other ministries and governmental agencies) are the power to request information (which must be honoured under Article 68 of the Constitution). This may take the form of oral or written questions, to request a debate on the floor of parliament, up to a fully fledged parliamentary investigation with the right to compel witnesses to appear and to give testimony under oath (the so-called *enquête*). All this can lead to the sanction of a vote of no confidence, which forces under customary constitutional law the cabinet to resign, as we already indicated above.
Parliamentary control of the armed forces through the accountability of the Minister of Defence, is facilitated by the existence of a Standing Committee for Defence in each of the Houses of Parliament. There is as yet no special form of parliamentary control over international "special missions" which require secrecy or strict confidentiality, and do not require prior information to be provided to parliament (see Article 100, paragraph 2), although manners are considered by the government to do justice to their accountability to parliament also with regard to these actions.[58]

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[57] Report of the *Tijdelijke Commissie besluitvorming uitzendingen,* (Bakker Committee), Tweede Kamer, 1999–2000, 26 454, nrs. 7–8, p. 60, 63, 100-101.

[58] Bakker-report, pp. 33-34.

Also through their powers of legislation, the need for parliamentary approval of treaties (Article 91 Constitution) and the power of the purse, parliament can exert control over the armed forces through their control over the minister of Defence and the council of ministers.
The powers reserved by the Constitution to the legislature - that is to say the matters which need regulation by act of parliament - are the draft (Article 98), conscientious objection (Article 99), and the quartering and provision of troops by the general population (Article 102). Moreover, Article 109 requires an act of parliament as an instrument for the determination of the legal status of public servants. Professional soldiers are public servants (*ambtenaar*) in the sense of this provision. As we presently have professionals only, this provision means that anything affecting the rights and duties of soldiers requires a basis in an act of parliament. Also the restriction of fundamental rights guaranteed by the first chapter of the Constitution need in general to be based on, or sometimes to be contained in, an act of parliament.
The Constitution provides in Article 90 (1) the general rule that the Kingdom cannot be bound to an international treaty except with prior approval by the States-General (parliament). The term "treaty" is heteronomous; it is not a term defined by national constitutional law, but by public international law. In the constitutional practice it is defined as "each international agreement which has been put in writing and which according to the criteria of public international law is binding upon the state."[59] This must be understood to refer not only to "written agreements" of which the written text is the original instrument but also to oral agreements which the government may have put into writing. The term "agreement" must be understood to refer to a multilateral legal act aimed at being legally binding. Thus it excludes the concerted unilateral acts of a self-binding nature, which live by names such as "administrative agreements" and "memorandum of understanding", although, confusingly, these names are also used for treaties in the proper sense as well. In these "administrative agreements" it is not the multilateral volitional act and intention which constitutes a legally binding duty as an objective intent separate from the individual subjective volition of the parties.[60] In the military field there are many such concerted unilateral agreements. Most of the integrated military command structures of NATO and many other forms of multinational cooperation in the military field are based on such "agreements" and are therefore outside the direct control of parliament. Most often they also remain unpublished, which makes academic research in the field of military law and international military cooperation a sometimes difficult task.
The manner in which the approval is to be given to treaties, and the exceptions to the requirement of parliamentary approval, are described in the *Rijkswet goedkeuring en bekendmaking verdragen*, the Act for the Realm on the Approval and Publication of Treaties. Among the exceptions to the rule of prior approval are treaties which have a validity of no more then a year and also do not entail important financial burdens, treaties which implement a treaty which has already been approved, treaties of which an act of parliament has determined that it does not require approval. Also in exceptional circumstances of a peremptory nature if the interest of the Kingdom makes it definitely necessary that the treaty is secret or confidential, no prior approval is necessary (Article 7 Rijkswet goedkeuring).

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[59] Aanwijzingen voor de regelgeving, 1993, Aanwijzing 304: "Onder verdrag wordt verstaan: iedere *op schrift gestelde overeenkomst* die volgens volkenrechtelijke criteria voor de staat verbindend is"

[60] On this and other constitutional aspect see L.F.M. Besselink, De staatsrechtelijke regeling van de aanvaarding en invoering van verdragen in Nederland, Tjeenk Willink 1996.

Examples of the temporary and cheap treaties in military affairs, are status of forces agreements negotiated with a view to a foreign operation, for instance the stationing of Apache helicopters in Djibouti with a view to have the possibility to extract UNMEE troops,[61] or for military exercises abroad, such as a treaty with Tanzania for the purpose of the military Exercise Tanzanite 2002.[62]
Approval of a treaty can either be tacit or express. It is up to the government whether it choses to submit a treaty for tacit or express approval, unless the treaty diverges from the Constitution; in that case express approval is required.
Express approval is by act of parliament. An act of parliament approving a treaty has as its major clause a provision which says that the relevant treaty is approved – the treaty itself is not part of the relevant act. Tacit approval is done by submitting the text for the purpose of approval to both houses of parliament. Tacit approval is granted unless, within 30 days, by or on behalf of either House or one fifth of the constitutional number of its members, the wish has been expressed that the treaty be approved expressly (Article 5 Rijkswet goedkeuring).
A treaty the provisions of which diverge from provisions of the Constitution, or necessitate such a divergence, can only be approved with a majority of two thirds of the vote in each house of parliament (Article 91 (3) Constitution).
The Treaty establishing the European Defence Community is one of the very few treaties which parliament (and government) have considered to necessitate a divergence from the Constitution.

b. Other forms of control

There are several other forms of control of the armed force which deserve mention. Among them are ombudsman institutions. These are not so strictly related to parliament as in some other countries. One of them is definitely not of the parliamentary type, but of the executive type. This is the Inspector-General of the Armed Forces (*Inspecteur-Generaal voor de krijgsmacht* - IGK). The office has existed since 1813. The IGK has competence to tender his advice to the Minister on personnel and organizational affairs, and all other matters concerning the armed forces. The office has developed in such a manner that he is now considered to be the "military ombudsman".[63] In order to ensure his impartiality and independence, he is not part of the core Ministry (the "Ministry in The Hague"). Any (former) member of staff can approach him to request mediation or an inquiry. The IGK has no power to decide issues, but can decide to inform the Minister about them and submit his views.
The National Ombudsman is the normal civilian general ombudsman institution of the Netherlands at the national level. His competence extends also to any act under the responsibility of the Minister of Defence and those acting under his authority (including military servicemen). The number of complaints received concerning this ministry is low. On a total of 8242 complaints received in the year 2000, only 53 regarded the Ministry of Defence.[64] Only in some 10 cases per year (or less) this leads to a report by the National Ombudsman; other complaints do not lead to an investigation because of issues of

[61] Tractatenblad 2001, 39.

[62] Tractatenblad 2002, 31.

[63] In some countries the official name of the general ombudsman institution is `inspectorate general'.

[64] Jaarverslag Nationale ombudsman 2000, Kamerstuk 27 645, nr. 2.

competence, admissibility or because they are dealt with otherwise (so-called direct intervention by the Ombudsman).
Complaints to the National Ombudsman come both from members of the public and members of the armed forces. The National Ombudsman is appointed by the Lower House and reports yearly to the Lower House, but otherwise he functions entirely independently.[65]
Complaints from members of the public mainly concern treatment by the Koninklijke Marechaussee (charged amongst other things with border controls and hence deals as a first line instance with immigration and asylum requests at the border); the complaints from members of the armed forces in recent years has concerned undue delays in treating such matters as payment of social benefits.
One report of the National Ombudsman of 1999 drew much public attention and concerned a number of incidents with AP-23 mines, especially two accidents in 1983 and 1984 with 8 casualties. The investigation was undertaken at the request of the Standing Committee for Defence of the Lower House. In this case the National Ombudsman reached negative conclusions as to the manner in which the Ministry had dealt with such a broad range of issues like the results of a test report from 1970 (!) proving that these mines were unsafe, the handling of the accidents, the communication with the dependants of victims, and the views it had taken on the responsibility and liability.
In 1998 the National Ombudsman investigated the aftermath of a disaster with a military Hercules aircraft in which all passengers died. Also in 1998 the National Ombudsman dealt with a complaint against the manner in which the Inspector General of the Armed Forces had dealt with two complaints, thus showing that in a sense the National Ombudsman acts as an appeal from the Inspector General; the National Ombudsman found that the complaint was unfounded.
Apart from the ombudsman institutions, some outside supervision of the armed force is exercised by the Committees for Petitions of the Lower and Upper Houses, which can deal with individual petitions regarding the armed forces. These receive few individual petitions which can be dealt with in the form of investigating a complaint. Over recent years between 1 and 4 of such complaints have been dealt with, most of which concern military pensions.
The *Algemene Rekenkamer* (General Chamber of Audit) has powers of investigating the financial affairs of the Ministry of Defence, including all branches of the armed forces. It verifies the legality and appropriateness of expenditure. With regard to appropriateness of expenditure, it also investigates more general issues. Thus a critical report reviewing international military cooperation was presented in December 1999; it concerned the Admiraal Benelux (ABNL), UK/NL Landing force (UK/NL LF), the 1 (GE/NL) Corps and Deployable Air Task force (DATF). Of the Admiraal Benelux it concluded that no extra value could be discovered in the cooperation, of the others their effectiveness and efficiency could not be measured due to (amongst other things) lack of operational criteria which these military organizations use to establish output. Also it found that with "all four forms of cooperation the organizational structure and the form of the management structure were at least complex and in part not well regulated. The management information regarding the cooperation is insufficient to provide insight into the results of the cooperation."[66]

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[65]For a brief English language description of the Netherlands Ombudsman, see the chapter on the Netherlands in: Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World. Kamal Hossain, Leonard F.M. Besselink [executive editor], Haile Selassie gebre Selassie, E.L.M. Voelker, eds.. Kluwer Law International, London/ The Hague/ Boston, 2001.

[66]Report General Chamber of Audit, 8 December 1999, kamerstuk 26950, nrs 1-2, pp. 17 (author's translation).

III. The Structure of the Armed Forces

1. The Armed Forces and their Administration

The administration of the military is not separate from the armed forces themselves. Part of the administration is the 'core department' in The Hague, but this is not exclusively civilian. The management principle governing the organization is that of 'central directing with decentralized implementation and execution' (*centrale regie en decentrale uitvoering*) in which central direction is on main lines only. The intention is to find a balance between centralization and decentralized management.[67] Again, the choice of this administrative policy principle must be understood against a background in which the three main branches of the armed forces each used to have their own centralized staffs. The process of cutting back on defence expenditure which set in in the early 1990's, has made a leaner and more transparent defence organization necessary. The more centralized role of the CDS mentioned above, is one aspect of this. Another is the establishment in 1996 of the *Defensie Interservice Commando*, Defence Interservice Commando (DICO) as a new branch of the armed forces, providing in a combined fashion a number of central support services to the other branches of the armed forces, so that these could concentrate better on their core activities;[68] it is a military institution.

The CDS, Secretary-General, Directors-General for Economics, Finance and Control (DGEFC), Materiel and Personnel (DGMP) are the top level officials in the core department, which is supplemented with directorates for General Policy Affairs (Dab), Public Information (DV), Legal Affairs (DJZ) and the Audit Service (Defac). The Military Intelligence Service is also placed in the core ministry.

For a general overview of the main structure of the Ministry of Defence at the top level, see the organization chart above.

There is no explicit legal basis for any of these organizational matters other than that they are based on decisions by the Minister, who derives this competence from Article 44 (1) of the Constitution: "Ministries shall be established by Royal Decree. They shall be headed by a Minister."

2. Procurement of materiel and supply for the armed forces

The process of procurement centrally and necessarily involves the DGMP, a civilian institution which is part of the core Ministry. The planning cycle does begin, however, in the relevant branch of the armed forces, which also plays a key executive role in procurement processes. This process is administrative in nature and is not codified in legal rules. What one

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[67] See chapter 3.2 of the Defensienota 2000, pp. 62-63, the Defensienota 2000 is published also as Kamerstuk 26 900, nr.2.

[68] It comprises two agencies:Dienst Gebouwen, Werken en Terreinen (DGW&T), the Defensie Telematica Organisatie (DTO); and eleven service units: Defensie Werving en Selectie (DWS), Diensten voor Geestelijke Verzorging (DGV), Militair Geneeskundig Facilitair Bedrijf (MGFB), Defensie Verkeers- en Vervoersorganisatie (DVVO), Instituut Defensie Leergangen (IDL), de Dienst Militaire Pensioenen (DMP), Dienst Personeels- en Salarisadministratie (PSA), Defensie Materieel Codificatiecentrum (DMC), het Defensie Archieven-, Registratie- en Informatiecentrum (DARIC), Bureau Internationale Militaire Sport (BIMS), de Maatschappelijke Dienst Defensie (MDD).

can say is that the branch of the forces involved has a key role to play in putting forward the request for procurement of materiel. Also, in practice their opinion on the desirability of the acquisition of a certain type of brand of materiel is not negligible.

IV. Soldiers' Rights and Duties

1. Restrictions of Fundamental Rights of Soldiers

a. General Aspects

Before one can make any statements about 'restrictions' on fundamental rights, it should first be determined whether such rights apply at all to soldiers. Fundamental rights as contained in the constitutional instruments are primarily concerned with securing the rights of citizens as against public authorities. They do not aim to regulate the position of public authorities *inter se*. In principle, soldiers exert public authority. Hence their acts and legal position are entirely covered by public law.
Nevertheless, it is now commonly accepted that soldiers (and civil servants) enjoy and exercise fundamental rights in principle. This goes for both the fundamental rights contained in the Constitution and the rights contained in human rights treaties (to the extent that these are self-executing). In this respect, no difference exists between "professional" soldiers and conscripts, although sometimes one can sense that some difference is made between them. The professionals have voluntarily entered into a special relationship with public authorities - have in a certain sense given up being a citizen - while conscripts have been involuntarily conscripted – have in a sense remained citizens. This type of reasoning, however, is never clearly articulated. As a matter of fact, from the legal point of view professional soldiers are to be considered "civil servants" or "public official" (ambtenaar),[69] which conscripts are not. Because of the fact that the active service of conscripts has been suspended in the early 1990's, we have as a matter of fact a professional, volunteer army.
The Constitution of the Netherlands allows restrictions only on the basis of an Act of Parliament, and some restrictions must be explicit in an Act of Parliament itself. Since 1983, all rules concerning the legal position of civil servants must have their basis in an Act of Parliament (Article 109 of the Constitution). This reinforces the constitutional principle that restrictions on fundamental rights can be imposed only in or pursuant to an act of Parliament. The legislative history of the fundamental rights provisions of the Constitution makes clear that restrictions can only be provided for in an act of parliament itself with regard to a number of fundamental rights, so that the power to restrict those rights cannot be delegated by act of parliament to some other institution or office with the power to set legally binding norms (*Gesetzesvorbehalt*). In general, the provision allows for delegation of restrictive powers when the language of the provision uses the words *'bij of krachtens wet'* (by or pursuant to an act of parliament) , *'regels'* (regulations), or a form of the verb *'regelen'* (to regulate). This is an artificial device, which cannot be adequately rendered in English translations of the Constitution's provisions.

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[69] We should perhaps here render *ambtenaar* with the term "public official" rather than "civil servant" in order not to confuse civilian defence personnel with military personnel; also because in the Netherlands legal system professional military and reservists are called "militair ambtenaar", which would otherwise have to be rendered as "military civil servant", which seems unidiomatic (though fitting the German ideology).

A further barrier to wide ranging restrictions of fundamental rights is the principle that in case of delegated restrictions, the basis for such restrictions in an act of parliament has to be deliberate, specific and clear.[70] Thus an "empty" or blanket delegation of the power to restrict the exercise of fundamental rights is considered to be unlawful. This can be illustrated in the military field with the following examples.
Provisions in the act on military disciplinary and military criminal code (the *Wet militair tuchtrecht*, furthermore WMT, and Wetboek Militair Strafrecht, furthermore, WMSr, respectively) make it an offence not to obey a service regulation (*dienstvoorschrift*) without further specification (Article 18 WMT and 135 ff. WMSr). These provisions are in a sense "empty" or blanket provisions which do not determine the power to make service regulations on specific issues. Therefore, they cannot provide a lawful basis for restricting fundamental rights by service regulation.
Another example is Article 12 sub q of the Act on Military Public Servants, the *Militaire Ambtenarenwet 1931* (furthermore: MAw 1931), which states that further rules can be made by or pursuant to an order in council concerning "other rights and duties". Also this provision is unspecific and can therefore not be deemed to delegate the power to restrict the exercise of fundamental rights.[71]
This strict system of restrictions was considered to provide the best protection of fundamental rights. This system is fairly rigid. In the case law sometimes courts seem not to have been very strict in determining whether the basis of a restriction in an act of parliament is specific enough, although there are numerous examples where courts have indeed applied this test strictly.
The system of restrictions of the Constitution does not expressly contain any reference to the principle of proportionality, nor has it been made reference to at the time of the introduction of Chapter I into the Constitution in 1983. This has led some authors to suggest that, unlike the ECHR, the principle of proportionality does not apply to the restriction of constitutional fundamental rights. This author, however, respectfully disagrees with this position. First of all it cannot be assumed that the framers of the Constitution have intended to permit disproportional restrictions of rights. Secondly, the principle of proportionality is part of the general principles of proper administration which public authorities have to take into account in all their decisions, and which has been codified in the *Algemene Wet Bestuursrecht*, the General Administrative Law Act, and is used by courts as a standard against which decisions of public authorities are reviewed. Hence, it is this author's opinion that the principle of proportionality applies not only as a principle with regard to the rights protected under the ECHR, but also to the fundamental rights of the Constitution.
The basis for legal restrictions on the rights of volunteers is to be found in the *Militaire Ambtenarenwet* (MAw) and *Militair Ambtenarenreglement* (Amar), because - as we already remarked - both professionals and reservists are "public officials", *militair ambtenaar*, in the legal system of the Netherlands. Also a number of separate provisions in other legislation (e.g. concerning searches and vaccinations) are relevant. The equivalent legislation dealing with conscripts is contained in the *Kaderwet Dienstplicht*, whereas the legal basis for restrictions imposed on the rights of civilian personnel is to be found in the *Ambtenarenwet.*

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[70] Kamerstuk 13 872, nr. 7, pp. 181-182.

[71] It is more disputed whether Article 12 sub g, which specifies "*ontslag*", dismissal, as a subject matter by which further rules can be made by order in council, provides sufficient ground for restrictions by delegated legislation. See below, when we discuss social rights.

These restrictions exist over and above the restrictions that are imposed by the generally applicable legislation, such as the Penal Code and other Acts of Parliament which provide a basis for restricting the exercise of fundamental rights.
In the Netherlands we do not have a centralized or specialized court to deal with alleged infractions of constitutional fundamental rights or human rights provisions in treaties. Article 120 of the Constitution prohibits courts to review the constitutionality of acts of parliament, but allows them to review the constitutionality of all other public acts. It should be remarked that at present there is an amendment pending in the Lower House to abolish this prohibition with regard to review against the constitutional fundamental rights provisions.
However, also under the present prohibition of reviewing the constitutionality of acts of parliament, any court can review the compatibility of *any* provision of national law (including acts of parliament and provisions of the constitution) with self-executing treaty provisions - which are typically the classic human rights provisions in treaties like the ECHR and ICCPR. Thus many courts deal with complaints of an infraction of fundamental rights of soldiers. However, there are specialized courts for different kinds of affairs concerning soldiers. I briefly sketch the court system with regard to the various types and issues of military law.
Which court is competent to deal with complaints of unlawful interference with a fundamental right, depends on the context in which the complaint arises. When it concerns legal questions concerning the legal status of soldiers, which are based on the *Militaire Ambtenarenwet* (and as regards conscripts on Chapter II of the *Kaderwet Dienstplicht*), these are matters of administrative law, which are dealt with in first instance by the administrative chamber of the district courts (*arrondissementsrechtbank*). Article 4 of the MAw (and 31 KwDpl) provides that appeals against decisions based on the MAw (and KwDpl) belong in first instance to the exclusive jurisdiction the District Court in The Hague.
In principle the administrative chamber which deals with a case is an *unus iudex*, but he can refer the case to a multiple chamber composed of three judges. In military affairs the unus iudex is a civilian judge; a multiple chamber is composed of two civilians, one of which acts as president, and of a military member from the army, navy of air force (depending on the force of which the appellant is a member).
An appeal against the judgment in first instance can be made to the *Centrale Raad van Beroep,* which is the court of highest instance in civil servants and social security cases. This court is composed exclusively of civilians, also in military cases.[72]
These administrative law courts are of importance with regard to the protection of fundamental rights, because important possibilities of restricting the exercise of fundamental rights of soldiers are contained in the MAw (and KwDpl). But of course in disciplinary and criminal cases, issues concerning fundamental rights can and do arise.
Against a punishment imposed in disciplinary affairs, first a possibility of complaint exists with the immediate superior of the commander who imposed the sanction. An appeal against his decision on the complaint lies with the *arrondissementsrechtbank Arnhem* (unless the appellant is in the territory under the command of the Commandant der Zeemacht in het Caraïbisch gebied (CZMCARIB) – in which case the *Gerecht in eerste* aanleg, Court of First Instance, of the Netherlands Antilles or Aruba is competent - or when the appellant is within

[72]See G.L. Coolen, Militair en recht, Zwolle 1996, pp. 75-94 {check nieuwe druk}. There is also a limited number of cases with regard to conscripts concerning their (non-)admission to the armed forces in which appeal is possible in sole instance to the *Afdeling bestuursrechtspraak Raad van State*, the Administrative Law [Judicial] Division of the Council of State, see Articles 10 (2), 11 (7) and 13 (2) KwDpl.

the area in the competence of a mobile court).[73] There is no further appeal or cassation possible of the judgment of the Court, except for the possibility of cassation in the interest of the law, *cassatie in het belang der wet*, which is at the initiative of the *Procureur-Generaal* at the *Hoge Raad* (which cassation has no consequences for the case in which cassation occurs).[74]
Criminal cases against soldiers are dealt with in first instance by the *kantongerecht* at Arnhem (cantonal court – for minor offences) or *arrondissementsrechtbank* (district court – for all other offences) at Arnhem, where military cases are concentrated. Appeals against judgments of the *militaire* kantonrechter can be made to the military chamber of the district court Arnhem. Appeals against judgments in first instance of the district court can be lodged with the military chamber of the *Gerechtshof* Arnhem. In cassation the *HogeRaad* deals with all military criminal cases.
The *militaire kantonrechter* is an *unus iudex*, and also criminal cases before the *arrondissementsrechtbank* can, depending on the seriousness of the offence, be dealt with by an *unus iudex* (who is then called *militaire politierechter*). The *unus* is always a civilian judge. The military chamber of the district court is composed of three members: two civilian judges and one military member. The military chamber of the *Gerechtshof* Arnhem is composed in the same manner. The *Hoge Raad* has no military members.
The territorial competence of the military courts of Arnhem is unrestricted, except when the suspect is in the territory of the CZMCARIB; then the Court of First Instance of the Netherlands Antilles or Aruba is competent. This means that both the *militaire kantorechter* and the military chamber of the district court Arnhem can hold sessions abroad, as happens for the troops stationed in Germany. However, also mobile courts can be established in areas where a state of emergency, *uitzonderingstoestand*, in the sense of Article 103 of the Constitution has been declared or for trial outside the Netherlands.[75] This is supposed to be done only under special circumstances. This presumably implies that those special circumstances may legitimate further restrictions on fundamental rights than would be the case otherwise.
With regard to declared states of emergency, Article 103 (2) of the Constitution allows for further restrictions to a number of fundamental rights.
To summarize it briefly, the main courts dealing with fundamental rights issues are in first instance either the District Court in The Hague (administrative chamber) or the courts in Arnhem (in criminal cases and on appeal in disciplinary cases), whereas in highest instance it is the Centrale Raad van Beroep (in administrative cases) or the Hoge Raad (in penal cases) which can deal with such cases.

b. Political Neutrality of Soldiers

The principle of neutrality of the armed forces is not formulated as a binding legal rule in the Netherlands legal order. This is not to deny the existence of the principle of subjection of the armed forces to the democratic political order under the rule of law, which entails a degree of

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[73] Art. 81 WMT in connection with 2, 10 and 17 WMSr. The territory of the CZMCARIB is determined geographically by Article 17 (1) of the Uitvoeringsbesluit Militair Straf- en Tuchtrecht.

[74] Article 100 WMT. This type of cassation has so far not occurred in disciplinary cases, but could very well be initiated in a case in which there is serious doubt as to the compatibility of a certain disciplinary measure with fundamental rights.

[75] Article 10 WMS.

"neutrality". However, it is a principle only. This also means that it cannot be an independent ground for restricting the fundamental rights of members of the armed forces, because the Constitution does not allow for restricting these rights on the basis of unwritten principles, because in general a restriction of a constitutional right requires a basis in an Act of Parliament.[76] Also the human rights treaties, which are directly effective in the Netherlands legal order and have higher rank than the Constitution, do not explicitly provide grounds for restricting the exercise of human rights. However, the principle - assuming that is "provided by law" in the sense of the relevant treaty clauses - might play a role when the assessment of the legitimacy of an imposed restriction involves the balancing of interests and proportionality. Courts may be called upon to assess the proportionality of a restriction, particularly in the framework of judging on the basis of the European Convention on Human Rights in connection with the requirement that restrictions must be "necessary in a democratic society"; and in doing so the principle of neutrality could play a role.

With regard to soldiers abroad, there is a duty to neutrality in a different sense, viz. not to engage in political activity which does not regard the Kingdom of the Netherlands. An exception is made for the use which is made of the right to vote or to stand for election. Engaging in political activity except is made a disciplinary offence under Article 35 WMT, which thus gives effect to Article II NATO Status of Forces Agreement. The *Reglement toepassing straf- en tuchtrecht ten aanzien van Nederlandse militairen, geplaatst buiten het Koninkrijk*, Regulation on the application of criminal and disciplinary law with regard to Dutch soldiers stationed outside the Kingdom, formulates this in Article 3 as a positive rule of conduct, by stating that the commander has to see to it that the laws of a foreign country are observed and that any political activity or other interference with the internal affairs of the foreign state where a soldier is stationed is forbidden. The language of this provision is somewhat different, notably the exception on electoral rights is absent. This should be understood in the light of the purpose of the *Reglement*, which is to give an overview of the applicable law and an instruction as to how to act with respect to a whole range of situations which can arise abroad. It should therefore be construed in conformity with the provision of the WMT.

Nevertheless, doubt can arise as to whether this overall prohibition of political activity abroad is a constitutional restriction of the freedom of assembly and demonstration. As we will see below, Article 9 (2) makes restrictions legitimate only for the protection of certain interests; these do not comprise the proper conduct of foreign relations or similar justifications of the prohibition of political activity abroad. Under the Netherlands Constitution this matter cannot be decided by courts, which are prohibited to judge the constitutionality of acts of parliaments. But even if the provision is in conflict with Article 9 Constitution, the Constitution allows for becoming a party to the treaties which lead to a departure from the Constitution, provided that they are approved with a two thirds majority in both Houses of Parliament (Article 91 (3) of the Constitution). We do not, however, need to see whether the NATO Status of Forces Agreement, which obliges the states party to adopt this rule of political neutrality abroad, was approved with this majority, because the criteria of Article 9 (2) have only been introduced in 1983. The act of parliament by which it was approved at the time remains valid under Article 140 of the Constitution.

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[76] In the lead up to the Constitution of 1983, which included a new catalogue of fundamental rights in its first chapter, the doctrine that fundamental rights can be restricted by general legislation which does not purport to restrict such right but incidentally may arguably have this effect, was explicitly rejected, unless such a restriction can be based on the specific constitutional clauses concerning restrictions.

c. Freedom of association and political rights

The freedom of association is guaranteed by Article 8 of the Constitution and Article 11 ECHR.

Article 8:

> The right of association shall be recognised. This right may be restricted by act of parliament in the interest of public order.

Under this provision, restrictions can only be imposed by an act of parliament, not by delegated legislation.

The freedom of association is restricted by the provisions on 'functionality', as we shall see again when discussing freedom of expression: the soldier should refrain form the exercise of fundamental freedoms, among which the freedom of association if this were to interfere with 'the proper performance of a public servant's duties and the proper functioning of the public service in so far as this relates to the performance of a public servant's duties'.

However, Article 12a (2) MAw and 27 KwDpl make an exception on this restriction for the freedom of association with regard to membership of *registered* political parties which participate in elections and with regard to trade unions.[77] This means that with regard to registered political parties and trade unions there is a nearly unrestricted "negative" freedom of association, that is to say that officials cannot restrict the freedom of being a member of these associations by interfering with it. One should be aware that the formulation of the provision is such that even membership of *unregistered* political parties can be restrained if it interferes with the proper functioning of the organization or the relevant soldier. It must immediately be added that registration of political parties can hardly ever be refused on grounds of the type of policies proclaimed by a party. Only once a party's registration has been refused because that party (an extremely right-wing party) had been dissolved by court order.

As regards the freedom of association in terms of positive claims to certain facilities ("positive" freedom), this does not exist entirely unrestrained. Article 12c (3) MAw provides that in accordance with regulations to be established by or pursuant to an order in council, leave must be given for certain trade union activities unless the interest of the service requires otherwise. These regulations are established in the Amar. It provides that with a view to attending certain meetings of trade unions, special leave is awarded; this concerns work for representative trade unions of soldiers which are officially recognized and participate in the negotiations on the conditions of employment.

Of course, soldiers have the right to vote and to stand for election. Special leave must be granted to soldiers who wish to vote and cannot do so without special leave (Article 85 Amar). Article 12c (1) and (2) MAw provides that if a soldier is elected or appointed to a public organ for which the activities are of such magnitude that they cannot be undertaken simultaneously with his function in the armed forces, he will be suspended from active service unless the interests of the service require otherwise; if the activities can be fulfilled while in active service, and no suspension is granted, the soldier will be given special leave to attend the meetings and sessions of the public organ involved and for participating is related

[77] These provisions are substantively the same as the relevant provision of the Civil Servants Act, *Ambtenarenwet*, Article 125a (2).

activities unless the interest of the service requires otherwise. If a person has been appointed minister or state secretary he is dismissed from the service.[78]

d. Freedom of expression

Before presenting the protection of the freedom of expression of soldiers, it is necessary to sketch the scope of the freedom of protection in the Netherlands and the possibilities of restricting its exercise. The main framework for the protection of the freedom of expression in the Netherlands is Article 7 of the Constitution[79] and Article 10 ECHR.[80] Article 10 ECHR has constitutionally a higher rank than Article 7 of the Constitution (see Articles 93 and 94 Constitution), but pursuant to the ECHR itself this is so only in so far as Article 10 ECHR provides better protection than the Constitution.[81] It is therefore necessary to specify the respects in which the one prevails over the other.

Article 7 of the Constitution provides better protection in as much as it prohibits all forms of censorship and hence the imposition of all forms of prior restraint, whereas certain forms of prior restraint are allowed under Article 10 ECHR, as is apparent from the case law of the ECrtHR.

The case law of the *Hoge Raad der Nederlanden*, the Netherlands Supreme Court, has made it clear that under Article 7 Constitution any restriction based on the *contents* of an expression can only be contained in an act of parliament; whereas the ECHR also allows such restrictions to be made by any other measure "provided by law".

It should be added that as regards the *means of distributing* certain expressions, especially printed matter in the sense of Article 7 paragraph 1 of the Constitution, also rules of lower rank than an act of parliament *can* restrict the distribution of expressions as long as such rules do not touch upon the contents of the expression, and do not introduce a general prohibition of or general licence requirement for distributing printed materials.

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[78] Article 40 MAW.

[79] Article 7: 1. No one shall require prior permission to publish thoughts or feelings through the press, without prejudice to the responsibility of every person under the law[*wet*]. 2. Rules concerning radio and television shall be laid down by act of parliament. There shall be no prior supervision of the content of a radio or television broadcast. 3. No one shall be required to submit thoughts or opinions for prior approval in order to disseminate them by means other than those mentioned in the preceding paragraphs, without prejudice to the responsibility of every person under the law [*wet*]. The holding of performances open to persons younger than sixteen years of age may be regulated by act of parliament in order to protect good morals. 4. The preceding paragraphs do not apply to commercial advertising.

[80] Article 10 ECHR: 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[81] See Article 53 ECHR: "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party."

On the other hand, Article 10 (2) ECHR specifies the aims which can legitimate a restriction, whereas no specific aims can restrain the legislature under Article 7 Constitution from restricting the freedom of expression.
Moreover, Article 10 (2) ECHR makes it imperative that a restriction must be "necessary in a democratic society", which according to the ECrtHR means that there must be a "pressing social need", while a restrictive measure can only be necessary if it is proportional to the legitimate aim which the restriction intends to serve.
Restrictions of the freedom of expression of soldiers must meet these several requirements.
For volunteers special restrictions are to be found in the Militaire Ambtenarenwet, Article 12a and for conscripts in the Kaderwet Dienstplicht, Article 27. These provisions are substantively identical and also cover the freedom of association, assembly and demonstration. Paragraphs 1 and 3 are of particular relevance with regard to the freedom of expression.
Paragraph 1 formulates the criterion of the "proper performance of one's duties and the proper functioning of the public service in so far as this relates to the performance of one's duties", which we had occasion to mention above. The exercise of the freedom of expression, assembly, association and demonstration can be restricted to the extent that this proper functioning and performance of duties is not "in all reasonableness guaranteed". This criterion is identical to the one in the legislation restricting the rights of civil servants in general (see Ambtenarenwet, Article 125 and following). This leaves a fairly large margin of freedom to the military to express criticism also of major government policies even those concerning the armed forces.[82]
Paragraph 3 imposes the duty of secrecy with regard to providing any information concerning the service to anyone who is not competent to receive it, in so far as this duty follows from the nature of the matter.
Both the *Wetboek van Militair Strafrecht*, Military Criminal Code (WMSr) and the *Wet militair tuchtrecht*, Military Disciplinary Act, (WMT) create criminal and disciplinary offences with regard to certain forms of the exercise of the freedom of expression, for all members of the armed forces in active service (in so far as they act within the ambit of these laws).
The WMT adds in Article 6 a sanction on acting in conflict with the duty contained in Article 12a (3) MAw and 27 (3) KwDpl. It provides that anyone who passes on information concerning the service to someone who is not competent to receive it, while from the nature of the matter it follows that the information is secret, acts contrary to military discipline.
This provision is supplementary to the offences formulated in the common Criminal Code concerning state secrets and official secrets.[83] To be more precise: they are supplementary in

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[82]For an analysis of the relevant criteria in the light of publications of high military officers, including the commander- in-chief of the army strongly criticizing the government policy over the armed forces, see J.P.M. Schwillens, Vrijheid van meningsuiting van de (militaire) ambtenaar, in Militair Rechtelijk Tijdschrift 1995, 93-103.

[83]Articles 98-98c and 272, Wetboek van Strafrecht (Sr). The Explanatory Memorandum with regard to Article 6 WMT has suggested that it covers matters not covered by the WSr, but also matters not covered by a service regulation, *dienstvoorschrift*. Kamerstuk 16813, nr 5 p. 6. This seems to suggest that a service regulation can create a secrecy delict; the offence then exists in the intentional or culpable failure to carry out a service regulation (Article 136 and 137 WMSr). However, to this author's opinion this would be contrary to Article 7 Constitution, because in this manner a regulation of lower rank than an act of parliament would touch on the content of the information not to be divulged. Perhaps one could argue that the WMT imposes the duty to obey service regulations so that by implication the duty to keep certain information determined by service regulation

the sense that they concern other secrets than those intended in the Criminal Code. This is so, because in the Netherlands, the disciplinary offences of the WMT – unlike what is the case in some other countries - are conceived of as distinct and separate from criminal offences (both common and military). The Military Criminal Code (WMSr) formulated a special offence regarding secrets until 1991. This was judged superfluous alongside the existing offences concerning state secrets contained in the Criminal Code and it has therefore been removed from the military criminal code.
Another restriction of the freedom of expression is to be found in Article 20 WMT, which makes it a disciplinary offence publicly or in the presence of another soldier to revile (abuse, NL: *uitschelden,* D: *beschimpfen*) or mock him.
Also it is a disciplinary offence orally or in writing to incite others to commit a disciplinary offence in the sense of the WMT, or to distribute writings which do so.
The Military Criminal Code makes it a criminal offence to incite orally or in writing a soldier to commit any offence in the sense of the WMSr. It is also an offence to distribute, exhibit, promote such writings or possess them for purposes of distribution.
For the prohibition of political activity when stationed abroad - which implies an important restriction of the freedom of expression - see above.
Whereas the previously mentioned provisions mostly relate to the *content* of the expressions, there are also provisions in the WMT which relate to the distribution of expressions in Articles 31 and 32. The first regards the contravention of a service regulation (*dienstvoorschrift*) which prohibits the distribution of printed matter. Such regulations must serve the interests of traffic, the prevention of obstruction of the service or the protection of state property or the property of others. The second regards the contravention of a prohibition issued by service regulation to distribute expressions by other means than printed matter. In this case such prohibitions must serve the interests of traffic, the prevention or repression of disorder or disturbances (*verstoringen*) of the regular order of the service.

e. Freedom of demonstration and assembly
A freedom of assembly and demonstration is formulated in Article 9 of the Constitution:

> 1. The right of assembly and demonstration shall be recognized, without prejudice to the responsibility of everyone under the law [*wet*].
> 2. Rules to protect health, in the interest of traffic and to combat or prevent disorders may be laid down by act of parliament.

The legislative history of this provision makes it clear that the words "responsibility under the law" in the first paragraph, refer to restrictions contained in an act of parliament, whereas the word "rules" in the second paragraph also comprises delegated legislation.

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secret, which flows from the WMT (an act of parliament) rather than from the service regulation. This type of reasoning was allowed in the Supreme Court case *Tilburg* (HR 28 November 1950, NJ 1951, 137) with regard to emergency regulations of burgomasters. However, in this case the *Hoge Raad* considered that the Criminal Code allowed this as a "very temporary interruption of the exercise of the fundamental right" under emergency situations. This can hardly be said of secrecy delects created by service regulation. Moreover, it is doubtful whether this still reflects the present law on freedom of expression. I may add that, assuming that the opinion on the incompatibility of secrecy offences created by service regulation is correct, this does not stand in the way of service regulations or other decisions that a certain concrete piece of information is secret by way of concrete application of the norm, rather than the creation of a delict.

Within the ECHR it is Article 11 with protects the right to assembly, which encompasses the right to demonstrate:[84]

> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Of particular relevance is the last sentence of paragraph 2, which makes it clear that "lawful restrictions" can be imposed with regard to (amongst others) members of the armed forces. To my knowledge the exact scope of this clause is as yet unclear with regard to the question which extra restrictions it allows for. In the *Vogt* case, the ECrtHR on the one hand conceded that this clause allows for "special restrictions",[85] yet on the other hand it quite clearly implied that the requirement of proportionality to the legitimate aim under the standard clause, also applies to restrictions under the special final clause for members of the armed forces, the police and civil servants.[86] This, however, raises the question what "special restrictions" other than the normal ones could be allowed with regard to members of the armed forces.
For volunteers special restrictions are to be found in the Militaire Ambtenarenwet, Article 12a and for conscripts in the Kaderwet Dienstplicht, Article 27, which formulates the criterion of the proper functioning of the service and the soldier, which we mentioned above.
Article 33 (1) WMT makes it a disciplinary offense to organize or participate in demonstrations on military premises if no permission has been sought to the competent authorities, or has been refused for reasons of traffic, or of reasonable fear for disturbances of public order or of the regular order of the service. The second paragraph prohibits participation in uniform in a demonstration or assembly outside military premises, unless it exclusively concerns the working conditions for soldiers and the demonstration or assembly

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[84] E.g. ECrtHR 21-6-1991, Publ. CEDH, Serie A vol. 139, Plattform "Ärzte fur das Leben" v. Austria.

[85] ECrtHR 2 September 1995, Vogt v. Germany, at nr. 43.

[86] Idem at nr. 68: "However, even if teachers are to be regarded as being part of the "administration of the State" for the purposes of Article 11 para. 2 (art. 11-2) - a question which the Court does not consider it necessary to determine in the instant case -, Mrs Vogt's dismissal was, for the reasons previously given in relation to Article 10 (art. 10) (see paragraphs 51 to 60 above), disproportionate to the legitimate aim pursued."

takes place in the country where the soldier has been appointed or the conscript has been called to active service – so participation in demonstrations abroad are prohibited.
Article 34 WMT makes it a disciplinary offense to meet in assemblies on military premises for which permission has been refused in the interest of traffic or because disorders or disturbance of the regular order of the service could reasonably be expected.


Demonstration of soldiers in The Hague, September 2000 for a pay rise; source: Ministry of Defence web site.

The requirement of prior permission does not exist under general constitutional law; the Act on public demonstrations, *Wet openbare manifestaties*, creates only the possibility for local councils to require prior notification, but not of prior permission. Some authors have doubted whether the Constitution allows the general requirement of prior permission. This is due to the words "without prejudice to the responsibility of everyone under the law [*wet*]" in Article 9 (1) of the Constitution. In the context of Article 7, first paragraph, of the Constitution, which concerns the freedom of expression and which uses these same words, they have to be understood as creating *ex post facto* liability. But in Article 7 there is an explicit prohibition of prior permission, unlike in Article 9. Moreover, prior permission for demonstrations and assemblies of soldiers is not general, but only regards demonstrations and assemblies on military premises.[87]
There is, however, a possible problem in the wording of Article 9 (2) of the Constitution in relation to the implication in Articles 33 and 34 of the WMT, that not only traffic requirements, but also the fear for disturbance of the regular order of the service (*verstoring van het ordelijk verloop van de dienst*) - separate from the fear for disorder (*ongeregeldheden*) - may be a ground for prohibiting a demonstration or assembly. This may be at variance with the grounds mentioned in Article 9 (2) of the Constitution, i.e. health, traffic interests and the interest "to combat or prevent disorders", which only can justify a restriction of the freedom of demonstration and assembly. It is unclear whether the constitutional category of "the combat or prevention of disorder (*wanordelijkheden*)" also comprises the internal disturbance of the normal order in a public service. I should hasten to add, that this matter is somewhat academic as long as Article 120 Constitution prohibits courts to judge the constitutionality of acts of parliament.

f. Freedom of religion

The general legal framework is provided by Articles 6 Constitution:

> 1. Everyone shall have the right to profess freely his religion or belief, either individually or in community with others, without prejudice to his responsibility under the law [*wet*].

[87] Also with regard to Article 11 of the ECHR, the requirement of prior permission for demonstrations or assemblies of soldiersdoes not constitute an unjustified infringement, assuming that the special nature of the armed forces makes it not disproportional to have such a general requirement.

> 2. Rules concerning the exercise of this right other than in buildings and enclosed places may be laid down by act of parliament for the protection of health, in the interest of traffic and to combat or prevent disorders.

and Article 9 ECHR:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

These provisions may entail positive obligations for the state in its treatment of soldiers. The case law on religion and military and other public officials has shown that the *Centrale Raad van Beroep* is on the whole reticent to consider the freedom of religion (and other fundamental rights) a claim right, nor does it very easily derive positive obligations for the government from these rights.[88]
Thus one may say that the constitutional and treaty provisions create no immediate right to certain days off can be derived. However, Article 12b MAw and 28 KwDpl provide that a soldier cannot be constrained to do service on feast days and resting days which he is to observe on grounds of religion or belief unless the service makes it unavoidable. This is further elaborated in Amar Article 54 j for soldiers who on grounds of religion or belief have their weekly resting day on another day than the Sunday; they must request in writing for registration of the relevant day, which will then be considered for that soldier as equivalent to a Sunday. The commander who determines for every soldier his working hours and resting hours pursuant to Articles 54b ff. Amar will have to take this right to respect for religious resting days into account also in other respects, particularly with regard to religious feast days.[89]
With respect to creating facilities for soldiers, one might perhaps expect a distinction between conscripts and volunteers. Conscripts are part of the armed forces because they are so compelled, whereas volunteers have freely assented to the job in the awareness of the nature of the institution. Hence, one might expect the state to be more readily prepared to create facilities in order to be able to enjoy one's fundamental rights, if people have been brought involuntarily into a situation in which the enjoyment of fundamental rights has been made more difficult, such as is the case with conscripts. With those who have freely chosen to be

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[88] A clear exception is CRvB 25 October 1990, TAR 1990, 243, in which the Centrale Raad judged that the facilities for Muslim, Jewish and Hindu soldiers (a service regulation of the commander of the army) did not provide for facilities for complying with the Ramadan obligations. Basing itself on Article 6 of the Constitution, the Centrale Raad concluded that facilities should be created, particularly with regard to working hours and the possibilities for occasional exemption of service duties.

[89] Arrondissementsrechtbank Den Haag, 22 December 1997, TAR 1998/39: A grant to a Jewish musician in the band of the airforce, who turned orthodox, for leave on Jewish feastdays and resting days led to an absence of at least 40 % of the time; as a consequence, he was given a 20 % unpaid leave. After careful scrutiny, this was upheld by the district court as unavoidable for reasons of service.

placed in such a situation this might perhaps be different. This way of reasoning is fraught with difficulties and raises such questions as to whether one can voluntarily forfeit fundamental rights, and if so, whether this should affect positive obligations for the government. However this may be, there is a decision of the *Centrale Raad* which disproves the legal validity of this type of distinction between the fundamental rights position of conscripts and of volunteers: the freedom of religion does not necessitate facilitation, but also there should be equality in this respect between conscripts and volunteers.
The case involved a Jewish navy corporal who for religious reasons wished to eat and drink kosher food only, which was not served. He claimed financial compensation for the cost of preparing his own kosher meals. The *Centrale Raad van Beroep* rejected the view of the officer that this claim could be derived from the right to freedom of religion (however, it did in the end grant the claim on grounds of equality: for conscripts there was a special allowance for those who have to prepare their own meals in order to observe religious dietary rules, but not for professionals).[90]
In some countries the issue has arisen of the involuntary attendance of religious ceremonies in the Netherlands. No case law in this issue exists in the Netherlands. It is hard to say what the courts would decide if a soldier had received an order to attend a religious ceremony against which he might have some objection, but which order involves an interest of the service (this is a requirement for an order to be lawful, see below). The question would then be whether there is an interference with the religious freedom of the soldier and if so, whether the justification for the order would fit in with the criteria for restrictions in Article 6 Constitution and 9 ECHR. The answer to both questions presumably depends on the nature of both the ceremony and military presence at the ceremony, and also on the circumstances (is it a state funeral or official ceremony at the burial of a soldier who was killed in action, or is it merely intended as moral education for an individual, etcetera).
As a positive aspect of the freedom of religion, in the sense that the government felt necessitated actively to create facilities, is the presence of *geestelijk verzorgers*, spiritual counsels, in the armed forces. They have been appointed as civilians (although some rules and regulations which apply to soldiers apply also to them, and they may hold military ranks). They are Roman Catholic chaplains (*aalmoezeniers*), protestant ministers (*predikanten*), rabbis, and humanist counsellors (*humanistisch raadslieden*). In preparation is the appointment of Hindu spiritual advisors. Soldiers also have access to Islamic spiritual advisors, imams, but these have not been officially appointed in a public function to the armed forces. Various provisions in the Amar allow soldiers access to spiritual advisors and to facilities to attend religious services, ceremonies and retreats (see for special leave on these occasions Article 81 (1) sub g, i, j, k and o).

g. Privacy and physical integrity (search, privacy, hair style, beards, ornaments and piercings)
The framework concerning privacy and physical integrity is provided by Articles 10 (1) and 11 Constitution [and Article 8 ECHR].

> Article 10
> Everyone shall have the right to respect for his privacy, without prejudice to restrictions laid down by or pursuant to act of parliament.

[90] Centrale Raad van Beroep, 14 March 1991, TAR 1991, 105.

Article 11
Everyone shall have the right to inviolability of his physical body, without prejudice to restrictions laid down by or pursuant to act of parliament.

Article 40 WMT provides that it is contrary to military discipline not to respect the room which is placed at the disposal for personal use of a soldier or of another person working for the armed forces.
The Article 12d MAw and 30 KwDpl formulates a duty to tolerate searches to ones body, clothes and goods on military premises, building, vessel or aircraft in use with the armed forces, or where he stays or which he uses in carrying out tasks in international context.
There has been controversy over certain other privacy related issues, particularly the issue of hairstyles and growing beards, since the early 1970's. At present the issue of earrings and other piercings has lead to some publicity.
There is a *Regeling haardracht1971*, issued by the Minister of Defence,[91] which proclaims the main principle of free hairstyle except when safety requires differently. Also, commanders-in-chief can make different regulations if necessary under special circumstances or for special operations.
In the case law the Arrondissementsrechtbank Arnhem has judged that this *Regeling* poses no unlawful infringement on the right to privacy and physical integrity, nor does a service regulation to the effect that at the start of the service all soldiers must appear washed and shaven.[92] It is not clear whether the Court considers these rules and regulations to be outside the scope of these fundamental rights, or whether it considers them lawfully restricted. If the latter, then it is not immediately clear what basis the rules concerning hair styles have in an act of parliament.
This matter has not been resolved by recent case law concerning an air force sergeant on an international mission to Villafranca. The principle of free hairstyle does not apply when a soldier is sent abroad. There the hair must be short and no ornaments are allowed.[93] This was in this particular case based on a regulation issued by the Commander Tactical Air Force. The sergeant of the air force, who was acting as a guard, was withdrawn from his UN/NATO mission in Villafranca because he refused to have his hair cut short. The district court of The Hague upheld the exception to the general rules on hair style. It upheld the justification adduced, to wit, that members of the armed forces wearing long hair is not generally accepted abroad and among other armed forces with which the air force cooperated; it may affect the image of professionalism and hence seriously affect the power and effectiveness of the armed forces. Hence it was rightly held necessary to make an exception to the general rules as specified by the regulation on hair dress.[94] Also the court held that there was no infringement of his right to privacy and physical integrity, because he had not been forced to cut his hair.

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[91]Ministerial Regulation, 8 July 1971, nr. 232.131/10H.

[92]Rb Arnhem, 26 November 1993, MRT 1994, p. 58: "... the rule contained in this [company] order [a service regulation in the sense of Article 18 WMT] to appear washed and shaven at the beginning of the serci, cannot be considered an infringement of the rights of Article 10 and 11 of the Constitution to respect of one's privacy and physical integrity. The same applies to the restrictions of the *Regeling Haardracht 1971* on the principle of free hair style for soldiers, among which the obligatory prior notification of the intention to grow a beard."

[93]Handelingen Tweede Kamer, Aanhangsel nr. 1181 and Handelingen Tweede Kamer 1996-1996, Aanhangsel 1594.

[94]Rb Den Haag, 6 May 1998, TAR 1998/126.

The consequences of not doing so, are justified. Nor did the Court consider it discrimination that no exception was made for women, who abroad only have to adapt their hairstyle to prevailing hygienic circumstances, because abroad and among other armed forces it is not abnormal that women wear long hair.
Appeal was lodged at the *Centrale Raad van Beroep* against this judgment. The Raad found in favour of the sergeant, but on different grounds than fundamental rights. It found that the regulation was *ultra vires*, because only the commanders-in-chief are competent to issue regulations which diverge from the ministerial regulation, the *Regeling Haardracht*.[95] Moreover, it judged that the general prohibition of long hair was not justified under the terms of the ministerial regulation, because no good reasons had been adduced which had made it plausible that appellant's special guard duties were of such a special nature as to make it necessary to wear short hair, nor has it more generally been made plausible that the strength or the professional image has been affected by the appellant's long hair, while in general the wearing of long hair appears not to have done so over the past decennia in which the armed forces have cooperated in international operations.
Interesting as this approach is, from the perspective of the constitutional protection of fundamental rights it has not solved the problem of the lack of a demonstrable and specific basis in an act of parliament for curtailing the right to privacy and physical integrity of soldiers.
There is some relevant legislation, but this only refers to the uniform and ways of being dressed. The most relevant is Article 38 of the WMT, which states that the soldier in uniform who is unnecessarily untidily dressed (*nodeloos slordig gekleed)*, acts contrary to military discipline. If hairstyle is covered by the expression 'being dressed', which in ordinary Dutch is not the case, there would be no problem. In fact, in Dutch 'dressing' (*kleden, kleding*) is putting something on and taking it off, whereas hairstyle is a matter of physical appearance (*uiterlijk*).
However, in a recent answer to parliamentary questions,[96] the state secretary for Defence has suggested that the legal basis is provided for Article 134 Amar. But this only concerns the wearing of the uniform and would therefore seem to be an even weaker basis. Again, the Amar is an order in council which, in order to restrict fundamental rights, must have a clear and specific basis in an act of parliament. The act of parliament which is at the basis of this order in council is the MAw, which in Article 12 under q delegates the power to provide for further regulation of 'other rights and duties' by or pursuant to an order in council. This can hardly be called a specific basis for restricting constitutional rights. To this author's opinion, the only basis for restrictions with regard to hairstyle and the growing of a beard could be the WMT with the help of a broad interpretation of the verb 'to dress' in the WMT. But this is over-stretching the words.

The issue of wearing ornaments, such as earrings, jewellery or piercings has lead to some legal controversy in recent years. At issue was in particular the fact that it has been allowed for women to wear (modest) earrings and jewellery, but without exception it has been

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[95]This presumably also implies that the judgement by the military chamber of the District Court at Arnhem, 11 July 1995, MRT 1996, 113-115, confirming in appeal a disciplinary measure against a soldier in Potocari who failed to cut his hair on the basis of rules set by the commander of Dutch troops in former Yougoslavia, was presumably incorrect. The order based on these rules was unlawful because the rules were not binding, because issued *ultra vires* as they were made by a commander who was not competent to do so.

[96]Handelingen Tweede Kamer 2000-2001, Aanhangsel, nr. 1181, written answer of 14 May 2001.

forbidden for men. This has led to two judgments of the *Commissie gelijke behandeling*, Commission for Equal Treatment. First, it judged (on complaint) that this is (unlawful) direct discrimination[97] and (at the request of the Minister of Defence). It has recently judged new regulations on the issue unlawful for the same reason.[98] On the basis of the first mentioned judgment, the district court The Hague has considered the regulations on dress codes unbinding.[99]
The secretary of state for Defence has announced that an amendment to Article 134 Amar is being prepared which will add a general prohibition of visibly wearing (non-prescribed) ornaments and jewellery when a soldier is wearing a uniform. This will solve the problem of discrimination, but not that of the legal basis for restricting the right to privacy and physical integrity (assuming these are indeed at stake).

Another issue regarding physical integrity and freedom of religion and conscience is that of immunization against infectious diseases. The *Wet immunisatie militairen* provides the basis for vaccination of all soldiers. Under Article 5 of this Act, those who have conscientious objections based on religion, belief or moral conviction can apply for an exemption with the Minister, who will decide after hearing the advice of a special Commission who investigates the seriousness and grounds of the objection. An exemption can also be granted for medical reasons (Article 6).

h. Freedom of movement, the right to leave the country
Article 2 (4) of the Constitution grants the right to leave the country:

> Everyone shall have the right to leave the country, except in the cases laid down by act of parliament.

The legislative history of this provision makes it clear that restrictions of this right can only be contained in an act of parliament itself, which cannot delegate the power to restrict the exercise of the right. For soldiers a restriction can be found in the MAw and the KwDpl. It provides that, except with the permission of the MoD (or a person determined by him) or at his order, it is forbidden to travel to or stay in a country:
a) determined by royal decree in which the presence of a soldier can pose a special risk for the security or other important interests of the Kingdom or its allies;
b) a country or part of it where an actual armed conflict exists.

In the literature, the question has been raised whether the referral to a royal decree is constitutional, because restrictions should be made by act of parliament, in this case the MAw and KwDpl. The answer depends on whether one sees the referral to a royal decree as a form of delegation of legislative power, or merely as a form of practical application of a rule which is already normatively complete in the provisions of the relevant Acts of Parliament. In favour of the latter view, one can say that all the relevant criteria can be found in the Act of Parliament. In favour of the former view, one can say that it is not always evident whether the

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[97] CGB, oordeel 1998-65.

[98] CGB, oordeel 2000-76.

[99] Rechtbank Den Haag 6 July 1999, A[dministratiefrechtelijke] B[eslissingen] 2000, 360; also published in MRT 1999, 299-304.

criteria have been met. In fact, we see that the last published royal decree specifying the 'risk countries' mentions: Libia, Syria, Iraq, Iran, North-Korea, Ukraine, Russia, Sudan, the Federal Republic Yugoslavia. For some of these countries it is more obvious that they are on the list than for others; and yet again some other good candidates are not on the list.[100] In this respect, the relevant Acts of Parliament seem to leave a fair amount of discretion to the government to determine which countries pose a risk and which do not.
For civilians, the *Burgerlijk Ambtenarenreglement Defensie* does not restrict the right to leave the country except for those who have access to secret or very secret information (Article 91a). These persons have the duty of informing the ministry in advance of the fact that they will be visiting a country posing the risk mentioned above. All civilian personnel who have been involved in an incident in one of these countries which can be relevant to the security or important state interests of our country, are under the obligation to inform the Military Intelligence Office.

i. Equal treatment and non-discrimination; women; homosexuals
As regards equal treatment in general, the legal framework is provided by Article 1 of the Constitution:

> All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted.

The general norm of Article 1 of the Constitution has been further elaborated in an Act on Equal Treatment of Men and Women, *Wet Gelijke Behandeling*, (which regards working and employment conditions) and in a General Act on Equal Treatment, *Algemene Wet gelijke behandeling*.
Also Article 26 ICCPR contains a general prohibition of discrimination and has direct effect in the Netherlands legal order with priority over all national provisions. The Netherlands has signed but not yet ratified Protocol 12 to the ECHR, containing a general prohibition on discrimination. Finally, the provisions on equal pay between men and women contained in various treaties are of some relevance, but these are not always directly effective in the sense of Articles 93 and 94 of the Constitution. It concerns Article 142 (former 119) EC and related provisions in the secondary EC law; Article 7 sub a (i) ICESCR and Article 4 sub 3 ESC (the Netherlands is not a party to the revised ESC).
Finally, the principle of equality is accepted and applied in practice and in the case law as a general principle of law and as a general principle of proper administration.

The armed forces are open to both men and women. Only two exceptions are made: women cannot be a member of a submarine crew, nor can they be a member of the *Korps Mariniers*, the Royal Netherlands Marine Corps. The *Commissie Gelijke Behandeling* has upheld this exception as not in conflict with national legislation on equality, nor with the case law of the Court of Justice of the European Communities, particularly in case C-273/97, *Sirdar*.[101]

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[100] Besluit aanwijzing risicolanden defensiepersoneel, Staatsblad 1997, 449.

[101] CGB 2000-38 of 39 June 2000.

The official aim is to raise the percentage of women in the armed forces to 12 %. The statistics show that women as a percentage of the total forces are strongly under-represented and the goal will be hard to achieve.[102]

	Koninklijke marine (navy)	Koninklijke landmacht (army)	Koninklijke luchtmacht (air force)	Koninklijke marechaussee (military constabulary)	Total
1992	6,4 %	4,7 %	4,2 %	6,4 %	5,2 %
1995	7,8 %	5,2 %	-	-	5,9 %
1998	9,1 %	6,5 %	6,8 %	7,3 %	7,3 %
1999	9,2 %	6,9 %	7,5 %	8,5 %	7,7 %
2000	9,2 %	7,2 %	8 %	8,7 %	8,0 %

For women a number of special provisions are made in the sphere of working hours and pregnancy, delivery and breast feeding.[103]
As to homosexuals the official policy has been that sexual orientation should not be an obstacle to the full participation of homosexuals in the armed forces. The emancipation and integration of homosexuals is an official policy aim since the early 1990's.[104] In 1998-1999 an independent committee of experts reviewed the effectiveness of this policy and presented a report to the Minister. It shows that among the members of the armed forces 10 % of the personnel considers social contacts in the presence of homosexuals unpleasant. The minister has announced a further intensification of the policy measures, aimed particularly at information, education and support. Special contact persons have been designated as confidants in all parts of the armed forces; there is also a special counsellor at the Inspectorate General; and there has been a *Stichting Homoseksualiteit en Krijgsmacht*, Foundation on Homosexuality and the Armed Forces, which is financially and organizationally supported by the Ministry of Defence. The foundation promotes the interests of homosexual members of the armed forces, it supports them, provides information and counselling. A special leaflet has been issued by the Ministry of Defence on various aspects of homosexuality in the armed forces.
Also as regards participation in international missions and units, the policy is that sexual orientation is no obstacle to being sent abroad. With regard to being stationed abroad other than for peace operations, previous consultation with the candidate takes place. In case the homosexual person involved seriously expects insurmountable problems, the intended stationing abroad can be changed to an equivalent alternative. According to the leaflet of the ministry, this does not have any consequences for the career development of the person

[102]Source: http:// www.smk.nl/mkcm3.html, last consulted 19 September 2002.

[103]Amar paragraph 11, Articles 59f to –I, Stb. 2001, 348, p. 16-17.

[104]Letter of the MoD to parliament of 28 May 1991, kamerstuk 21 800 X, nr.47) and 4 May 1993, kamerstuk 22 800 X, nr 51.

involved. With regard to deployment for peace operations, the regime is stricter. This can happen involuntarily. The person involved has the right to be informed about the situation with regard to homosexuality in the country where he will be sent to.

In the case law, there have been repeated references to legal norms on discrimination and equal treatment in cases concerning members of the armed forces.[105] We mention a few of them.
In a case on the inequality between pay for conscripts and professionals, the Centrale Raad van Beroep, decided the claim on the basis of Article 7 ICESCR stating that in this context it cannot have direct effect.[106]
We saw above that in the case of the financial compensation for kosher food, the Centrale Raad van Beroep had made an explicit reference that in this respect conscripts and professionals were equal cases which on the basis of Article 1 of the Constitution needed to be treated equally.[107]
The *Commissie Gelijke behandeling* has dealt since 1997 with 10 cases in which the Ministry of Defence was involved. We mentioned some cases already. Most of the others concerned civilians, such as a case on discrimination on the basis of part-time work and (indirectly) on the basis of sex. In this case also Article 125 g of the *Ambtenarenwet* played a role, which forbids discrimination on the basis of part-time or fulltime appointment. A similar provision is lacking in all (other) regulations for defence personnel. The Commission found in favour of the woman.[108]
Another case concerned an alleged discrimination on the basis of marital status existing in the fact that soldiers with family members did not need to pay a contribution towards meals served in the mess after service hours, whereas other soldiers did need to do so. The Commission found that there was indirect discrimination on the basis of marital status.[109]

j. Right to strike

In the Netherlands there is no national legislation whatsoever on the right to strike. The right to strike has been recognized in the case law of the Hoge Raad as part of the rights deriving from Article 6 (4) of the European Social Charter, which has been considered self-executing and directly effective. The restrictions on this right are in principle contained in Article 31 of the ESC. This requires that restrictions are provided by law and are necessary in a democratic society with a view to the protection of public order, national security, public health and morals. This also provides the legal framework for the right to collective action and the right to strike of public officials.

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[105] Among those not further elaborated here, CrvB 9 September 1993, Militair Rechtelijk Tijdschrift, 1994, 172-174, in which different rules for compensation for travel in the various branches of the armed forces were deemed not to be in contravention of the general legal principle of equality; HR 18 April 1995, Militair Rechtelijk Tijdschript, 1995, 297 ff., reviewing whether treatment of other conscientious objectors not enjoying the same treatment as Jehova's witnesses was in conflict with Article 26 ICCPR; .

[106] Centrale Raad van Beroep 10 January 1991, TAR 1991, 69.

[107] Centrale Raad van Beroep, 14 March 1991, TAR 1991, 105.

[108] CGB oordeel 2000-93, 22 December 2000.

[109] CGB oordeel 1997-06, 7 January 1997.

The Netherlands has made a declaration on ratification (in 1980) that it considers itself bound by Article 6 (4) ESC except for civil servants (*ambtenaren*, which includes professional soldiers). This was not intended to uphold a prohibition for public officials, but was rather intended as a temporary measure in order to be able to formulate legislation defining the limits and restrictions on the right to strike for public officials (civil servants and soldiers). In practice, the right to strike has been acknowledged also for civil servants of various types, including the police.
There has been a long standing effort to codify the right to strike, but the case law has been satisfactorily developed to a level where the legislature considers it difficult to come up with a better form of protection. Although there still seems to exist the intention to draft legislation with regard to restricting the right to strike of defence personnel, so far none has come about.[110]
The case law of the Hoge Raad has developed the restrictions (of Article 31 of the ESC) to the right to strike on the basis of actions grounded on Article 6:162 Civil Code on unlawful acts (tort). The case law on the right to strike of civil servants has formulated as general principles determining the lawfulness of the action, that collective action must be a last resort (ultimum remedium), it must concern working conditions or pay and similar interests; the lawfulness depends also on factors such as timely announcement, nature and manner of carrying out the collective actions, the proportionality as to the damage caused to the public administration, to the public and to the general interest, etcetera. With respect to police, fire brigades and soldiers it has often been said that the right to collective action, including the right to strike, can be totally withheld under Article 31 ESC. Also various legislative proposals (none of which have materialized into positive law) contain general restrictions for these categories. However, in the absence of actual legislation courts have allowed collective action by the police. This might also be the case for soldiers. I would carefully suggest that depending on the circumstances it is lawful for soldiers to strike, but this is not entirely certain.

k. Child soldiers

It has been so that young men and women can apply for a military function as of the age of 17. Seventeen year olds have always been able to be soldiers. In this respect there has arisen a problem over the Convention of the Rights of the Child, to which the Netherlands have been a party since 1995, and more particularly the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, to which the Netherlands is a party since September 2000. Article 38 of the Convention allows the enrollment of children between 15 and 18 years old, but clearly favours the approach that soldiers should be older. The optional protocol prohibits the exposure of soldiers younger than 18 years to hostilities. This led to some concern in parliament over the Dutch practice. In the end the minister of defence has opted for a system in which 17-year olds can become *aspirant-militair*. They receive training also in the use of fire weapons, but are not allowed to carry these on duty. They cannot participate in operations. At least until the moment they reach the age of 18 years, they have the choice to leave the service.[111]

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[110] On the various proposals J. Hellendoorn, De militair en het recht op collectieve acties, Militairrechtelijk Tijdschrift 1992, 238-245; A.J.M. van Meer, Collectief actierecht militairen, Militairrechtelijk Tijdschrift 1998, 153- 168.

[111] See a letter of the MoD of 1 March 2002, Kamerstukken, Tweede Kamer 26 900, nr. 48.

2. *Legal Obligations of Soldiers*

There is no special law summing up the rights and duties of soldiers like the *Soldatengesetz* in Germany. The rights and duties of the soldier follow from the whole complex of legislation concerning the position of the armed forces and its members, including the Militaire Ambtenarenwet and Militair Ambtenarenreglement, the Kaderwet Dienstplicht, the Wetboek van Militair Strafrecht, Wet Militaire Strafrechtspleging and Wet Militair Tuchtrecht and related instruments, and various administrative regulations touching on working conditions, etc. As we have seen above, some rights and duties are formulated explicitly in the Militaire Ambtenarenwet and Kaderwet Dienstplicht and statutory instruments based thereupon.
Nevertheless, many specifically military rights and duties of soldiers derive from the Wetboek van Militair Strafrecht, and more specifically the Wet Militair Tuchtrecht. From the norms which formulate offences against military discipline, the substantive disciplinary rules must be deduced. This indirect manner of defining the rules of military discipline is conscious, but is awkward both in law and in practice. Thus the WMT provides in Article 2:

> 'The punishments provided by this act, apply to the soldier (*militair*) who violates the rules of conduct (*gedragsregels*) of this act.'[112]

Article 3 determines when the 'rules of conduct', *gedragsregels*, of this act apply;[113] and Chapter II of the Act bears the heading *Gedragsregels*, Rules of conduct. But in reality, this chapter, nor any other form of legislation formulates rules of conduct but only offences.[114]

3. *The Power of Command and the Duty to Obey*

The limits of the power to command are determined both by general legal norms of international and national law and by the military disciplinary and penal law (which in the Netherlands are considered different and distinct legal categories).
The duty to obey orders is limited to lawful orders, that is to say lawfulness both in terms of law of national and of international origin; international law forms integral part of the Netherlands legal order (monism).
Provisions of national origin are to be found in the military disciplinary and criminal codes (WMT and WMSr), and there is also a relevant provision in the Laws of War Act (Wet Oorlogsstrafrecht).
First of all, an order, *dienstbevel*, is defined as an order which serves an interest of the military service and is given by a superior to a subordinate.[115]

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[112] Article 2: De straffen, in deze wet voorzien, zijn van toepassing op de militair die een gedragsregel van deze wet schendt..

[113] Basically this concerns the time in which a soldier is or should be on duty, when he is in a 'military place', when he is wearing the uniform.

[114] This legislative technique involving this type of expression has been strongly criticized by G.C. Coolen, Militair Tuchtrecht, 3rd ed., p. 35-36.

[115] Article 125 MSr, which pursuant to Article 1 WMT applies also to the disciplinary code.

'An interest of the military service' is usually taken very broadly, but for instance an order to cooperate in a private company's production of a television serial, entitled *Combat,* because it was expected to have a positive effect on the image of the armed forces, was considered not to serve an interest of the service – and a corporal who had refused to carry out an order to perform some services towards this film production was for this reason acquitted. [116]
'Not carrying out' comprises a refusal to carry out an order and the exceeding of its terms (Article 130a MSr)
For the purpose of orders, a guard or troops on guard are considered superior (Article 134 WMSr).
Also the order which is given when the superior has no competence to do so is in principle unlawful, although the requirement of competence is no longer part of the definition of an order (*dienstbevel*) in the WMSr. The requirement of competence was removed as an element of the legal definition of the delict of disobedience in order to avoid the necessity each time having to prove such competence.[117]
In the disciplinary code the most relevant provisions are Article 16 WMT on unlawful orders, and Article 17 WMT on contradictory orders; Article 16 refers back to Article 15:

> Article 15: The soldier (*militair*) who does not carry out an order (*dienstbevel*) acts contrary to military discipline.
>
> Article 16: The previous Article does not apply if the ordered conduct (*gedraging,* lit. behaviour) is unlawful or was in good faith considered to be unlawful by the soldier.

The exemption of unlawfulness in Article 16 is by some considered superfluous because self-evident, whereas the disculpationary clause (good faith) in the same article has been criticized for being too much in favour of disobedience.[118] In this connection reference is made to Article 43 (2) of the *Wetboek van Strafrecht,* Criminal Code (of common criminal law), which rules out the punishability of the subordinate who has obeyed an order which he believed in good faith to be lawful; the exculpating clause in Article 16 WMT turns this into the opposite.[119]
In fact, I submit that the consistency between Article 43 (2) Criminal Code and 16 WMT is that both base themselves on the principle *error iuris non nocet*; the difference between them is that one may say that in the one case this principle works in favour of obedience to orders, in the other case it works in favour of disobedience.
Article 17 provides:

> If two or more mutually contradictory orders have been given, the non-compliance with the order that preceded the last one is not contrary to military discipline.

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[116]Rb. Arnhem 11 May 1998, MRT 1999, p. 85

[117]See G.L. Coolen, Is ongehoorzaamheid aan een onbevoegd gegeven dienstbevel strafbaar? In: Militair Rechtelijk Tijdschrift, October 2001.

[118]G.L. Coolen, Militair Tuchtrecht, 3rd ed. 2000, p. 71.

[119]To my knowledge there is only one reported case which reached a court, Arrondissementsrechtbank (District Court) Arnhem, 28 August 1992, MRT 1993, p. 116, where an appeal to both the appeal to unlawfulness as a ground for exemption and the appeal to good faith as a exculpatory argument based on Article 16 failed.

The provisions which concern us most in the Military Criminal Code are Article 131 and 132. These provide that the soldier who disobeyed an unlawful order cannot be punished (131); nor can he be punished if in good faith he thought it to be an unlawful order (132). When two contradictory orders have been given, the soldier who only obeys the last of them, cannot be punished for disobeying the first (Article 133).
It is common understanding that Article 131 WMSr and Article 16 WMT in principle only grants the right not to obey an order, unless the carrying out of an order constitutes a criminal offence; in other words, there is a duty to disobey an order which if obeyed, would lead to a criminal offence.
Article 28 WMT makes it a disciplinary offence to give an unlawful order to a subordinate; Article 150 WMSr makes it a crime to order a subordinate to commit a crime.
As to the question whether and to what extent the law of the host state is a standard for the lawfulness of an order, it is international law which comes into play because this determines to what extent the law of the host state has any role to play with regard to armed forces in its territory. In this respect Status of Forces Agreements, SOFA's, are of importance. Without going into detail, the relevant provisions of the various SOFA's, tend to leave military matters and command relations to be determined by the law of the visiting forces. In most cases, only in other respects the armed forces are to respect the law of the host state.
This being said, there are provisions in the national legislation which aim to ensure that the laws of host states are respected. They seem to be inspired by the desire to avoid the host state to interfere too easily with the relationships within the armed forces. Thus Article 18 (2) WMT extends the applicability of military disciplinary law to service regulations concerning soldiers abroad also when they are off duty. This extends the possibility of maintaining proper behaviour of soldiers abroad and the respect of the laws and customs of host states.
A notable provision is Article 170 WMSr, which makes it a criminal offence not to respect the laws of a host state. This provision has always been controversial, giving as examples homosexuality which may be an offence in host states and spying in favour of the Netherlands.[120] In fact the six reported cases in the case law since 1967 in which the prosecution relied on Article 170 WMSr, have only concerned cases in Germany, most of which were traffic offences, one case of obstruction of German police officers in uniform and one allegation of the unlawful possession of a broadcasting installation (in the latter case the suspect was acquitted).

The lawfulness of an order includes the lawfulness under public international law. Thus there is a fair amount of case law on the so-called SITE guards who refused to do guard duties on military sites where presumably nuclear weapons were kept, and on the so-called 'total objectors', *totaalweigeraars*, who refuse any cooperation with the armed forces and therefore do not wish to cooperate in proceedings with a view to having their conscientious objections recognized. The latter would let it come to an order to appear on the premises, which they would refuse. In all of these cases in highest instance the Hoge Raad (and the then *Hoog Militair Gerechtshof*) have considered the question whether the relevant orders were in agreement with general principles of international law, customary public international law, treaty obligations such as the UN Charter, the Non-proliferation Treaty, the various Geneva

[120] J. Roozemond, 'Wereldstrafrecht voor de Nederlandse Militair', NJB 1958, p. 694. Also it is curious to have as a maximum punishment that of the foreign country. In Third World Countries maximum fines can be exceedingly low for a soldier with a Dutch salary.

Conventions and Protocols, the rules and principles of Nuremberg and Tokyo, the laws and customs of war and warfare and other international humanitarian law.[121]
The issue of superior orders in relation to the laws and customs of war will be discussed below in paragraph VI, 2 f).

4. Social Rights of Soldiers and their Families

The type of social rights which a soldier enjoys in the Netherlands is related to the type of armed forces we have. They are quite clearly of the occupational model, where soldiers work to earn a living, have a job and legal status is a negotiable thing. This determines the kind and even the extent of facilities offered to soldiers and their families.
Among the social rights which deserve special mention is the right to receive education. There is a duty to follow initial training and education (Article 13 Amar). One can be assigned to follow further training (*bijscholing*) related to the function to which one is assigned, but this can also happen at the request of a soldier (Article 14 Amar). The same applies to retraining for a different function (Article 15 Amar). The cost for these forms of training are borne by the armed forces, but each of the relevant provisions states that there is the possibility of creating a duty to repay the armed forces for the cost of training and education under certain circumstances, such as removal from the training or course, removal from his position or dismissal from the military service.
More significant is the right to facilities for study for improving the internal and external job certainty (Articles 17b and 17c Amar). These rights exist only for those who have an appointment for an indefinite period. If the studies pursued are also or entirely in the interest of the service, the cost for the studies will be refunded for respectively 50 % or 100 %. Also here there is provision for repaying these subsidies in case one is released from one's position before finishing the studies, or if one proves unsuccessful due to personal failure. Provision is also made that persons pursuing these studies will not be charged with duties or activities on days on which they have to take exams, unless the interest of the service necessitates otherwise.

Another particular social right may be mentioned in this context. This is the right of free choice of work (Article 19 (3) Constitution):

> The right of every Dutch national to a free choice of work shall be recognised, without prejudice to the restrictions laid down by or pursuant to act of parliament.

There is some case law on this provision in military cases. It concerned three judgments in situations in which a soldier had committed himself not to leave the service upon assuming active service, and on being granted certain study facilities. In all cases the relevant officers applied for dismissal from active service, which was refused. In the first case the President of the public service tribunal, *Ambtenarengerecht*,[122] judged that the duty to serve (and the concomitant refusal of the dismissal) was regulated in the Amar and the WMSr (presumably the provisions which make the various forms of absence of soldiers an offence). It deemed the

[121] HR 4 mei 1981, NJ 1981/464; HR 29 november 1983, NJ 1984/599; HR 18 juni 1985, NJ 1986/58; HR 27 mei 1986, NJ 1987/413; HR 23 december 1986, NJ 1987/508; HR 24 maart 1987, NJ 1988/82.

[122] An administrative court abolished in 1992.

refusal of the dismissal to have a sufficient legal basis. Hence there was no infringement of Article 19 (3) of the Constitution.[123]
The two other cases were decided by the *Centrale Raad van Beroep*. Upon careful scrutiny of the nature of Article 19 (3), the Centrale Raad took the refusal of dismissal to be a restriction of the right to free choice of work. The Centrale Raad in its first judgment considered Article 12 MAw to be too general a basis for the restriction of a fundamental right by delegated legislation.[124] Basing itself on this judgment, also the district court in The Hague concluded to the unlawfulness of the refusal of the dismissal in a subsequent case.[125] This case went to the Centrale Raad in appeal. This time, however, the Centrale Raad reversed its earlier judgment and without further explanation decided that Article 12 MAw was a sufficient basis for a restriction of the fundamental right.[126]
The approach taken by the Centrale Raad in the first mentioned case had been criticized by a commentator on the grounds that Article 12 sub g MAw mentioned the subject of dismissal, *ontslag*, for further legislation by order in council.[127] However, in the second case the Centrale Raad did not really provide any clear reasons for its conclusion at all. The lack of any clear reasoning as to why the earlier judgment was reversed and what precisely makes Article 12 MAw a sufficiently precise and specific ground for delegation was subsequently criticized by others.[128]

There is no right to free military medical care for soldiers and their families in the Netherlands. In principle soldiers receive medical care from the armed forces in so far as it concerns service related accidents and illness.

5. Rules governing Working Time

a. Working Time and Compensation for Overtime Work

The *Arbeidstijdenwet*, Act on Working Hours, has a special regime for 'defence personnel' (which includes both military and non-military personnel), including a provision which grants the Minister of Defence the power to suspend the work-day norms with a view to the international functions of defence personnel. The regulations for defence personnel has found its most recent form in an amendment to chapter 7 of Amar and chapter 4 of the *Burgerlijk amtenarenreglement defensie* in a decree of 7 July 2001 – both are very similar as regards the principles and the details of the working hours regulations.[129] For practical reasons, these

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[123]Voorzitter Ambtenarengerecht [President of the Civil Servants' Court] Den Haag, 20 March 1991 TAR 1991, 138.

[124]CRvB 10 December 1992, TAR 1993, 34.

[125]Arrondissementsrechtbank Den Haag, 16 January 1995, TAR 1995,81.

[126]CRvB 10 October 1996, TAR 1997, 40.

[127]Coolen in a case note to TAR 1991, 138, whose views on both cases are set out in De vrijheid van arbeidskeuze en het recht op ontslag, Militair Rechtelijk Tijdschrift 1997, 129-132.

[128]See case note in TAR 1997, 40 by Riezebos.

[129]Staatsblad 2001, 348.

decrees consolidate and incorporate the rules which are also to be found in the *Arbeidstijdenwet* and *Arbeidstijdenbesluit* (a decree issued by order in council, giving further regulations concerning working hours) which are applicable to defence personnel as well. The particular rules applicable to defence personnel which are contained in the decree, have been agreed upon in the *Sector overleg defensie*, which is the regular negotiating forum between representatives of the trade unions and the ministry. In the following I focus on soldiers, but for civilians the same applies.
The focus in practice is on the schedule of working hours which a commander has to establish for every soldier at least 4 weeks in advance. In drawing up the schedule, account must be taken of the rules of the decree mentioned. The commander must determine the schedules in consultation with the *medezeggenschapcommissie,* a consultative co-determination committee. Working hours must be as much as possible between 7 and 18 hours; the duration of working times per week have a maximum of on 38 hours on average over the period for which the schedule is determined. This maximum does not need to be observed for service which is done for the military organization as determined by a commander-in-chief, the secretary general of the ministry of Defence or the commander of the Defensie Interservice Commando. The maximum weekly working times and the daily working hours do not apply to
- officers who lead units and have a rank higher than lieutenant, commander or major;
- and for all officers of the rank or captain or lieutenant-colonel or higher rank unless it involves dangerous work or the usual work is on night shifts;
- soldiers who are medical doctors, dentists or specialists.
Also there is a general exception for those soldiers in the sense of Article 2 (2) Amar who are employed outside the Netherlands (Article 55e Amar). This concerns soldiers who are employed under the supervision of an organ of the United Nations, or at the service of a allied organ or allied armed forces, or for the purpose of operations in the framework of an international agreement or other international engagements of the Netherlands.[130] So the working hours regulations do not apply to national units abroad, such as the troops in Seedorf. In principle the soldiers at the disposal of international organs have to comply with the working hours arrangements of the relevant international organization;[131] to them the whole chapter does not apply. [132]
Work in overtime can be compensated either in money in accordance with a ministerial decree or in free time.[133] A framework can be found in the *Regeling voorziening bij vredes- en humanitaire operaties* (VVHO 1996) for peace and humanitarian operations.

b. Holidays and Special Leave

Regulations concerning holidays and other forms of leave are to be found in chapter 8 Amar.
The rules applicable to the navy differ from those of the other forces (Articles 68-72 Amar). In the navy the principle is that three types of holiday are granted within a year: within the period between 1 June and 15 September one period of holiday leave of 15 working days is to

[130]Article 2 (2) Amar.

[131]Staatsblad 2001, 348, p. 42 and 47.

[132]Except the rule of an average of 38 hours a week and some other provisions, such as those on compensation for overtime; this, however, seems to make little sense.

[133]Articles 60c and 60d Amar.

be granted (summer holiday), while in the period between 1 December and 1 February next, one period of 10 working days shall be granted (winter holiday); while within one calendar year another four days can be granted at the choice of the soldier (that is to say, it does not need to be one single period of four days). The commander-in-chief can diverge from this principle 'in special cases' and determine different periods; a commander can in special cases grant leave outside the indicated periods and also combine the holidays into one period.
For the other forces, there is no division between summer, winter and other holidays (Articles 73-80 Amar). Depending on rank, the total number of holidays in days per calendar year is fixed (23 below the rank of major, 24 for the rank of major and above), with additional days depending on age.
The minister can make regulations on holidays which diverge from the Amar if the interests of the service so require. However, if such a special regime leads to a situation in which a soldier enjoys fewer holidays than would be the case under the provisions of Amar, he retains a claim on the number of days which make up the difference (Article 81 Amar).
There is also a kind of leave, the so-called embarkation leave, *inschepingsverlof,* in cases in which a member of the armed forces will be outside the Europe for longer than 6 months, or on board a ship outside the Netherlands. These range, depending on the length of stay abroad, from 5 to 10 days before departure (Article 83 Amar). Also after serving abroad a number of extra days leave are granted, depending on the duration of stay outside Europe or (for the navy) on board a ship outside the Netherlands, the so-called disembarkation leave, *ontschepingsverlof* (Article 84 Amar).
Apart from the forms of leave mentioned so far there is also the so-called special leave, *buitengewoon verlof* (Article 85-87 Amar). As a general rule this is granted in enumerated special circumstances, such as the exercise of a legal duty or the right to vote or stand for election, attending meetings in the framework of regular consultations of representatives of trade unions, for work for trade unions who are represented at the regular consultations in accordance with relevant ministerial decrees, searching for housing in case of change of place where the soldier usually serves, a house moving for this reason, marriage (including relevant religious ceremonies), death of spouses, children and specified close relatives (including relevant religious ceremonies), on giving birth by a spouse, certain marriage jubilees, religious retreats organized by the spiritual counsels of the armed forces, and in the last six months of the service for looking for employment elsewhere (Article 85). Outside these cases, a commander may grant a maximum of 10 days leave for other special circumstances, and a commander-in-chief can do so without a maximum of leave to be granted, with or without pay, in accordance with ministerial regulations (Article 86 Amar).
The commander-in-chief can grant special leave of long duration with or without pay. If this is for predominantly personal reasons, this can only be granted without pay and for a maximum of six months. If it also serves the public interest, the duration can be with pay and for a maximum of one year. In case of a soldier requesting the special leave of long duration for working for an international organization, for the Netherlands Antilles or as a special advisor to a foreign power, and if this predominantly serves the general interest, the commander-in-chief can grant a leave for long duration without pay for a maximum of three years (Article 87 Amar).
For soldiers who serve in the Netherlands, there is the possibility of special leave for parental care of one's own children younger than 8 years old. This parental leave can be granted for a maximum of half the time for the duration of a maximum of 6 months (Article 87 a Amar).
Special rules apply for soldiers who do shift work (Article 88 Amar).

The general exception as to members of the armed forces who have been placed at the disposal of international organizations also applies here.
One provision which may be of some relevance with a view to multinational cooperation, in particular for troops stationed abroad, is Article 66 Amar, which concerns the situation in which a soldier intends to spend his leave in another country than the one he is stationed in. In this case, the person competent to grant the leave can for operational reasons require the soldier to inform him of this and of the countries he intends to visit.

6. Legal Remedies, especially Rights to Complain

a. General Rights to Complain

For soldiers the right to complain exists in two major forms, one of a disciplinary nature and the other administrative in nature.
One is the right to complaint against the verdict guilty in disciplinary procedures or against a disciplinary punishment imposed. This is governed by disciplinary law (WMT Article 80a-80t). Complaint lies with the superior of the commander who imposed a punishment or declared a soldier guilty, within 5 days after the verdict in first instance. After this complaint procedure appeal to a court can be made against disciplinary punishment or the verdict guilty.

The other form of complaint is considered to be governed by administrative law and concerns the right to complain against two things. First, a complaint can be lodged against an order which the soldier finds objectionable ('*zich bezwaard voelt*'); second, a complaint can be lodged against treatment of a superior by which a soldier finds himself aggrieved or unfairly treated (Article 9 (1) MAw and 34 (1) KwDpl).
Complaint lies with the commanding superior, competent to impose punishment, of the soldier against who the complaint is filed, the so-called complaints superior, *beklagmeerdere*[134] within 6 weeks after the event occurred which is complained of.
These complaint proceedings are merely within the chain of command, because it concerns non-justiciable issues of order of a non-legal nature. In fact, this military complaints procedure is a specific form of the general complaint proceedings against the conduct (not being a justiciable decision) of an administrative organ or a person working under the responsibility of an administrative organ, the so-called *klachtrecht*. This complaint is directed against the conduct of an administrative organ, and can always be entertained against any administrative organ under the General Administrative Law Act (*Algemene Wet Bestuursrecht*), Chapter 9.
The rules of chapter 9 of the General Administrative Law Act apply, with some adaptations under the Militaire Ambtenarenwet 1931 to the special right to complaint we just described. Except for time limits in case when one of the soldiers involved are abroad for reasons of service, the major adaptation is that this right of complaint is restricted to the type of behaviour (and order) indicated above.
As with the general right to complain against the decision of an administrative organ, there is a duty to deal with the complaint in a particular manner (hearing the complainant, etc) within certain time limits (Articles 9:4 to 9:12a, Awb). No appeal is possible against the manner in which the administrative organ deals with the complaint (Article 9:3 Awb); this also applies to the military right to complaint we are discussing here.

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[134] Article 9 (1) MAw juncto Article 1 (f) Besluit klachtrecht militairen, Stb. 1991, 535.

These complaints proceedings should not be confused with the possibility of appeal against decisions of administrative organs, which are also open to the military. This concerns not so much the conduct of an administrative organ, but focuses on written decisions being legal acts under public law, that is to say, which aim to have legal effects (*publiekrechtelijke rechtshandeling*) (Article 1:3 Awb).
Such an appeal lies with the administrative chamber of the district courts. As we mentioned elsewhere in this report, it is in military cases concentrated in the district court in The Hague with a further appeal to the Centrale Raad van Beroep.
In general this form of appeal to the administrative court, concerns the legal status of soldiers. It must concern a written decision constituting a legal act under public law. Appeal to an administrative court against this type of decision is – as a rule - only open after first having made an objection against the decision to the relevant public authority and this objection has been rejected (Article 7:1 Awb). Appeal to the administrative court can only concern the lawfulness and not the effectiveness or appropriateness of the relevant measure. This is quite different from the complaints procedure as described above.

b. Complaint to Ombudsman institutions

The complaints procedure we just described, concerns an internal proceedings. The *external* complaints proceedings is filing a complaint to an ombudsman institution. This external complaints procedure can be followed after an internal complaints procedure. This is also the understanding concerning the complaints procedure for soldiers.
Above (paragraph 5 b), we discussed the two ombudsman institutions, the IGK and the National Ombudsman.
The IGK is, as we mentioned above, part of the armed forces, but an independent entity within it.[135] As recourse to the IGK is not governed by any rules of regulations, a soldier is always free to approach the IGK with any complaints. About 400 to 500 individual requests per year are made to the IGK. These are treated confidentially. In individual cases, the IGK usually takes the role of mediator who inquires, informs, consults and mediates.
The functioning of the National Ombudsman is regulated by the *Wet Nationale Ombudsman*, the Act on the National Ombudsman, and statutory instruments based on this Act. He judges the propriety of the conduct, decisions and decision-making. This includes all acts of officials under the authority of the Minister of Defence (and of course his own acts and omissions). Access exists except if - put briefly - a matter is pending or has been dealt with in court, concerns general policy of the government as determined by the council of ministers, acts of parliament and statutory instruments.[136] Complaints have to be filed in writing, in principle within a year after the conduct took place and after the complaint has also been expressed at the relevant official or office of whose conduct the complaint exists.[137]

c. Right to Petition

There is always the general possibility of using the general and fundamental right of petitioning the competent authorities under Article 5 of the Constitution, which is also open to

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[135] Information about the history and tasks of the IGK is to be found at his website (in Dutch) at http://www.mindef.nl/frameset/igk.html (last consulted 13 September 2002).

[136] Article 16 Wet Nationale Ombudsman.

[137] Article 12 Wet Nationale Ombudsman.

soldiers.[138] The only formal requirement for petitions is that are to be done in writing. This constitutional right is an independent right of petition, which strictly speaking can always be used without regard to time limits, other formal requirements and the existence of other complaints procedures or legal proceedings. However, this right is partly implemented within the framework of complaints procedures. The right to petition under Article 5 of the Constitution does not entail a legal right to a response.

d. Complaint about the Behaviour of Fellow Soldiers

There is no specific possibility of complaint about the behaviour of fellow soldiers. These, however, could be the substance of a complaint to the IGK, the National Ombudsman and under the general right of petition.

7. Rights of Institutional Representation

There is an elaborate system of consultation of representatives of the trade unions of soldiers with a view to determining aspects of working conditions and pay.

A central element of this system is referred to as the system of 'organized consultation', *georganiseerd overleg*. The main principles are set out in the Decree on organized consultation sector Defence, *Besluit georganiseerd overleg sector Defensie* (Stb. 1993, 353). This is based for civilians on Article 125 (1) under m of the Ambtenarenwet, for professional soldiers on Article 12 under p of the MAw, and for conscripts on Article 21 under m, KwDpl.

On the basis of the Decree, there is one general *Sectorcommissie Defensie* and there are 7 special commissions, one for each of the respective forces, divided into soldiers and civilians employed by the forces and one for civilians in the central organization at the Ministry of Defence. On each of the commissions the four main trade unions are represented. Consent must be reached on main issues which concern the rights and duties of soldiers and civilians; on other issues this is not strictly necessary. There is an intricate system of dispute resolution attached to all this.

Apart from this 'organized consultation', there is also the consultation nearer the grass root level. This has recently found a new form in the royal decree on co-determination with regard to defence personnel, *Besluit medezeggenschap defensie,* (Stb. 1999, 361). In the units in all forces there are now consultative organs on co-determination, *medezeggenschapscommissies*.[139] The head of the unit (for soldiers: the commander; for civilians: head of the unit) consults the commission of representatives elected by the soldiers of a unit in a meeting which he chairs. He may consult, on his own initiative or that of the commission, on all matters concerning the unit except individual personnel matters. Also, the content and size of the task of the unit and matters which are dealt with in the 'organized consultation' cannot be the object of consultation. On the other hand, the head of the unit is under the duty to consult the commission on a whole range of specified measures, such as the implementation of general personnel policy in the unit, the manner in which the conditions of work and the service are implemented, matters concerning safety, health and well-being in relation to work in the unit, the organization and working methods in the unit, and matters

[138]Constitution, Article 5: 'Everyone shall have the right to submit petitions in writing to the competent authorities.'

[139]Previously 'consultative organs', *overlegorganen*, based on a ministerial decree on consultative organs of the units, *Regeling onderdeelsoverlegorgaan,*see G.L. Coolen, Militair en recht, 3rd ed. Deventer 1996, pp. 44-59.

touching on the living conditions in the unit. The meetings should result in an advisory opinion tendered to the commander. no advice can be tendered on measures which aim to ensure the appointment of personnel, and the readiness and undisturbed functioning of the armed forces.
The commander should inform the organ within two months on whether he will follow the advice or not. In case he does not follow the advisory opinion, renewed consultation is required, after which there is the possibility of placing the matter before a committee for dispute settlement, which tenders advice to the commander-in-chief on the relevant matter.
If the tasks of the unit or the special situation of the unit urgently require to do so, the commander may take decisions without prior consultation.
A general exception to the applicability of this system of co-determination is found in Article 2, which states that – among other situations such as the state of war and cases determined by the minister – rules do not apply during exercises and for personnel which works for a unit abroad which is not or not exclusively under Dutch command. This means that it does not apply to multinational units.

V. The Relationship of the Superior to Subordinate Personnel

1. Legal Rules concerning the Relationship between Superior and Subordinate

Article 67 WMSr defines the relationship between superior and subordinate. It exists between soldiers ('*militairen*') if one is superior by having a higher rank, or when of same rank by age in circumstances related to the service, or independent of rank or age if a soldier has other soldiers under his command as a consequence of being in a commanding function or of a decision of the competent authorities.
For the purpose of giving and obeying orders, a guard or troops on guard duty are considered superior (Article 134 WMSr).

2. Subordination of Soldiers to the Command of a Superior of Foreign Armed Forces

The Constitution provides for the possibility of transferring legislative, administrative, and judicial powers to international organizations (Article 92). Such transfer should have its basis in a treaty, and this treaty must be approved by a two thirds majority in both Houses of Parliament if such transfer diverges from constitutional provisions. In the case of transfer of military command to a foreign superior, the relevant constitutional provision which may be at stake is the provision which vests supreme authority over the armed forces in the government (Article 97 (2)). There is no treaty in force which, with a view to this, has been approved with the required two thirds majority. It may seem to be difficult to submit a Dutch soldier under the exclusive command of a foreign service man without interfering with the constitutional provision on supreme authority in Article 97 (2) of the Constitution in any other manner. This matter was not raised when the treaty which made bi-national guard duties of the 1st (NL/G) Corps possible, presumably because the command of a foreign superior is not exclusive. In fact the relevant agreements were approved tacitly, which is legally not possible if the treaty may diverge from provisions of the Constitution. This provides a legal assumption that the supreme command and ultimate power over the armed forces ("full command" in NATO-language) has not been transferred by this treaty.
As to the national law on possible relationships of superiority between Dutch and foreign soldiers, we must make a number of different remarks.

Theoretically, there is a possibility of equating a foreign soldier to a Dutch soldier in order to place a Dutch soldier under the command of the foreign soldier.
Because Article 67 WMSr uses the expression '*militairen*', which is defined in Article 60 in terms of Dutch soldiers, under Dutch law, in principle there cannot be a relationship of superior and subordinate between a Dutch and foreign soldier. However, by royal decree under Article 60a foreign soldiers can be equated with Dutch soldiers for the application of certain provisions determined in that same decree (a possibility of which no use has been made so far). Article 67a makes it possible to create equivalence of foreign ranks with Dutch rank by royal decree. Also this has not been done so far. Although, potentially the possibilities of Article 60a and 67a WMSr make it possible that a foreign soldier be a superior of a Dutch soldier, this would require a further decision by royal decree. This follows from Article 75a WMSr which provides that a relation of superior and subordinate can *only* exist in so far as this is determined by royal decree or an authority determined by royal decree. Again: this has not been done so far.
Nevertheless, a Dutch soldier will have to comply with a foreign soldier's instructions on the basis of a different construction.[140] This can be based on the duty to carry out a service regulation, *dienstvoorschrift.* A service regulation is 'a written decree of a general purport made by or pursuant to an order in council or order in council for the Realm, which concerns an interest of the military service and contains a prohibition or command aimed at a soldier' (Article 135 WMSr).[141] The Amar is, therefore, a service regulation. It provides in Article 137 Amar that the soldier in active service has to do as he is told, which includes what he is ordered by a foreign 'superior':

> "The soldier in active service is under the obligation to carry out the work and services with which he has been charged (*hem opgedragen*) to the best of his abilities, and to know the applicable regulations and orders which result from this."[142]

The expression 'work and services with which he has been charged', *dienstopdracht*, comprises whatever a soldier has been assigned to do by a foreign soldier. Not carrying this out properly is a disciplinary and criminal offence.
It would seem to this author that the service regulation of Article 137 Amar reinforces the integrity of 'full command', if we are to follow the principle on which the German *Anweisung zur Zusammenarbeit* is based. It is in the end a piece of Dutch legislation which remains at the basis of the duty to carry out an instruction of a foreign 'superior'.
Somewhat differently from the German situation, is the fact that usually the regulation of Article 137 Amar is the only legal basis for carrying out an instruction given by a foreign soldier. Although it is possible to add a special order to a soldier or a unit of soldiers to obey a foreign soldier, this has - in so far as we have been able to find out - usually not been done since the Second World War. One could, however, take the assignment of soldiers to a

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[140] See Coolen, Dienstopdrachten gegeven door buitenlandse militairen, MRT 1996, p. 238-241.

[141] 'Onder dienstvoorschrift wordt verstaan een bij of krachtens algemene maatregel van Rijksbestuur of van bestuur dan wel een bij of krachtens landsverordening onderscheidenlijk landsbesluit gegeven schriftelijk besluit van algemene strekking dat enig militair dienstbelang betreft en een tot de militair gericht ge- of verbod bevat.'

[142] 'De militair in werkelijke dienst is verplicht de hem opgedragen werkzaamheden en/of diensten naar beste vermogen te vervullen, en de uit dien hoofde voor hem geldende voorschriften en orders te kennen.'

foreign unit or under foreign command to imply an order to cooperate with this foreign unit or commander; but this seems to this author to be too indirect a construction for a duty to obey.
Again, theoretically it could be possible that a treaty is at the basis of cooperation in a multinational military organization. But it would be unusual to find an express duty to obey a foreign superior directly formulated in such a treaty. This implies that it requires further national implementation acts, which could still be considered to leave 'full command' intact even if they have to conform to the terms of the relevant treaty provisions.
There is one exception to all this. This is contained in the Convention between the Government of the Kingdom of the Netherlands and the Government of the Federal Republic of Germany on the General Conditions for the 1 (German- Netherlands) Corps and Corps-related units and establishments of 6 October 1997 (furthermore: the Convention).[143] Article 10 of this Convention reads:

> Article 10
> Guard Duty
> 1. Binationally used facilities or premises may be guarded by binational guards, if the guard personnel of the sending State is vested with the same competences as guard personnel of the receiving State.
> 2. For the execution of their guard duties binational guards are *exclusively subordinated to the competent superior guard authorities of the receiving State.*
> 3. ...
> [italics added]

This provision is significant in as much as it speaks of a soldier being "*exclusively*" subordinated to a foreign soldier. Although it only regards the function of guard duties, it is difficult to escape the conclusion that the soldier of the sending state is no longer under the command of his own national authorities. This conclusion is full of implications.
For one thing it could be argued on the Dutch side that being under exclusive command of the German guard authorities is an infraction of Article 97 (2) of the Constitution, which allocates ultimate authority over the armed forces to the Netherlands government. (A similar argument could be made *mutatis mutandis* for the German soldier on guard in the Netherlands under the Convention.) It transpires that in preparing the legislation vesting identical competence in foreign soldiers, in the sense of Article 10 (1) of the Convention, one has been careful not to make the military disciplinary and criminal law of the Netherlands applicable to German (or other foreign) soldiers. But clearly, this is not the only and decisive issue with regard to the question whether ultimate authority still lies with the original constitutional authorities.[144]

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[143] Officially published in the Netherlands *Tractatenblad*, 1998, 117.

[144] The present Rijkswet does not say so explicitly, but it is common understanding that the term *militairen* refers to Dutch soldiers in the sense of Article 60 WMSr. It would, hence, seem to be possible simply to make the Rijkswet applicable to foreign soldiers on the basis of a royal decree in the sense of Article 60a WMSr. But this has not been done. The minister explained this in response to questions on the pending bill by stating that there is no objection against not using the possibility of Article 60a WMSr, because the NATO Status of Forces Agreement imposes the duty for foreign armed forces to respect the laws of the host state and for to sending states to take necessary measures in this respect. With regard to the *sanctioning* of the duties on the use of violence, this is a satisfactory answer. However, it is possible under Article 60a WMSr to extend the term '*militair*' to foreign soldiers in precisely the same manner as the act of parliament does now, and determine that the rules established by and pursuant to the *Rijkswet* apply also to foreign soldiers designated by the minister of Defence pursuant to a treaty or a decision of an international organization. In this respect it should be noted that

Another issue is whether Article 10 (2) of the Convention creates of itself a relationship of subordination between the foreign guard and the guard superior; in other words, the question can be raised whether in this respect Article 10 (2) is self-executing. It is true that the first paragraph of Article 10 of the Convention requires a national act of implementation in order to create bi-national guards, viz. a piece of legislation which vests the same competence in a soldier from a sending state by the receiving state. However, once this condition has been fulfilled, the second paragraph of Article 10 of the Convention could be considered self-executing in the sense that this provision itself creates the relationship of subordination. This means that this Convention diverges from Article 67 (read in conjunction with Article 60) of the WMSr, which defines the relationship of subordination between soldiers; also it diverges from Article 75a WMSr, which requires a royal decree for creating this relationship between a Dutch and a foreign soldier (see above).
A similar question could be raised with regard to the duty to obey a foreign superior. This duty may be implied in Article 10 (2) of the Convention, but it is quite unclear whether such an implied duty suffices to create a legal duty on foreign guards. If it does, than this would mean that on the Dutch side the service regulation contained in Article 137 Amar is no longer the basis for carrying out tasks assigned to a Dutch soldier by a German guard superior. On the German side it would seem to mean that it is no longer an *Anweisung zur Zusammenarbeit* in conjunction with § 7 *Soldatengesetz* which is at the basis of the duty to obey, but the Convention or the Act by which the Convention was approved.
This duty to obey a command has further ramifications. This is a consequence of the legal rule that a guard on duty must be considered a superior in a functional sense with regard to the giving commands to a soldier approaching a military object which he is guarding ((Article 134 WMSr). The reason for this 'functional' superiority is practical, because a guard must be able to fulfill his task properly also with regard to persons approaching a military object of whom it is not apparent that they are soldiers or that they are soldiers of superior rank. Does this functional duty to obey also exist with regard to a German guard on duty in the Netherlands (and a Dutch guard on duty in Germany), so that a German soldier is superior to a Dutch soldier? And if so, what is the legal basis to do so? If the legal basis is not the Convention - as would seem to be the case - it is the relevant national legislation, which is for Dutch soldiers the service regulation of Article 137 Amar and the *Anweisung zur Zusammenarbeit* for German soldiers. In this respect, the classic constructions which the Convention seemed to do away with in the relation between a guard and a guard superior, crops up again in the relationship between a guard and other soldiers. There is a relative weakness in these classic constructions, in as much as - at least on the German side - they create relationships between foreign soldiers and national soldiers which are legally precarious, because in principle they are revokable.

3. Powers to Direct Civilian Workers in the Armed Forces

There are no lines of command in the military sense between soldiers and civilians. The definition of superior and subordinate as defined in Article 67 of the WMSr, only refers to soldiers. The legal regime for civilians, though largely parallel in content, is therefore separate. This does not mean that no soldier can 'direct' a civilian. The basis for civil servants' obedience is based on Article 79 (1) *Burgerlijk Ambtenarenreglement defensie*,

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Article 60a WMSr was not intended to be restricted to the sphere of military criminal and disciplinary law, and until it was taken up into the WMSr existed for precisely this reason as a separate Article IV in the Rijkswet 4 July 1963, Stb. 1963, 295.

which imposes the general obligation on civilian defence personnel to fulfil all the obligations which flow from his function meticulously and diligently. The civilian who does not comply with duties imposed or who is guilty of failure in duty, is exposed to disciplinary measures (not being those of the WMT). Failure in duty concerns not only the transgression of some regulation, but also consists in 'doing a good civil servant should not do or failing to do what a good civil servant should do under the circumstances' (Article 99 Burgerlijk Ambtenarenreglement defensie). This duty of civilian defence personnel is the counterpart of the duty of soldiers under Article 137 Amar. This provision – as we mentioned immediately above - provides that the soldier in active service has to carry out what he has been charged with to the best of his possibilities. This *dienstopdracht*, comprises not only whatever he has been assigned to do by a foreign soldier, but also what he has been charged with by a competent civilian. Not carrying out properly this assignment is a disciplinary and criminal offence under military law.

4. Service-Regulations and their Legal Nature

A service regulation (Dutch: *dienstvoorschrift*), is 'a written decree of general purport made by order in council or order in council for the Realm, which concerns an interest of the military service and contains a prohibition or command aimed at a soldier' (Article 135 WMSr).[145] A service regulation is mainly to be distinguished from an order, *dienstbevel*, by virtue of the fact that is of a general nature, that is to say of a rule-like nature, as opposed to an order, which is concrete. Service regulations must be in writing. And also the competence to issue service regulations is more restricted.

The Decree implementing the Military Criminal Code and the Military Disciplinary Act, *Rijksbesluit uitvoeringsbepalingen militair straf- en tuchtrecht*, provides that the competent authorities to issue service regulations are the Minister of Defence, the authorities he so designates and the military commanders who have the power to impose disciplinary sanctions and their commanding superiors. In a ministerial decree the Minister of Defence has designated the (other) authorities who are competent to issue service regulations, among which are also other civilians than the minister, such as the secretary-general of the Ministry of Defence, the directors-general at the ministry and the directors of the central organization of the ministry.[146]

VI. Possibilities for Sanctions

1. Disciplinary Law

a. Disciplinary Power and Disciplinary Measures

Disciplinary power and disciplinary measures are regulated in the Wet Militair Tuchtrecht (WMT). However, as we saw in passing above, there are certain general definitions to be

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[145] 'Onder dienstvoorschrift wordt verstaan een bij of krachtens algemene maatregel van Rijksbestuur of van bestuur dan wel een bij of krachtens landsverordening onderscheidenlijk landsbesluit gegeven schriftelijk besluit van algemene strekking dat enig militair dienstbelang betreft en een tot de militair gericht ge- of verbod bevat.'

[146] Article 4 of the Uitvoeringsregeling militair straf- en tuchtrecht 2000, ministerial decree of 22 December 1999, CST 99/011 7/029 1999003890, issued by the state-secretary of defence, not officially published, but contained in Van den Bosch and others, Militair straf- en tucht recht, vol. II, bijlage VIII, pp. 7-8/12.

found in the Wetboek voor Militair Strafrecht (WMSr) which are also applicable in disciplinary affairs.

b. Criminal Law and Disciplinary Law

In principle the disciplinary system is separate from the system of military criminal law. The criterion which the legislature has (ostensibly) adopted in order to keep a disciplinary offence distinct from a criminal offence, was that of (fear of) damage caused to the readiness to effectively carry out an operation or exercise of any branch of the armed forces.[147] The latter criterion is applied to criminal offences.

Although disciplinary and criminal offences are different things under Dutch military law, it can of course happen that a certain act constitutes a disciplinary offence but also a criminal offence.

In case of such a concurrence of disciplinary and criminal offences, the matter must be transferred to the public prosecution to be dealt with in the manner of criminal law. In case it only transpires after a disciplinary punishment has been imposed that the case involved a criminal offence, this will be taken into account when a punishment in the criminal case is imposed.

c. The Purpose of Disciplinary Law

The purpose of disciplinary law is to maintain and restore discipline. Although this obviously has ulterior motives, it is important to insist on this because of the separation of disciplinary law from criminal law. On the other hand, if it comes to other considerations than maintenance of or restoring order, such as considerations of mere effectiveness and efficiency, other measures than disciplinary measures are the right ones to use.

d. Disciplinary Measures

There are four types of sanctions: reprimand, fine, penal duties (translator: Dutch *strafdienst*) and confinement to the barracks (*uitgaansverbod*). There is no official hierarchy between these types of disciplinary punishment.

The reprimand is in writing (Article 42 WMT). The fine is of a minimum of NFL 2,50 and a maximum of NFL 100 per offence, with a maximum of NFL 200 per calendar month; except for disciplinary offences during international operations outside the Kingdom, when the maximum per offence is NFL 200 and the monthly accumulated maximum NFL 600 (Article 43 WMT).

The penal duties consist of the performance of services in accordance with rank outside the official working hours. The maximum is three hours per 10 working days. There is an accumulated maximum of performing such extra duties during no more than 15 days per calendar month; if this maximum is reached, the remaining extra duty hours will have to be postponed until the next month. (Article 47 WMT).

Confinement to the barracks consists of the duty to remain present in a military place determined by the commander; it may include the prohibition by the commander to visit certain buildings or premises. Confinement to the barracks can only be imposed for illicit absence and the refusal to obey an order. It can last no more than 4 consecutive days (Article 48 WMT). The punishment of confinement to the barracks can be combined with the punishment of penal duties.

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[147] Whether the legislature has been succesfull, is another matter.

[There are some data on the use of the respective sanctions in the various forces. Necessary to include?]

e. Disciplinary Law and the European Convention on Human Rights

Most problems issue from the fact that disciplinary measures are not always imposed by an independent court. But because ultimately there is an appeal to an independent court against imposed disciplinary sanctions, even if the imposition of a punishment would be problematic, there will be no infringement of Article 6 ECHR as the sanctions will ultimately be imposed by a court of law in accordance with this provision. That the procedures of military disciplinary (and criminal) procedure are in conformity with Article 6 ECHR has been the view of the courts in the Netherlands.[148]

The difficulty of imposing sanctions which are based on a rule which is too undetermined as to which behaviour it exactly sanctions (as may be the case in some other countries), has in the Netherlands in the main disappeared since the adoption of the present Act on military discipline, which specifically describes certain behaviour and conduct as infractions on discipline.

f. The Disciplinary Procedure and Legal Remedies

The procedure begins with the handing out of a written accusation to the suspect (Article 51 WMT). This must be done within 21 days after the fact occurred or (in some cases) has been discovered; this period is 60 days when it concerns a fact during an international operation outside the Kingdom and the commander and soldier are not in the same country (Article 53 WMT).

Although this is not explicit in the legislation,[149] the commander to whom the disciplinary delict has been reported does not have an absolute duty to proceed with handing out an accusation, which starts up the disciplinary procedure.[150] Here the principle that there is discretion to prosecute or not to prosecute, a general principle of criminal law in the Netherlands, has been drawn to its logical consequence in the field of disciplinary law: if there is discretion in whether to pursue criminal prosecution, then *a fortiori* there should be discretion in imposing disciplinary measures.

By way of preliminary inquiry, the commander may hear the accused, witnesses or experts (Article 61 WMT). At least twenty four hours must separate the moment at which the accusation was handed out from the beginning of the inquiry. The accused has a duty to appear at the inquiry. The inquiry is not public. The accused may at any time during the

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[148]There might theoretically be a problem as regards deprivation of liberty, which is not immediately decided upon within the terms of Article 5 ECHR by an independent court, but since the Engel case, this problem has in practice been removed. The military chamber of the District Court of Arnhem has deemed disciplinary proceedings not to be a criminal charge in the sense of Article 6 ECHR, Arrondissementsrechtbank Arnhem 14 March 1995, Militair Rechtelijk Tijdschrift 1995, 227 ff..; the Centrale Raad van Beroep, 28 September 2000, MRT 208-210 judged that the case law of the ECrtHR required a "serious criminal charge", which is not at issue in disciplinary affairs, and that the proceedings must be viewed in their entirety, for which the fact that in the end appeal to an independent court is guaranteed, is decisive.

[149]To the contrary: the Article 27 WMT makes it a disciplinary offence for a soldier not to take measures when a subordinate infringes or has infringed a rule of disciplined conduct. However, the measures which should be taken do not need to consist in reporting the offence to the commander; for instance, a warning may be a sufficient measure.

[150]See Coolen, Militair tuchtrecht, 3rd ed., Zwolle 2000, p. 145.

procedure seek the assistance of a so-called confidant, *vertrouwensman*,[151] who must as a rule be chosen from the military or civilian personnel of his own unit, although in special cases – for instance the small size of the unit or the special circumstances of the case - the commander may allow another person to act as confidant (Articles 56-59 WMT). Acting as a confidant in disciplinary proceedings is a service duty.
The commander must decide the case at the latest on the first working day after closing the inquiry. Also the commander must within 21 days since the accusation was handed out take a decision on the case - which time limit can be extended under certain circumstances, among which a suspension of the inquiry in accordance with the provisions of the WMT. If this period expires without a decision being taken, the procedure ends ipso iure (Article 54 (1) sub b, WMT).
Within five days after the written version of the decision has been delivered, a soldier who has been declared guilty has the right to complain of this or of the penalty imposed (not only the fact of the imposition of the penalty but also the modalities of its execution) to the commanding superior of the commander who decided the case in first instance. In principle the same procedure as in first instance applies, with slightly different time limits. No *reformatio in peius* is possible.
After the decision on complaint, appeal lies with the three-member military chamber of the district court at Arnhem (of which one member is a soldier, see above paragraph IV a). If the soldier is in the area of command of the Commandant der Zeemacht in het Caraïbisch gebied (CZMCARIB), the *Gerecht in eerste* aanleg, Court of First Instance, of the Netherlands Antilles or Aruba is competent. Also, if a mobile court has been established and the soldier is within the remit of this court, this mobile court shall be competent.
The right to appeal of the subordinate only exists against a declaration of guilt or an imposition of a punishment on the accused. Also the complaints superior, *beklagmeerdere*, has a right to appeal to the court against a decision in first instance of a commander if the subordinate has not made a complaint.
The inquiry at the court is public. The accused can again designate a confidant, who in appeal can also be an *advocaat*. Also the court can assign an *advocaat* as confidant to an accused even without him requesting so. There can be a *reformatio in peius*.
No appeal lies against the decision against the court. Nevertheless, the *procureur-generaal* of the Hoge Raad can lodge a request for so-called cassation in the interest of the law on points of law only. A decision of the Hoge Raad in these proceedings have no effect on the parties in the case.

g. Representation of the Armed Forces during Disciplinary Proceedings

There is no special office representing the armed forces during any stage of the disciplinary proceedings. The proceedings up to and including the decision on complaint against a disciplinary decision in first instance are so to say an 'internal' matter of the armed forces; so no formal representation of the armed forces is called for. On appeal at the court, the proceedings are really between the appellant and the commander who made the disciplinary decision. Therefore, there is no special role for the prosecution in military affairs, which is the public prosecutor of the district court of Arnhem, *officier van justitie*, except that the public prosecutor has the special right of putting forward his views on a case to the court (Article 91 WMT), which right he uses frequently.

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[151] Although the expression in the WMT refers to male persons, quite obviously the confidant can also be a woman.

h. Measures of Commendation

There is the possibility of being awarded military honours as a mark of distinction in accordance with rules established by royal decree, if a soldier has delivered special, or longstanding and honourable services. Also an extra-ordinary promotion can be made by way of reward for a very important feat of arms or other act or accomplishment by which he has distinguished himself especially. And finally a titular rank can be granted for having contributed in a special manner to the promotion of the interests of the armed forces (Article 130 Amar). Also there are commemorative medals awarded, especially after service in a major international military operation.

2. Military Criminal Law

a. General Issues

The *Wetboek van Militair Strafrecht*, Military Criminal Code (furthermore WMSr) which defines a number of offences apart from those in the common Military Code (*Wetboek van Strafrecht*). The *Wet militaire strafrechtspraak*, Act on Military Criminal Procedure, which gives special rules with regard to the prosecution and trial of military criminal offences.

It applies principally to soldiers ("militairen") in active service ("in werkelijke dienst"). This is the case for professionals on fixed term appointments and those for an indefinite period for the whole duration of their appointment. Reservists and conscripts are considered to be in active service under the circumstances summed up in Article 62 WMSr:

- upon their arrival at their destination when he is called into active service or has come into active service voluntarily, or he has reported for active service or been taken up into it, in both cases until departure for long furlough;
- for the duration of participation in a military exercise or in training or during any other military activity;
- when during long furlough or as a suspect is present in a military criminal case;
- when he undergoes punishment in a military establishment or on board of a military vessel.[152]

Article 65 WMSr extends the application of the military criminal code to acts perpetrated by prisoners of war (cf. Article 84 of the 1949 Geneva Convention on Prisoners of War).

Until 1963, Article 65 mentioned also "foreign soldiers (*militairen*) who, with permission of the military authorities, accompany or follow the armed forces on foot of war". This was deemed no longer appropriate under the modern relationships among allied forces. Instead in Article 60a WMSr it was determined that by royal decree foreign soldiers can be equated with Netherlands soldiers for the application of provisions to be determined by royal decree. So far no use has ever been made of this possibility.

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[152] WMSr, Article 62: De in artikel 60 no. 2 bedoelde vrijwilliger bij de krijgsmacht of de dienstplichtige wordt geacht in werkelijke dienst te zijn: 1 /. zodra hij, voor de werkelijke dienst opgeroepen of vrijwillig in werkelijke dienst komende, op de plaats van zijn bestemming is aangekomen, zodra hij zich voor deze dienst heeft aangemeld of zodra hij voor deze dienst is overgenomen, een en ander totdat hij met groot verlof vertrekt; 2 /. zolang hij deelneemt aan militaire oefening of militair onderricht, dan wel enige andere militaire werkzaamheid verricht; 3 /. zolang hij als vrijwilliger of dienstplichtige of als verdachte in een militaire strafzaak bij enig onderzoek tegenwoordig is; 4 /. zolang hij uniformkleding of het voor hem vastgestelde kenteken of onderscheidingsteken draagt; 5 /. zolang hij in een militaire inrichting of aan boord van een vaartuig der krijgsmacht straf ondergaat.

With regard to foreign soldiers two other provisions merit mention. Article 67a provides that an equation of foreign military ranks can be made by royal decree or on behalf of the King by the Minister of Defence. Article 75a specifies that a relation of superior and subordinate can exist with regard to foreign soldiers only in so far as this has been determined by royal decree or on behalf of the King by the Minister of Defence. Also no use has been made of these possibilities in practice.
Spiritual advisers (*geestelijk verzorgers*) (to wit Catholic chaplains, protestant ministers, humanistic counsellors and rabbis) are not *militair*, and are appointed as civilians, although under the laws of war they are considered to be members of the armed forces.
To the contrary, all violations of the laws and customs of war are adjudicated by the military chambers in first instance and on appeal, irrespective of whether the suspect is a soldier or a civilian (see below paragraph g, *in fine*).

b. Relation to General Criminal Law
The opening articles of the WMSr provide that in the application of the military code, the provisions of the code common criminal law apply. The common criminal code also applies to offences committed by soldiers which are not contained in the WMSr (Articles 1 and 2 WMSr).

c. Military Criminal Courts
Military courts are to dispense both military and common criminal law as regards soldiers. However, since 1991 these courts are basically regular courts which deal with cases against soldiers, and some (to wit, the district courts and high courts) have a member of the armed forces on the bench of the court as a 'lay judge'. For this reason and the reason that these courts apply not only common criminal law but also special military law, these courts are in legal parlance referred to as "military courts".
Criminal cases against soldiers (*militairen*) are dealt with in first instance by the *kantongerecht* at Arnhem (cantonal court – for minor offences) or *arrondissementsrechtbank* (district court – for all other offences) at Arnhem, where military cases are concentrated. Appeals against judgments of the *militaire* kantonrechter can be made to the military chamber of the district court Arnhem. Appeals against judgments in first instance of the district court can be lodged with the military chamber of the *Gerechtshof* Arnhem. In cassation the *HogeRaad* deals with all military criminal cases.
The *militaire kantonrechter* is an *unus iudex*, and also criminal cases before the arrondisementsrechtbank can, depending on the seriousness of the offence, be dealt with by an *unus iudex* (who is then called *militaire politierechter*). The *unus* is always a civilian judge. The military chamber of the district court is composed of three members: two civilian judges and one military member. The military chamber of the *Gerechtshof* Arnhem is composed in the same manner. The *Hoge Raad* has no military members. Military members of the courts are not a member of the judiciary in the sense of the Constitution.
The territorial competence of the military courts of Arnhem is unrestricted, unless the suspect is in the territory of the CZMCARIB; then the Court of First Instance of the Netherlands Antilles or Aruba is competent. This means that both the *militaire kantorechter* and the military chamber of the district court Arnhem can hold sessions abroad, as happens for the troops stationed in Germany. Also mobile courts can be established in areas where a state of emergency, *uitzonderingstoestand*, in the sense of Article 103 of the Constitution has been

declared or for trial outside the Netherlands.[153] This is supposed to be done only under special circumstances. This presumably implies that those special circumstances may legitimate further restrictions on fundamental rights than would be the case otherwise.

d. Special Rules with respect to Legal Procedure and the Sanctions System

The principle is that the ordinary Code of Criminal Procedure, *Wetboek van strafvordering*, applies in military cases, except where the Wet militaire strafrechtspraak (WMS) diverges there from (Article 1 (2) Wet militaire strafrechtspraak). One difference between the common procedure and the military procedure, is that the Code of Criminal Procedure in normal cases only applies to the Netherlands, whereas in military cases the Wet militaire strafrechtspraak extends its operation also to the other countries of the Kingdom for reasons of uniformity, which is desirable because soldiers may be stationed and moved between the various countries of the Kingdom.

As regards the investigation of criminal offences by soldiers, the Koninklijke Marechaussee is charged with the task of policing the armed forces with the attendant powers of investigation.[154] Apart from this, commanding officers have investigative powers when troops are outside the Kingdom and there is no other investigative authority is present.[155]

If the public prosecutor, *officier van justitie*, deems it necessary to prosecute a case, there shall first be a preliminary investigation which is conducted by a *rechter-commissaris*, who in military matters must be a member of a military chamber. Also the military member of a military chamber can be *rechter-commissaris* if the inquiry takes place mainly or entirely outside the Netherlands, or if the nature of the case is such that the president of the chamber (a civilian judge) deems it preferable to have it investigated by the military member. Such a soldier acting as *rechter-commissaris* does not have all the powers which a judge would have; in particular he cannot order the (temporary) deprivation of liberty of any person, because he is not a member of the judiciary (Article 29 (2) WMS).

Not only can a suspect be assisted by a barrister but also by a military officer, except in cassation at the Hoge Raad, where officers cannot act as counsel.

To the rule that the testimony of only one witness cannot be full proof, the WMS makes an exception with regard to declarations of a superior as to the violation of his order, factual insubordination against him, or mutiny against him (Article 31 (1) WMS).

As regards justification of an offence, Article 31 (2) WMS reverses the burden of proof for a guard on duty who has committed an offence. The guard who invokes a justification is assumed to have acted lawfully unless the opposite is made plausible. The reason for this is the fact that often the guard acts on his own without the presence of other witnesses.

In other respects the normal code of criminal procedure applies.

e. The Military Prosecutor

Since 1991 the competent prosecutor is the *officier van justitie* at Arnhem (before the decision whether to prosecute was taken within the armed forces and there was a special military prosecution). The *officier van justitie* at Arnhem is a civilian and owes his special role in military matters to the fact that military criminal cases are concentrated at the courts in

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[153] Article 10 WMS.

[154] Article 6 (4) Politiewet 1993.

[155] Article 59 WMS.

Arnhem. As stated above, in disciplinary cases he has no prosecuting role but an advisory one in cases of disciplinary appeal to court.

f. Justification by Superior Orders

As we discussed above (see paragraph IV,3) the WMT provides in Article 16 that a soldier does not act contrary to military discipline if the ordered conduct (*gedraging,* lit. behaviour) is unlawful or was in good faith considered to be unlawful by the soldier. The Military Criminal Code provides in Articles 131 and 132 that the soldier who disobeyed an unlawful order cannot be punished (131 WMSr); nor can he be punished if he thought it in good faith to be an unlawful order (132 WMSr). It is common understanding that Article 131 WMSr and Article 16 WMT in principle only grant the right not to obey an order, unless the carrying out of an order constitutes a criminal offence; in other words, there is a duty to disobey an order which if obeyed, would lead to a criminal offence.

Before saying a few words about superior orders in relation to the laws of war and warfare, it should be pointed out once more, that the lawfulness of an order includes the lawfulness under public international law. Thus there is a fair amount of case law on the so-called SITE guards who refused to do guard duties on military sites where presumably nuclear weapons were kept, and on the so-called "total objectors", *totaalweigeraars*, who refuse any cooperation with the armed forces and therefore do not wish to cooperate in proceedings with a view to having their conscientious objections recognized. The latter would let it come to the order to appear on the premises, which they would refuse. In all of these cases the Hoge Raad in highest instance (and the then *Hoog Militair Gerechtshof*) have considered the question whether the relevant orders were in agreement with general principles of international law, customary public international law, treaty obligations such as the UN Charter, the Non-proliferation Treaty, the various Geneva Conventions and Protocols, the rules and principles of Nuremberg and Tokyo, the laws and customs of war and warfare and other international humanitarian law.[156]

As regards the issue of superior orders in relation to the laws and customs of war, the relevant provision in the Laws of War Act (Wet Oorlogsstrafrecht) is Article 10 (1):

> With regard to facts intended in Article 8 and 9 [violations of the laws and customs of war] the Articles 42 and 43 [the defence of superior orders and of carrying out of the laws] of the *Wetboek van Strafrecht* [Criminal Code] do not apply.[157]

Contrary to what the text of this provision seems to suggest, the legislature merely intended to state that a superior order cannot justify the perpetration of one of the crimes intended in the

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[156]HR 4 mei 1981, NJ 1981/464; HR 29 november 1983, NJ 1984/599; HR 18 juni 1985, NJ 1986/58; HR 27 mei 1986, NJ 1987/413;HR 23 december 1986, NJ 1987/508; HR 24 maart 1987, NJ 1988/82.

[157]Article 10 WOS: '1. Ten aanzien van de feiten, bedoeld in de artikelen 8 en 9, zijn de artikelen 42 en 43 van het Wetboek van Strafrecht niet van toepassing.' Article 42 Wetboek van Strafrecht [Criminal Code]: 'A person who commits an offence in carrying out a legal requirement is not criminally liable.' Article 43 Wetboek van Strafrecht: '(1) A person who commits an offence in carrying out an official order issued by a competent authority is not criminally liable. (2) An official order issued without authority to do so (*ultra vires*), does not remove criminal liability unless the order was assumed by the subordinate in good faith to have been issued with authority to do so and he complied with it in his capacity as subordinate.'

Act. It did not wish to make it entirely impossible to plead the obedience in good faith of superior orders as a mitigating or exculpating circumstance, although the language of the provision suggests otherwise. This has been one of the two objections to the provision voiced in the literature. The other objection is that Article 10 (1) suggests an unjustifiable dualist approach to international law. In a monist view Article 10 (1) would allegedly be superfluous, at least in the sense in which it was intended.
There is some case law on the superior orders exemption of the *Bijzondere Raad van Cassatie*, Special Court of Cassation, which dealt with war crimes (in the broadest sense of the word) after the Second World War.
In the *Zühlke* case,[158] the *Bijzondere Raad van Cassatie* considered the meaning of Article 8 of the IMT Neurenberg Charter, which provides that superior orders do not free the defendant from responsibility, but may be a mitigating circumstance with a view to punishment. The *Bijzondere Raad* held that 'this Article provides nothing for which the Netherlands laws would have to yield as lower ranking law.' It stated that Article 8 referred only to major war criminals and did not express a principle of public international law of wider scope; 'the court is therefore called to judge the appeal made by Z to superior orders (*ambtelijk bevel*) by the standards of written and unwritten law prevailing in the Netherlands.'
In another case the *Bijzondere Raad van Cassatie* judged of a low ranking German policeman who had carried out an order to set an object to fire, that his awareness of the criminal character of his act should not have been judged present.[159]

g. Sanctions for Non-compliance with International Humanitarian Law
This is mainly done in the Laws of War Act, *Wet Oorlogsstrafrecht*, which we mentioned above. This act is – due to its legislative history - legally a very complex instrument, which has in recent years given rise to various quite fundamental legal questions. The Act both creates a number of offences, but is also concerned with determining jurisdiction over these and various other types of offences during wartime which are defined in other acts, such as the acts implementing the genocide and torture treaties.
For the purpose of sanctioning non-compliance with the international humanitarian law, Articles 8 and 9 are important. Article 8 provides that "the person who is guilty of violating the laws and customs of war" shall be punished with imprisonment of a maximum which varies between 10, 15, 20 years or life long imprisonment, or a fine of the highest category. [160]

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[158] BRvC, 6 December 1948, NJ 1949, 85.

[159] BRvC, 6 July 1949, NJ 1949, 540.

[160] Article 8, Wet Oorlogsstrafrecht: 1. Hij die zich schuldig maakt aan schending van de wetten en gebruiken van de oorlog, wordt gestraft met gevangenisstraf van ten hoogste tien jaren of geldboete van de vijfde categorie.
2. Gevangenisstraf van ten hoogste vijftien jaren of geldboete van de vijfde categorie wordt opgelegd: 1/. indien van het feit de dood of zwaar lichamelijk letsel van een ander te duchten is; 2/. indien het feit een onmenselijke behandeling inhoudt; 3/. indien het feit inhoudt het een ander dwingen iets te doen, niet te doen of te dulden; 4/. indien het feit plundering inhoudt.
3. Levenslange gevangenisstraf of tijdelijke van ten hoogste twintig jaren, of geldboete van de vijfde categorie wordt opgelegd: 1/. indien het feit de dood of zwaar lichamelijk letsel van een ander tengevolge heeft dan wel verkrachting inhoudt; 2/. indien het feit inhoudt geweldpleging met verenigde krachten tegen een of meer personen dan wel geweldpleging tegen een dode, zieke of gewonde; 3/. indien het feit inhoudt het met verenigde krachten vernielen, beschadigen, onbruikbaar maken of wegmaken van enig goed, dat geheel of ten dele aan een ander toebehoort; 4/. indien het feit, in het voorgaande lid bedoeld onder 3/ of 4/, wordt gepleegd met verenigde krachten; 5/. indien het feit uiting is van een politiek van stelselmatige terreur of wederrechtelijk optreden tegen

Article 9 provides that the same sanctions apply to the person who intentionally allows a subordinate to commit a crime in the sense of Article 8.[161]
These provisions go further than is strictly required to the extent that they make not only serious violations, but *all* violations of international humanitarian law an offence; also they are in national legal terms all considered to be a serious offence, *misdrijf*. Moreover, the expression "the laws and customs of war" comprises both violations of international humanitarian law *stricto sensu* and the law concerning means of warfare.
As to jurisdiction, there are two contradictory provisions: one which seems to restrict the scope of the Act to wars, international armed conflicts, international operations and civil wars in which the Netherlands is involved,[162] whereas another seems to enunciate the principle of universal jurisdiction for violations of the laws and customs of war.[163] In 1997 the matter was decided in favour of the universality principle on the basis of the legislative history – basically the insertion of Articles 3, 8 and 9 at a very late stage in the legislative process.[164] In the same case, the Hoge Raad also decided the controversial issue of which court is competent to hear cases under Article 8 to the advantage of the military courts, instead of the normal criminal courts, even when it concerns a civilian.

h. Ratification of the Rome Statute of the International Criminal Court
The Netherlands has ratified the Rome Statute on 7 July 2001. It has been approved by the States General under Article 91 (3) with a two thirds majority.[165] The Rome Statute was judged to diverge from the provisions of the Constitution on the immunity of various holders of political office, to wit the King, ministers and members of parliament. The Netherlands has made no reservations to the Statute of the ICC.

VII. Regulations governing Guard Duties

1. Powers of Guards towards Military Personnel as well as towards Civilians
As we indicated above, the general rules regarding guard duties concern the functional superiority of guards in the execution of their tasks. Also there is the exceptional provision on the value to be attached to the testimony of a guard in criminal cases, which implies a reversal

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de gehele bevolking of een bepaalde groep daarvan; 6 /. indien het feit inhoudt een schending van een gegeven belofte, of een schending van een met de tegenpartij als zodanig gesloten overeenkomst; 7 /. indien het feit inhoudt misbruik van een door de wetten en gebruiken van de oorlog beschermde vlag of teken dan wel van de militaire onderscheidingstekenen of de uniform van de tegenpartij.

[161]Article 9, Wet Oorlogsstrafrecht: Met gelijke straf als gesteld op de in het voorgaande artikel bedoelde feiten wordt gestraft hij die opzettelijk toelaat, dat een aan hem ondergeschikte een zodanig feit begaat.

[162]Article 1 Wet Oorlogsstrafrecht as transpires clearly from the legislative history, and as confirmed by the Hoge Raad 11 november 1997, NJ 1998, 463.

[163]Article 3 sub 1° Wet Oorlogsstrafrecht, which provides that the Netherlands criminal law applies to "every person who perpetrates one of the crimes defined in Articles 8 and 9".

[164]Hoge Raad 11 november 1997, NJ 1998, 463.

[165]Staatsblad 2001, 343.

of the burden of proof (Article 31 (2) WMS). There are no further rules concerning guards, except legislation on the use of force by guards.

2. The Rules concerning the Carrying and the Use of Arms and other Military Equipment

A guard's duties with regard to the use of arms are at present codified in the *Rijkswet geweldgebruik defensie-personeel in de uitoefening van de bewakings- en beveiligingstaak* (Act for the Realm on the use of force by defence personnel in the exercise of guard and security tasks). [166] It states that in the course of the lawful exercise of military guard duties and security tasks, a member of the armed forces and personnel in the service of the Ministry of Defence may resort to the use of violence if this is justified bearing in mind the dangers of the use of violence, and if the objective cannot be attained in any other manner. The use of force must be preceded by a warning if possible. The exercise of the power to use force must be moderate and proportional to the objective. The competence to use force applies only to objects indicated by the Minister of Defence.[167] An *algemene maatregel van bestuur* (Order in Council) regulates the use of force in the sense of the Act.

This Order in Council is the *Besluit geweldgebruik defensiepersoneel in de uitoefening van de bewakings- en beveiligingstaak* (Decree on the use of force by defence personnel in the exercise of guard and security tasks). This Decree defines the use of force as "any compelling power of more than slight significance employed against persons or objects" and "includes the threat of force" (Article 1 (1 sub c) and 1(2)). It allows the use of force only by those who have the lawful competence to exercise the relevant means and who have been trained in the use of that means (Article 3). It determines that the only means of force allowed are: physical force, a fire arm, a fire arm as a thrusting or stabbing weapon, a truncheon, a patrol dog, a water cannon, or handcuffs (Article 6). The use of force must always be preceded with a warning - in the case of an aimed shot, a warning shot which should avoid harm to persons or goods (Article 5). The least forceful means possible must be used, and the attendant risks must be restricted as much as possible (Article 7). The use of a water cannon is allowed only at the explicit order of a superior (Article 6 (3)), whereas the use of a patrol dog is permitted only under the supervision of a special K-9 officer (hondenbegeleider) (Article 6 (2)). When a guard acts in the presence of a superior, he may not use force unless at the previous and explicit order of this superior. The superior is to indicate the means of force to be used (Article 4).

There are special instructions as to the use of fire arms (Articles 9 to 11) and the cases in which handcuffs can be used (Article 12). The use of fire arms is only allowed against a person who may reasonably be assumed to carry fire arms which are ready for use and which

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[166] Staatsblad 1999, 12.

[167] This has been done in a ministerial Decree for the Realm (ministerieel rijksbesluit) of the Minister of Defence, 10 November 1997, nr. CWW88/014 97003315 (Stcrt. 1997, 220). Article 1 of the decree concerns objects with a permanent character. These are mentioned in an appendix to the decree. It involves amongst others barracks and premises, open terrain, and certain buildings, both in the Netherlands and in the Netherlands Antilles and Aruba. It also concerns certain mobile weapon systems, aircraft, and ships. Article 2 concerns objects which require guarding and security measures of a nature that they require the competence to use force only temporarily (i.e. no longer than 12 weeks). Examples might be ammunition stored temporarily in a harbour, a temporary command post, or a crashed airplane. The legal basis of this ministerial decree was Article 1 sub a of the Besluit geweldgebruik krijgsmacht in de uitoefening van de bewakings- en beveiligingstaak. This provision has, however, been moved to Article 1 (3) of the Rijkswet. The explanatory memorandum of the new Besluit states that the ministerial decree must now be considered to be based on the Rijkswet (Staatsblad 2000, 337, p. 8). But a provision to this effect cannot be found. in the Rijkswet and Besluit.

will be used against persons, or who will use other life threatening violence against persons. Also fire arms can be used against a person who may reasonably be assumed to be committing a serious offence against an object which involves a vital interest of the armed forces (Article 9). In using fire arms, three conditions must be satisfied: serious injuries or worse must be avoided to the extent possible; if possible, shots should be aimed at the legs; risks for third persons must be avoided to the extent possible (Article 10). A person may raise/ take up [? Language editor] fire arms only if a situation in the sense of Article 9 may reasonably be expected to arise; as soon as it no longer occurs, the weapon must be lowered/ put away [? language editor] (Article 11).
The Decree does not apply to international armed conflict and internal conflict in the sense of the common Articles 2 and 3 of the Geneva Conventions and the Additional Protocol's Article 2. In such cases the instructions of the Decree "can be an obstacle to a response which is adequate to the circumstances." [168] Then those instructions apply which are formulated for the specific circumstances of the conflict, e.g. Rules of Engagement.
The official Explanatory Memorandum to the Decree specifies that normally the regulations of the Decree will apply only within the Kingdom. The extra-territorial effect of these rules (their applicability to Dutch soldiers abroad) depends on the circumstances. The applicable instructions on the use of force are determined when the decision to deploy abroad is taken, but the form this takes depends on the circumstances. The general principle of public international law is that the law of the host country is to be observed. However, by treaty agreement, the rules of the sending state may apply. Special instructions as formulated in rules of engagement can also be made by the competent authority, as in UN peace missions. When the government decides to participate in an international operation, the rules of engagement which result from the mandate of the international mission are reviewed for their conformity with the underlying principles of the Rijkswet and Besluit, especially the principles of proportionality and subsidiarity. [169] It is the view of the government that if no agreements have been made regarding the use of force, which may happen in the cases of exercises or visits to harbours, the military who are outside the Kingdom may only use the right to self defence allowed under public international law for the protection of persons or vital objects within the boundaries set by the principles of subsidiarity and proportionality. [170]
For the use of force in emergency situations in which, pursuant to the Oorlogswet Nederland, military authorities exercise broad powers of regulation and administration, there is a separate instruction.[171]

3. Performance of Guard Duties by Soldiers of Foreign Armed Forces

We have described the possibility of bi-national guards in the 1 (NL/G) Corps in accordance with Article 10 of the relevant Convention (see above paragraph V, 2). This will lead to a change in the legislation on the use of force by guards of military objects, in order to grant foreign soldiers the same competence as Dutch soldiers on guard.

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[168] Explanatory Memorandum to the Decree, Staatsblad 2000, 337, p. 9.

[169] Staatsblad 2000, 337, p. 7-8.

[170] Idem, p. 8.

[171] Besluit geweldgebruik bij de uitoefening buitengewone bevoegdheden, Staatsblad 1997, 173.

Formally, the *Rijkswet geweldgebruik defensie-personeel* will be replaced by a new Rijkswet geweldgebruik bewakers militaire objecten, *Act for the Realm on the use of force by guards of military objects*.[172] Substantively, the only change is that also foreign soldiers will acquire the powers to use force under the circumstances described in the Act and the Decree based thereon. Under the present Rijkswet only "*militairen*" (soldiers) and designated civilians were mentioned as the ones to use legitimate force. The bill extends the act's scope to soldiers who are members of foreign armed forces who have been so designated by the minister of Defence and who for the purpose of guard and security duties are under the command of a member of the Netherlands armed forces or a civilian of the ministry of Defence. The designation is only possible pursuant to a treaty or decision of an international organization.[173],[174]

VIII. Legal Reforms with respect to Multinational Operations and Structures

1. Pertinent Legislation

Since 1990, two emandations of legislation were prompted by the increased international activity of the armed forces. Firstly, the Constitution was revised in July 2000 to include a number of specific references to the "maintenance and promotion of the international rule of law" and to create a duty of the government to provide information to Parliament on decisions to participate in international operations. Secondly, in 1999 a revision of the military disciplinary and criminal codes from the beginning of the 1990's was evaluated, in which framework some changes were made in the light of the experience in international operations. We first discuss the amendments to the Constitution.[175]

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[172]Kamerstukken 27624.

[173]Kamerstuk 27 624, nrs. 1-2, Article 1, 1.

[174]The term "*militairen*" refers to "soldiers" in the sense of the WMSr, which in Article 60 gives a definition which is taken to be the definition of the word as used throughout the military legislation. The present Rijkswet does not say so explicitly, but this is common understanding. It would, hence, seem to be possible to make the present Rijkswet applicable to foreign soldiers on the basis of a royal decree in the sense of Article 60a WMSr. But this has not been done. The minister explained this in response to questions on the pending bill by stating that there is no objection against not using the possibility of Article 60a WMSr, because the NATO Status of Forces Agreement imposes the duty for foreign armed forces to respect the laws of the host state and for to sending states to take necessary measures in this respect. With regard to the sanctioning of the duties on the use of violence, this is a satisfactory answer. However, it is possible under Article 60a WMSr to extend the term "*militair*" to foreign soldiers in precisely the same manner as the act of parliament does now, and determine that the rules established by and pursuant to the *Rijkswet* apply also to foreign soldiers designated by the minister of Defence pursuant to a treaty or a decision of an international organization. In this respect it should be noted that Article 60a WMSr was not intended to be restricted to the sphere of military criminal and disciplinary law, and until it was taken up into the WMSr existed for precisely this reason as a separate Article IV in the Rijkswet 4 July 1963, Stb. 1963, 295.

[175]For a discussion of the earlier proposals for reforming the constitutional provisions on defence, M.J.J. Van den Honert De regering heeft het oppergezag over de krijgsmacht, in: Militair Rechtelijk Tijdschrift 1990, 10-22; on the present provisions when still pending in parliament, E. Soetendal, Boeiend en geboeid, enige beschouwingen over de wijzigingen van de defensiebepalingen in de Grondwet, in: Militair Rechtelijk Tijdschrift 1997, 285-297.

The amendment of the Constitution specified the "maintenance and promotion of the international rule of law" as a task of the armed forces in Article 97:

> 1. For the purpose of the defence and the protection of the interests of the Kingdom, as well as for the maintenance and promotion of the international rule of law, there shall be armed forces.

The reasoning behind the insertion of the new provision was that the existent provisions were too general to cover international military cooperation. A general provision on the policy objective of developing the international legal order existed, but it did not refer to any particular role of the armed forces in this respect. The other provisions mentioned the defence of the independence and territorial integrity of the Realm and the State's interests.[176] This, however, has not prevented the active engagement of troops in international conflicts which did not immediately affect the independence of the Realm.
The extent to which the formulation contained in the new Article 97 really grants competence to involve the armed forces in international operations is questionable, as it seems primarily merely to formulate the ends for which the armed forces exist.
Previously, there existed legislation which in principle enabled the involvement of draftees in international operations under the aegis of the UN. The Hoge Raad decided that the existent general legislative provisions prevented the sending of draftees against their will to such operations (UNIFIL-judgment). The relevant legislation has been superseded by a Framework Act on Military Service (Conscription) [Kaderwet Dienstplicht]. This Framework suspends the calling into active service of conscripts, and restricts the calling into active service - under normal circumstances - to active service for the purpose of training exercises only (Article 18 Kaderwet).[177] This implies that under such circumstances a draftee cannot be sent abroad (for purposes other than such training exercises). This is confirmed by the legislative history of this provision. An amendment to the effect that draftees could also be sent abroad under normal circumstances was rejected.[178] Thus, sending conscripts abroad is allowed only under special circumstances. The calling into active service under these special circumstances takes place by Royal Decree, which is accompanied by a bill introduced in Parliament for confirmation of the decree. There is no specific legal basis for sending professionals abroad. There is only the general basis in Article 19 (2) of the Algemeen militair ambtenarenreglement (Amar) which imposes the duty to fulfil the function assigned to him. Presumably, professionals are understood to volunteer to any military service. As we already noticed above, the *Centrale Raad van Beroep*, the court of highest instance dealing with the legal status of soldiers, has deemed even the previous constitutional provisions – which did not yet include a reference to the maintenance of international legal order - sufficient for

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[176] In the pre-July 2000 version, Article 97 (1) read: "All Dutch nationals who are capable of doing so shall have a duty to cooperate in maintaining the independence of the State and defending its territory;" and Article 98(1) "To protect the State's interests, there shall be armed forces, which shall consist of volunteers, and which may also include conscripts."

[177] Art. 18 (1): "De dienstplichtige is in gewone omstandigheden uitsluitend verplicht tot het vervullen van werkelijke dienst voor opleiding en oefening alsmede voor herhalingsoefeningen."

[178] Kamerstuk [Parliamentary Documents] 24245, nr. 12; Handelingen TK [Minutes of the Proceedings of the Lower House] 1995-1996, 91-6044.

sending them against their will on UN missions; refusing to do so is a reason for dismissal from the service.[179]

The other constitutional provision which was introduced as Article 100, concerns the position of the government towards parliament. It provides that the government shall provide prior information to the States General concerning the deployment or making available of the armed forces for the maintenance or promotion of the international rule of law.[180] This includes providing information concerning the engagement or making available of the armed forces for humanitarian assistance in cases of armed conflict. We already discussed this provision above in paragraphs I and II, 2, c.

In 1990 a general revision of the military disciplinary and military criminal codes took place. In 1992/1993 an evaluation of the revised codes was undertaken, which led to a number of changes taking effect in 1999.[181] Some of these concerned the possibilities of investigation and prosecution and punishment of infringements of military criminal and disciplinary order in international contexts.
This refers for instance to the time limits within which an act can be prosecuted (extended to 60 days, see the new Article 53 (3) WMT). The reason for this provision was that in operations in which only a small contingent or even only some individual officers or soldiers participate, there are no persons with investigative and/ or prosecuting powers in the contingent and have to be flown in.[182] Another new provisions concerned the possibility to double the normal fines when on mission abroad. (Article 43 (3 and 4) WMT). This is because some other disciplinary measures cannot be effectively imposed. This is for instance the case with the prohibition to leave the premises is not a realistic sanction, due to for instance a suspension of normal working time limits which is usual during international operations; also the supplementary premiums on wages which soldiers earn by being on a mission abroad, reduces the deterrent effect of the standard level of fines.[183]
The duty to comply with service regulations (*dienstvoorschriften*, see below) has been broadened in cases of international operations in the disciplinary code (Article 18 (2) WMT). Previously, service regulations were only to be complied with abroad while off duty when special circumstances so required.

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[179]Centrale Raad van Beroep, 7 September 2000, TAR (Tijdschrif voor Ambtenarenrecht) 2000, 1444; commented and criticized in L.F.M. Besselink, De Constitutie en uitzending van militairen voor vredeshandhaving. In: Tijdschrift voor Ambtenarenrecht TAR, juni 2001 pp. 295-306.

[180]Previously, Article 100 read: "Foreign troops shall not be employed other than pursuant to an act of Parliament." This was understood to refer to the engagement of foreign nationals as mercenaries or as a foreign legion. The provision has not been retained.

[181]See on this report, D.B. den Hoedt, Het militaire tuchtrecht, theorie om praktijk, Militair Rechtelijk Tijdschrift 1993, 177-193; idem, Evaluatie bedoelingen, MRT 1993, 283 ff.; P.Th. Hebly, Evaluatie van een evaluatie, naar aanleiding van een rechtsvergelijking van het militair tuchtrecht van Nederland en Duitsland, MRT 1993, 273-283.

[182]See Toelichting bij Nota van wijziging [Explanatory Statement to the Memorandum of amendment], 25 454 nr 6.

[183]Tweede Kamer, 1996–1997, 25 454 (R1595), nr. 3 p.10.

Finally, a new Article 5a WMT extended the disciplinary rules with which Dutch soldiers have to comply, to acts perpetrated against foreign military men and military objects. It does so by stating that, during the time that a Dutch soldier forms part of an international military cooperative entity (*internationaal militair samenwerkingsverband*) the definition of "soldier" (*militiar*) includes also the foreign soldier belonging to that international military entity; under such circumstances also the definition of "armed forces", *krijgsmacht*, includes the relevant international military cooperative entity.

2. Probability of Future Reforms

Except for pending legislation on the use of violence by multi-national guards, no enactment of special legislation pertinent to multinational military units or operations is envisaged at the moment. There has been a suggestion that the procedure of Article 100 should lead to an Act of Parliament to regulate the moment and manner in which information under this provision is to be provided to the Houses of Parliament (Bakker committee)[184], but this has not been followed up so far. At the moment most criteria for sending troops abroad are governed by a set of guidelines laid down in a letter of the government to the Lower House, the so-called Toetsingskader uitzending strijdkrachten [Framework for Decision-making for Sending the Armed Forces Abroad], which has recently been amended in the light of recent experience.[185] The formalization of this framework, which extends beyond the scope of Article 100 of the Constitution, into legislation has, however, not been pursued further either.

3. Academic Discussion

The law concerning the armed forces is not considered a field of intense academic study outside the circle of those immediately involved with the armed forces. The exception is the special chair in military law at the University of Amsterdam, established by the law faculty under the aegis of the Koninklijke Vereniging ter Beoefening van de Krijgswetenschap [Royal Society for the Practice of Military Science], for which purpose this society receives a subsidy from the Ministry of Defence.[186] In general one may say that the only more widespread academic discussion which has arisen, was during the period of the debates on the deployment of the Pershings; after 11 September, perhaps the academic interest in the legal aspects of international military operations revives. There is, however, a relatively broad interest among international lawyers in humanitarian law and more recently also criminal lawyers, due to the establishment of the various international tribunals. The issue of multinational military cooperation in the form of multinational military units has drawn relatively little interest in academic circles.[187] This may also be caused by the fact that this form of military cooperation is based on agreements which have not been published and are –

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[184]Report of the *Tijdelijke Commissie besluitvorming uitzendingen,* (Bakker Committee), Tweede Kamer, vergaderjaar 1999–2000, 26 454, nrs. 7–8, p. 494-495, recommendation 11 to 18; see on these recommendations Volkskrant, 30 September 2000, p. 15.

[185]Kamerstukken II 1994/95, 23 591, nr.5; revised 2001/2002, 23 591, nr. 7.

[186]See Kamerstuk 26800 X, nr. 3 p. 26, d.d. 21 September 1999; and Bijlage [appendix] 6, of the Budget for Defence 2001, kamerstuk 27 400 nr 3 , p. 13.

[187]The exception is a thematic issue of the Militair Rechtelijk Tijdschrift of 1995, though mainly with contributions written by practitioners.

sometimes unjustifiably – considered to be mere administrative agreements which do not create legal obligations under public international law. The involvement in multinational units and operations in UN cum NATO contexts has drawn political attention, but there has been relatively little involvement by lawyers.

IX. Select Bibliography

1. Pertinent Legislation

Primary legislation and most of the secondary legislation which is officially published can be found at the internet-site www.overheid.nl/wetten/index.html. However, many ministerial regulations of the Minister of Defence and state secretary for Defence are not officially published.
Standard printed legislation is in the following two titles:

Militair straf-, strafproces- en tuchtrecht: Wetboek van Militair Strafrecht; Wet Militair Tuchtrecht; Wet Militair Strafrechtspraak. Edited by G.L. Coolen. 2000, 11th ed., up to date to 1 January 2000, Deventer: W.E.J. Tjeenk Willink. Series: Nederlandse wetgeving : editie Schuurman & Jordens ; vol. 81,
315 p. ISBN: 90-271-5142-3

Militair ambtenarenrecht; Militaire ambtenarenwet 1931; Wet voor het reservepersoneel der krijgsmacht; Wet immunisatie militairen. W.M. Schwab (ed.), 2002, 5th ed.., updated until 15 November 2001, Alphen aan den Rijn : Kluwer, Series:Nederlandse wetgeving : editie Schuurman & Jordens ; vol. 177, 358 p, ISBN: 90-14-07509-X

The parliamentary history of primary legislation in the field of military disciplinary and criminal law is printed in:

Parlementaire geschiedenis van het militaire straf-, strafproces- en tuchtrecht / G.L. Lindner, Volume I: Militair tuchtrecht; Volume II: Militair strafrecht;Volume III: Militair strafprocesrecht. 1992. Arnhem: Gouda Quint, 233 + 244 + 226 pp.

2. Books and Articles

A main text on military disciplinary and criminal law is:

Militair straf- en tuchtrecht, Th.W. van den Bosche et al., 1990-..., Arnhem: Gouda Quint, loose-leaf

The most recent standard textbooks are:

Coolen, G.L., Militair tuchtrecht, 3rd rev. ed., Zwolle : Tjeenk Willink, 2000. XVI, 259 p.

Coolen, G.L., Militair straf- en strafprocesrecht, 3rd ed., Zwolle : W.E.J. Tjeenk Willink, 2000. XVII, 242 p.

Coolen, G.L., Humanitair oorlogsrecht, Deventer : W.E.J. Tjeenk Willink, 1998. XVI, 211 p.

Coolen, G.L, Hoofdzaken van het militaire ambtenarenrecht, 4th ed., Deventer : Tjeenk Willink, 2001. XVII, 280 p.

Most articles on military law and relevant military case law is published in:
Militair-Rechtelijk tijdschrift, published since 1905 by respectively the Ministry of the Navy, the Ministry of War and since 1959 by the Ministry of Defence (Ministerie van Defensie), The Hague Staatsuitgeverij. It appears 10 times a yearly. [Usually abbreviated to MRT]

A digest of case law in military criminal law published in the MRT is:

Uitspraken militair strafrecht 1923-1979, gepubliceerd in het Militair-rechtelijk tijdschrift. Collected by Th.W. van den Bosch, A.E.L.M. Fontijn et al..1981, Zwolle: Tjeenk Willink. viii, 358 p. ISBN: 90-271-1784-5