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Foreword

In their letter of 27 December 2006, the Minister of Foreign Affairs and the Minister of Defence asked the Advisory Council on International Affairs (AIV) to produce a supplementary advisory report on national and international decision-making concerning the deployment of the armed forces (see Annexe I). Among other issues, the AIV was asked to focus on the deployment of Dutch military personnel as part of the NATO Response Force (NRF) and EU Battlegroups. The specific reason for this request for advice was the June 2006 report *Inzet met instemming – de rol van de Tweede Kamer bij het uitzenden van militairen* (Deployment with consent: the role of parliament in relation to the deployment of military personnel abroad) by the NRF working group of the House of Representatives, chaired by Hans van Baalen. This broad-based working group has proposed a new constitutional provision to the effect that the Dutch armed forces may be deployed abroad only with the consent of the House of Representatives. The report also includes proposals to involve the House of Representatives more closely and at an earlier stage in the international decision-making process for the deployment of the NRF or EU Battlegroups. The letter of 27 December 2006 requests the AIV to examine the consequences of these proposals more closely and to comment on them, in preparation for the government's response to the NRF working group's report.

The AIV had already looked at decision-making procedures concerning military operations in advisory report no. 34 of March 2004, *The Netherlands and Crisis Management: Three Issues of Current Interest*. A number of recommendations from that report were adopted in the government's response dated 11 June 2004. The NRF working group also took account of the 2004 AIV report in its deliberations. Four of the authors of the report were interviewed by the members of parliament in the NRF working group.

The present report was prepared by a joint AIV committee chaired by General A.K. van der Vlis (retd.), who is also a member of the Peace and Security Committee (CVV) of the AIV. Other CVV members on the joint committee were A.L. ter Beek, Professor G. van Benthem van den Bergh, Dr A. Bloed, Dr P.P. Everts, Professor F.J.M. Feldbrugge, Lieutenant-General G.J. Folmer (retd.), Ms B.T. van Ginkel, former ambassador J.S.L. Gualthérie van Weezel, Dr P. van Ham, Professor K. Koch, Rear Admiral R.M. Lutje Schipholt (retd.), former ambassador J. Ramaker, Lieutenant-General H.W.M. Satter (retd.), Professor B.A.G.M. Tromp and E.P. Wellenstein. Other members of the joint committee were F. Korthals Altes (chair of the AIV) and Dr W.F. van Eekelen, a member of the permanent European Integration Committee (CEI) of the AIV.

The civil service liaison officers were F.C. van Beuningen and R.J. Gabriëlse (Ministry of Foreign Affairs) and S.J.G. Reyn and M.W.M. Waanders (Ministry of Defence). The executive secretary was G.W.F. Vigeveno, assisted by the executive secretary of the CVV, J.M.D. van Leeuwe.

Between January and May 2007, during the preparation of this report, members of the Dutch permanent delegations to the EU (A.J. Molenaar) and NATO (Dr H.W. van Santen) were consulted regarding procedures within these two organisations. Further information on the parliamentary NRF working group's report was provided by the group's clerk, T.J.E. van Toor.

The AIV adopted this report on 11 May 2007.

I Introduction

The Minister of Foreign Affairs and the Minister of Defence have asked the AIV to give its views on the conclusions and recommendations contained in the NRF working group's June 2006 report *Inzet met instemming – de rol van de Tweede Kamer bij het uitzenden van militairen* (Deployment with consent: the role of parliament in relation to the deployment of military personnel abroad)[1] Their request for advice (Annexe I) begins by discussing the key element of the parliamentary report, namely the recommendation that Article 100 of the Constitution should include a provision that the House of Representatives must consent to any deployment of the armed forces abroad, including missions for the purpose of national or NATO defence. The request for advice also highlights the proposal that this and other recommendations be acted on immediately, pending the constitutional amendment.

The government has asked about 'the consequences' of the NRF working group's conclusions and recommendations 'for the deployment of Dutch military personnel and for Dutch participation in international military operations coordinated by, for example, the UN, NATO, the EU or other international bodies, in situations which might include defence of the Netherlands itself or the Netherlands' duty to assist as a signatory to the North Atlantic Treaty to assist in the defence of Allied territory.'

With regard to the NATO Response Force and EU Battlegroups, the government more specifically asks whether 'the requirement of parliamentary consent [could] affect the rapid deployment and effectiveness of NATO or EU units' and how 'to ensure that obtaining parliamentary consent does not delay preparations for actual military deployment'. It also asks the AIV for its 'thoughts on the working group's conclusions and recommendations [...] as regards the provision of information to and the involvement of parliament in the successive stages of NATO and EU decision-making'. The government observes that discussions within NATO and the EU are often 'an informal, dynamic process of negotiation and consultation' which may involve 'information that by law is defined as secret or confidential according to the rules and regulations of the relevant international organisation.'

The ministers rightly characterise this as a '*supplementary* request for advice'. In March 2004 the AIV produced advisory report no. 34, *The Netherlands and Crisis Management: Three Issues of Current Interest*, which covers similar ground. As that report noted, a number of difficult dilemmas are involved: specifically, the need for prompt, effective military deployment versus the need for close democratic supervision and public backing, the wish to have the final say on the deployment of one's own armed forces versus the need for the EU and NATO to have an effective military capability. This sovereignty dilemma is all the more acute in the case of rapidly deployable multinational units that are set up in advance, such as the NRF and the EU Battlegroups. Furthermore, the secrecy that so often surrounds military planning is not readily compatible with the openness of parliamentary debate – a dilemma that came to the fore when parliament requested to see the Rules of Engagement and Military Intelligence and Security Service (MIVD) reports when military personnel were to be deployed to the Afghan province of Uruzgan. These dilemmas are the main topic of this report.

1 *Parliamentary Papers 2005-2006*, 30 162, nos. 2-5, <http://parlando.sdu.nl>.

In the AIV's opinion, its earlier report – particularly Chapter III ('National decision-making procedures concerning participation in international military forces') – is still very relevant to the present discussion. Indeed, the recommendations in the present report are in many ways a reiteration of those made in advisory report no. 34.

The idea of a formal parliamentary right of consent is not new. As far back as 1994, a motion by MP Eimert van Middelkoop and others ('the Van Middelkoop motion') called for such a right to be enshrined in the Constitution or elsewhere in national law.[2] This became the subject of a protracted debate between the government and parliament, and many of the relevant arguments have already been put forward at the time. This eventually led to a constitutional amendment which came into force in 2000. Although the amendment did not introduce a formal right of consent, Article 100 now gives parliament the right to be informed in advance, so that it can express its views on any decision to deploy military personnel abroad before it is carried out.

When the constitutional amendment was debated in parliament in 1998, Eimert van Middelkoop (then still a member of the House, now Minister of Defence) expressed satisfaction at the government's efforts to adopt 'the gist' of his motion, and said he considered the result a 'tangible right of consent or right of refusal'.[3] He said that the new Article 100 had added a form of 'prior supervision' to the existing array of parliamentary oversight instruments in this area.

In December 2005, the notion of a formal right of consent was revived by the confusion surrounding the deployment of military personnel in Uruzgan. In a motion adopted by the House on 2 February 2006, the NRF working group was asked to 'clarify matters'.[4] This broadened the mandate of the NRF working group (which had been set up some time before) and led to its aforementioned report.

The parliamentary report, and the ensuing request for advice, deal not only with more general issues relating to all forms of deployment abroad (such as the proposed right of consent and provisions regarding its scope), but also with more specific issues concerning pre-determined multinational units, particularly the NRF and the EU Battlegroups. Chapter II starts by outlining the Netherlands' active role in peace operations. Chapter III discusses experience with the present arrangements, whose functioning is a key element in deciding whether a constitutional amendment is actually required. Chapters IV, V and VI then examine various aspects of the proposed amendment, as well as a number of measures which could be implemented immediately, pending the amendment. Chapter VII discusses national and international decision-making procedures concerning the deployment of the NRF and Battlegroups. Finally, Chapter VIII presents the conclusions.

The subject of the present report is not only a security issue but also, to a large extent, a constitutional one. For this reason, the advisory report also touches on constitutional issues (particularly in Chapter IV). Since the request for advice indicates that the Council of State may be asked to examine these issues in more detail, they are discussed here in general terms only.

2 *Parliamentary Papers 1993-1994*, 23 591, no. 2.

3 *Proceedings* 40-3247.

4 *Parliamentary Papers 2005-2006*, 27 925, no. 203.

II The Netherlands and crisis response operations

In recent years, the Netherlands has taken an active part in a variety of crisis response operations, including both peacekeeping and peace enforcement missions. This is a specific means of implementing the provision of the Constitution obliging the government to promote the development of the international legal order.[5] Large parts of the world are unstable, and not many countries are willing or able to act as exporters of stability. Accordingly, demand for the kind of high-quality peacekeeping troops that the Netherlands can provide far exceeds supply.

In an age of growing international interdependence, instability in one region can easily have an impact elsewhere in the world. What seems far away can suddenly hit close to home. It is therefore in our interest to tackle sources of instability early on, before they affect our part of the world. Indeed, this is the guiding principle of the European security strategy drawn up in December 2003:

"*With the new threats, the first line of defence will often be abroad.*"[6]

New threats and cross-border problems can only be effectively tackled by joint action at international level. The Netherlands therefore has an interest in effective international organisations that are capable of intervening and restoring order. It is our task to continue along this path. This was expressed as follows in the most recent Speech from the Throne:

"*As a strong, prosperous and free country we have a major international responsibility. Conflicts and emergencies in the world call for an active response from the Netherlands. Together with other countries we are helping to maintain the international legal order.*"

In the government statement of policy on taking office on 1 March 2007, Prime Minister Jan Peter Balkenende stressed the importance of peace missions:

"*The Netherlands will continue to make an active contribution to efforts to promote the international legal order. We have confidence in the peace missions currently under way, the mission in Afghanistan in particular. Our troops are doing an excellent job there, and their work will benefit us all. After all, working on political stability and reconstruction in Afghanistan contributes to our security here.*"

Unlike self-defence or defence of an ally's territory, participation in crisis management operations is essentially voluntary. It is a choice. This means that parliamentary and public backing is less self-evident than it would be if the Netherlands or a NATO ally were attacked. Accordingly, if the Netherlands takes part in a crisis management operation, it is important to ensure as much sustained political and public backing as possible. This particularly applies to hazardous missions in which Dutch military personnel are called upon to risk their lives. The troops themselves also need to know that parliament and the public are behind them. For a more detailed discussion of the issue of political and public backing, readers are referred to AIV advisory report no. 48 (*Society and the Armed Forces*, April 2006).

5 Article 90 of the Constitution: 'The government shall promote the development of the international legal order.'

6 *A secure Europe in a better world: European security strategy*, adopted by the Brussels European Council on 12 December 2003.

III Experience with the Article 100 procedure

In recent decades the Netherlands has been increasingly involved in crisis management operations, at first mainly UN peace missions (UNIFIL, UNTAC, etc.) and later also operations led by NATO (SFOR, ISAF) and by ad hoc coalitions (Enduring Freedom, SFIR). Over time, it became common practice for the government to consult the States General (primarily the House of Representatives) before committing to any such missions. The role of the States General in the deployment of military personnel abroad was further expanded by the inclusion of a new Article 100 in the Constitution in 2000.[7] Paragraph 1 requires the government to inform the States General 'in advance'[8] about the deployment of the armed forces to promote the international legal order, including peace missions of all kinds. The government's general accountability to parliament and its duty to provide information under Article 68 of the Constitution[9] are thereby extended more specifically to operations to promote the international legal order. The new provisions apply to the deployment of military units rather than individual members of the armed forces.

Further details were worked out in the revised Terms of Reference for Decision-making for the Deployment of Military Units Abroad (also known as the Assessment Framework) of July 2001.[10] The result was what is now referred to as the Article 100 procedure. The revised Assessment Framework also takes account of the recommendations made by the House's Temporary Committee on Decision-making on Deployment (TCBU), a parliamentary committee which released its report in September 2000. The Article 100 procedure ensures that the States General are closely involved whenever the Netherlands is called upon to take part in peacekeeping missions as well as more robust stabilisation missions. The procedure has usually worked well. The intensive debate between the government and parliament that precedes the deployment of military units makes for more careful, informed decision-making. The procedure compels all the parties to think carefully about the planned involvement in an operation and about such matters as the mandate, the command structure, arrangements with other participating allies, the weapons required, etc. Lessons have been learned from the events in Srebrenica, and the TCBU's recommendations have been put into practice. In his comparative study of nine European countries, Marc Houben emphasises that the Assessment Framework is of great value to the government and parliament, as it ensures a more structured debate and a more careful decision-making

7 Article 100 of the Constitution is reproduced in Annexe II.

8 Government memorandum to the Senate regarding the constitutional amendment, 12 May 2000 (*Parliamentary Papers 1999-2000*, 26 243, no. 165a): 'The government points out that Article 100, paragraph 1 implies that, if the armed forces are to be deployed or made available, information will be provided before the decision is actually implemented, at a point such that the government can actually confer with the States General. This means that both houses of parliament will receive timely information on the decision taken. The result may be a debate in which motions can be adopted. The government will take serious account of such motions and cannot dismiss them out of hand.'

9 Article 68 of the Constitution is reproduced in Annexe II.

10 *Parliamentary Papers 2000-2001*, 23 591, no. 7.

process.[11] In accordance with the Assessment Framework, ongoing operations are also evaluated annually, with a final evaluation when the operation is over.[12]

Only two ambiguities have arisen in connection with the Article 100 procedure. In December 2005, before deploying military personnel in Uruzgan, the government submitted a 'plan' rather than a 'decision' to the States General. This conflicted with the government's own consistent interpretation of Article 100. When the constitutional amendment was debated in early 1998, the government made the following statement:

> *"The government notes that the obligation to provide both houses of parliament with information on the deployment of the armed forces under Article 100, paragraph 1 concerns government decisions rather than plans."*[13]

In adopting the aforementioned motion of 2 February 2006, parliament pointed out to the government that, under the Article 100 procedure, it was required to submit a fully fledged decision to the States General. The government agreed with this interpretation. In the AIV's view, any ambiguity on this point has thus been eliminated.

The other ambiguity concerned the distinction – introduced by the constitutional amendment in 2000 – between three different tasks (or purposes) of the armed forces. Article 97, paragraph 1 of the Constitution[14] assigned three types of task to the armed forces:

- 'defence' (both national defence and NATO and WEU commitments);
- 'protecting the interests of the Kingdom';
- 'maintaining and promoting the international legal order'.[15]

The obligation under Article 100 to inform the States General prior to a deployment only relates to the third purpose, which includes crisis management operations and peace missions of all kinds.

In autumn 2001, there was a debate on the Netherlands' participation in Enduring Freedom, the US-led operation against Al Qaeda and the associated Taliban regime in Afghanistan in response to the events of 11 September 2001. The legal basis for the Dutch contribution, which initially only consisted of ships and aircraft, lay in Article 51 of the UN Charter (individual and collective self-defence) and Article 5 of the North Atlantic Treaty,

11 Marc Houben, *International crisis management: the approach of European states*, Routledge, 2005, p. 78.

12 One such final evaluation concerned the Dutch stabilisation mission in Al-Muthanna, southern Iraq (*Parliamentary Papers 2005-2006*, 29 521, no. 17.

13 Memorandum of reply dated 16 February 1998, *Parliamentary Papers 1997-1998*, 25 367, no. 226b.

14 Article 97 of the Constitution is reproduced in Annexe II.

15 Before the constitutional amendment in 2000, the Constitution mentioned only one reason to deploy the armed forces, namely 'protection of the interests of the state', phrasing which is still echoed in the second purpose laid down in the current version of Article 97.

which the NATO Council declared applicable on 12 September 2001.[16] This was clearly quite a different situation from the classic Soviet invasion scenario that NATO's founders had envisioned. This decision effectively expanded the applicability of the mutual assistance clause in Article 5.

The result was that the Dutch contribution fell within the first task of the armed forces. This meant that the Article 100 procedure was, strictly speaking, not applicable. The then Minister of Defence, Frank de Grave, soon conceded that the situation did not fit neatly into any of the categories referred to in the Constitution. The government therefore agreed to inform the States General, 'in the spirit of Article 100'. The debate flared up again in February 2005, when the government decided to contribute special forces (250 commandos and marines) to Enduring Freedom. Once again the government acted 'in the spirit of Article 100'. Various members of parliament pointed out that more than four years had elapsed since the 11 September attacks. They wondered whether, with the fall of the Taliban regime in November-December 2001, the operation had become more of a stabilisation mission – in which case Article 100 would be fully applicable. In its letter of 10 March 2005 to parliament, the government argued that the right of self-defence was still applicable.[17]

In its 2004 report, the AIV already considered what should be done in cases where more than one of the purposes for deploying the armed forces (as mentioned in the Constitution) was applicable. At the time the AIV concluded that in such situations the government should follow the information procedure specified in Article 100, and indicated that this was the obvious choice if the operation displayed significant features of an Article 100 operation. 'Significant' did not necessarily mean 'predominant', the report continued.[18] The AIV still holds this view. The Article 100 procedure should be applied in borderline cases. If the government consistently applies this principle in such cases, the AIV believes that the second ambiguity in the current arrangements will also be eliminated.

Article 100, paragraph 2 of the Constitution provides for an exception to the general rule, laid down in paragraph 1, that information must be supplied in advance. If there are 'compelling reasons' to do so, the States General can also be informed later ('as soon as possible'). This can be done during or even after the operation. The explanatory memorandum to Article 100 interprets paragraph 2 in the following terms:

> *"Examples include emergencies and other situations in which military personnel must be deployed at very short notice, or military interventions which can only be meaningful if they take place unannounced and in the strictest secrecy, for instance if there is imminent danger in life-threatening situations and action must be taken promptly or in strict secrecy. In such acute emergencies, it may be impossible to supply information in advance."*[19]

16 UN Security Council Resolution 1368, which was adopted on 12 September 2001, confirmed that Article 51 of the Charter (on individual and collective self-defence) was applicable in this case. Article 51 is reproduced in Annexe III.

17 *Parliamentary Papers 2004-2005*, 27 925, no. 166.

18 *The Netherlands and crisis management: three issues of current interest*, AIV advisory report no. 34, The Hague, March 2004, p. 34.

19 Explanatory memorandum, *Parliamentary Papers 1997-1998*, 25 367, no. 3.

When the constitutional amendment was debated in parliament on 13 January 1998, the then Minister of Defence, Joris Voorhoeve, gave three examples of 'emergencies' in which the States General would not be informed in advance:
- arrests of wanted war criminals;
- seizure of hostages abroad, involving Dutch nationals (what the minister called 'a kind of Entebbe scenario');
- evacuation of Dutch nationals from countries where 'extremely threatening conditions' prevail.[20]

The main cases in which use can be made of the exception clause in Article 100, paragraph 2 are 'special operations', a term explained in a letter of 23 August 2000 from the Minister of Defence, Frank de Grave.[21] Special operations are carried out by small units of the Commando Corps and/or the Royal Netherlands Marine Corps. According to the letter, they involve:

> *"special intelligence gathering, special arrests, assaults on selected targets, military support for allies, evacuation of Dutch nationals from life-threatening situations and operations to combat international terror."*

The letter also emphasises 'the need for strict secrecy' in operations of this kind. If information is supplied to the States General, it will often have to be done on a confidential basis.

The government and parliament agree that the exception clause in Article 100, paragraph 2 should only be invoked sparingly. In practice, its use has indeed been limited − more limited, in fact, than the list of examples quoted from De Grave's letter would suggest. The unannounced operations were usually small-scale special operations in support of larger-scale regular Dutch contributions to an international mission (e.g. reconnaissance by special forces in preparation for the deployment of the Dutch detachment to Uruzgan). Special forces were also used to back up the Dutch detachment in southern Iraq. The arrest and attempted arrest of war criminals in Bosnia were likewise part of a broader regular peace mission. One operation which was so urgent that it was only announced on the day it took place was the protection of the Dutch embassy in Côte d'Ivoire by commandos, in conjunction with the evacuation of Dutch civilians from that country in November 2004.[22]

On a number of occasions parliament has questioned the government's use of the exception clause in Article 100, paragraph 2. Some parliamentary parties did not feel it was right that the government could decide for itself when to invoke the exception clause. In their opinion, there was a need for more specific criteria in such cases. This view was not widely shared. Most parliamentary parties were satisfied with the existing procedure. After a long and probing debate on 16 and 17 June 2004, MP André Rouvoet concluded, 'The Minister of Defence has satisfied me that all special operations and deployments of special units have been duly reported to parliament, if necessary on a confidential basis. This, too, constitutes full parliamentary supervision.'[23]

20 *Proceedings* 40-3272.

21 *Parliamentary Papers 2000-2001*, 26 800 X, no. 46.

22 *Parliamentary Papers 2004-2005*, 29 878, no. 1.

23 *Proceedings* 85-5496.

The request for advice asks whether a 'difference of opinion' between the government and parliament concerning participation in an international operation could 'damage the Netherlands' reputation for reliability with international partners and organisations'. This question primarily concerns the NRF and the EU Battlegroups, and will therefore be discussed in Chapter VII. Neither the NRF nor the Battlegroups have so far been deployed in combat conditions. In the case of operations that *have* taken place, the government has never been forced to renege on an international commitment because of a position adopted by parliament.

IV Whether or not to introduce a parliamentary right of consent for deployment of military personnel abroad

Although, formally speaking, Article 100 of the Constitution only requires the government to *inform* the States General in advance, it has often been said that in practice this is tantamount to a right of consent. And indeed, parliamentary practice has evolved along these lines in recent years. Before deploying military units abroad, the government usually makes sure it has sufficient backing in parliament. At the end of the parliamentary debate on an Article 100 letter, it is now also customary for the spokespersons of the political parties to explicitly express – or withhold – their parties' backing for the deployment.

The NRF working group's report proposes that the provisions of Article 100, paragraph 1 be replaced by a formal right of parliamentary consent for all deployments 'abroad', including NATO commitments.[24] According to Professor L.F.M. Besselink, the term 'consent requirement' provides a clearer indication of what is meant.[25] By analogy with the development of legislation, one could also speak of a 'right of co-decision', in this case involving only the House of Representatives, not the Senate. The request for advice asks what 'the consequences' of this proposal would be.

As the NRF working group sees it, the proposal formalises 'the political practice that has evolved, whereby parliament has a *de facto* right of consent.'[26] To a certain extent this applies to the operations that now fall under Article 100, but the proposed change would extend the scope of Article 100 to the defence of the Netherlands' allies. This is clearly a new element, which will be discussed in more detail in Chapter V. However, even as regards Article 100 operations, the difference between the current arrangements and a formal right of co-decision should not be underestimated. The phrasing of Article 100 was specifically chosen to take account of this difference. In amending the Constitution in accordance with the Van Middelkoop motion, the government endeavoured 'to comply with the House's wishes as far as possible [...] with due regard for the constitutional relationship between the government and the States General'.[27] The result was the present procedure, whereby the States General are informed in advance, at a time such that they have an opportunity to express their views. Under this arrangement, the decision is taken by the government, which thus bears full responsibility. In referring to the existing constitutional relationship, the government was invoking the principle 'the government governs and parliament supervises'. This was repeatedly mentioned in both the written reports and the oral debate on the constitutional amendment. The government also referred to the doctrine of dualism in this connection.[28]

24 See p. 69.

25 Annexe to the NRF working group's report, p. 44.

26 See p. 69.

27 Letter of 17 January 1995 from the Minister of Foreign Affairs and the Minister of Defence to parliament (*Parliamentary Papers 1994-1995*, 23 591, no. 3).

28 The government's view was summed up as follows in a memorandum dated 12 May 2000 concerning the Senate debate on the constitutional amendment on second reading (*Parliamentary Papers 1999-2000*, 26 243, no. 165a): 'The government's view in implementing the Van Middelkoop motion is based on the existing constitutional relationship, in which the government governs and parliament supervises. The

Footnote 28 cont. on p. 16 >>

As already stated, the arrangements agreed on at the time give parliament an opportunity to determine and express its views. What is important here is that the government does not confront parliament with *faits accomplis*, international commitments are contingent on the outcome of the parliamentary debate. As a rule, the government will go along with parliament's judgement. This, too, is part of the existing constitutional relationship. If the government is inclined to ignore the views of a majority of members of parliament, the latter can call for a vote of no confidence and force the ministers not directly involved, or even the entire cabinet, to resign. Under our system, parliament has the final say.

In our constitutional system there are various instances of shared decision-making between the government and parliament, a fact that casts the notion of strict separation between the tasks of government and parliament (governing and supervising) in rather a different light. Thus the States General have a right of co-decision on both national and international legislation (laws and treaties) and also, for example, when approving the national budget. However, these are matters whose rationale and expected effects can be thoroughly discussed and weighed up beforehand. Deployment of the armed forces involves a different kind of decision. In the military sphere, it is sometimes necessary to act immediately on matters of life and death. This cannot be covered by legislation, however judiciously the Assessment Framework is used. It is a very different matter.

The objection may be raised that there has been at least one exception to the constitutional tradition that deployment of the armed forces is primarily the responsibility of the executive − namely, the constitutional amendment of 1922. Until then, declarations of war were constitutionally a royal prerogative, although since 1848 they had fallen under ministerial responsibility. In 1922 it was decided that a declaration of war (later amended to 'a declaration that the Kingdom is in a state of war') could be made only with the prior approval of the States General meeting in joint session. However, this provision − which survives in a slightly amended form in Article 96 of the Constitution[29] − has never been invoked, mainly because declarations of war are not in keeping with modern views of international relations. This constitutional provision is therefore quite clearly obsolete.[30]

A more specific point is that the right of consent proposed by the NRF working group would be restricted to the House of Representatives, thus excluding the Senate. Apart from the generally accepted political primacy of the House of Representatives, the need to take rapid decisions at times of crisis may have inspired this aspect of the proposal. There is no doubt that time will be lost if both houses have to give their formal consent in succession. Another

>> Footnote 28 cont. from p. 15
government is also pleased to note that the aforesaid members of parliament see this as the correct constitutional relationship, espouse the principle of normative dualism and regard dualism as something desirable. The government considers right of consent incompatible with such dualism and undesirable. Under our constitutional system, the States General cannot be free to carry out their supervisory task if they formally share governmental responsibility.'

29 Article 96 of the Constitution is reproduced in Annexe II.

30 For a more detailed review of the constitutional amendment of 1922 and the present-day Article 96, see L.F.M Besselink, 'Van constitutionele beslissingsmacht tot vermeende politieke zeggenschap: parlementaire betrokkenheid bij de deelname van de Nederlandse krijgsmacht aan internationale militaire operaties' (From constitutional powers of decision to supposed political influence: parliamentary involvement in the participation of the Dutch armed forces in international military operations), in *De Grondwet en het inzetten van strijdkrachten* (The Constitution and the deployment of armed forces), ed. M. van Damme, Antwerp, 2005.

reason may be that, in practice, the Senate leaves the Article 100 procedure largely (though not entirely) in the hands of the House of Representatives. The current arrangement is that the Senate examines the written record of the debate in the House of Representatives and decides on that basis whether there is any need for the Senate to discuss the planned deployment. It usually deems this unnecessary.

Besides practical aspects connected with time constraints, there are constitutional considerations that must not be overlooked. Under our constitutional system, all existing instances of a formal right of co-decision involve both houses of parliament. In most cases this right of co-decision is implemented through legislation. For example, the national budget and treaties are approved by voting appropriate bills into law. Even a highly specific matter such as consent to the monarch's marriage must, under Article 28 of the Constitution, be dealt with by legislation. The NRF working group's report does not specify what form the proposed formal right of consent should take. The working group may have been thinking of an arrangement based on the existing Article 100 procedure, possibly followed by a plenary vote. It evidently did not intend the proposed consent to be granted through legislation, since only the House of Representatives would be required to give its consent. A right of co-decision restricted to the House of Representatives would introduce a completely new element into our constitutional system. While this new arrangement would admittedly allow swifter approval than a procedure involving both houses, it would also raise constitutional questions regarding our bicameral system.

Shared authority to deploy the armed forces also has implications for the supervisory task of the States General and the assignment of responsibility. What is remarkable is that the introduction of a formal right of consent turns the government's decision into a proposal which can be accepted or rejected, rather than a proper decision. Yet, as parliament made clear when it adopted the motion of 2 February 2006, it was not happy with the idea of the government submitting a proposal rather than a decision. The NRF working group's report also states that 'this right of consent does not entail a restriction of parliament's supervisory task, as this will then be focused on the implementation of the decision which the House has approved'.[31] However, in the view of the AIV, having given its formal consent, parliament will probably feel less at liberty to criticise the further progress of the operation and the Netherlands' involvement in it. As already mentioned, the notion that the government should be able to govern and that parliament should remain free to supervise and criticise it from a position of independence was frequently expressed during the debate on the constitutional amendment in the period 1996-2000. If the States General become involved in specific decisions to deploy the armed forces and share responsibility for them, their freedom to supervise and criticise will be reduced. It is questionable whether such a joint exercise of executive responsibility will aid government and parliament in performing their respective tasks. After all, no one wants a situation where the government is less able to govern effectively and the States General less inclined to subject government ot critical scrutiny.

Finally, one can also look abroad for answers to the question of the consequences of a formal right of consent. However, the picture that emerges is far from clear. Each country has its own constitutional and military traditions.[32] In the United Kingdom and France, for instance, the executive has a relatively strong position in the decision-making process.

31 See p. 70.

32 Section 2.3 of the NRF working group's report provides a clear description of parliamentary approval procedures in the Netherlands' main partner countries. For more on this, see Marc Houben, *International crisis management: the approach of European states*, Routledge, 2005.

Many of our other European partners require the government to consult parliament or a parliamentary committee whenever military personnel are to be deployed abroad. In most of these countries the idea that the government might disregard the views of parliament is as inconceivable as it would be in the Netherlands. In Germany, parliament's right of co-decision is formally enshrined in law (the Parliamentary Participation Act). Similar legislation has recently been adopted in Spain. In Sweden and Denmark, the basic rules are laid down in the Constitution. Finnish law requires the government to consult the parliamentary committee on foreign affairs. All in all, it is hard to tell whether there is any correlation between military activism and the relative power of the executive – or indeed the reverse. For example, it would be wrong to attribute Germany's reluctance to take part in certain peace missions entirely to the Bundestag's relatively strong position in approving the deployment of military personnel abroad. This reluctance is also related to historical factors which in fact also underlie the Parliamentary Participation Act and the German notion of a 'parliamentary army'.

V The scope of Article 100: crisis response operations only, or collective defence as well?

As the request for advice points out, the most striking new feature of the proposals made by the NRF working group is the extension of the scope of Article 100 of the Constitution. The three purposes of deploying the armed forces, as set out in Article 97, paragraph 1, have already been discussed in Chapter III. Although the current Article 100 only applies to the third purpose, a constitutional right of consent would extend its scope to all deployments 'beyond national borders', i.e. deployments abroad. The phrase 'beyond national borders' should be seen in relation to the entire Kingdom, including the Netherlands Antilles and Aruba.[33]

The NRF working group also proposes that, 'pending the constitutional amendment', a number of recommendations be acted on immediately, including the recommendation that the Article 100 procedure already be applied to 'all forms of deployment [...] outside the Kingdom of the Netherlands',[34] including defence of NATO allies.[35] One wonders how this and other proposed changes to the current arrangements could possibly take effect before the Constitution is amended. Obviously there will have to be debates between the government and the two houses of parliament on the working group's report and the government's response to it, which has yet to be drafted. It is conceivable that, as in the case of the TCBU report, there will be a motion at the end of the debate indicating which recommendations from the working group's report should be adopted. Recommendation 14[36] states that the new rules on the provision of information should then be laid down in an annexe to the rules of parliamentary procedure. In the AIV's opinion, a mere amendment to the rules of procedure would not be sufficient, since these are only binding upon parliament; the Assessment Framework, which is still based on the current, more limited interpretation of Article 100, would also have to be amended.

The request for advice emphasises the fact that the NRF working group's proposals cover military action in defence of NATO allies. It also mentions the proposal that these and other recommendations be acted on without waiting for the Constitution to be amended.

The NRF working group may have been influenced by the idea that the end of the Cold War has made the armed forces' defence task a good deal less relevant. As things now stand, scenarios involving an attack by regular troops on the Netherlands or a NATO ally are indeed unlikely. However, as already indicated in Chapter II, the world is undergoing rapid changes which may affect the balance of power. As history has shown, it is never easy to predict future risks. The unexpected events that took place at the end of the 1980s are a case in point. New threats have also emerged. Terrorist attacks causing mass casualties have become part of the equation. Another worrying development is the proliferation of

33 Under the terms of the 1954 Charter for the Kingdom of the Netherlands, 'maintenance of the independence and the defence of the Kingdom' are 'Kingdom affairs'.

34 See p. 70.

35 The 'assistance clause' in Article 5 of the North Atlantic Treaty is reproduced in Annexe III.

36 See p. 71.

weapons of mass destruction, sometimes in conjunction with the development of long-range missiles. All this calls for flexible decision-making procedures that take account of the possibility that the defence task may become relevant once more.

The current Article 100, as elaborated in the Assessment Framework, concerns 'voluntary deployments', i.e. 'missions for which there are no WEU or NATO treaty obligations'. More so than crisis management operations, self-defence and defence of allies' territory are core tasks of the government, which has supreme authority over the armed forces for this purpose. Moreover, national security should be seen not only in territorial terms, but also in terms of the protection of Dutch nationals anywhere in the world. All this very directly involves the executive's own responsibility.

The second purpose specified in Article 97, 'protection of the interests of the Kingdom', also plays a part in this discussion. Initially this was a somewhat vague notion. When the constitutional amendment was debated on first and second reading (in 1998 and 2000), Senator Jurgens inquired at length what 'protection of the interests of the Kingdom' actually meant.[37] Besides tasks of a domestic nature such as military assistance for the police, these debates eventually yielded examples of more internationally oriented action, such as the interception of drug runners in the Caribbean by the Royal Netherlands Navy and the evacuation of Dutch nationals from theatres of conflict (the evacuation of British Nationals from war-torn Sierra Leone was quoted as an example). In the AIV's opinion, the 'Entebbe scenario' referred to by Minister Voorhoeve would also fall under 'protection of the interests of the Kingdom'. Given the increased terrorist threat, the possibility cannot be ruled out that commando troops will have to intervene far from home to liberate (or help liberate) Dutch hostages.

All this must be seen in the light of the 'abroad' criterion introduced in the NRF working group's report. Almost all the examples and risks mentioned here concern situations arising abroad. The new right of consent would apply here, but for the fact that in acute emergencies such as seizure of hostages the government could invoke the exception clause in Article 100, paragraph 2, which the NRF working group also felt could be used in such cases (see Chapter VI). Yet if the 'abroad' criterion were applied, it would substantially restrict the government's freedom of action in deploying the armed forces for the purposes discussed here. The criterion, which is more reminiscent of traditional territorial defence, is not in keeping with the now generally accepted strategic view that events occurring far away are increasingly having repercussions close by. The workability of the 'abroad' criterion is equally questionable when it comes to the defence of Aruba and the Netherlands Antilles by the Dutch navy and air force, not least because, if this proved necessary, such an operation would commence far beyond the islands' borders and territorial waters. Accordingly, the AIV feels that the 'abroad' criterion is at variance with present-day strategic developments and may complicate the timely adoption of defensive measures. As a result, the government will be inclined to invoke the exception clause in Article 100, paragraph 2 more often than was originally intended.

Another key issue here is the extent to which a parliamentary right of consent is compatible with the Netherlands' various treaty obligations concerning military and other assistance when exercising the collective right of self-defence, particularly as set out in Article 5 of the North Atlantic Treaty, which has been in existence for almost sixty years. This treaty obligation to provide (military) assistance is also mentioned in the request for advice. The

37 *Proceedings* 22-1064 (1998) and 32-1510 (2000).

WEU treaty, as revised in 1954, is likewise still in force and includes (again in Article 5, as it happens) a more robust assistance clause than the North Atlantic Treaty,[38] requiring the signatories (now ten European countries) to provide all the military and other aid and assistance in their power if any of them is attacked. The WEU treaty should therefore be seen as a major milestone in the process of European integration. A somewhat less forceful version of this clause was included in the now defunct European constitutional treaty,[39] which also contained a clause on solidarity in the fight against terrorism.[40] The AIV assumes that the WEU treaty will remain in force as long as no equivalent guarantee is provided by EU treaties.[41] Article 5 of the North Atlantic Treaty differs in that its phrasing leaves the treaty states free to decide how they will fulfil their obligations. Legally speaking, they are only required to provide assistance of *some* kind – the form this takes is left up to them. It does not therefore have to be military assistance, although the reference in Article 5 to collective self-defence under the terms of the UN Charter does indicate a military context. The latitude for national considerations, which is created by the text of the treaty, is likely to be limited in actual practice, given the strong political commitment within the alliance to mutual defence, based on years of military cooperation.

In order for Article 5 of the North Atlantic Treaty to be invoked, a number of steps must be taken. The NATO Council must declare Article 5 applicable, after which the organisation will start making military plans. But each member state must also decide on the nature and scale of its contribution, a fact pointed out in the NRF working group's report, which concludes that parliament must be involved in this national decision.[42]

International law does not stipulate how countries should be internally organised in order to fulfil their treaty obligations. Signatories are at liberty to make parliamentary approval part of their national decision-making process. However, it should be remembered that a ratified treaty is binding upon parliament as well as the government. Parliament cannot therefore refuse, any more than the government can, to provide military support under Article 5 of the WEU treaty. Such refusal would breach the treaty. Article 5 of the North Atlantic Treaty allows more scope for national considerations, at least in terms of international law – but probably not politically. The fact that NATO is a close-knit organisation also plays an important part here. If the NATO Council decides that there has been an 'armed attack' on a member country, the other allies will be expected to display solidarity. In such cases, NATO will prepare defensive measures, and there will be a strong sense of political obligation to carry one's share of the burden. In practice this will probably reduce the latitude for national considerations, even if the text of the treaty allows for them. This will be all the more true if a decision is made to deploy the NATO Response Force – as is likely, since of all NATO's combat forces the NRF is in the highest state of

38 See Article 5 of the Modified Brussels Treaty (the WEU treaty), which is reproduced in Annexe III.

39 See Article I-41, paragraph 7 of the unratified Treaty establishing a Constitution for Europe, which is reproduced in Annexe III.

40 See Annexe III.

41 For a discussion of the various European assistance clauses, see Willem van Eekelen, *From Words to Deeds: the Continuing Debate on European Security*, Centre for European Policy Studies, Brussels, 2006, pp. 168-173.

42 See p. 70.

readiness. As will be mentioned in Chapter VII, the NRF is a pre-assembled military force, and this will limit the options even more.

In the AIV's view, all this means that the distinction currently made in the Constitution between (a) defence and the protection of national interests and (b) promotion of the international legal order (through peace missions) should be maintained. As already mentioned in Chapter III, the Article 100 procedure should be applied in borderline cases. Incidentally, the fact that the first and second task of the armed forces are not covered by the obligations in Article 100 does not mean that military action of that kind should not be reported to the States General. Ministers' general accountability to parliament and duty to provide information under, *inter alia*, Article 68 of the Constitution[43] remain applicable. Moreover, the practice that has evolved in recent years, as well as repeated pledges by successive governments, point to a maximum effort to keep the States General properly informed, in advance if possible.

43 See Annexe II.

VI Exceptions due to secrecy or an acute threat

The request for advice asks how the need for prompt, effective action ties in with the proposed new procedures for parliamentary approval. It also raises the question of secrecy.

The level of secrecy and the speed with which military action has to be taken depend heavily on the scenario and the nature of the operation. Relevant factors include the level of violence and the type of deployment (i.e. whether it is an initial entry or follow-on operation). For example, launching aerial bombardments with the aim of achieving tactical surprise requires a very different level of secrecy than participating in a long-running UN peace operation. The time factor can play a role in many ways, and not just in operations at the higher end of the spectrum of force. Refugee crises resulting from violent conflicts may suddenly take a dramatic turn for the worse. For example, the Kurds in northern Iraq fled en masse in late March 1991 in the face of the advancing Iraqi army. The Netherlands later contributed to the contingent of UN guards who helped to stabilise the situation.

Most of the international operations to which the Netherlands has contributed over the past 20 years were designed to achieve stabilisation following a period of more intense fighting or to ensure compliance with a peace agreement (often a fragile one). As a result, there was usually plenty of time to consult parliament. When necessary, it has proved possible to shorten the duration of the Article 100 procedure by a considerable margin when necessary. For example, the first deployment of troops as part of the ISAF mission (an infantry company to protect Kabul and support the newly installed transitional government) received the approval of the House of Representatives very quickly. The initial notification was sent to the States General on 11 December 2001. The government took the decision and sent the Article 100 letter to both houses of parliament on 21 December 2001. The very next day, the operation was given the go-ahead at a meeting with the permanent parliamentary committees on foreign affairs and defence.[44]

Providing the States General with ample information via public channels (Article 100 letter, written questions and answers, public debate etc.) is not usually a problem. There has, however, been some debate about whether certain sensitive military information should be provided publicly or through confidential briefings. The House of Representatives prefers public information as a matter of principle. In this regard, the report *Inzet met instemming* (Deployment with consent)[45] refers to the earlier recommendation made in the report by the Temporary Committee on Decision-making on Deployment (TCBU):[46] 'The use of confidential briefings should be avoided as much as possible.' In some cases, however, confidential briefings and the restricted viewing of certain documents will be the only options. Such a situation arose before the deployment of troops to Uruzgan, when parliament asked to see the Rules of Engagement and reports by the Military Intelligence and Security Service (MIVD). The leaders and spokespeople of the parliamentary parties were eventually allowed to see these documents on a confidential basis.

44 *Parliamentary Papers 27 925,* no. 42.

45 See p. 71.

46 *Parliamentary Papers 26 454*, nos. 7-8.

In Germany confidential briefings are seen as a standard part of the procedure much more so than in the Netherlands – to the satisfaction of both the federal government and the Bundestag, according to the report 'Deployment with consent'.[47] In the view of several German MPs, the fact that the Bundestag's committees on foreign affairs and defence are involved in confidential deliberations at an early stage makes it easier for the Bundestag to complete the formal approval procedure in short order, which is important in urgent situations.[48]

In addition to participating in follow-on operations, the Netherlands may be called upon to play a leading role in the early stages of a military campaign. For example, Dutch F-16s took part in the initial dogfights during the air campaign over Kosovo. Admittedly, the intervention in Kosovo was not entirely typical of an initial entry operation, as it was preceded by a prolonged period of coercive diplomacy. An exceptionally long period elapsed between the North Atlantic Council's activation order of 13 October 1997 and the actual start of the air campaign. On 30 January 1998 the authority to launch the military operations was delegated to NATO's Secretary General. The air campaign did not actually begin until 24 March 1998. Crises will undoubtedly occur that require prompt decision-making in far more hectic conditions. In the case of Kosovo, NATO terms such as ACTWARN and ACTORD were actually used more as a means of applying political pressure than in their traditional military meaning, a fact that indicates that NATO procedures will probably be applied differently in each crisis. The operations of the past 20 years are therefore not representative in every respect. Consequently, when developing national procedures, it is important to take account not only of recent experience with the deployment of troops but also of the possibility that future crises may unfold in very different ways and demand far more secrecy and/or speed.

All in all, the Article 100 procedure certainly provides scope for alleviating problems connected with secrecy or time constraints. The smooth handling of the first ISAF deployment is a good example. The way in which Germany uses confidential briefings is also pertinent. Practical solutions of this kind are important because they avoid the need to make excessive use of the exception provided for by Article 100, paragraph 2. In the AIV's opinion, however, this clause needs to be retained. It is always necessary to allow for the possibility of situations that require immediate action and/or absolute secrecy. The example of the arrest of war criminals has already been mentioned in chapter III. Recommendation 19 in the report 'Deployment with consent' indicates that the parliamentary working group, too, believes that the exception clause in Article 100, paragraph 2 should be maintained even if a right of consent is included in Article 100. The AIV fully agrees with this.

This ties in with the question of the scope of Article 100, as discussed in the previous chapter. If every action abroad were to require parliamentary consent, including NATO defence or missions to protect national interests (such as the evacuation of Dutch citizens), the exception clause would assume much greater importance. This in turn would make the government more inclined to invoke the clause. If, on the other hand, the scope of Article 100 remains unchanged, the use of the exception clause can probably be restricted to small-scale actions by commandos and marines, as in recent years.

More generally, it should be noted that if the approval procedures are too cumbersome, the Netherlands may have trouble playing a role in the opening stage of a military operation.

47 See p. 36.

48 Annexe to *Inzet met instemming* (Deployment with consent), p. 34.

Instead, it will have to focus more on follow-on missions, such as stabilisation and reconstruction. These are, in themselves, important tasks, and also in keeping with the Dutch development tradition, but in terms of training and equipment, our armed forces are capable of tackling more demanding missions. The AIV argued in advisory report no. 34 that the Netherlands must be prepared to take part in crisis management operations at the higher end of the spectrum of force and in initial entry missions:

> *"The AIV feels that the Netherlands should contribute not only to 'follow-on' operations, but also to 'initial entry' missions. … The AIV recommends the deployment of Dutch armed forces in those fields where there is most demand for their advanced capabilities (in other words, in operations which demand high levels of skill and experience and sophisticated resources …). These qualities are especially necessary where troops are deployed in the complex situations likely to occur at the higher end of the spectrum of force."*[49]

49 AIV report, p. 22

VII Pre-determined multinational units: the NATO Response Force and the EU Battlegroups

Both the NATO Response Force and the EU Battlegroups are discussed in detail in the NRF working group's report. The government's request for advice asks the AIV to give its views on the report's conclusions and recommendations on this issue, and more specifically the proposals that parliament be involved more closely and at an earlier stage in the various phases of the international decision-making process. The government expresses concern that parliamentary approval procedures may delay the intended rapid deployment, which raises the question of how national parliamentary procedures can be integrated into international decision-making processes. The request for advice also asks whether a 'difference of opinion' between the government and parliament concerning participation in an international operation may 'damage the Netherlands' reputation for reliability with international partners and organisations'.

These are very topical issues: the first two EU Battlegroups became fully operational on 1 January 2007, one comprising the Netherlands, Germany and Finland, and the other France and Belgium. The first group contains 2,000 troops, 750 of whom are Dutch (Battlegroups range in size between 1,500 and 2,000). These Battlegroups will remain on high-readiness duty for the first six months of this year. After this six-month period, other combinations of countries will take over. The Battlegroups reached initial operational capability back in 2005.

The NRF, which became fully operational in 2006, also operates on a six-monthly rotational basis. It reached initial operational capability in 2003. The NRF is much larger (averaging between 20,000 and 25,000 troops), and more countries are involved. This makes the NRF much more of a multinational force.

The Netherlands has contributed to the NRF from the very outset. Dutch navy vessels were part of the NRF in the first half of this year, and both ships and aircraft will be involved in the second half of the year. In the first half of 2008, the Netherlands will have 3,150 troops on stand-by, including 2,400 ground troops led by the Dutch-German army corps headquarters.[50] Thus the issue is by no means a purely theoretical one.

The underlying idea is that, if combat forces are to intervene promptly in the event of a crisis, they must be set up in advance, otherwise too much time will be wasted assembling the necessary units from various countries (what NATO calls the 'force generation process'). The NRF and battlegroup concept thus saves a good deal of time. The force generation phase is already over. Other major advantages are that the units are familiar with each other and that matters such as the command structure have already been dealt with. Experience within the UN, in particular, has repeatedly shown that it takes a great deal of time to assemble the required military units and make all the necessary arrangements.

The NRF can be deployed for non-article 5 crisis response operations as well as for article 5 defence. So far, NRF contingents have only been used for relatively light-weight tasks (in military terms), such as humanitarian aid after the earthquake in Kashmir. However, the

50 Letter of 19 January 2006 from the Minister of Foreign Affairs and the Minister of Defence to the States General (*Parliamentary Papers 2005-2006*, 29 521, no. 22).

NRF is very well suited for more demanding military tasks, including 'initial entry'.

The Battlegroups are intended for the 'Petersberg tasks', which include crisis management operations (in the words of the existing EU Treaty, 'humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking').[51] The rapidly launched Operation Artemis in the Ituri province of the Democratic Republic of Congo – the first autonomous EU operation – was a key benchmark for the development of the battlegroup concept.[52] The concept also reflects Europe's aspirations to play a fuller military role, especially in situations where the United States is not willing to take action. At the request of the UN Secretary-General, a battlegroup could also function as the advance guard of a UN operation ('lead-in function'). The NRF can also be used for this purpose. Given the relatively small size of the Battlegroups, there are limits to the tasks they can take on without reinforcements.

Both NRF and battlegroup units are formed eighteen months to two years in advance. The stand-by period is preceded by an intensive period of joint exercises. Once the units are on stand-by, they must be in a sufficiently high state of readiness to intervene promptly in the event of a crisis. In practice, however, things are somewhat more complex. Formally, the member states still have the final say on the deployment of their own armed forces. The point at which military personnel are placed under the direct command of a NATO commander ('transfer of authority') is the final stage of a decision-making process with both international and national dimensions. At national level, this means that the Article 100 procedure must be completed by that time, at least in the case of operations to promote the international legal order. NATO is not a supranational body, nor is the EU's second pillar. Collective decisions within NATO and the EU are taken by consensus, and individual countries have the final say over their own military personnel. NATO has 26 members and the EU has 27. It is no easy matter to reach a consensus in organisations of that size. In some situations, 'constructive abstention' or similar formulas may be the answer. For example, Greece was opposed to NATO intervention in Kosovo in 1999 and therefore did not contribute any military forces, but the Greek representative did not oppose the joint decision by the NATO Council.[53]

If a large majority of member states are in favour of a particular military operation, it seems unlikely that the Netherlands will disagree. Conversely, if the Netherlands has strong reservations about an operation, it will probably not be the only country to feel this way. There is also some latitude for national preferences when choosing what resources will be deployed. The NRF is a fairly large combat force, and it will not always be necessary to deploy all of it. The Battlegroups are smaller, but there will always be two of them on stand-by. This leaves some margin for countries that are less inclined to participate. It also seems likely that, when deciding to deploy forces, more weight will be given to the views of the countries supplying these troops. Nor will it always be necessary for all countries to take part. This is particularly true of the Battlegroups, which in practice are made up of troops

51 See Annexe III.

52 For a detailed discussion of the Battlegroup concept, see Gustav Lindstrom, *Enter the EU Battlegroups*, Chaillot Paper no. 97, February 2007.

53 Also known as the North Atlantic Council, the NATO Council meets at least once a week at Permanent Representative level. In times of crisis it will meet almost daily. There are also several meetings a year at ministerial level.

from no more than one to four countries. A collective decision by the 27 EU countries will therefore have to be implemented by a relatively small number of member states, whose views will then surely carry more weight.

Formally, then, it is up to the member states to decide whether their military personnel will take part in a military operation. This is also the Netherlands' view. However, the AIV does not believe that the decision whether or not to allocate Dutch units to the NRF or EU Battlegroups should be seen as free of consequences, even though it is taken almost two years in advance. If these forces are to be effective, member states cannot retain total freedom of choice until the last moment. As the AIV sees it, opting out is only justified if extremely grave national interests are at stake − for instance, if a member state needs its military personnel to defend overseas territories (a 'Falklands scenario'). Account must also be taken of specific national sensitivities, such as Germany's reluctance to join peace missions in which German and Israeli troops might come into conflict.

The NRF and the Battlegroups are extremely useful as a framework for raising standards of training and readiness. However, more is involved here than mere enhancement of military capability. The whole idea is to create a joint instrument for rapid deployment in crisis situations. The AIV's advisory report no. 34 already emphasised that the allocation of military personnel to the NRF (the Battlegroups did not yet exist) creates obligations. In view of this, the report recommended that 'more conscious attention' be paid to the allocation stage,[54] stating that 'there would seem to be a need for substantive discussion with the States General at that point.' The AIV still feels that the allocation of military personnel should be seen as a serious political commitment. Refusal to let pre-assigned units take part in an operation when the time comes ('opting out') would gravely damage the Netherlands' reputation. A fuller debate between the government and parliament on the allocation of military personnel may result in clearer appraisal and greater acceptance of the implications.

The NRF working group discusses advisory report no. 34 in detail and − like the AIV − considers 'a proper exchange of views between parliament and the government on the allocation of military units [...] important.'[55] However, the NRF working group appears to attach less importance to the allocation stage than the AIV report does. It notes that 'the most politically relevant aspects of a possible deployment of Dutch units' are not yet known.[56] It also looks at what it calls the 'funnelling' problem: the further the allies' decision-making proceeds, the harder it becomes for parliament to say no. 'The result may be that, when a specific decision to deploy military personnel arises, parliament feels it is faced with a *fait accompli* and has no choice but to back the government's decision. Yet the House has a duty to assume its own responsibility in the light of the latest information.'[57] This goes to the core of the aforementioned sovereignty dilemma. The NRF working group believes the answer is to involve parliament more closely at an early stage: 'Instituting more transparent decision-making and informing parliament at the earliest possible stage may help counteract this funnelling process.'

54 AIV report, p. 32.

55 See p. 73.

56 See p. 72.

57 See p. 72.

It certainly makes sense to inform the States General as early as possible. The AIV still believes that the allocation stage is very important in this respect. Apart from the allocation stage, it is also essential to keep parliament well informed when a crisis actually arises; only then is it clear in which part of the world, and in what circumstances, the government is considering deploying military personnel.

The current arrangements for informing States General about the allocation of military personnel are satisfactory. As recommended by the AIV, the government letter announcing the allocation of military personnel now addresses these elements of the Assessment Framework on which information can already be provided. The AIV's recommendation concerned the NRF, but the government has since followed the same procedure with the Battlegroups. Many elements of the Assessment Framework that often raise questions in connection with UN operations have already been dealt with in the case of NRF and battlegroup operations: the command structure, military planning capability, weaponry, participation by other countries, Dutch influence on political decision-making, etc. However, other aspects (such as the risks involved, the deployment zone and the financial implications) will only become clear at a time of crisis, when the decision to deploy military personnel is actually being considered.

There is still no experience with informing parliament about the deployment of the NRF or Battlegroups *during* a major crisis. The NRF working group's report makes a number of proposals regarding this point, and the request for advice specifically asks the AIV to look at these. In particular, it asks 'at what point' parliament should be informed about Dutch participation in such international military operations. When deploying the NRF and the Battlegroups, most steps in the NATO and EU procedures are in fact the same as for other operations. The only important difference is that a number of matters can be dealt with more quickly in the case of the NRF and the Battlegroups. Accordingly, the conclusions drawn in this chapter on interaction between national and international decision-making processes apply to all the crisis management operations carried out by these two international organisations.

One preliminary comment that needs to be made is that international consultation on tackling a crisis is a fluid process which often takes place in several forums at once. Thus, while talks are going on within NATO and the EU, there will probably also be debates in the UN Security Council. The NRF working group's report calls for parliament to be given more information on the preparations for NATO and EU decisions. As the request for advice indicates, the type of information that the government could provide on this preliminary phase of international consultations would pertain to 'exploratory studies, complete or rudimentary proposals, tentative suggestions and other elements which, taken together, would constitute the informal, dynamic process of negotiation and consultation, ultimately leading to a decision.' The AIV shares this view, and wonders whether it would be worthwhile to try to identify or codify what information should be made available to the States General, in terms of preparatory steps taken at international level. Each crisis will unfold differently. There are fewer fixed patterns than the handbooks and flow charts would suggest. One specific moment that has been mentioned is the point at which the NATO Council asks the Supreme Allied Commander Europe (SACEUR), via the Military Committee, to work out the military options. According to the proposals put forward by the parliamentary working group, this is one of the first points at which parliament should be informed.[58] It may indeed be an appropriate time in some situations, but it is by no means certain that this will always be a readily identifiable moment: options can be worked out in the political as well as the military

58 See p. 73, Recommendation 19.

section of NATO headquarters. In fact, the moment when the NATO Council chooses from a number of military options is more significant. It is also conceivable that, due to time constraints, the stage at which options are worked out may simply be omitted.

EU procedures are somewhat different, though not essentially so. The key role in that body is played by the Political and Security Committee and the Council of Ministers, through the General Affairs and External Relations Council (GAERC). In preparing the final decision, the EU usually draws up a Crisis Management Concept, a document mentioned in the NRF working group's report.[59] However, the point at which the Political and Security Committee calls for such a document to be drawn up is less significant than its subsequent approval by the GAERC. Another key moment, especially from a legal perspective, is the point at which the Council agrees on 'joint action' under Article 14 of the EU Treaty.[60] The 'joint action' document also specifies the command structure. This document is always published, so there are no confidentiality problems. The EU equivalent of the abovementioned stage at which military options are worked out by SACEUR is known as the military strategic options phase.

In the light of all this, the AIV concludes that one should not try to codify the provision of information to the States General on the basis of procedural steps in international forums. The AIV feels it makes more sense for the release of such information to be linked, wherever possible, to the letter of early notification under the Article 100 procedure, since this is the point at which Dutch participation comes into the picture. In its letter, the government informs parliament that it is considering whether it is desirable and feasible for the Netherlands to contribute to an international crisis management operation. In some situations it may be a good idea to time the notification to coincide with the point at which NATO or the EU decides to draw up military plans (either on the basis of a range of options or a more specific set of plans). However, there may be cause to do this earlier, for example if there has already been a detailed debate in the UN. If the possibility of Dutch participation has not yet been raised during the discussion of options within NATO or the EU, it makes sense to postpone the notification. In any case, it would be useful to make the notification rather more substantive than hitherto and to give an indication of the current state of thinking in the relevant international forums.

NATO and EU rules on confidentiality may create restrictions in some situations. These will vary from case to case, and it is impossible to make any generalisations on the subject. Moreover, in the initial stages of thinking on the subject, account must be taken not only of military secrecy, but also of diplomatic sensitivities (such as those that would come into play for countries that will have to authorise the use of their territory for the operation). Confidential briefings of parliament (already discussed in Chapter VI) are the most appropriate channel in such situations.

The request for advice asks 'what consequences [it could] have for national and international decision-making' if parliament were to take a political stand on a planned NATO or EU mission or on Dutch participation in it on the basis of information concerning the preliminary stages of NATO or EU thinking on the subject (e.g. the abovementioned study of military options). However, it seems unlikely that parliament would make a formal statement at this point, as that only happens at the end of the Article 100 procedure,

59 See p. 73.

60 See Annexe III.

during the 'third round' of the parliamentary debate. In principle, information on preliminary stages of the international decision-making process can lead to a debate in which parliament expresses any doubts it may have. It will be useful for the government to be aware of such doubts at this early stage, so it can take account of them in the remainder of the procedure. The fact that a debate in the Dutch parliament can influence debates in other parliaments and vice versa is an inherent feature of an alliance of democracies.

The NRF working group's report dwells at some length on the NATO Council or GAERC meeting at which the decision to deploy the NRF or the Battlegroups is taken.[61] The report states that there should be preliminary consultations with parliament on the Dutch position regarding any such decision. The request for advice draws particular attention to this proposal. When discussing this, it needs to be clear just which NATO Council or GAERC meeting is meant. In emergencies, everything may have to be decided in one session, but in normal circumstances the approval process will consist of several stages, which are clearly described in the working group's report.[62] Crucial moments are the NATO Council meeting that issues the 'initiating directive' and the one that issues the 'execution directive'. In the intervening period, described in the report[63] as the 'operational planning stage', a concept of operations (CONOPS) and then the actual operations plan (OPLAN) are drawn up, and details of the individual countries' contributions are worked out. The Article 100 letter can best be sent during this stage, once it is clear what contribution the Netherlands is expected to make. The timing of the Article 100 letter will depend on the main items from the Assessment Framework (including the contribution the Netherlands is being asked to make) being known. In the meantime, the Netherlands will have to make any promise of military personnel conditional upon the outcome of the forthcoming parliamentary debate. Germany and various other countries will do likewise. What this chapter says about the right time for the Article 100 letter under the current arrangements applies equally to the present procedure and to the formal approval procedure that would come into effect if the Constitution were amended as proposed.

In the case of the EU, the report[64] again identifies an 'operational planning stage', the first crucial point being the 'initiating military directive' which follows on from the aforementioned 'crisis management concept'. A concept of operations will then be drawn up, followed by the operations plan, with details of the personnel required. All this will culminate in a 'decision to launch the operation', taken by the GAERC. The Article 100 procedure can best be initiated during this operational planning stage, once it is clear what the Netherlands' military contribution will be.

The AIV feels it is essential to complete the parliamentary procedures before NATO or the EU takes a formal, final decision in the form of an 'execution directive' (NATO) or a 'decision to launch the operation' (EU). The same applies in principle to all NATO and EU crisis management operations in which the Netherlands takes part. Opting out after the operation is launched would create an extremely awkward situation and would gravely

61 See p. 73, Recommendations 20 and 21.

62 See pp. 54 *et seq*. Not only is the actual report highly informative, the annexes to it are most useful as well, especially the reports on talks with experts in Brussels.

63 See p. 54.

64 See p. 56.

damage the Netherlands' reputation.[65] The request for advice asks how the government can ensure that parliamentary approval procedures do not delay the deployment of military personnel. A key part of the answer is that the Article 100 procedure must be completed during the operational planning stage, rather than after the final decision to launch the operation has been taken. It is also important, as already mentioned, to inform parliament early on in the crisis that participation by Dutch military personnel is being considered; the letter of early notification used for this purpose should provide more substantive information than hitherto, if necessary in conjunction with confidential briefings. The better informed parliament is, the faster it will be able to deal with the Article 100 letter when the time comes. Parliament's consent to a mission to Kabul in December 2001 has already been mentioned (in Chapter VI) as an example of how relatively quickly the Article 100 procedure can be completed in an emergency.

The proposal in the NRF working group's Recommendation 19 to hold preliminary consultations between the government and parliament on the eve of the crucial NATO Council or GAERC meeting is based on the assumption that the decision will be taken during that one meeting. However, this will only happen in an emergency. In that case it will indeed be necessary to hold preliminary consultations, in order to ensure that any objections on the part of parliament become known before the international decision is taken. The government can then take account of parliament's views in its consultations with NATO and the EU. However, this should not mean that the Dutch position will be set in stone from that point. That would leave the government with little room for manoeuvre. Discussions with allies or partners may reveal new facts (e.g. which countries will or will not be taking part) that will have to be taken into account when the Netherlands determines its position. However, as already indicated, international decision-making will normally proceed in stages. In that case, as the AIV recommends, the Article 100 procedure can be completed before NATO or the EU takes its final decision. There will then be less need for preliminary consultations ahead of NATO Council or GAERC meetings.

The AIV's recommendation concerning the timing of the Article 100 letter is more in keeping with actual practice than might at first be thought. It is already common for the Article 100 letter to be submitted before the 'execution directive' is issued or the 'decision to launch the operation' is taken. The parliamentary debate, including the 'third round', usually also takes place before that point (although not always). Of course, it is easier to complete national procedures in good time when operations are planned a long way ahead. A case in point was Operation Althea, in which the EU took over NATO's duties in Bosnia. The Article 100 letter for Dutch participation in Althea was submitted to the States General on 1 October 2004. The debate between the government and parliament took place on 17 November 2004, concluding with the 'third round'. The GAERC took its 'decision to launch the operation' on 25 November. The decision to take part in ISAF III in southern Afghanistan, which the Netherlands struggled with from December 2005 to early February 2006, was still reached well before the NATO Council issued its execution directive (on 28 July 2006). In an emergency, on the other hand, the decision-making procedures in Brussels, New York and the various capitals will have to be largely simultaneous. An example is the end of the Kosovo air campaign in June 1999. A stabilisation force for Kosovo (KFOR) had to be set up within a matter of days. The debate in parliament that resulted in the go-ahead for Dutch participation took place one day after NATO issued the execution directive. However, earlier debates had already given the government a good sense of parliament's views on the matter.

65 This was pointed out by the Dutch representative on the EU Political and Security Committee during an interview with the NRF working group (see the annexe to the report, p. 19).

A final point that requires attention is the interaction between the bilateral and multilateral decision-making. Contributions to the NRF and the EU Battlegroups are also based on bilateral agreements. This is particularly true of the Battlegroups, which are usually formed by small groups of countries. Here the Netherlands can build on its many years of military cooperation with Germany and the United Kingdom. In the present battlegroup it now works closely not only with Germany, but also with Finland.[66] Early next year, the Dutch-German high-readiness headquarters will be in charge of the NRF land component. Without Dutch participation there is no functioning headquarters that can be used by Germany, and vice versa. There is thus a high degree of interdependence. In the first half of 2009, British and Dutch amphibious forces will take part in the NRF,[67] and in the first half of 2010 they will form an EU battlegroup.[68] British and Dutch marines have held regular joint manoeuvres for decades, but they can also operate very well separately, unlike the fully integrated Dutch-German headquarters. If the Netherlands takes a different position from Germany when military personnel actually come to be deployed, relations between the two countries will obviously be strained. This is also acknowledged by the NRF working group.[69] Such a situation must clearly be avoided. If there are signs of a crisis that may lead to deployment, there will have to be close bilateral consultations between the countries concerned, in addition to multilateral consultations.[70]

66 Press reports alleging that Finland had reservations late last year about the deployment of the Battlegroup in Africa are unfounded. The Finnish government did send parliament a paper indicating that deployment of a Battlegroup in Africa should be part of a larger operation. However, the Finnish parliament did not feel it made sense to set new conditions after the event.

67 Letter of 18 December 2006 from the Minister of Foreign Affairs and the Minister of Defence to the States General (*Parliamentary Papers 2006-2007*, 29 521, no. 35).

68 Letter of 10 July 2006 from the Minister of Foreign Affairs and the Minister of Defence to the States General (*Parliamentary Papers 2005-2006*, 21 501-21 502, no. 693).

69 See p. 72.

70 The many parallels between the debates in the Netherlands and Germany are clearly revealed in a discussion paper published by the German Institute for International and Security Affairs (SWP): Christian Mölling, *EU-Battlegroups*: the current situation and problems of implementation in Germany and for the EU), March 2007.

VIII Summary and conclusions

General
This request for advice by the Ministers of Foreign Affairs and Defence was prompted by the report *Inzet met instemming* (Deployment with consent), produced by a working group of the House of Representatives chaired by MP Hans van Baalen. This parliamentary report proposes amending Article 100 of the Constitution so that parliamentary consent would be required for the deployment of Dutch military units outside the Netherlands. It also proposes tightening up existing arrangements on the provision of information to the States General (the Dutch parliament) pending this constitutional amendment. The government's request for advice of 27 December 2006 asks the AIV to examine the implications of these proposals more closely and to comment on them, in preparation for the government's response to the working group's report.

Experience with the procedure based on Article 100 of the Constitution
The AIV first considered whether the present arrangement shows shortcomings that could be remedied by amending the Constitution or by some other means. It was found that current procedures, based on the Article 100 introduced in 2000 and on the revised Assessment Framework from 2001, work well and are evolving in the direction of a substantive right of consent. The intensive debate between the government and parliament prior to the deployment of troops improves the quality of decisions and the care with which they are taken. The AIV therefore believes that Article 100 has achieved its aim.

Only two uncertainties have arisen in applying the Article 100 procedure. In the case of the Uruzgan mission, the government presented parliament with an 'intention' instead of a firm decision. Jozias van Aartsen and Wouter Bos tabled a motion pointing out that, under the prevailing procedure, the government should present an actual decision to parliament. The government endorsed this interpretation of the Article 100 procedure. In the AIV's opinion, there can be no further uncertainty on this point.

The other uncertainty concerned the deployment of Dutch troops as part of Operation Enduring Freedom, which was launched under Article 51 of the UN Charter (right of self-defence), but gradually assumed the character of a stabilisation operation. In this sense it can be regarded as a borderline case. As stated in advisory report no. 34, the AIV takes the view that the Article 100 procedure should be applied in borderline cases. If the government applies this principle consistently, the second uncertainty will also be eliminated.

Proposed revision of Article 100
The report 'Deployment with consent' proposes transforming the requirement to provide information, as laid down in Article 100, paragraph 1, into a requirement to obtain consent for every deployment of armed forces 'abroad'. A central question raised in the government's request for advice concerned the implications of this proposal, especially for the defence of an ally's territory. There are several dimensions to this question.

The parliamentary proposal raises a number of complex constitutional issues. A formal right of consent for the House of Representatives alone, as proposed in the report, would introduce a new element to our constitutional system. The instances of co-decision enshrined in our Constitution concerns both houses of parliament. Such a right is usually implemented through the adoption of a law by both houses. Although a right of co-decision

for both houses, exercised through the passage of legislation, would be more in keeping with our constitutional tradition, it may evoke other, more practical objections. A formal debate in both houses of parliament in succession would take a considerable amount of time, and might delay troop deployments. This would make it more difficult, for example, to complete the parliamentary procedure before NATO or the EU takes the final decision to begin an operation, as recommended in chapter VII.

When framing Article 100 during the previous amendment of the Constitution, the government sought to comply with parliament's wishes as far as possible, while also respecting the existing constitutional arrangement, which is based on the principle that the government governs whilst parliament scrutinises. The wording of Article 100 gives the States General the opportunity to determine and make known its position in advance. As a rule, the government will accommodate parliament's opinion. After all, parliament has the constitutional powers to ensure that its views prevail. In our constitutional system, the States General has the final word.

Under Article 100, it is the government that decides on the deployment of troops and therefore bears responsibility for that decision. The States General scrutinises the decision, not only after the mission has taken place but also before it begins. A formal right of co-decision would entail an actual sharing of responsibility. The government's decision would then assume the character of a proposal to be accepted or rejected − in other words, an intention. Yet in the Van Aartsen-Bos motion, the House of Representatives already expressed its dissatisfaction with an attempt by the government to present parliament with an intention rather than a full-fledged decision. According to the parliamentary proposal, the decision to deploy would essentially be a joint one. Were it shares the responsibility, the House of Representatives would probably feel less free to criticise the course of the military operation and the Netherlands' role in it. In the AIV's view, it is therefore questionable whether a joint exercise of executive responsibility would enhance the performance of the respective tasks of government and parliament with regard to military operations. After all, no one wants to see a situation where the government is less able to govern effectively and the States General is less inclined to subject government decisions to critical scrutiny.

The practices of the last 20 years have created customary law, which, in conjunction with the revised Article 100, has strengthened the position of the States General when it comes to international troop deployments. This demonstrates that our constitutional law is constantly evolving and adapting to new circumstances. The AIV therefore sees no reason at present for another amendment of the Constitution, with all the complications this entails. It would prefer that the Assessment Framework and the procedures it contains be adjusted at regular intervals in the light of experience. For instance, the rule outlined above − if in doubt, the Article 100 procedure applies − could be laid down in a revised Assessment Framework.

The proposals of the parliamentary working group would introduce a new system to replace the distinction that Articles 97 and 100 of the Constitution currently make between three purposes of the armed forces. The new system that has been proposed would extend the scope of Article 100 to include all operations 'beyond national boarders' (sometimes the equivalent phrase 'outside the territory of the Kingdom' is used instead). This would include the defence of NATO allies and also, for example, operations to rescue Dutch citizens from dangerous situations abroad. The AIV believes that these cases embody − even more so than peace operations − core tasks of the executive, namely ensuring national security. This directly affects one of the government's major responsibilities. In the AIV's view, the

'abroad' criterion is out of step with the age of globalisation, in which 'far away' problems can suddenly come close to home. In addition to defending our allies, the armed forces may need to operate outside national borders or territorial waters in order to protect the Kingdom and its citizens. This especially applies to the air force and navy, which nearly always operate outside Dutch airspace or coastal waters even for defensive purposes. The 'abroad' criterion may therefore make it more complicated to take prompt defensive action and will lead to more frequent use of the exception clause in Article 100, paragraph 2. In the AIV's view, all this shows the need to maintain the distinction that the Constitution currently makes between defence and protection of national interests on the one hand and the promotion of the international legal order (through peace operations, for example) on the other.

The government's request for advice asks how the need for prompt, effective military action relates to the new parliamentary consent procedures that have been proposed. It also raises the question of secrecy. 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.

The rapidly changing international environment makes it difficult to predict the precise circumstances in which the armed forces will be deployed in the future. Moreover, decision-making in international organisations will not always follow a fixed pattern. National procedures therefore need to be sufficiently flexible that they can be applied in highly diverse scenarios.

National and international decision-making on the deployment of the NATO Response Force and EU Battlegroups

The report 'Deployment with consent' takes a detailed look at both the NATO Response Force and the EU Battlegroups. The government's request for advice asks the AIV for its opinion on the conclusions and recommendations contained in the report on these matters, including the proposals for involving the House of Representatives earlier and more closely in the different stages of international decision-making. The request for advice expressed concern that parliamentary approval procedures might delay military deployments, an issue that raises the question of how national parliamentary procedures should be integrated into international decision-making processes.

A pledge to allocate Dutch military units to the NRF or the EU Battlegroups is a crucial initial step, which, in the AIV's opinion, creates a political obligation. Our allies and partners must be able to count on the fact that these units will not be withheld at the last moment, otherwise the Netherlands' reputation as a reliable ally will be damaged. That is why the AIV advisory report no. 34, published in 2004, emphasises that the commitment of military units to the NRF must be regarded as a key stage in the dialogue between the government and the States General. Withholding previously committed troops at the crucial moment (an opt-out) is only conceivable if exceptionally important national considerations militate against participation.

More specifically, the request for advice asks at what point in time parliament should be informed about Dutch military participation in international military operations. The AIV's recommendations in response to this question apply not only to the deployment of the NRF and Battlegroups, but to all crisis response operations undertaken by NATO or the EU in

which the Netherlands participates. A distinction can be made between the early phase of international deliberations and the phase in which the operation is given the green light, nationally and internationally.

The parliamentary report mentions several steps in the initial phase of NATO and EU decision-making of which the House of Representatives or both houses should be apprised, e.g. the moment when SACEUR is asked to work out military options. The AIV concludes that one should not attempt to define which information should be provided to the States General (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 of parliament regarding the possible participation of Dutch forces, the first step in the Article 100 procedure. After all, this is when Dutch participation is first mooted. As soon as the prospect of a Dutch contribution arises, the States General should be notified. This initial letter of notification, which to date has tended to be very brief, should provide more information on the stage reached in international deliberations or decision-making. This could include the announcement that military options are being studied by international military staffs as suggested by the parliamentary report, depending on confidentiality requirements. Otherwise, this kind of information can be provided by means of a confidential briefing to the parliamentary committee concerned.

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 GAERC takes 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. After all, the criterion is whether sufficient information is available to consider all the elements of the Assessment Framework.

If the operation is of such an urgent nature that the decision is made at a single session of the NATO Council or the GAERC – 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.

The Netherlands' contribution to the NRF and Battlegroups builds on its long-standing, close military cooperation with Germany and the UK in particular. In the framework of the Battlegroups, the Netherlands now works with Finland as well as Germany. Such cooperation thus involves a significant bilateral dimension as well as the multilateral dimension. This especially applies to the fully integrated Dutch-German headquarters. A situation where the Netherlands and Germany were to draw different conclusions on the deployment of the units they had jointly contributed to the NRF or Battlegroup should be avoided. The same applies to the British-Dutch contributions in the form of amphibious forces and the cooperation with Finland in relation to the Battlegroup. In the event of a looming crisis that may lead to military deployment, it will therefore be necessary to engage in close bilateral consultations with relevant partner countries, alongside multilateral consultations.

Annexe I

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Mr F. Korthals Altes
Chairman of the Advisory Council
on International Affairs
Postbus 20061
2500 EB Den Haag

Date
27 December 2006

Our ref.
DVB-074/06

Re: Supplementary request for advice on NATO Response Force

Dear Mr Korthals Altes,

The government would once again request the Advisory Council on International Affairs (AIV) for advice on decision-making regarding Dutch participation in international military operations. This request comes in response to the report of 19 June 2006 by the parliamentary working group on the NATO Response Force (NRF), *Inzet met instemming – De rol van de Tweede Kamer bij het uitzenden van militairen* (Deployment with consent – the role of parliament in relation to the deployment of military personnel) (Parliamentary Papers 30 162, nos. 2, 3 and 4). The government informed parliament on 18 August 2006 that it would seek advice from both the Council of State and the AIV before responding to the report of the parliamentary working group on NRF, in view of the constitutional and policy-related questions that it raises.

The parliamentary NRF working group made two main suggestions. First, it suggests an amendment to Article 100 of the Constitution such that parliamentary consent would be required for the deployment of Dutch armed forces outside the Netherlands (point 4.2.1, NRF working group report). The scope of the NRF working group's report is so broad that the proposed amendment would also extend to deployment in defence of the Netherlands or its allies. Second, the working group formulated a number of conclusions and recommendations, which it considers to be applicable immediately, in anticipation of the Constitutional amendment. These recommendations would make the right of parliamentary consent effective immediately and include matters such as the scope of Article 100 of the Constitution, ways of deploying Dutch forces, the decision-making procedure and the role of the House of Representatives in it, the provision of information and parliamentary involvement in decision-making about the NRF and EU Battlegroups (point 4.2.2 ff and point 4.3 in the NRF working group report).

The NRF working group's conclusions and recommendations raise new questions about the deployment of armed forces which were not addressed in the previous AIV advisory report 'The Netherlands and crisis management: three issues of current interest'. The government is now putting these questions before the AIV. The government will ask the Council of State to consider the proposed Constitutional amendment, pursuant to section 18 of the Council

of State Act. The government will use the reports of the AIV and the Council of State to draw up its response to the NRF working group's report.

The government's primary aim is to meet the need for prompt, effective military action in a multilateral framework, if a decision to this end is made, while also assuring parliament's involvement in the decision-making process. The working group's conclusions and recommendations might affect the relationship between government and parliament in matters concerning military deployment. This requires a further examination of the current procedures for decision-making and consulting parliament as they have evolved since the coming into effect of the Assessment Framework for decision-making for the deployment of military units abroad. In view of the above, the government would put the following questions to the AIV:

- In the opinion of the AIV, what would be the consequences of the conclusions and recommendations of the NRF working group for the deployment of Dutch military personnel and for Dutch participation in international military operations coordinated by, for example, the UN, NATO, the EU or other international bodies, in situations which might include the defence of the Netherlands itself or the Netherlands' duty to assist in the defence of Allied territory as a signatory to the North Atlantic Treaty? In the opinion of the AIV, at what point should parliament be informed about Dutch military participation in such international operations? It must be noted that the NRF working group did not adopt the recommendation of the AIV in 'The Netherlands and crisis management: three issues of current interest' to attach more political weight to the phase in which national forces are allocated to the NRF. If a difference of opinion between government and parliament should emerge as regards participation, would that damage the Netherlands' reputation for reliability with international partners and organisations?

- When deployment of the NRF or EU Battlegroups – and a Dutch military contribution – is being considered, what could be done to ensure that obtaining parliamentary consent does not delay preparations for actual military deployment? Could the requirement of parliamentary consent affect the rapid deployment and effectiveness of NATO or EU units?

- As regards decisions at NATO or EU level concerning, respectively, the deployment of the NRF or the EU Battlegroup, the NRF working group assumes that the government would enter a reservation that it first needs to obtain parliamentary consent for Dutch participation. The working group also states that the government should inform parliament beforehand about the position that it will take at the meeting of the North Atlantic Council or the General Affairs and External Relations Council (GAERC) on the possible deployment of the NRF or EU Battlegroup, respectively. This information should be given at a time that will allow consultation between government and parliament. The working group also recommends that the government provide parliament with information before the North Atlantic Council decides to instruct the Supreme Allied Commander Europe (SACEUR) to develop various strategic options or an operations plan. Likewise, the working group recommends (in point 4.3.5 of its report) that the government provide this information to parliament before the Political and Security Committee (PSC) or the GAERC decides to ask the EU military staff to draw up a Crisis Management Concept. The only information that the government could provide in such an early phase of international consultations would pertain to exploratory studies,

rudimentary rather than complete proposals, tentative suggestions and other elements which, taken together, would contribute to an informal, dynamic process of negotiation and consultation, ultimately leading to a decision. It might also be information that is defined as secret or confidential by the rules and regulations of the relevant international organisation. In the opinion of the AIV, if parliament takes a political stance on Dutch participation in a NATO or EU mission on the basis of the information available at that time, what consequences could this have for national and international decision-making? What are the AIV's thoughts on the working group's conclusions and recommendations referred to above as regards the provision of information to and the involvement of parliament in the successive stages of NATO and EU decision-making?

The government would appreciate an AIV advisory report on this matter in May 2007. A copy of this request will be sent to the House of Representatives.

Yours sincerely,

(signed)

Bernard Bot
Minister of Foreign Affairs

(signed)

Henk Kamp
Minister of Defence

Relevant articles from the present Constitution of the Kingdom of the Netherlands

Article 68
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.

Article 90
The Government shall promote the development of the international rule of law.

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.

Article 97
1. There shall be armed forces for the defence and protection of the interests of the Kingdom, and in order to maintain and promote the international legal order.
2. The Government shall have supreme authority over the armed forces.

Article 100
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.
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.

Relevant provisions from international treaties

Article 51, Charter of the United Nations, June 1945
Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Assistance clause in article 5, North Atlantic Treaty, April 1949
The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Article 6, North Atlantic Treaty, as amended on the accession of Greece and Turkey in October 1951
For the purpose of Article 5, an armed attack on one or more of the Parties is deemed to include an armed attack:
1. on the territory of any of the Parties in Europe or North America, on the Algerian Departments of France, on the territory of Turkey or on the islands under the jurisdiction of any of the Parties in the North Atlantic area north of the Tropic of Cancer;
2. on the forces, vessels, or aircraft of any of the Parties, when in or over these territories or any other area in Europe in which occupation forces of any of the Parties were stationed on the date when the Treaty entered into force or the Mediterranean Sea or the North Atlantic area north of the Tropic of Cancer.

Article 5, amended Treaty of Brussels (WEU Treaty) of October 1954 (this provision comes from the original treaty of March 1948)
If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power.

Articles from the current Treaty on the European Union (these provisions come partly from the Treaty of Amsterdam of October 1997, and partly from the Treaty of Nice of December 2000)

Article 14
1. The Council shall adopt joint actions. Joint actions shall address specific situations where operational action by the Union is deemed to be required. They shall lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation.

2. If there is a change in circumstances having a substantial effect on a question subject to joint action, the Council shall review the principles and objectives of that action and take the necessary decisions. As long as the Council has not acted, the joint action shall stand.
3. Joint actions shall commit the Member States in the positions they adopt and in the conduct of their activity.
4. The Council may request the Commission to submit to it any appropriate proposals relating to the common foreign and security policy to ensure the implementation of a joint action.
5. Whenever there is any plan to adopt a national position or take national action pursuant to a joint action, information shall be provided in time to allow, if necessary, for prior consultations within the Council. The obligation to provide prior information shall not apply to measures which are merely a national transposition of Council decisions.
6. In cases of imperative need arising from changes in the situation and failing a Council decision, Member States may take the necessary measures as a matter of urgency having regard to the general objectives of the joint action. The Member State concerned shall inform the Council immediately of any such measures.
7. Should there be any major difficulties in implementing a joint action, a Member State shall refer them to the Council which shall discuss them and seek appropriate solutions. Such solutions shall not run counter to the objectives of the joint action or impair its effectiveness.

Article 17

1. The common foreign and security policy shall include all questions relating to the security of the Union, including the progressive framing of a common defence policy, which might lead to a common defence, should the European Council so decide. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.
   The policy of the Union in accordance with this Article shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.
   The progressive framing of a common defence policy will be supported, as Member States consider appropriate, by cooperation between them in the field of armaments.
2. Questions referred to in this Article shall include humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking.
3. Decisions having defence implications dealt with under this Article shall be taken without prejudice to the policies and obligations referred to in paragraph 1, second subparagraph.
4. The provisions of this Article shall not prevent the development of closer cooperation between two or more Member States on a bilateral level, in the framework of the Western European Union (WEU) and NATO, provided such cooperation does not run counter to or impede that provided for in this title.
5. With a view to furthering the objectives of this Article, the provisions of this Article will be reviewed in accordance with Article 48.

Articles from the Treaty establishing a Constitution for Europe, adopted by the European Council on 18 June 2004, but which never took effect (rejected by referenda in France and the Netherlands)

Article I-41, paragraph 7

7. If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.
   Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation.

Article I-43 (known as the solidarity clause)

1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:
   (a) – prevent the terrorist threat in the territory of the Member States;
   – protect democratic institutions and the civilian population from any terrorist attack;
   – assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;
   (b) – assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.
2. The detailed arrangements for implementing this Article are set out in Article III-329.

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