

THE NETHERLANDS AND NATO

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A. Joining NATO: Constitutional Questions and Parliamentary Involvement

1. The Relation between the Legal Order of the Netherlands and the International Legal Order

In order to understand the relationship between the Netherlands and NATO, one should be aware of the general, somewhat exceptional, relationship this country has with international law and international institutions. Traditionally, the Netherlands has an open attitude towards the international legal order. Its culture of global merchandising ever since the 17th century defined its position in the world and allowed for other (cultural) influences to be easily accepted by the Dutch. Some claim that the open attitude may even be a sign of a lack of national sentiments, and indeed, the symbols of national identity (such as the flag or the national hymn) are perhaps less cherished than in other countries. Joseph Luns, Minister for Foreign Affairs from 1956-1971 and later Secretary General of NATO, used to joke that the open attitude simply follows from the fact that The Netherlands as a small country has a relatively large ‘abroad’. In any case, it is generally held that the strong support for international law follows from a combination of the fact the Dutch are a law-abiding people but at the same time – as a small trading country with insufficient individual military capacity – need the protection of international rules.¹ The openness of the Netherlands’ constitutional order is part and parcel of the domestic legal culture and explains the limited discussion (or even the absence of a real debate) on this issue. A second explanation can be found in the fact that many constitutional practices are not formally laid down in the Constitution.² Even the membership of the European Community and the subsequent case law of the European Court of Justice on

¹ See more extensively: H.G. Schermers, “Netherlands”, in F.G. Jacobs and S. Robberts, *The Effects of Treaties in Domestic Law*, London: Sweet & Maxwell, 1987, pp. 109-122.

² L.F.M. Besselink, 2005, *De invloed van Europeanisering op de constitutionele verhoudingen in Nederland*, *Beleid en maatschappij* 32(1), pp. 45-55

direct effect and supremacy of Community law has not been able to seriously stir up the *communis opinio* on this issue.

The international relations are regulated in Article 90-96 of the Netherlands Constitution (*Grondwet*). It is characteristic of the Constitution that the first provision in this section does not concern the national, but the international legal order. Article 90 provides:

“The Government shall promote the development of the international legal order”.

This provision was included in the Constitution in 1953, but in fact codified the traditional view of The Netherlands as forming part of a global legal order.³ The Constitution of 1922 already contained a similar provision.⁴ Provisions with a similar reference to the development of the international *legal* order are indeed scarce and may only be found in the Constitution of Surinam.

The Kingdom of The Netherlands currently consists of the territory in Europe, but also of the Netherlands Antilles and Aruba. Thus, the ‘state’ that forms part of the international legal order is the Kingdom of The Netherlands, including the overseas territories. The Kingdom may become party to international agreements, not its separate parts. Treaties are concluded by the Crown and are published in the “Tractatenblad”. With regard to the European Communities, the Netherlands – in a special Protocol – claimed an exception to the general rule of international law (reflected in Article 299, par. 1 EC) that the Treaty shall apply to the territory of the entire Kingdom. Ratification originally was done for the European part of the Kingdom and for Netherlands’ New Guinea (hence, not for Surinam and the Netherlands Antilles). These days, only The Netherlands Antilles and Aruba form part of the Kingdom of The Netherlands. The North-Atlantic Treaty also applies to the European territory of the Kingdom only as its geographical scope is limited to Europe, North America, and “the territory of or on the Islands under the jurisdiction of any of the Parties in the North Atlantic area north of the Tropic of Cancer” (compare Articles 5 and 6).

³ See on Article 90: L.F.M. Besselink, “The Constitutional Duty to promote the Development of the International Legal Order: The Significance and Meaning of Article 90 of the Netherlands Constitution”, *Netherlands Yearbook of International Law*, 2003, pp. 89-138.

⁴ Article 58: “The King shall have supreme authority over foreign affairs. He shall promote the development of the international legal order”.

In line with its general open attitude, the Constitution provides that treaties and decisions of international organizations form part of the domestic legal order without a need to be adopted or transferred. Article 93 provides:

“Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published”.

Yet, the limits of this provision are clear. First of all, not all rules and principles of international law are covered by this provision. While one could argue that, in a monist system, it does not make sense to differentiate between treaty law and customary law; the implication of Article 93 is that only *written* international law in the form of provisions of international agreements and decisions of international organizations enjoy automatic validity in the domestic legal order. In 1959, the Dutch Supreme Court (the *Hoge Raad*) ruled in the *Nyugat*-case that the explicit reference to treaties and decisions of international organizations in the Constitution meant that *a contrario* these have a different status than customary rules.⁵ At the time of the constitutional modification in 1983, this restrictive interpretation was explicitly taken over by both the Government and Parliament. And, indeed, in 2001, the Supreme Court (*Hoge Raad*) ruled that prosecution of the Surinam army leader, Mr. Bouterse, was not possible in The Netherlands because a written rule of domestic law (*in casu* the principle of legality in criminal procedural law) could not be set aside by an unwritten international rule (*in casu* the prohibition of torture, which at the time of the crime in 1982 was not yet codified).⁶

The second restriction in Article 93 can be found in the reference to “directly effective” provisions (“which may be binding on all persons”). This restriction refers to the possibility to invoke international law before a domestic court, rather than that it denies the validity of other international provisions in the Dutch legal order. It therefore becomes relevant in particular in relation to the other principle defining the relation between national and international law: supremacy. Article 94 of the Dutch Constitution provides:

“Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties

⁵ *Nyugat* case, Hoge Raad, 6 March 1959, NJ 1962 No. 2.

⁶ *Bouterse* case, Hoge Raad, 18 September 2001, NJ 2002 No. 559.

that are binding on all persons or of resolutions by international institutions”.

This rule was first codified in the Constitution in 1953. The restriction to “provisions of treaties that are binding on all persons” was explicitly introduced to prevent judges from applying treaties in favour of domestic law when no individual interests were at stake. It is up to the courts to decide whether a particular provision is directly effective and, in determining this, the court relies on the nature of the treaty and the specific provision. The nature of the North Atlantic Treaty and the decisions of the NATO Council would, in most cases, not be binding on all persons and thus exclude a “direct effect” (see further *infra*).

Nevertheless, in general, the Constitutional system allows for international law to be taken into account in judicial proceedings and to set aside domestic law in case of a conflict with written international law. One could argue that international law thus forms part of the Dutch “Constitutional framework” in the broad sense and that it even occupies a higher ranking position in relation to the written Constitution itself. At this moment, Article 120 excludes Courts from considering the constitutionality of domestic law,⁷ but based on the system of Articles 93 and 94 it is often argued that “constitutionality” is guaranteed by interpreting domestic law in conformity with international law and by granting priority to the latter in case of conflicting provisions.

Since Articles 93 and 94 thus guarantee the openness of the Netherlands legal order, some views hold that these provisions should not be interpreted as limiting the truly monist nature of the domestic legal order. In this view, national judges must regard international law as forming part and parcel of domestic law. The unity of domestic and international law would even put the relevance of Articles 93 and 94 into perspective. Indeed, some indications of this view can be found in national case law. While the *Grenstractaat Aken* case of 1919 already hinted in this direction, a recent (2004) judgement of the Administrative Jurisdiction Division of the Council of State seems to support this view by stating that the judicial competence to apply international (environmental) law is, *among other things*, based on Articles 93 and 94.⁸ It has been argued that this would make an end to the distinction that is generally made between interna-

⁷ Changes may be foreseen on the basis of a recent initiative by Parliament (the *Halsema* proposal). See Kamerstukken 28 331 as well as the opinion of the Government, *Constitutionele toetsing van formele wetten*, Kamerstukken 28 335, nrs. 1-2.

⁸ HR 3 March 1919, NJ 199, 371; ABRvS 15 September 2004, AB 2005, no. 12.

tional (in this case: environmental) law and European Community law as far as the question of their validity in the domestic legal order is concerned.⁹

In case membership in an international organization would amount to possible conflicts with the Netherlands Constitution, a special provision – Article 91, paragraph 3 – provides for a possibility to even deviate from the Constitution:

“Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it, may be approved by the Houses of the States General only if at least two-thirds of the votes cast are in favour”.

Thus, on the basis of Article 91(3), the entry into force of a treaty that conflicts with the Constitution does not require a preceding amendment of the Constitution, as long as the Statute by which the treaty is approved is adopted with a two-thirds majority.¹⁰ The question of whether a treaty conflicts with the Constitution is determined by a normal majority. With regard to NATO (and EU) obligations, questions on the constitutionality have come up in relation to the transfer of the command of forces (*infra* section B.3).

2. Joining NATO: The Netherlands as “A Faithful Ally”

Considering the constitutional obligation to “promote the development of the international legal order”, joining NATO has generally been regarded as a logical step. However, in 1949, NATO was a different organization and the reasons for the Netherlands to join were of a different nature. Membership in NATO in 1949 – or, in fact, acceding to the Brussels (later WEU) Treaty one year before – marked the end of the Dutch traditional policy of neutrality. There were sev-

⁹ R.A.J. van Gestel and J.M. Verschuuren, “Internationaal en Europees milieurecht in Nederland? Gewoon toepassen!”, *SEW* 2005, 42, pp. 244-251.

¹⁰ This does not mean that Government and States-General can consider constitutional provisions or principles (e.g. the prohibition of the death penalty (art. 114 Gw)) of such a fundamental nature that they do not want to bind the Netherlands to such a treaty or cooperate to establish a treaty that violates these provisions or principles. But Article 91(3) plays no role in such decisions.

eral reasons for the Netherlands to end this policy after the Second World War.¹¹ First of all there was the fear of Soviet expansion and communism. This reason dominated the political and societal debate at the time. Other reasons included the protection of NATO and its American leadership against Germany (and French leadership ambitions) and the possibility to receive American financial assistance through the Marshall plan. In that framework, the Netherlands was also hoping for a liberalisation of world trade.

From 1949 until 1989, NATO membership determined a large part of Dutch foreign policy. The Netherlands were seen as “a faithful ally”¹² and “Atlanticism” formed the cornerstone of its security policy. Even occasional criticism by the Government (for instance, to the role of the US in the decolonization of the Netherlands Indies) or by the public (for instance, to the nuclear policy and the possible establishment of cruise missiles in the Netherlands) did not seriously disturb the continuity of this policy. Van Staden therefore concluded that the European policy of the Netherlands was defined by the Atlantic policy and not vice versa.¹³ The “logical” step to join NATO in 1949, when a prolonged neutrality was no longer an option, explains the consensus and the absence of a real and difficult political debate on the issue. The Netherlands was liberated by the Americans (and others) and saw its future linked to Atlantic developments. The long period of – at times ‘arrogant’ and finally ‘naive’ – neutrality were gone and the Netherlands now chose to be a global player by participating rather than by commenting only. As neutrality was not mentioned as a principle in the Dutch Constitution, there were no legal obstacles in joining NATO, as there were no legal obstacles to join a more supranational organization ten years later. During the Cold War, the Netherlands proved to be an active and loyal member of the Alliance, which allowed for a much larger role in international affairs than its size would justify. This may very well have been a reason for the continuity that was maintained by all different political coalitions, including the left-wing government in the beginning of the 1970s.¹⁴ Because of its prominent

¹¹ See D. Hellema, “50 jaar Nederlands NAVO-lidmaatschap” and A. van Staden, ‘Wat is de NAVO ons eigenlijk nog waard?’, in *50 jaar NAVO en Nederland*, The Hague: Atlantische commissie, 1999.

¹² See one of the classics on the relationship between the Netherlands and NATO: A. van Staden, *Een trouwe bondgenoot: Nederland en het Atlantisch Bondgenootschap 1960-1971*, Baarn: In den Toren, 1974.

¹³ *Ibidem*, at p. 26.

¹⁴ Cf. Hellema, *op.cit.*, at 13.

role in NATO, the Netherlands was not just a small country, but a global player. The fact that this country was allowed to offer three Secretaries General (Dirk Stikker, 1961-64; Joseph Luns, 1971-1984; and Jaap de Hoop Scheffer, 2004-now) serves as a clear testimony to the visible role of the Netherlands.

After the end of the Cold War, the Netherlands policy towards NATO also remained consistent and a good relationship with the United States remained a priority for subsequent coalition governments. The development of a European Security and Defence Policy forced the Netherlands to divide its attention between NATO and the EU, but never at the cost of the Atlantic cooperation. In fact, it is often mentioned that because of its traditional policy of “Atlanticism”, the Netherlands is able to bridge possible differences between EU and NATO priorities.¹⁵

3. Parliamentary Involvement

a. The General Constitutional Role of Parliament in Relation to the Conclusion of Treaties

As we have seen, national customary law already ruled that international treaties have legal force in the Dutch legal order. The 1953 constitutional amendment codified this rule, but it already existed in 1949. One of the reasons for the codification was to ensure parliamentary involvement in the approval of treaties. After all, by that time it became clear that international agreements could have an effect on the domestic legal order and a serious democratic deficit could occur once the regular parliamentary involvement in the legislative procedure would be by-passed. With minor changes, the provision was upheld in Article 91 of the 1983 version of the Constitution:

“1. The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the States General. The cases in which approval is not required shall be specified by Act of Parliament.

¹⁵ Cf. the report *Nederland in de Veranderende EU, NAVO en VN*, The Hague: Advisory Council on International Affairs, No. 45, 2005, at 38.

2. The manner in which approval shall be granted shall be laid down by Act of Parliament, which may provide for the possibility of tacit approval.
3. Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it, may be approved by the Houses of the States General only if at least two-thirds of the votes cast are in favour”.

The Constitution requires, with a qualified majority, a preceding approval of a treaty before it binds the Kingdom. This is also the case whenever the Kingdom intends to denounce a treaty, ever since the 1956 revision of the Constitution¹⁶. Article 6 (1) of the *Rijkswet goedkeuring en bekendmaking verdragen* requires that treaties which conflict with the Constitution must be explicitly approved. Article 4 of the *Rijkswet* requires that this approval can only be granted by Statute. Article 6(2) requires that a Statute, by which a treaty that deviates (or requires to deviate) from the Constitution is approved, must explicitly state that the approval is only granted in compliance with Article 91(3). In case of doubt, the Statute must contain that the approval is granted “as much as necessary” or “as far as necessary” in compliance with Article 91(3).¹⁷ The possibility of tacit approval was elaborately regulated by Article 61 of the 1953 Constitution. As revealed by Article 91(2), the current version leaves this matter to be dealt with by an Act of Parliament. Thus, Article 3 of the *Rijkswet* allows for either tacit or express consent, with a special procedure for tacit consent laid down in

¹⁶ Fleuren, 2002, *op.cit.*, p. 50. At the moment this is required by Article 91(3) jo. 91(1) of the Constitution. See also Article 14(1) jo. 6 *Rijkswet goedkeuring en bekendmaking verdragen*. Before the 1956 revision treaties could be denounced with a normal majority (Article 63 j art 64(2)), see Duynstee, 1954, *op.cit.*, ad artikel 64, p. 46 and Tweede Kamer, Handelingen, vergaderjaar 1951-1952, pp. 1895 and 1911.

¹⁷ No treaty is ever explicitly, without doubt, approved in compliance with Article 91(3). The statutes to approve the Treaty to Establish a European Defence Community (Stb. 1954, 25), the Agreement with Indonesia concerning the transfer of Nieuw-Guinea (Stb. 1962, 363) and the Statute of Rome establishing the International Criminal Court (Stb. 2001, 343) all have been granted with the use of the wordings required in case of doubt.

Article 5. Article 7 of this Act lists the exceptions to the general rule on parliamentary approval of treaties.¹⁸

Parliament (the “States General”) is informed on the basis of the general provision in Article 68 of the Constitution:

“Ministers and State Secretaries shall provide, orally or in writing, the Houses either separately or in joint session with any information requested by one or more members, provided that the provision of such information does not conflict with the interests of the State”.

b. Parliamentary Involvement in the Sending of Troops

As acceding to NATO in 1949 did not meet with opposition in Parliament nor raised important constitutional questions, the role of this institution primarily becomes of interest in relation to (implicit) changes to the North Atlantic Treaty (see *infra*, section B.1) and, above all, with regard to the sending of troops. Indeed, the role of Parliament is particularly visible in relation to the sending of troops to foreign countries. Since 1994, the question of a possible parliamentary right of assent has been subject to debates in the Dutch Second Chamber (the House of Representatives).¹⁹ The initial result of this debate was the introduction of a right to be informed and not a right of assent. In the year 2000, the new Article 100 was included in the Dutch Constitution and reads:

“1. The Government shall inform the States General in advance if the armed forces are to be deployed or made available to maintain or promote the international legal order. This shall include the provision of humanitarian aid in the event of armed conflict.

¹⁸ a. non-approval of a specific treaty is regulated by law; b. the treaty merely implements another treaty (unless parliament decides otherwise – see Article 8 (2)) –; c. the treaty has no important financial consequences and is concluded for a maximum period of one year; d. there are exceptional and pressing circumstances necessitating the confidential nature of a treaty; e. the treaty can be seen as to prolong an already existing treaty (unless parliament decides otherwise); and f. the treaty modifies an implementation protocol of an already existing treaty.

¹⁹ See the proposal by MP Van Middelkoop, Kamerstuk 23 591, no. 2, 1994.-

2. The provisions of paragraph 1 shall not apply if compelling reasons exist to prevent the provision of information in advance. In this event, information shall be supplied as soon as possible”.

Article 100 serves as the framework for the decision-making process on the sending of troops abroad. Since 1995, the concrete criteria on the basis of which government decides on the sending of troops are laid down in the so called “Toetsingskader” (Assessment Framework), which contains fourteen criteria to be taken into account:

- There are interests for the Netherlands, including the protection of international peace and security and the development of the international legal order;
- Employment is done in conformity with international law and preferably on the basis of a clear UN mandate;
- Issues such as solidarity, credibility, and sharing of responsibilities play a role;
- There is preference for a multinational approach;
- Employment of missions is never automatic but done on a case by case basis, after consulting Parliament and with sufficient societal support;
- There has to be a concrete military assignment;
- Government assesses whether the political and military goals are attainable;
- Prevent that operations are in the hands of a small groups of countries only; agree on finances and the taking over of missions;
- Units should be available;
- There must be a clear command structure;
- The risks for the employed personnel should be assessed;
- There need to be clear international agreements on the mission and the tasks are to be feasible;
- Financing is secured;
- Employment is done for a fixed term; a new decision is needed to prolong the mission.

In 2000, a special Committee formulated a number of additional criteria, which are now considered to form an integral part of the “Toetsingskader”:

- The Government states the reasons for participation as completely as possible; also in the case of a continuation or the ending of a mission;
- All aspects related to the mission are to be placed in one document;
- In assessing the feasibility, both the operation as a whole and the military feasibility are to be taken into account;
- The question is not which units have to take their turn, but which units are best fit to do the mission;
- A good exit strategy is needed.

The Government uses these criteria to explain their decision on an employment of a military mission to Parliament.²⁰ They do so in a so-called “Article 100 letter”. The Article 100 letter forms the basis for the debate in Parliament. The “Toetsingskader” is also used for yearly and final evaluations of military missions.

Although Article 100 is only an obligation to inform, it has been said that, in a more substantive way, it can be regarded as a parliamentary right of assent.²¹ After all, it becomes quite difficult for Government to maintain its position when a substantial part of Parliament is in disagreement. The Article 100 letter is used to convince Parliament of the need to employ the mission. Openness of some of these reasons may harm the international position of the Netherlands as they imply a risk to disclose confidential information; a special procedure foresees the possibility of informing only the chairs of the parliamentary fractions in a “secret” committee. The sessions of this committee take place behind closed doors and allow the Minister to share some of its perhaps less obvious reasons to participate in a mission. These reasons may include pressure from an international organization, or another Member State, or information received from secret services. The information shared in the secret committee is not to be shared with anyone else, which means that other Members of Parliament will have to rely on the opinion of the parliamentary fraction chairs.

The “Article 100” procedure was extensively tested during the decision-making on the sending of troops in the framework of the NATO operation in Uruzgan, Afghanistan during 2006. The debates in Parliament were intensive,

²⁰ See for the importance of this “Toetsingskader” in comparison to the system in some other European states: M. Houben, *International Crisis Management. The Approach of European States*, Routledge, 2005, p. 78.

²¹ See the original reaction by (then) MP Van Middelkoop, Kamerstukken, Handelingen 40-3247.

but did not so much concern legal issues. The hesitation of many political parties considered the risks of this quite dangerous mission to a country which was still very much in conflict. The Government stressed the “reconstruction”-dimension of the mission, but acknowledged that there were serious military risks and that soldiers could be lost. Nevertheless, the reputation of the Netherlands played a role in the final decision of the Government to contribute troops to the mission. Afghanistan is also a good example of the “Dutch Approach” in this type of situation. Whereas the British and the Canadians, in the areas of Helmand and Kandahar, spread around the area to continue putting pressure on the Taliban, the Dutch focus in Uruzgan was not so much on defeating the Taliban, but rather on “winning the hearts and minds of the population” and of local administrators, the use of the *ink blot* strategy (start in a small area and gradually enlarge the territorial scope of the mission), and on the transfer of (police) functions to local authorities. Indeed, the social-democratic party continued to stress the need to “allow young girls in Afghanistan to go to school again” as one of its main reasons to finally vote in favour of the mission.²² It is interesting to note that, within a NATO operation, there is room for different approaches. This has at least allowed the Government to convince a majority in Parliament that the participation of the Netherlands had an added value.

c. Towards a Constitutional Amendment and a Parliamentary Right of Assent?

While, in a political sense, the system allows for an extensive involvement of the States General, recent criticism held that the right to be informed cannot be equated with a right of assent. After all, once the Government decides to deploy troops without the support of a majority in Parliament, the only possibility is to try and send the Minister away. This may be too heavy a sanction to be used and may be considered inappropriate in many situations. At the same time, the possibilities of NATO and the EU to deploy troops in crisis situations (the NATO Response Force and the EU Battlegroups) formed a reason for Parliament to reconsider the function of Article 100. After all, the sending of troops in the

²² See for a rather extensive evaluation of the political debate: R. de Wijk, “Nederland en de NAVO-operatie in Afghanistan; politieke besluitvorming en militaire uitvoering”, in: B. Bomert, Th. Van den Hoogen en R.A. Wessel (eds.), *Jaarboek Vrede en Veiligheid 2006*, Amsterdam: Rozenberg, 2006, pp.1-17.

framework of these types of missions by definition does not allow for extensive parliamentary debates, and, in fact, only works when *a priori* consent has been granted. At the same time, there appeared to be some consensus in the academic world that Article 100 cannot be seen as implying a substantive right of assent.²³ The unclear status of Article 100 (information only in the eyes of the government and constitutional lawyers; *de facto* assent in the eyes of MPs) formed the reason for a special parliamentary working group (the so-called NRF Working Group, or Working Group Van Baalen) to present a report in June 2006 on the improvement of parliamentary involvement.²⁴ This report forms the basis for the current and ongoing discussion regarding a possible constitutional amendment.

An additional reason for a renewed look at Article 100 is formed by its ambiguous text, which excludes the deployment of forces in the case of defence and protection of the interests of the Kingdom. This would include defence in the framework of NATO. But, it is increasingly difficult to make a distinction between the three traditional tasks of the Dutch army (Article 97 Constitution: the defence and protection of the interests of the Kingdom, and the maintenance and promotion of the international legal order). Is Article 100 only relevant in relation to the latter task? Indeed, the Dutch Government claimed that its contribution to “Enduring Freedom” in Afghanistan was based on invoking Article 5 of the NATO Treaty, which goes beyond the scope of Article 100 of the Constitution. Hence, not even a prior parliamentary information obligation would exist. Nevertheless, the Government was prepared to inform Parliament “in the spirit of Article 100”. In the case of the NRF and the EU Battlegroups, Government agreed that it would be wise to inform Parliament at the moment when the Netherlands had to agree to make forces available for possible crisis situations. It acknowledged that it would almost be impossible to not send troops in crisis situations once the Netherlands had agreed to be part of the NRF or an EU Battlegroup.²⁵ However, this has not solved the problem of so-called “funnel decision-making”, in which there is (politically) no way back for both Government and Parliament once the decision on participation in NRF or Battlegroup has been made.

²³ See P.P.T. Bovend'Eert, “De inzet van de krijgsmacht met toestemming van het parlement”, in *Grondwet, krijgsmacht en oorlog*, Publicaties van de Staatsrechtkring, Nijmegen: Wolf, 2008, pp. 21-38 at 23.

²⁴ See Kamerstukken 2005-2006, 30 162, nos. 2-3.

²⁵ See Report of the NRF Working Group, p. 61.

The report of the NRF Working Group proposes a modification of Article 100 in order to make the parliamentary right of assent explicit and unambiguous. Secondly, it proposes to apply Article 100 in all cases, implying the employment of the army (including defence of the Kingdom or its interests), pending a possible constitutional amendment. Finally, the report calls for a prompt supply of information, even prior to the actual decision-making (irrespective of the fact that, in December 2005, Parliament was not willing to debate the sending of troops to Afghanistan prior to governmental decision-making). In relation to the deployment of troops in NRF or Battlegroups, the report proposes that Parliament be informed as soon as possible and that it maintains the right to disagree with the actual deployment.

The Government has always maintained that a formal right of assent is contrary to the constitutional relationship between Government and Parliament, in particular in relation to Article 97 (2), which states that “The Government shall have supreme authority over the armed forces”. Constitutional lawyers, however, claim that this does not mean that parliamentary scrutiny in this area is excluded.²⁶ In reaction to the NRF Working Group report, the Government asked advise of the Advisory Council on International Affairs (AIV).²⁷ In the AIV’s opinion, the national procedures should continue to take account of operations that require strict confidentiality and/or immediate action (“acute emergencies” as they were termed in the debates on the earlier constitutional amendment). If a decision were to be made to amend Article 100, it would therefore be necessary to retain the exception clause in paragraph 2. The clause has been used sparingly to date, and this should continue to be the aim in the future.

In relation to the question regarding at what point in time Parliament should be informed, the AIV’s recommendations apply not only to the deployment of the NRF and Battlegroups, but to all crisis management operations undertaken by NATO or the EU in which the Netherlands participates. The AIV concludes that one should not attempt to define which information should be provided to Parliament (or when it should be provided) on the basis of procedural steps in international fora. The AIV believes that it is better to link the provision of this type of information as much as possible to the initial notification regarding the possible participation of Dutch forces, the first step in the Article 100 proce-

²⁶ See Bovend’Eert, *op.cit.* at 31.

²⁷ AIV Report No. 56, May 2007, *Deployment of the Armed Forces: Interaction between National and International Decision-Making*, English summary available at www.aiv-advies.nl. The sections below are based on this summary.

ture. After all, this is when Dutch participation is first mooted. As soon as the prospect of a Dutch contribution arises, Parliament should be notified. Under normal conditions, decision-making in NATO or the EU will involve a whole series of steps, and the supreme bodies of NATO (North Atlantic Council) or the EU (General Affairs and External Relations Council) will discuss a proposed operation several times. The AIV believes that parliamentary procedures should be completed before the NATO Council or the Council of the EU makes a final decision (i.e. before NATO's execution directive or the EU's decision to launch the operation). To say "no" after this stage would create serious problems. It is therefore best to submit the Article 100 letter when military planning has reached such an advanced stage that the expected role of the Netherlands has become clear. If the operation is of such an urgent nature that the decision is made at a single session of the NATO Council or the Council of the EU – which would imply a very serious situation indeed – it would be logical for the Government to hold preliminary consultations with Parliament on the participation of Dutch troops. In general, the AIV does not consider an amendment of Article 100 necessary.

In its first official reaction to the Reports of the NRF Working Group and the AIV of 25 April 2008,²⁸ the Government indicated that an amendment of Article 100 is not only unnecessary, but not even preferred. The current system allows for a normal working relationship between Government and Parliament based on mutual trust. "Co-decision" on the sending of troops is contrary to constitutional starting points and may even limit the autonomous position of Parliament. The Government also wishes to maintain the restriction of the information obligation to situations related to the development of the international legal order and not to the defence of the Kingdom, although Article 100 may apply in "mixed" situations. With regard to the NATO NRF and the EU Battlegroups, Government sees the primary value of the information obligation at the moment of the actual deployment of forces. It agrees, however, that parts of the "Toetsingskader" can already play a role and be debated the moment the Netherlands decides to participate in a NRF or a Battlegroup. Nonetheless, Government has indicated an unwillingness to wait for parliamentary assent the moment it is asked to actually deploy troops in a crisis situation. This would seriously harm the international political position of the Netherlands. Indeed, Article 100 (2) allows for information to be supplied later in case of compelling reasons.

²⁸ Kamerstuk 30 162, no. 9.

Today, the Dutch security and defence policy is still embedded in the UN, NATO, and the EU. Over the past years, Dutch troops were deployed in, *inter alia*, Afghanistan, Iraq, Bosnia, Kosovo, Sudan, Congo, Liberia, the Arabic Sea, the Persian Gulf, and the Mediterranean. The Dutch Government indicated that the interaction between national and international decision-making differs per international operation and hinted at a need for flexibility. In the case of the contribution to the EUFOR-mission in the Democratic Republic of Congo in 2006, both the Article 100 letter and the parliamentary debate preceded the EU-decision to launch the operation. The same situation occurred in relation to the initial decision in 2006 to contribute troops to the ISAF-mission in Uruzgan, Afghanistan. In other cases, international and national decision-making coincide, or national debates can only take place after the international decision has been taken.²⁹ It is not so much the organization – UN, NATO, EU (or in earlier days WEU) – that defines the procedure or the intensity of the debate, but rather the mandate of the troops.

B. Legal Issues during the Course of NATO Membership

1. Implicit Modifications of the North Atlantic Treaty: The Strategic Concepts

Where the *de facto* modification of the North Atlantic Treaty through the Strategic Concepts of 1991 and 1999 resulted in interesting debates among international lawyers, both Government and Parliament concentrated on the political aspects. Legal problems (including the explicitly mentioned possibility to use NATO in situations not covered by the Treaty – “non-Article 5 operations”) were hardly mentioned during the debates and the Strategic Concepts did not change the relationship with NATO. By now, they are – in practical terms – considered as well as accepted as reflecting the new role of NATO.

For lawyers it may have been striking that the 1991 Strategic Concept was accepted without much political debate. The legal question concerning possible “out-of-area” operations may have been popular for a while among academics,³⁰

²⁹ Ibidem.

³⁰ See in relation to the situation in the Netherlands: E.P.J. Myjer, “NAVO, WEU en Nederland : is ‘out-of-area’ -optreden geoorloofd?”, *Utrecht papers on international, social and economic law*, no. 14, 1991.

but in politics NATO had the choice to go either “out-of-area, or out-of-business”. The euphoria after the end of the Cold War may explain the almost automatic acceptance of NATO’s new tasks as well as the traditional preference for the Netherlands to maintain institutional security ties with the United States.

During the debate on the 1999 Strategic Concept, a number of motions were proposed by the left-wing parties, but the most far-reaching did not succeed in getting majority support (on NATO’s nuclear strategy, on the need to wait for the results of the Kosovo crisis, on the need for a NATO no-first-use declaration, and on the need for an explicit UN mandate for NATO actions). Some others were adopted and presented to Government in order to play a role during the discussions in Washington on the new Strategic Concept (on the partnership for peace, on the need to strengthen the non-proliferation treaty, and on the central role of the UN in relation to peace and security).³¹ As the idea of a new Strategic Concept was initiated by the Dutch, the Government was not able to be too critical during the discussions in Washington; in general, the discussion was overshadowed by the ongoing Kosovo crisis at the moment.

2. Article 96 of the Dutch Constitution: War Situations

Article 96 of the Constitution of the Netherlands reads:

- “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”.

³¹ See *Handelingen* 73-4786, 1999.

These days, a declaration of war is no longer used in international relations. This limits the relevance of Article 96 to factual situations of war: a “state of war” or “times of war”.³² The discussion emerged when NATO decided to place 108 Pershing-II missiles and 464 cruise missiles on the European continent on 12 December 1979. During the parliamentary debates, the question arose whether the placing of missiles could be seen as a declaration of war, which would therefore need prior approval of the States General. However, the Council of State (the main governmental advisory body) concluded that military measures cannot be considered a declaration of war even when these would actually lead to war.³³ In a following legal case against the Netherlands by the *Stichting Verbiedt de Kruisraketten* (a foundation that organized the protest against the establishment of the cruise missiles with nuclear warheads on Dutch soil) the Supreme Court, in 1989, held that the missiles remained under the supervision of the United States, which meant that the decision to launch would not be taken by the Dutch Government.³⁴

In 2001, the decision by the Dutch government to take part in Operation Enduring Freedom in Afghanistan led to a similar confusion. *Enduring Freedom* was led by the United States and resulted in a war situation for the Netherlands. Nevertheless, Article 96 was not invoked and in Parliament the question was raised whether Government could bring the country in a situation of war without the explicit approval of the States General. The Government argued that participation of the Netherlands was based on Article 5 of the NATO Treaty, which had been invoked directly after 11 September 2001. Hence, the legal base was to be found in the right to self-defence, and the Government maintained that participation in war situations did not amount to the Netherlands being “in war”.³⁵

³² See H. van Schooten, “The Declaration of War in the Dutch Constitution and Models of Legal Communication”, *International Journal for the Semiotics of Law*, no. 14, 2001, pp. 329-344.

³³ Kamerstuk 1985-1986, 19 290 (A), p. 6. More extensively: J. van Schooten-van der Meer, “De oorlogsverklaring”, in *Grondwet, krijgsmacht en oorlog*, op.cit., pp. 39-66.

³⁴ HR 10 november 1989, NJ 1991, 248.

³⁵ J. van Schooten-van der Meer, op.cit., at 58.

3. The Issue of Command and Control

Ever since the debacle in Srebrenica in 1995 – where Dutch UN troops were not able to protect the Muslims against the Bosnian Serbs – the questions of command, control, and responsibility are of special interest in the debates on the deployment of troops.³⁶ Irrespective of the fact that military involvement of the Netherlands these days takes place in multinational military frameworks, the basis is still found in Article 97 (2) of the Constitution, which places the “supreme authority over the armed forces” in the hands of the Government. With a view to the democratic legitimacy and the possibility of national parliamentary scrutiny, this principle is still upheld in the Netherlands. In practice, this means that troops can be withdrawn by the Government at all times even if they have been placed under international command. Use is made of the distinction between *full command* and *operational command and control*. *Full command* relates to the complete competence to supply military units with assignments on all aspects of a military operation. *Operational command and control* is derived from *full command* and can be transferred to an international or multinational context.³⁷ In the NATO context, *operational command* has been transferred to SACEUR or SACLANT (the major NATO commanders), while *operational control* is transferred to the Force Commander of a specific operation.³⁸ *Operational control* is based on an operations plan and Government can interfere whenever issues are not settled by this plan, an example being the ban on cluster munitions which was decided by the Dutch government at the time of the Kosovo bombardments in which Dutch F-16’s participated. In general, the Dutch Government has held that any transfer of operational command and control can never limit the ministerial responsibility at the national level. This way the democratic legitimacy of operations can be assured.³⁹

The starting point that the supreme authority over the armed forces remains in the hands of the Government implies that any treaty in which full command would be transferred to an international organization or foreign authority would be in conflict with Article 97 (2) of the Constitution and would therefore need to

³⁶ See in general and with a particular focus on NATO: M. Zwanenburg, *Accountability of Peace Support Operations*, Leiden, etc.: Martinus Nijhoff Publishers, 2005.

³⁷ L.F.M. Besselink, “Geweldsmonopolie, Grondwet en krijgsmacht”, in *Grondwet, krijgsmacht en oorlog, op.cit.*, pp. 67-123 at 100.

³⁸ See Kamerstuk 2000-2001, 26 454, no. 18, p. 2.

³⁹ Kamerstuk 2000-2001, 26 454, no. 18, p. 3.

be approved by two-thirds of the votes in both Houses of Parliament (see Article 91 (3) of the Constitution). This was not the case in relation to the North-Atlantic Treaty and has in fact occurred only once and in relation to only one specific task: in the regulations on the First German-Dutch Force it has been agreed that “For the execution of their guard duties binational guards are *exclusively* subordinated to the competent superior guard authorities of the receiving State”. But even in this case, the Government had a different interpretation of this provision and the treaty was not considered to deviate from the Constitution.⁴⁰ The discussion is expected to have a follow-up in relation to officials that are seconded to an international (military) organization, as is the case of Dutch military personnel working at the EU’s Military Committee or the Military Staff.⁴¹

4. An Adequate International Legal Mandate

One of the recurring questions in the parliamentary debates on the international military contributions of the Netherlands concerns the legal basis of the operations. The current coalition government (“Balkenende IV”) stated at its inauguration that “an adequate international legal mandate is needed in order for Dutch soldiers to participate in international missions”. For international lawyers, this may sound like a statement of the obvious, but the issue has become quite sensitive ever since the Kosovo crisis in 1999. In October 1998, 6 months before the air strikes in Kosovo, the Government stated that “the continuous refusal of President Milosevic to implement Resolution 1199 legitimises military action *to a sufficient extent*”. A large majority in Parliament supported the need to force Milosevic to agree with the demands of the international community and accepted the legal reasoning, which allowed for Dutch participation in the NATO operation “Allied Force” in March 1999.⁴² The Netherlands followed the majority view in NATO, which implied that military action could be possible without a Security Council mandate. This was the first time that both Government and Parliament decided on an international operation without an unambiguous legal basis. A similar argumentation was used in relation to the invasion in Iraq. In March 2003, the Government informed Parliament that “a new Security Coun-

⁴⁰ See Besselink, *op.cit.*, at 107.

⁴¹ *Ibidem*, at 110-111.

⁴² See B. Bomert and J.W. Brouwer, “Nederlands defensiebeleid: de krijgsmacht onder vuur”, in: B. Bomert and Th. Van der Hoogen, *Jaarboek Vrede en veiligheid 1999*, Nijmegen: SVV, 1999, pp. 166-193.

cil mandate to use violence is preferred, but not strictly necessary". In April 2008, the current Minister for Foreign Affairs, Verhagen, also kept all options open in relation to a possible attack on Iran. A motion by MP Halsema (Greens) to stress the importance of an international legal mandate for this type of operation did not get the required majority support in Parliament, despite the support of one of the coalition parties, the Social-Democrats.⁴³ On the basis of the parliamentary debates, one could conclude that there is a growing willingness in Parliament to be more flexible in relation to a Security Council mandate for military operations and that the absence of a clear legal basis is balanced against other humanitarian or security interests. This puts the traditional focus of the Netherlands on the rule of international law into perspective.

5. Judicial Proceedings in Relation to the Membership of NATO

a. Cases on the Basis of National Law

The (primarily) monistic system of the Netherlands allows for international agreements and decisions of international organizations to have effect in the domestic legal order (see *supra*, section A.1). Nevertheless, in most situations individuals are not directly affected by the North-Atlantic Treaty, nor by decisions of the NATO Council. In addition, possible constitutional questions are mostly solved in debates between Government and Parliament, due to the absence of a Constitutional court. The cases mentioned below are merely to be seen as examples. Over the past ten years, Dutch membership of NATO was somehow featured in approximately 30-40 national cases (including appeals), although sometimes quite indirectly.

The supremacy of international law (Article 94 of the Constitution, *supra*) played a role in a case before the Court in Hertogenbosch in 2008. In this (fiscal) case, the Court decided that the States (and all its components) are bound by the treaties to which it is a party. That means that domestic regulations may have to be interpreted in conformity with those treaties. In this case, the Court held that the civil (and fiscal) status of a person working for the American forces in the Netherlands has to be determined while taking into account the 1951 Agreement between the Parties to the North Atlantic Treaty regarding the Status of

⁴³ See also the motion of MP Halsema, Kamerstuk 2006-2007, 23 432, 4 April 2007. See more extensively on this issue: D. Leurdijk, "Een adequaat volkenrechtelijk mandaat: het debat over de rechtsgrond van missies met inzet van Nederlandse militairen", *ARMEX*, no. 3, June 2007.

their Forces.⁴⁴ Similar cases relate to the status of NATO personnel and their privileges and immunities.

Another situation may arise when victims of peace-keeping or peace-enforcement actions in which the Netherlands participated decide to bring proceedings against the State. In the year 2000, three individuals brought a case against the Dutch Prime Minister, the Minister for Foreign Affairs, and the Minister for Defence because of their personal involvement in a crime against peace against the Federal Republic of Yugoslavia. The argument was that the actions in relation to Kosovo in 1999 were illegal because of the absence of a clear international legal base. The Court in Amsterdam accepted the suggestion that Dutch law is applicable, but also on that basis argued that the Ministers acted as organs of the State and are only personally responsible when they disregarded their mandate. This was not the case and for that reason they did not act illegally. The court also held that individuals cannot invoke Article 2(4) of the United Nations Charter and points to the (then) pending case before the International court of Justice where the possible international responsibility of the Netherlands is concerned.⁴⁵ In 2002, the Supreme Court came to a similar conclusion in the so-called *Danikovic* case.⁴⁶ Similar cases have shown a reluctance of the domestic courts to accept the arguments of appellant who claim that the State or its organs are legally responsible in relation to alleged violations of the laws of war and armed conflict.⁴⁷ Nevertheless, it is striking that courts do take these claims seriously and are prepared to deal with the matter quite extensively before reaching a conclusion.

Still other cases may relate to the special position of NATO personnel and may include questions related to social security or pension rules,⁴⁸ the access to restricted documents,⁴⁹ or the Ministerial decision to remove a certain Personnel Security Clearance at NATO SECRET level.⁵⁰

⁴⁴ Case LJN: BC9201, Gerechtshof 's-Hertogenbosch , 06/00381, 12 February 2008.

⁴⁵ Case LJN: AO0070, Gerechtshof Amsterdam , 759/99 SKG, 6 July 2000.

⁴⁶ Case LJN: AE5164, Hoge Raad, C01/027HR, 29 november 2000.

⁴⁷ See for instance Case LJN: AU4443, Gerechtshof 's-Gravenhage , 99/735 KG, 25 March 2004.

⁴⁸ See for instance Cases LJN: AT4561, Centrale Raad van Beroep , 03/5047 AOW, 22 April 2005; and LJN: AY6359, Centrale Raad van Beroep , 04/5597 AOW, 11 August 2006.

⁴⁹ Case LJN: BA5281, Rechtbank Utrecht , SBR 05/3451, 23 April 2007.

⁵⁰ Case LJN: BD3635, Raad van State , 200707194/1, 11 June 2008.

b. Cases on the Basis of International Law

Together with nine fellow NATO members,⁵¹ the Netherlands was sued before the International Court of Justice for its participation in the NATO operations on Yugoslav territory. On 29 April 1999 the Government of the Federal Republic of Yugoslavia (with effect from 4 February 2003, “Serbia and Montenegro”) filed an Application instituting proceedings against the Kingdom of the Netherlands in respect of a dispute concerning acts allegedly committed by the Netherlands “by which it has violated its international obligation banning the use of force against another State, the obligation not to intervene in the internal affairs of another State, the obligation not to violate the sovereignty of another State, the obligation to protect the civilian population and civilian objects in wartime, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons, the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group”.

At the hearing of 22 April 2004, the Netherlands argued the following:

“May it please the Court to adjudge and declare that:

- the Court has no jurisdiction or should decline to exercise jurisdiction as the parties in fact agree that the Court has no jurisdiction or as there is no longer a dispute between the parties on the jurisdiction of the Court.

Alternatively:

- Serbia and Montenegro is not entitled to appear before the Court;
- the Court has no jurisdiction over the claims brought against the Netherlands by Serbia and Montenegro; and/or
- the claims brought against the Netherlands by Serbia and Montenegro are inadmissible”.

⁵¹ The Kingdom of Belgium, Canada, the French Republic, the Federal Republic of Germany, the Italian Republic, the Portuguese Republic, the Kingdom of Spain, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

While this case could have given us interesting answers, in particular in relation to the responsibility of states participating in military operations enacted by international organizations, the Court found that “at the time when the present proceedings were instituted, the Applicant in the present case, Serbia and Montenegro, was not a Member of the United Nations, and consequently, was not, on that basis, a State party to the Statute of the International Court of Justice. The Applicant not having become a party to the Statute on any other basis, it follows that the Court was not then open to it under Article 35, paragraph 1, of the Statute”. As the Court could also not find a basis in Article 35, paragraph 2 of the Statute, it had no choice but to (unanimously) state that it had no jurisdiction.⁵²

C. Concluding Remarks

It is safe to conclude that NATO membership defined the security and military policy of the Netherlands to a large extent. After a traditional policy of neutrality, it even allowed the Netherlands to work towards the attainment of one of its constitutional objectives in a more active fashion: the development of the international legal order. By playing an active role on the international scene, the influence of the Netherlands on international security developments has been larger than its size would justify.

Legal questions in relation to the membership of NATO have hardly emerged. Because the time was right, neither the North Atlantic Treaty nor the two Strategic Concepts of 1991 and 1999 raised legal or constitutional problems. Legal cases before national courts mainly concerned administrative issues, for instance related to the status of NATO personnel. The legality of NATO operations (and the participation of the Netherlands or its individual Ministers therein) played a role only in incidental cases. Nevertheless, these cases were dealt with quite extensively by the courts and contributed to relevant case law. The Netherlands was sued for its participation in a NATO operation before the International Court of Justice only once.

From time to time, political questions were raised regarding the nuclear policy of NATO or the different approach promoted by the United States. In the end, however, the Netherlands has been able to keep up its efforts in relation to

⁵² Case concerning Legality of Use of Force (Serbia and Montenegro v. Netherlands), 15 December 2004.

the participation in NATO missions. While the development of the European Defence and Security Policy forced the Netherlands to divide its attention, its traditional policy of “Atlanticism” and its close ties with the United States have even been able to survive the “Bush-period”, although polls show a decline of popular support.

Public support for military missions is still quite high. In 2007, almost 80% of the Dutch population said that they would (probably) support military action in case of genocide. 74% is willing to intervene whenever the security of Dutchmen is at stake and 71% whenever the United Nations decided that it is necessary. Nevertheless, support for the mission in Afghanistan has further declined in 2007 from around 40% to 30%. It is, however, believed that this is mainly due to the slow progress in Afghanistan.⁵³

Parliament is extensively involved in the sending of troops in the framework of NATO (and UN and EU). The debates on this issue have intensified after the Srebrenica debacle in 1995 in particular. Since 2000 Government informs Parliament on the basis of (new) Article 100 of the Constitution. The interpretation of this provision (“information” according to the text and according to Government; *de facto* “assent” according to Parliament) is subject to an ongoing debate, which may lead to a constitutional amendment. In any case, Government has shown willingness to debate the issue of sending troops as far as international decision-making procedures have allowed on the basis of a special “Assessment Framework”, which so far seemed to have assured democratic legitimacy.

⁵³ See for these data and an analysis: P.P. Everts, “Ontwikkelingen in de publieke opinie”, in: B. Bomert, Th. Van den Hoogen en R.A. Wessel, *Jaarboek Vrede en Veiligheid 2007*, Amsterdam: Rozenberg, 2008, pp. 228-259.

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