CITIZENS-IN-UNIFORM: A LEGAL IMPULSE TOWARDS UNIONIZATION OF EUROPEAN ARMED FORCES

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1. Introduction

Various international human rights treaties guarantee the right to form trade unions for the protection of one's professional interests. This right is generally accepted for public servants, but the situation is different for military personnel, for whom many States deny or put severe limitations on the right to form trade unions. This differential treatment is deemed justified by the need to protect the internal and external security of the State. However, recent developments have resulted in a more generous recognition of union rights for military personnel. Over the past decades, many countries have abolished compulsory military service and established an army composed exclusively of civilian and military professionals, which often goes hand-in-hand with major cutbacks. Consequently, the armed forces are forced to improve cost-effectiveness and compete on the labour market with private businesses. As a result military service is more and more perceived as "just another job", and military personnel increasingly stand up for their own interests. Hence, members of the armed forces are increasingly perceived as "citizens in uniform", both in Europe and other continents.[1] This perspective implies that armed forces personnel, whether professional or conscripted, are entitled to the same rights and protections as

[1] See the convergence theory as outlined by military sociologist Charles Moskos (Moskos 1977); see also Taylor, Arango & Lockwood 1977; Harries-Jenkins 1995; Bartle & Heinecken 2006; Rowe 2007; Heinecken 2010.

all other persons, subject to certain limitations imposed by military life.[2] From the late-1980s onwards the Parliamentary Assembly of the Council of Europe has repeatedly propagated that members of the armed forces cannot be isolated from the democratic society that they are designated to protect.[3] "Members of the armed forces cannot be expected to respect humanitarian law and human rights in their operations unless respect for human rights is guaranteed within the army ranks", the Parliamentary Assembly stated.[4] International human rights treaties on trade union rights, however, are still of limited scope where members of the armed forces are concerned. A recent turning point is that in October 2014 the European Court on Human Rights (hereafter: ECtHR or the Court) lifted the French blanket ban on military trade unions.[5] The Court considered the French ban a violation of Article 11 of the European Convention on Human Rights (hereafter: ECHR of the Convention), which established the right to form trade unions as a specific aspect of freedom of association. Previously, the ECtHR has associated to Article 11 the right to collective bargaining and (supposedly) the right to strike. If these judgments are extended to military personnel, this will have substantial impact on the existing – or lacking – "bargaining" structures set out for military personnel. Key question in this paper is to what extent members of the (contemporary) military service in Europe are guaranteed the same trade union rights as civilian employees, and what this will mean for signatory states' practice.

In order to address this question a brief overview of military unionization in Western democracies is provided (section 2), followed by an outline of the personal scope of the right to

[2] Leigh & Born 2008, p. 22.
[3] *Resolution 903 (1988) of the Parliamentary Assembly on the right to association for members of the professional staff of the armed forces* (adopted on 30 June 1988), Strasbourg: Council of Europe 1988, § 5.
[4] *Recommendation 1742 (2006) of the Parliamentary Assembly on human rights of members of the armed forces* (adopted on 11 April 2006), Strasbourg: Council of Europe 2006, § 3.
[5] ECtHR 2 October 2014, 20609/10 (*Matelly/France*); ECtHR 2 October 2014, 32191/09 (*ADEFDROMIL/France*) (official language: French).

freedom of association in international human rights instruments (section 3). The paper then concentrates on the ECtHR ruling in October 2014 in the cases *Matelly/France* and *ADEFDROMIL/France* (section 4). Prima facie, the ECtHR is remarkably liberal in granting union rights to the military. Then, I will outline the potential impact of the ECtHR ruling by placing it in the context of extant judgments on the right to collective bargaining and strike (section 5). To illustrate the potential ramifications of the judgment on national practices, the paper will finally present three case studies, concerning South Africa, the Netherlands, and Sweden (section 6), followed by concluding remarks (section 7).

2. Bird's eye perspective on military unionism in international practice

Before taking a bird's eye view on international practice, it should be noted that the extent of trade union rights may vary from country to country, depending on its particular history, (military) culture, political situation, and level of (past) external threat.[6] Therefore a common standard is lacking. This section only provides a simplified representation by making a distinction between countries that are (1) long-unionized; (2) not-unionized; and (3) newly-unionized.[7] The first group consists of countries that have a long standing tradition of military unionism, including Belgium, Germany, Austria, the Netherlands, Norway, Switzerland, Sweden, and Denmark. Common feature is that these countries' military associations have evolved from the maturation of public sector bargaining.[8] None of these countries afford military

[6] Leigh & Born, p. 18.
[7] This tripartition is derived from Bartle & Heinecken 2006; see also *Report of the Committee on Legal Affairs and Human Rights on the Right to association for members of the professional staff of the armed forces*, Strasbourg: Council of Europe 15 July 2002, § 19-23; Caforio 2006.
[8] Stites 1993, p. 13.

personnel the right to strike, except for Switzerland[9], Austria[10], and Sweden (see section 6.3). The long-unionized countries also have in common that they have not expressed concern regarding the effectiveness of their militaries as a result of unionization. It is even argued that military unions have a positive effect as they intend to lead to a "satisfied soldier".[11]

Even so, numerous Western democratic societies still deny military personnel the right to unionize under the presentiment that this might impair combat effectiveness, *ergo* national security.[12] In their view military trade unions might lead to a breakdown of military discipline and threaten the chain of command. [13] Unionization is prohibited, for example, in the United Kingdom, the United States, Spain, Portugal, Italy, France, Turkey, Greece, and Canada. Amongst these countries are NATO's major allies. The legal prohibition is usually clearly expressed. In the United States, for example, Title 10 Section 976 of the United States Code makes it illegal for members of the military to unionize. This legislation is considered the "cornerstone" of the American resistance to unionization and dates back to 1978.[14] In the mid-1970s, after the United States switched from conscription to an all-volunteer armed force, the American Federation of Government Employees allowed military personnel to join its union. In response, military and political leaders emphasized the unique nature of military service – captured by the phrase "it's a service, not a job" – while pointing out the ultimate sacrifice

[9] According to Art. 28 of the Swiss Constitution strikes and lockouts are admissible in both the private and the public sector. By special legislation the right to strike can be abrogated for certain categories of persons. One of the designated categories concerns military management. On the basis of Art. 24 *Bundespersonalgesetz* 2000 (172.220.1) the government has limited the right to strike for military personnel, but only for reasons of national security, safeguarding foreign policy interest, or ensuring vital interests.

[10] Caforio 2006, p. 316.

[11] Meeting OCSE/ODIHR & EUROMIL 2013, § 19-20; see also Stites 1993, p. 13; Caforio 2006, p. 316-317.

[12] Stites 1993, p. 9-10; Harries-Jenkins 1995, p. 18.

[13] See for example Mittelstadt 2011, p. 30; Caforio 2006, p. 315.

[14] Stites 1993, p. 23; before 1978 Defense Department Directives allowed service members to join unions, but commanders forbidden to negotiate with unions (Moskos 1977, p. 46).

required by the "military way of life".[15] By protecting and even expanding military benefits the union "threat" was defeated within the year. In the United Kingdom, the same paternalistic approach was used to quash the emergence of military unionism in the 1970s.[16] The Queen's Regulations (J5.588) still outlaw military trade unions. There are, however, subtle nuances: in the United Kingdom, for example, military personnel may become members of civilian trade unions; in France and Italy alternative (internal) arrangements have been installed to deal with soldiers' grievances;[17] and an increasing number of the non-unionized countries, for example the United Kingdom, Spain, and Portugal, grant military personnel the right to join professional associations other than trade unions.[18]

In the past decades, a group of newly-unionized countries has emerged, consisting of, amongst others, Ireland, Australia, South Africa, and Slovenia. One of the "most controversial cases" is represented by South Africa.[19] On 27 April 1994 the new South African Defence Force (SANDF) came into being. It immediately faced a challenge of transforming the forces from the pre-1994 all-white male conscription force to an all-volunteer force representative of the broader society. This major restructuring led to the need for some form of collective representation. Just four months after the establishment of SANDF the South African National Defence Union (SANDU) was created. The Defence Act, however, prohibited members of the armed forces from joining trade unions (Sec. 126B), whilst the new Constitution granted these rights to "every worker" (Sec. 23). In 1999 this discrepancy was resolved by the South African Constitutional

[15] Mittelstadt 2011, p. 37-39.
[16] Bartle 2006, p. 17.
[17] See for France: Mandeville 1976, p. 542; Martin 2013, p. 57; see for Italy: Olivetta 2006, p. 40-43. See also ECSR 4 December 2000, 2/1999, 4/1999, 5/1999 (*EUROFEDOP/France, Italy and Portugal*).
[18] Meeting OCSE/ODIHR & EUROMIL 2013, § 24.
[19] Bartle and Heinecken 2013, p. 7.

Court who ruled the ban on military trade unions to be unconstitutional (the 1999 *SANDU* decision).[20] Since military leadership was still not receptive to the idea, tensions nevertheless remained (section 6.1). In 2007 Heinecken and Nel suggested that "the South African case certainly [will] be noted in the discourse on military unionism, especially if it should serve before the European Court of Human Rights".[21] Seven years later the French blanket ban on military unions was challenged before the Court.

3. Scope of the relevant human rights instruments

On an international level, union rights were first recognized in ILO Convention 87 (1948). Article 2 secures to all workers, without any distinction between the public and private sector, the unrestricted right to establish and join trade unions. The only exception relates to the armed forces and the police, for whom national laws or regulations shall determine the extent to which the guarantees provided for in the Convention shall apply (Art. 9). Similar wording appears in the other relevant conventions.[22] According to the ILO supervising bodies, in particular the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and Committee on Freedom of Association (CFA), this means that States are not required to grant these rights and may impose restrictions, or even exclusions, as regards the trade union rights for said categories of workers.[23] A similar restrictive approach can be found in Article 22 of the International Covenant on Civil and Political Rights (ICCPR) and Article 8 of the International Covenant on Economic, Social and Cultural Rights.

[20] Constitutional Court of South Africa 26 May 1999, 1999(4)SA 469(CC); 1999(6) BCLR 615 (CC) (*African National Defence Union/Minister of Defence and Another*).
[21] Heinecken & Nel 2007, p. 483.
[22] Art. 5 ILO Convention 98; Art. 1 § 3 ILO Convention 151; Art. 1 § 2 ILO Convention 154.
[23] CFA Digest 2006, §§ 224-225; ILO General Survey 2013, §§ 67-70, 89, 251-253.

On the European level, the Council of Europe has drafted two key treaties for ensuring civil and political rights: the aforementioned EHCR (1950) and the European Social Charter (1961, revised in 1996) (RESC). In the *Engel and others* case in 1976 the ECtHR affirmed that soldiers are within the scope of the ECHR. It considered, though, that when interpreting and applying the rules of the Convention in cases involving the military, the Court has to take into account the particular characteristics of military life, such as military discipline, the hierarchical structure, and the protection of morale.[24] This judgment reflects the "citizens in uniform" perspective.[25] The idea that military personnel are entitled to Convention protection has been reiterated by the ECtHR multiple times.[26] Illustrative is the consideration "that the Convention does not stop at the gates of army barracks", while pushing aside the idea of the special status of the armed forces as a general argument for "frustrating" the rights of the military. "Any restrictions on their Convention rights, to be justified, must satisfy the test of necessity in a democratic society", the Court insists.[27] Article 11 of the Convention states that "everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests". In the *ADEFDROMIL* and *Matelly* cases, discussed later in more detail, it all came down to the interpretation of the second sentence in Article 11§2 ECHR:

> This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

[24] ECtHR 8 June 1976, 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (*Engel and others/the Netherlands*), § 54.
[25] See also Leigh & Born 2008, p. 34.
[26] See, inter alia, ECtHR 25 November 1997, 24348/94, (*Grigoriades/Greece*), §§ 45-48; ECtHR 19 December 1994, 15153/89 (*Vereinigung demokratischer Soldaten Österreichs and Gubi/Austria*), § 36; ECtHR 6 February 2003, 45624/99 (*Akbulut/Turkey*) (inadmissible).
[27] ECtHR 22 March 2012 (Grand Chamber), 30078/06 (*Konstantin Markin/Russia*), § 136.

The meaning of this personal exception clause will be discussed in section 4.3. In the RESC, the right to organize is laid down in Article 5; the right to collective bargaining in Article 6 (see section 5.2). Both apply to the private sector and the public sector.[28] Only Article 5 RESC contains an exception clause concerning the armed forces and the police. A distinction is being made between these two groups. With regard to members of the police the second sentence of Article 5 RESC states that "[t]he extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations". The explanation given to this by the European Committee of Social Rights (ECSR), the supervising body of the RESC, is that States are permitted to restrict but not to completely deny police officers' right to organize.[29] With regard to the armed forces the last sentence of Article 5 RESC states:

> The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.

According to the ECSR it follows from the wording of this sentence that States are permitted to "limit in any way and even to suppress entirely the freedom to organize of the armed forces". In December 2000 this was re-emphasized in three cases brought by the European Federation of Employees in Public Services (EUROFEDOP), in which the ECSR judged the blanket ban on military trade unions in France, Italy, and Portugal to be compatible with Article 5 ESC.[30] One year later, the Parliamentary Assembly of the Council of Europe adopted Recommendation 1572 (2002), in which it advised to amend Article 5 RESC by removing the distinction between soldiers and police officers, thereby abandoning the permissibility of an absolute prohibition.[31] In

[28] ECSR Digest 2008, p. 51.
[29] ECSR 21 May 2002, 11/2001 (*CESP/ Portugal*); see also ECSR 2 December 2013, 83/2012 (*EuroCOP/ Ireland*).
[30] ECSR 4 December 2000, 2/1999, 4/1999, 5/1999 (EUROFEDOP/France, Italy and Portugal), § 26.
[31] *Recommendation 1572 (2002) of the Parliamentary Assembly on the Right to association for members of the professional staff of the armed forces* (adopted on 3 September 2002), Strasbourg: Council of Europe 2002, § 8.

2006 the Parliamentary Assembly adopted Recommendation 1742 in which it noted that despite repeated requests, the rights of members of the armed forces in some states remained at odds with those stipulated under the ECHR. It called upon member States to guarantee human rights for members of the armed forces, in particular "to authorize members of the armed forces to join professional representative associations or trade unions entitled to negotiate matters connected with remuneration and conditions of employment (…)".[32] In 2010 the Committee of Ministers of the Council of Europe issued a similar recommendation to the members States, in which it catalogued the rights and freedoms that are to be guaranteed to members of the armed forces, as well as the reasons that can justify restrictions.[33] The Organization for Security and Co-operation in Europe (OSCE) also propagates the citizen-in-uniform approach, though member States retain the discretion to impose restrictions.[34] Finally, Article 12 of the Charter of Fundamental Rights of the European Union (hereafter: Charter) awards "everyone" the right to freedom of association.[35] This is often referred to as the only clause that contains no limitation for members of the armed forces.[36] Apart from the question if the Charter applies to the armed forces,[37] it

[32] *Recommendation 1742 (2006) of the Parliamentary Assembly on human rights of members of the armed forces* (adopted on 11 April 2006), Strasbourg: Council of Europe 2006, § 9.1. See also ECtHR 2 October 2014, 20609/10 (*Matelly/France*), § 35.

[33] *Human rights of members of the armed forces. Recommendation CM/Rec (2010)4 of the Committee of Ministers and explanatory memorandum* (adopted on 24 February 2010), Strasbourg: Council of Europe 2010, § 54.

[34] See for example the OCSE Code of Conduct on Politico Military Aspects of Security, § 32.

[35] The Charter has become legally binding on the EU with the entry into force of the Treaty of Lisbon in December 2009 (Art. 6§1 Treaty on European Union).

[36] See also Art. 23§4 of the United Nations Universal Declaration on Human Rights. This (resolution) is not, in itself, legally binding.

[37] Art. 51§1 Charter limits the scope of the Charter to the member States to when they are *implementing* Union law (see also ECJ EU 26 February 2013, C-617/10 (*Åklagaren/Hans Åkerberg Fransson*), § 22). The Court of Justice of the European Union (ECJ) has upheld that activities which, like national defence, fall within the exercise of public powers are in principle excluded from classification as economic activity (ECJ 18 October 2012, C-583/10 (*United States of America/Christine Nolan*)). It could therefore be argued that the Charter, in principle, is not applicable to the armed forces. The Charter does apply to EU Common Security and Defence Policy (CSDP) operations (*Human rights applied to CSDP operations and missions* (Briefing of 21 January 2014), European Parliamentary Research Service 2014).

should be noted that the Charter is to be interpreted with due regard to the complementary explanations.[38] This reveals (also in view of Article 52§3 Charter) that the meaning and scope of Article 12 Charter corresponds with that of Article 11 ECHR – so that we have come full circle.

4. The cases of Matelly and ADEFDROMIL against France

4.1 Case facts

France is one of the countries that has restricted members of the armed forces to belong to some form of military union. The French refusal to grant active serviceman this right is closely connected to its traditional conception of military service.[39] In the French view, the right to join and form trade unions could have an adverse effect on basic aspects of the military institution, such as hierarchy, readiness, and (political) neutrality.[40] The relevant provisions are currently laid down in French Defence Code (*Code de la défense*), Article L. 4121-4, own translation:

> Exercising of the right to strike is incompatible with the military condition. The existence of professional groups and associations of a syndicalist nature, as well as syndicalist activity of active military personnel are incompatible with rules of military discipline. It is the commander, at all levels, who protects the interests of his subordinates through the chains of command.

The French Council of State (*Conseil d'Etat*) interprets the notion of "professional groups" as a group which "aims in particular to defend the material and moral interests of the military (...)". It thus covers "any structure that would serve as a cover-up for syndicalist activity".[41] This is what confronted both ADEFDROMIL and Jean-Hugues Matelly. ADEFDROMIL was set up in 2001 by two servicemen with the statutory aim of "examining and defending the collective or

[38] Art. 6§1 Treaty on European Union.
[39] Martin 2013, p. 48-50.
[40] Mandeville 1976, p. 539; Martin 2013, p. 49; ECtHR 2 October 2014, 20609/10 (*Matelly/France*), §§ 50-51; ECtHR 2 October 2014, 32191/09 (*ADEFDROMIL/France*), § 35-36.
[41] ECtHR 2 October 2014, 20609/10 (*Matelly/France*), §§ 29-30.

individual rights and pecuniary, occupational and non-pecuniary interests of military personnel".[42] In pursuit of this goal the organization, amongst others, gave advice to military personnel regarding disputes within the hierarchy over advancement, sanctions, and other professional issues. In 2002 it was considered to have a trade-union-like character due to the aforementioned reference in its statutes. Active-duty members were to resign their membership or else face disciplinary action. The organization then lost many of its leaders. ADEFDROMIL lodged several applications for judicial review. Those were eventually dismissed by the *Conseil d'Etat* on the grounds that the organization was in breach of Article L. 4121-4 of the Defence Code. For this reason it was denied access to justice.[43] In Strasbourg ADEFDROMIL complained that it was deprived of every right to act in justice solely on the grounds of its occupational interests.[44] More or less the same happened to Matelly, an officer in the National Gendarmerie, a semi-military police force in France with military status.[45] In 2008 the association "*Forum gendarmes et citoyens*" was created, with Matelly as founding member and vice-president. Statutory aim was to facilitate the exchange of information between citizens and gendarmes, as well as "defending the pecuniary and non-pecuniary situation of gendarmes".[46] One day after the association was officially announced, the Director General ordered Matelly (and other active serving gendarmes involved) to terminate their membership immediately or face disciplinary action for violating article L4121-4 of the Defence Code. Matelly turned to the national administrative courts for review of this order; in February 2010 the *Conseil d'Etat*

[42] ECtHR 2 October 2014, 32191/09 (*ADEFDROMIL/France*), § 5.
[43] Ibid, § 17.
[44] Ibid, §§ 21-22.
[45] ECtHR 2 October 2014, 20609/10 (*Matelly/France*), § 27; the conferring of military status to the National Gendarme was not contested in this case, though in October 2013 the ESCR declared a collective complaint of French gendarmes on the issue admissible (ECSR 21 October 2013, 101/2013 (*CESP/ France*) (see also Dorssemont 2015, sec. 2).
[46] Ibid, § 8.

rejected his request.[47] In Strasbourg, Matelly complained of an unjustified and disproportionate interference of his freedom of association.

4.2 ECtHR judgment

Both ADEFDROMIL's and Matelly's complaint was examined solely from the perspective of Article 11 ECHR, which guarantees trade-union freedom as a specific aspect of the right to freedom of association.[48] In both cases the interference of Article 11 was traced back to the provisions of Article L. 4121-4 of the Defence Code. This resulted in two practically similar rulings;[49] therefore reference is made only to the *Matelly* case. The *Matelly* judgment shows that members of the armed forces are not removed from the ambit of Article 11. Referring to what had become its constant case-law on members of the administration of the State and the police, the other two groups specified in the exception clause *ratione personae* in §2, the ECtHR recalled that at most "lawful restrictions" may be imposed by the States (see section 4.3). These restrictions are limited to the "exercise" of the right to association and may not affect the essential elements of the freedom of association, without which this right would become meaningless.[50] The ECtHR has previously indicated "the right to form and join a trade union" to be one of those essential elements.[51] In addition, the interference has to comply with the material

[47] Ibid, § 17.
[48] Matelly also appealed to Art. 10 ECHR on freedom of expression (§ 41). The ECtHR considers Art. 11 to be a *lex specialis* of Art. 10 ECHR (see for example ECtHR 25 September 2012, 11828/08 (*Trade Union of the Police in the Slovak Republic and others/Slovakia*), § 52). ADEFDROMIL also appealed to Art. 6, 13 and 14 ECHR (§ 23).
[49] Main difference is that in the ADEFDROMIL a violation of Art. 6 and 15 ECHR was also in issue on the grounds of the differential treatment in access to justice. The ECtHR considered that this restriction of the ability of a trade union to provide legal assistance to its members impairs the essence of freedom of association set forth in Art. 11 ECHR (See also Dorssemont 2015).
[50] Ibid, § 56-57.
[51] Ibid, § 58; the Court referred to ECtHR (Grand Chamber) 12 November 2008, 34503/97 (*Demir and Baykara/Turkey*), §§ 144-145.

conditions of §2.[52] This means that, regardless of the relevance of the personal scope of §2, the classical three steps are applied – "prescribed by law", "legitimate aim", and "necessary in a democratic society". As for the first step, the ECtHR considered the interference as prescribed by law: Article L. 4121-4 of the Defence Code (complemented by the *Conseil d'État's* case-law) was sufficiently "accessible" and "foreseeable".[53] As a legitimate aim served the protection of the order and discipline necessary in the armed forces (of which the gendarmerie is part of).[54] Even so the ECtHR stressed that an absolute injunction for soldiers to form unions is not by definition "necessary in a democratic society".[55] In §71 the Court states:[56]

> The Court is aware that the special nature of armed forces' mission requires that trade union activity which – in fulfilling its purpose, could bring to light the existence of critical views regarding certain decisions that affected the non-pecuniary and pecuniary situation of military personnel – be adapted to those particular circumstances. It therefore emphasizes that, under Article 11 of the Convention, restrictions, even significant ones, could be imposed on the forms of action and expression of an occupational association and of the military personnel who joined it. Such restrictions, however, must not deprive the military and their unions of the general right of association in defense of their professional and non-pecuniary interests.

According to the Court the relevant provisions of the Defence Code amounted to prohibiting military personnel, "*purement et simplement*",[57] from joining any trade-union-like group.[58] As

[52] Ibid, § 59.
[53] Ibid, § 65-66. See also ECtHR 26 April 1979, 6538/74 (*Sunday Times/the United Kingdom*), § 49; ECtHR 20 May 1999, 25390/94 (*Rekvényi/Hungary*), § 34; ECtHR 2 October 2014, 20609/10 (*Matelly/France*), § 60.
[54] Ibid, § 67; the Court referred to the *Engel and others* case, in which the ECtHR had determined that the phrasing "prevention of disorder" in Article 11§2 ECHR relates to public order, as well as "order that must prevail within the confines of a specific social group" (internal order) such as the armed forces, since disorder in this group can have repercussions on order in society as a whole (ECtHR 8 June 1976, 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (*Engel and others/the Netherlands*), § 98).
[55] Ibid, § 62.
[56] Ibid, § 71; translation based on press release "The blanket ban on trade unions within the French armed forces is contrary to the Convention", issued on 2 October 2014 by the register of the Court.
[57] Ibid, § 68.
[58] Ibid, §§ 49, 72-73.

for the government's argument that it had established several mechanisms in order to meet the demand for group representation within its armed forces, the ECtHR considered that these could not replace the granting of the right to freedom of association, "which includes the right to form and join trade unions".[59] Hence, the Court considered the absolute prohibition of trade unions in the French army in violation of Article 11 ECHR.[60]

4.3 Scope of Article 11 ECHR

4.3.1 ECtHR case-law

From a human rights perspective the *Matelly* ruling is to be applauded; from a legal perspective, however, it seems questionably liberal compared to international practice and international human rights treaties. The bottom line of the *Matelly* case is the interpretation of the twofold exception clause in Article 11§2 ECHR. In case of an interference in the rights guaranteed in Article 11§1 the classical three parameters – "prescribed by law", "legitimate aim" and "necessary in a democratic society" – are to be examined to determine whether this constitutes a breach. This follows from the first sentence of §2. Convention-wise unique is the addition of the second sentence (cited in section 3). The value of this sentence (a *personal* exception clause) over the first sentence (a *material* exception clause) is debatable.[61] Illustrative is the *Vogt* case (1995). On the one hand the ECtHR mentioned that the second sentence allows States to impose "special restrictions" to the exercise of associational rights by the indicated categories; on the other hand the ECtHR considered the breach "disproportionate to the legitimate aim pursued",

[59] Ibid, §§ 53-54, 70.
[60] Ibid, §§ 75-76. A separate opinion was expressed by Judge De Gaetano, joined by Judge Power-Forde (see section 5.1).
[61] See also Besselink 2003, p. 592; Leigh & Born 2008, p. 69; Dorssemont 2013, p. 350-354; Dorssemont 2015, sec. 8; Van Hiel 2014.

therefore applying the first sentence.[62] Next in the *Rekvényi* case (1999), the proportionality test was explicitly excluded by virtue of the second sentence.[63] Consequently, the ECtHR examined only the "lawfulness" of the restrictions. The difference in approach may be explained by the type of public officials in question: teachers (members of the administration of the State)[64] in the *Vogt* case; members of the police in the *Rekvényi* case. As outlined in section 3 other international human rights instruments contain similar arrangements for members of the armed forces and the police; only the ICESCR also indicates members of the administration of the State. This notion has led to a strict interpretation of the limitation on last-mentioned group's right to form trade unions, as can be observed in the jurisprudence on Turkish civil servants' trade union freedom. In the *Tüm Haber Sen* case in 2006, and in subsequent cases, the ECtHR has intertwined the two grounds for restriction:[65]

> As to whether the interference was "necessary in a democratic society", the Court reiterates that lawful restrictions may be imposed on the exercise of trade union rights by members of the armed forces, of the police or of the administration of the State. However, it must also be borne in mind that the exceptions set out in Article 11 are to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining whether a necessity within the meaning of Article 11 § 2 exists, the Contracting States have only a limited margin of appreciation (…).

This implies that a restriction cannot be justified by the mere fact that it concerns one of the three categories mentioned in §2. This line of reasoning was prolonged by the Grand Chamber in the

[62] ECtHR (Grand Chamber) 26 September 1995, 17851/91 (*Vogt/Germany*), §§ 43, 68; in ECtHR 24 November 2005, 27574/02 (*Otto/Germany*) the ECtHR applied the same approach.

[63] ECtHR 20 May 1999, 25390/94 (*Rekvényi/Hungary*), § 59-61; in ECtHR 20 January 1987, 11603/85 (*Council of Civil Service Unions et al/the United Kingdom*) the European Commission on Human Rights had adapted a similar view on Article 11 § 2 ECHR by considering this a separate ground for restrictions.

[64] According to the ECtHR the notion of "administration of the State" should be interpreted narrowly in the light of the post held by the official concerned. In the *Rekvényi* case it did not consider it necessary to answer the question if teachers were to be regarded as such (Ibid, §§ 67-68).

[65] ECtHR 21 February 2006, 28602/95 (*Tüm Haber Sen and Çınar/Turkey*), § 35; see also ECtHR 12 November 2008, 34503/97 (*Demir and Baykara/Turkey*), § 119; ECtHR 9 July 2013, 2330/09 (*Sindicatul "Păstorul Cel Bun"/Romania*), § 145.

Demir and Baykara case in considering that "members of the administration of the State" are not beyond the scope of Article 11 ECHR.[66] At the same time the Grand Chamber narrowed this group down to civil servants who are actually engaged in the administration of the State.[67] In doing do it also referred to European State practice. The ECtHR observed that nowadays all signatory States recognize freedom of association for public servants and that "[i]n the majority of member States, the few restrictions that can be found are limited to judicial offices, the police and the fire services, with the most stringent restrictions, culminating in the prohibition of union membership, being reserved for members of the armed forces".[68] The second sentence of Article 11§2 ECHR is thus deprived of its meaning where "members of the administration of the State" are concerned.

The *Trade Union of the Police in the Slovak Republic* case in 2012 concerned a public protest by police members who shouted that the Government should step down. In this case the ECtHR first examined police officers' union rights. It considered that their duties and responsibilities justify "particular arrangements".[69] The Court nonetheless assessed the justification of the interference in question by applying the classical parameters – it did not call in question their right to freedom of association.[70] The Court did not refer to the case-law cited above. Without any justification this case-law was extended to members of the police and armed forces in the *Sindicatul "Păstorul Cel Bun"* case (concerning priests).[71] It is noteworthy that this case-law laid the

[66] ECtHR (Grand Chamber) 12 November 2008, 34503/97 (*Demir and Baykara/Turkey*), §107.
[67] Ibid, § 97.
[68] Ibid, § 106.
[69] ECtHR 25 September 2012, 11828/08 (*Trade Union of the Police in the Slovak Republic and others/Slovakia*), § 67.
[70] Ibid, § 69-75.
[71] ECtHR 9 July 2013, 2330/09 (*Sindicatul "Păstorul Cel Bun"/Romania*), § 145; in this case the ECtHR made no reference to the *Trade Union of the Police in the Slovak Republic* case.

foundation for the *Matelly* ruling, and not, as one might expect, the case-law on the applicability of the ECHR on members of the armed forces (starting with the *Engel* ruling; see section 3). The first-mentioned case-law, however, is based on the position of members of the administration of the State in international human rights treaties and European State practice. These differ widely whereas members of the armed forces are concerned, as also observed by the Grand Chamber in the *Demir and Baykara* case (cited above).[72] The *Matelly* ruling therefore appears to be built on quicksand. In Van Hiel's words: "Apparently, the Court aimed for a fundamental decision on the freedom of association of military personnel".[73]

4.3.2 Evolutive interpretation

France had (implicitly) called upon the Court to apply the so-called evolutive interpretation methodology (also called *dynamic* or *consensus* interpretation) by appealing to the ECSR case-law on Article 5 RESC to clarify the purpose of the second sentence of Article 11§2 ECHR.[74] This interpretation methodology is elaborately outlined in the aforementioned *Demir and Baykara* ruling. The Grand Chamber stated that the Convention is a "living instrument" which must be interpreted "in the light of present-day conditions".[75] It summarized its methodology as follows:[76]

> (…) when it [the Court] considers the object and purpose of the Convention provisions, it also takes into account the international law background to the legal

[72] ECtHR (Grand Chamber) 12 November 2008, 34503/97 (*Demir and Baykara/Turkey*), § 106.
[73] Van Hiel 2014.
[74] ECtHR 2 October 2014, 20609/10 (*Matelly/France*), § 50, 74. According to Dorssemont this conflicts with Art. H RESC since France appealed to Art. 5 RESC to undermine the trade union freedom guaranteed in Art. 11 ECHR. At the time the French government's view was presented, however, trade union freedom for military personnel was not (clearly) guaranteed in Art. 11 ECHR since the case-law was based on members of the State administration. See for the classification of the National Gendarmerie as armed forces Conclusions 2002, Chapter I (France); Conclusions 2004 (France); Conclusions 2006 (France); ECSR 21 October 2013, 101/2013 (*CESP/France*).
[75] Ibid, § 146.
[76] Ibid, §§ 86.

> question before it. Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty.

In the *Matelly* case the Court concluded, "in view of its case-law", that evolutive interpretation was not at issue with regard to soldiers' rights to association.[77] This decision is arguable, since the said case-law originates in deploying evolutive interpretation on the *other* categories mentioned in Article 11§2 ECHR.

The question is whether evolutive interpretation would indeed have led to another conclusion. The international human rights treaties show no consensus. On the one hand the ILO Conventions and Article 5 RESC are of a narrow scope concerning military personnel; on the other hand, the Council of Europe's Recommendations – non-binding instruments that are nonetheless valued by the ECtHR[78] – fully embrace the "citizen-in-uniform" approach. European practice with respect to soldiers' union rights also diverges widely – as recalled by the ECtHR, 19 out of 42 member States (which possess armed forces) do not guarantee the right of association to their military personnel; 35 out of 42 do not guarantee the right to collective bargaining.[79] Yet an increasing number of countries guarantee military personnel the right to freedom of association, as also reflected in the Council of Europe's policy. This ongoing trend could very well constitute sufficient foundation for an advanced interpretation of Article 11§2

[77] ECtHR 2 October 2014, 20609/10 (*Matelly/France*), § 74.
[78] ECtHR (Grand Chamber) 12 November 2008, 34503/97 (*Demir and Baykara/Turkey*), §§ 46, 104.
[79] ECtHR 2 October 2014, 20609/10 (*Matelly/France*), § 35.

ECHR.[80] In addition, it can be argued that the increasing international military co-operation and integration of European armed forces should also be taken into consideration, in particular in the context of the Common Security and Defence Policy (CSDP) adopted by the EU. In the case of combined action by armed forces, for example in peace keeping and humanitarian operations, the differences in human rights and fundamental freedoms for military personnel between member states become all the more visible – and all the less justifiable.[81] On behalf of France, however, it can be argued that other major NATO-allies (and permanent members of the UN Security Council) still forbid military unions; and that, in view of these countries' leading role and (greater) military responsibility, it cannot just be compared to other European countries.[82] This leads me to the conclusion that the ECHR ruling in the *Matelly* case – the recognition of trade union freedom for European military personnel – is defensible through evolutive interpretation of Article 11§2 ECHR, though another outcome was not impossible.

5. Extent of European soldiers' newly associational rights

5.1 Introduction

The *Matelly* and the *ADEFDROMIL* cases were the first in which the Court had to decide on the freedom of association of military personnel.[83] The recognition of soldiers' right to join and form trade unions immediately raises the question to what extent this right may be exercised, since

[80] See also ECtHR 8 April 2014, 31045/10 (*R.M.T./the United Kingdom*), § 98; ECtHR (Grand Chamber) 12 November 2008, 34503/97 (*Demir and Baykara/Turkey*), § 85; ECtHR 11 July 2002, 28957/95 (*Christine Goodwin/the United Kingdom*), § 85; ECtHR 6 May 2003, 44306/98 (*Appleby and others/the United Kingdom*), § 46.

[81] This was put forward by EUROFEDOP in ECSR 4 December 2000, 2/1999, 4/1999, 5/1999 (*EUROFEDOP/France, Italy and Portugal*), §§ 13, 27.

[82] *Rapport à Monsieur le Président de la République Sur Le droit d'association professionnelle des militaires,* Parijs: Conseil d'Etat 18 December 2014, p. 17.

[83] In the case *Schmidt and Dahlström/Sweden* an army officer (Dahlström) had complained that the Swedish government had violated Art. 11 (and Art. 14) ECHR; the second sentence of §2 was not in issue (ECtHR 6 February 1976, 5589/72 (*Schmidt and Dahlström/Sweden*).

Article 11 ECHR grants this right for the protection of one's interests. Has the ECtHR opened the floodgates to all kinds of trade union prerogatives within the armed forces? The concerns on the implications – the right to take industrial action – of granting military personnel the right to join and form a "trade union" can be read between the lines of the concurring opinion by Judge De Gaetano (joined by Judge Power-Forde).[84] He was not satisfied by the restrictions specified by the Court in §71 (cited in section 4.2). These concerns are all very real. The ECtHR has made it clear not to accept restrictions that affect indispensable elements of trade-union freedom. Apart from "the right to form and join a trade union", the ECtHR has previously indicated "the prohibition of closed-shop agreements", and "the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members" as essential elements of the right of association.[85] In 2008 the right to collective bargaining was added to this list; in 2009 (supposedly) the right to strike. All this is backed by the ECSR in 2012 lifting the ban on the right to strike for members of the Irish police. Van Hiel has therefore suggested that "[i]n the present situation, applying the same principles on members of the armed forces, seems difficult to avoid".[86] The next two sections will outline the applicability of right to collective bargaining and the right to strike under Article 11 ECHR on military personnel, by also tying in with (the explanation given to) Article 6 RESC. Because of their limited scope for the military the ILO Conventions are left aside (see section 3).

[84] Judge De Gaetano pointed out a linguistic difference between the term "trade union" and "professional association"; in many countries freedom of association and union membership are understood as the right to take industrial action (including the right to strike) (see also Harries-Jenkins 1995, p. 20-28; Dorssemont 2015, sec. 7-8).
[85] See the references in ECtHR (Grand Chamber) 12 November 2008, 34503/97 (*Demir and Baykara/Turkey*), §§ 144-145. On account of the *ADEFDROMIL* ruling Dorssemont has debated that the right for a trade union to act in justice on behalf of its members might also have become an essential element (Dorssemont 2015, sec. 9).
[86] Van Hiel 2015.

5.2 Right to collective bargaining

For decades the Court upheld the notion that the right to bargain collectively and the right to strike do not constitute an indispensable element of Article 11 ECHR.[87] These were merely indicated as "important elements" as to which member States have a margin of appreciation to provide other means to safeguard trade union freedom.[88] With respect to the right to collective bargaining this line of reasoning was abandoned in 2008 by the *Demir and Baykara* judgment.[89] In its judgment the Grand Chamber considered that, regarding the developments in labour law, "the right to bargain collectively with the employer had, in principle, become one of the essential elements of the trade union right set forth in Article 11 ECHR".[90] It awarded the same rights to civil servants, "except in very specific cases". It nevertheless added that "lawful restrictions" may have to be imposed to the categories mentioned in Article 11§2 ECHR. Member States remain free to organize their system so as, if appropriate, to grant special status to representative trade unions.[91] The right to collective bargaining is not interpreted as including a "right" to a collective agreement: it is merely an employees' right to social dialogue with the employer.[92] For further interpretation the ECtHR might seek reference to the ECSR.

The right to collective bargaining is laid down in Article 6§2 RESC. In contrast to Article 5 RESC the provisions of Article 6 RESC do not contain a *ratio personae*. It follows that the right

[87] See Jacobs 2013, p. 310-311 for an overview.
[88] ECtHR 27 October 1975, 4464/70 (*National union of Belgian Police/Belgium*), § 39; ECtHR 6 February 1976, 5589/72 (*Schmidt and Dahlström/Sweden*), § 36.
[89] It is suggested that this judgment was motivated by the need to counterbalance the severe restrictions the ECJ had put on the right to collective bargaining and strike by balancing these rights against the economic freedoms set forth in the EU Treaties in the *Viking* and *Laval* cases a few months earlier (Jacobs 2013, p. 313).
[90] ECtHR (Grand Chamber) 12 November 2008, 34503/97 (*Demir and Baykara/Turkey)*, §§ 52, 154.
[91] Ibid, § 154; see also ECtHR 6 February 1976, 5614/72 (Swedish Engine Drivers' Union/Sweden), § 46.
[92] ECtHR 8 April 2014, 31045/10 (*R.M.T./the United Kingdom*), § 85.

to collective bargaining must in some way be guaranteed to members of the armed forces.[93] With regard to public sector bargaining the ECSR has considered that, by virtue of the distinct features of labour relations in the public sector (often unilaterally fixed in public law), the right to collective bargaining does not oblige States to end in collective agreements. States that impose restrictions on collective bargaining in the public sector do however have an obligation to arrange for the involvement of staff representatives in the drafting of the applicable employment regulations (for example, consultation).[94] Mere hearing of a party is not sufficient and it is "imperative to regularly consult all parties during the process of collective bargaining and thereby offer a possibility to affect the contents of the negotiated outcome".[95] Especially in a situation where trade union rights have been restricted, it must maintain its ability to argue on behalf of its members through at least one effective mechanism.[96] In this regard a parallel can be drawn between members of the armed forces and the police. Under Article 5 RESC States are permitted to restrict police officers' right to organize. "It follows", the ECSR asserted, "firstly, that police personnel must be able to form or join genuine organizations for the protection of their material and moral interests and secondly, that such organizations must be able to benefit from most trade union prerogatives".[97] These are, inter alia, the right to express demands with regard to working conditions and pay, the right of access to the working place, as well as the right of assembly and speech.[98] In my view it is inevitable that, under normal circumstances, these rights are conveyed to military personnel as well.

[93] ECSR 4 December 2000, 2/1999, 4/1999, 5/1999 (*EUROFEDOP/France, Italy and Portugal*), §§ 11, 28-29
[94] ECtHR (Grand Chamber) 12 November 2008, 34503/97 (*Demir and Baykara/Turkey*), §§ 147-150. See also Art. 7 ILO Convention 151.
[95] ECSR 2 December 2013, 83/2012 (*EuroCOP/Ireland*), § 176.
[96] Ibid, §177.
[97] Ibid, §26.
[98] Ibid, § 40.

5.3 Right to collective action

In 2009, the ECtHR appeared to have construed the right to strike as an essential element of the right to freedom of association in the *Enerji Yapi-Yol Sen* case.[99] The Court was clearly inspired by the ILO supervising bodies intertwining the right to strike with trade union freedom as "*un corrolaire indissociable*" – which is under attack[100] –, and by Article 6 RESC linking the right to strike to the right to collective bargaining.[101] Last year, however, the Court disclosed that the reference to the ILO supervising bodies does not mean that it has conferred special status on the right to strike.[102] In the *Enerji Yapi-Yol Sen* case the Court did acknowledge that the right to strike is not absolute and could be subject to certain conditions and restrictions. A prohibition cannot be extended to all civil servants in general, though certain categories of civil servants exercising public authority could be prohibited from taking strike action.[103] In the *Pellegrin* judgment, to which the Court referred, the term "civil service" was defined as "public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities". Both the armed forces and the police were considered to be "manifest examples" of such specific activities.[104] This means that a ban on the right to strike for military

[99] ECtHR 21 April 2009, 68959/01 (*Enerji Yapi Yol Sen/Turquie*) (official language: French).

[100] In view of the employer representatives in the ILO, the supervising bodies have overstepped their mandate in connecting in the right to strike to ILO Convention 87. The conflict on the right to strike has brought the ILO's supervisory mechanism to a standstill. In February 2015 the right to strike was re-affirmed in a tripartite meeting (*Outcome of the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level*, Geneva: International Labour Organization 23-25 January 2015).

[101] ECtHR 21 April 2009, 68959/01 (*Enerji Yapi Yol Sen/Turquie*), § 24.

[102] ECtHR 8 April 2014, 31045/10 (*R.M.T./the United Kingdom*), § 84.

[103] ECtHR 21 April 2009, 68959/01 (*Enerji Yapi Yol Sen/Turkey*), §32.

[104] ECtHR (Grand Chamber) 8 December 1999, 28541/95 (*Pellegrin/France*), §66. In determining the relevance of Art. 6§1 ECHR (which is limited to "civil rights and obligations" and "criminal charges") for disputes between the State and its servants, the so-called *Pellegrin*-criterion is now abandoned (ECtHR (Grand Chamber) 19 April 2007, 63235/00 (*Vilho Eskelinen and others/Finland*).

personnel is permissible, provided that it passes the material test for justification established in Article 11§2 ECHR.[105] This echoes the ECSR approach.

In Article 6§4 RESC the right to take collective action is laid down.[106] The ECSR upholds that the right to collective action of certain categories of public servants may be restricted, including members of the police and armed forces, judges and senior civil servants. Such a restriction may nevertheless only be compatible with the RESC if the requirements of Article G RESC – "prescribed by law", "legitimate aim", and "necessary in a democratic society" – are met.[107] In the collective complaint *EUROCOP/Ireland*, concerning an absolute prohibition of the right to strike for member of the Irish police (established *a priori* by law), the ECSR considered that States must demonstrate "compelling reasons" as to why this is justified in the specific national context in question, as distinct from the imposition of restrictions as to the mode and form of such collective action. In doing so States have only a limited margin of appreciation.[108] Question is if an absolute ban on soldiers' rights to strike will pass this test. To that end the Dutch ban will be examined as a case study in the next section.

[105] ECtHR 21 April 2009, 68959/01 (*Enerji Yapi Yol Sen/Turquie*), § 32.
[106] ECSR 2 December 2013, 83/2012 (*EuroCOP/Ireland*), § 212
[107] Ibid, §§ 203-204.
[108] Ibid, § 210-212; see also ECSR 3 July 2013, 85/2012 (*Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO)/ Sweden*), § 120. The ECtHR also recognized a lesser margin of appreciation regarding a legislative restriction at the core of trade union activity in ECtHR 8 April 2014, 31045/10 (*R.M.T./ the United Kingdom*), § 87.

6. Case studies

The *Matelly* ruling will clearly have consequences for European practice – only Spain has secured a formal reservation that exempts its military legal system from Article 11 ECHR.[109] To illustrate this, three case studies will be pointed out. The first case study concerns the aftermath of the 1999 *SANDU* decision – as such comparable to the *Matelly* ruling – in South Africa (see section 2). The other two case studies focus on two European countries that can boast a long tradition of military associations: the Netherlands and Sweden.[110] The Dutch have a mature system of collective consultation, though bereft of the right to strike, which right, in contrast, is granted to the Swedish armed forces. Key question is how this works out in practice.

6.1 South Africa

Shortly after the 1999 *SANDU* decision the South African Minister of Defence issued legislation on labour relations in the SANDF.[111] In 2001 the Military Bargaining Council (MBC) was established with the main objective to "negotiate and bargain collectively on matters of mutual interest".[112] Its powers and duties include "the prevention and resolution of labour disputes". Disputes that cannot be resolved through conciliation are to be resolved by arbitration before the Military Arbitration Board (MAB). SANDU is the only registered military trade union that has reached the appropriate threshold of representation, and consequently the only union admitted to the MBC. From the start the MBC failed to resolve issues placed before it. Both the Department of Defence and SANDU were therefore finding the process of bargaining with one

[109] *List of Declarations made with respect to treaty No. 005 (Convention for the Protection of Human Rights and Fundamental Freedoms)*, www.conventions.coe.int (last assessed: 27 February 2015).
[110] See for the history of military trade unions in the Netherlands: Moelker 2006; in Sweden: Brickmann 1976.
[111] Chapter 20 of the General Regulations for the SANDF and Reserve (Regulations).
[112] Constitutional Court of South Africa 30 May 2007, CCT 65/06 [2007] ZACC 10 (*South African National Defence Union/Minister of Defence*), § 6.

another at the MBC "both frustrating and painful".[113] In its disputes with the Defence Minister SANDU had launched five proceedings; culminating in (again) a ruling by the Constitutional Court in 2007. "The real nub of the dispute between the parties in the case", this court summarized, "arose from the employers' insistence on its entitlement to adopt and to implement policies in the face of objections from the union".[114] The Constitutional Court ruled that the Minister was not entitled to unilaterally decide on a policy which falls within the permissible bargaining topics before exhausting the dispute procedure.[115] In addition, several regulations were declared invalid, amongst others, the limitation on peaceful protest by SANDF members in their private capacities.[116] Military leadership nonetheless continued to sideline the military unions, who had meanwhile gone militant. This eventually resulted in a total breakdown of communication. On 26 August 2009 an all-time low was reached when three thousand soldiers took part in a protest march to the Union Buildings in Pretoria to express their grievances. In doing so they contravened military orders and a court order that had been issued that morning. The protesters were violently dispersed by the police with rubber bullets and teargas. In response to the allegedly unlawful protest the Minister of Defence announced the dismissal of hundreds of SANDF members, ignoring due process and basic principles of fair justice. This resulted in an ongoing extended legal battle between SANDU and SANDF, with more legal success for

[113] Ibid, § 14.
[114] Ibid, § 75.
[115] Ibid, § 74; Regulation 36 allows for a military trade union to engage in collective bargaining and to negotiate on behalf of its members on selected matters.
[116] Ibid, §§ 77-82; Regulation 8(b) exceeded the scope of item 46 of the Military Disciplinary Code, which prohibits private protest by members of the SANDF which could cause "actual or potential prejudice to good order and military discipline". In the 1999 SANDU decision the Constitutional Court had considered the prior provisions on acts of public protest unconstitutional and suggested to limit this to a prohibition of strike action (1999 *SANDU* decision, § 15).

SANDU.[117] The 2009 events – described in the media as "tantamount to mutiny"[118] – sparked a new wave of antipathy towards SANDU and other military unions.[119] The South African case shows that the recognition of trade union freedom by a (national or international) court does not automatically mean that this right can de facto be exercised.

6.2 The Netherlands

In the Netherland, a process called "normalization" has been underway from the 1980s onwards, aligning the bargaining framework for established public officials (governed by public law) more closely to that of private sector workers (governed by private law). This has resulted in an elaborate system of "organized consultation"[120] that can be characterized as "substantively bilateral, formally unilateral".[121] For the most part, the system of collective consultation within the armed forces matches that of other public officials. The main exception is that Article 12i§1 of the Act on Military Public Servants (MAW)[122] poses a legal barrier that forbids military personnel to strike. It is mainly because of this ban that Defence personnel are excluded from the final step in the normalization process: the *privatization* of the legal status of public officials, as envisioned in the Normalization Bill, which is currently before parliament.[123] The Dutch

[117] See also Supreme Court of Appeal of South Africa 30 August 2012, 161/11 ZASCA 110 (*Minister of Defence/SA National Defence Force*); Supreme Court of Appeal of South Africa 28 August 2014, 514/2013 ZASCA 102 (*Minister of Defence/SA National Defence Force*).

[118] The action was also called a strike. Most soldiers, however, had been granted leave to participate in the protest. Merely 30 minutes before the march was due to start the interdict to declare the march illegal was received (Heinecken 2009, p. 28).

[119] Heinecken 2009; Heinecken 2010.

[120] In Dutch: *georganiseerd overleg.*

[121] Moll, van der Meer & Visser 2003, p. 17; Hummel 2014. The main principles of the system of organized consultation are set out in the Decree on Organised Consultation Sector Defence (*Besluit georganiseerd overleg sector Defensie*) (BGO).

[122] In Dutch: *Militaire Ambtenarenwet 1931.*

[123] In Dutch: *Wet normalisering rechtspositie ambtenaren (Kamerstukken I* 2013/14, 32550, A; see also Barentsen 2014).

legislator perceives the right to strike as irreconcilable with the required operational readiness of the armed forces, both national and international, and finds the international credibility of the Dutch defence effort at stake.[124] The Netherlands have no (other) statutory provision on the right to collective action; the Dutch Supreme Court has recognized the right to collective action for all workers, including public officials, on the basis of Art. 6§4 RESC.[125] The Dutch, however, have secured a reservation excluding their Defence personnel from the provisions of this article.[126] The question now rises if Article 12i§1 MAW is compatible with Article 11 ECHR. One could argue that a blanket ban on the right to strike for *all* military personnel, including, for example, administrative support branches (or gendarmes), is disproportionate to the legitimate aim of ensuring the operational preparedness of the armed forces; that the decisive criterion should be the provided (essential) services, and not merely the membership of the armed forces. In addition, it can be put forward that Article 8 ECHR contains provisions for derogation in time of war or public emergency, so that there is no "pressing social need" for maintaining a statutory ban in the interest of national security.[127] In assessing the Dutch ban on soldiers' right to strike in view of Article 6§4 RESC, Hellendoorn nonetheless concluded that there is no violation. He attached great importance to the permanent and unconditional preparedness that is required of all – *interdependent* – units, in order to provide for national security through performing the constitutional tasks, which include international commitments within, for example, UN- and NATO-context.[128] In my view these are "compelling reasons" to justify an absolute ban on

[124] *Kamerstukken II* 2005-2006, 30674, 3, p. 19.
[125] Hoge Raad 30 mei 1986, *NJ* 1986, 688; Hoge Raad 11 december, *NJ* 1996, 229; see also Moll, van der Meer & Visser 2003, p. 8.
[126] *Stb.* 2005, 694; *Kamerstukken II* 2004/05, 29941, 3, p. 13.
[127] See also Art. F RESC.
[128] Hellendoorn 1993, p. 64-66. The tasks are laid down in Art. 98 of the Dutch Constitution. In January 2008 Art. 12i MAW came into force; before that the only legal barrier for military personnel to take collective action was the reservation secured to Art. 6§4 RESC.

soldiers' right to strike (see section 5.3). Moreover, the Netherlands have explicitly granted military personnel the right to resort to *other* collective action, under the precondition that this does not impair the armed forces' operational deployability (Art. 12i§2 MAW). In practice, the Dutch military limit their actions to participation – in uniform[129] – in public demonstrations, which an outsider might easily confuse with strike action.[130] Hence, the Netherlands have *restricted* – not absolutely prohibited – their military's right to collective action. Lastly, the Netherlands have established a system of dispute resolution through mediation or (if both parties agree) arbitration by an independent committee.[131] The CEACR of the ILO considers such a system an important compensation for the restrictions imposed on the freedom of action during arising disputes.[132] All things considered, it is highly unlikely that the *Matelly* ruling will impact Dutch practice.

6.3 Sweden

In Sweden, military personnel have full-blown trade union rights, including the right to strike. This policy seems somewhat unorthodox but fits the Swedish model in which industrial relations are traditionally determined primarily by labour market parties rather than by State intervention.[133] By affiliating themselves with the main (central) organizations Swedish military unions have been relatively successful in promoting their members' professional interests – and

[129] Participation in a demonstration in uniform is prohibited unless it exclusively concerns the working conditions for soldiers (Art. 33 § 2 of the Act on Military Discipline (*Wet militair tuchtrecht*); see also Besselink 2003, p. 591-592).

[130] In May 2011 several Dutch media headlined "Five thousand soldiers gathered for strike". In legal perspective this protest action (against major cutbacks) was no strike as military personnel involved had to take a day off or were granted special leave.

[131] In Dutch: *Advies- en Arbitragecommissie Rijksdienst*; laid down in Art. 13-22 BGO.

[132] ILO General Survey 2013, § 486; see also Hummel 2014, sec. 4.1.

[133] From the 1970s onwards, however, the Swedish legislator has introduced a number of laws, altering the balance between agreements and legislation (Ahlberg and Bruun 2005).

in acquiring associational rights.[134] The latter originate from the enactment of the State Official Act in 1965, that extended the longstanding private sector bargaining rights to the public sector, including (nearly)[135] all military personnel. This laid the foundation for a uniform (privately set up) labour regime for both private and public employees.[136] Members of the armed forces are thus covered by collective agreements.[137] There are, however, still special statutory provisions for state officials, such the 1994 Public Employment Act (LOA).[138] The right to take industrial action (strike, lockout, or similar actions) is guaranteed by the Constitution (Ch. 2 Sec. 17); the 1976 Co-Determination in the Workplace Act governs the exercise of this right.[139] This also applies to the public sector, for which the LOA contains specific restrictions. The most important restriction is that those exercising public authority may only implement industrial action in the form of lockout, strike, refusal of overtime, or blockade of new employment. Other restrictions apply to sympathy actions and political strikes (sec. 23 LOA). There are no further special restrictions by law. Social partners, however, have entered various basic agreements, containing regulations on collective labour disputes (as a *code of conduct*). For the public sector, the Basic Agreement on Negotiations' Procedure (*slottsbacksavtalet*) was a *conditio sine qua non* for the

[134] Brickman 1976, p. 537; see also ECtHR 6 February 1976, 5589/72 (*Schmidt and Dahlström/Sweden*), § 15; ECtHR 6 February 1976, 5614/72 (*Swedish Engine Drivers' Union/Sweden*), §§ 15.

[135] Initially conscripts were not allowed to join a trade union (Brickman 1976).

[136] From the 1965 reform onwards the privatization of Swedish public employment law has passed several stages (the last change was in 1994) (see also SOU 2010:86, App. 4).

[137] Public sector collective agreements are initially concluded at central level between the Swedish Agency for Government Employers (*Arbetsgivarverket*) (SAGE) and the four central trade union organisations of State employees. This is followed by local negotiations between the employer and the local unions. For military personnel *Försvarsmaktens avtalssamling* (FAS) contains most wages and benefits agreements.

[138] In Swedish: *Lagen* (1994:260) *om offentlig anställning.*

[139] In Swedish: *Lag (1976:580) om medbestämmande i arbetslivet*. These include labour stability obligations ("peace obligation") (Sec. 41); the obligation to give notice to the other party and the Mediator Office at least seven working days prior to the intended industrial action (Sec. 45); and provisions on mediation (Sec. 46-53). Most regulations on collective bargaining in this act are optional and can be replaced by collective agreement.

1965 reform.[140] In the current Basic Agreement and the Cooperation Agreement (*huvudavtal*) parties have agreed to "strive for peaceful negotiations" and to protect vital interests of the State. Several positions are excluded from the right to industrial action. For the armed forces this is an extensive list, including military management, unit heads, and international deployed personnel.[141] When a conflict is on the verge of becoming a risk, it is taken under evaluation by the Civil Servant Board (*Statstjänstenämnden*).[142] This board has the option to postpone an industrial action for at most three weeks. Parties are also obliged to initiate mediation before giving notice of industrial action.[143] When vital interests are at stake, Parliament can intervene, which happened in 1971 to end a major conflict in the public sector. In this conflict, selective lock-outs by the State even threatened to extend to military officers.[144] In case of (the threat of) war, legislation grants the government the right to ban industrial action.[145] All this leads to the conclusion that, although no *legal* restrictions for the right to strike relating to the armed forces apply, this right is in fact limited, in particular by the (military) unions' constructive approach.[146] The Swedish Ministry of Defence seems satisfied: "It cannot be claimed that the unions have exerted any direct influence on readiness";[147] and so are the military trade unions: "As a result of

[140] Adlercreutz & Nyström 2010, p. 208, 220; concluded between the National Collective Bargaining Office (currently SAGE) and the four main organisations of State officials (see also ECtHR 6 February 1976, 5589/72 (*Schmidt and Dahlström/Sweden*), §§ 10-20; ECtHR 6 February 1976, 5614/72 (*Swedish Engine Drivers' Union/Sweden*), §§ 10-20).
[141] *Huvudavtal* 2000, Ch. 7 Sec. 15; App. 1.
[142] *Huvudavtal* 2000, Ch. 7 Sec. 10.
[143] This does not apply to sympathy actions (*Huvudavtal* 2000, Ch. 7 Sec. 1).
[144] Brickman 1976, p. 534; Adlercreutz and Nyström 2010, p. 220-221; ECtHR 6 February 1976, 5589/72 (*Schmidt and Dahlström/Sweden*), § 21; ECtHR 6 February 1976, 5614/72 (*Swedish Engine Drivers' Union/Sweden*), § 21.
[145] Act (1987:1262) respecting emergency public work (*Arbetsrättslig Beredskapslag*).
[146] The Swedish Association of Military Officers (SAMO) has agreed, through a collective agreement of limited duration, not to use strike action (Leigh & Born, p. 71).
[147] Malan 1994.

the establishment of military trade unions, the employee's isolation from the rest of society was avoided".[148] So far, no Swedish military union has ever been involved in a strike.

7. Concluding remarks

The recognition of soldiers' right to form and join a trade union reflects the European trend to grant military personnel the same human rights as other citizens. However, the military can hardly be called a normal job. Because of the unique social function of the armed forces – the legitimate management of violence – the military requires of its personnel ("the men in the firing line") a degree of commitment that exceeds the one required by other organizations. Consequently, members of the armed forces have a unique legal position.[149] States, whether European or not, all face the same paradox: how is military unionism to be reconciled with society's "insurance policy" for national security?[150] The growing tensions in Eastern Europe and the jihadism in North Africa and the Middle East show that the external threat in the post-Cold War era is not imaginary. Military personnel will therefore remain limited in the exercise of their union rights, as acknowledged by the ECtHR, though this differential treatment is being reduced to a minimum level which might differ from country to country. The Swedish case illustrates the military trade unions' awareness of the distinctive position of the servicemen they represent. As for France, in December 2014 President François Hollande announced a bill

[148] Lars Fresker, Chairman of the Swedish Association of Military Officers (SAMO) cited in: *Roundtable on Military Unions and Associations Summary Report,* Bucharest: 30-31 October 2006, p. 3.
[149] Segal 1977, p. 28.
[150] The notion of the armed forces as an "insurance policy" (*verzekeringspolis*) is derived from: Bijlage bij *Kamerstukken II* 2009/10, 31243, 16.

granting French military personnel the right to join a military association, but not a "trade union" in the French sense of the word.[151]

[151] EUROMIL, 'French Reaction to the Judgments of the ECtHR', 8 January 2015, euromil.org (search for *Matelly*). This was announced after the *Conseil d'Etat* had reported that a request for submission of the case to the Grand Chamber was unlikely to be successful (*Rapport à Monsieur le Président de la République Sur Le droit d'association professionnelle des militaires,* Parijs: Conseil d'Etat 18 December 2014).

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