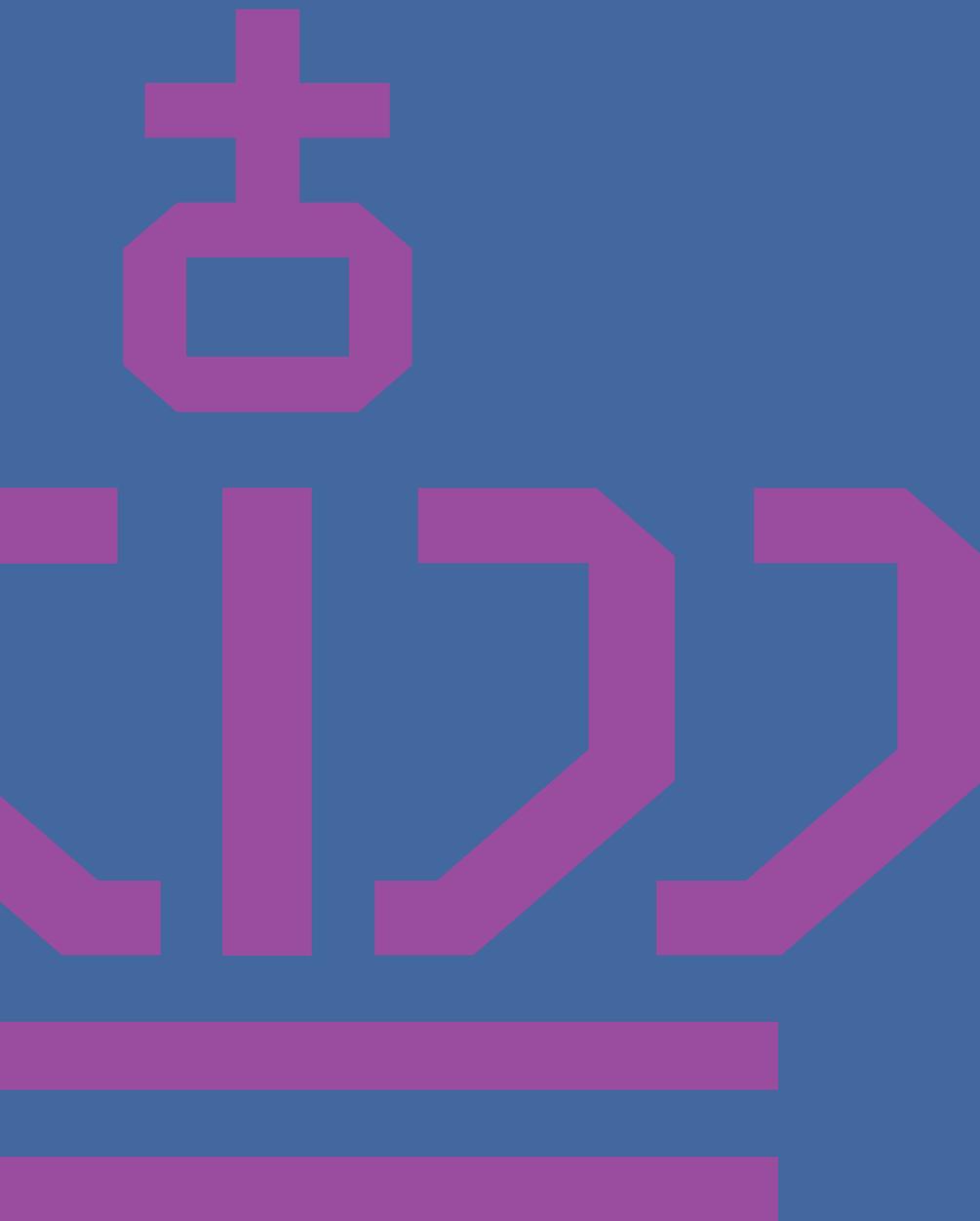


The Danish Military Justice System



Welcome

I am pleased to present this brief introduction to the organization of the Danish Military Justice System and the duties and functions of the Military Prosecution Service.

In short. Denmark maintains a separate justice system for the Armed Forces. With the 2005 legislative reform the Danish Parliament affirmed the need for a separate system of justice to meet the unique requirements of military discipline in particular with a view to the international operations that Denmark has participated in since the early 1990es.

The Danish Military Justice System is structured as a dualistic system with a clearly defined separation between criminal justice operated by the Military Prosecution Service and summary proceedings operated by the chain of command.

Copenhagen, February 2018

Lars Stevnsborg
Military Prosecutor General

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Introduction to the Danish Military Criminal Justice System



The neoclassical building of the City Court of Copenhagen from 1815 offers a quote from the preamble to the Law of Jutland from 1241: "*With Law shall the Country be built*".

The purpose of military justice

The purpose of military justice is to protect the efficiency and readiness of the armed forces through maintaining order and discipline in compliance with international law. The Danish Military Justice System is divided in two parts: The criminal justice system operated by the Military Prosecution Service and the summary proceedings operated by the chain of command.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

Article 43 - Armed forces

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, 'inter alia', shall enforce compliance with the rules of international law applicable in armed conflict.

General procedural provisions

The Danish Military Criminal Justice System is an integral part of the general criminal justice

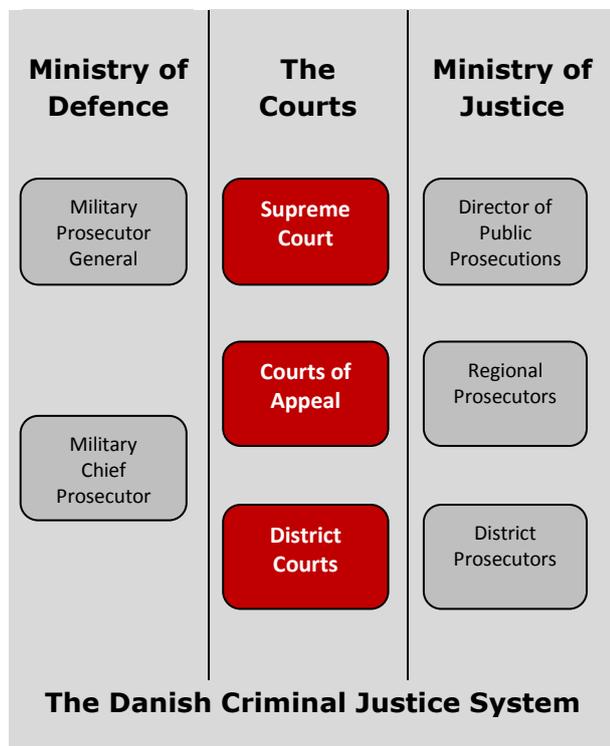
system and abides by its fundamental principles of justice. The military justice procedures follow those applied in civilian criminal law with some differences due to the nature of military service.

Criminal justice is based on the adversarial process. The Administration of Justice Act sets out a wide range of detailed provisions aiming to facilitate a *fair trial* for the defendant as well as protecting the rights of victims and witnesses. The aim is also to strike a fair balance between the rights of the individual and the interests of Society, including the necessary efficiency of the criminal justice system.

The basic principles are the presumption of innocence, the burden of proof placed on the Prosecution Service and the application of the principle "*in dubio pro reo*", the free assessment of evidence, the rights of the defendant to remain silent and protection against self-incrimination, the right to be brought promptly before a judge when arrested and equality of arms between the prosecution and the defence counsel.

The Administration of Justice Act set out the guiding principles for the prosecutors that the Prosecution Service at all times shall proceed

with timeliness and ensure that those liable to punishment are prosecuted while those innocent are not. This is the fundamental principle of *objectivity and fairness*.



Military Criminal Jurisdiction

The Military Administration of Justice Act and The Danish Military Penal Code defines the military criminal jurisdiction.

The jurisdiction *ratione persona* applies to military personnel in active service and discharged military personnel in specified circumstances. During an armed conflict the jurisdiction extends to everybody – including civilians – serving in the armed forces or accompanying a unit thereof.

The European Convention on Human Rights is incorporated in Danish law. Thus the legal guarantees provided in the Convention form part of the Danish legal system.

Military Courts (Courts-Martial) were abolished in 1919. All military criminal cases are heard by the ordinary courts in accordance with the rules and procedures in the Administration of Justice Act, either with a single judge presiding alone or with a panel of lay judges or jurors depending on the nature and severity of the case.

A District Court ruling may be subject to appeal to a High Court and a judgment of a Court of Appeals may – with a special permit from the Appeals Permission Board – be appealed to the Supreme Court.

The jurisdiction *ratione materiae* extends to violations of the Military Penal Code and violations of other (civilian) legislation with a nexus to military service.

The territorial jurisdiction (*ratione loci*) of the Military Penal Code applies to crimes committed within and outside the Danish state.

Substantive Military Criminal Law

The Military Penal Code

The Danish Military Penal Code comprise a series of specific offences against the duties of service personnel.

The 2005 Law Reform introduced a substantive decriminalization of military offences. From 2006 the Military Penal Code *only* covers violations of a more severe nature that has been committed either with intent or by gross negligence. Lesser degrees of negligence does not constitute a criminal offence but might be sanctioned within the framework of summary proceedings (see below).

The Military Penal Code includes several service offences that are unique to military service such as disobedience of a lawful command, mutiny, harassment, absence without leave, negligent performance of duty as well as a number of offenses that would prejudice of good order and discipline such as disrespectful behaviour, abuse of position, degrading rituals and abuse of alcohol and controlled substances.

The 'War Articles' comprise a specific set of provisions applicable in armed conflict only. These provisions comprise violations to the laws of armed conflict as set out by conventions which Denmark has ratified, including the Hague Conventions, the Geneva Conventions and Additional Protocols and various other international agreements and customary rules of international law. See further below: International Investigations and Armed Conflict.

With legislative amendments in 2008 the Parliament set forth parallel provisions in the Military Penal Code and the Civil Penal Code to support increased penalties for offenses committed by torture as defined in the 1984 UN Convention against Torture and Other

Cruel, Inhumane or Degrading Treatment, or Punishment.

Torture being a particularly grave crime – like the most severe crimes – has no statute of limitations.

Other military criminal cases

Other military criminal cases comprise violations of the civil Penal Code, the most frequent being theft and assault etc., and violations of provisions in specialized legislation such as the Traffic Act, the Weapons Act, the Health and Safety at Work Act and the Environmental Act committed with a service nexus, on military areas or in military barracks.

In recent years more than fifty percent of the sanctions have been imposed for violations of the Military Penal Code while the rest of the sanctions have been imposed for violations of the civilian legislation with a nexus to military service.

Sanctions in criminal cases

Under Danish criminal law an offender may be punished by imprisonment, a fine or an alternative sanction in form of community service. The Court may order an offender to be deprived of the proceeds of crime or may issue an order to pay compensation to the victim. The Court may also impose an additional sentence such as suspension of a driving license.

The Military Prosecution Service is responsible for the enforcement of penalties and orders imposed by the Courts.

A prisons sentence is served in the ordinary prisons and service prisons or detention barracks are not available in Denmark.

International Investigations and Armed Conflict



Independent investigations

The Military Prosecution Service is a military organization and the military prosecutors and investigators have formal status as military personnel outside the chain of command. Consequently the Military Prosecution Service may access operational areas in a foreign country and conduct an investigation while being covered by Status of Forces Agreement (SOFA), as applicable, for the particular mission.

The investigations are conducted independently of the chain of command by an investigation team from the Military Prosecution Service and may be launched *ex officio* as required by International Law. As stipulated in the Military Administration of Justice Act the Military Prosecution Service may rely on the assistance of military agencies – in particular the Military Police units in the operational theatre. Under these circumstances the Military Police act upon the direct instruction and responsibility of the Military Chief Prosecutor.

International law

International humanitarian law and human rights law require States to conduct *ex officio* investigations of potential violations of international law committed during international military operations. The jurisprudence of the European Court of Human Rights has established that the obligation to protect the right

to life under Article 2 of the European Convention on Human Rights (ECHR) entails a procedural obligation to take all reasonable steps to ensure that an effective and independent investigation is conducted into alleged breaches of the right to life. This procedural obligation under Article 2 continues to apply in difficult security conditions, including in a context of armed conflict.

As further developed by the jurisprudence of the European Court of Human Rights, the persons responsible for and carrying out the investigation must be hierarchically, institutionally and practically independent from those implicated in the events. The requirement of effectiveness also entails thoroughness, transparency, promptness and reasonable expedition.

Although these requirements relate to investigations into alleged breaches of the right to life in Article 2 of the European Convention on Human Rights in territories where the Convention applies, the Military Prosecution Service endeavors to comply with the requirements in all investigations.

In practice the Military Chief Prosecutor ascertains that those military that assist the service in the investigation meets the criteria of independence. I.e. that the military personnel in question not only is – but is seen to be – operationally independent from the military chain of command.

Armed conflict

The assessment as to whether an armed conflict is occurring is conducted by the Ministry of Foreign Affairs, e.g. in connection with a submission to Parliament on the deployment of Danish Armed Forces to an international operational theatre.

The Military Penal Code contains a number of provisions which are only applicable "*when Danish forces in or outside the country are involved in an armed conflict*".

In relation to the Military Penal Code the ramifications of the existence of an armed conflict are the following:

- The jurisdiction extends to everybody serving in the armed forces or accompany a unit thereof, including civilians,
- the jurisdiction extends to anyone committing an offence against the efficiency of the military forces as well as other types of crimes during armed conflict,
- the activation of a specific set of provisions on armed conflict,
- an increased severity of sanctions may be imposed on certain ordinary offences related to the dereliction of military duties.

Provisions in the Military Penal Code ('War Articles')

The main provisions applicable in armed conflict are found in the Military Penal Code, sections 28 to 35 on 'crimes against the effectiveness of the military forces' and sections 36 to 38 on 'other types of crime during armed conflict'.

The provisions on 'crimes against the effectiveness of the military forces' prohibit conduct which is considered particularly harmful to the armed forces. These provisions include treason (section 28); espionage (section 29);

deliberate change or replacement of ammunition or other types of war equipment (section 30); cowardice (section 31); deliberate disclosure of a military secret harmful to the defence of the country (section 32); deliberate omission to prevent mutiny etc. (section 33); deliberate causing dispiriting (section 34); and deliberate unauthorised contact with the enemy (section 35).

The provisions on 'other types of crime during armed conflict' are intended to protect individuals during armed conflict.

The provisions in section 36(1) prohibits a specific violation of international humanitarian law, namely deliberate abuse or disrespect of distinctive emblems designed to protect religious or medical personnel, units and establishments, i.e. abuse of the Red Cross emblem.

The provisions in section 36(2) is wider and more generally formulated and prohibits deliberate use of war methods or procedures contrary to an international agreement signed by Denmark or international customary law.

The provisions also prohibits looting (section 37) and marauding (section 38).

Jurisprudence

Over the years the Military Prosecution Service has conducted a number of investigations under difficult security conditions some of which were followed by charges.

So far the courts have imposed stricter sanctions in cases concerning disobedience, absence without leave and gross negligence of military duties in operational theatres.

Summary Proceedings - Military Disciplinary Cases

The Military Disciplinary Act

The Danish military justice system also comprises a system for dealing with disciplinary offenses of a minor nature by summary proceedings. The jurisdiction for these proceedings extends to personnel covered by the military criminal jurisdiction (see above).

Disciplinary proceedings are initiated by a military commander and are subject to the jurisdiction of the chain of command. The military commanders are responsible for the enquiry in accordance with the Military Disciplinary Act of 2005. Such proceedings may also be initiated following the discharge in a criminal case.

If a military commander is in doubt as to whether the case should be investigated as a criminal offense or pursued as a disciplinary case, the matter is referred to the Senior Commander. If the Senior Commander is in doubt, the matter is referred to the Military Chief Prosecutor for a final decision on the application of the law.

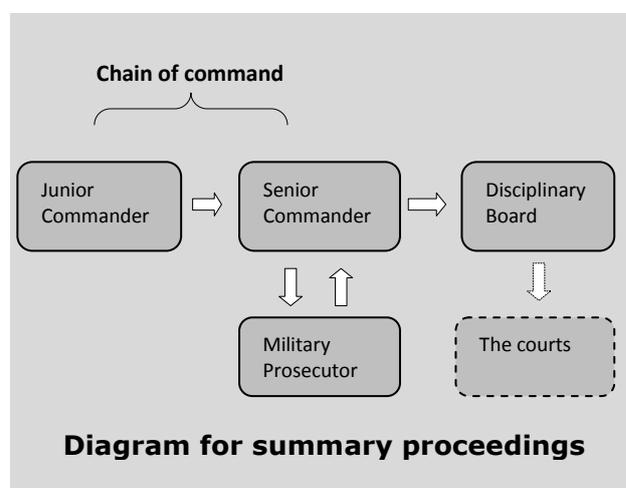
The purpose of the summary proceedings is to ensure discipline within the armed forces. Disciplinary responsibility shall be imposed where – as a consequence of a dereliction of duties – disciplinary reasons call for such a sanction, but where criminal sanctions are not warranted or needed.

The summary proceedings carry administrative sanctions and the Public Administration Act applies unless otherwise provided in the Military Disciplinary Act.

The disciplinary measures comprise inter alia reprimand, additional work and exercise, additional service or a disciplinary fine up to a maximum of 1/10 of the monthly salary of the person in question for each offence. The measures do not comprise demotion and discharge.

The *legal remedy* to a disciplinary sanction imposed by a military commander is an appeal to the Senior Commander. The Senior Commander's decision may in turn be appealed to the Military Disciplinary Board.

The Board is presided by a District Court Judge and is composed a representative of the armed forces appointed by the Chief of Defence, and a representative of the ranks of the person on whom the disciplinary measure has been imposed.



Decisions of the Disciplinary Board may be brought before the ordinary courts by the individual in accordance with the provisions in the Danish Constitution.

The Civil Servants Act

If the disciplinary measures in the Military Disciplinary Act are deemed inadequate – inter alia in cases where *demotion* and *discharge* from military service would be an appropriate sanction – disciplinary proceedings according to the Civil Servants Act may be relevant. Such proceedings may also be initiated following a conviction in a criminal case.

Proceedings pursuant to the Civil Servants Act are *not* available for disciplinary offences heard summarily in accordance with the Military Disciplinary Act.

The Danish Military Prosecution Service

Organisational structure

The organisation and responsibility of the Military Prosecution Service (MPS) is set out in the Military Administration of Justice Act.

The MPS is independent and does not form part of the military chain of command. The service is subordinate only to the Minister of Defence in the same way as the Civilian Prosecution Service is subordinate to the Minister of Justice.

The MPS is a two tier organization comprised of the Office of the Military Prosecutor *General (Judge Advocate General)* and the Office of the Military Chief Prosecutor (*Judge Advocate*). Decisions taken by the Military Chief Prosecutor in criminal cases may be appealed to the Military Prosecutor General.

Mission, vision and strategy

The mission and vision of the MPS is defining overall objective and purpose and is attached to and part of the general characteristics of the organisation of the Ministry of Defence.

»The joint mission of the organisation of the Ministry of Defence:

- Together we work for the Danish security and interests and the security of citizens

The joint vision of the organisation of the Ministry of Defence:

- We operate and develop tasks so that we get the most out of the resources we have available.
- The Ministry of Defence wants to be a professional and widely recognized collaboration partner.
- Joint capacity and drive will be created through loyal and confident cooperation.«

Based on the joint mission and vision the MPS has developed a four pillar strategy plan and a breakdown into specific objectives.

The strategic objectives are fair, impartial and independent prosecutions maintaining quality, efficiency, professionalism and transparency. The objectives (focus areas) supporting the strategic objectives comprises the continuous improvement of core competencies, communications and cooperation maintaining an attractive workplace with a highly motivated staff.

Duties and functions

The key responsibility of the MPS is to ensure enforcement of the law in accordance with the rules in the Administration of Justice Acts where a breach of law carries a criminal sanction. Military criminal cases are subject to the jurisdiction of the MPS only.

The MPS is responsible for the investigation and prosecution of violations of the Military Penal Code as well as other (civilian) legislation with a nexus to the military service.

An investigation may be launched ex officio or upon a report from military commanders or individuals when there is a reasonable suspicion that a criminal act has been committed. A case may be subject to a preliminary examination prior to initiating an investigation. Investigations into serious service related accidents inter alia when servicemen are seriously injured or killed in connection with the service are initiated ex officio.

Other duties

The Military Prosecution Service has responsibilities outside the Criminal Justice as well. The Service is a key player in the Legal Advisory Service of the Danish Armed Forces.

The existing Military Legal Advisory Service was created in 1997 to fulfil the obligations to facilitate legal advice to military commanders, in particular in the field of international humanitarian law as prescribed by Article 82 of the Additional Protocol 1 to the Geneva

Conventions of 1949 relative to the protection of victims of armed conflict.

The Military Prosecutor General's Office is responsible for the training of Danish Military Legal Advisors in obligations under international humanitarian law while the Military Legal Advisors are under the command of Defence Command Denmark.

Furthermore, the Military Prosecutor General's Office inter alia provides advice to the Ministry of Defence pertaining to military justice and to the Home Guard authorities on the fitness of membership of members or applicants convicted of a criminal offence.

Office and personnel

With the Defence Agreement 2014 it was decided to further strengthen the independence of the MPS' case management.

The implementation of the agreement comprised the amalgamation of the operational prosecutors' offices into one single office, located in central Jutland, supported by a rapid response team of investigators in the Greater Copenhagen area, as well as a move from the military bases to civilian facilities. The Military Prosecutor General resides in Copenhagen. The re-organisation was completed in 2015.

The personnel of the MPS comprise prosecutors, investigators and other legal and administrative staff. The military prosecutors are mainly recruited from the Civilian Prosecution Service while the investigators are recruited from the National Police. Legal advisors and other staff are recruited from other sources including the National Defence.

The historical evolution in brief

The first Judge Advocate General of the Danish Army was appointed by Royal Decree of 3 June 1659 as a legal advisor to the King on military law. Later, in 1867, a joint legal service for the Army and Navy was established as an organization by an Act of Parliament.

The Criminal Justice Reform of 1919 detached the Service from the chain of command and gradually the role of the Service as a military legal service was transformed to its role of today.

After World War Two, in 1951, a heraldic coat of arms was approved and in addition a gilt regimental badge was created as a collar and cap badge for wearing on the Army uniform for those personnel with military status.



The badge of Military Prosecution Service'

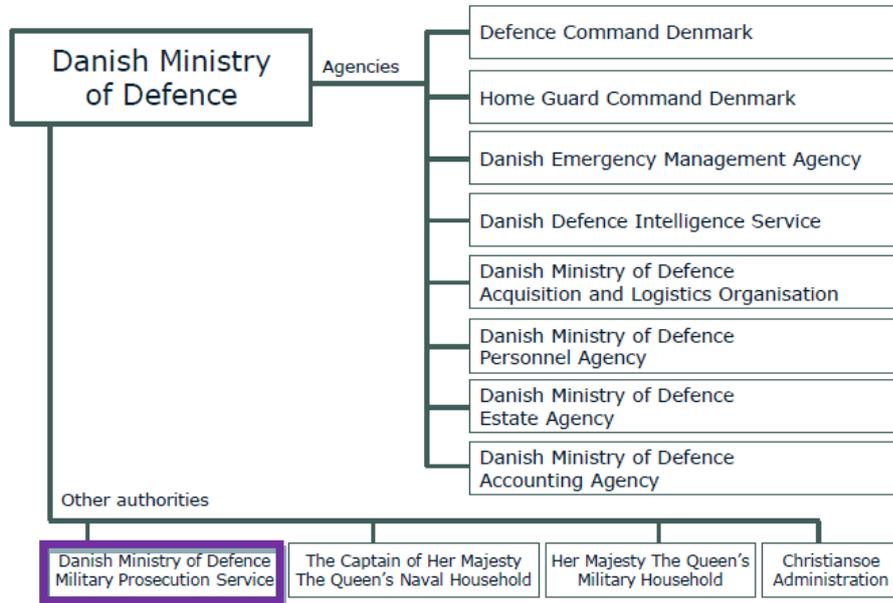
The Royal crown refers to State Agencies. The wreath of thistle and the crossed fasces refer to the special uniform that was approved after the Military Justice Reform of 1919. The crossed fasces refer to the power and jurisdiction of the Roman magistrates, the axe being a symbol of full authority in the field (*militiae*).

Blazon of the heraldic coat of arms: *"In a black shield an oval golden wreath of thistle with red flowers tied by a red bow. Here on two crossed red Roman lictor's rods with fasces and silver-axes"*.

In 2017 a new modern crown was designed and approved by the National Heraldic Consultant to be implemented by all agencies within the Ministry of Defence in 2018.

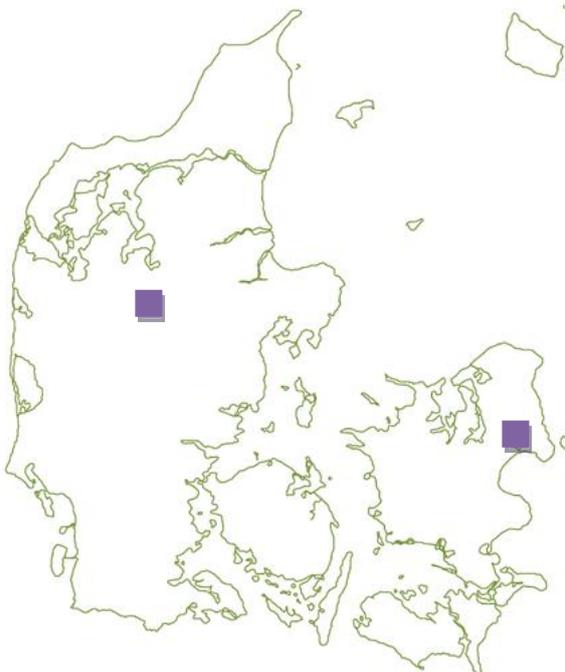
The purple and secondary colour is the branch colour for the Military Prosecution Service and has been the signature colour of prosecutors since 1688 when the prosecutors at the Supreme Court began wearing black gowns adorned with purple. From 1920, following the general Criminal Justice Reform, such gowns have been worn by all prosecutors in the Courts of Appeal as well.

Organizational chart



The organisation of the Danish Ministry of Defence pursuant to the Defence Agreement 2014.

Source: the Ministry of Defence 2018, www.fmn.dk.



The Offices of the Military Prosecution Service

The Office of the Military Prosecutor General is located in the Citadel of Copenhagen.

The Office of the Military Chief Prosecutor is located in Viborg (Jutland) with a rapid response team located in the Greater Copenhagen area.

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KASTELLET 14 A
2100 COPENHAGEN Ø

PHONE: (+45) 7226 5000
FAX: (+45) 7226 5035

MAIL: FAUK-MYN@MAIL.DK
WEB: WWW.FAUK.DK

CVR: 16 28 71 80
EAN: 5798000201996

