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Gwenaël Guyon, Evert Kleynhans,
Anna La Grange, Sonja Els, Mariella Terzoli *(Eds.)*

Military Justice: Historical Perspectives and Contemporary Developments

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THE DECLINE OF BELGIAN MILITARY CRIMINAL LAW

Jens Claerman and Pieter-Jan Tuts[*]

Abstract

This contribution examines the decline of Belgian military criminal law in the two decades following the abolition of military courts in peacetime (2004). Historically, maintaining good order and discipline in the Belgian Armed Forces was done via three mechanisms: military criminal law, operational discipline, and statutory discipline, all aimed at maintaining good order and discipline within the armed forces. While the Military Criminal Code remains formally in force, its practical relevance has sharply diminished. Statistical analysis reveals a 75% decrease in reported martial offences between 2005 and 2024, with convictions becoming exceedingly rare. This trend predates the abolition of military courts and could be explained by broader sociological and institutional developments: the professionalisation and downsizing of the armed forces, the suspension of conscription, the civilianisation of the military profession, and evolving operational contexts that favour flexibility over rigid obedience. The contribution argues that these factors have shifted reliance away from criminal sanctions toward disciplinary measures. However, recent geopolitical instability, notably Russia's invasion of Ukraine, may revive the need for robust enforcement mechanisms, especially if conscription returns. The authors conclude that while military criminal law still serves a complementary role, it requires modernization and harmonization with disciplinary systems to remain effective in the 21st century.

1 Introduction

The function of the armed forces is successful armed combat.[1] Good order and discipline has long been considered primordial in achieving this objective.[2] In *Engel v The Netherlands*,[3] the ECtHR stated that 'each State is competent to organise its own system of military discipline and enjoys in the matter a certain margin of appreciation'. States have certainly made use of this margin in determining their preferred 'use of legal structures to set desirable military conditions for achieving national security objectives' and ways to create 'a self-regulating armed force of self-regulating individuals presenting the most favourable conditions possible for the use of reliable armed force by the chain of command, on behalf of legitimate civilian political authority…'[4] The criminalisation of disciplinary shortcomings – so called martial offences – is one of the several forms this use of legal structures can take, and globally it's a common one. As

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[1] Samuel P Huntington, *The Soldier and The State* (Harvard University Press, 1957) 11.

[2] See K S Donahue, 'The Anatomy of Discipline' (US Army Command and General Staff College,1993) 44 for a list of maxims reflecting the importance of military discipline.

[3] App no 100/71, 5101/71, 5102/71, 5354/72, 5370/72 (ECtHR, 8 June 1976), para 59.

[4] Daniel Maurer, 'Sovereign, Employer, Community: A Theory of Military Justice beyond Discipline, Obedience, and Efficiency' [2023] 107 *Marq L Rev* 399, 484-485.

States attach supreme importance to their own survival, and given the central role that well organised armed forces play in ensuring that survival,[5] it should come as no surprise that the application of the *ultimum remedium* of criminal sanctions is considered an acceptable measure for maintaining good order and discipline.

Belgium is among the nations providing criminal sanctions for the most serious disciplinary shortcomings. These were traditionally imposed by military courts. These courts were however abolished in peacetime as of 1 January 2004.[6] With the Belgian military courts now *de facto* relegated to the realm of legal history, it falls to the civilian criminal courts to judge martial offenses committed by servicemembers (and a limited group of civilians)[7]. Along with the military courts in peacetime, overall interest in military criminal law seems to have disappeared: the *Chronique annuelle du droit pénal militaire* bad the academic community farewell back in 2002,[8] the most recent circular of the Board of Prosecutors-General at the courts of appeal on the prosecution policy regarding martial offences dates from 2004,[9] the last question by a member of parliament on the prosecution of these offences dates back to 2016,[10] and the media have not spent much attention on the matter since the end of the cold war.[11]

In the day-to-day application of military discipline, we noticed a similar trend: convictions for martial offences have become exceedingly rare. This makes us wonder: what happened and why? Some 21 years after the abolition of the military courts we set out to get the lay of the land of military criminal law and assess the practical relevance of this branch of law *anno* 2025. This contribution will first give an overview of the mechanisms used to maintain good order and discipline in the Belgian Armed Forces. Secondly, we will present the current state of Belgian military criminal law based upon the data provided to us by the Justice Department and gathered via other sources. This will be followed up by an attempt to explain reasons behind the trends established by the data. Finally, we assess what the future might hold for military criminal law.

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[5] Timothy Edmunds, 'What Are Armed Forces For? The Changing Nature of Military Roles in Europe', [2006] 82 *Int Aff* 1059.

[6] Wet van 10 april 2003 tot regeling van de afschaffing van de militaire rechtscolleges in vredestijd alsmede het behoud ervan in oorlogstijd, *Belgisch Staatsblad* (BS) 7 May 2003 (Wet Afschaffing Militaire Rechtscolleges).

[7] Military Criminal Code (MCC), art 14*bis* and 57*bis*.

[8] Jean-Yves Mine and Gerald Waillez, 'Chronique annuelle du droit pénal militaire (2001-2002)', [2002] 82 *RDPC* 1004.

[9] Circular No COL 1/2004 of the Board of Prosecutors-General at the courts of appeal, 5 January 2004 regarding the abolition of the military courts in peacetime and their maintenance in wartime – laws of 10 April 2003 (Circular No COL 1/2004).

[10] Question no 848 by C Van Cauter, KAMER, 2015-16, 29 April 2016, No 54/71, 223.

[11] Thierry Wilmotte, 'La désertion à l'armée ne sera bientôt plus un délit' *Le Soir* (Brussels 13 April 1991) <https://bit.ly/3oPCdU0> accessed 12 December 2025; A C, 'Qui sont les déserteurs de l'armée belge' Dernière Heure (Brussels 6 March 2015) < https://bit.ly/3jS1hWK> accessed 12 December 2025.

2 Maintaining military discipline in Belgium

2.1 Overview

To ensure good order and discipline in the ranks of the Belgian Armed Forces, the State provides, next to ordinary criminal law, in a specific repressive system that is made up out of three distinct components: military criminal law, operational discipline (*operationele tucht*) and statutory discipline (*rechtspositionele tucht*). Making sense of these three parts and their relationship to one another is done through both the purpose (i.e. maintaining operational effectiveness or safeguarding the dignity and legitimacy of the armed forces) and legal nature (i.e., criminal (judicial) or administrative (non-judicial)) of the respective mechanisms. These kinds of distinctions seem quite straightforward from a theoretical point of view, but in practice their shared legal ancestry and somewhat overlapping goals cause practical difficulties and divergent interpretations regarding the exact nature and scope of application of these systems and certain due process protections.

2.2 Maintaining operational effectiveness through military criminal law and operational discipline

As stated previously, political entities – be they nation states or their more ancient or feudal predecessors – have always attached supreme importance to their survival and frequently resorted to armed force to respond to real or perceived threats to this survival. To ensure that the military organisation called upon to execute this task was up to it, discipline was often imposed by way of often plainly cruel punishments. Towards the late Middle Ages European rulers started to codify unwanted military behaviour in so called military codes or articles of war. Throughout the following centuries the territories now comprising Belgium were part of many an empire whose armed forces were at some point governed by military codes.[12] The 1870 Belgian Military Criminal Code[13] (MCC) is but Belgium's most recent iteration of this long historical tradition of military codification. It was introduced as part of a more general overhaul of Belgian criminal law[14] and replaced the Dutch 1815 Military Criminal Code – which was generally regarded as overly harsh.[15]

The MCC, reflecting essential military values such as loyalty, courage, presence, and obedience, seeks to punish the behaviour that most negatively impacts operational effectiveness. It contains an enumeration of classic martial offenses such as treason

[12] Aimé Louis Philémon de Robaulx de Soumoy, *Étude historique sur les tribunaux militaires en Belgique* (Librairie Polytechnique d'Aug. Decq, 1857); Robert O. Rollman, 'Of Crimes, Courts-Martial, and Punishment – a Short History of Military Justice' [1969] *USAF JAG L Rev* 212.
[13] Wet van 27 mei 1870 houdende het Militair Strafwetboek, BS 4 June 1870.
[14] The French Napoleonic *Code criminel* was replaced by a first proper Belgian ordinary criminal code in 1867 (Wet van 8 juni 1867 houdende het Strafwetboek, BS 9 June 1867).
[15] Alfred Moreau and Charles Dejongh, *Commentaire du code pénal militaire* (Larcier, 1880) 36.

(article 15), espionage (articles 17-18), premature capitulation and retreat (articles 19-21), desertion, abandonment of post (articles 23 and 25-26), insubordination (article 28), mutiny (article 29) and battery or insult of a superior (articles 27, 33-40, and 42). These infractions are classified as belonging to the two most serious types of infractions: *misdaden* and *wanbedrijven*.[16] The MCC purposefully doesn't mention the least serious type of infraction (*overtreding*): these shortcomings were to be punished by disciplinary means and were considered to 'have always been foreign to criminal law'.[17] This formal distinction dates back to the 1815 Criminal Code for the Army[18] and Disciplinary Regulation for the Army[19] of the United Kingdom of the Netherlands, which were kept in effect for some time after the Belgian Revolution.[20] The legislator put in place a hierarchy between military criminal and military disciplinary law and expected judges (of the military courts) to apply military criminal law with good order and discipline in mind.[21]

The system of operational discipline has its legal basis in the 1975 Disciplinary Regulation of the Armed Forces[22] (MDR). While the MDR contains no enumeration of possible disciplinary infractions, it does provide a *very* general description (art 21) of what acts can be considered as disciplinary, namely any service-related conduct that entails a shortcoming with regards to some elementary military obligations. Given the operational objective of this system, a quick procedure allows local military commanders (company commanders, battalion commanders and detachment commanders) to impose punishments.[23] The MDR provides not only purely moral sanctions such as a call to order (*terechtwijzing*) or a reprimand (*vermaning*), but can also restrict, via simple arrest (*eenvoudig arrest*) or restriction to barracks (*consigne*), and deprive, through rigorous arrest (*zwaar arrest*), military personnel of their liberty.[24] When receiving restriction to barracks as a punishment, candidates are forced to stay late up to a maximum of four times four hours (possibly during the weekend). Simple arrest has servicemembers participate in their normal duties but forbids them to frequent recreational areas during a maximum of eight days, while rigorous arrest provides that a servicemember

[16] MCC, art 1. The new Criminal Code of 2024 does away with this threefold subdivision. Recent legislative action brings the formulation of punishments in the MCC in line with those in the new Criminal Code, but does not alter MCC, art 1.
[17] *Memorie van toelichting* Military Criminal Code, KAMER, 1868-69, No 56, 2.
[18] Crimineel Wetboek voor het Krijgsvolk te Lande, 20 July 1814.
[19] Reglement van krijgstucht voor het krijgsvolk te lande, 15 March 1815.
[20] Decree of the Provisional Government of 27 October 1830.
[21] *Memorie van toelichting* Military Disciplinary Regulation, KAMER, 1971-72, No 373/1, 9; Note du Collège des procureurs généraux du 31 juillet 2008 au sujet de la réintroduction du "renvoi à la discipline du corps" (art. 24 du Code de Procédure Pénale Militaire (L. du 15 juin 1899), abrogé) (Note Renvoi à la discipline du corps). See also Rob Gerits, *Militair tuchtrecht* (die Keure, 2011) 135.
[22] Wet van 14 januari 1975 houdende het tuchtreglement van de Krijgsmacht, BS 1 February 1975.
[23] MDR, art 31; Koninklijk besluit van 19 juni 1980 betreffende de militaire tuchtrechtspleging, BS 8 October 1980.
[24] MDR, art 22.

participates in normal duties (unless ordered otherwise by the battalion commander) but is otherwise locked up in a separate room.[25]

Military criminal law and operational discipline have, considering their shared goal, had a long, intimate relationship. This bond is up endures by way of several specific characteristics of the operational disciplinary system: the nature of some the punishments of the operational disciplinary system (rigorous and simple arrest), the ability of the public prosecutor and courts to refer a case back to military commander when the infraction is deemed to be insufficiently serious,[26] the obligation for the judge to impose disciplinary sanctions for lesser infractions or when accepting attenuating circumstances[27] and the statutory application of the *non bis in idem* principle.[28] Some even argue based on declarations made by both the 1870 and 1975 legislator that both systems of law are of the same – criminal – order.[29]

2.3 Safeguarding the dignity of the military profession through statutory discipline and military criminal law

Statutory discipline answers a whole other question. Instead of repressing behaviour strictly because it affects the capacity to perform its military function (i.e., the use of armed force against adversaries), the statutory disciplinary system seeks to punish servicemembers for behaviour that negatively impacts the honour or dignity of the military profession.[30] Protecting this interest is no luxury: in a democracy, the State's institutions, and more specifically those that are the executors of the State monopoly on violence, ought to enjoy a minimum of legitimacy to be able to function properly. The institution thus must be able to rid itself (temporarily) of elements whose further presence endangers this legitimacy. In other words: any time the disciplinary authority considers imposing a statutory disciplinary measure, it in essence asks whether a servicemember still merits being part of the armed forces.

While the classically supreme value accorded to good order and discipline within the armed forces has resulted in the operational disciplinary system being a military idiosyncrasy in the Belgian legal order; the statutory disciplinary system on the other hand resembles more closely the disciplinary systems found in other public services (e.g., police, teachers) and some professional groups (e.g., lawyers, doctors, architects). Given that the speedy maintenance of operational effectiveness is not the objective of this disciplinary system, the disciplinary procedure is far more laborious and centralised,

[25] MDR, art 25-26.
[26] MDR, art 44.
[27] MCC, art 24-25 and 59.
[28] MDR, art 43.
[29] Rob Gerits, 'Tegen de operationele militaire tuchtstraffen moet een beroep openstaan bij een rechter met een hervormingsbevoegdheid' [2011] 74 *RW* 730, 732-733 and 736-736; Gerits (n 21) 181.
[30] Constitutional Court 7 December 1999, no 129/99, 6. This behaviour does not necessarily have to be service related, as even acts perpetrated in the service members' private life can impact the dignity and reputation of the military profession.

with political authorities (Minister of Defence or the King) imposing the disciplinary measures.[31] These measures are: the withholding of 2 to 5% of pay for a maximum of one month (*inhouding op de wedde*), the disciplinary suspension for up to three months at 75% of pay (*tijdelijke ambtsontheffing bij tuchtmaatregel*)[32] and dismissal from the Armed Forces (*definitieve ambtsontheffing*).

Statutory discipline is however not the only disciplinary mechanism that concerns itself with protecting the honour and dignity of the Armed Forces, the MCC does as well. Its article 20 requires the military commander in the field to 'do or negotiate everything that duty and honour demands' before capitulating – thereby not only punishing the servicemember for negatively impacting operational effectiveness, but also because also for bringing dishonour upon the military. Additionally, the MCC contains specific military punishments that directly impact the career of the servicemember: degradation,[33] which strips him of his rank and decorations, bars him from wearing the uniform and forbids him serve in the armed forces, and destitution,[34] which busts officers back down to private, but does allow further service in the military.

2.4 The abolition of the military courts

A certain knowledge of military affairs was long considered to be a prerequisite to pass judgement on martial offences. Due to the specific, operational objective of these criminal provisions the judge must pay special attention to the disciplinary implications of the facts on which he ought to rule.[35] The military context was considered a quintessential element of the whole judicial process and ought to pervade it entirely, thereby justifying a judicial apparatus specifically shaped to not lose sight of the operational nature, and specific and dangerous tasks of the military: the military courts.[36] The peculiarity of the military jurisdiction often resulted in them unjustly being given the pejorative description of 'extraordinary courts'[37] notwithstanding their constitutional basis.[38]

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[31] Wet van 28 februari 2007 tot vaststelling van het statuut van de militairen en kandidaat-militairen van het actief kader van de Krijgsmacht, BS 10 April 2007, art 54-57 (Military Statute); Koninklijk besluit van 14 oktober 2013 tot vaststelling van de procedure betreffende de statutaire maatregelen toepasselijk op de militairen van het actief kader en tot wijziging van meerdere koninklijke besluiten betreffende de militaire tucht, BS 6 November 2013.

[32] Not to be confused with the preventive suspension (*schorsing bij ordemaatregel*) (Military Stature, art 51).

[33] MCC, Art 1 and 5.

[34] MCC, Art 1 and 6.

[35] Verslag namens de commissie institutionele aangelegenheden inzake de herziening van artikel 157 van de Grondwet, SENAAT, 2001-02, No 2-697/4, 29 (Verslag Commissie Institutionele Aangelegenheden art 157 Gw*)*.

[36] de Soumoy (n 12).

[37] Constitution, art 146; A Giron, *Dictionnaire de Droit Administratif et de Droit Public* (vol III, Bruylant, 1896) 135; Jan Verniers, *Inleiding tot het militair strafrecht en strafprocesrecht: handboek voor de krijgsraad, rechtsgids voor advocaten, militairen, officieren-rechters, consulenten* (Maklu, 1992) 20.

[38] Constitution, art 157.

The military courts and prosecutors that existed in the Belgian territories since their incorporation in the first French Republic in 1795 have played an important role in maintaining good order and discipline in the armed forces, especially during both World Wars. Here however they exceeded the purely military context of the conflict as they also formed the legal battlegrounds of the Flemish struggle for emancipation and collaboration with the Nazi-regime.[39] During the Cold War they would serve as the competent courts for tens of thousands of soldiers stationed both in Belgium and near the Iron Curtain in Germany for both common and martial offences. Near the end of the Cold War, however, fundamental questions on the overall justness of the military jurisdiction rose in prominence. An important catalyst to change was *Pauwels v Belgium* in which the ECtHR found that the way in which the military prosecutor combined the roles of prosecutor and investigative judge was incompatible with the Convention.[40] This decision combined with the suspension of the draft,[41] the troublesome 1980's,[42] the affaire Dutroux, and mounting judicial arrears,[43] culminated in the 'Octopus accord' which not only foresaw a sweeping reform of the law enforcement and judicial landscapes, but also included the abolition of the military jurisdiction.[44] This political agreement was followed by several unsuccessful legislative initiatives[45] with regards to the abolition of the military courts but finally resulted in the adaptation of article 157 of the Constitution limiting the existence of military courts to times of war as of 1 January 2004.[46]

The legislative discussions preceding this watershed moment in the history of Belgian military law provides great insight as to what military justice practitioners considered the exact role of the military courts in maintaining good order and discipline in the armed forces. Then Auditor-General, Jean-Yves Minne, stated that 'the mission of the military courts is to ensure the maintenance of good order and discipline within the Armed Forces' and that 'serious breaches thereagainst ought to receive an immediate penal response'.[47] Senior president of the Military Court of Appeals, Jozef Durant, clarified that

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[39] Jos Monballyu, *De jacht op de flaminganten: De strafrechtelijke repressie van de Vlaamsgezinde militairen aan het IJzerfront* (De Klaproos, 2010); Luc Huyse and Steven Dhondt, *Onverwerkt verleden: Collaboratie en repressie in België, 1942-1952* (Lannoo, 2020).

[40] App no 10208/82 (ECtHR 26 May 1988).

[41] Verslag Commissie Institutionele Aangelegenheden art 157 Gw, 5; verslag namens de commissie voor de Justitie inzake het wetsontwerp houdende sociale en diverse bepalingen (art. 137 en 151), KAMER, 1994-95, No 1630/5, 8.

[42] Most notable were the terrorist attacks of the *Cellules Communistes Combatantes* (CCC) and a string of deadly armed robberies on supermarkets by the still uncaught Brabant Killers (*Bende van Nijvel*).

[43] Verslag Commissie Institutionele Aangelegenheden art 157 Gw, 34.

[44] Bijlagen bij het voorstel van resolutie betreffende de hervorming van de politiediensten en van de gerechtelijke organisatie, SENAAT, 1997-98, No 1-994/2, 44.

[45] Wetsvoorstel houdende afschaffing van de militaire rechtbanken in vredestijd, KAMER, 1995-96, No 567/1; wetsvoorstel houdende afschaffing van de militaire rechtbanken in vredestijd, KAMER, 1999-2000, No 50-0149/1.

[46] The abolition took effect after the abrogation of the Military Code of Criminal Procedure by the Wet Afschaffing Militaire Rechtscolleges.

[47] Verslag Commissie Institutionele Aangelegenheden art 157 Gw, 33 and 37.

military courts existed primarily 'to satisfy military discipline' and had to 'retain, against their will, servicemembers who wanted to desert, and expel unwanted elements from the ranks'.[48] The decision to abolish the military courts in time of peace by way of the laws of 10 April 2003 predominantly concerned procedural side of the military justice system;[49] the provisions of the MCC – and thus the importance of the criminal prosecution of the gravest infractions against good order and discipline – remained unaffected. In the words of Minister of Justice, Stefaan De Clerck: 'The existence of the army itself, its specific organisation and its mission in time of war or overseas justify maintaining these specific infractions ...'[50] Likewise, the Board of Prosecutors-General at the courts of appeal emphasised the continuing importance of military criminal law after the abolition of the military courts:

> Maintaining good order and discipline within the military remains of special importance. By designating the gravest errors as criminal, instead of disciplinary, infractions, the legislator has necessarily entrusted their repression to the judiciary. The Public Prosecutors Office would fail to fulfil its duties by not prosecuting infractions against military criminal law.[51]

3 Statistics regarding military criminal law

Have these principled expressions have stood the test of time? A lot has changed since the early 2000s: not only has the public's conception of what constitutes behaviour worthy of criminal repression evolved along with public morality, ever increasing demands and shrinking budgets have forced the Justice Department to set priorities. Since 2004, members of the *Kamer van Volksvertegenwoordigers* have only haphazardly questioned the Minister of Justice on the application of the MCC by the civilian criminal courts.[52] In 2009 Rob Gerits questioned the relevance of military criminal law in the day-to-day maintenance of military discipline.[53] Yet, up until now a more comprehensive review of the Public Prosecutor's Office's courts' relationship with military criminal law has been lacking. This contribution wishes to fill this gap by presenting an overview of statistical data on the prosecution of military criminal law, deducing trends from this data, and trying to explain these trends.

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[48] ibid, 29.
[49] Wet Afschaffing Militaire Rechtscolleges, art 103.
[50] *Hand* SENAAT, 1995-96, 9 November 1995, No 1-8, 177.
[51] Circular No COL 1/2004, 7
[52] Question no 1051 by I. Meeus, KAMER, 2006-07, 29 January 2007, No 51/151, 29290; question no 755 by H. Vautmans, KAMER, 2008-09, 13 July 2009, No 52/76, 121; Question no 278 by T. Francken, KAMER, 2010-11, 18 July 2011, No 53/36, 157; question no 734 by S. Lahaye-Battheu, KAMER, 2012-13, 18 February 2013, No 53/101, 144; Question no 848 by C. Van Cauter, KAMER, 2015-16, 29 April 2016, No 54/71, 223.
[53] Rob Gerits, 'De Belgische operationele tucht op de helling: enkele voor kritiek vatbare ingrepen van de wetgever vanaf 2003', [2009] 48 *MLLWR* 81, 105-106.

3.1 Source material

A comprehensive view of the role that military criminal law 20 years after the abolition of the military courts in times of peace, requires data on the number of cases opened by the Public Prosecutor's Office and the number of judgements pronounced by the courts based on the MCC during the period between 1 January 2004 and 31 December 2024. Publicly available data was incomplete both quantitively and qualitatively. We hence decided to try and obtain more complete data for this period via the Public Prosecutor's Office and the Justice Department.[54] The little data publicly available for the decade preceding the abolition of the military courts was gleaned from the *Jaarlijkse Kroniek Militair Strafrecht*.

3.2 Number of cases and judgments

According to the data provided by the Public Prosecutor's Office a total of 3,159 cases regarding martial offences were opened between 1 January 2004 and 31 December 2024. Over a quarter of these cases (900; 28.49%) were opened in 2004, the year the military jurisdiction disappeared. The following year only 229 (7.25%) cases were opened, an amount that steadily declined over the subsequent decades, culminating in 51 cases (1.61%) in 2024. The statistical anomaly of 2004 can be explained by the fact that, when the Military Prosecutor's Office[55] closed, its remaining unresolved cases were transferred to its competent civilian counterparts[56] and where they received new case numbers, making it look as if these cases were opened in 2004. The Prosecutor-General of Mons confirmed to us that between 5 and 23 January 2004, 616 cases relating to military offences were registered, and that for the whole of 2004, 690 such cases were transferred to the civilian section of the Public Prosecutor's Office.[57] This would mean that only 210 cases were opened in 2004. When we extend this purge of transferred cases to the whole of the studied period, only 2,218 unique cases were opened. However, given that we could not specifically identify those 690 transferred cases in the latest date provided by the Public Prosecutor's Office (16 September 2025),[58] and for the sake of complete coherence between any quantitative and qualitative analyses, we will exclude 2004 from our further conclusions - which leaves us with 2,008 unique cases opened between 1 January 2005 and 31 December 2024. This 20-year period shows a 75.51% decline in the number of cases opened (2005: 196; 2024: 48). This decline, however, appears to be merely

[54] We extended our sincere gratitude to the Prosecutor-General and Senior Attorney-General of Mons and the statisticians of the Criminal Policy Service of the Justice Department for aiding us.

[55] The *Krijgsauditoraat* was a specialised part of the Public Prosecutor's Office. The prosecutors were civilians and not part of the military hierarchy (Pierre D'Argent, 'Military Law in Belgium' in Georg Nolte, *European Military Law Systems* (De Gruyter Recht, 2003) 223).

[56] Wet van 10 april 2003 tot regeling van de rechtspleging voor de militaire rechtscolleges en tot aanpassing van verscheidene wettelijke bepalingen naar aanleiding van de afschaffing van de militaire rechtscolleges in vredestijd, BS 7 May 2003, art 34.

[57] Email from Ignacio De la Serna to authors (14 September 2021). Transferred cases are closed by the transferring entity and subsequently reopened by the receiving entity under a new case number.

[58] Only 40 cases are specifically marked as 'transferred'.

the offshoot of the far more precipitous decline that took place between the mid-1990s and early 2000s (1995: 1,296; 2000: 372).[59]

On the other end of the criminal procedure we, evidently, find a similar trend. In 2,272 of these 2,868 opened cases the Public Prosecutor's Office has taken a decision awarding a permanent or provisional disposition to the case.[60] Most (1,791) of those 2,272 cases were closed without any judicial consequence: either for technical reasons (549), such as a lack of elements justifying prosecution, statute of limitations or the inadmissibility of prosecution, or for policy reasons (1,242). In 176 cases the Public Prosecutor's Office referred the matter to administrative authorities (including the disciplinary authority), civil courts, entities of general or medical public assistance, etc. 53 cases were, formally or informally, disposed by non-judicial punitive measures, such as an informal warning (8), a plea deal entailing the payment of a fine[61] (40) or a mediation procedure[62] (5). In a little over one out of ten cases (262) the matter was referred to a criminal court for judgment. Between 2004 and 2018, 92 unique convictions were pronounced for a total of 97 military offences.[63] A clear downward trend invisible: While 2005 and 2006 both saw 19 unique convictions; the subsequent years saw far fewer judicial decisions. Besides the unusually productive year of 2013 (12 convictions), barely a handful of convictions have been pronounced each year since 2010, with a mere two convictions having been pronounced between 2014 and 2018.

3.3 Kinds of martial offences

Now to a more qualitative analysis: what martial offences have the post-abolition military criminal law cases pertained to? Both the Public Prosecutor's Office and the Criminal Policy Service of the Justice Department divided their data in six categories: 'murder',[64] 'insubordination and mutiny', 'desertion', 'theft', an eclectic category encompassing 'espionage and treason', 'infractions against martial duties', 'insults to His Majesty the King', but also specific laws on the police of the military domain and the

[59] The data for 1995-2000 can be found in the following reports by Jean-Yves Mine and Gerald Waillez: *Jaarlijkse Kroniek van Militair Strafrecht 1995-96* (Auditoraat-Generaal bij het Militair Gerechtshof 1996) 11; *Jaarlijkse Kroniek van Militair Strafrecht 1996-97* (Auditoraat-Generaal bij het Militair Gerechtshof 1997) 10; *Jaarlijkse Kroniek van Militair Strafrecht 1997-98* (Auditoraat-Generaal bij het Militair Gerechtshof 1999) 14; *Jaarlijkse Kroniek van Militair Strafrecht 1998-99* (Auditoraat-Generaal bij het Militair Gerechtshof 2000) 14; 'Chronique annuelle de droit pénal militaire (1999-2000)' (2000) 88 *RDPC* 1154, 1164; 'Chronique annuelle de droit pénal militaire (2000-2001)' [2001] 89 *RDPC* 1045, 1052. The unpublished data for 2001-2003 is probably retained in the archives of the *Auditoraat-Generaal*. Stringent privacy protections apply to archival material less than 100 years old.

[60] 17 cases remain under *active* investigation. 564 cases currently have the disposition indicating that the Police have been asked to be on the lookout for a suspect. 15 cases, all dating back to at least 2016, are earmarked as being in a state of 'unknown/error'.

[61] Criminal Code, art 216*bis*.

[62] Criminal Code, art 216*ter*.

[63] This number does not consider any exonerations.

[64] The Public Prosecutor's Office uses a broader category ('murder in a military context') than the Criminal Policy Service of the Justice Department ('murder of a superior', cf. MCC, art 40).

destruction of defensive works built by the military (which are arguably not martial offences, as they do not concern professional shortcomings by military personnel),[65] and finally 'infractions against some foreign laws'.[66] As we cannot be completely certain, based on the Prosecutor-General's affirmation of 14 September 2021, which crimes were alleged in the 690 transferred 2004 cases – though these would probably mostly concern desertions[67] – and to stay consistent with the decision taken above, we will again exclude the data from 2004 from any further conclusions.

Even after the abolition of the military courts, desertion has remained[68] the most frequently investigated and committed martial offence: three out of every four opened cases between 1 January 2005 and 31 December 2024 pertain to a desertion and nearly three out of every five convictions between 1 January 2005 and 31 December 2018 concern this martial offence. A distant second is theft of military goods - not unsurprising as this concerns an offence that is *in se* equal to its civilian counterpart. A little over one out of eight cases and one out of five convictions relate to theft. The bronze medal goes to insubordination and mutiny, these crimes being the subject of some 6.5% of cases and just under 8% of convictions. The '*potpourri*'-group of martial infractions and the infractions against some foreign laws both represent but a meagre 2-3% of cases and 5.6% and 7.9% of convictions respectively. Lastly, it should come as no surprise that only a single[69] case of murder figures among the statistics, given the seriousness of the crime. The case was closed as it was determined that there was no infraction.

4 Possible explanations for the decline of the importance of military criminal law

The remarkable decline in the number of opened cases and convictions concerning martial offences predates the abolition of the military courts. It can therefore not simply be explained by a lack of interest in this branch of criminal law on the side of civilian prosecutors and judges. At and around the same time of this decline, however, several social and military developments were unfolding that, in our opinion (partially) explain the fate of military criminal law: the professionalisation of the Armed Forces, a changing operational context and the civilianisation of the military profession.

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[65] MCC, chs II and III and art 42; koninklijk besluit van 6 december 1897 betreffende het toezicht over krijgsdomein, BS 9 December 1987; besluitwet van 20 augustus 1915 met betrekking tot de vernietiging of beschadiging van door het leger opgerichte verdedigingswerken, BS 21 August 1915.

[66] MCC, arts 54-57.

[67] The continuous nature of the infraction and the limited ways in which it ends generally allow the illegal situation to persist for years (Frits Gorlé and Guy Van Gerven, *Militair Strafrecht* (Story-Scientia, 1993) 178 and 209-213)). On 26 January 2000 the Minister of Justice indicated that, at that time, there were some 1600 desertion cases still open, with desertions spanning periods of months up until multiple decades' (question no 376 by V Van Quickenborne, SENAAT, 1999-2000, 15 February 2000, No 2-9, 376.

[68] Gorlé and Van Gerven (n 67) 181-182.

[69] The 2008 case was transferred in the same year, explaining why it is counted twice in the data from the Public Prosecutor's Office.

4.1 The professionalisation of the Armed Forces

The ways armed forces have been composed and structured have undergone profound changes over the centuries due to evolutions in the broader political structures within which they operated, the threats they had to confront, as well as a multitude of economic and technological advances. For a large part of our country's history, the Belgian Armed Forces were largely made up out of men who were conscripted, initially via a lottery system and since 1913 though general conscription.[70] However, after the end of the Second World War, a long-term evolution began to which sociologists refer as 'the decline of the mass army': technological, economic/budgetary, geostrategic, and socio-political factors, resulted in a preference in smaller, faster, more mobile, and functionally and technically more flexible armed forces.[71] In Belgium, this eventually led to the suspension of conscription as of 1994 and a thorough restructuring of the Armed Forces.[72]

Impact of the reduction of the Armed Forces

In the 1980s Belgium maintained a force of nearly 100,000 servicemembers, of which about a third were conscripts. By way of the 'Plan-Delcroix' (1992–1998), successive Belgian governments decided to collect the post-Cold War peace dividend by cutting the budgets and size of the Armed Forces – nearly halving the force by 1995. This was done in a small part by gradually diminishing the number of active-duty troops, but mostly by culling the force of conscripts. This reduction in force subsequently continued in the subsequent decades, with the current maximum strength of the Armed Forces for 2026 to be set at 30,300 – a first significant increase in years.

A reduction in force naturally affects the occurrence of martial offences: less service members means that fewer martial offences can be committed and hence recorded. The lack of data on reported martial offences prior to 1995 makes drawing definite conclusions impossible, though the decade preceding the abolition of the military courts clearly shows that the declining contingent size as such cannot be the sole explanation for the decreasing number of recorded martial offences. While most the Cold War strength had been shed by 1995, recorded martial offences continued to drop precipitously. Between 1995 and 2000, the maximum force size decreased by 14.37% (1995: 53,200; 2000: 45,553),[73] while reported offences fell by 71.3%. Though the decline in reported martial offence cases became more gradual after the abolition of the military

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[70] Luc De Vos, *Het effectief van de Belgische krijgsmacht en de militiewetgeving, 1830-1914* (Koninklijk Legermuseum, 1985); Mario Draper, *The Belgian Army and Society from Independence to the Great War* (Palgrave Macmillan, 2018) 81-121.

[71] Paul Manigart, 'Les forces armées belges en transition: une étude sur le concept de déclin de l'armée de masse' (DPhil thesis, Université Libre de Bruxelles, 1983) 9; Karl W Haltiner, 'The Decline of the European Mass Armies' in Giuseppe Caforio (ed), *Handbook of the Sociology of the Military* (Springer, 2006) 362.

[72] Gecoördineerde Dienstplichtwetten van 30 april 1962, BS 9 May 1962, art 1*bis*; Paul Manigart, 'Ending the Draft: The Case of Belgium' [2012] 30 *Sicherheid und Frieden* 1, 4.

[73] Wet van 27 december 1994 tot vaststelling de legersterkte voor het jaar 1995, BS 24 January 1995; wet van 30 december 1999 tot vaststelling van het legercontingent voor het jaar 2000, BS 22 January 2000.

courts, it still greatly outpaced the shrinking of the force as between 2005 and 2024 the military contingent decreased by approximately 35% (2005: 42,042; 2024: 27,200) while the number of reported martial offences fell by 75.5%.

Impact of the suspension of the conscription

The impact of the transition towards an all-volunteer force on the Armed Forces merits a closer look. Again, while the lack of publicly available data on the reported number of martial offences during the period in which the number of conscripts was limited most significantly (1992-1994) makes definite conclusions impossible, there are significant indications that the transition away from conscription was a key factor. The transition to an all-volunteer force brought an end to a practice that forced many young people to spend months in an environment defined by rules that differed significantly from those prevailing in the civil society. It is therefore not surprising that this gave rise to numerous disciplinary problems and behaviour that may even have fallen under the scope of military criminal law.

From a legal point of view one ought to take note that the scope of military criminal law at the time of conscription was broader than today, as individuals who attempted to evade conscription were considered as deserters.[74] Moreover, the report by the *Commissie ter bestudering van de delinkwentie in de schoot van de krijgsmacht* provides further insight into this matter. This Commission, established in the 1980s in response to an alleged 'worrying increase' in the number of cases concerning desertion and insubordination[75] noted that, in 1985, over two-thirds of deserters were conscripts, despite professional soldiers outnumbering conscripts two to one.[76] It linked this trend to the moral liberalisation of the 1960s, which made disobedience seem minor and left young people less aware of their military obligations.

Since the suspension of conscription, only individuals who voluntarily submit to military discipline join the Armed Forces. This intrinsic motivation unquestionably benefits compliance with disciplinary rules. The continuing rapid decline of reported martial offences even after the suspension of conscription might indicate group effects from the culling of less disciplined elements. Moreover, as the Armed Forces could no longer rely on a steady influx of young recruits, meaning they had to compete in the war for talent to attract motivated young men and women. Consequently, the armed forces would have to start paying attention to creating favourable working conditions[77] and a challenging

[74] Gecoördineerde Dienstplichtwetten, art. 65 and 107.

[75] Ministerieel besluit van 11 oktober 1985 houdende oprichting van een Commissie ter bestudering van de delinkwentie in de schoot van de Krijgsmacht, BS 29 October 1985; verslag namens de commissie voor de Defensie inzake het ontwerp van wet houdende wijziging van de bestaande bepalingen op strafrechtelijk en tuchtrechtelijk gebied alsmede van de dienstplichtwetten, gecoördineerd op 30 april 1962, SENAAT, 1994-95, No 1087-2, 1.

[76] Manigart (n 71) 123.

[77] Pauline Collins, *The Military as a Separate Society: Consequences for Discipline in the United States and Australia* (Lexington Books, 2019) 2.

work environment, notwithstanding the handicap it faces due to the inherent nature of its mission and organisation[78] and the lack of resources. More recent initiatives to enhance the work-life balance of military personnel include increased pecuniary compensation, a geographical reorganisation aimed at a more balanced distribution of personnel across Belgium to shorten commutes and increased attention towards problems of harassment, violence, and inappropriate sexual behaviour.[79] One could consider a change of institutional attitudes away from reliance on military criminal law as a possible aspect of this trend.

4.2 Civilianisation of the military profession

This line of reasoning might also be considered in another, broader trend related to the position of the military personnel within the broader civil society: civilianisation. Traditionally, the military profession was regarded as a position without a civilian equivalent, subject to a legal statute with significant restrictions on fundamental rights and freedoms.[80] Throughout the 20th century, the Belgian Armed Forces have lost many of the institutional characteristics that distinguished it from civilian bureaucratic organisations.[81] This process did not cease after the end of the Cold War. In the absence of an external enemy, the professional soldier is increasingly perceived as an ordinary civil servant.[82] Hence, the necessity of special treatment has increasingly been called into question, leading to legislative and judicial interventions limiting the difference between military service and a civilian job. For example, the political rights of military personnel were expanded in 2006 and 2017,[83] making it possible for Belgian servicemembers to run as a candidate during elections. In 2014, the ECtHR recognised the right of military personnel to organise themselves in trade unions. Today, the soldier is regarded as a 'civilian in uniform' and can claim the same rights as ordinary citizens, except for certain limitations inherent to military service.[84]

The process of civilianisation also has disciplinary consequences. In the all-volunteer force, it has become quite easy for soldiers to obtain a voluntary separation, for example once it became clear not to be cut out for military life after all,[85] thereby greatly reducing

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[78] Jozef Durant, 'De afschaffing van de militaire rechtscolleges in vredestijd en het behoud ervan in oorlogstijd' (Seminar *Studiecentrum voor Militair Recht en Oorlogsrecht*, Brussels, 20 April 2004) 11.

[79] Jens Franssen, 'Para-opleiding in Marche-les-Dames moet hervormd worden na incidenten' (VRT NWS, 1 September 2020), <https://tinyurl.com/5n7zy3r9> accessed 13 December 2025.

[80] Gerits (n 21) 77; Robert Gerits, 'De militaire specificiteit in vraag gesteld' (2011) BMT 65, 67-68; Pieter-Jan Tuts, 'De syndicale rechten van militairen' [2017] *TSR* 697; Nicolas B. Bernard and Mathieu Fontaine, 'Citoyen, fonctionnaire ou militaire? Droits civils et politiques des militaires' in Valéry De Saedeleer and Nicolas Lagasse (eds), *Nouvelles missions de la Défense: Quel cadre juridique?* (Anthemis, 2021) 29.

[81] Paul Manigart, 'Les forces armées belges en transition : une étude sur le concept de déclin de l'armée de masse' (DPhil thesis, Université Libre de Bruxelles, 1983) 248.

[82] Nataschja Hummel, 'Vrijheid van vakvereniging voor Europese militairen' [2015] *MRT* 109.

[83] Military Statute, art 172 and 173.

[84] *Matelly v France* (2014) App no 10609/10 (ECtHR 2 October 2014).

[85] Question no 1667 by K Grosemans, KAMER, 2018-19, 8 March 2019, No 54/182, 207-208.

the need for committing the martial offence of desertion. In addition, the process of civilianisation has also led to a liberalisation of the organisational control over military personnel.[86] Because of the perception of the soldier as a civilian in uniform, military superiors might also be less and less inclined to apply the most repressive system available to them to punish soldiers.

4.3 An altered operational context

'Time altereth the order of warre …'[87] The way in which armed forces engage their enemies and how they organise themselves to so greatly evolved over the centuries.[88] Fighting in close formations on a battlefield of limited size or crossing no-man's-land to reach the enemy line required a completely different – much more absolute – conception of discipline and obedience. It was only after the Second World War that the Belgian Armed Forces moved away from this requirement of absolute obedience.[89] In the period between the end of the Cold War and Russia's invasion of Ukraine in February 2022, Europe was spared from large-scale interstate conflicts. Relatively recent phenomena such as the war on terror and the increasing importance of non-international armed conflicts (NIAC) have had a significant impact on the nature of military operations (for example, the rise of peacekeeping operations and the renewed importance of maintaining public order on the national territory). The characteristics of these 'new' operations of the Armed Forces have had consequences for the application of military discipline.

One could start question whether military criminal law is still adequately adapted to the current operations or whether these operations justify the existence of a separate military criminal justice system at all. As operations were increasingly carried out by smaller, more isolated units over ever larger areas and became more and more complex, the need for initiative and flexibility from subordinates grew. According to former US Chairman of the Joint Chiefs of Staff, general Mark A. Milley, 'Future warfare requires 'disciplined disobedience',[90] thereby describing the growing need for soldiers to interpret the commander's orders in the field according to their own judgement and translate them into concrete actions.[91]

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[86] Manigart (n 71) 302-319.

[87] Robert Barret, *The Theoretike and Praticke of Moderne Warres* (London, 1598) 2.

[88] William Lind, Keith Nightendale, John Schmitt, Joseph Sutton and Gary Wilson, 'The Changing Face of War: Into the Fourth Generation' [1989] 73 *Marine Corps Gazette* 22; Frank Tallett and David J B Trim (eds), *European Warfare 1350-1750* (Cambridge University Press, 2010); Brian Campbell and Lawrence A Tritle (eds), *The Oxford Handbook of Warfare in the Classical World* (Oxford University Press, 2013); John Keegan, *The Face of Battle: A study of Agincourt, Waterloo and The Somme* (Bodley Head, 2014).

[89] Gerits (n 21) 77.

[90] C Todd Lopez, 'Future warfare requires "disciplined disobedience", Army chief says (US Army News Service, 5 May 2017), <https://www.army.mil/article/187293/> accessed 13 December 2025.

[91] Donohue (n 2) 7; Jim Mattis and Bing West, *Call Sign Chaos* (Random House, 2019) 44-46.

5 The future of military criminal law: to decriminalise or not to decriminalise?

Prior to the Russian invasion of Ukraine, the role that military criminal law was to play in maintaining discipline within the ranks of the future Belgian Armed Forces was highly uncertain given the likelihood of the aforementioned trends persisting. One might have argued that there was no longer the necessary societal consensus for maintaining, at least in peacetime, a separate body of criminal law just for the military, and that there was no longer a military demand or legal necessity for such a tool – essentially prompting the conclusion that disciplinary procedures sufficed to maintain discipline and that military criminal law could be abolished without much ado. Though in our opinion such a conclusion foregoes the fact these societal and military evolutions have not altered the nature of the mission of the military in such a fundamental way as to leave it – and discipline's role therein – wholly unrecognisable. A military force completely subservient to the decisions of its civilian political leaders and as capable as possible to protect the polity remains an essential democratic ideal worthy of the most stringent protections.

5.1 Belgian military criminal law in Europe's new geopolitical reality

The Russian invasion of Ukraine in early 2022 has not only been a hard wake-up call in this regard, but it has also caused a reaction that impacts some of the trends we have previously identified as contributing to the decline of Belgian military criminal law. The advent of a new peer-to-peer conflict on European soil has led several European nations to envision an increase in the size of their armed forces – possibly through conscription.[92] While some European nations have always maintained some form of conscription (e.g., the Scandinavian and Baltic countries), western European nations who previously abandoned the concept altogether are now considering reintroducing it or have recently decided to reintroduce some version of the system.[93] In Belgium and a voluntary service year[94] for 18-year-olds has been introduced, though no actual plans seem to be in the works to reintroduce traditional conscription. If, however, the geopolitical situation in Europe were to deteriorate even further it is not unlikely that conscription could also be reactivated in Belgium. The unpopular nature of this measure[95] would most certainly

[92] Jeroen Van Horenbeek, 'Militaire heropbouw: minister Francken wil leger tot bijna 35.000 mensen uitbreiden' *De Morgen* (Antwerp, 14 March 2025), <https://tinyurl.com/vc3uemkh > accessed 13 December 2025; 'Defensie werkt aan een schaalbare krijgsmacht met meer reservisten' (*Ministerie van Defensie*, 24 March 2025) <https://tinyurl.com/2b5j4362> accessed 13 December 2025; 'German parliament backs controversial military service law amid Russian threat' (*Reuters*, 5 December 2025) <https://tinyurl.com/3emsst34> accessed 13 December 2025. Finn Seifert, *Attrition - The Uncomfortable Reality of War and its Neglect in Contemporary Western Military Thought* (Finabel, 2025) 3-7; Maxime Launay, 'Le retour du service militaire en Europe: De la suppression des conscriptions après la fin de la guerre froide à leur rétablissement relatif depuis 2022' (report no 128, IRSEM 2025).

[93] Sophia Besch and Katrine Westgaard, *Europe's Conscription Challenge: Lessons from Nordic and Baltic States* (Carnegie Endowment for International Peace, 2025) 2-4.

[94] 'Het Militaire Dienstjaar' (Defensie 2025), <https://tinyurl.com/y68urvtj> accessed 13 December 2025.

[95] Besch and Westgaard (n 95) 10-11.

lead to problems of a similar nature and scope as those we have sketched out above – problems which even Ukraine, despite arguably elevated societal willingness to fight, must deal with.[96] The nature and scale of likely draft-dodging would evidently require measures that go beyond non-judicial disciplinary measures.

The new reality with which Belgium is now faced will require a change of mindset, not only within the military, but also amongst the civilian prosecutors and judges who remain responsible for enforcing military criminal law. In this regard recent judicial decisions appear to show that, possibly because of the severance of institutional links between the judiciary and military, the disciplinary interests of the Armed Forces carry little weight. For some infractions the legislator determined that criminal judges must impose certain punishments of the Criminal Code or MCC, whether suspended or not, that have direct consequences for the servicemembers employment status. Therefore, the legislator has authorised civilian judges to determine whether it is appropriate for a convicted service member to remain in the Armed Forces. In these cases, judges must balance the personal interests of the individual service member against the interests of society as a whole – which include the interests of the Armed Forces. In cases where the judge does not forget to pronounce such obligatory punishment due to a lack of familiarity with military criminal law, we noted a pattern of reasoning heavily skewed towards the interests of the individual and frequently not even considering the special obligations incumbent upon military personnel and the larger societal importance of protection the public's faith in the armed forces.[97]

5.2 Military criminal law complements military disciplinary law

Moreover, a rash decision to completely decriminalise the maintenance of discipline in the Belgian armed forces, would not only go against the way decriminalisation is usually done in Belgium,[98] but it would also lose sight of the gaping holes such an action would leave in the effectiveness of military disciplinary law. Any attempt at (partial) decriminalisation would have to be part of a more holistic approach that both brings military criminal law into the 21st century and revitalises military disciplinary law.

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[96] Yuliia Taradiuk, 'Over 250,000 desertion, AWOL cases opened since 2022, prosecutors say' *Kyiv Independent* (Kyiv, 26 August 2025), <https://tinyurl.com/5n7ebjz2> accessed 13 December 2025; Maria Varenikova, 'The Village Where Draft-Age Men Have Mostly Vanished' *New York Times* (New York City, 10 November 2025), <https://tinyurl.com/4x33ft5v> accessed 13 December 2025.

[97] Jens Claerman, 'De verplichte ontzetting uit de burgerlijke en politieke rechten wegens zedenfeiten' [2025] 23 *T Strafr* 135.

[98] Belgium usually prescribes criminal punishment but allows for settlement through administrative sanctions as an option, Marie-Julie Horseele, *De nawerking van straf(proces)rechtelijke regels bij de administratieve sanctionering van misdrijven* (Larcier Intersentia, 2024).

If earmarking certain conduct as punishable by criminal sanction is considered to have a certain general preventive effect,[99] this effect goes beyond that of the provisions of military disciplinary law. In this regard it is worth noticing that, without criminal law as a backup, the limited scope *ratione temporis* of disciplinary law[100] makes it so that a person who does not wish to further entertain a military career will not have much external incentive to further execute his professional obligations to a sufficient standard. This is not only the case for your average grunt who has just 'had enough', but also for very specialised profiles, such as doctors and engineers, for whom the financial incentives of private employment might justify risking disciplinary punishment after their resignation was (temporarily) refused for being contrary to the interests of the Armed Forces.[101]

Additionally, military criminal law fills in several gaps that currently exist in military disciplinary law, most notably with regards to the available punishments. Currently neither operational nor statutory discipline contain any punishment that reduces the servicemember involved in rank. The punishment of destitution has this consequence, albeit in an extreme form – busting officers down to private. Degradation does not serve the same purpose: while also technically stripping a servicemember of his or her rank, it automatically entails this person's dismissal from the service thereby having the same effect as a disciplinary dismissal. The dismissal by way of degradation however goes beyond the classic disciplinary dismissal with regards to another, arguably more important matter: the impact on the military pension. A servicemember dismissed by way of degradation loses the right to a military pension and any rights built up over the years will be transferred to less generous the system for the private sector.[102]

5.3 Updating military criminal law

The current complementary nature of military criminal law *vis-à-vis* military disciplinary law and a possible change of fortune due to the war in Ukraine should however not hold us back from already exploring avenues to improve the Belgian military justice system. The MCC contains some glaring inconsistencies. Given the way war and society have evolved since the second half of the 19th century, reconsidering the contents and text of the MCC is no luxury. Sadly, where back in the 1860s the reform of the MCC followed

[99] Johannes Andenaes, 'The General Preventive Effects of Punishment' [1966] 114 *U Pa L Rev* 949. Though the actual impact is highly contested (Joëlle Rozie, 'De strafdoelstellingen in het licht van de gewijzigde rechtspraak van het Hof van Cassatie' [2022] 17 *Nullum Crimen* 119.

[100] Someone who is no longer a servicemember, cannot receive a disciplinary punishment. An imposed disciplinary punishment is not shared with third parties such as future employers etc.

[101] Military Statute, art 52.

[102] Wet van 15 mei 1984 houdende maatregelen tot harmonisering in de pensioenregelingen, BS 15 May 1984, art 46; Koninklijk besluit nr 16020 van 11 augustus 1923 samengeordende wetten op de militaire pensioenen, BS 29 August 1923, art 3*bis*.

on the heels of the new common Criminal Code, no doubt due to its more acute societal relevance, it is by no means clear history will repeat itself in the 21st century.[103]

A first set possible of alterations concern the acts that are considered to merit criminal sanction. While almost all these martial offences prove quite timeless, some of their elements have become militarily irrelevant.[104] One might also wonder whether the Code's outdated character lies perhaps also in the lack of certain infractions or aggravating circumstances. There are, for example, no specific provisions on drug offences in a military context, notwithstanding the proliferation of this issue in society at large and the stark difference in civilian and military attitudes towards this issue. Finally, some provisions of the MCC are glaringly inconsistent with its concept.[105] The MCC forms a line of demarcation: it enumerates the most egregious[106] shortcomings impacting good order and discipline and elevates them out of the realm of disciplinary law. Hence it is quite odd to see that some provisions of the MCC don't punish the enumerated behaviour with a criminal punishment, but merely with a disciplinary punishment. As in Belgian criminal law the nature of the infraction is determined by the punishment imposed,[107] and given that the MCC does not provided for an alternate rule,[108] this would thus make these infractions disciplinary in nature – which begs the question why they are enumerated in the MCC in the first place.[109]

Another, more general, alteration would be to reconsider how we draw the line between military criminal law and military disciplinary law. As it stands, this division has not been reconsidered since the 19th century. During the revision of the Dutch military justice system the Kingdom of the Netherlands, with whom we share our military legal tradition, put in place a very categorical distinction between military criminal and disciplinary law. Based on the idea that behaviour causing significant adverse effect on the general societal interest of well-functioning armed forces merited judicial repression, whereas military behaviour merely disrupting the inner workings of the military service will only justify disciplinary action,[110] multiple provisions of the Dutch Military Criminal

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[103] The most recently voted and proposed alterations to the MCC are primarily technical in nature (wet van 24 februari 2024 tot invoering van boek I van het Strafwetboek, BS 8 April 2024, art 3-10; wet van 29 februari 2024 tot invoering van boek II van het Strafwetboek, BS 8 April 2024, art 3-4; wetsontwerp houdende de harmonisatie van de geldende wetsbepalingen van Justitie met het Strafwetboek van 29 februari 2024, KAMER, 2025-26, No 1182/1).

[104] Taking a horse is an aggravating circumstance for desertion (MCC, art 47. See also MCC, art 23-24).

[105] MCC, art 24 (sleeping or being drunk as a sentry) and 25, para 1-3 (abandoning one's post).

[106] *Note Renvoi à la discipline du corps*.

[107] Criminal Code, art 1.

[108] *Memorie van toelichting* Military Criminal Code, KAMER, 1868-69, No 56, 2.

[109] Disciplinary infractions do not require enumeration as the *nullum crimen sine lege* aspect of the legality principle does not apply in disciplinary law. See also P Cassiers, 'De la suppression des peines disciplinaires militaires du Code pénal militaire' [1953] 33 *RDPC* 353.

[110] *Hand* Tweede Kamer der Staten-Generaal, 2018-19, 1 November 2018, 35000 X, no 19: Brief van de minister en staatssecretaris van Defensie, 3-4; Bas van Hoek and Mark Roorda, 'De scherpe scheiding

Code explicitly reference danger and/or damage as a constitutive element.[111] Here the Belgian MCC limits itself to more classical aggravating circumstances such as behaviour in time of war,[112] when part of a combat unit (*werkdadig leger*)[113] or in the face of the enemy[114] – concepts that come with their own set of problems. Not only is Belgian law's idea of states of exception a conceptual jungle,[115] within the context of military criminal law it just no longer reflects the use of armed force in the 21st century which frequently occurs outside of the classical dichotomy of war and peace.[116] As Europe prepares for a potential conflict with Russia, the MCC in and of itself does not formally recognise this tense geopolitical situation as an aggravating circumstance (reflecting the need for a heightened standard of military discipline).

If we were to reconsider our priorities by overhauling the MCC and decriminalising certain behaviour in peacetime, while at the maintaining its criminalisation when it generates actual risk or harm to operations or when it takes place in periods of geopolitical turmoil short of war, we must not forget to also ensure that military disciplinary punishment is sufficiently effective to tackle unwanted, now decriminalised behaviour. It should be noted that the punishments of operational discipline have for some time been considered to be lacking in effectiveness – a position contested however by the military unions.[117] With regards to the measures of statutory discipline an often-heard criticism is that, besides the extremely cumbersome procedure, the three provided punishments do not allow sufficient personalisation of the imposed measure.[118]

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tussen het militair tuchtrecht en het (militair) strafrecht: pleidooi voor een heroverweging' [2022] *NTS* 98, 100.

111 For example, Wetboek van Militair Strafrecht, artt 126 and 127 (disciplinary equivalent: Wet Militair Tuchtrecht, art 15).

112 This concerns the period when the army is mobilised (Wetboek van strafrechtspleging voor het leger, art 58 (abrogated in 2003)).

113 The army organised on a war footing and intended to engage the enemy, Stanislas Horvat, *De vervolging van militairrechtelijke delicten tijdens Wereldoorlog I: De werking van het Belgische krijgsgerecht* (VUBPress 2009) 134.

114 MCC, artt 23-25, 28, 30-31, and 38-39.

115 Rob Gerits, 'De 'staat van oorlog' en de 'staat van beleg': uitzonderingsregimes die aan herziening toe zijn' in Emmanuel Vandenbossche (ed), *Uitzonderlijke omstandigheden in het grondwettelijk recht* (Die Keure, 2019) 65-85. This also impacts the resurrection of the military courts, see the contribution by Nicolas B Bernard in this issue.

116 On the spectrum of armed conflict, see: Rosa Brooks, *How Everything became War and the Military became Everything* (Simon & Schuster, 2016) 82. The last time the Belgian Armed Forces were mobilised was in 1939 (koninklijk besluit van 26 augustus 1939 betreffende de mobilisatie van het leger, BS 27 Augustus 1939).

117 Rob Gerits and Ruben Ritsema, 'Het Belgische en Nederlandse militair tucht- en strafrecht. Suggesties voor enkele noodzakelijke aanpassingen' [2022] MRT, <https://puc.overheid.nl/mrt/doc/PUC_729207_11/> accessed on 12 December 2025; Floriant Gilman, 'Quelles sont les conditions à réunir pour aboutir à un changement des règlements militaires relatifs à la discipline dans le courant de la prochaine législature' (Thesis Superior General Staff Course, Royal Military Academy, 2025).

118 Gerits (n 21) 341-346.

Specifically, the gap between a 90-day suspension at 75% of pay and the next higher punishment, dismissal, is considered too large. To fill this gap, one could consider for example a watered-down version of the military criminal punishments of destitution, whereby servicemembers would be able to remain in the service, not at the lowest rank (private), but the immediately lower rank.

6 Conclusion

The specific mission of the armed forces and the sacrifices that go along with it are hardly comparable to the tasks of any other governmental institution. As servicemembers must maintain constant readiness to effectively participate in military operations, we expect of them a very disciplined attitude. To enforce this good order and discipline the legislator has provided three mechanisms: military criminal law, operational discipline and statutory discipline. Some 21 years after the abolition of the military courts in times of peace, we have established a stark reduction in the relevance of military criminal law in maintaining good order and discipline in the ranks: where some 200 cases were opened every year and more than a dozen convictions for martial offences were pronounced in the early 2000's, two decades later these numbers have shrivelled to next to nothing.

While a lack of interest in military criminal law by the civilian Public Prosecutor's Office and criminal courts was already decried back in the mid 2000's, we suggest that the current situation is rather a consequence of sociological and military trends that predate the abolition of the military courts by at least a decade. Since the end of the Cold War, the professionalisation of the Belgian Armed Forces, the civilianisation of the military profession and an altered operational context have seemingly pushed Belgian society and its policymakers, magistrates and military officers to alter their views as to what mechanisms, given limited resources, best serve the need for a disciplined military. In theory the Russian invasion of Ukraine in early 2022 should have upended this calculation: this conflict has urged many European nations to reconsider the size of their armed forces and the usefulness of conscription as a way of meeting these manpower goals. The manpower problems faced by Ukraine will, in the event the conflict drags all of Europe into the fray, most certainly surface in other European nations given the widespread unpopularity of conscription. It is highly unlikely that in such circumstances repressive mechanisms of a non-judicial nature will prove sufficiently effective in maintaining manpower levels and good order and discipline within the ranks.

Military criminal law still has a purpose to serve, and it would be prudent to give it a long overdue fundamental update, bringing this repressive mechanism into the 21st century. Partial decriminalisation could be a part of such an update, though only if it is a component of a more holistic approach that ensures harmony with military disciplinary law and sufficiently effective disciplinary punishments.