

# Human Rights of Armed Forces Personnel:

COMPENDIUM OF STANDARDS,  
GOOD PRACTICES AND RECOMMENDATIONS



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**HUMAN RIGHTS OF ARMED  
FORCES PERSONNEL:  
COMPENDIUM OF  
STANDARDS, GOOD  
PRACTICES AND  
RECOMMENDATIONS**

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# Abbreviations and Acronyms

***CAT – UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment***

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***CPT – European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment***

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***CRC – Convention on the Rights of the Child***

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***CEDAW – Convention on the Elimination of All Forms of Discrimination against Women***

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***DCAF – Geneva Centre for Security Sector Governance***

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***ECHR – European Convention for the Protection of Human Rights and Fundamental Freedoms***

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***ECRI – Council of Europe European Commission against Racism and Intolerance***

---

***ESC – European Social Charter***

---

***EU – European Union***

---

***EUROMIL – European Organisation of Military Associations and Trade Unions***

---

***ICCPR – International Covenant on Civil and Political Rights***

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***ICERD – International Convention on the Elimination of All Forms of Racial Discrimination***

---

***ICESCR – International Covenant on Social, Economic and Cultural Rights***

---

***ICRC – International Committee of the Red Cross***

---

***IHL – International Humanitarian Law***

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***ILO – International Labour Organization***

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***IOM – International Organization for Migration***

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***NATO – North Atlantic Treaty Organization***

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***NCO – Non-commissioned officer***

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***ODIHR – OSCE Office for Democratic Institutions and Human Rights***

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***OSCE – Organization for Security and Co-operation in Europe***

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***OSCE PA – Parliamentary Assembly of the Organization for Security and Cooperation in Europe***

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***PACE – Parliamentary Assembly of the Council of Europe***

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***PTSD – Post-traumatic stress disorder***

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***SCSL – Special Court for Sierra Leone***

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***UDHR – Universal Declaration of Human Rights***

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***UN – United Nations***

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***UNICEF – United Nations Children’s Fund***

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***UN ECOSOC – United Nations Economic and Social Council***

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***UN OHCHR – United Nations Office of the High Commissioner for Human Rights***

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***UNSCR 1325 – United Nations Security Council Resolution 1325 on Women, Peace and Security***

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## Foreword

Sixteen years ago, ODIHR and DCAF started to work on a handbook compiling existing common standards, models and good practices on the human rights and fundamental freedoms of armed forces personnel in the OSCE region. Since the Handbook was published in 2008, considerable progress has been made in the realm of human rights of armed forces personnel, with the Handbook itself contributing to developing common standards and spurring action in this area among both OSCE participating States and beyond. With these developments in mind, we sought to build on the impressive foundation that was established in 2008 by collecting and compiling developments made since then.

In 2021, as it was the case in 2008, the armed forces continue to play a key role in defending a democratic state and society by enabling a security environment that allows every individual to enjoy the inalienable human rights and fundamental freedoms to which s/he is entitled. As representatives of the state structure, armed forces personnel are bound to respect human rights and international humanitarian law in the exercise of their duties. But only when their rights are guaranteed within their own institution will armed forces personnel be likely to uphold these rights in the discharge of their tasks — both when in the barracks and during operations.

Given the unique nature of armed forces personnel, derogations from some human rights can occur. Such derogations can be justified by the need to maintain military discipline or to ensure the neutrality of the armed forces in the public sphere, for instance. However, back in 2008 and even more so today there is broad recognition among democratic societies that all members of the armed forces - career servicemen and - women or conscripts - should be treated as “citizens in uniform”. This means that they are in principle entitled to the same human rights and fundamental freedoms as all other citizens. As a consequence, derogations must always meet strict requirements of legality, proportionality, non-discrimination and necessity.

This approach is reflected in the seminal document that informs this whole Compendium, the OSCE Code of Conduct on Politico-Military Aspects of Security, adopted by all participating States in 1994, which requires states to “reflect in their laws or other documents the rights and duties of armed forces personnel” and to “ensure that the military, paramilitary and security forces personnel will be able to enjoy and exercise their human rights and fundamental freedoms”. It also requires participating States to “provide appropriate legal and administrative procedures to protect the rights of all its forces personnel”.

Ensuring that the human rights of armed forces personnel are respected is also a matter of effectiveness. In an evolving security landscape in which modern warfare is often fought in amorphous, urbanized conflicts and where the distinction between combatants and the civilian populations is often difficult, it is essential that every single member of the armed forces has a deep awareness and profound knowledge of human rights.

Furthermore, it is widely acknowledged that the armed forces are drawn from, and reflective of, society. By embracing wider societal, cultural or legal realities and developments, the military avoids insulating itself from society. As the armed forces should ideally be a reflection of the diversity of society, it is important that these forces embrace all groups within a given society, including ethnic, racial, linguistic and other minorities. In order to achieve this, institutional barriers to the recruitment

and inclusion of certain subgroups should be removed, and discriminatory practices based on tradition should be revisited to avoid the dominance of any specific group. Increased diversity and equality will also help tackle situations of abuse, brutality, bullying, harassment, violence, ill-treatment, torture and other unlawful practices, which have serious consequences. In some cases unlawful practices are institutionalized as part of a wider pernicious military culture which can go as far as accepting impunity for perpetrators and disrespect for the dignity of human beings. Therefore, it is essential that armed forces also develop effective mechanisms to prevent impunity and support a culture of respect for human rights and fundamental freedoms, for instance through education, command responsibility, military justice and authoritative ombuds institutions.

As the world's largest regional security organization the OSCE is uniquely placed to provide a forum in which the above-mentioned issues can be discussed. While acknowledging that each country is unique and every military different, the OSCE's comprehensive approach to security, as well as the Organization's commitment to the protection and promotion of human rights and fundamental freedoms can help to effectively tackle these challenges.

DCAF, the Geneva Centre for Security Sector Governance, is an ideal partner to team up with the OSCE in this effort. DCAF believes that a democratically run, accountable and efficient security sector is fundamental to people's livelihoods, to reducing poverty and the risk of conflict, and to creating an enabling environment for sustainable peace and development. DCAF contributes to improved human and national security within a framework of democratic governance, the rule of law and respect for human rights, by supporting organizations like the OSCE and its participating States, and by developing and sharing norms, standards and good practices.

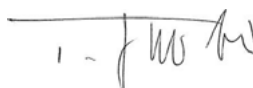
This Compendium presents an overview of legislation, policies, and mechanisms for ensuring the protection and enforcement of the human rights and fundamental freedoms of armed forces personnel. It includes many examples and good practices from across the OSCE region that have proven successful. It also contains recommendations which can help participating States ensure that their policies and practices are in full compliance with international human rights standards and OSCE human dimension commitments.

The Compendium is aimed at all individuals who play a role in promoting, protecting, and enforcing the human rights of armed forces personnel, such as parliamentarians, government officials, policy makers, judges, professional military associations, non-governmental organizations, and armed forces personnel themselves. We hope that this publication will encourage all interested parties to take the necessary measures to ensure that all servicemen and -women are able to enjoy their human rights and fundamental freedoms.



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## Chapter 1: Introduction

The starting point for this compendium is the OSCE Code of Conduct on Politico-Military Aspects of Security. The Code of Conduct makes several references to the rights of armed forces personnel, the most important of which is paragraph 32:

*"Each participating State will ensure that military, paramilitary and security forces personnel will be able to enjoy and exercise their human rights and fundamental freedoms as reflected in OSCE documents and international law, in conformity with relevant constitutional and legal provisions and with the requirements of service."*

This paragraph underscores the notion that the human rights of armed forces personnel are subject to any limitations and duties of military service provided for by national law. Other provisions of the Code of Conduct refer to the human rights of service personnel in the context of the political neutrality of the armed forces (paragraph 23); recruitment and conscription (paragraph 27); rights and duties, as well as exemptions from, or alternatives to, military service (paragraph 28); and the obligation of states to provide appropriate legal and administrative procedures to protect the rights of military personnel (paragraph 33).<sup>1</sup>

The OSCE Code of Conduct is firmly grounded in the provisions of human rights treaties, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and considers armed forces personnel as "citizens in uniform", a concept also confirmed by the European Court of Human Rights.<sup>2</sup> Accordingly, service personnel retain their human rights and fundamental freedoms, but these are subject to certain limitations and duties imposed by military service. OSCE participating States' understanding of "citizens in uniform" varies, however, and usually depends on the military culture and history of a particular state, such as a recent transition to democracy and its experiences of conflict. For these reasons, no single model for protecting the human rights of armed forces personnel exists. Therefore, this compendium puts forward various models and good practices applied in OSCE participating States aimed at integrating human rights into the armed forces.

The country examples and specific cases mentioned in this report serve to illustrate practices, challenges and jurisprudence relating to the protection of human rights of armed forces personnel, and are not intended to single out specific OSCE participating

<sup>1</sup> OSCE, *Code of Conduct on Politico-Military Aspects of Security*, Budapest, 3 December 1994, <https://www.osce.org/fsc/41355>; also, for detailed commentary on the Code of Conduct, see: Victor-Yves Ghébal and Alexander Lambert, *The OSCE Code of Conduct on Politico-Military Aspects of Security: Anatomy and Implementation* (Leiden/Boston: Brill Academic Publishers, 2005).

<sup>2</sup> European Court of Human Rights, *Matelly v. France*, no.10609/10, 2 October 2014.

States. While a geographically representative approach across the OSCE region was the aim, the compendium relied, to some degree, on participating States' responses to ODIHR's survey, as well as accessible case information.

## The Importance of Human Rights of Armed Forces Personnel

The "citizen in uniform" approach implies that armed forces personnel, whether professional or conscripted, are entitled to the same rights and protections as all other persons, subject to certain limitations imposed by military service. Indeed, respect for human rights and fundamental freedoms for all, including armed forces personnel, is part of the OSCE's comprehensive concept of security, which links the maintenance of peace to respect for human rights and fundamental freedoms.<sup>3</sup>

Nevertheless, in some states, members of the armed forces, and in particular conscripted soldiers, are subjected to abuse, brutality, bullying, harassment, violence, ill-treatment, torture and other unlawful practices. Such practices can lead to serious accidents, injuries, disabilities, death or suicide. Unfortunately, these practices may be institutionalized as part of a wider military culture that is characterized by impunity for perpetrators and disrespect for the dignity of human beings.

The constitutions or laws of some states disproportionately restrict service personnel's enjoyment of their human rights. For example, in many states, armed forces personnel are not allowed to fully exercise their rights to freedom of expression and freedom of assembly (see "Chapter 5: Civil and Political Rights" and "Chapter 6: Freedom of Expression"). Consequently, armed forces personnel may be hindered from speaking for themselves or voicing concern about cases of human rights violations. As this situation can be exacerbated by the closed nature of military institutions, it is important for governments to ensure that human rights are protected in the barracks.

Human rights are conceptually indivisible and an entitlement of being human. Indeed, the exercise of some human rights cannot be limited at all.<sup>4</sup> However, the exercise of other

<sup>3</sup> Principle 2 of the OSCE *Code of Conduct on Politico-Military Aspects of Security*, states: "The participating States confirm the continuing validity of their comprehensive concept of security, as initiated in the Final Act, which relates the maintenance of peace to the respect for human rights and fundamental freedoms."; See: Title VII of the Code of Conduct, discussed in greater detail in "Chapter 2: OSCE Commitments".

<sup>4</sup> These include the right not to be tortured or treated in an inhuman or degrading way; prohibition of slavery; prohibition of medical or scientific experimentation without consent; prohibition of imprisonment on the grounds of the inability to fulfil a contractual obligation; prohibition against the retrospective operation of criminal laws; and the right to be recognized as a person before the law. While parts of the freedom of thought, conscience and religion, and of the right to life are also considered absolute rights, some restrictions to these rights apply. For example, *manifestation* of religion may be limited, and persons right to life is not breached if, for example, a public authority uses necessary and proportionate force to stop a person from carrying out unlawful violence. For more information on reservations, derogations and limitations, see "Chapter 3: International Human Rights Law", including Box 3.2.



human rights may be adapted or limited under specific conditions and situations. Several factors may be considered when adapting human rights standards to the armed forces, including the nature of military discipline, the hierarchical organization of military ranks, the need to obey orders and the protection of morale. Unlike any other group of citizens, members of the armed forces may, in the course of their official duties, be called upon to kill other people and to sacrifice their own lives. Military life may involve serving under harsh or extreme conditions. Even in normal circumstances, there may be relatively little separation between private life and official duties, such as when personnel live in barracks. These special factors, distinctive from life in the armed forces, confirm the need to place limitations on the human rights of armed forces personnel.

**Box 1.1: The importance of respecting and protecting human rights in the armed forces**

1. By virtue of being citizens, armed forces members should enjoy the same human rights and fundamental freedoms as other citizens.
2. Respect for the human rights of armed forces members contributes to a military that is firmly integrated into society.
3. Respect for human rights in the barracks prevents the military from being misused by the government and turned against the civilian population.
4. Respect for human rights in the barracks protects armed forces members against misuse and oppression by the government or army commanders.
5. Modern-day peace operations require armed forces personnel to integrate human rights work into their day-to-day operations. They will be better prepared for such activities if they themselves operate in an environment that respects and protects those rights and requires them to internalize the values that underpin them.

Differences in the ways that states choose to limit the human rights of service personnel will depend on the abovementioned factors. These differences are rooted in the perception of the wider role and position of the armed forces in society. In answering the question “How different should the military be?”, some take the view that the military is a unique institution and entirely different from civilian institutions. This uniqueness is seen as the only way of preserving operational effectiveness. According to this view, a member of the armed forces is not an ordinary public servant but is someone who answers a calling and is dedicated to duty, country and honour. Contrary to this position, others take the view that the military’s distinctiveness is of only relative importance, owing to political, legal, cultural, technological and economic pressures that led the military to be “civilianized” in the 20th century.<sup>5</sup> Therefore, today’s military is the result of broader transformations in society, the

<sup>5</sup> See: Bernard Boene, “How Unique Should the Military Be? A Review of Representative Literature and

effect of which is illustrated by the institution/occupation model. The underlying thesis of this model is that the military profession is shifting away from an institutional format to one that is similar to the occupational format of other professions in society. Increasingly, the military profession is becoming “just another job”, driven by financial incentives, job security and attractive working conditions, instead of a unique institution based on country, duty and honour.<sup>6</sup> According to the institution model, soldiers’ human rights may be greatly restricted because the military profession cannot be compared with any other profession in society. According to the occupation model, however, service personnel may have the same rights as other citizens because of the commonalities between the military profession and other professions in society.

It is imperative, however, that any restrictions satisfy several criteria. They should be rationally related to military needs and not merely the result of arbitrary practice or tradition. They should be firmly based upon law, preferably legislation that has been subject to considered democratic debate and lawful procedure. They should be proportionate, i.e., adapted in a nuanced way to the interests of the military, which would be compromised by the full exercise of human rights. Any restrictions on the rights of armed forces personnel that operate in a discriminatory fashion on the basis of race, ethnicity, religion, sex or other criteria must be carefully scrutinized given their suspect nature and the requirement for clear justification. The onus to demonstrate the necessity of restricting the rights of armed forces personnel should firmly lie with the military.

Human rights are not merely a matter of high-sounding aspirations on paper; they must also be fully implemented in daily practice in the armed forces. Human rights violations resulting from illegal practices (e.g. mistreatment of conscripts) are some of the most common violations occurring in the armed forces. Although laws and regulations prohibiting such practices often exist, it is their practical implementation that often proves most difficult.

In many OSCE participating States, the mechanisms for protecting the rights of armed forces personnel remain inadequate. Even in states where laws and regulations have improved, they are often not respected at the practical level. The effective implementation of human rights is therefore crucial. This compendium emphasizes not only the role of national and international courts, but also other methods of investigating complaints concerning human rights violations and the sanctioning of violations, including military ombuds institutions. The first line of defence, however, has to come from within the armed forces. In particular, the protection of the human rights of their subordinates features among the key responsibilities of superior officers. Human rights education is crucial in raising awareness and creating a professional culture within the military that includes respect for human

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Outline of a Synthetic Formulation”, *European Journal of Sociology*, Vol. 31, No. 1, 1990.

**6** See: Charles Moskos, “From Institution to Occupation: Trends in Military Organization”, *Armed Forces & Society*, Vol. 4, No. 1, Fall 1977; and Charles Moskos, John Allen Williams and David Segal (eds.), *The Post-modern Military: Armed Forces after the Cold War* (Oxford: Oxford University Press, 2000).

rights as part of a commitment to democratic values. When this is achieved, the armed forces are not merely defenders of a state's territorial integrity, but also defend and embody its democratic commitments.

## How to Use This Compendium

This compendium is divided into five sections, each of which comprises several chapters (19 in total). The publication can be used in different ways depending on what each reader hopes to gain from it. Reading the compendium in its entirety will, naturally, provide the most comprehensive understanding of the human rights (including their implementation) of armed forces members. Readers may, however, opt to focus only on those sections and chapters that are of particular interest to them.

Throughout the compendium, readers will find boxes containing facts and figures that clarify or illustrate complex issues described in the main text by providing examples of the policies, laws and procedures applied by OSCE participating States or relevant information from international organizations. Furthermore, all chapters conclude with a section titled "Good Practices and Recommendations", where information about how to improve respect for human rights in the barracks may be found. Readers interested in policy-oriented practices and recommendations are advised to focus on these illustrative boxes and the recommendations at the end of each chapter.

**Section I** sets out the regulatory framework, norms and standards for human rights in the armed forces. It provides the national and international legal context for the exercise of human rights by members of the armed forces.

**Section II** deals with the civil and political rights of armed forces personnel. Political rights, in particular, refer to those rights that allow people to participate in public affairs. This section also deals with the right to conscientious objection and the fundamental freedom of religion or belief.

**Section III** deals with equality, non-discrimination and equal opportunities in the armed forces. While acknowledging that the enjoyment of human rights on an equal footing does not imply identical treatment in every instance, this section looks at both *de jure* and *de facto* equality in the armed forces. In particular, it deals with women service personnel, ethnic and national minorities, gender identity and sexual orientation.

**Section IV** deals with specific issues of military life, including recruiting and selecting underage armed forces personnel, proper treatment of armed forces personnel and working and living conditions.

Finally, **Section V** covers the important field of promoting and enforcing compliance with human rights in the barracks. It includes human rights education, the responsibility of commanders to hold individual soldiers accountable for their conduct, and military justice and ombuds institutions.

## Objectives

This publication – *Human Rights of Armed Forces Personnel: Compendium of Standards, Good Practices and Recommendations* – focuses on the human rights and fundamental freedoms enjoyed by members of the armed forces. The compendium is not aimed at setting new standards; instead, it seeks to contribute to the effective implementation of existing standards by presenting a number of models, or good practices, from within the OSCE region that demonstrate how military structures can successfully integrate human rights and fundamental freedoms. At the same time, necessary limitations on the human rights and fundamental freedoms of armed forces personnel are taken into account, bearing in mind the requirements of military life and national security. While recognizing that there is no single applicable model, and that the particularities of individual contexts will always influence a given country's approach, this compendium provides guidance to OSCE participating States by advancing models that have proven successful.

## Scope

### *Human rights*

In this compendium, human rights are clustered into four groups: (1) civil and political rights, (2) rights related to equal opportunities and non-discrimination in the armed forces, (3) rights related to military life and (4) procedural rights related to implementing and ensuring human rights in the barracks. They are addressed in each chapter with respect to the issues at stake, international human rights standards, different national approaches and good practices, and recommendations on ensuring that human rights are respected. Each chapter also contains several boxes that illustrate the laws, policies and practices found in participating States.

The compendium focuses specifically on the human rights and fundamental freedoms of armed forces personnel. It does not deal with respect for human rights *by* armed forces personnel in the execution of their operations. Therefore, the impact of the conduct of armed forces personnel on civilians remains outside the scope of this compendium.

Similarly, the compendium deals with peacetime situations only. Hence, armed forces personnel deployed abroad, such as on peacekeeping operations, and at home during crisis or emergency situations do not fall within its scope.

### *Armed forces*

Although the OSCE Code of Conduct refers in its provisions to "military, paramilitary and security forces" (for example, in paragraph 32), this compendium focuses on members of the armed forces. The reason for this is that "military, paramilitary and security forces" can quite easily be interpreted as including all elements of a state's security sector, including the

military, police, border guards, paramilitary forces, private security and military companies, internal security services, and foreign and military intelligence services. As these services have very different mandates, different operational procedures and different legal regimes, the compendium is limited to the consideration of armed forces proper.

While individuals do not lose their human rights when they enter the armed forces, states can limit their enjoyment of human rights due to requirements related to the particular characteristics of military life. The particularities of military life that are used to justify restrictions on the exercise of human rights are often related to preserving order and discipline in the military, establishing the political neutrality of the armed forces, maintaining operational effectiveness, protecting classified information, obeying orders and maintaining the hierarchical structure of the military. How and to what extent – if at all – these characteristics constitute a justification for restricting the enjoyment of human rights is one of the main issues discussed throughout the compendium.

## ***Armed forces personnel***

Armed forces personnel are not a homogeneous group, as many subcategories exist, including conscripted service personnel, volunteer service personnel, members of different branches of the armed forces (air force, army, military police, navy and special units), as well as the various ranks, from private to general. This compendium takes the view that human rights are an inherent part of being human and that membership in a certain category of military personnel should not affect the enjoyment of human rights.

In particular, the concept of citizens in uniform cannot apply solely to conscripted personnel. While conscripted personnel bear arms as part of compulsory military service, the professional soldier joins the armed forces on a voluntary basis. The mere fact of joining the armed forces voluntarily does not result in a waiver of human rights, as confirmed by the European Court of Human Rights in 1999.<sup>7</sup> At times, however, special safeguards are necessary to protect certain groups within the armed forces, such as service personnel under 18 years of age.

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<sup>7</sup> Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge: Cambridge University Press, 2006), pp. 9-23; European Court of Human Rights, *Lustig-Prean and Beckett v. United Kingdom*, 27 September 1999, "European Human Rights Reports", Vol. 29, 2000, p. 548.

## Methodology

Studying the human rights of armed forces personnel in different countries presents some significant challenges. First, while extensive attention has been dedicated to human rights law, the human rights of armed forces personnel have received comparatively minimal attention, aside from previous work by the Geneva Centre for Security Sector Governance (DCAF) and ODIHR. Although there have been some excellent studies on specific legal systems and particular aspects of this issue, there is a clear lack of comprehensive studies and analyses of national practices.<sup>8</sup> Another challenge is the gap between legal provisions and their implementation. Norms and standards enshrined in a country's constitution and laws are not always respected in reality. For these reasons, the research approach in drafting the compendium involved the following steps.

### ***Revision of the 2008 handbook***

A qualitative review was conducted of the original 2008 DCAF-ODIHR *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel* to identify sections and data that were in greatest need of revision. The findings of this review were compiled into a document that formed the outline of the questionnaire that followed.

### ***ODIHR-DCAF questionnaire***

A questionnaire was devised to identify developments since the original handbook was published. The questionnaire was circulated to all 57 participating States in February 2018, and by June 2018 26 responses had been submitted. The responses were used to provide context to illustrate laws, procedures and practices, as well as comparable data for each participating State that responded. In cases where countries with regular armed forces failed to reply to the questionnaire, it was nevertheless possible to describe parts of their human rights policies and practices in the armed forces by using information obtained from open public sources, NGOs, the media and academic institutions.

Box 1.3 shows that not all participating States responded to the questionnaire, while some do not have regular armed forces. In cases where countries with regular armed forces failed to reply to the questionnaire, it was nevertheless sometimes possible to describe parts of their human rights policies and practices in the armed forces by using information obtained from public sources, non-governmental organizations, the media and academic institutions.

<sup>8</sup> See, for example: *Ibid.*, Rowe; Georg Nolte (ed.), *European Military Law Systems* (Berlin: De Gruyter Recht, 2003); and Ghébalí and Lambert, *op. cit.*, note 1.

### **Box 1.2: Questionnaire on human rights of armed forces personnel in OSCE participating States**

In order to collect detailed information, ODIHR and DCAF circulated a questionnaire to the delegations of all 57 participating States in February 2018. The questionnaire comprised 74 questions, which sought to fill gaps in current knowledge and obtain useful examples for each chapter of the compendium.

Substantive responses were received from the following countries (25):

Albania, Austria, Azerbaijan, Bosnia and Herzegovina, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Malta, Montenegro, Norway, Poland, Romania, Slovakia, Slovenia, Sweden, Switzerland and the United Kingdom.

A note verbale was received from Liechtenstein, which does not have regular armed forces.

The following countries did not reply to the questionnaire (31):

Armenia, Belarus, Belgium, Bulgaria, Canada, Croatia, France, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Luxembourg, Moldova, Mongolia, the Netherlands, North Macedonia, Portugal, the Russian Federation, Serbia, Spain, Tajikistan, Turkey, Turkmenistan, Ukraine, the United States and Uzbekistan, as well as Andorra, the Holy See, Iceland, Monaco and San Marino, five states that do not have regular armed forces.

## ***Authorship***

Each chapter was drafted by a recognized expert on the topic of the chapter. Taking the information obtained by the questionnaire, each drafter endeavoured to update the previous version of the chapter or, as in several cases, to re-write the chapter altogether, with the aim of accurately reflecting the present state of affairs across the OSCE region.

## ***Expert review***

Drafts of each chapter were subjected to close scrutiny by experts in the field of human rights of armed forces personnel, who recommended revisions to each chapter to ensure that the ideas presented and conclusions drawn were valid. Internal reviews were also performed within ODIHR and DCAF.

# *SECTION I*

## **— THE REGULATORY FRAMEWORK**



## Chapter 2: OSCE Commitments

The OSCE regards norms and activities to promote democracy, human rights and the rule of law – known as the human dimension – as an essential aspect of security. The human dimension forms part of the OSCE's comprehensive concept of security, which also covers the politico-military and the economic and environmental dimensions. The term human dimension also indicates that OSCE norms in this field cover a wider area than traditional human rights law. This chapter deals with the nature and scope of OSCE human dimension commitments in the field of human rights, and also discusses the human rights aspects of the cross-dimensional OSCE Code of Conduct on Politico-Military Aspects of Security.

### The Nature and Status of OSCE Commitments on Human Rights

A commitment to human rights has been an integral part of the OSCE's comprehensive approach to security since its inception. In the Helsinki Final Act of 1975, the participating States agreed that one of the guiding principles of relations between them would be to:

*"promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for free and full development."*<sup>9</sup>

This commitment to human rights has been reaffirmed on several occasions, including in Madrid, 1983; Vienna, 1989; Moscow, 1991; and Astana, 2010.

OSCE commitments on human rights are politically binding on all participating States, including new members that accept the *acquis* upon joining the OSCE. This chapter maps out the main areas covered by these commitments, while subsequent chapters deal with the major individual commitments in greater detail.

The politically binding nature of the commitments means that, unlike human rights treaties, they are operative immediately (since they do not require constitutional approval) and in their entirety (that is, without reservations). They are not, however, legally enforceable in court. OSCE commitments are more than a simple declaration of will or good intentions; rather, they are a political promise to comply with these standards. They may also, if reflective of general state practice and a concomitant legal obligation, indicate the emergence of customary law.

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<sup>9</sup> OSCE, "Helsinki Final Act", Helsinki, 1 August 1975, Article 1(a) VII, <https://www.osce.org/helsinki-final-act>.

In Copenhagen in 1990, the participating States declared their commitment to provide effective remedies for human rights abuses and complaints. Remedies enable members of the armed forces to utilize, in a practical way, the commitments of states to uphold human rights norms. A remedy is effective if it allows for an independent inquiry into alleged human rights abuses and an impartial determination of whether a violation has occurred, and if it provides a means to obtain sufficient redress for the alleged victim. Box 2.1 highlights some of the key features of effective remedies for violations of human rights contained in the 1990 Copenhagen Document.

Where no remedy, or an insufficiently effective one, is provided at the national level, recourse may be had to individual complaint mechanisms at the international level. OSCE human rights commitments do not themselves provide for complaint mechanisms, but complaints mechanisms are available under various UN and regional human rights treaties to which OSCE participating States are parties. These treaties are discussed in “Chapter 3: International Human Rights Law”.

OSCE participating States have agreed that any limitations on human rights must be provided for by law and must be consistent with other international obligations (Copenhagen 1990). Much like as required in the international human rights treaties, any restrictions on human rights should be exceptional, applied consistently and strictly proportionate to the aim of the law.

## OSCE Monitoring and Implementation Mechanisms

OSCE participating States have consistently reaffirmed that, since the protection of human rights is a pillar of the international order, recognition of human rights is not the internal preserve of individual states. Rather, states are accountable to their citizens and to each other for the implementation of their commitments. In Moscow in 1991, the participating States affirmed categorically and irrevocably that matters within the human dimension of the OSCE were of “direct and legitimate concern to all participating States”.

Various OSCE bodies are engaged in monitoring the implementation of human dimension commitments, including ODIHR and the OSCE’s Representative on Freedom of the Media. Participating States are ultimately responsible for implementing their commitments, however, and also engage in peer review on the implementation of commitments in their fellow participating States.

## Relevant OSCE Commitments

The participating States have agreed to a number of binding commitments concerning specific human rights. These commitments apply to everyone, including members of the armed forces.

### Box 2.1: OSCE commitments on human rights<sup>10</sup>

Right	OSCE Commitment	Relevant Chapter
Right to effective remedies	<p>[The participating States will] ensure that effective remedies as well as full information about them are available to those who claim that their human rights and fundamental freedoms have been violated. (Vienna 1989)</p> <p>The participating States will consider acceding to a regional or global international convention concerning the protection of human rights, such as the European Convention on Human Rights or the Optional Protocol to the International Covenant on Civil and Political Rights, which provide for procedures of individual recourse to international bodies. (Copenhagen 1990)</p>	Chapters 3 and 4
Right to equal participation in political and public affairs	<p>The participating States will accordingly respect the right of their citizens to take part in the governing of their country, either directly or through representatives freely chosen by them through fair electoral processes.</p> <p>The participating States will [...] respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination. (Copenhagen 1990)</p>	Chapter 5
Freedom of association	<p>[The participating States] affirm that, without discrimination, every individual has the right to [...] freedom of association and peaceful assembly. (Paris 1990)</p>	Chapters 5 and 7

<sup>10</sup> OSCE Human Dimension Commitments, Volume 1: Thematic Compilation (Warsaw: ODIHR, 2011), 3rd ed., <https://www.osce.org/odihr/76894>; OSCE Ministerial Council, Decision No. 3/13, "Freedom of Thought, Conscience, Religion or Belief", Kyiv, 6 December 2013, <https://www.osce.org/mc/109339>; and OSCE Ministerial Council, Decision No. 4/18, "Preventing and Combating Violence against Women", 7 December 2018, <https://www.osce.org/chairmanship/406019>.

Right	OSCE Commitment	Relevant Chapter
Freedom of expression	<p>The participating States will ensure [...] that everyone will have the right to freedom of expression including the right to communication. This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. (Copenhagen 1990)</p> <p>We reaffirm the importance of [...] the free flow of information as well as the public's access to information. (Istanbul 1999)</p> <p>We value the important role played by civil society and free media in helping us to ensure full respect for human rights. (Astana 2010)</p>	Chapter 6
Freedom of thought, conscience, belief and religion	<p>The participating States [...] agree to take the action necessary to ensure the freedom of the individual to profess and practise, alone or in community with others, religion or belief acting in accordance with the dictates of his own conscience. (Madrid 1983)</p> <p>The Ministerial Council calls on the participating States [...] to ensure the right of all individuals to profess and practice religion or belief, [...], and to manifest their religion or belief through teaching, practice, worship and observance, including through transparent and non-discriminatory laws, regulations, practices and policies [and to] refrain from imposing restrictions inconsistent with OSCE commitments and international obligations on the practice of religion or belief by individuals and religious communities (Kyiv 2013)</p>	Chapter 9
National, cultural and linguistic identities	<p>The participating States will protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of national minorities on their territory. (Vienna 1989)</p> <p>Persons belonging to national minorities have the rights to [...] use freely their mother tongue in private as well as in public. (Copenhagen 1990)</p> <p>We reaffirm our commitments to ensure laws and policies fully respect the rights of persons belonging to national minorities. (Istanbul 1999)</p>	Chapter 10

Right	OSCE Commitment	Relevant Chapter
Gender Equality	<p>[The participating States undertake to] eliminate all forms of discrimination against women, and to end violence against women and children as well as sexual exploitation and all forms of trafficking in human beings. (Istanbul 1999)</p> <p>[The participating States recognize that] the knowledge, skills and experience of both women and men are essential to peace, sustainable democracy, economic development and therefore to security and stability in the OSCE region. (Ljubljana 2005)</p> <p>The Ministerial Council [...] calls on the participating States to [...] consider taking measures to create equal opportunities within the security services, including the armed forces [...], to allow for balanced recruitment, retention and promotion of men and women. (Athens 2009)</p>	Chapter 11
Equality and non-discrimination	<p>[The participating States will] ensure human rights and fundamental freedoms to everyone within their territory and subject to their jurisdiction, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; [...]</p> <p>[The participating States will] ensure that no individual exercising, expressing the intention to exercise or seeking to exercise these rights and freedoms or any member of his family, will as a consequence be discriminated against in any manner. (Vienna 1990)</p> <p>All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law will prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground. [...]</p> <p>Measures derogating from obligations will be limited to the extent strictly required by the exigencies of the situation [...] such measures will not discriminate solely on the grounds of race, colour, sex, language, religion, social origin or of belonging to a minority. (Copenhagen 1990)</p>	Chapters 9, 10, 11 and 12

Right	OSCE Commitment	Relevant Chapter
Right to private life	The participating States reconfirm the right to the protection of private and family life, domicile, correspondence and electronic communications. In order to avoid any improper or arbitrary intrusion by the State in the realm of the individual, which would be harmful to any democratic society, the exercise of this right will be subject only to such restrictions as are prescribed by law and are consistent with internationally recognized human rights standards. (Moscow 1991)	Chapter 12
Right to life	We stress that everyone has the right to life, liberty and security of person; no one shall be held in slavery, and no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. (Helsinki 2008)	Chapter 14
Freedom from torture, inhuman and degrading punishment or treatment	The participating States strongly condemn all forms of torture as one of the most flagrant violations of human rights and human dignity. They commit themselves to strive for its elimination. (Budapest 1994)	Chapter 14
Human rights education	Human rights education is fundamental, and it is therefore essential that [participating States'] citizens are educated on human rights and fundamental freedoms. (Moscow 1991)  [The participating States] will encourage their competent authorities responsible for education programmes to design effective human rights related curricula and courses for [...] those attending military [...] schools. (Moscow 1991)  [The Ministerial Council] calls on the participating States to [...] take action, including through awareness-raising and capacity-building for the armed forces [...], on preventing and combating all forms of violence against women and girls. (Milan 2018)	Chapter 16
Freedom from arbitrary arrest and trial	No one will be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law. (Moscow 1991)	Chapter 18
Right to a fair trial	The participating States will [...] effectively apply [...] the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal. (Vienna 1989)	Chapter 18

In addition to these general human rights commitments, participating States have made three specific commitments related to the human rights of members of the armed forces. First, participating States have pledged to consider introducing alternatives to compulsory military service (Copenhagen 1990 and Budapest 1994; see “Chapter 8: Conscientious Objection to Military Service”). Second, concerning the minimum age of recruitment to the armed forces, participating States agreed to consider acceding to the UN Convention on the Rights of the Child where they had not yet done so (Copenhagen 1990). States have also committed to reviewing whether their practices for the recruitment or conscription of personnel for military service are consistent with their human rights obligations (Budapest 1994). Third, states have committed to provide legal protections for the human rights of armed forces members. These find their fullest expression under the OSCE Code of Conduct on Politico-Military Aspects of Security (Budapest 1994).

## **OSCE Code of Conduct on Politico-Military Aspects of Security: Key Features**

The OSCE Code of Conduct on Politico-Military Aspects of Security was adopted by the Forum for Security Co-operation in Budapest on 3 December 1994.<sup>11</sup> It came into effect as a politically binding document on 1 January 1995. The Code of Conduct was the first multilateral instrument to regulate the armed forces at both the domestic and international levels. The rationale behind the Code is that the democratic control of armed forces is “an indispensable element of stability and security and an important expression of democracy” (paragraph 20). It adopts an innovative approach that bridges both the human and military dimensions of security. Moreover, the Code applies to military and defence policies both in peacetime and in times of conflict and, as such, reflects an important acceptance by participating States of the limitations in an area traditionally seen as their own preserve.

The Code of Conduct embodies four key principles: the primacy of constitutional civilian power over military power (paragraphs 21-26), the subjection of armed forces to international humanitarian law (IHL) (paragraphs 29-31 and 34-35), respect for the human rights of armed forces members (paragraphs 23, 27-28 and 32-33), and limits on the domestic use of force in line with the legal mission and with respect to the peaceful and lawful exercise of human rights (paragraphs 36-37).

It can be seen, then, that the Code of Conduct takes a dual approach to human rights. First, participating States are to ensure that their armed forces respect the human rights of civilians and follow IHL. For example, care must be taken to avoid injury to civilians, and the use of force must be proportionate. Individual members of the military must be accountable for any violations of international law. Equally, the human rights of members of the armed forces themselves are to be protected by states. This means that domestic legislation must

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<sup>11</sup> OSCE, *Code of Conduct on Politico-Military Aspects of Security*, *op. cit.*, note 1.

be in place establishing effective procedures to safeguard their rights, whether through the courts or other independent means, such as military ombuds institutions.

OSCE participating States have agreed to exchange information on the implementation of the Code of Conduct in the form of a questionnaire submitted by 15 April each year. Since 2009, OSCE participating States can voluntarily report on the implementation of UN Security Council Resolution 1325 on Women, Peace and Security (UNSCR 1325), through the annual information exchange on the implementation of the Code of Conduct at the Forum for Security Co-operation (FSC). In 2011, the FSC offered a reference guide in the form of an indicative list of questions on women, peace and security.<sup>12</sup>

### **Box 2.2: The OSCE Code of Conduct – key human rights features<sup>13</sup>**

- Recruitment and call-up practices are to be consistent with human rights commitments (paragraph 27).
- Domestic legislation shall reflect the human rights of members of the armed forces (paragraph 28).
- Participating States will ensure the enjoyment and exercise of human rights by members of the armed forces, including appropriate legal and administrative procedures to protect their rights (paragraphs 32 and 33).

### **Duties of armed forces to respect rights**

- The armed forces shall be politically neutral (paragraph 23).
- States are required to disseminate information on and train members of the armed forces in IHL of war (paragraphs 29 and 30).
- Armed forces personnel can be held individually accountable for violations of IHL (paragraph 31).
- Armed forces are, in peace and in war, commanded, manned, trained and equipped in accordance with the provisions of international law (paragraph 34).
- Recourse to force in performing internal security missions must be commensurate with the needs for enforcement. The armed forces will take due care to avoid injury to civilians or their property (paragraph 36).
- The use of the armed forces cannot limit the peaceful and lawful exercise of citizens' human and civil rights or deprive them of their national, religious, cultural, linguistic or ethnic identity (paragraph 37).

<sup>12</sup> OSCE, Forum for Security Co-operation, Decision No. 5/11, "Reference Guide on the Questionnaire on the OSCE Code of Conduct on Politico-Military Aspects of Security", 13 July 2011, <https://www.osce.org/fsc/80988>.

<sup>13</sup> OSCE, *Code of Conduct on Politico-Military Aspects of Security*, *op. cit.*, note 1, Sections VII and VIII.



The provisions of the Code of Conduct concerning human rights are summarized in Box 2.2. As can be seen from paragraph 23 (on political neutrality) and paragraph 32 (on ensuring the human rights and fundamental freedoms of service personnel, as reflected in OSCE documents and international law and “in conformity with relevant constitutional and legal provisions and with the requirements of service”), the Code adopts a “citizens in uniform” approach, as the Code of Conduct clearly establishes that the rights of their individual members do not stop at the barracks.

## Further reading

Victor-Yves Ghébal, *The OSCE Code of Conduct on Politico-Military Aspects of Security* (Geneva: DCAF, 2003), <https://www.dcaf.ch/osce-code-conduct-politico-military-aspects-security>.

ODIHR, “Analysis of the Reporting on Human Rights of Armed Forces Personnel under the 2014 Information Exchange on the Code of Conduct on Politico-Military Aspects of Security”, 29 October 2014, <https://www.osce.org/odihr/126150>.

# Chapter 3: International Human Rights Law

## Introduction: Issues at Stake

International human rights law emerged from the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in 1948.<sup>14</sup> Together with the UN Charter of 1945,<sup>15</sup> the UDHR laid the foundations of modern international human rights law. The key principles of the UDHR were later developed into the legally binding obligations contained in the ICCPR and the ICESCR, both adopted in 1966.<sup>16</sup>

In addition to the above, certain treaties adopted under the auspices of the UN deal with specific human rights issues or the rights of particular categories of individuals. Thus, there are conventions which protect rights of children,<sup>17</sup> migrant workers<sup>18</sup> and persons with disabilities.<sup>19</sup> There are also conventions against racial discrimination,<sup>20</sup> discrimination against women,<sup>21</sup> torture<sup>22</sup> and enforced disappearance.<sup>23</sup> Today, a dense body of international and regional treaties exists, including the European Convention on Human Rights and Fundamental Freedoms (ECHR).<sup>24</sup> The existing human rights treaties are complemented by numerous declarations, principles, guidelines and recommendations published by the United

<sup>14</sup> UN General Assembly, "Universal Declaration of Human Rights" (UDHR), 10 December 1948, 217 A (III)

<sup>15</sup> UN, "Charter of the United Nations", 26 June 1945 (entered into force 24 October 1945), 1 UNTS XVI, in particular Preamble and Arts. 1(3), 55 and 56.

<sup>16</sup> UN General Assembly, "International Covenant on Civil and Political Rights" (ICCPR), 16 December 1966 (entered into force 23 March 1976), UN, Treaty Series, vol. 999, p. 171; UN General Assembly, "International Covenant on Economic, Social and Cultural Rights" (ICESCR), 16 December 1966 (entered into force 3 January 1976), UN, Treaty Series, vol. 993, p. 3.

<sup>17</sup> UN General Assembly, "Convention on the Rights of the Child" (CRC), 20 November 1990 (entered into force 2 September 1990), UN, Treaty Series, vol. 1577, p. 3.

<sup>18</sup> UN General Assembly, "International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families", 18 December 1990, UN, Treaty Series, vol. 2220, p. 3.

<sup>19</sup> UN General Assembly, "Convention on the Rights of Persons with Disabilities", 13 December 2006 (entered into force 3 May 2008), UN, Treaty Series, vol. 2515, p. 3.

<sup>20</sup> UN General Assembly, "International Convention on the Elimination of All Forms of Racial Discrimination" (ICERD), 21 December 1965 (entered into force 4 January 1969), UN, Treaty Series, vol. 993, p. 3.

<sup>21</sup> UN General Assembly, "Convention on the Elimination of All Forms of Discrimination against Women" (CEDAW), 18 December 1979 (entered into force 3 September 1981), UN, Treaty Series, vol. 1249, p. 13.

<sup>22</sup> UN General Assembly, "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (CAT), 10 December 1984 (entered into force 26 June 1987), UN, Treaty Series, vol. 1465, p. 85.

<sup>23</sup> UN General Assembly, "International Convention for the Protection of All Persons from Enforced Disappearance", 20 December 2006 (entered into force 23 December 2010), UN, Treaty Series, vol. 2716, p. 3.

<sup>24</sup> Council of Europe, "European Convention for the Protection of Human Rights and Fundamental Freedoms" (ECHR), 4 November 1950, ETS No. 5 (entered into force 3 September 1953).

Nations System,<sup>25</sup> the Council of Europe<sup>26</sup> and the human dimension commitments of the OSCE.<sup>27</sup>

The International Labour Organization (ILO), a specialized agency of the UN, has also issued numerous labour standards on different aspects of employment relations, including the eight “core” ILO Conventions on forced labour,<sup>28</sup> minimum age,<sup>29</sup> child labour,<sup>30</sup> equal remuneration<sup>31</sup> and discrimination,<sup>32</sup> collective bargaining<sup>33</sup> and the right to associate and organize.<sup>34</sup>

According to the 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, all ILO member states “have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution” four categories of principles and rights at work, even if they have not ratified the eight ILO core conventions to which they refer:<sup>35</sup>

- freedom of association and the effective recognition of the right to collective bargaining;

<sup>25</sup> See, for example: UN General Assembly, “Standard Minimum Rules for the Treatment of Prisoners”, Resolution 70/175, 17 December 2015; UN Office of the High Commissioner for Human Rights (OHCHR), “Recommended Principles and Guidelines on Human Rights and Human Trafficking,” UN Doc. E/2002/68/Add.1, 20 May 2002.

<sup>26</sup> See, for example: Council of Europe, “Recommendation CM/Rec(2010)4 of the Committee of Ministers on Human Rights of Members of Armed Forces,” 24 February 2010, [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016805cf8ef](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805cf8ef).

<sup>27</sup> OSCE Human Dimension Commitments, *op. cit.*, note 10.

<sup>28</sup> ILO, “Convention Concerning Forced or Compulsory Labour” (No. 29), 28 June 1930 (entered into force on 1 May 1932); Ratified by 52 of the OSCE participating States (All but the United States, and the non-ILO member states: Andorra, the Holy See, Lichtenstein and Monaco); see also: ILO, “Convention Concerning the Abolition of Forced Labour” (No. 105), 25 June 1957 (entered into force on 17 January 1959). Ratified by 53 of the OSCE participating States (All but Andorra, the Holy See, Lichtenstein and Monaco, which are not member states of the ILO).

<sup>29</sup> ILO, “Convention Concerning Minimum Age for Admission to Employment” (No. 138), 26 June 1973 (entered into force on 19 June 1976). Ratified by 52 of the OSCE participating States (All but the United States, and the non-ILO member states: Andorra, the Holy See, Lichtenstein and Monaco).

<sup>30</sup> ILO, “Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour” (No. 182), 17 June 1999 (entered into force on 19 November 2000). Ratified by 53 of the OSCE participating States (All but Andorra, the Holy See, Lichtenstein and Monaco, which are not member states of the ILO).

<sup>31</sup> ILO, “Equal Remuneration Convention” (No. 100), 29 June 1951 (entered into force on 23 May 1953). Ratified by 52 of the OSCE participating States (All but the United States, and the non-ILO member states: Andorra, the Holy See, Lichtenstein and Monaco).

<sup>32</sup> ILO, “Convention Concerning Discrimination in Respect of Employment and Occupation” (No. 111), 25 June 1958 (entered into force on 15 June 1960). Ratified by 52 of the OSCE participating States (All but the United States, and the non-ILO member states: Andorra, the Holy See, Lichtenstein and Monaco).

<sup>33</sup> ILO, “Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively” (No. 98), 1 July 1949 (entered into force on 18 July 1951). Ratified by 52 of the OSCE participating States (All but the United States, and the non-ILO member states: Andorra, the Holy See, Lichtenstein and Monaco).

<sup>34</sup> ILO, “Convention Concerning Freedom of Association and Protection of the Right to Organise” (No. 87), 9 July 1948 (entered into force on 4 July 1950). Ratified by 52 of the OSCE participating States (All but the United States, and the non-ILO member states: Andorra, the Holy See, Lichtenstein, and Monaco).

<sup>35</sup> ILO, 1998 “ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up”, 18 June 1998.

- the elimination of all forms of forced or compulsory labour;
- the effective abolition of child labour; and
- the elimination of discrimination in respect of employment and occupation.

UN treaty obligations are further supported by regional human rights systems. In practice, the main regional system of relevance to the greatest number of OSCE participating States is the one established by the ECHR. The ECHR has been ratified by 47 states and is applicable in all but ten OSCE participating States.<sup>36</sup> The European Social Charter (ESC) is the counterpart of the ECHR in the sphere of economic and social rights. The Charter's original 1961 version and revised 1996 version bind a total of 45 states (all but 12 participating States).<sup>37</sup>

Human rights law is complemented during times of armed conflict by IHL (also known as the law of armed conflict).<sup>38</sup> The main treaties applicable in this field of international law are the Geneva Conventions of 1949,<sup>39</sup> including the 1977 Protocols.<sup>40</sup> Several other treaties also protect human rights by dealing with the criminal responsibility of individuals or the prevention of serious crimes, and can potentially apply to armed forces personnel. This compendium, however, focuses on the human rights of members of the armed forces rather than on their duties to respect the human rights of civilians, fellow members of the armed forces or enemy combatants. IHL and international criminal law are, therefore, beyond the scope of this publication, except in the limited sphere of commanders' responsibility (see "Chapter 17: The Role of Commanders and Individual Accountability").

This chapter discusses the main human rights treaties and explains their potential application to members of the armed forces, introducing the notion of armed forces members as "citizens in uniform" under human rights law. The relationship between these

**36** The OSCE participating States not bound by the ECHR are Belarus, Canada, the Holy See, Kazakhstan, Kyrgyzstan, Mongolia, Tajikistan, Turkmenistan, the United States and Uzbekistan. For ratifications by individual states, see: "Chart of signatures and ratifications of Treaty 005", Council of Europe, <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/005/signatures>.

**37** Council of Europe, "European Social Charter", 18 October 1961 (entered into force 26 February 1965), ETS No. 35; and "European Social Charter" (Revised), 3 May 1996 (entered into force 1 July 1999), ETS No. 163. OSCE participating States not bound by the either are those mentioned in note 34, as well as Liechtenstein and Switzerland. See: "Chart of signatures and ratifications of Treaty 035", Council of Europe, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/035/signatures>.

**38** See: Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1995); and Ingrid Detter, *The Law of War* (London, New York: Routledge, 3rd edition, 2013).

**39** International Committee of the Red Cross (ICRC), "Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field" (First Geneva Convention), 12 August 1949, UN, Treaty Series, vol. 75, p. 31; "Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea" (Second Geneva Convention), 12 August 1949, UN, Treaty Series, vol. 75, p. 85; "Geneva Convention Relative to the Treatment of Prisoners of War" (Third Geneva Convention), 12 August 1949, UN, Treaty Series, vol. 75, p. 135; and "Geneva Convention Relative to the Protection of Civilian Persons in Time of War" (Fourth Geneva Convention), 12 August 1949, UN, Treaty Series, vol. 75, p. 287.

**40** ICRC, "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, UN, Treaty Series, vol. 1125, p. 3; and "Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts" (Protocol II), 8 June 1977, UN, Treaty Series, vol. 1125, p. 609.

treaties and domestic law is examined, as are the conditions under which these rights can be limited under international law. Finally, the chapter deals with the issue of safeguards against breaches of human rights law.

## International Human Rights Standards

The approach of treating members of the armed forces as “citizens in uniform” is longstanding in many domestic legal systems. This approach is a consequence of political changes that situate the role, form and function of the state in direct relationship to the rights and responsibilities of all citizens (including members of the armed forces) and is founded on the principles of democracy and the rule of law. Viewing armed forces personnel as “citizens in uniform” requires that service personnel be, so far as is consistent with military life, accorded the same civil, labour and constitutional rights of other citizens. This approach was encapsulated by United States Chief Justice Earl Warren as recognizing that “our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.”<sup>41</sup> Similarly, the European Court of Human Rights has ruled that “Article 10 [ECHR] does not stop at the gates of army barracks”, while further acknowledging that restrictions are necessary for military discipline “as the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining it.”<sup>42</sup>

Viewing armed forces personnel as citizens in uniform recognizes that the military is drawn from, and reflective of, a country’s citizenry and society. Acknowledging that the military cannot be insulated from wider societal, cultural or legal developments embeds the military within society. It also supports operational capacities by bolstering public and political support for the military and its institutions.

Furthermore, the UN Security Council increasingly defines instability in human rights terms.<sup>43</sup> Stabilization mandates, in particular, focus assistance on the political institutions of societies fractured by conflict, with the aim of re-establishing a culture of respect for human rights and the rule of law. Militaries possessing knowledge of human rights standards and a culture of respecting human rights are better equipped to operate in the complex contexts of today and within the multinational missions deployed to deal with them.

Fundamental to all modern militaries is a shift in contemporary warfare from definitive industrialized battlefields to prolonged, indecisive, urbanized conflicts. Modern militaries

<sup>41</sup> Earl Warren, “The Bill of Rights and the Military”, *New York University Law Review*, Vol. 37, 1962, pp. 181 and 188.

<sup>42</sup> European Court of Human Rights, *Grigoriades v. Greece* (Application no. 24348/94, Grand Chamber judgment of 25 November 1997), para. 45; European Court of Human Rights, *Rose v. Germany* (Application no. 51001/07, decision of 14 September 2010); and European Court of Human Rights, *Jokšas v. Lithuania* (Application no. 25330/07, judgment of 12 November 2013), para. 70.

<sup>43</sup> Security Council Report, “Human Rights and the Security Council – An Evolving Role”. 25 January 2016, [https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research\\_report\\_human\\_rights\\_january\\_2016.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_human_rights_january_2016.pdf).

are required to achieve their objectives “among the people” within operational theatres that are scrupulously monitored.<sup>44</sup> Modern militaries must achieve their objectives in a manner that does not adversely impact the human rights of civilian populations in order to maintain international, national and domestic support for the mission. Modern warfare favours militaries with an inherent and instinctive knowledge of human rights that can be utilized as a force and effects multiplier.

The “citizens in uniform” approach is firmly grounded in international law. Article 2(1) of the ICCPR requires States Parties to respect and ensure the rights of *all individuals* within their jurisdiction. In a similar vein, Article 1 of ECHR obliges States Parties to “secure to *everyone* within their jurisdiction the rights and freedoms defined in Section I of this Convention” [emphasis added], while Article 14, as well as Protocol 12 to the Convention, prohibit discrimination when it comes to the enjoyment of rights and freedoms.

The European Court of Human Rights clearly recognized this approach in the seminal case of *Engel v. The Netherlands* (1976), in which it underscored that the Convention applies to armed forces members, as well as civilians.<sup>45</sup> At the same time, the Court acknowledged that the rights and freedoms of armed forces personnel may diverge in practice, highlighting the need to “bear in mind the particular characteristics of military life and its effects on the situation of individual members of the armed forces” when interpreting the Convention.<sup>46</sup> More recently, in *Markin v. Russia* (2012), the Court’s Grand Chamber drew attention to the “special” context of the armed forces: “special because it is intimately connected with the nation’s security and is, accordingly, central to the State’s vital interests.”<sup>47</sup>

In a 2010 Recommendation, the Committee of Ministers of the Council of Europe confirmed the application of the ECHR – along with other international human rights instruments – to members of the armed forces.<sup>48</sup>

The basic proposition that international human rights law protects members of the armed forces has fundamental significance. As “citizens in uniform”, armed forces personnel enjoy the most important civil and political rights under the ICCPR and ECHR: freedom of expression; the right to respect for private life, home and correspondence; freedom of thought, belief and conscience; and freedom of association. These rights are discussed further in the relevant chapters of this compendium. Box 3.1 summarizes these rights and provides examples of their relevance to members of the armed forces.

<sup>44</sup> Rupert Smith, *Utility of Force: The Art of War in the Modern World* (London, New York: Allen Lane, 2005).

<sup>45</sup> European Court of Human Rights, *Engel and others v. The Netherlands* (Application nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, judgment of 8 June 1976), para. 54.

<sup>46</sup> *Ibid.*

<sup>47</sup> European Court of Human Rights, *Konstantin Markin v. Russia* (Application no. 30078/06, Grand Chamber judgment of 22 March 2012), para. 134.

<sup>48</sup> Council of Europe, Recommendation CM/Rec(2010)4, *op. cit.*, note 26.

The “citizens in uniform” approach encapsulates an important and fundamental understanding about the position of the armed forces in a democracy under the rule of law. Encouraging members of the armed forces to regard themselves as citizens to the fullest extent possible enhances respect for human rights, which, in turn, strengthens both the military institutions themselves and how they are perceived by their members and the wider public.

**Box 3.1: Main human rights treaty obligations and their relevance to armed forces personnel**

Right	Legal Source	Examples of Relevance
Right to life	Article 3 UDHR (life, liberty and security)	Extreme abuse of conscripts; non-independent or ineffective inquests into deaths on military premises or during military service and training.
	Article 6 ICCPR	
	Article 6 CRC <sup>49</sup>	
	Article 2 ECHR	
Right to liberty	Article 1 UDHR (liberty and equality)	Detention under military justice systems.
	Article 3 UDHR (life, liberty and security)	
	Article 9 ICCPR	
	Article 5 ICERD	
	Article 10 ICCPR	
	Article 5 ECHR (lists circumstances where the scope of the right may be curtailed in cases prescribed by law)	

<sup>49</sup> Applicable for service personnel who are under 18 years old (Further details on state responsibilities regarding minimum age for voluntary recruitment and applicable safeguards in “Chapter 13: Children Associated with Armed Forces”)

Right	Legal Source	Examples of Relevance
Right to equality	<p>Preamble UN Charter</p> <p>Article 1 UDHR (liberty and equality)</p> <p>Article 2 UDHR</p> <p>Article 6 UDHR (recognition before the law)</p> <p>Article 7 UDHR</p> <p>Article 3 ICCPR (does not list grounds on which discrimination may be based)</p> <p>Article 14 ICCPR (equality before courts and tribunals)</p> <p>Article 3 ICESCR</p> <p>Article 2 CEDAW</p> <p>Article 15 CEDAW</p> <p>Article 2 ICERD</p> <p>Article 2 CRC</p> <p>Article 2 ILO C100 (equal remuneration)</p> <p>Articles 2 and 3 ILO C111 (national policies to promote equality in employment and occupation)</p> <p>Article 14 ECHR</p> <p>Article 27 ESC(R)</p> <p>Article E ESC(R)</p>	<p>Discrimination in treatment of women, religious and ethnic minorities, and on the basis of gender identity or sexual orientation (for example, discharge following pregnancy or upon discovery of sexual orientation, sexual harassment, limitations on the promotion of women and their deployment to combat zones), equality in employment and occupation, and equal remuneration.</p>



Right	Legal Source	Examples of Relevance
Right to a fair trial, hearing and remedy	<p>Article 6 UDHR (recognition before the law)</p> <p>Article 8 UDHR (effective remedy)</p> <p>Article 10 UDHR (public and fair hearing by an independent and impartial tribunal)</p> <p>Article 11.1 UDHR (innocent until proven guilty)</p> <p>Article 7 ECHR (non-retroactivity)</p> <p>Article 13 ECHR (effective remedy)</p> <p>Article 14 ICCPR (equality before courts and tribunals – gives minimum guarantees)</p> <p>Article 15 ICCPR (non-retroactivity)</p> <p>Article 5 ICERD</p> <p>Article 6 ICERD</p> <p>Article 12 CRC</p> <p>Article 6 ECHR (fair and public hearing within a reasonable time)</p>	Court martial and military justice systems, and due process procedures.
Right to freedom of thought, conscience, religion or belief	<p>Article 18 UDHR</p> <p>Article 19 UDHR</p> <p>Article 18 ICCPR</p> <p>Article 5 ICERD</p> <p>Article 12 CRC (conferred on those capable of forming their own views)</p> <p>Article 13 CRC</p> <p>Article 14 CRC</p> <p>Article 5 ICERD</p> <p>Article 9 ECHR</p> <p>Article 10 ECHR</p>	Right of conscientious objection, restrictions on the manifestation of religion (e.g., religious dress, religious dietary requirements, opportunities for religious worship and observance, access to co-members of religious communities, and proselytizing to fellow service personnel).
Right not to be subjected to cruel, inhuman or degrading treatment	<p>Article 2 CAT</p> <p>Article 12 UDHR</p> <p>Article 17 ICCPR (no medical or scientific experimentation without consent)</p> <p>Article 8 ECHR</p>	Misuse of disciplinary measures and informal punishments and sanctions. Ill-treatment within Armed Forces

Right	Legal Source	Examples of Relevance
Right to freedom of opinion and expression	Article 19 UDHR	Limitations on the permissibility of public statements by members of the armed forces.
	Article 19 ICCPR	
	Article 13 CRC	
	Article 10 ECHR	
Right to peaceful assembly and right to freedom of association	Article 20 UDHR	Participation by service personnel in public assemblies, trade unions, military associations or civil society groups; the right to strike.
	Article 21 ICCPR	
	Article 8 ICESCR	
	Article 5 ICERD	
	Article 11 ECHR	
	Article 15 CRC	

## ***Reservations, derogations and limitations***

In the context of the rights of armed forces members, the extent and scope of restrictions on human rights are of particular significance. Reservations or derogations may be imposed on the exercise of certain rights by military personnel. Where no reservations or derogations are in place, then the rights in question are fully applicable, according to their respective wording, and limitations will only be permissible if they follow the requirements set out in respective human rights provisions.

### ***Reservations***

Some human rights treaties allow state parties to make reservations with respect to certain provisions. This means that a state may unilaterally exclude or modify the effect of certain provisions in their application to that particular state.<sup>50</sup> For example, several OSCE participating States have entered reservations to Article 5 (liberty and security of person) and/or Article 6 of the ECHR (the right to a fair trial before an independent and impartial tribunal) with respect to their military justice systems.<sup>51</sup> Similarly, some participating States have made reservations to provisions of the ICCPR concerning discipline in their armed forces.<sup>52</sup> Where a state has made a valid reservation, the relevant provision of the treaty

**50** See: UN, "Vienna Convention on the Law of Treaties", 23 May 1969, UN, Treaty Series, vol. 1155, p. 331, Art. 2(1)(d) and Arts. 19–23.

**51** At the time of writing, this applied to Armenia, Azerbaijan, the Czech Republic, France, Moldova, Portugal, the Russian Federation, Slovakia, Spain and Ukraine. See: "Reservations and Declarations for Treaty No.005", Council of Europe, <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/005/declarations>.

**52** At the time of writing, this applied to France, Ireland and the United Kingdom. See: "Status of Treaties: 4. International Covenant on Civil and Political Rights", UN Treaty Collections, [https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtdsg\\_no=IV-4&src=IND](https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtdsg_no=IV-4&src=IND).

must be applied to that state only as qualified by the reservation.

When states cannot submit reservations upon ratification, as is the case for example with ILO instruments, the conventions themselves may contain provisions to ensure flexibility. For example the applicability of the freedom of association and the right to collective bargaining treaties to the armed forces and police remains at the full discretion of individual states.<sup>53</sup> It should also be noted that, in relation to armed forces, the ILO's definition of "forced labour" does not include compulsory military service that is "of a purely military character".

## *Derogations*

States are permitted to suspend – or "derogate" from – certain rights in case of public emergency. Derogations are strictly regulated by human rights treaties. Both the ICCPR and ECHR provide that derogations are only possible under the following conditions:

- there is a public emergency that threatens the life of the nation;
- a public emergency has been publicly declared;
- measures derogating from human rights obligations are strictly limited to what is required by the exigencies of the situation;
- such measures are not inconsistent with other obligations under international law (arising, for example, from IHL);
- such measures do not discriminate on the grounds of race, colour, sex, language, religion or social origin; and
- such measures are duly communicated to the UN Secretary-General (in case of the ICCPR) and the Secretary General of the Council of Europe (in case of the ECHR).

Importantly, there are certain non-derogable rights that cannot be suspended, even in the context of a public emergency (see Box 3.2).

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**53** ILO, "Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively" *op. cit.*, note 33; ILO, "Convention Concerning Freedom of Association and Protection of the Right to Organise", *op. cit.*, note 34.

**Box 3.2: Non-derogable human rights**

<b>Article 4(2) of the ICCPR</b>	<b>Article 15(2) of the ECHR</b>
The right to life (Article 6).	The right to life (Article 2), except in the case of deaths resulting from lawful acts of war.
The right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Article 7).	The right not to be subjected to torture or to inhuman or degrading treatment or punishment (Article 3).
The right not to be held in slavery or servitude (Article 8).	The right not to be held in slavery or servitude (Article 4(1)).
The right not to be imprisoned for failure to perform a contractual obligation (Article 11).	
The right not to be subject to retroactive penal measures (Article 15).	The right not to be punished by retroactive laws, i.e., for actions that were not in violation of criminal law when performed (Article 7).
The right to recognition as a person before the law (Article 16).	
The freedom of thought, conscience and religion or belief (Article 18).	

More detailed procedural stipulations concerning emergency situations have been made by the UN Human Rights Committee,<sup>54</sup> as well as during meetings of internationally recognized legal experts.<sup>55</sup>

The circumstances in which non-absolute rights can be limited depend on the right in question. Qualified rights, such as right to private and family life, freedom to manifest your religion or belief, and freedom of expression can be limited even in normal times, since in their formulation they come with boundaries, subject to various conditions. The interference must be necessary, proportionate and have a legitimate aim, such as national security and the need to protect the rights of other people. Derogable rights are those from which derogations are allowed in the time of war or public emergency – any rights except the right to life, prohibition of torture, prohibition of slavery and servitude, and no punishment without law.<sup>56</sup> Therefore, derogable and qualified rights overlap to some extent. They are, however, distinct concepts with very different practical applications. It is only where the qualifications permissible to qualified rights are inadequate in an emergency situation that

<sup>54</sup> UN Human Rights Committee, "CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency", 31 August 2001, UN Doc. CCPR/C/21/ Rev.1/Add.11, <https://www.refworld.org/docid/453883fd1f.html>.

<sup>55</sup> UN Commission on Human Rights, "The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights", 28 September 1984, E/CN.4/1985/4. See also: International Law Association, "Paris Minimum Standards of Human Rights Norms in a State of Emergency", 1984, reprinted in *American Journal of International Law*, Vol. 79, 1985, p. 1072.

<sup>56</sup> European Court of Human Rights, "Guide on Article 15 of the European Convention on Human Rights: Derogation in Time of Emergency", 20 April 2019, Council of Europe [https://www.echr.coe.int/Documents/Guide\\_Art\\_15\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf) Page 10

a state would even need to consider derogating from the rights in question, and for that reason derogations of these rights are rarely necessary. For the most part, where the rights of members of the armed forces are limited, this is because the right is a qualified right, rather than because of a derogation.

### ***Limitations***

Many of the rights mentioned earlier as having particular significance to members of the armed forces are qualified rights. This means that the rights in question are not absolute, in that states may restrict these rights provided certain conditions are met. Limitations must be “in accordance with law” or “authorized by law”, and “necessary in a democratic society” for one of a number of specified legitimate aims. The legitimate aims most relevant to situations involving members of the armed forces are those that are “in the interests of national security”, although on occasion “the prevention of disorder” and the protection of the “rights and freedoms of others” have also been cited.

Importantly, the ability to invoke one of these recognized legitimate aims does not provide the state with unfettered discretion to limit the rights of members of the armed forces. Rather, the limiting measure needs to be both necessary and proportionate to the legitimate aim pursued. Disagreements regarding restrictions on the rights of service personnel often come down to assessing which limitations are necessary and proportionate and which are not. In this context, the European Court of Human Rights has noted that “[a] wide margin of appreciation is afforded to the States in matters relating to national security in general and the armed forces in particular”.<sup>57</sup>

It must be emphasized, however, that some rights may not be subjected to such limitations. For example, the prohibition of torture and other acts of cruel, inhuman or degrading treatment is absolute. Thus, interests of national security, however important, cannot be invoked to impose inhuman punishments on members of the armed forces.

### ***Domestic implementation***

The domestic effect of international human rights law varies considerably from state to state, owing to divergent constitutional provisions. In some states, treaty obligations binding upon the state are automatically part of domestic law and, in some cases, are given priority.<sup>58</sup> In these states, domestic courts can apply human rights treaties directly in disputes involving individuals.

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**57** European Court of Human Rights, *Konstantin Markin v. Russia*, *op. cit.*, note 47, para. 134.

**58** See, for example: Constitution of the Kingdom of the Netherlands, 24 August 1815, Art. 94; Constitution of the Republic of Estonia, 28 June 1992, Art. 123(2).

In other states, however, treaties concluded by the executive do not automatically become part of the law of the land and, therefore, do not have effect domestically and may not be invoked before national courts. While the state is bound by international law, specific national legislation needs to be enacted if a change in rights and duties under domestic law is required.<sup>59</sup> Some states have passed special legislation to give international human rights obligations a particular domestic legal status, such as by placing a duty on the courts to interpret legislation in light of these commitments, without altering other national laws, which may potentially conflict with international obligations undertaken by a state. However, a state cannot invoke the provisions of its internal law as justification for its failure to perform a treaty.<sup>60</sup>

In many states, regardless of whether international treaties have a privileged status, domestic constitutional provisions overlap with the content of these human rights obligations.<sup>61</sup> Sometimes, human rights treaty provisions are incorporated into constitutional law by reference.<sup>62</sup>

Irrespective of these differences, it is relatively common for either parliamentary or other constitutional bodies to vet draft legislation with reference to human rights standards.<sup>63</sup> Even in the absence of specific constitutional provisions or other legislation, domestic courts are nevertheless able to refer to international human rights standards. For example, it is presumed that courts will interpret domestic law consistently with international law obligations whenever possible, authorities can take human rights treaties into account when exercising administrative discretion, human rights treaties can influence the development of common law, and the conclusion of human rights treaties can provide indications of public policy.<sup>64</sup>

## ***International compliance mechanisms***

International human rights treaties offer a variety of means to protect rights and provide remedies for violations.<sup>65</sup> These include the establishment of an expert committee to monitor the implementation of the treaty (or the establishment of a court to decide individual cases), the submission of regular reports by states on their compliance with the treaty, references by other states to the expert committee and petitions by individuals.

**59** See, for example: *Parlement Belge* (1880) 5 PD 197.

**60** See, for example: The United Kingdom Human Rights Act 1998 and Article 27 of the Vienna Convention on the Law of Treaties (1969).

**61** See, for example: Basic Law for the Federal Republic of Germany, 8 May 1949, Arts. 1-19.

**62** Constitution of Bosnia and Herzegovina, 14 December 1995, Art II(2).

**63** See, for example: Constitution of Finland, 11 June 1999, s. 74.

**64** See: Andrew Byrnes and Catherine Renshaw, "Within the State", in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds.), *International Human Right Law* (Oxford: Oxford University Press, 3rd edition, 2018) pp. 482-499, p. 489.

**65** Dinah Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 3rd edition, 2016).

Before recourse is made to an international body, however, a person complaining of a human rights violation must usually first exhaust the available domestic remedies.<sup>66</sup> This principle emphasizes two issues: the importance of national institutions in providing redress, and that international courts and other institutions are the second line of defence against violations of human rights. The rule requiring the exhaustion of domestic remedies also points to the importance of domestic constitutional and legislative protections for the human rights of armed forces members.<sup>67</sup> Box 3.3 provides an overview of the compliance mechanisms established by some of the key treaties.

### Box 3.3: Human rights compliance mechanisms

	ICCPR	ICESCR	CEDAW	ICERD	CRC	ECHR	ESC	ILO	CAT
Establishing an expert committee	Article 28	ECOSOC <sup>68</sup>	Article 17	Article 8	Article 43		Article 25	Resolution 1926 <sup>69</sup>	Article 17
Establishing a court						Article 19			
Reporting by states	Article 40	Article 16	Article 18	Article 9	Article 44		Articles 21-24	Article 19 of the ILO Constitution	Article 19
Reference by other states	Article 41			Article 11		Article 33		Articles 26-34 of the ILO Constitution	Article 21
Individual communications	Optional Protocol <sup>70</sup>	Optional Protocol <sup>71</sup>	Optional Protocol <sup>72</sup>	Article 14		Article 34			Article 22
Collective complaints							Additional Protocol <sup>73</sup>		

<sup>66</sup> For example, ECHR, *op. cit.*, note 24, Art. 35(1).

<sup>67</sup> See "Chapter 4: National Protections for the Human Rights of Armed Forces Personnel" of this compendium.

<sup>68</sup> The Committee on Economic, Social and Cultural Rights was established by the UN Economic and Social Council (ECOSOC), Resolution 1985/17, 28 May 1985.

<sup>69</sup> ILO, "Resolution Concerning the Methods by Which the Conference Can Make Use of the Reports Submitted Under Article 408 of the Treaty of Versailles, Submitted by the Committee on Article 408", adopted at the ILO Conference's 8th session, 1926.

<sup>70</sup> UN General Assembly, "Optional Protocol to the International Covenant on Civil and Political Rights", 19 December 1966 (entered into force 23 March 1976), UN, Treaty Series, vol. 999, p. 171.

<sup>71</sup> UN General Assembly, "Optional Protocol to the International Covenant on Economic, Social and Cultural Rights", 5 March 2009 (entered into force 5 May 2013), A/RES/63/117.

<sup>72</sup> UN General Assembly, "Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women", 6 October 1999 (entered into force 20 December 2000), UN, Treaty Series, vol. 2131, p. 83.

<sup>73</sup> Council of Europe, "Additional Protocol to the European Social Charter providing for a System of Collective Complaints", 9 November 1995 (entered into force 1 July 1998), ETS No. 158.

Several of these international mechanisms are discussed in more detail in other chapters of this compendium. This introductory chapter concludes with an overview of two major UN treaties, the ICCPR and ICESCR, as well as the major regional human rights treaty relevant to most OSCE participating States, the ECHR. Given that a number of OSCE participating States are European Union Member States, this chapter also includes an overview of fundamental rights provided by the Treaty of the European Union.

## ***International Covenant on Civil and Political Rights*<sup>74</sup>**

States Parties to the ICCPR are under an obligation to respect and ensure to everyone within their territory and subject to their jurisdiction the rights recognized in the Covenant, without distinction of any kind.<sup>75</sup> To fulfil this obligation, States Parties commit to take the necessary steps and adopt any laws or other measures to give effect to these rights.<sup>76</sup> States also undertake to ensure that any person whose Covenant rights or freedoms are violated will have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.<sup>77</sup> States Parties must further ensure that those persons claiming a remedy will have their right to such a remedy determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state. They undertake to develop the possibilities of judicial remedy.<sup>78</sup> Finally, states are obligated to ensure that the competent authorities will enforce such remedies when granted.<sup>79</sup>

The Human Rights Committee set up under the ICCPR monitors measures adopted by States Parties in implementing their obligations under the Covenant.<sup>80</sup> The Committee is comprised of 18 experts "of high moral character and recognized competence in the field of human rights", elected by States Parties.<sup>81</sup>

States Parties are required to submit a report to the Secretary-General of the United Nations (UN), for consideration by the Committee, on the various measures adopted to meet the objectives of the Covenant.<sup>82</sup> States Parties are required to do this within one year of the Covenant entering into force in a particular State Party and, thereafter, when the Committee so requests.<sup>83</sup> It is also possible for a State Party to refer another State Party to the Committee if it believes that the State Party is not giving effect to the provisions of the Convention.<sup>84</sup>

**74** Ratified by 56 OSCE participating States (all, but the Holy See).

**75** ICCPR, *op. cit.*, note 16, Art. 2(1).

**76** *Ibid.*, Art. 2(2).

**77** *Ibid.*, Art. 2(3)(a).

**78** *Ibid.*, Art. 2(3)(b).

**79** *Ibid.*, Art. 2(3)(c).

**80** *Ibid.*, Art. 28(1) and Art. 40.

**81** *Ibid.*, Arts. 28-32.

**82** *Ibid.*, Art. 40.

**83** *Ibid.*

**84** *Ibid.*, Art. 41. The Committee may only take action if the state party being reported has made a declaration



Under the First Optional Protocol to the ICCPR,<sup>85</sup> it is possible for an individual to petition the Human Rights Committee. If the Committee finds that a State Party has violated the Covenant, it relates its views to the state concerned and publishes them. The Committee often specifies a particular remedy or action to be taken by the state concerned.<sup>86</sup>

### ***International Covenant on Economic, Social and Cultural Rights***<sup>87</sup>

The enforcement of the ICESCR is achieved primarily by States Parties submitting reports on measures adopted in pursuit of the aims and objectives of the Covenant.<sup>88</sup> These are delivered to the UN Secretary-General, who then transmits them to the UN Economic and Social Council (ECOSOC).<sup>89</sup>

The reports should contain information such as “factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant”.<sup>90</sup> ECOSOC may submit reports to the General Assembly that include general recommendations applicable to all States Parties in order to meet the aims and objectives of the Covenant.<sup>91</sup> In 1985, ECOSOC created an expert body, the Committee on Economic, Social and Cultural Rights, to assist in monitoring States Parties’ compliance with their obligations under the Covenant.<sup>92</sup> States make reports to the Committee every five years.<sup>93</sup>

### ***International Labour Conventions***<sup>94</sup>

Implementation of the international labour standards is backed by a comprehensive supervisory system to ensure that ILO member states implement the Conventions that they have ratified. As part of the regular system, the ILO Committee of Experts on the Application of Conventions and Recommendations provides impartial and technical evaluations based on both the state reports and observations to these reports submitted by the employers and workers organizations. The Committee of Experts may communicate requests directly to the governments concerned, or make observations that are published in the Annual Report of the Committee and submitted to the International Labour Conference

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recognizing the Committee as competent to hear such complaints (Art. 41(1)). For more information, see: Arts. 41 and 42.

**85** Optional Protocol to the ICCPR, *op. cit.*, note 70.

**86** Shelton, *op. cit.*, note 65, pp. 197–201 and 384.

**87** Ratified by 54 of the 57 OSCE participating States (all but Andorra, the Holy See and the United States).

**88** ICESCR, *op. cit.*, note 16, Art. 16.

**89** *Ibid.*, Art. 16(2).

**90** *Ibid.*, Art. 17(2).

**91** *Ibid.*, Art. 21.

**92** *Ibid.*

**93** UN OHCHR, “Fact Sheet No. 16 (Rev.1), The Committee on Economic, Social and Cultural Rights”, May 1996, <https://www.ohchr.org/Documents/Publications/FactSheet16rev1en.pdf>.

**94** Fifty-three of the OSCE participating States are also member states of the ILO (all, but Andorra, the Holy See, Lichtenstein and Monaco)

Committee on the Application of Standards. The Conference Committee, which is made up of government, employer and worker delegates will examine the report, select observations for discussion, and engage in dialogue with the respective governments. Conclusions and recommendations to the states are published in the reports of the Conference Committee.<sup>95</sup>

The application of ILO International Labour Standards is also supervised through special procedures, which are based on the submission of a representation made by national or international employers' or workers' association, or a complaint filed either by another member state that has ratified the same Convention, a delegate to the International Labour Conference or the ILO Governing Body of its own motion.<sup>96</sup>

Under the ILO Constitution member states are required to report also on measures taken towards ratification of certain conventions. As a follow-up mechanism to the ILO Declaration on Fundamental Principles and Rights at Work, the member states are expected to submit annual review reports that capture the measures taken towards achieving respect for the relevant rights and principles of the Declaration, noting any impediments to the ratification of the Conventions to which it refers.<sup>97</sup>

### ***European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)***<sup>98</sup>

The Convention established a court – the European Court of Human Rights, based in Strasbourg – which may be petitioned by individuals, companies and non-governmental organizations claiming that their Convention rights have been violated. The Court may award what the Convention calls “just satisfaction” – usually monetary compensation<sup>99</sup> – to individuals whose rights have been violated. State compliance with the determinations of the Court is overseen by the Council of Ministers.

In addition, States Parties to the Convention have committed to provide effective domestic remedies for those who claim that their Convention rights have been violated.<sup>100</sup> The European Court of Human Rights has also interpreted certain Convention rights as imposing positive obligations in this regard, so that a state has the duty not only to prevent violations by state institutions but also to take steps to protect everyone from any actions taken by private individuals. Hence, where a claim involving a violation of the

<sup>95</sup> See page on ILO international labor standards: <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--en/index.htm>

<sup>96</sup> *Ibid.*

<sup>97</sup> See ILO declaration <https://www.ilo.org/declaration/lang--en/index.htm>.

<sup>98</sup> Ratified by the 47 OSCE participating States that are also members of the Council of Europe (all but Belarus, Canada, the Holy See, Kazakhstan, Kyrgyzstan, Mongolia, Tajikistan, Turkmenistan, Uzbekistan, and the United States).

<sup>99</sup> In some rare cases, the Court may order specific measures that go beyond monetary compensation. See, for example: European Court of Human Rights, *Broniowski v. Poland* (Application no. 31443/96, Grand Chamber judgment of 22 June 2004).

<sup>100</sup> ECHR, *op. cit.*, note 24, Art. 13.

right to life is involved,<sup>101</sup> states are required to establish effective and independent means of investigating the circumstances of death.<sup>102</sup> This is especially relevant in cases where the death was caused by alleged mistreatment or bullying in the armed forces. In addition, the right not to be subject to torture or inhuman or degrading treatment or punishment imposes on states a positive duty to prevent such acts and to punish those responsible via a legal process initiated following an independent and effective investigation.

### ***Fundamental rights under European Union law***

European Union law applies to the 27 OSCE participating States that are members of the European Union.<sup>103</sup> The Treaty on European Union proclaims the importance of human rights in the following terms:

*"1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000<sup>104</sup>, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. [...]"*

*"3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."<sup>105</sup>*

The European Council may, with the assent of the European Parliament, decide to investigate persistent and serious human rights breaches in a member state and impose sanctions by suspending the rights of that state.<sup>106</sup> The European Court of Justice can review measures of European Union institutions, and the implementation of these measures by member states, for consistency with human rights standards.<sup>107</sup>

**101** *Ibid.*, Art. 2.

**102** European Court of Human Rights, *McCann v. the United Kingdom* (Application no. 18984/91, Grand Chamber judgment of 27 September 1995), paras. 161-163. See also: European Court of Human Rights, *Kaya v. Turkey* (Application no. 22729/93, judgment of 19 February 1998), para. 87; and European Court of Human Rights, *Hugh Jordan v. the United Kingdom* (Application no. 24746/94, judgment of 4 May 2001), paras. 106-109.

**103** At the time of writing, the United Kingdom was a member of the European Union and had withdrawn by publication date.

**104** Article 4, "Prohibition of Torture and Inhuman or Degrading Treatment or Punishment", Article 5, "Prohibition of Slavery and Forced Labour", Article 6, "Right to Liberty and Security", Article 11, Freedom of Expression and Information", Article 12, "Freedom of Assembly and of Association", Article 23, Equality between Men and Women", Article 28, "Right of Collective Bargaining and Action", and other rights.

**105** European Union, "Consolidated Version of the Treaty on European Union", OJ C 202, 7 June 2016, pp. 13-388 (EN), Art. 6.

**106** *Ibid.*, Art. 7.

**107** See, for example: Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (Oxford University Press, 7th edition, 2014), pp. 13-14.

## Good Practices and Recommendations

The relevance of human rights law for the armed forces is beyond doubt. While militaries are, in certain ways, unique institutions with special rules, this does not mean that they are not obliged to follow or that the rights of their personnel are not protected by the human rights obligations their states have committed to uphold. Certain exceptions may, however, be permissible given the special role of armed forces.

The following good practices and recommendations can help to guide states in meeting their international human rights obligations:

- » Human rights should be considered as a force multiplier and a critical element of any institutional reform within the armed forces.
- » Efforts should be undertaken to strengthen knowledge of human rights standards and cultivate respect for human rights among service personnel. This will enable the armed forces to also meet the complex demands of contemporary operations and multi-national missions.
- » Practices and procedures should be established to ensure that service personnel can seek redress when their rights under international law are violated.
- » Members of the armed forces should be encouraged to regard themselves as “citizens in uniform”, rather than only as representatives of the state.

## Further reading

Evan J. Criddle (ed.), *Human Rights in Emergencies* (Cambridge: Cambridge University Press, 2016).

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W. Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law", *American Journal of International Law*, Vol. 84, No. 4, October 1990, pp. 866-876.

Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge: Cambridge University Press, 2006).

Scott Sheeran and Sir Nigel Rodley (eds.), *Routledge Handbook of International Human Rights Law* (London: Routledge, 2013)

Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013).

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Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (Oxford: Oxford University Press, 2008).

Raymond J. Toney and Shazia N. Anwar, "International Human Rights Law and Military Personnel: A Look Behind the Barrack Walls", *American University International Law Review*, Vol. 14, No. 2, 1998, pp. 519 – 543.

# Chapter 4: National Protections for the Human Rights of Armed Forces Personnel

## Introduction: Issues at Stake

This chapter concerns the constitutional provisions and national legislation governing the treatment and rights of armed forces personnel.

The chapter examines the relevance of constitutional provisions to the armed forces and their accountability, before exploring the ways in which constitutions apply to the rights enjoyed by service personnel. The chapter also examines the role of national legislation in defining the rights of service personnel in line with the demands of military service. The chapter addresses the recognition of the human rights of armed forces members in domestic legislation, including civil and political rights (such as the right to vote and to participate in political affairs), privacy, freedom of expression and social and economic rights (such as social security, education and housing).

### *Constitutional provisions*

The human rights protections granted to members of the armed forces exist within a broader context of the military's position within a democratic state. Constitutions commonly deal with a variety of matters relevant to armed forces.

**Legal structure:** Includes legislative mechanisms, principles governing non-legislative sources of power,<sup>108</sup> procedures for passing emergency legislation, constitutional provisions for derogations from human rights and processes governing entering into international agreements for security co-operation.

**Accountability mechanisms:** Concerns the allocation of authority for national defence, security and intelligence among state institutions, the prohibition on defence or security officials holding parliamentary or ministerial office, the powers of the legislature and the constitutional powers of the courts (e.g., constitutional review).

**Independent review:** Pertains to the security of tenure for officials, constitutional guarantees for the independence of the judiciary and the position of military courts.

**Individual rights:** Namely, the rights applicable to everyone and those, such as conscientious objection, that are specifically relevant to military service (see Box 8.2 in "Chapter 8: Conscientious Objection to Military Service"), and the restrictions on rights that

**108** For example, in the United Kingdom, under the royal prerogative, ministers may take executive decisions on certain matters without parliamentary authority. See: United Kingdom House of Commons, "The Royal Prerogative", Briefing Paper, 17 August 2017, <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN03861>.

apply to service personnel.

A report by the European Commission for Democracy through Law (Venice Commission) of the Council of Europe concluded that the democratic control of armed forces represents a guarantee that human rights and fundamental freedoms be respected both within the armed forces and by the armed forces during their operation.<sup>109</sup> While military decisions have some special features (including speed or urgency, efficacy, secrecy and discretion), such decisions need to be balanced with democratic control. The Venice Commission has provided a series of principles governing the democratic control of the armed forces (see Box 4.1). The principles include a combination of both pro-active oversight to identify potentially problematic military decisions and the examination of any problems that arise in implementing those decisions.

The constitutional regulation of the armed forces is more common among younger democracies. Such control usually goes further than securing the accountability of the armed forces, and also seeks to secure the armed forces' commitment to the new constitutional and democratic order. Constitutional rules or laws should clearly identify the organs exercising oversight of the armed forces, as well as the acts or issues under their control and the mechanisms to achieve it.

#### **Box 4.1: Constitutional control of the armed forces – the Venice Commission principles <sup>110</sup>**

1. Domestic democratic oversight of armed forces is conducted by parliaments (including specialized defence committees), the executive, the judiciary and other entities.
2. Parliamentary control of the armed forces can include the approval and control of the military budget, decisions concerning international deployments, the adoption of legislation and other decisions regulating the military field, and control over decisions adopted by organs with military competences (for example, general defence policy and the appointment or dismissal of top commanders).
3. Executive (namely, the head of state, government and national defence council) oversight mechanisms include, *inter alia*, decision-making and control over the use of force in states of emergency and the appointment and dismissal of top commanders.
4. Judicial control reinforces the principle of the rule of law. Constitutional courts (and, where they exist, military courts) bring an important contribution to the control of armed forces.
5. Other independent bodies, such as ombuds institutions, audit offices and courts of

<sup>109</sup> Council of Europe, European Commission for Democracy through Law (Venice Commission), "Report on the Democratic Control of Armed Forces", CDL-AD(2008)004, 23 April 2008, [https://www.venice.coe.int/web-forms/documents/default.aspx?pdffile=CDL-AD\(2008\)004-e](https://www.venice.coe.int/web-forms/documents/default.aspx?pdffile=CDL-AD(2008)004-e).

<sup>110</sup> *Ibid.*, paras. 372-402.

audit, complement and reinforce the oversight of armed forces.

6. Internal military mechanisms, such as military disciplinary law, codes of conduct and criminal law, provide the internal regulatory framework for ensuring that orders issued by civilian command authorities are executed from the top down. They also ensure that service personnel have clear standards and norms for fulfilling their duties.
7. Commanders play a crucial role in ensuring the discipline of those under their command, and have a responsibility to prevent, investigate and address disciplinary infractions or crimes committed by subordinates.
8. Controlling organs should respect human rights, the rule of law and democratic accountability, as well as international law. Domestic legislation and guidelines should not contradict international standards.

Many constitutions outline in broad terms the mission of the armed forces as maintaining security and protecting territory and the constitutional order. In some cases, more specific tasks may be defined in the constitution. For example, Article 87(a) of the German Constitution makes particularly detailed reference to the tasks and powers of the armed forces, a feature resulting from German history. For the most part, however, such details are included in legislation. In rare cases, such as in the United Kingdom and France, the tasks of the armed forces are specified by the government. The level at which the tasks of the armed forces are specified will affect the ease with which their role can be changed and whether specific military deployments can be challenged on constitutional grounds. Constitutional reform may be difficult to effect and may promote a national debate on the state's position within the international community.

The principle of neutrality – whereby the state is prevented from joining international alliances or engaging in joint military action – may be explicit (see the example of Austria in Box 4.2). Some constitutions, such as those of Denmark and Ireland, do not place limitations on military activities but, instead apply a negative restriction, requiring parliamentary approval before the use of armed force against any foreign state. A prohibition on aggression may also be contained in the constitution. Reference is made to international obligations and international peacekeeping in the constitutions of Hungary and the Netherlands, respectively.



#### **Box 4.2: Examples of constitutional provisions on the role of the armed forces<sup>111</sup>**

##### **Spain: Article 8(1) (on armed forces)**

The Armed Forces, constituting the Army, the Navy and the Air Force, have as their mission the guarantee of the sovereignty and independence of Spain, the defence of its territorial integrity and the constitutional order.

##### **Romania: Article 118 (on armed forces)**

The Armed Forces shall be exclusively subordinated to the will of the people, to guarantee the sovereignty, independence and unity of the State, the country's territorial integrity and constitutional democracy.

##### **Hungary: Article 45(1) (on duty)**

Hungary's armed forces shall be the Hungarian Defence Forces. Core duties of the Hungarian Defence Forces shall be the military defence of the independence, territorial integrity and borders of Hungary, the performance of collective defence and peacekeeping tasks arising from international treaties, as well as the carrying out of humanitarian activities in accordance with the rules of international law.

##### **Austria: Article 9(a) (on defence and military service)**

Austria subscribes to universal national defence. Its task is to preserve the federal territory's outside independence, as well as its inviolability and its unity, especially as regards the maintenance and defence of permanent neutrality. Also, in this regard, the constitutional establishments and their capacity to function, as well as the democratic freedoms of residents, must be safeguarded and defended against acts of external armed attack.

##### **Germany: Article 87(a) (on the establishment and powers of the armed forces)**

The Federation shall establish armed forces for purposes of defence. Their numerical strength and general organizational structure must be shown in the budget.

##### **Denmark: Article 19(2)**

Except for purposes of defence against an armed attack upon the Realm or Danish forces, the King shall not use military force against any foreign State without the consent of the Parliament. Any measure that the King may take in pursuance of this provision shall immediately be submitted to the Parliament. If the Parliament is not in session, it shall be convoked immediately.

<sup>111</sup> For the constitutions of OSCE participating States, see: "Constitutions", Legislationline.org, <https://www.legislationline.org/documents/section/constitutions>.

**Republic of Ireland: Article 28(3)**

(3.1) War shall not be declared and the State shall not participate in any war save with the assent of the House of Representatives.

(3.2) In the case of actual invasion, however, the Government may take whatever steps they may consider necessary for the protection of the State, and the House of Representatives if not sitting shall be summoned to meet at the earliest practicable date.

Most written constitutions contain a guarantee of the rights of individuals. Members of the armed forces will be entitled to enjoy these rights in the same way as other citizens unless the constitution states otherwise. Where such restrictions exist, they usually apply to specific rights, such as the right to stand for parliament or freedom of association or assembly. Constitutional provisions dealing explicitly with the human rights of armed forces members tend to be introduced for two reasons.

First, in countries with conscript armies, the constitution may provide a right of conscientious objection to military service. A number of these constitutional provisions are summarized in Box 8.2 in "Chapter 8: Conscientious Objection to Military Service", which examines in detail the human rights issues surrounding conscientious objection.

Second, the history of a particular country may suggest that it is necessary to guarantee the neutrality of the armed forces in the constitution as the highest normative level. For example, the constitution may enforce a separation between the military and political leadership. In such cases, the human rights of service personnel are to some extent restricted in pursuit of a higher constitutional goal. Restrictions on the political rights of armed forces members are dealt with at greater length in "Chapter 5: Civil and Political Rights".

These two concerns apart, it is uncommon for matters touching on the human rights of members of the armed forces to be referred to in a written constitution. The tendency has been to regard members of the armed forces as citizens in uniform – entitled to the same civil and political rights as the remainder of the population, although these rights may, where necessary, be subject to legal restrictions owing to the nature of military service.

## *The scope of defence legislation*

Legislation concerning defence and the armed forces may address a wide range of issues, for example:

- the role of the military;
- the chain of command;
- political neutrality;
- the status of military personnel;
- conscientious objection;
- states of emergency;
- military discipline, offences and military justice systems;
- legal redress and complaints mechanisms;
- liability for unlawful orders and violations of human rights;
- salaries and pensions; and
- insurance rights for family members in case of the accidental death of, or injury to, service personnel.

Much of military law is concerned with imposing specific legal duties upon members of the armed forces to underline the disciplined environment in which they operate. Thus, military law deals with issues such as desertion, absence without leave (AWOL), insubordination, mutiny, aiding the enemy and sleeping on duty. This compendium is not concerned in general with such offences, although the human rights aspects of military justice procedures are examined in “Chapter 18: Discipline and Military Justice”.

In many states, members of the armed forces do not fall under regular employment laws or, if they do, only to a certain extent. For example, provisions regarding permissible working hours will often not apply or will be different for military employees,<sup>112</sup> as will provisions on salaries.<sup>113</sup> This is not the case, however, for member states of the European Union. In 2017, the European Commission issued an Interpretative Communication on Directive 2003/88/EC concerning certain aspects of the organization of working time, in which it specified that the Directive is applicable to members of the armed forces (at least in relation to activities conducted under normal conditions).<sup>114</sup> In an order issued in 2005,

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**112** See: Swedish Working Hours Act, Section 2, 1982:673 (24 June 1982); and the United Kingdom Employment Rights Act (22 May 1996), Section 192, with references to other provisions applicable to armed forces members.

**113** See: Article 323(2) of the Labour Code of the Republic of Moldova, No. 154-XV (28 March 2003).

**114** See: European Commission, “Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council Concerning Certain Aspects of the Organisation of Working Time”, OJ C 165, 24 May 2017, p. 11. Article 2 of the Directive states that it shall not be applicable where “characteristics peculiar to certain specific public service activities, such as the armed forces or the police [...] inevitably conflict with it.” In the Interpretative Communication, the European Commission noted that certain services must deal with events that are, by definition, unforeseeable. However, it also reiterated the position of the

the European Court of Justice essentially stated the same with respect to Directive 89/391 on health and safety at work.<sup>115</sup>

Even where military personnel are within the scope of domestic employment legislation, they may be subject to special neutrality, confidentiality, anti-corruption or conflict of interest provisions arising from the nature of their employment and status.<sup>116</sup> Laws on discrimination will usually apply to all professional sectors in a country, including the military.<sup>117</sup> In some states, the same applies to health benefits and other rights, such as maternity leave and care.<sup>118</sup>

In legislating for the armed forces, parliaments can ensure that the rule of law is applied not merely in the superficial sense of legal authority for the work of the armed forces, but also in a deeper sense that the law governing the armed forces is clear, comprehensive, consistent and in conformity with human rights standards. Moreover, legislation can be used to set out in positive terms the civil, political and social rights of members of the armed forces and their families. Similarly, where it is necessary to limit the rights of armed forces personnel because of the nature of military life, legislation can ensure that such restrictions are clear, follow a legitimate aim and are necessary, proportionate and non-discriminatory.

## International Human Rights Standards

Laws governing the armed forces are especially important if the human rights of service personnel are to be limited for reasons of national security. Any such restrictions should be clearly based on legal authority and conform to relevant human rights treaty provisions.

In the OSCE Code of Conduct on Politico-Military Aspects of Security, OSCE participating States committed themselves to "reflect in their laws or other relevant documents the rights and duties of armed forces personnel" and to "ensure that military, paramilitary and security forces personnel will be able to enjoy and exercise their human rights and fundamental freedoms as reflected in OSCE documents and international law, in conformity with relevant constitutional and legal provisions and with the requirements of service".<sup>119</sup>

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European Court of Justice in noting that the activities of such services under normal conditions can be organized in advance, including as relates to working hours and the prevention of safety or health risks. See also: European Court of Justice (ECJ), *Bernhard Pfeiffer and others v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, C-397/01 to C-403/01, judgment of 5 October 2004, para. 57; and *Personalrat der Feuerwehr Hamburg v. Leiter der Feuerwehr Hamburg*, C-52/04, Order of 14 July 2005, para. 46 (on the working time and health and safety conditions for firemen).

**115** *Ibid.*, ECJ, *Personalrat der Feuerwehr Hamburg v. Leiter der Feuerwehr Hamburg*.

**116** See, for example: Art. 303 of the Czech Labour Code, No. 262/2006 (21 April 2006).

**117** In contrast to other laws, the Swedish Discrimination Act 2008:567 (5 May 2008) sets this out clearly in Section 15.

**118** The United Kingdom Employment Rights Act, *op. cit.*, note 112.

**119** OSCE, *Code of Conduct on Politico-Military Aspects of Security*, *op. cit.*, note , paras. 28 and 32.

According to the ICCPR, the rights to privacy, to freedom of thought, conscience and religion or belief, to freedom of expression and to freedom of association and assembly can be limited where necessary in the interests of a democratic society if the restrictions are “prescribed by law” and are necessary for protection of the public interests listed below. Right to privacy is enshrined in Article 17. This provision does not mention grounds for restrictions. At the same time, possible restrictions should be “lawful” and “non-arbitrary”.<sup>120</sup> The latter requirement is “intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant”.<sup>121</sup> Box 4.3 illustrates the permitted grounds for restrictions in different cases.

<b>Box 4.3 Restrictions under Articles 17-19(2) and 21 of the ICCPR</b>				
<b>Permitted grounds for restriction</b>	<b>Convention right</b>			
	Right to privacy (Article 17)	Freedom of thought, conscience and religion or belief (Article 18)	Freedom of expression (Article 19(2))	Freedom of assembly and association (Article 21)
National security	N/A		✓	✓
Public safety	N/A	✓		✓
Public order	N/A	✓	✓	✓
Protection of health or morals	N/A	✓	✓	✓
Protection of the rights and freedoms of others	N/A	✓	✓	✓
Protecting the reputation of others	N/A		✓	

The ECHR – which applies to most OSCE participating States – stipulates that, in a democratic society, the rights to privacy, to freedom of thought, conscience and religion or belief to the freedom of expression and to freedom of association and assembly can be limited, where necessary, in the interests of a democratic society if the restrictions are “in accordance with law” and in pursuit of one or more legitimate aims. However, the ECHR sets minimum standards for legal restrictions on the rights of service personnel, and different permitted restrictions apply in each case, as Box 4.4 below shows.

<sup>120</sup> ICCPR, *op. cit.*, note 16, Article 17.

<sup>121</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 16: Article 17 (Right to Privacy), “The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation”, 8 April 1988, para 4, <https://www.refworld.org/docid/453883f922.html>.

**Box 4.4 Restrictions under Articles 8-11 of the ECHR**

Permitted grounds for restriction	Convention right			
	Respect for private life (Article 8)	Freedom of thought, conscience and religion or belief (Article 9)	Freedom of expression (Article 10)	Freedom of assembly and association (Article 11)
National security	✓		✓	✓
Public safety	✓	✓	✓	✓
Public order		✓		
Economic well-being	✓			
Prevention of disorder or crime	✓		✓	✓
Protection of health or morals	✓	✓	✓	✓
Protection of the rights and freedoms of others	✓	✓	✓	✓
Protecting territorial integrity			✓	
Preventing disclosure of information received in confidence			✓	
Protecting the reputation of others			✓	
Maintaining authority and impartiality of the judiciary			✓	

In addition, Article 11 on the right to freedom of assembly and association provides that “this article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State” (see “Chapter 7: Military Unions and Associations”). Moreover, Article 14 of the ECHR prohibits discrimination in the enjoyment of all Convention rights on “any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”. A similar stand-alone non-discrimination principle may be found in Protocol 12 to the Convention.

Similarly, to conform to the right to a fair trial under Article 6 of the ECHR, military justice must operate through “an independent and impartial tribunal *established by law*” [emphasis added].

Some of the rights set out in the main ILO conventions, including protection against child labour, forced labour (if of a non-military character) and discrimination, apply to everyone, with no special mention of exceptions for members of the armed forces. With respect to other rights, including association and organization rights, and the right to collective bargaining, the relevant ILO conventions declare that the applicability of their provisions to members of the armed forces shall be determined in national laws and regulations. At the same time, some of these conventions, notably ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise, stress that the ratification of the convention shall not affect any existing laws, awards, customs or agreements by virtue of which members of the armed forces enjoy any of the convention's rights.

## Different Approaches

### *Constitutional provisions*

Most constitutions assume that members of the armed forces enjoy the same constitutional rights as other citizens and do not make express reference to their rights, except in the context of necessary restrictions. Such restrictions may be designed to ensure political neutrality according to the constitutional role of the armed forces or to allow for military justice in order to maintain discipline. In some countries, constitutional provisions deal with the position of other institutions – such as ombuds institutions, military police and prosecutors and military courts – that oversee the military or are concerned with upholding the rights of service personnel.

Military justice is a specialized topic, and there are three approaches to the subject in constitutional provisions:

1. States with military court systems where the constitution makes no reference to the process of military justice (for example, Hungary, Lithuania, Romania and Slovakia) or explicitly bestows powers to parliament, congress or other related entity to create a system of military justice (for example, Article 1(8) of the United States Constitution);
2. States where the constitution merely recognizes existing military law, in effect qualifying other constitutional provisions (for example, Article 94 of Luxembourg's Constitution, Article 86 of Latvia's Constitution and Section 11(f) of the Canadian Charter of Rights and Freedoms); and
3. States where the constitution governs the application of military law and the jurisdiction of military courts (for example, Article 38(4) of Ireland's Constitution). In this category, the variations essentially concern the detail with which the provisions delimit offences and personnel within the permissible reach of these tribunals.

The question of military justice and the human rights of service personnel is discussed further in "Chapter 18: Discipline and Military Justice".

#### **Box 4.5: Constitutional provisions on the armed forces (selected examples)<sup>122</sup>**

##### **The Constitution of the Republic of Armenia, Article 14**

- Article 14 (2): The Armed Forces of the Republic of Armenia shall maintain neutrality in political matters and shall be under civilian control.
- Article 14 (3) Every citizen shall be obliged to participate in the defense of the Republic of Armenia in the manner stipulated by law.
- Article 155 (1): The Armed Forces shall be subordinate to the Government. A decision on engagement of the Armed Forces shall be taken by the Government. [...]
- Article 155 (5) The subordination and command of the Armed Forces, as well as other details shall be stipulated by law.

##### **Estonian Constitution, paragraph 124:**

- Persons serving in the defence forces enjoy all rights and freedoms provided in the Constitution unless there are restrictions prescribed by the law.

##### **The Constitution of Greece:**

- Article 4(6): Every Greek capable of bearing arms has the duty to contribute to the defence of the Fatherland as provided by law.
- Article 29(3): Manifestations of any nature whatsoever in favour of political parties by [...] the military in general, members of the security corps [...] are absolutely prohibited.
- Article 56(1): [...] [S]ervants or officers of the Armed Forces and the security corps [...] may neither stand for election nor be elected to Parliament if they have not resigned from the said offices prior to their nomination.
- Article 96(4)(a): Special statutes provide for military, naval and air force courts, which shall have no jurisdiction over civilians.

##### **The Basic Law of Germany, Article 45(b):**

- A Parliamentary Commissioner for the Armed Forces shall be appointed to safeguard basic rights and to assist the Bundestag in exercising parliamentary oversight over the armed forces. Details shall be regulated by a federal law.

<sup>122</sup> Legislationline.org, *op. cit.*, note 111.



### **The Constitution of Italy, Article 52:**

- The defence of the Fatherland is the sacred duty of every citizen.
- Military service is compulsory within the limits and under the terms of the law. The fulfilment of military duties may not prejudice a citizen's position as an employee or the exercise of his political rights.
- The rules about Armed Forces must conform to the democratic spirit of the Republic

### **The Constitution of Poland, Article 26(2):**

- The Armed Forces shall observe neutrality regarding political matters and shall be subject to civilian and democratic control.

### **Constitution of the Russian Federation, Article 59:**

- Defence of the Fatherland shall be the duty and obligation of a citizen of the Russian Federation.
- Citizens of the Russian Federation shall perform military service in accordance with federal law.
- In the event that their convictions or religious beliefs run counter to military service and in other cases established by federal law, citizens of the Russian Federation shall have the right to replace it with alternative civilian service.

### **Constitution of the United States of America**

- Section 2: The President shall be Commander-in-Chief of the Army and Navy of the United States,
- Section 8: The Congress shall have the power (9) To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations; [...] To raise and support Armies [...] To provide and maintain a Navy [...] To make rules for the Government and Regulation of the land and naval Forces [...] To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States.

Constitutional courts play an important part in interpreting constitutional provisions, checking the limits and distribution of legitimate power and upholding fundamental rights. In the case of the military, constitutional litigation has been used in several states to challenge violations of fundamental or constitutional rights, or actions that undermine the rule of law or democratic order.<sup>123</sup> The German Federal Constitutional Court, for example, in the 1994 Somalia Case, interpreted the Basic Law on peacekeeping operations.<sup>124</sup> In Italy, the

<sup>123</sup> Venice Commission, *op. cit.*, note 109, para. 263, citing the respective country chapters in George Nolte (ed.), *European Military Law Systems*, *op. cit.*, note 8.

<sup>124</sup> German Federal Constitutional Court, Judgment of the Second Senate of 12 July 1994 – 2 BvE 3/92, 5/93, 7/93, 8/93 (BVerfGE 90), p. 286.

Constitutional Court has issued important judgments on a variety of questions touching on the Armed Forces, including the interpretation of the “democratic spirit clause”, the principle of political neutrality and conscientious objection.<sup>125</sup> The Polish Constitutional Court has similarly interpreted the Constitution as requiring the political neutrality of the Armed Forces.<sup>126</sup>

### ***Parliaments and the human rights of armed forces personnel***

Within the scope of their responsibility to create an appropriate framework for military accountability, parliaments have a number of tools that can be used to ensure that the human rights of armed forces personnel are adequately protected. These include approving legislation on the armed forces, military law and complaints and redress mechanisms, conducting inquiries into the performance of the armed forces in protecting and respecting human rights, establishing specialized bodies, such as military ombuds institutions, and receiving and debating periodic reports from the armed forces and those specialized bodies.<sup>127</sup> Box 4.6 illustrates the operation of these procedures in the armed forces of different states.

#### **Box 4.6: Parliamentary oversight of the human rights of armed forces personnel<sup>128</sup>**

- **Albania:** Parliamentary oversight is executed indirectly through National Security Commissions.
- **Austria:** The Parliamentary Commission for the Federal Army accepts and verifies complaints from members of the armed forces or conscripts.
- **Bosnia and Herzegovina:** The Parliamentary Military Commissioner is responsible for investigating specific issues as instructed by the Parliamentary Assembly and the Joint Committee for Defence and Security. The Commissioner may receive complaints from members of the Armed Forces, inspect military units, Armed Forces headquarters and units of the Ministry of Defence without prior notice and at any time, and demand reports and information from the Ministry.
- **Finland:** The Parliamentary Ombudsman carries out inspections in the various units of the Defence Forces and peacekeeping contingents, and generally reviews public decisions and receives complaints (including from members of the armed forces).
- **Germany:** The Parliamentary Commissioner for the Armed Forces assists the Parliament in overseeing the Armed Forces, and investigates possible rights violations, both *ex officio* and following petitions by service personnel.

<sup>125</sup> Jörg Luther, “Military Law in Italy”, in Nolte, *op. cit.*, note 8, p. 433.

<sup>126</sup> Constitutional Court of Poland, Judgment No. K 26/98 (7 March 2000).

<sup>127</sup> DCAF and the Inter-Parliamentary Union, *Parliamentary Oversight of the Security Sector: Principles, Mechanisms and Practices* (Geneva 2003), <http://archive.ipu.org/PDF/publications/decaf-e.pdf>.

<sup>128</sup> Responses to question 5 of the ODIHR-DCAF questionnaire of 2018, and relevant parliament websites.

- **Norway:** The Parliamentary Ombudsman for the armed forces investigates possible rights violations *ex officio*, or following complaints received from armed forces members, and also conducts inspections of military units.
- **Romania:** The Romanian Parliament has a dedicated Committee for Defence, Public Order and National Security. However, issues related to human rights – including those of service personnel – are overseen by the Committee for Human Rights, Culture and National Minorities Issues of the Chamber of Deputies, as well as the Senate Committee for Human Rights.
- **Slovenia:** The Parliamentary Committee on Defence deals with all matters pertaining to the country's defence system, as well as other related issues handled by the competent ministry.
- **Sweden:** The Parliamentary Committee on Defence deals with all matters concerning military and civil defence, among others.
- **Switzerland:** The Parliamentary Security Policy Commission is responsible for the armed forces, security policy and military peace support, among other matters.
- **The United Kingdom:** The House of Commons Defence Select Committee examines the expenditure, administration and policy of the Ministry of Defence and its associated public bodies. To this end, the Committee may consult persons, papers and records, appoint specialist advisers, establish subcommittees, and meet and report from time to time.

## ***Legislation and the human rights of armed forces personnel***

Legislation may be utilized to set out in positive terms the civil, political and social rights of members of the armed forces. An example of a wide-ranging piece of legislation dealing with the rights of armed forces members is the Law of the Russian Federation on the Status of Military Personnel, which articulates human rights from freedom of conscience and religion to clothing supply (see Box 4.7).

### **Box 4.7: Legislation on the rights of armed forces personnel (selected examples)**

#### **Russian Federation**

- Federal Law No. 76 on the Status of Military Personnel covers the following:<sup>129</sup>
- Article 5: Protection of the freedoms, honour and dignity of military personnel;
- Article 6: The right to freedom of movement and choice of residence;
- Article 7: Freedom of speech, participation in meetings, rallies, demonstrations,

<sup>129</sup> Federal Law No. 76 of the Russian Federation of 27 May 1998 (as amended) on the Status of Military Personnel.

processions and picketing;

- Article 8: Freedom of conscience and religion;
- Article 9: The right to participate in management of government and public unions;
- Article 10: The right to work;
- Article 11: Service time and right to rest;
- Article 12: Monetary allowance;
- Article 13: Additional payments;
- Article 14: Clothing supply;
- Article 15: The right to housing;
- Article 16: The right to healthcare and medical aid;
- Article 17: Property rights and tax privileges;
- Article 19: The right to education and rights in the field of the arts;
- Article 20: Use of transport;
- Article 21: The right to appeal against illegal orders;
- Article 22: Rights in legal proceedings;
- Article 24: Social security rights; and
- Article 25: Additional privileges during service in a state of emergency

### Italy

Italy's Code of Military Order of 2010, including articles 1465-1507, covers the human rights of Armed Forces personnel, such as the right to gender equality, the prohibition of discrimination, freedom of circulation, freedom of assembly, freedom of religion and thought, freedom of information and education, the right to vote, the right to stand for elections, the right to health, the right to holidays and the right to the protection of personal data.<sup>130</sup>

As noted above, legislation is especially important if the human rights of armed forces personnel are to be limited for reasons of national security. In order to avoid abuse or otherwise unjustified limitations on the rights of service personnel, it is important that such limitations be accompanied by safeguards.

The international principles set out by the European Court of Human Rights are relevant to the interpretation of restrictions on the human rights of armed forces personnel. The Court has established a careful approach as to how and when states may use the available limitations on human rights for reasons of national security. This approach can also be taken

<sup>130</sup> Luther, *op. cit.*, note 125.

by OSCE participating States that are not party to the ECHR. In particular, the Court has stipulated certain criteria that legislation should meet (see Box 4.8 on the “quality of law” test). Accordingly, laws should be foreseeable and restrain the discretion of those to whom they confer powers, and safeguards should be put in place to guard against the abuse of such powers.

#### **Box 4.8: The European Convention’s “quality of law” test<sup>131</sup>**

The Convention prescribes that limitations have to be made “in accordance with the law”. The case law of the European Court of Human Rights has said that, *inter alia*:

- Laws include common-law rules, as well as statutes and subordinate legislation. In this case, the Court has stated that, to qualify as “law”, a norm must be adequately accessible and formulated with sufficient precision to enable citizens to regulate their conduct.<sup>132</sup>
- A law that “allows the exercise of unrestrained discretion in individual cases will not possess the essential characteristics of foreseeability and thus will not be a law for present purposes. The scope of the discretion must be indicated with reasonable certainty”,<sup>133</sup> and safeguards must exist against abuse of the discretion established by law.<sup>134</sup>
- As far as these safeguards are not written in the law itself, the law must at least establish the conditions and procedures for interference.<sup>135</sup>

<sup>131</sup> Ian Cameron, *National Security and the European Convention on Human Rights* (Dordrecht/Uppsala: Kluwer Law International, 2000).

<sup>132</sup> European Court of Human Rights, *Sunday Times v. the United Kingdom* (Application No. 6538/74, judgment of 26 April 1979), para. 49.

<sup>133</sup> European Court of Human Rights, *Silver and others v. the United Kingdom* (Application No. 5947/72 6205/73 7052/75 7061/75 7107/75 7113/75 7136/75, judgment of 25 March 1983), para. 88.

<sup>134</sup> *Ibid.*, para. 90.

<sup>135</sup> European Court of Human Rights, *Klass v. the Federal Republic of Germany* (Application No. 5029/71, judgment of 6 September 1978), paras 51-58; *Kruslin v. France* (Application No. 11801/85, judgment of 24 April 1990), para. 35; and *Huvig v. France*, (Application No. 11105/84, judgment of 24 April 1990), para. 34.

## Good Practices and Recommendations

- » Constitutional rules or laws should clearly identify the organs responsible for exercising control and oversight of the armed forces, as well as the acts or issues under their control and the mechanisms to achieve it.
- » Control mechanisms should be established both within the military and by the executive, the parliament, the judiciary and independent bodies working to ensure democratic control, respect for the rule of law and the protection of human rights. Such control should be both pro-active (aimed at identifying and preventing potential issues) and reactive (in investigating and addressing any problems that have already occurred).
- » Oversight organs should always act in line with international standards and guidelines.
- » Legislation concerning the armed forces should be consistent with international standards, be clear, precise and non-discriminatory, and constrain the abuse of discretion.

## Further reading

Council of Europe, "Committee of Ministers Recommendation CM/Rec(2010)4 on the Human Rights of Members of the Armed Forces", 24 February 2010, [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016805cf8ef](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805cf8ef).

DCAF/Inter-Parliamentary Union (IPU), *Parliamentary Oversight of the Security Sector: Principles, Mechanisms and Practices* (Geneva: DCAF/IPU, 2003), <http://archive.ipu.org/PDF/publications/decaf-e.pdf>.

European Parliament Office for the Promotion of Parliamentary Democracy, *Parliamentary Oversight of the Security Sector* (Brussels: European Parliament, 2013), [https://www.dcaf.ch/sites/default/files/publications/documents/EP Parliamentary Oversight Security Sector 2013 BOH.pdf](https://www.dcaf.ch/sites/default/files/publications/documents/EP%20Parliamentary%20Oversight%20Security%20Sector%202013%20BOH.pdf).

Victor-Yves Ghebali, *The OSCE Code of conduct on Politico-Military Aspects of Security: A Paragraph by Paragraph Analysis* (Geneva: DCAF, 2003), [https://www.dcaf.ch/sites/default/files/publications/documents/dd03\\_ghebali\\_osce-code\\_EN.pdf](https://www.dcaf.ch/sites/default/files/publications/documents/dd03_ghebali_osce-code_EN.pdf).



## *SECTION II*

# **— CIVIL AND POLITICAL RIGHTS**



## Chapter 5: Civil and Political Rights

### Introduction: Issues at Stake

As citizens in uniform, armed forces personnel enjoy the same fundamental rights as other citizens, including the civil and political rights to participate in public life, to join and support political parties, to vote and to demonstrate. Many states, however, have concerns that political activities by members of the armed forces can undermine discipline in and compromise the political neutrality of armed forces, and that certain such activities are incompatible with the military profession. For these reasons, the political neutrality of service personnel is a controversial issue for all military systems. While the rules on political neutrality within the armed forces are similar across the OSCE region, the extent of the obligation to refrain from political activities outside the armed forces varies widely. Similarly, restrictions are often imposed on service personnel's freedom of speech, in part because of the need for the armed forces to be seen as politically neutral, and partly to prevent dissent and insubordination. These topics are discussed in more detail in "Chapter 6: Freedom of Expression", on "Freedom of Expression".

This chapter first deals with the arguments concerning restrictions on political rights. It then addresses the scope of relevant international human rights standards, as well as limitations on the right to vote, to stand for office and to participate in political demonstrations. Examples are provided of the different approaches taken by OSCE participating States to maintain political neutrality, ranging from less restrictive approaches to those that impose strict standards of neutrality and restrict rights accordingly. The most frequent limitations on the political activities of armed forces members are:

- prohibitions on participation and membership in political parties;
- prohibitions on eligibility for elected political office; and
- prohibitions on taking part in public demonstrations while in uniform.

There are several justifications for restrictions of this kind. First, the armed forces, as defenders of territorial integrity and the constitutional order, need to be independent and above political controversy, and to be perceived as such. Neutrality helps to ensure that voters alone determine who governs the state. In many transitional democracies, the armed forces may be viewed primarily through their historical association with the dominant political party and ideology. In such contexts, the transition to democratic politics requires stringent neutrality on the part of the armed forces, in order to ensure a break with past associations and practices and to establish public confidence in the armed forces.

Second, restrictions are aimed at preventing political controversy within the armed forces that could detract from their effectiveness and morale. In particular, this applies to criticism of the country's political leadership or of the tasks assigned to the military by elected leaders.

Third, effective civilian control and accountability of the armed forces – a fundamental requirement of democracy and the rule of law – requires a separation of the political and military spheres. If members of the armed forces can intervene in the political sphere in an active and visible way, this may undermine democratic accountability and create conflicts of interest. Consequently, restrictions may be necessary to prevent the active involvement of armed forces members in politics.

Although democratic societies usually regard a person's political views as a private affair, there also may be a limited case for excluding people with extreme political views or associations from membership of the armed forces.<sup>136</sup> This is because such political associations are regarded as lacking the commitment of other political parties to the constitutional order. The need for restrictions in public service on people with extreme political views has, for example, been recognized as a justifiable ground for restricting civil and political rights under the ECHR. During the Cold War, the European Court of Human Rights accepted some political restrictions on state employment in cases of political affiliations that were considered to demonstrate a lack of commitment to a "free democratic system".<sup>137</sup> The case for limited "lustration" provisions was similarly accepted in transitional states after 1989.<sup>138</sup> In response to the ODIHR questionnaire, Azerbaijan, the Czech Republic, Germany, Latvia, Montenegro, Slovakia, Slovenia, Sweden and Switzerland reported applying restrictions on service in the armed forces for individuals holding extremist views.

Some countries (for example, Germany) take the view that the best education in democratic practice for members of the armed forces is through active citizenship. They therefore impose minimal restrictions on political activities. Where restrictions are imposed on the political activities of service personnel, they must be proportionate to the objectives of securing constitutional order or protecting military discipline. Moreover, these restrictions should be legally grounded in a way that makes them transparent, predictable and capable of being judicially reviewed. For example, a restriction on active participation in national

**136** The questionnaire responses provided no common definition of "extreme". Therefore, "extreme political views" are generically understood as those that, if enacted, would undermine the established democratic constitutional order, and "extreme associations" are understood as purposeful engagement with those who are actively attempting to enact "extreme" views.

**137** See: European Court of Human Rights, *Glaser v. the Federal Republic of Germany* (Application no. 9228/80, judgment of 28 August 1986); and *Kosiek v. the Federal Republic of Germany* (Application no. 9704/82, judgment of 28 August 1986). In both cases, the Court found no violation of Article 10 because it considered the real issue to be that of access to the civil service, which was not protected by the Convention (as it was then interpreted). By contrast, in *Vogt v. Germany* (Application no. 17851/91, judgment of 26 September 1995), a teacher dismissed for actively campaigning for the Communist Party successfully invoked Article 10. Restrictions on members of the Armed Forces would, however, be easier for a state to defend under limitations for national security under Articles 10 and 11 of the ECHR.

**138** See: Parliamentary Assembly of the Council of Europe (PACE), "Resolution 1096 (1996) on Measures to Dismantle the Heritage of Former Communist Totalitarian Systems", 27 June 1996. European Court of Human Rights jurisprudence is summarized in *Ivanovski v. the Former Yugoslav Republic of Macedonia* (Application no. 29908/11, judgment of 21 January 2016). See also: James A. Sweeney, *The European Court of Human Rights in the post-Cold War Era: Universality in Transition* (Oxon, New York: Routledge, 2012), Chapter 5.

politics may be justified by the need to separate the military and politics, but the case is weaker with regard to local politics, especially if local authorities have no control over or involvement in military matters. The appearance of neutrality may be maintained by codes of conduct that restrict *public identification* in political parties (for example, by prohibiting the wearing of military uniforms at party meetings), rather than by proscribing political participation altogether. Moreover, restrictions may be relaxed after a member of the armed forces has left the service.

## International Human Rights Standards

The OSCE has consistently affirmed the importance of civil and political rights and the need to ensure that they can be fully exercised.<sup>139</sup> In Paris in 1990, OSCE participating States affirmed the right to freedom of association and peaceful assembly.<sup>140</sup> In Copenhagen in the same year, they stressed the importance of the right to establish political parties.<sup>141</sup>

The main rights at stake are the freedom of association (namely, to join a political party), the right to vote and stand for office and the right to participate in public demonstrations, all of which are guaranteed by human rights treaties.

### *Freedom of association and political neutrality*

#### **Box 5.1: Restrictions on the right to freedom of association acknowledged in international standards**

ICCPR, Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

<sup>139</sup> OSCE, Helsinki Final Act, *op. cit.*, note 9; OSCE, "Concluding Document of the Second Follow-up Meeting", Madrid, 6 September 1983, <https://www.osce.org/mc/40871>; and "Concluding Document of the Third Follow-Up Meeting", Vienna, 19 January 1989, <https://www.osce.org/mc/40881>

<sup>140</sup> OSCE, "Charter of Paris for a New Europe", 21 November 1990, <https://www.osce.org/mc/39516>.

<sup>141</sup> OSCE, "Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE", 29 June 1990, <https://www.osce.org/odihr/elections/14304>.

# ICCPR, Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

# ECHR, Article 11

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his [her] interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Although in earlier decades the European Court of Human Rights tended to give states a wide margin of appreciation in cases involving restrictions on human rights for reasons of national security, this has progressively narrowed in recent years where the rights of armed forces personnel are concerned.<sup>142</sup> If a state is unable to show that a restriction has a legal basis, it is unable to take advantage of these restrictions. The necessity and proportionality test employed by the Convention system requires consideration of the nature and extent to which a restriction is justified by a legitimate objective. As indicated in Box 5.1, restrictions on the right to freedom of association for service personnel are permitted under Article 11(2) of the ECHR. However, the Court has interpreted Article 11(2) as only allowing restrictions on the *exercise* of the right to freedom of association for service personnel. Thus, Article 11(2) cannot be used to entirely remove this right.<sup>143</sup>

**142** See: European Court of Human Rights, *Hadjianastassiou v. Greece* (Application no. 12945/87, judgment of 16 December 1992); *Grigoriades v. Greece*, *op. cit.*, note 42; *Vereinigung Demokratischer Soldaten Österreichs [VDSO]* and *Gubi v. Austria* (Application no. 15153/89, judgment of 19 December 1994); *Lustig-Prean and Beckett v. the United Kingdom* (Application nos. 31417/96 and 32377/96, judgment of 27 September 1999); *Smith and Grady v. the United Kingdom*, (Application nos. 33985/96 and 33986/96, judgment of 27 September 1999); and *Konstantin Markin v. Russia*, *op. cit.*, note 47. See also: Council of Europe Research Division, *National Security and European Case-Law* (Strasbourg: Council of Europe Research Division, 2013).

**143** See: European Court of Human Rights, *Matelly v. France*, *op. cit.*, note 2, paras. 57-58; and *ADEFDROMIL v. France* (Application no. 32191/09, judgment of 2 October 2014), paras. 43-44. In both cases, the Court noted that “the restrictions imposed on the three groups mentioned in Article 11 [including members of the Armed Forces] are to be construed strictly and should, therefore, be confined to the “exercise” of the rights in question”.

It is clear from the jurisprudence of the European Court of Human Rights that the concept of a "lawful restriction" under Article 11(2) does not mean that all domestic laws restricting rights will necessarily be compatible with the Convention.<sup>144</sup> Moreover, despite the absence of an express reference to a proportionality requirement for the protected interests mentioned in Article 11(2), the Court has nonetheless approached limitations in this way.<sup>145</sup>

Restrictions on the rights encapsulated in Article 11 may be justified because of the need to ensure the political neutrality of the armed forces. This is an objective that is recognized in international human rights law and practice. Paragraph 23 of the OSCE Code of Conduct on Politico-Military Aspects of Security states that, "while providing for the individual service member's civil rights, each state will ensure that its armed forces are politically neutral." It is also clear that the ECHR allows restrictions on the rights of members of the armed forces designed to achieve this purpose (see Box 4.3 in "Chapter 4: National Protections for the Human Rights of Armed Forces Personnel").

In a case involving restrictions imposed in Hungary that prevented members of the armed forces, the police and security services from joining political parties and engaging in political activities, the restrictions were challenged as regards the police. The European Court of Human Rights found, however, that there was no violation of Articles 10 or 11 of the ECHR, since the restrictions pursued legitimate aims, namely the protection of national security and public safety and the prevention of disorder, and were, given the context in Hungary, necessary and proportionate.<sup>146</sup> Moreover, the limits imposed by Hungarian law were intended to depoliticize the police and, hence, to contribute to the consolidation and maintenance of a pluralistic democracy. Bearing in mind the important role of the police in society, the Court found the restrictions to be consistent with democratic principles, stating that:

*"Ultimately the police force is at the service of the State. Members of the public are therefore entitled to expect that in their dealings with the police they are confronted with politically neutral officers who are detached from the political fray."*<sup>147</sup>

The Court has applied similar principles when examining restrictions on members of the armed forces designed to prevent membership in extremist political parties, as Box 5.2 shows.

<sup>144</sup> See: European Court of Human Rights, *Sunday Times v. the United Kingdom*, *op. cit.*, note 132, para. 49; and *Silver and Others v. the United Kingdom*, *op. cit.*, note 133, paras. 88-90. See also the summary of European Court of Human Rights case law on this matter in "Chapter 4: National Protections for the Human Rights of Armed Forces Personnel".

<sup>145</sup> See, instead of others: European Court of Human Rights, *Rekvényi v. Hungary* (Application no. 25390/94, judgment of 20 May 1999), para. 49; *Matelly v. France*, *op. cit.*, note 2, para. 76; and *ADEFDROMIL v. France*, para. 61, *op. cit.*, note 143.

<sup>146</sup> *Ibid.*, *Rekvényi v. Hungary*, paras. 46-50.

<sup>147</sup> *Ibid.*, para. 41.

**Box 5.2: Preventing political extremism in the German Army Reserve<sup>148</sup>**

In the case of *Erdel v. Germany*, the applicant was a professional lawyer and an army reservist. He complained to the European Court of Human Rights that his rights of freedom of association and freedom of expression had been violated because his call-up to the military reserve had been revoked due to his membership of a right-wing populist political party. As a consequence, although he retained his rank as a lieutenant in the reserve, the applicant was not eligible for future training. The party (Die Republikaner) had been investigated by the Federal Office for the Protection of the Constitution but had not been banned by the Federal Constitutional Court. The applicant had unsuccessfully challenged the revocation before the German Federal Administrative Court, which found that there was sufficient material to establish an initial suspicion that the Die Republikaner party was disloyal to the Constitution.

The German military authorities and administrative courts based their decisions that the revocation was lawful on Article 49 of the Code of Administrative Procedure, in conjunction with Section 8 of the Soldiers Act, which provides that a soldier must recognize the free democratic order within the meaning of the German Basic Law and act at all times in such a way as to uphold it.

The European Court of Human Rights found this complaint to be manifestly ill-founded. The revocation was not a disproportionate restriction of the applicant's rights of freedom of expression and association, and had been undertaken in "the interests of national security" and "for the prevention of disorder or crime", both legitimate aims under Article 11(2) of the ECHR. The Court referred to Germany's experience during the Third Reich and the concept of a "democracy capable of defending itself" subsequently embodied in the Basic Law. Bearing in mind the role of the army in society, the Court recognized that "it is a legitimate aim in any democratic society to have a politically neutral army". In the circumstances, a fair balance had been struck between the fundamental right of the individual and the legitimate interest of a democratic state. The Court stressed that "even though no criticism had been levelled at the way the applicant actually performed his duties, [...] the applicant bore a special responsibility as he held the position of lieutenant on the reserve list, namely, a senior post within the German army." Moreover, the decision did not result in the loss of the applicant's livelihood.

In these circumstances, the Court did not find that the revocation amounted to a disproportionate and, hence, unjustified restriction of the applicant's right to freedom of expression or freedom of association.

<sup>148</sup> European Court of Human Rights, *Erdel v. Germany* (Application no 30067/04, judgement of 13 February 2007).

## ***The right to vote and stand for office***

Article 25 of the ICCPR states:

*“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:*

- a. To take part in the conduct of public affairs, directly or through freely chosen representatives; to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*
- b. To have access, on general terms of equality, to public service in his country.”*

The UN Human Rights Committee has remarked that, if there are reasonable grounds for regarding certain elected offices as incompatible with holding specific positions within the military (such as in the case of high-ranking military office), measures to avoid any conflicts of interest should not unduly limit the rights protected by Article 25(b) of the ICCPR.<sup>149</sup> In one case, restrictions imposed in the Netherlands that prevented a serving police officer from taking his elected seat in a local council were upheld. The Committee took the view that there was no violation of Article 25 because the restrictions were designed to prevent a conflict of interest.<sup>150</sup> Similar principles would apply to restrictions on armed forces personnel.

Under Article 3 of Protocol 1 to the ECHR:

*“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”*

In its interpretation of Article 3, Protocol 1, the European Court of Human Rights has differentiated between requirements that may be imposed on the eligibility to stand for election to parliament (the “passive” aspect) and the eligibility to vote (the “active” aspect).<sup>151</sup> In considering such “passive” restrictions, the Court notes that there should be no arbitrariness in the domestic procedures that disqualify an individual from standing as a candidate.<sup>152</sup> States enjoy a broader margin of appreciation in respect of the “passive”

<sup>149</sup> UN Human Rights Committee, “CCPR General Comment No. 25: Article 25, The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service”, 12 July 1996, CCPR/C/21/Rev.1/Add.7, para. 25.

<sup>150</sup> UN Human Rights Committee, *Debreczeny v. The Netherlands*, Communication No. 500/92.

<sup>151</sup> See: European Court of Human Rights, “Guide on Article 3 Protocol 1: Right to Free Elections”, Strasbourg, April 2018, [https://www.echr.coe.int/Documents/Guide\\_Art\\_3\\_Protocol\\_1\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_3_Protocol_1_ENG.pdf).

<sup>152</sup> European Court of Human Rights, *Ždanoka v. Latvia* (Application no. 58278/00, Grand Chamber judgment

aspect than of the “active” aspect.<sup>153</sup> Although the Court has not considered restrictions on candidature from serving members of the armed forces, it has upheld comparable restrictions on civil servants and local government officers, which have the purpose of ensuring political impartiality and ensuring that there is a distinction between elected representatives and officials.<sup>154</sup>

The active aspect and the requirement to hold free elections by secret ballot are also relevant in terms of arrangements made to ensure that armed forces members are able to exercise the right to vote, regardless of military service. Most participating States that responded to the ODIHR questionnaire enable service personnel to exercise their right to vote in civilian polling stations. There are some circumstances of active deployment (such as deployment in hard-to-reach locations and overseas) where the ability to exercise the right to vote in military units is a concern, however. Thus, in Austria, for example, the armed forces ensure that personnel on duty on election day are given the necessary time to vote in a civilian polling station, or by postal ballot.

The Council of Ministers of the Council of Europe recommended in 2010 that:

*“Any restrictions on the electoral rights of members of the armed forces which are no longer necessary and proportionate in pursuit of a legitimate aim should be removed.*

*Member states may impose restrictions on membership in the armed forces during a member’s candidacy or, following election, during the term of office.”<sup>155</sup>*

of 16 March 2006), para. 115; and *Melnitchenko v. Ukraine* (Application no. 17707/02, judgment of 19 October 2004), para. 57.

**153** European Court of Human Rights, *Etxebarria and Others v. Spain* (Application Nos. 35579/03, 35613/03, 35626/03 and 35634/03, judgment of 30 June 2009), para. 50; and *Davydov and Others v. Russia* (Application no. 75947/11, judgment of 30 May 2017), para. 286.

**154** European Court of Human Rights, *Ahmed and others v. the United Kingdom* (Application no. 22954/93, judgment of 2 September 1998); and *Briķe v. Latvia* (Application no. 47135/99, decision of 29 June 2000).

**155** Council of Europe, Recommendation CM/Rec(2010)4, op. cit., note 26, paras. 38 and 39.



## ***The right to demonstrate***

The freedom of peaceful assembly is guaranteed by Article 21 of the ICCPR and Article 11 of the ECHR. In general, the imposition of punishment (including a professional disciplinary penalty) for participating in a demonstration is regarded as a breach of Article 11, and any legitimate restrictions must satisfy the criteria of necessity and proportionality.<sup>156</sup> At the same time, Article 11(2) of the ECHR allows states to restrict this right for, among others, members of the armed forces (see Box 5.1).

Where restrictions are imposed on the right to freedom of peaceful assembly under Article 11(2), the Council of Ministers of the Council of Europe recommends that such restrictions be prescribed by law where necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>157</sup> Since Article 21 of the ICCPR does not specifically allow for restrictions on the right to freedom of assembly of service personnel (unlike Article 11(2) of the ECHR), States Parties to the ICCPR would, in any case, need to follow the requirements for limiting this right set out in the ICCPR (which are largely similar to those set out in Article 11(2) of the ECHR). In practice, most restrictions on members of the armed forces are related to national security, public order or public safety.

## **Different Approaches**

Paragraph 23 of the OSCE Code of Conduct on Politico-Military Aspects of Security states that, “while providing for the individual service member’s civil rights, each state will ensure that its armed forces are politically neutral”. The balance between the communal interest in the political neutrality of the armed forces as a whole and the political rights of individual members of the armed forces can be drawn in various ways. As can be seen from Box 5.3, a number of OSCE participating States apply restrictions on the rights of service personnel to join a political party or stand for political office.<sup>158</sup>

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**156** European Court of Human Rights, *Ezelin v. France* (Application no. 11800/85, judgment of 26 April 1991), paras. 52-53.

**157** Council of Europe, Recommendation CM/Rec(2010)4, *op. cit.*, note 26, para. 53.

**158** Responses to the ODIHR-DCAF 2018 questionnaire.

### Box 5.3: Recognition of the civil and political rights of service personnel in selected OSCE participating States

	The right to join a political party	The right to stand for election	Freedom of association
Recognized in legislation	Austria, Cyprus, Germany, Italy, Malta, Norway, Sweden, Switzerland, the United Kingdom	Albania, Austria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, <sup>159</sup> Germany, Italy, <sup>160</sup> Latvia, Malta, Montenegro, Norway, Poland, Slovenia, Sweden, Switzerland	Albania, Austria, Cyprus, the Czech Republic, <sup>161</sup> Denmark, Estonia, Finland, Germany, Italy, <sup>162</sup> Latvia, Lithuania, Malta, Montenegro, Norway, Slovenia, Sweden, Switzerland
Prohibited or not recognized	Albania, Azerbaijan, Bosnia and Herzegovina, the Czech Republic, Denmark, Estonia, Finland, Greece, Ireland, Latvia, Lithuania, Montenegro, Poland, Romania, Slovakia, Slovenia	Azerbaijan, Bosnia and Herzegovina, Greece, Ireland, Lithuania, Romania, Slovakia, <sup>163</sup> the United Kingdom	Azerbaijan, Bosnia and Herzegovina, Greece, Ireland, Poland, Romania, Slovakia <sup>164</sup>

A comparison of European military law systems highlights three approaches to the level of political participation permitted for service personnel, namely:

- highly restrictive policies of political neutrality;
- moderately restrictive policies of political neutrality; and
- least restrictive policies of political neutrality.<sup>165</sup>

*Highly restrictive policies* effectively ensure the invisibility of the armed forces in public debate. This approach seeks to ensure neutrality by, in effect, isolating the armed forces and separating them from active political involvement. Such policies may be justified by a desire to avoid repetition of military intervention in political life (such as is the case in Spain).

Similarly, in Poland, Article 26(2) of the Constitution provides that “[t]he Armed Forces shall observe neutrality regarding political matters and shall be subject to civil and democratic

<sup>159</sup> Career soldiers cannot be elected as members of parliament.

<sup>160</sup> Senior officers cannot be elected as members of parliament, or to regional or municipal authorities in the district of service.

<sup>161</sup> Trade unions are not allowed.

<sup>162</sup> Political meetings cannot be attended in uniform.

<sup>163</sup> Active duty military personnel cannot get involved on political party gatherings.

<sup>164</sup> Active duty military personnel cannot take part in trade unions nor political party gatherings.

<sup>165</sup> Georg Nolte and Heike Krieger, “Comparison of European Military Law Systems”, in Nolte, *op. cit.*, note 8, pp. 77 and onwards.

control." In 2002, the Polish Constitutional Tribunal held that severe restrictions on the political activities of members of the Armed Forces were not unconstitutional.<sup>166</sup> The Tribunal found that the challenged statutory provisions prohibiting membership of a political party conformed to the constitutional principles of the freedom of creating and functioning of political parties, proportionality, equality, freedom of association and equal access to the public service, as well as to Article 22 of the ICCPR and Articles 11 and 17 of the ECHR. The Tribunal stated that:

*"The neutrality of the armed forces in political matters (Art. 26.2 of the Constitution) has two aspects. Firstly, it means that the armed forces cannot be an autonomous entity within the state political structure, capable of influencing political decisions of state constitutional organs. This political neutrality is secured in particular through civil control, by subjecting the military to the constitutional organs of the republic. The second aspect of the neutrality of the armed forces is that they must be removed from the sphere of direct influence of political parties."*<sup>167</sup>

Restrictions in Romania are another example of this approach (see Box 5.4).

#### **Box 5.4: Restrictions on the Armed Forces in Romania<sup>168</sup>**

##### **Constitution of Romania**

Article 40:

(1) Citizens may freely associate into political parties, trade unions, employers' associations and other forms of association. [...]

(10) [...] active members of the Armed Forces [...] shall not join political parties.

Article 37 (Right to be Elected):

(1) Eligibility is granted to all citizens having the right to vote, who meet the requirements in Article 16(3), unless they are forbidden to join a political party, in accordance with Article 40(3).

##### **Law no. 80 of 1995 on the status of militaries:**

Article 28 forbids military cadres to exercise the following rights:

- a) to be part of political parties, formations or organizations or carry out propaganda by any means or other activities in the political parties' favour or of an independent

<sup>166</sup> Polish Constitutional Tribunal, *Commissioner of Citizens Rights v. The State*, 10 April 2002, Case No. K 26/00.

<sup>167</sup> Based on an unofficial translation from the website of the Polish Constitutional Tribunal, <http://www.trybunal.gov.pl/eng/index.htm>.

<sup>168</sup> Response of Romania to the ODIHR-DCAF 2018 questionnaire.

candidate for public functions;

- b) to stand for election in the local public administration and in the Parliament of Romania, as well as in the position of President of Romania; [...]

Article 29 restricts the exercise of certain rights and freedoms for active service militaries:

- a) Political opinions can only be expressed outside the service;
- b) The public expression of opinions contrary to the interests of Romania and the armed forces is not allowed;
- c) The conditions under which military cadres in service will be able to publicly disclose military information shall be established by order of the Minister of National Defense;
- d) Accession to religious cults is free, except for those which, according to the law, are contrary to the rules of public order, as well as to those that violate good morals or affect the exercise of the profession;
- e) Establishment of different forms of association with a professional, technical-scientific, cultural, sport-recreational or charitable character, with the exception of trade unions or those that contradict the unique chain of command, order and discipline specific to the army institution, is permitted under the conditions established by the military regulations. [...]
- f) Participation in rallies, demonstrations, processions or meetings of a political or trade union nature is prohibited, except for the activities in which they participate in the mission; [...]

*Moderately restrictive policies* of political neutrality, on the other hand, seek to restrict *how* armed forces personnel participate in public life. The objective is to avoid the appearance that the military and/or individuals identified as service personnel are publicly aligned with a political cause. In Finland, for example, military personnel can stand for local elections as independent candidates, but not participate in political activities, election advertising and demonstrations *while in uniform*.<sup>169</sup> Similar restrictions apply in Italy, Belgium and the United Kingdom.<sup>170</sup> In the United Kingdom, limitations may be imposed on service personnel holding office in political parties but not on political party membership.

*Least restrictive policies* of political neutrality aim to encourage political participation by limiting restrictions on the political rights of armed forces members, provided that the exercise of such rights does not interfere with military duty. The Netherlands follows this approach and even permits, under certain circumstances, demonstrations to be held at military installations or the participation of service personnel in uniform in public meetings. As with highly restrictive means, the rationale of minimal restrictions may be to protect democratic values. The German “citizen in uniform” approach, for example, aims to actively

<sup>169</sup> Response of Finland to the ODIHR-DCAF 2018 questionnaire.

<sup>170</sup> Nolte and Krieger, *op. cit.*, note 165, pp. 79-80.

promote democratic principles in the military by permitting the political participation of individual members of the armed forces.

**Box 5.5: Political restrictions for service personnel in Germany<sup>171</sup>**

Military personnel are required to behave in a way that does not disrupt their shared sense of duty. In particular, they are prohibited from acting to promote a political group by giving speeches, distributing written material or acting as a representative of a political organization. Mutual respect must always be maintained. Military personnel may not wear their uniform at political events. Superiors may not influence their subordinates to be for or against political viewpoints. Under Section 15 of the Legal Status of Military Personnel Act, the political activities of military personnel are subject to certain restrictions. In the course of their duties, military personnel may not act to the benefit or hindrance of a particular political side. This does not, however, affect the right of military personnel to express their own opinions in conversation with one another.

All of these approaches have been shown to be effective in terms of guaranteeing democratic practice and balancing this with the individual rights of armed forces members. While no one approach can be prescribed, all approaches require sensitivity as to when political activity genuinely calls the armed forces' neutrality into question and when restrictions on individuals rights are excessive. Restrictions on the rights of service personnel that take account of different types of political office, differing degrees of political involvement and the requirements of different military contexts can more easily be justified. In that sense, less restrictive policies focusing on individual circumstances are to be preferred. At the same time, the particular history or situation of a state may require a more restrictive approach in order to establish and maintain the armed forces' political neutrality in support of democratic processes. It would also be difficult to justify prohibitions based on the type of political view supported by a member of the armed forces, except in the case of a political party advocating the overthrow of democratic institutions.

<sup>171</sup> Response of Germany to the ODIHR-DCAF 2018 questionnaire.

## Good Practices and Recommendations

- » Members of the armed forces should have the same rights as other citizens to vote in elections.
- » Where military duties prevent armed forces personnel from voting in the normal way, the armed forces should take positive measures to enable them to vote in conformity with electoral law.
- » Members of the armed forces and military personnel should be permitted to join legal political parties, and restrictions should only be imposed in the case of political parties that actively threaten the constitutional order.
- » Where restrictions are imposed on service personnel's right to hold office in political parties, engage in political campaigning or stand for election to political office, these should be prescribed in legislation, be strictly necessary and proportionate, and be applied in a non-discriminatory fashion.
- » Any restrictions on the right of service personnel to take part in peaceful assemblies should be prescribed in legislation, be strictly necessary and proportionate, and be applied in a non-discriminatory fashion.

## Further reading

Council of Europe, "Committee of Ministers Recommendation CM/Rec(2010)4 on the Human Rights of Members of the Armed Forces," 24 February 2010, [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016805cf8ef](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805cf8ef).

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ODIHR, *Guidelines on Political Party Regulation* (Warsaw: ODIHR, 2011), paragraph 117, <https://www.osce.org/odihr/77812>.

## Chapter 6: Freedom of Expression

### Introduction: Issues at Stake

In principle and practice, armed forces personnel, as “citizens in uniform”, enjoy the same fundamental rights as citizens. In many states, however, armed forces consider restrictions on service personnel’s freedom of speech to be necessary, in part because of the need for them to be seen as politically neutral, and also to prevent dissent and insubordination. Moreover, in certain situations, including operational deployments, special restrictions will be necessary in order to maintain the security of operations and to protect the right to life of armed forces personnel.

This chapter begins with a general discussion on freedom of expression in the military. It then addresses specific topics of concern, including the use of mobile phones and social media, as well as whistleblowing. The requirements of international human rights law on the right of freedom of expression and limitations upon the right are then examined. The chapter concludes by presenting the approaches of different OSCE participating States to these questions.

Freedom of expression is a valuable form of self-expression that enables service personnel to make their opinions known. In a military context, freedom of expression may be relevant in various forms. These range from issuing communications complaining about conditions of service and publishing barracks newsletters, to maintaining blogs and using social media, as well as expressing public dissent about military orders, voicing criticism in the media and whistleblowing about human rights abuses or illegal activities.

Respecting and protecting each individual’s right to exercise their freedom of expression is fundamental to the well-being of democratic societies. It is also closely connected to other human rights concerns, and is integral to, for example, the ability to exercise the civil and political rights addressed in “Chapter 5: Civil and Political Rights” and the right to freedom of religion or belief discussed in “Chapter 9: Religion in the Armed Forces”. Moreover, the exercise of this right is also closely tied to the possibility to report any illegal malpractice, misconduct, ill-treatment or human rights abuses committed in the armed forces. This latter aspect is all the more important owing to the traditionally barracked environment of the armed forces, in which such abuses are more likely to be shielded from public view and secrecy can lead to a culture of impunity. In a number of OSCE participating States, armed forces personnel have the right to submit petitions and complaints to public and state institutions, such as ombuds institutions and human rights commissions. Some countries (such as Armenia) provide dedicated hotlines to enable reporting of this kind.

Individual freedom of expression is also closely linked to freedom of the media. In principle, there is a distinction between a member of the armed forces expressing their own opinion as a private person and as a representative of the state. In the former situation, they are

acting as citizens in uniform and should be granted greater latitude. On the other hand, comments made in an official capacity are likely to be governed by internal guidelines, as with any public and private organization. Armed forces that do not forbid service personnel from communicating with the media often require them to receive prior permission from the relevant superior. Alternatively, communications with the media may only be undertaken via an authorized spokesperson – often personnel trained in media relations.

Military discipline requires some limits on freedom of expression. Accordingly, types of expression that would undermine discipline can be restricted, even if equivalent conduct would be unregulated in civilian employment.<sup>172</sup> The need to ensure the political neutrality of the armed forces can also justify restrictions on service personnel's right to freedom of expression. Similarly, the interests of national security preclude service personnel from disclosing classified information and operational details, especially during operational deployments, and this may sometimes extend to the communication of personal and other details that in non-operational environments would be innocuous. Logistical difficulties of military life – in particular, deployment overseas – can create barriers to personal communication. Armed forces often facilitate personal communications between personnel and their families to support their well-being, and thus strengthen morale.

The ubiquitous use of mobile phones also presents potential challenges. On the one hand, mobile phones enable armed forces personnel to maintain contact with family and friends even when on military deployment, with consequent benefits for morale. Armed forces personnel may use their phones to describe their situation and conditions in the unit to their families, friends or other contacts through phone calls, text messaging, videos and photos. Mobile phones also allow them to more easily communicate bullying, mistreatment and other abuses.

On the other hand, in situations of active deployment, mobile phone use can be a potential danger, putting at risk the lives of both the user and other members of their unit, thereby impacting military effectiveness. There is a real risk that service personnel may inadvertently give away sensitive operational details. Moreover, there are recent cases where mobile phone GPS data have been used by an adversary to track military units and direct attacks against them. Even apparently innocuous apps may provide useful information, such as the layout of military bases, by recording the jogging routes of personnel.<sup>173</sup> It is not surprising, then, that a number of armed forces regulate the use of mobile phones under operational conditions in order to protect operational security and the lives of armed forces personnel.<sup>174</sup>

**172** This has also been the approach of the United States Supreme Court, see: *Parker v. Levy* 417 U.S. 733 (1974).

**173** "Fitness app Strava lights up staff at military bases", BBC News, 29 January 2018, <https://www.bbc.co.uk/news/technology-42853072>.

**174** Responses to the ODIHR-DCAF 2018 questionnaire, qu. 14.



## ***Social media***

As with mobile phones, armed forces often facilitate access to social media of service personnel to enable them to stay in contact with family and friends. As social media are often also a source of news and current affairs, unnecessary restrictions on access could be seen as undermining the citizen-in-uniform role of armed forces personnel, as informed citizens are engaged and responsible citizens, and also have a right to be informed of current events. Social media can also be used beneficially by the armed forces themselves, such as in recruitment or to spread messages to personnel or the public.<sup>175</sup> In addition, there are various types of online platforms where individuals can report instances of mistreatment of armed forces personnel.

The potential risks are acknowledged by many employers who seek to regulate to some extent their employees' use of social media, intending to mitigate the risk of reputational damage through ill-considered or unprofessional comments by employees. Moreover, the dangers of social media being used to bully or intimidate vulnerable individuals are well-known. In addition, as with mobile phone use more generally, there can be specific risks to the security of military operations from the use of social media during active operational deployments, particularly where members of the armed forces inadvertently publish mission data – through images, videos, comments and even the timings of social media posts.

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**175** Maria Hellman, Eva-Karin Olsson and Charlotte Wagnsson, "EU Armed Forces' Use of Social Media in Areas of Deployment", in *Media and Communication*, Vol. 4, Issue 1, 2016, pp. 51-62; "Social Media in the Armed Forces", Economic and Social Research Council, October 2016, <https://esrc.ukri.org/files/news-events-and-publications/evidence-briefings/social-media-in-the-armed-forces/>.

## International Human Rights Standards

### Box 6.1: Freedom of expression in international human rights law

UDHR, Article 19	Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.
ICCPR, Article 19	<ol style="list-style-type: none"> <li>1. Everyone shall have the right to hold opinions without interference.</li> <li>2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.</li> <li>3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: <ol style="list-style-type: none"> <li>a. For respect of the rights or reputations of others;</li> <li>b. For the protection of national security or of public order (ordre public), or of public health or morals.</li> </ol> </li> </ol>
ECHR, Article 10	<ol style="list-style-type: none"> <li>1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority. [...]</li> <li>2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.</li> </ol>

In Copenhagen in 1990, OSCE participating States affirmed the following:

*"Everyone will have the right to freedom of expression including the right to communication [...] [and the] freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."*<sup>176</sup>

<sup>176</sup> Copenhagen 1990, *op. cit.*, note 141, para. 9.1.

The participating States reaffirmed this commitment in Budapest in 1994, maintaining that “freedom of expression is a fundamental human right and a basic component of a democratic society”. In Astana in 2010, they further recognized “the important role played by civil society and free media in helping us to ensure full respect for human rights [...]”.

Further human rights commitments make clear that freedom of expression includes the right to disseminate and publish views and information.<sup>177</sup> In Istanbul in 1999, the participating States reiterated “the importance of [...] the free flow of information as well as the public’s access to information.”<sup>178</sup>

## ICCPR

Article 19, paragraph 2 of the ICCPR requires States Parties to guarantee the right to freedom of expression, including the right to “seek, receive and impart information and ideas of all kinds, regardless of frontiers” (see Box 6.1). This right includes the expression and receipt of all ideas and opinions capable of being transmitted from one person to another. It includes, *inter alia*, political discussions, comments on public affairs, canvassing, discussions of human rights and journalism. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of Article 19, paragraph 3 and Article 20 (concerning propaganda or war and incitement of national, racial and religious hatred). All forms of expression and the means of their dissemination are protected,<sup>179</sup> including spoken and written means of expression, such as books, newspapers, pamphlets, posters, banners and all forms of audio-visual communications, as well as electronic and internet-based modes of expression.

In line with paragraph 3, Article 19 of the ICCPR, the protection of national security is a legitimate ground for restricting the freedom of expression, where the restriction is provided by law, necessary and proportionate. However, the UN Human Rights Committee has cautioned that:

*“Extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security.”<sup>180</sup>*

<sup>177</sup> *Ibid.*, para. 10.1.

<sup>178</sup> OSCE, “Istanbul Document, Charter for European Security: III. Our Common Response”, 19 November 1999, <https://www.osce.org/mc/39569>.

<sup>179</sup> UN Human Rights Committee, *Kivenmaa v. Finland*, Communication No. 412/1990, para. 9.3.

<sup>180</sup> UN Human Rights Committee, “General Comment No. 34, Article 19: Freedoms of Opinion and Expression”, 12 September 2011, CCPR/C/GC/34, para. 30.

In addition, any such restrictions in legislation or under military discipline must not be excessive and unreasonable, and should be appropriate and proportionate to the aim of protecting national security, while also seeking to minimize intrusiveness. Account should be taken of the type of expression at issue, as well as the means of its dissemination. For example, democratic societies place a high value on public debate concerning public and political figures, and restrictions on related activities will be difficult for a state to justify. The precise nature of the threat, and the necessity and proportionality of the action taken to remedy the threat, need to be demonstrated, in particular by establishing a direct and immediate connection between the expression and the threat. Unlike under the ECHR, no margin of appreciation applies to any restrictions.

With regard to restrictions on electronic media (including websites, blogs, Internet service providers and search engines), the UN Human Rights Committee has noted that:

*"Any restrictions [...] are only permissible to the extent that they are compatible with paragraph 3. Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3."*<sup>181</sup>

### **Limits to freedom of expression: the ECHR approach**

Article 10 of the ECHR applies to participating States that are members of the Council of Europe. It is of similar scope to Article 19 ICCPR, in that it protects the right to hold opinions and to receive and impart ideas and information and also applies to all forms of expression, including shocking and controversial ideas.<sup>182</sup> The European Court of Human Rights has also applied the principles governing freedom of expression via the media under Article 10 to Internet-based communication.<sup>183</sup> It has further acknowledged that freedom of expression applies to service personnel,<sup>184</sup> stating that "Article 10 does not stop at the gates of army barracks".<sup>185</sup> However, the interests of military discipline and national security are recognized as legitimate reasons for restrictions on freedom of expression under Article 10(2). In the *Engel* case, the Court stated that:

<sup>181</sup> *Ibid.*, para. 43.

<sup>182</sup> See: Dominika Bichawska-Siniarski, *Protecting the Right to Freedom of Expression under the European Convention on Human Rights: A Guide for Legal Practitioners* (Strasbourg: Council of Europe, 2017), <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>.

<sup>183</sup> See: European Court of Human Rights, *Times Newspapers Ltd v. the United Kingdom* (Application Nos. 3002/03 and 23676/03, judgment of 10 March 2009), para. 27. See generally: European Court of Human Rights Research Division, *Internet: case-law of the European Court of Human Rights* (Strasbourg: European Court of Human Rights Research Division, 2015), [https://www.echr.coe.int/Documents/Research\\_report\\_internet\\_ENG.pdf](https://www.echr.coe.int/Documents/Research_report_internet_ENG.pdf).

<sup>184</sup> See, for example: European Court of Human Rights, *Engel and others v. The Netherlands*, *op. cit.*, note 45, para. 100; and *VDSO and Gubi v. Austria*, *op. cit.*, note 142, para. 27.

<sup>185</sup> European Court of Human Rights, *Grigoriades v. Greece*, *op. cit.*, note 42, para. 45.

*"The freedom of expression guaranteed by Article 10 applies to servicemen just as it does to other persons within the jurisdiction of the Contracting States. However, the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline, for example by writings."<sup>186</sup>*

When assessing whether the right of service personnel to freedom of expression has been justifiably restricted, the Court has held that it is necessary to take into account the special conditions of military life and the "specific 'duties' and 'responsibilities' incumbent on the members of the armed forces".<sup>187</sup> Measures to restrict the right to freedom of expression must be necessary and proportionate, even where legitimate military interests are at stake. Measures to restrict freedom of expression must likewise provide sufficient protection against arbitrariness and be reasonably foreseeable.<sup>188</sup>

The proportionality of the restriction will also depend on its aims. Overall, the European Court of Human Rights has tended to give states a wide margin of appreciation in cases involving restrictions of the rights of service personnel. Accordingly, the Court found no violation of Article 10 when two conscripts were imprisoned for a year after distributing material calling for French army units to withdraw from Germany,<sup>189</sup> or when a German military service member was dismissed for criticizing government policy and condemning modern warfare on television.<sup>190</sup>

In part, this is due to a generally wide margin of appreciation for claims of national security (at least when voiced by the military). Nevertheless, if a state is unable to show that a restriction has a legal basis, these restrictions would be in violation of the Convention. The necessity and proportionality test employed by the Convention system requires that due consideration be given to the need for, nature of and extent to which a restriction on rights is justified by a legitimate objective.

The Court's jurisprudence provides an indication of when limitations on the freedom of expression of service personnel will not be upheld. Instances where the Court has found a violation of Article 10 have included: (a) a ban on the distribution of a magazine whose articles were written in a critical satirical style, but did not call into question the duty of obedience or the purpose of military service,<sup>191</sup> and (b) where a sentence of three months'

<sup>186</sup> European Court of Human Rights, *Engel and others v. The Netherlands*, op. cit., note 45, para. 100.

<sup>187</sup> European Court of Human Rights, *Hadjianastassiou v. Greece*, op. cit., note 142, para. 46.

<sup>188</sup> European Court of Human Rights, *VDSO and Gubi v. Austria*, op. cit., note 142, para. 31.

<sup>189</sup> European Court of Human Rights, *Le Cour Grandmaison and Fritz v. France* (Application nos. 11567/85 and 11568/85, Commission decision of 6 July 1987).

<sup>190</sup> European Court of Human Rights, *E.S. v. Germany*, (Application no. 23576/94, Commission decision of 29 November 1995).

<sup>191</sup> European Court of Human Rights, *VDSO and Gubi v. Austria*, op. cit., note 142, para. 49.

imprisonment for a junior officer who had sent a long letter of complaint to his superior (which was not otherwise published) was considered to be disproportionate and not “necessary in a democratic society”.<sup>192</sup>

## ***Whistle-blower protection***

As noted above, freedom of expression is materially linked to the exposure of wrongdoing, including human rights abuses in the armed forces. Over the last decade, the European Court of Human Rights has recognized the need to protect public servants who disclose official wrongdoing, notably in the leading judgment of the Grand Chamber in *Guja v. Moldova*.<sup>193</sup> The case involved the dismissal of a civil servant who had disclosed letters to a newspaper demonstrating political pressure upon the state prosecutor. The Court found that the dismissal violated Article 10 of the ECHR. It also established six criteria that such disclosures need to meet in order to benefit from the protection of Article 10, the first being that the disclosure should correspond to a strong public interest. Additional criteria require the lack of other effective means to remedy the wrongdoing, a public interest override (over a legally imposed duty of confidence) and a situation where the damage caused through disclosure does not outweigh the public interest in disclosure. Finally, the disclosure should not be motivated by personal grievances or the expectation of personal advantage, and the whistle-blower should have acted in good faith, believe the information to be true and be convinced that the disclosure was in the public interest.<sup>194</sup>

The Court decided that, in view of the importance of the right to freedom of expression on matters of general interest and of the right of civil servants and other employees to report illegal conduct and wrongdoing at their place of work, the interference with this applicant's right to freedom of expression was not “necessary in a democratic society”.<sup>195</sup> As the Grand Chamber noted:

*“In a democratic system the acts or omissions of government must be subject to close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence.”*<sup>196</sup>

**192** European Court of Human Rights, *Grigoriades v. Greece*, *op. cit.*, note 42.

**193** European Court of Human Rights, *Guja v. Moldova* (Application no. 14277/04, judgment of 12 February 2008).

**194** For a summary of the six criteria, see Council of Europe, *Thematic Factsheet: Whistleblowers and the Freedom to Impart Information*, May 2017, p. 1.

**195** See also: European Court of Human Rights, *Heinisch v. Germany*, (Application no. 28274/08, judgment of 21 July 2011); *Sosinowska v. Poland* (Application no. 10247/09, judgment of 18 October 2011); and *Matúz v. Hungary* (Application no. 73571/10, judgment of 21 October 2014).

**196** European Court of Human Rights, *Guja v. Moldova*, *op. cit.*, note 193, para. 74.

Clearly, the case for preventing disclosure may be stronger for some military matters. Nonetheless, the Court later found that even the disclosure by a member of the Romanian Intelligence Service during a press conference about the illegal interception of communications, after having tried to raise the matter with his superiors and a member of parliament, was justified in the circumstances.<sup>197</sup> The Court conducted a close analysis of the available avenues for raising allegations of irregularities and concluded that none of them was likely to be effective. Moreover, the general interest of the public in the disclosure of information revealing illegal activities within the Romanian Intelligence Service was so important in a democratic society that it prevailed over the interest in maintaining public confidence in that institution. Comparable arguments could obviously apply to disclosures of potential illegality and wrongdoing in the armed forces.

In this context, it should be noted that, in a 2010 resolution, the Parliamentary Assembly of the Council of Europe (PACE) stressed that legislation on whistle-blowers should be comprehensive and should cover the private and the public sectors, including members of the armed forces and special services.<sup>198</sup> A 2014 recommendation by the Council of Europe's Committee of Ministers noted, however, that in national normative, institutional and judicial networks established to protect the rights and interests of whistle-blowers, special schemes or rules, including modified rights and obligations, may apply to information related to national security or defence.<sup>199</sup>

Good practice requires that service personnel be provided with effective avenues for reporting illegal behaviour and human rights abuses to appropriate organs with the capacity to investigate and remedy such abuses. In the absence of such laws and procedures, it is likely, based on the above principles, that even disclosures to the media may be protected under the ECHR, provided that they are sufficiently important and made in good faith. The balancing of public interests (and the disclosure mechanisms) may take account of the special circumstances surrounding defence and military matters. It is particularly vital that armed forces provide avenues for whistleblowing, despite its seeming incongruousness with the chain of command, as abuse and injustice will erode the moral fabric and morale of a unit – and even the institution of the armed forces – until it is exposed and remedied.

## Different Approaches

The OSCE participating States that responded to the ODIHR questionnaire all reported that they impose some restrictions on the freedom of expression of armed forces personnel. These restrictions take various forms.

<sup>197</sup> European Court of Human Rights, *Bucur and Toma v. Romania* (Application no. 40238/02, judgment of 8 January 2013).

<sup>198</sup> PACE, "Resolution 1729 (2010) on the Protection of Whistleblowers", 29 April 2010, para. 6.2.

<sup>199</sup> Council of Europe, "Recommendation CM/Rec(2014)7 of the Committee of Ministers on the Protection of Whistleblowers", 30 April 2014.

## Contact with the media

A minority of participating States prohibit members of the armed forces from speaking to the media entirely and require all contact to be channelled through an official spokesperson. This is the case in Malta. In other states, including Bosnia and Herzegovina,<sup>200</sup> Ireland,<sup>201</sup> Romania<sup>202</sup> and Slovenia,<sup>203</sup> service personnel are required to receive prior permission before giving comments or interviews to the media. Azerbaijan and Lithuania place no restrictions on armed forces personnel communicating with the media.<sup>204</sup>

Some states prohibit members of the armed forces from discussing certain topics with the media without permission. This is the approach in Estonia, Latvia and Montenegro. In Montenegro, for example, permission is required from the Minister of Defence for armed forces personnel to speak publicly about the following: the composition, organization, formation, training, readiness and combat readiness of the armed forces; military preparedness and mobilization; military equipment and weapons; deployment in international forces; command and control in the armed forces and the defence system; or decisions of the council for security and defence, as well as generally operationally sensitive matters.<sup>205</sup>

Other countries permit interviews but provide guidelines, as is the approach in Denmark, Finland, Greece and Poland.<sup>206</sup> The restrictions or guidelines commonly make a distinction between different types of information that may or may not be provided to the media, such as classified information, identification of rank, unit or location, political topics, sensitive information and operational details.

## Reporting to official bodies

Bosnia and Herzegovina and Germany specifically address the position of members of the armed forces giving testimony to official bodies. In Bosnia and Herzegovina, the requirement to obtain prior written approval from the Minister of Defence for public statements does not apply to those giving testimony before parliamentary committees or courts of law.<sup>207</sup>

**200** Law on Service in the Armed Forces of Bosnia and Herzegovina, Art. 27.

**201** Defence Forces Regulations (DFR) of Ireland, Regulations 29 and 33.

**202** Romanian Minister of National Defence Order No. M.76/2016.

**203** Response to the ODIHR-DCAF 2018 questionnaire, qu. 13

**204** Responses to the ODIHR-DCAF 2018 questionnaire, qu. 13.

**205** Montenegro response to ODIHR-DCAF 2018 questionnaire.

**206** Responses to ODIHR-DCAF 2018 questionnaire, qu. 13.

**207** Law on Service in the Armed Forces of Bosnia and Herzegovina, Art. 27(2).



**Box 6.2: Reporting information to official bodies in Germany<sup>208</sup>**

Under Section 14 of the Legal Status of Military Personnel Act, even after leaving military service, military personnel must maintain the secrecy of matters that became known to them in the course of their official duties. This does not apply to the communication of information in the line of duty, or to the reporting of known facts or facts that do not need to be kept secret, or in cases where, on grounds of reasonable suspicion, a corruption offence under Sections 331 to 337 of the Criminal Code is reported to the competent highest service authority, a law enforcement agency or other agency or external body designated by the highest service authority.

Military personnel must not give evidence of such matters in court or out of court, or make any statement without prior permission. Permission must be obtained from the disciplinary superior of the service member in question or, if the service member is no longer in military service, from their last disciplinary superior. The deliberate violation of official obligations is a disciplinary offence and may lead to disciplinary action.

***Use of mobile phones***

Of those participating States that responded to the ODIHR survey, none reported entirely prohibiting service personnel from using mobile phones.<sup>209</sup> It is likely that any such blanket prohibition would violate both the right to freedom of expression and the right to respect for private life, while also being almost impossible to enforce in practice. Indeed, the Committee of Ministers of the Council of Europe has recommended that “where members of the armed forces are posted abroad, they should, as far as possible, be able to maintain private contacts and reasonable means should be provided to this end”.<sup>210</sup> The specific regulation of mobile phone use in particularly sensitive contexts where security is at risk is, however, defensible.

Most OSCE participating States reported providing guidance aimed at attenuating such risks (namely, Denmark, Estonia, Finland, Germany, Greece, Ireland, Latvia, Malta, Norway, Romania, Slovakia, Slovenia, Sweden and Switzerland). In Finland, restrictions on the use of mobile phones apply during military exercises and on premises where top secret information is being handled. Failing to adhere to these limits can result in disciplinary action. In February 2019, the Russian Federation’s lower house of parliament voted to ban the use of smartphones by military personnel while on duty, although mobile phones with basic calling and messaging functions are still allowed.<sup>211</sup> In Ireland, unit liaison officers seek to mitigate

<sup>208</sup> Response of Germany to the ODIHR-DCAF 2018 questionnaire.

<sup>209</sup> A decree against the use of mobile phones by members of the Armed Forces of the Republic of Armenia is under review.

<sup>210</sup> Council of Europe, Recommendation CM/Rec(2010)4, *op. cit.*, note 26, para. 38.

<sup>211</sup> Federal Law of the Russian Federation of March 6, 2019 No. 19- “On Amendments to Articles 7 and 28-5 of

situations where service members' contact with family and friends are restricted, while in Malta, family and friends are warned that operational restrictions may mean that a member of the armed services is unreachable for longer than anticipated.

## Use of social media

Social media use brings both risks and opportunities. The potential risks involve compromising operations by revealing information that is useful to an adversary. For instance, the Danish Army, citing that soldiers might be placed at risk through social media use, has developed a social media strategy for the armed forces.<sup>212</sup> Most states responding to the ODIHR survey provide guidance to military personnel on their use of social media. The main variations relate to the status and scope of this guidance (see Box 6.3). Most states that regulate the use of social media by members of their armed forces do so through a combination of a Code of Conduct, specific guidance and disciplinary offences. Guidance commonly addresses the types of duty, locations and types of information or photographs to which restrictions on social media use apply. It is uncommon for bullying or harassment via social media (cyberbullying) to be specifically addressed, although several states reported that general offences prohibiting bullying would apply in such instances. Specific guidance for service personnel on cyberbullying does, however, exist in Cyprus and Switzerland.

### Box 6.3: Regulation of social media use in the armed forces of selected OSCE participating States<sup>213</sup>

Form of regulation			
No guidance <sup>214</sup>	Code of conduct	Specific guidance	Disciplinary
Azerbaijan, Bosnia and Herzegovina, Lithuania, Montenegro, Romania, Slovakia	Albania, Austria, Cyprus, the Czech Republic, Finland, Greece, Ireland, Malta, Switzerland, the United Kingdom	Austria, Cyprus, Estonia, Finland, Germany, Greece, Ireland, Italy, Latvia, Malta, Norway, Poland, Slovenia, Sweden, Switzerland, the United Kingdom	Cyprus, Germany, Greece, Ireland, Malta, Switzerland, the United Kingdom
Scope of guidance			
Types of duty	Location	Type of information/ photograph	Bullying/ harassment

the Federal Law 'On the Status of Military Personnel'" (in Russian) - <http://publication.pravo.gov.ru/Document/View/0001201903060013?index=0&rangeSize=1>

<sup>212</sup> Hellman et al., *op. cit.*, note 175.

<sup>213</sup> Responses to the ODIHR-DCAF 2018 questionnaire, qu. 15.

<sup>214</sup> In Denmark, civil disciplinary offences apply.

Scope of guidance			
Austria, Cyprus, the Czech Republic, Denmark, Finland, Germany, Greece, Ireland, Italy, Malta, Norway, Poland, Slovenia, Sweden, Switzerland, the United Kingdom	Austria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Ireland, Italy, Latvia, Norway, Poland, Slovakia, Slovenia, Sweden, Switzerland, the United Kingdom	Albania, Austria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Ireland, Italy, Latvia, Malta, Norway, Poland, Slovenia, Sweden, Switzerland, the United Kingdom	Austria, Cyprus, Latvia, Norway, Switzerland

Other variations exist. For example, the United Kingdom's approach to social media use divides topics into those that are permitted, those that are always forbidden and those where service personnel must obtain permission before communicating/posting.<sup>215</sup> The Norwegian armed forces have, likewise, issued tips and recommendations to soldiers regarding the use of social media.<sup>216</sup> The United States Army has a Social Media Handbook, with sections covering social media use, social media standards for army leaders, a checklist on operational security, guidance on establishing and maintaining a social media presence, use of social media in crisis communications, a checklist for setting up a social media presence, army branding and social media case studies.<sup>217</sup>

A number of states and their armed forces also see the opportunities and benefits that social media can offer. A 2016 study by researchers at the Swedish Defence University on social media use by Armed Forces deployed abroad found that most states perceive the use of social media as an opportunity, while the most commonly perceived risk was to the safety of service personnel on deployment.<sup>218</sup> The use of social media, such as blogs and websites, can help families share information with service personnel deployed abroad and allow for easier access to support groups. Research from the United Kingdom has advocated incorporating clear principles on social media use into basic training.<sup>219</sup>

<sup>215</sup> United Kingdom Ministry of Defence, "Using Social Media – A Guide for Military Personnel", 2012, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/34247/social\\_media\\_info\\_card.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/34247/social_media_info_card.pdf).

<sup>216</sup> Norwegian Armed Forces, "Tips til sosiale medier [Social media tips]", Norwegian armed forces website, <https://forsvaret.no/hv/tjeneste/sosialemedier>.

<sup>217</sup> United States Office of Chief of Public Affairs, U.S. Army Social Media Handbook, 2011, <http://www.dtic.mil/dtic/tr/fulltext/u2/a549468.pdf>.

<sup>218</sup> Hellman et al., *op. cit.*, note 175, pp. 51-62.

<sup>219</sup> Economic and Social Research Council, *op. cit.*, note 175.

## Whistleblowing

As mentioned above, the Committee of Ministers of the Council of Europe has recommended that member states have in place a normative, institutional and judicial framework to protect individuals who, in the context of their work, report or disclose information on threats or harm to the public interest.<sup>220</sup> Although the recommendation allows states to determine the scope of protections (especially in the areas of, among others, defence and national security), such protections should at least cover public interest disclosures by individuals working in both the public and private sectors concerning “violations of law and human rights, as well as risks to public health and safety, and to the environment”.<sup>221</sup> Clear channels should be in place for public interest reporting and disclosures. Depending on the circumstances, these should include reports within an organization or enterprise (including to persons designated to receive reports in confidence), reports to relevant public regulatory bodies, law enforcement agencies and supervisory bodies, and disclosures to the public, such as to a journalist or a member of parliament.<sup>222</sup> Whistle-blowers should be entitled to confidentiality and not have their identity revealed, and should be able to exercise their fair trial rights.<sup>223</sup> Moreover, the Council of Europe Committee of Ministers has further underscored the importance of protecting whistle-blowers from “retaliation of any form, whether directly or indirectly, by their employer and by persons working for or acting on behalf of the employer”.<sup>224</sup>

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**220** Council of Europe, “Recommendation CM/Rec(2014)7”, *op. cit.*, note 199.

**221** *Ibid.*, para.2.

**222** *Ibid.*, paras.13 and 14.

**223** *Ibid.*, para. 18.

**224** *Ibid.*, para. 21.

## Good Practices and Recommendations

- » Members of the armed forces should have the same rights to vote in elections as other citizens.
- » Where military duties prevent armed forces personnel from voting in the normal way, the armed forces should take positive measures to enable them to vote in conformity with electoral law.
- » Members of the armed forces and military personnel should be permitted to join legal political parties. Restrictions should only be imposed in the case of political parties that actively threaten the constitutional order.
- » Where restrictions are imposed on service personnel's right to hold office in political parties, engage in political campaigning or stand for election to political office, these should be prescribed in legislation, be strictly necessary and proportionate, and be applied in a non-discriminatory fashion.
- » Any restrictions on the right of service personnel to take part in peaceful assemblies should be prescribed in legislation, be strictly necessary and proportionate, and be applied in a non-discriminatory fashion.
- » Restrictions on the freedom of expression of service personnel should be based on legal authority, be clear and foreseeable, and should not go beyond what is necessary to protect national security or other protected interests listed in relevant international human rights instruments. Such restrictions should also be proportionate to these intended aims.
- » Where states impose restrictions on the private communications of armed forces members on grounds of national security, they should respect the right to private and family life and impose restrictions only to the minimum extent necessary. Where service personnel members are deployed, they should, as far as possible, be able to maintain private contacts, and reasonable means should be provided to this end.
- » Armed forces should develop clear guidance for their personnel about the use of mobile phones and social media in restricted locations or while on combat missions. This guidance should balance military effectiveness and safety with the rights of freedom of expression and respect for private and family life.
- » Guidance on the appropriate use of social media should address potential questions of cyberbullying and harassment. A clear contact person on this issue should be identified, to avoid duplications and ensure that all claims of cyberbullying and/or harassment are properly dealt with.
- » Multiple avenues for reporting illegal conduct, human rights abuse and wrongdoing should be provided, and treated as a support to the chain of command and moral leadership. Whenever possible, these would include in-person reporting in places other than military barracks, such as at offices of internal and independent oversight bodies or police stations, or using remote methods, like a toll-free number or a secure email address.

- » Clear procedures should be established for members of the armed forces to raise within the armed forces concerns about illegality, corruption, mistreatment, bullying or other human rights abuses. These should be accompanied by clear information on available external reporting channels. Service personnel who report abuses using authorized procedures should be guaranteed confidentiality and be protected by law from retaliation.
- » Information about the process that will follow such reporting of abuse or wrongdoing should be made readily available to service members, so they have a clear idea of the timeline and other actions that might need to be taken further down the road. Similarly, information about their rights, and their special protected status as complainants, should be made clear to them at the moment of the complaint at the latest, and ideally earlier.
- » In case of disciplinary action or criminal prosecution against a whistle-blower from the armed forces, the case should be tried in a civil court. As further developed in "Chapter 18: Discipline and Military Justice", the European Court of Human Rights has ruled that a right to a fair trial is incompatible with a series of circumstances, such as if the superior officer of the defendant appoints the judges to try the case, appoints the prosecuting and/or defence counsel or prepares the evidence against the accused.<sup>225</sup> Taking into account the special nature of a whistle-blower's actions, which might be seen by some in the armed forces as going against military discipline, or *esprit de corps*, it is more likely that a civil court will give them a fair trial. This is further buttressed by the nature of whistle-blower complaints, which must be to the benefit of "the general public."

## Further reading

Benjamin S. Buckland and Aidan Wills, "Whistleblowing and the Security Sector", in Nevena Ruzic and Bojana Medenica (eds.) *Protection of Whistleblowers* (Belgrade: Commissioner for Information of Public Importance and Personal Data, 2013), <https://whistleblowingnetwork.org/WIN/media/pdfs/National-security-INT-2013-Buckley-Wills-Whistleblowing-in-the-Security-Sector.pdf>.

William McDermott and Efrat Gilfrad, *Social Media Guide for Ombuds Institutions for the Armed Forces* (Geneva: DCAF, 2017), <https://www.dcaf.ch/sites/default/files/publications/documents/Social-Media-Guide-Ombuds-Institutions.pdf>.

Open Society Foundations, *Global Principles on National Security and the Right to Information (Tshwane Principles)* (New York: Open Society Foundations, 2013), [www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles](http://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles).

<sup>225</sup> European Court of Human Rights, *Findlay v. the United Kingdom*, EHRR 221, 25 February 1997; and *Grievies v. the United Kingdom*, EHRR 2, 16 December 2003 (concerning the lack of independence of a naval judge advocate). Revisions to the procedures in the United Kingdom introduced by the Armed Forces Act of 1996 have been found to satisfy Article 6 of the ECHR: *Cooper v. the United Kingdom*, EHRR 8, 16 December 2003.

## Chapter 7: Military Unions and Associations

### Introduction: Issues at Stake

The freedom of association with others is a fundamental right that is clearly recognized in major human rights treaties and includes the freedom to join professional bodies and trade unions. Some states have long-standing arrangements allowing armed forces personnel to join associations representing their interests. Several other states have granted this right in recent years. In several states, however, the unionization of military personnel has been viewed as conflicting with the unique requirements of the military in achieving its role of maintaining national security. Moreover, a distinction should be made between different models of military associations, such as professional associations, trade unions and other informal mechanisms of consultation.

There exists no internationally agreed definition of a trade union or other types of military associations. For example, the ILO's Convention on Freedom of Association and Protection of the Right to Organise (1948)<sup>226</sup> refers, instead, to "workers' organisations" aimed at "furthering and defending the interests of workers". The central question when considering military unions or associations is not what such bodies are called, but rather how to respect the rights of military personnel to freedom of association while at the same time meeting the needs and legitimate concerns of the military and the state, given the military's unique function.

In addition to the freedom to join professional bodies and trade unions, freedom of association also extends to collective action, such as public demonstrations and statements representing the group interests of service personnel. These aspects are covered in greater detail in "Chapter 5: Civil and Political Rights", while "Chapter 15: Working Conditions and Support for Veterans" discusses issues related to the working conditions of armed forces personnel. The focus of this chapter, however, is the recognition of military associations and unions for the enjoyment of the right to freedom of association.

Collective bodies can play a valuable role in representing their members' interests, including protecting their human rights. Military associations or unions may help to ensure that service personnel are aware of their rights, promote the welfare of individual members by pursuing grievances on their behalf, represent their interests at different levels and consult or negotiate on collective conditions of military service. They may also play a valuable role as intermediaries between the Ministry of Defence and armed forces personnel when issues such as restructuring the military are discussed. Box 7.1 illustrates the range of questions covered by collective consultation in selected OSCE participating States.

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**226** ILO, "Convention Concerning Freedom of Association and Protection of the Right to Organise", *op. cit.*, note 34.

**Box 7.1: Subject matter of collective consultation<sup>227</sup>**

<b>Health and safety</b>	<b>Housing</b>	<b>Other social benefits</b>	<b>Pay</b>	<b>Promotion procedures</b>	<b>Drafting of regulations</b>
Albania, Austria, Cyprus, the Czech Republic, Denmark, Finland, Ireland, Italy, Malta, Montenegro, Norway, Poland, Slovakia, Slovenia, Sweden, Switzerland, the United Kingdom	Albania, Austria, Azerbaijan, the Czech Republic, Denmark, Italy, Montenegro, Norway, Poland, Slovakia, Sweden, Switzerland, the United Kingdom	Albania, Austria, Cyprus, the Czech Republic, Finland, Germany, Ireland, Italy, Malta, <sup>228</sup> Montenegro, Norway	Albania, Cyprus, Ireland, Italy, Montenegro, Norway, Poland, Slovakia, Slovenia, Sweden, Switzerland, the United Kingdom <sup>229</sup>	Albania, Austria, Ireland, Italy, Montenegro, Sweden, Switzerland	Albania, Austria, Finland, Germany, Ireland, Italy, Montenegro, Norway, Slovenia, Switzerland

Where military associations exist, they vary in nature from country to country.<sup>230</sup> Some major variations concern the extent to which they are autonomous, their links with external professional unions or federations, and whether they are legally permitted to engage in collective action. In Germany and Sweden, for example, independent military associations exist that are financed by members' fees and employ their own advisory staff. In other states, such as Poland, funding comes from the Ministry of Defence. It is more common for associations to define themselves as bodies representing professional service personnel rather than as military unions, although this is partly a consequence of the legal culture in specific countries.

It is less common for military associations to have links with external confederations of trade unions, although this is the case in Denmark, Finland, the Netherlands and Sweden. In other states, military associations have joined umbrella associations representing professionals or public servants. In addition, many military associations or unions are members of international associations promoting the interests of armed forces personnel. The largest of these is the European Organisation of Military Associations and Trade Unions

<sup>227</sup> Responses to the ODIHR-DCAF 2018 questionnaire, qu. 18.

<sup>228</sup> Includes the working conditions and environment of personnel.

<sup>229</sup> Consultations also take place on pensions.

<sup>230</sup> See: "Do soldiers have staff associations and trade unions?", EUROMIL, <http://euromil.org/who-we-are>.



(EUROMIL), which in May 2020 comprised 32 associations (both professional associations and trade unions) from 22 countries.<sup>231</sup>

Many states limit the freedom of association of public servants, including armed forces personnel. This difference in treatment compared to workers in other sectors is often justified by the public interest in ensuring that essential public services are not disrupted. It can be argued that service personnel are not workers in a conventional sense in that, when enlisting, they subject themselves to restrictions under a system of military discipline that is far more extensive than the usual control of an employer over an employee. Nevertheless, it is notable that some legal bodies have treated members of the armed services as “workers”.<sup>232</sup> Most OSCE participating States prohibit collective action, primarily strikes, by armed forces members.

Membership of armed forces personnel in trade unions or other collective representative bodies raises two distinct concerns – discipline and outside influence. The first concern is the question of military discipline and possible interference with the *esprit de corps* and operational effectiveness. The raising of collective grievances on the part of service personnel has traditionally been seen as equivalent to insubordination, or even the serious military offence of mutiny, due to the perceived impact on the established chain of command. Moreover, collective action could disrupt vital operations in a way that threatens national security. Whether such concerns should impact the ability to discuss and represent issues around conditions of service is clearly open to debate. Associations that focus on working conditions and the socio-professional aspects of military life, as opposed to operational and strategic processes and decisions, have had no discernible impact on operational effectiveness in Austria, Belgium, Denmark, Finland, Germany, Ireland, the Netherlands and Sweden.<sup>233</sup>

The second concern is related to allegiance and outside influence. In terms of allegiance, members of a union may act collectively on the instruction of union officials, including in taking collective action. This is seen by some as providing a rival source of authority and allegiance to the chain of command, and detrimental to military effectiveness. The objection is all the greater if the union in question is a civilian one or, as in some countries, the trade union movement is historically associated with a particular political party or doctrine, leading to concerns over political neutrality (see “Chapter 5: Civil and Political Rights”). In order to address these concerns in countries where they are permitted, military associations

**231** EUROMIL was founded in 1972 and represents approximately 500,000 soldiers and their families. It has consultative status at the UN Economic and Social Council (ECOSOC) and participatory status at the Council of Europe. See: EUROMIL homepage, <http://euromil.org/>.

**232** In 1999, South Africa’s Constitutional Court found that members of the South African Defence Force were entitled to a constitutional right for “workers” to be members of a trade union, to participate in its activities and to strike.

**233** See: Giuseppe Caforio, “Unionization of the Military: Representation of the Interests of Military Personnel”, in Giuseppe Caforio (ed.), *Handbook of the Sociology of the Military* (New York: Kluwer Academic/Plenum Publishers, 2003), pp. 311-322.

and unions commonly work under two constraints. The first is that they may be limited to members of the armed forces, in order to counter the concern of outside influence, and will not be linked to other trade unions. Second, legal barriers may be imposed that forbid strikes or other forms of collective action that could disrupt operations or threaten security.

Treating armed forces personnel as “citizens in uniform” recognizes that the military is drawn from, and is reflective of, its citizenry and society. One element of service personnel’s role as citizens is their use of technologies, including mobile phones and social media (discussed in detail in “Chapter 6: Freedom of Expression”). These technologies present multiple avenues for expressing discontent at conditions of service, posing potential risks to the military’s reputation, recruitment, discipline and even operational effectiveness. In such communication and information-rich environments, trade unions and associations establish a process for dialogue on the terms and conditions of service that is independent of the chain of command. In doing so, they provide an effective and human rights-compatible approach to adapting to these changing realities and mitigating the inherent risks involved.

Moreover, the increasing professionalization of armed forces means that the military needs to compete effectively in the labour market in order to attract and retain high-quality personnel. Any conditions of service that make the armed forces less attractive as a career path will be scrutinized by potential candidates and communicated widely. It is, therefore, desirable for the armed forces to reappraise whether restrictions on freedom of association remain strictly necessary, and how ensuring their personnel’s enjoyment of this right can meet the evolving needs of a modern military.

## International Human Rights Standards

The freedom to associate with others is a fundamental right that is clearly recognized in the UDHR and the major human rights treaties, including the ICCPR, ICESCR, ECHR and ESC (see Box 7.2). This right extends to the freedom to join trade unions.<sup>234</sup> Key conventions of the ILO protect the right to freedom of association, the right to organize<sup>235</sup> and the right to collective bargaining.<sup>236</sup>

### Box 7.2: Freedom of association in human rights law

UDHR, Article 20	(1) Everyone has the right to freedom of peaceful assembly and association.  (2) No one may be compelled to belong to an association.
ICCPR, Article 22	1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.  2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order ( <i>ordre public</i> ), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.  3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.
ECHR, Article 11	1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.  2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

<sup>234</sup> For an updated list of the most important human rights commitments referring to military associations, please visit: "International Standards", EUROMIL, <http://euromil.org/international-standards>.

<sup>235</sup> ILO Convention No. 87, *op. cit.*, note 34.

<sup>236</sup> ILO Convention No. 98, *op. cit.*, note 33; and *Convention concerning the Promotion of Collective Bargaining* (No. 154), adopted on 3 June 1981 (entered into force on 11 August 1983).

# ICESCR, Article 8

1. The States Parties to the present Covenant undertake to ensure:
  - c). The right of everyone **to form trade unions and join the trade union of his choice**, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
  - d). The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
  - e). The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
  - f). The **right to strike**, provided that it is exercised in conformity with the laws of the particular country.
2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

# ESC, Article 5

With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organizations for the protection of their economic and social interests and to join those organizations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. [...] The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.

# ESC, Article 6

With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:

1. to promote joint consultation between workers and employers;
2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements;
3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise: the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

ILO C087, Article 2	Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorisation.
ILO C087, Article 9	<ol style="list-style-type: none"> <li>1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.</li> <li>2. In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.</li> </ol>
ILO C098, Article 2	<ol style="list-style-type: none"> <li>1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.</li> <li>2. Such protection shall apply more particularly in respect of acts calculated to— <ol style="list-style-type: none"> <li>a). make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;</li> <li>b). cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.</li> </ol> </li> </ol>
ILO C098, Article 5	<ol style="list-style-type: none"> <li>1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.</li> <li>2. In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.</li> </ol>
ILO C154, Article 1	<ol style="list-style-type: none"> <li>2. The extent to which the guarantees provided for in this Convention apply to the armed forces and the police may be determined by national laws or regulations or national practice. [...]</li> </ol>

# ILO C154, Article 5

1. Measures adapted to national conditions shall be taken to promote collective bargaining.
2. The aims of the measures referred to in paragraph 1 of this Article shall be the following:
  - a). (a) collective bargaining should be made possible for all employers and all groups of workers in the branches of activity covered by this Convention;
  - b). (b) collective bargaining should be progressively extended to all matters covered by subparagraphs (a), (b) and (c) of Article 2 of this Convention;
  - I the establishment of rules of procedure agreed between employers' and workers' organizations should be encouraged;
  - c). (d) collective bargaining should not be hampered by the absence of rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules;
  - d). (e) bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining.

In addition to these, Article 12 of the European Union Charter of Fundamental Rights provides that everyone has the right to freedom of association at all levels, in particular in political, trade union and civic matters.<sup>237</sup> This implies the right of everyone to form and join trade unions for the protection of their interests. The Charter is notable because the right is not qualified in the case of members of the armed services.

In Madrid in 1983, OSCE participating States recognized the right of workers to “establish and join trade unions”, within the laws of the respective state.<sup>238</sup> At the Copenhagen Conference in 1990, participating States added the right of individuals to form political parties and political organizations,<sup>239</sup> along with the corollary right to peaceful assembly and demonstration.<sup>240</sup> Any restrictions of these rights need to be prescribed by law.<sup>241</sup> The Copenhagen Conference also recognized the right of trade unions to determine their membership.<sup>242</sup> In Helsinki in 2008, the OSCE affirmed that “[e]veryone has the right [...] to freedom of association”.

Alongside these rights are the more general provisions related to freedom of expression, respect for others and minority cultural differences.<sup>243</sup> Although none of these refer specifically to unions in the armed forces, the OSCE Code of Conduct on Politico-Military Aspects of Security commits OSCE participating States to ensure that service personnel are able to enjoy and exercise their human

**237** The Charter binds both the EU and EU member states when implementing EU law.

**238** OSCE, Madrid 1983, *op cit.*, note 139.

**239** OSCE, Copenhagen 1990, *op. cit.*, note 141, para. 7.6.

**240** Also recognized at the Paris Conference of 1990 (A New Era of Democracy, Peace and Unity).

**241** OSCE, Copenhagen 1990, *op. cit.*, note 141, para. 9.2.

**242** *Ibid.*, para. 9.3.

**243** *Ibid.*, para. 9 et seq.

rights and fundamental freedoms (see “Chapter 2: OSCE Commitments”).<sup>244</sup> More specifically, the 2015 ODIHR/Venice Commission *Guidelines on Freedom of Association* reiterate relevant international case law on the matter, and note that the association of military personnel in trade unions should be viewed positively, as this permits them to protect their own labour rights.<sup>245</sup>

A number of ILO conventions recognize union rights, including Convention No. 87 on the Freedom of Association and Protection of the Right to Organise (C087), Convention No. 98 concerning the Right to Organise and Collective Bargaining (C098) and Convention No. 154 on Collective Bargaining (C154). These conventions establish important rights for workers, including the rights to establish and, subject to the rules of the organization concerned, to join organizations of their own choosing without previous authorization (C087, Article 2); to trade-union autonomy, free from interference by public authorities (C087, Article 3); and to establish and join federations of trade unions (C087, Article 5). Convention No. 154 encourages states to provide and promote the use of voluntary negotiations between employers or employers’ organizations and workers’ organizations, with a view to regulating the terms and conditions of employment by means of collective agreements.

Although these conventions are expressed in terms that apply to all workers and all sectors,<sup>246</sup> all three contain important provisos for members of the armed forces (see Box 7.2), namely that national laws and regulations determine the extent to which the guarantees provided in the conventions apply to the armed forces.

In considering complaints to the ILO’s Freedom of Association Committee about whether such restrictions are appropriate, the Committee has found that provisions dealing with exceptions should be interpreted restrictively (and should not apply, for example, to civilians working for the armed forces in manufacturing establishments or in a country’s army bank).<sup>247</sup> The committee has stated that, in case of doubt, workers should be treated as civilians.<sup>248</sup>

The ECHR and ICCPR take an equally restrictive approach (see Box 7.2). It is clear, however, from the jurisprudence of the European Court of Human Rights, that the concept of a “lawful restriction” under Article 11(2) does not mean that all domestic laws restricting rights will necessarily be compatible with the Convention. The Convention organs employ a qualitative test – a legal restriction must be foreseeable in its effect and there must be an absence of arbitrariness (see also “Chapter 4: National Protections for the Human Rights of Armed Forces Personnel”).<sup>249</sup>

<sup>244</sup> OSCE *Code of Conduct on Politico-Military Aspects of Security*, *op. cit.*, note 1, para. 32.

<sup>245</sup> See: *Guidelines on Freedom of Association* (Warsaw: ODIHR/Council of Europe Venice Commission, 2015), para. 146. <https://www.osce.org/odihr/132371>.

<sup>246</sup> For example, Article 1 of the Collective Bargaining Convention, 1981 states that “1. This Convention applies to all branches of economic activity.”

<sup>247</sup> ILO Freedom of Association Committee, 238th Report, Case No. 1279, para. 140.a, and 284th Report, Case Nos. 1588 and 1595, para. 737.a.

<sup>248</sup> ILO Freedom of Association Committee, 295th Report, Case No. 1771, para. 499.

<sup>249</sup> European Commission of Human Rights, *Council of Civil Service Unions and Others v. United Kingdom*, 20 January 1987, *Decisions and Reports*, Vol. 50, 1987, p. 228.

Moreover, as already outlined in “Chapter 5: Civil and Political Rights”, the *exercise* of the right may be restricted, but may not be entirely denied to members of the armed forces.<sup>250</sup> Thus, the Court’s jurisprudence indicates that the armed forces are not allowed to absolutely prohibit their personnel from joining a group that was formed to protect their occupational and non-pecuniary interests. An absolute ban applicable in France was found to constitute an undue restriction on the freedom of association in a challenge brought by two associations (see Box 7.3).<sup>251</sup> Following these rulings, and on the recommendation of the Conseil D’État, amendments to the Defence Code were introduced in 2015 permitting members of the Armed Forces to create and join professional military associations.<sup>252</sup>

### **Box 7.3: Freedom of association in the European Court of Human Rights<sup>253</sup>**

Jean-Hugues Matelly, an officer in the gendarmerie (part of the French Armed Forces), who was employed as an accountant, was a founding member and vice-president of *Forum Gendarmes et Citoyens*, an association formed to provide a legal framework for an Internet forum enabling gendarmes and citizens to express themselves and exchange views. Other serving gendarmes were involved in the association as members, and some sat on its administrative board. The association’s objectives included “defending the pecuniary and non-pecuniary situation of gendarmes”. Soon after the association’s launch, Matelly and the other serving gendarmes who were members of the association were ordered to resign from it immediately, on the basis that the association resembled a trade union occupational group, prohibited under the Defence Code. The applicant resigned from the association and the offending objective was removed from the association’s constitution. The Conseil d’État, nonetheless, dismissed an application for judicial review of the order to resign.

The European Court of Human Rights held that, although significant restrictions on the freedom of a professional association were permitted, these could not entirely deprive the association’s members of their rights under Article 11 of the Convention. The Court noted that, although the French State had put in place special bodies and procedures to take into account the concerns of military personnel,<sup>254</sup> these measures could not substitute freedom of association rights for military personnel, which includes the right to form and join trade unions.

**250** See: European Court for Human Rights, *Matelly v. France*, *op. cit.*, note 2, paras. 57-58; and *ADEFDROMIL v. France*, *op. cit.*, note 143.

**251** *Ibid.*

**252** “Contact with New French Professional Military Associations”, EUROMIL, <http://euromil.org/contact-with-new-french-professional-military-associations/>.

**253** European Court for Human Rights, *Matelly v. France*, *op. cit.*, note 2; and *ADEFDROMIL v. France*, *op. cit.*, note 143.

**254** *Ibid.*, paras. 53-54.



The government had argued that the prohibition under the Defence Code on membership of occupation groups was necessary to preserve the order and discipline of the Armed Forces. The Court found, however, that this was not sufficient to justify an absolute prohibition on joining a professional association founded for the purpose of defending the members' professional and moral interests.

The Court reiterated that the right to form and join a trade union was one of the essential elements of freedom of association. It held that:

"[L]awful restrictions [...] must be construed strictly and confined to the exercise of the right in question [and] must not impair the very essence of the right to organise; a mere suppression of the right to organise was not a "measure necessary in a democratic society."<sup>255</sup>

The prohibition affected the essence of the freedom guaranteed under Article 11 of the Convention, rather than its exercise and, consequently, violated the Convention.

The Court reached the same conclusion in a separate judgment adopted on the same day, *ADEFDROMIL v. France*, which concerned another professional association for members of the Armed Forces, the *Association de Défense des Droits des Militaires*. In this case, the Ministry of Defence had issued a note prohibiting existing and potential members from continuing their membership or joining ADEFDROMIL.

The approach of the European Court of Human Rights has also influenced the interpretation of the right of association under the ESC by the European Committee of Social Rights.<sup>256</sup> National constitutional courts have also tended to favour proportionate, rather than total restrictions. In 2000, Poland's Constitutional Court ruled that a ban on membership of trade unions in the military was constitutional, provided that there were alternative means of exercising the right to freedom of association.<sup>257</sup> In Spain, the Constitutional Court ruled in 2000 that members of the Armed Forces had a constitutional right to participate in bodies representing their social and economic interests, provided that these bodies did not intend to engage in collective action.<sup>258</sup>

<sup>255</sup> *Ibid*, paras. 60-61.

<sup>256</sup> European Committee of Social Rights, *European Organisation of Military Associations and Trade Unions (EU-ROMIL) v. Ireland*, Complaint 112/2014 ESC, decision of 12 February 2018. See also Box 7.6.

<sup>257</sup> Polish Constitutional Court, Judgment K 26/28 of 7 March 2000.

<sup>258</sup> Nolte, *op. cit.*, note 8, p. 84. A challenge to the Italian legislation was heard by the Corte Costituzionale in April 2018, and a judgment is pending. See: "Soon Trade Unionism in the Italian Military?", EUROMIL, <http://euromil.org/soon-trade-unionism-italian-military/>.

## Different Approaches

Among OSCE participating States, approaches to recognizing freedom of association vary from those that prohibit professional associations entirely, those that have officially sponsored non-autonomous associations, to those that allow independent military associations or unions that are usually, though not always, subject to a restriction on taking strike action. Of these arrangements, the most prevalent would seem to be a legal right to join a trade union or a professional association.<sup>259</sup> A significant minority of states, however, prohibit or do not recognize any form of collective representation for armed forces personnel.<sup>260</sup>

### Box 7.4: Are armed forces personnel permitted to join bodies representing their collective interests?<sup>261</sup>

Yes	No
Albania, Austria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Ireland, Italy, Latvia, Malta, Montenegro, Norway, Poland, Romania, Slovenia, Sweden, Switzerland, the United Kingdom	Azerbaijan, Bosnia and Herzegovina, Lithuania, Romania, Slovakia

### Box 7.5: Types of bodies that armed forces personnel are permitted to join<sup>262</sup>

General trade unions	Austria, Finland, Germany, Malta, Norway, Slovenia, Sweden
Specific sector trade unions	Austria, Finland, Norway, Slovenia, Sweden, Switzerland
Military associations	Albania, Austria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Greece, Ireland, Montenegro, Norway, Poland, Slovenia, Sweden, Switzerland, the United Kingdom

**259** This is confirmed by the findings of the Council of Europe in 2013, that (of 33 states responding) 21 allowed trade union membership, and that a majority of the remainder allowed the right to join an association: Council of Europe Steering Committee for Human Rights, "Draft Report on the Committee of Ministers Recommendation CM/Rec (2010) 4 on the Human Rights of Members of Armed Forces", 27 February 2013, CDDH (2013) 003, para. 43

**260** A Council of Europe survey at the time of the *Matelly* and *ADEFDROMIL* decisions found that 19 member states either did not recognize or denied collective association

**261** Responses to the ODIHR-DCAF 2018 questionnaire, qu. 16. The questionnaire responses provided various interpretations of the term "trade union" and often used "trade union" and "association" interchangeably. Boxes 7.4 and 7.5 apply the terminology used by participating States in their responses.

**262** Responses to the ODIHR-DCAF 2018 questionnaire, qu. 17. Some states permit service personnel to join more than one type of body.

Other	Romania – professional, technical and cultural associations
	Malta – affiliation with a registered trade union
	Latvia – elected non-commissioned officers’ (NCO) councils
	Italy – representative bodies within a military organization; collective representation subject to legislative, regulatory provisions and conditions
	Germany – collective interests provided for by the Military Personnel Representation Act
	Albania – non-governmental organizations and associations for retired personnel established through legislation

In countries that do not permit members of the armed forces to join professional associations, the focus is on the chain of command as the traditional mechanism for ensuring the welfare (such as food, housing and healthcare) of those service personnel. This approach places responsibility on the military hierarchy for the welfare of subordinates, which is seen as an intrinsic part of good leadership, resulting in operational effectiveness. Hence, the rights of individual members of the armed forces to associate are restricted, and military associations or collective action are prohibited. The corollary perspective of this approach is an understanding that freedom of association primarily aims to ensure that welfare needs are met, and conditions of service are acceptable. In this view, once these conditions are met or an alternate means to meet these needs is established, then the right to association becomes redundant. Such an understanding counters the established view that the right to association cannot be absolutely prohibited and that any legal restrictions must be foreseeable in their effect and may not be arbitrary.

Furthermore, this approach treats the welfare of armed forces personnel as a prerequisite of operational effectiveness. Grievances of individual members of the armed forces are referred through the chain of command, and no mechanism is provided for collective grievances. Restrictions on association may also be balanced (as in Canada) by strong legal rights for service personnel to raise individual complaints with an independent military ombuds institution or with external human rights bodies (see “Chapter 19: Ombuds Institutions for the Armed Forces”). However, in other countries, notably Germany, such systems exist alongside military associations.

**Box 7.6: Military unions and associations in the United Kingdom<sup>263</sup>**

In the United Kingdom, service personnel are permitted to join military associations representing their collective interests. The state does not recognize any such association, in order not to “advantage or disadvantage any association”.

The United Kingdom’s Ministry of Defence has established the Armed Forces Continuous Attitude Survey (AFCAS) and the Reserves Continuous Attitude Survey (ResCAS) to gather information on the views and experiences of regular and reserve Armed Forces personnel. The information from these surveys helps shape and evaluate policies for training, support and the terms and conditions of service. For more information on AFCAS, see Box 19.8 in Chapter 19.

The Armed Forces Pay Review Body (AFPRB) is an independent body charged with providing annual recommendations to the Prime Minister and Secretary of State for Defence on pay for Armed Forces’ personnel. It visits a wide range of military establishments in the United Kingdom and overseas each year, during which it holds meetings with groups of service personnel of all ranks and their spouses/partners, to inform its understanding of key issues affecting service personnel and defence. A separate body, the Senior Salaries Pay Review Body, fulfils a similar role that includes making recommendations on the pay of senior military officers.

The chain-of-command approach has the disadvantage, however, of merging the distinct interests of the military as a whole and of individual members. Separate treatment and representation of these viewpoints may make for clearer and more structured decision-making. Moreover, the absence of direct representation of the interests of service personnel may lead to their indirect representation, including by groups representing veterans, retired members of the services or the families of active service personnel. In some states, these groups are little more than an unofficial method of representing the interests of serving members of the armed forces, and have a large (undeclared) membership. Alternatively, cultural groups that service personnel are permitted to participate in may assume the role prohibited to military associations. Vicarious or indirect representation of these kinds may, to some extent, fill the vacuum of direct representation, but they do so as a second-best option.

The second approach is to provide non-autonomous arrangements. Here, the state provides the legal machinery for representing the interests of armed forces personnel, such as in bargaining over pay or negotiating changes to conditions of service. These arrangements may be formalized by a legal requirement that they be used before making any changes to service conditions or pay, for example. Such an arrangement existed in France, where the General Statute of the Military of 2005 prohibited members of the Armed Forces from joining professional associations. Instead, the Higher Military Council (*Conseil Supérieur de la*

<sup>263</sup> United Kingdom response to the ODIHR-DCAF 2018 questionnaire, qus. 16 and 17.

*Fonction Militaire*, or CSFM) provided for participation in discussions concerning conditions of service.<sup>264</sup> However, the General Statute of the Military was changed in July 2015, based on the judgments of the European Court of Human Rights (*Matelly v. France* and *ADEFDROMIL v. France*, see Box 7.3), so that French military personnel are now allowed to join national military professional associations that can have a seat in the CSFM, under certain conditions.

Created in 1990, the CSFM advises on questions related to the conditions of service and must be consulted if legislation or regulations related to these conditions are proposed. The CSFM may deal with various topics, including career development, transition to civilian life, welfare in the Armed Forces, pension reform, housing and the conditions of international operations. An item may be put on the CSFM's agenda by a majority of the members. Seven councils (known as CFM) have been created to represent the army, the air force, the navy, the military constabulary, the medical corps, the procurement agency and the energy agency, respectively. The members of the CSFM are elected for four-year terms by and from among the members of the seven CFM. The councils have two functions – to study any question related to the conditions of service or the organization of work in the forces, and to represent the viewpoint of forces personnel on the topics submitted to the CSFM. A similar approach is followed in Italy.<sup>265</sup>

As the name suggests, non-autonomous arrangements may be perceived as having less credibility or legitimacy in representing the interests of armed forces members, as they are not created by the members themselves but are imposed from above by the government. While it may be easier for the armed forces to consult with such bodies, the absence of democratic accountability to those whose interests they represent can also undermine their authority to speak on behalf of members of the armed forces.

The third approach is for there to be an authorized but autonomous military association (professional association or trade union). This approach provides no legal restrictions on service personnel joining military associations. Some associations of this kind are long-standing, such as those in Belgium, the Netherlands (the first such association was formed in the late 19<sup>th</sup> century) and Sweden. In other states, such as Bulgaria, Hungary, Poland and Romania, such associations have come about due to recent legal or constitutional changes.

**264** See: "Conseil Supérieur de la Fonction Militaire [Higher Military Council]", the Ministry of the Armed Forces of France, <http://www.defense.gouv.fr/csfm>.

**265** Code of Military Order of Italy (Law n.210/66), Art. 1475: Italian response to ODIHR-DCAF 2018 questionnaire. See also: V. S. Nesterov and A. D. Pruefert, *Military Unionism: The Establishment of Professional Organisations/Trade Unions of Servicemen and their Present Position* (Moscow: Ves Mir, 2006), pp. 119-121.

### Box 7.7: A summary of the three approaches to military associations and unions

Chain-of-command approach	The rights of individual members of the armed forces to associate are restricted, and military associations and/or collective action are prohibited.
Non-autonomous arrangements	The state provides the legal machinery for representing the interests of armed forces members.
Authorized but autonomous military associations	Members of the armed forces are not legally restricted from joining military associations.

### Box 7.8: Military associations in selected participating States<sup>266</sup>

#### Swedish Association of Military Officers (SAMO)

- Founded in 1995, following the merger of two older unions.
- It has around 9,500 officers of all ranks, from second lieutenants to generals/ admirals.
- SAMO is a member of the Swedish Confederation of Professional Associations.
- It operates through the Public Employees' Negotiation Council, which negotiates for employees' unions working in the service of the government, county councils or local authorities.
- SAMO has concluded a series of agreements with the Armed Forces on matters concerning working time, travel and lodging regulations, the employment of officers in the reserve, employment of other categories of military personnel, and on international service.
- Although it is not legally prohibited from calling a strike, SAMO has agreed, through a collective agreement of limited duration, not to use strike action.

#### Poland

- Ministry of Defence decisions allow for meetings of officers at all levels and for the election of commissioners to act as advocates in the interests of Armed Forces personnel (decisions nos. 81 and 82 of 22 August 1994).
- In 2000, the Constitutional Tribunal ruled that a ban on membership in trade unions for the military was constitutional, provided that there were alternative means of exercising the right to freedom of association (decision of 7 March 2000).
- Article 10, Section 3.4 of the Act on Military Service of Professional Soldiers (11 September 2003) allowed professional soldiers to form representative bodies in line with regulations issued by the Ministry of Defence, and established a consultative council of senior officers.

<sup>266</sup> Information taken from the EUROMIL website, <http://euromil.org/>.

## Germany

- The German Armed Forces Association (Deutscher Bundeswehr Verband, or DBwV) was created together with the German Armed Forces (Bundeswehr) in the 1950s.
- Although military personnel in Germany have the right to join a trade union, the DBwV is a professional association. As such, it does not negotiate collective agreements but, rather, engages in direct advocacy with members of the German Parliament for issues of common concern to military personnel.
- The association currently has about 200,000 members and has its headquarters in Berlin.

## Bulgaria

- The Bulgarian Armed Forces Women Association (BUAFWA) was founded in 2006 as an independent association of women serving in the armed forces. The Association's primary focus is on the implementation of Bulgaria's commitments under UNSCR 1325.
- As the association quickly grew and became more successful and influential, servicemen began to join the union, and within ten years comprised almost 20 per cent of its members.
- The association is financed by membership fees only and is dependent on the voluntary work of its members.

These military associations enjoy autonomy and are accountable to their members, meaning that they are able to speak with authority on their behalf. They may be recognized by the ministry of defence for negotiating purposes, and some (for example, in Germany) have very high rates of participation among eligible service members. In practice, they may be insulated from mainstream trade unionism, for example, by not participating in federations of unions. There are a few examples of associations that represent the interests of women in the armed forces, such as in Bulgaria (see Box 7.8). Where these exist, they have the potential to create an inclusive environment and provide support to women in the armed forces.<sup>267</sup>

Notwithstanding freedom of association, members of the armed forces may be legally prohibited from engaging in certain forms of collective action, especially strikes. It should be mentioned, however, that even where a military association itself is prohibited from or voluntarily forswears collective action, this may not prevent secondary collective action by another union in support of the association's cause, where such action is legal.

Finally, in several countries (including Austria, Denmark, Finland, Germany, Malta, Montenegro, Norway and Sweden), existing trade unions for members of the armed forces

<sup>267</sup> Ruth Montgomery, *Female Staff Associations in the Security Sector: Agents of Change?* (Geneva: DCAF, 2011), [https://wiisglobal.org/wp-content/uploads/2016/05/Female-Staff-Associations-Paper\\_2011.pdf](https://wiisglobal.org/wp-content/uploads/2016/05/Female-Staff-Associations-Paper_2011.pdf).

may be associated with other trade unions through a federation. Despite the apparent risks of external influence and industrial militancy, the experience of such arrangements in the Netherlands has been one of self-restraint. Strike action, for example, has never been taken. Moreover, the potential advantages of such a collaboration should be considered.

The human rights compatibility of some of these arrangements is now in doubt, following a significant ruling in 2018 by the Council of Europe's European Committee of Social Rights. The case was brought to the Committee by EUROMIL, which alleged that Ireland was in violation of Articles 5 and 6 of the Revised European Social Charter, on the grounds that the defence force representative associations did not possess proper trade union rights. The Committee concluded that Article 5 and Article 6(2) of the ESC had been violated but that there was no violation of Article 6(4) of the Charter. The decision is discussed in detail in Box 7.9.

### **Box 7.9: Military associations and the European Social Charter<sup>268</sup>**

Ireland's defence legislation had established two associations to represent officers, among other ranks, and perform limited consultation and conciliation roles. The associations were independent but could not associate with or be affiliated to any trade union or any other body without the consent of the Minister of Defence. They were not permitted to "sponsor or resort to any form of public agitation as a means of furthering claims or for any other purpose". Individual members of the Defence Force were prevented from joining trade unions and from engaging in strike action.

One of the associations, the Permanent Defence Forces Other Ranks Representative Association (PDFORRA), sought the consent of the Minister of Defence to become affiliated to the Irish Congress of Trade Unions (ICTU) but was refused. This prevented PDFORRA from attending the national negotiations that ICTU conducts on salaries in the public service sector.

As a non-governmental organization entitled to submit complaints to the European Committee of Social Rights, EUROMIL was able to lodge a complaint against Ireland, in support of PDFORRA (a EUROMIL member organization).

#### **Inability to affiliate to trade union associations**

The Committee found that, while Article 5 allows states to impose restrictions on the right of service personnel to organize, and granted a wide margin of appreciation, these restrictions could not go so far as to entirely suppress the right to organize, such as by instituting a blanket prohibition of trade unions and of professional associations' affiliation to national federations/confederations. The Committee rejected the Irish government's contention that the total prohibition was necessary and found that a complete ban on affiliation was neither necessary nor proportionate (see paragraphs 55-56).

<sup>268</sup> European Committee of Social Rights, *op. cit.*, note 256; and "The European Social Charter", The Council of Europe, <https://www.coe.int/en/web/european-social-charter>.



### **Exclusion from national collective bargaining**

In view of the essential role of pay bargaining for the purposes of Article 6, the Committee found that the exclusion of the military associations from direct participation in national public sector pay negotiations failed to ensure sufficient access of military representative associations to pay agreement discussions, thus violating Article 6(2) (paragraph 97).

### **Prohibition on strikes**

The Committee's judgment considered the specific nature of the tasks carried out by armed forces personnel, the special circumstances of military discipline under which they operate and the potential for collective action to disrupt operations in a way that threatens national security. In view of this, the Committee found that the absolute prohibition on the right to strike was justified, and that it was proportionate to the legitimate aim pursued and necessary in a democratic society (paragraph 117).

The European Committee of Social Rights' decision may impact other OSCE participating States that are members of the Council of Europe. Where military associations are wholly prevented from affiliating with national or international representative bodies, this may also be found to violate the European Social Charter, as in the case of *CGIL v. Italy*. In 2019, the European Committee of Social Rights issued another crucial decision, on the complaint of the Italian General Confederation of Labour (CGIL), where it found that Italy violated the Social Charter as regards the rights of members of the financial guards, which has military status, to establish and join trade unions (Article 5), to negotiate collective agreements (Article 6(2)) and to strike (Article 6(4)).<sup>269</sup> The implications of these cases should, therefore, be studied by other states. Overall, the Committee's decisions confirm the general rule that restrictions on collective representation for service personnel must always be tested against considerations of necessity and proportionality.

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<sup>269</sup> European Committee of Social Rights, *CGIL v. Italy*, complaint 140/2016, decision of 7 June 2019.

## Good Practices and Recommendations

Many OSCE participating States allow for the existence of military associations, either formally or informally. Given that the right to associate is protected by key international human rights instruments and has been upheld by relevant case law, it is essential that service personnel are permitted to organize themselves as a means to exchange information, know their rights and seek to promote these rights collectively. This also includes the right to be affiliated with national or international representative bodies.

The following recommendations may help ensure greater compliance with the right to freedom of association:

- » States should permit all members of the armed forces to join either a professional association or a trade union representing their interests.
- » Special attention should be given to representing the interests of different under-represented groups, such as ethnic and religious minorities and women serving in the armed forces, irrespective of whether or not any they are enrolled in a military association.
- » Military associations should be allowed to join national and international umbrella organizations.
- » States should organize a well-regulated social dialogue via which representative associations are consulted on issues concerning the conditions of service.
- » Armed forces personnel should be free to participate in the activities of professional associations or trade unions without being subject to disciplinary action, victimization or discrimination.
- » Where restrictions are imposed on collective action by members of the armed forces, they should be prescribed by law, non-discriminatory, proportionate to legitimate state interests and recognized in human rights treaties.

## Further reading

European Court of Human Rights, "Factsheet on Trade Union Rights", 2016, [https://www.echr.coe.int/Documents/FS\\_Trade\\_union\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Trade_union_ENG.pdf).

ILO, *Decisions of the Committee on Freedom of Association*, 6th edition (Geneva: ILO, 2018), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_632659.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_632659.pdf).

ODIHR, *Guidelines on Freedom of Association* (Warsaw: ODIHR, 2015), <https://www.osce.org/odihr/132371?download=true>.

## Chapter 8: Conscientious Objection to Military Service

### Introduction: Issues at Stake

This chapter provides an overview of the legislation, policies and good practices that various countries have adopted in dealing with conscription and the right to conscientious objection. OSCE participating States have taken a variety of approaches to this issue with some having a fully established legal right of conscientious objection without penalties, while others still treat conscientious objectors harshly. In a minority of OSCE participating States, the right is not recognized at all.

Conscientious objection is an issue that arises mainly (but not exclusively) in states that conscript persons to the armed forces. After outlining the general issues that are raised by conscientious objection, this chapter discusses the growing recognition by international bodies of the right to conscientious objection, especially by the UN and the Council of Europe, as well as the relevant constitutional provisions of individual states. The remaining sections examine how different states recognize a variety of bases for conscientious objection, the availability of alternative service and the recognition of selective conscientious objection.

Many people have religious, philosophical or ethical objections to the use of violence or the deliberate taking of life. Historically, these beliefs have been associated with religious groups, such as the Quakers (Society of Friends) or Jehovah's Witnesses, but by no means exclusive to such groups. Within a democracy, people with pacifist or non-violent convictions are free to hold and propagate these views and to argue that state policy should adhere to them, such as by pursuing peaceful diplomacy rather than armed intervention. Moreover, the freedom to do so is recognized by protections for freedom of thought, belief and conscience found within international human rights treaties (these are discussed at greater length in "Chapter 9: Religion in the Armed Forces").

The question of conscientious objection is a narrower and personal one – it involves a person's freedom to act upon their beliefs by refusing to join the armed forces or take part in military action. Naturally, where the armed forces of a state are made up entirely of volunteers, a person with conscientious objections can satisfy their conscience by not enlisting. In 2008, the Quaker Council for European Affairs noted that conscription had been suspended in 15 European countries in the previous decade, but remained in force in 22 European states.<sup>270</sup> Since then, the trend among OSCE participating States has been more mixed. Germany suspended conscription in 2011, and in Lithuania, Norway and Sweden selective conscription

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<sup>270</sup> Quaker Council for European Affairs, *The Right to Conscientious Objection in Europe: A Review of the Current Situation* (Brussels: revised 2008), p. 3.

(including of women in the Norwegian and Swedish cases) has been reintroduced.<sup>271</sup>

The issue of conscientious objection is not exclusive to states with conscripted armed forces. A conscientious objection may arise at any point during the careers of armed forces personnel and, as such, may also occur in a state with no draft system. This could include, for example, situations where a serviceperson's religious or other beliefs change. The right to change one's beliefs is an important component of the freedom of thought, religion and belief. In addition, a person who does not have a general objection to the use of violence or the taking of life may, nevertheless, have a conscientious objection to a particular military campaign that they regard, for example, as immoral or contrary to international law. This is sometimes referred to as "selective conscientious objection" and is discussed later in this chapter.

All of these situations raise common concerns. On the one hand, effective protection is needed so that people are not compelled to act against their convictions. On the other, authorities have to be satisfied that the conscientious objection is genuine and not an attempt to evade legal responsibilities. The question of assessing the authenticity of beliefs is by no means unique to conscientious objection, nor is it unresolvable. It arises in many other contexts in which the law recognizes the freedom to act upon different beliefs.<sup>272</sup> A state may either take a claim of conscientious objection at face value (particularly where there is little or no other advantage in making insincere claims) or, as many states do, it may establish a formal process for testing the sincerity of an individual's professed beliefs through an inquiry by some type of panel.

Where states recognize conscientious objection to conscription, they generally provide for alternative or substitute service in non-military work for other public authorities, such as healthcare, social services or education. In some cases, the extent to which alternative service is comparable to military service may be questioned. Clearly, if alternative service is perceived as significantly less onerous, then there may be an incentive for insincere claims of conscientious objection. On the other hand, if alternative service is significantly more arduous or time-consuming, it may be seen as an effort to punish or deter conscientious objectors. It may also be difficult to make a strict comparison between military service and alternative service, because certain features of conscription do not have a civil counterpart, such as the requirement to live in barracks, take part in military exercises or be deployed to the battlefield.

There are also issues concerning the practical recognition of conscientious objection. A 2012 report from the UN Office of the High Commissioner for Human Rights (UN OHCHR), cites the following considerations:

**271** Elizabeth Braw, "Bring Back the Draft: No, Really", Politico, 21 January 2017, <https://www.politico.eu/article/bring-back-the-draft-conscription-sweden-scandinavia/>.

**272** Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2nd edition, 2013), Chapter 6.

*"the basis on which conscientious exemption from military service can be granted and the process for obtaining such exemption; the provision, length and conditions of alternative service and the rights of those who object to alternative service; whether alternative service provides the same rights and social benefits as military service; the length and conditions of alternative service; and whether there can be repeated punishment for failure to perform military service [...] [the] lack of an independent decision-making process, disproportionate lengthy alternative service and States parties that recognize the right to conscientious objection in a discriminatory manner, e.g., by granting exemption only to religious groups and not others."*<sup>273</sup>

## International Human Rights Standards

Over the last 50 years, conscientious objection has become recognized as a human right, largely through the interpretation of existing treaty obligations protecting freedom of thought, belief and religion. Whereas the ECHR and the ICCPR do not explicitly recognize this right, the more recent Charter of Fundamental Rights of the European Union does. Article 10(2) of the Charter states:

*"The right to conscientious objection is recognized, in accordance with the national laws governing the exercise of this right."*

In Copenhagen in 1990, OSCE participating States took note of the resolution of the UN Commission on Human Rights that everyone should have a right to conscientious objection.<sup>274</sup> The Copenhagen Conference also resolved that participating States with obligatory military service should consider introducing various forms of alternative service for those with conscientious objections.<sup>275</sup> These commitments are reiterated in paragraphs 27 and 28 of the OSCE Code of Conduct on Politico-Military Aspects of Security (see "Chapter 2: OSCE Commitments"):

*"27. Each participating State will ensure that the recruitment or call-up of personnel for service in its military, paramilitary and security forces is consistent with its obligations and commitments in respect of human rights and fundamental freedoms."*

<sup>273</sup> UN OHCHR, *Conscientious Objection to Military Service* (New York and Geneva: UN OHCHR, 2012), p.14.

<sup>274</sup> OSCE, Copenhagen 1990, *op. cit.*, note 141, para. 18.1.

<sup>275</sup> *Ibid.*, para. 18.4. This was reiterated in the OSCE Code of Conduct, *op. cit.*, note 13.

*28. The participating States will reflect in their laws or other relevant documents the rights and duties of armed forces personnel. They will consider introducing exemptions from or alternatives to military service."*

Additionally, the ODIHR-Venice Commission *Guidelines for Review of Legislation Pertaining to Religion or Belief* note the clear trend in most democratic states to provide alternative service for conscientious objectors and, with reference to existing international documents, stress that state laws should not be unduly punitive for those who cannot serve in the military for reasons of conscience.<sup>276</sup>

### ***Conscientious objection under the ICCPR***

Freedom of conscience is recognized under Article 18(1) of the ICCPR, which reads:

*"Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."*

Although a state may place limitations on the manifestation of a person's religion or beliefs under Article 18(3), the first sentence of this provision sets out absolute rights. In earlier jurisprudence, the Human Rights Committee found that "[t]he Covenant does not provide for the right to conscientious objection; neither article 18 nor article 19."<sup>277</sup> In 1993, however, the Committee argued that, while there was no explicit reference to conscientious objection in the Covenant, "such a right can be derived from Article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief."<sup>278</sup> This was reflected in decisions of the Committee, initially mainly in those where it found no violation of Article 18 on the facts, because the complainant had failed to satisfy the domestic authorities regarding the serviceperson's "insurmountable objection to military service" or had not claimed a conscientious objection to performing military service.<sup>279</sup>

In 2007, in a complaint brought against South Korea, the Committee decided, for the first

<sup>276</sup> ODIHR - Venice Commission, *Guidelines for Review of Legislation Pertaining to Religion or Belief* (Warsaw: ODIHR, 2004), pp. 22-23.

<sup>277</sup> UN Human Rights Committee, *LTK v. Finland*, Communication No. 185/1984, para. 5.2.

<sup>278</sup> UN Human Rights Committee, "General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)", 30 July 1993, CCPR/C/21/Rev.1/Add.4, para 9.3.

<sup>279</sup> See: UN Human Rights Committee, *Westerman v. The Netherlands*, Communication No. 682/1996; and *Dr JP v. Canada*, Communication No. 446/1991, para 4.2. In the latter case, the Committee rejected the application because it did not consider that the right to conscientious objection extended to the right not to pay taxes for military activities.

time, that a lack of alternative civilian service to military conscription breached Article 18 of the Covenant.<sup>280</sup> Bearing in mind that a large number of states had introduced schemes of alternative service to accommodate conscientious objectors, it found that Korea had not adequately demonstrated why, as it claimed, this was impossible in its case without compromising national security. Accordingly, it could not rely on Article 18(3), which provides that any limitations on the freedom to manifest religion or belief be prescribed by law and “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”

That approach, nevertheless, provided the possibility for states to justify a refusal to accommodate conscientious objectors under Article 18(3). This possibility was closed, however, in the later case of *Min-KY Jeong et al. v. the Republic of Korea*, when the Human Rights Committee, by a majority, found that the complainants’ conviction and sentence for refusing to be drafted amounted to an infringement of their freedom of conscience under Article 18(1), rather than an unjustified restriction on the manifestation of belief.<sup>281</sup> Subsequent decisions have confirmed this approach.<sup>282</sup> In *Jong-nam Kim v. the Republic of Korea*, the Human Rights Committee confirmed its view that the imposition of compulsory military service without the option of alternative civilian service deprives individuals of the right to choose whether or not to declare their conscientiously held beliefs. The Committee argued that this would place such persons “under a legal obligation, either to break the law or to act against those beliefs, in a context in which it may be necessary to deprive another human being of life.”<sup>283</sup>

## Council of Europe standards

Within the Council of Europe, there has also been a progressive process, leading to the full recognition of the right to conscientious objection by the European Court of Human Rights in 2011.

While Article 4 of the ECHR expressly exempts military service or alternative service from being treated as forced labour,<sup>284</sup> the ECHR does not refer explicitly to conscientious objection. In a 1966 case against Germany, the European Court of Human Rights found that each contracting state could decide whether or not to grant conscientious exemption

**280** UN Human Rights Committee, *Yeo-Bum Yoon and Myung-Jin Choi v. the Republic of Korea*, Communication Nos. 1321/2004 and 1322/2004.

**281** UN Human Rights Committee, *Min-Kyu Jeong et al v. the Republic of Korea*, Communication nos. 1642-1741/2007.

**282** UN Human Rights Committee, *Atasoy and Sarkut v. Turkey*, Communication nos. 1853/2008 and 1854/2008.

**283** *Jong-nam Kim et al v. the Republic of Korea*, Communication no. 1787/2008, para 7.3. See also: *Young-kwan Kim v. the Republic of Korea*, Communication no. 2179/2012.

**284** Article 4(3): “For the purpose of this Article, the term ‘forced or compulsory labour’ shall not include: [...] (b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service.” ECHR, op. cit., note 24. See also: ICCPR, op. cit., note 16, Art. 8(3)(c).

from military service.<sup>285</sup> Accordingly, conscientious objectors could be required to perform civilian service instead of compulsory military service, and had no right to be exempted from substitute civilian service. It is noteworthy that, at the time of this ruling, in 1966, many Council of Europe states retained compulsory military service. Later judgments found that, where states recognized conscientious objection, they were required to do so in a way that was not discriminatory. Article 14 of the Convention prevents discrimination in the enjoyment of Convention rights on any ground, including “religion, political or other opinion”. Thus, differences in the length of alternative service relative to the period of conscription that cannot be objectively justified may breach Article 14.<sup>286</sup> Nonetheless, the Court stopped short of requiring states to make alternative service available for conscientious objectors. Additionally, in a series of cases brought against Turkey, the European Court of Human Rights found that the liability of conscientious objectors in that country to repeated prosecution for military offences based on their refusal to serve constituted a form of civil death or being made an outlaw. This could then amount to degrading treatment in violation of Article 3 of the Convention.<sup>287</sup>

Finally, in 2011, after acknowledging that legal recognition of conscientious objection was now available in most Council of Europe states, the Grand Chamber, in *Bayatyan v. Armenia*,<sup>288</sup> reversed the Court’s initial position and determined that a right to conscientious objection could be deduced from Article 9 on the right to freedom of religion or belief (see Box 8.1).

**285** A series of decisions confirmed that whether states chose to recognize conscientious objection was discretionary: European Court for Human Rights, *X. v. the Federal Republic of Germany* (Application no. 7705/76, decision of 5 July 1977); *Conscientious Objectors v. Denmark* (Application no. 7565/76, decision of 7 March 1977); *A. v. Switzerland* (Application no. 10640/83, decision of 9 May 1984); *N. v. Sweden* (Application no. 10410/83, decision of 11 October 1984); *Autio v. Finland* (Application no. 17086/90, decision of 6 December 1991); *Peters v. The Netherlands* (Application no. 22793/93, decision of 30 November 1994); *Heudens v. Belgium* (Application no. 24630/94, decision of 22 May 1995); and *GZ v. Austria* (Application no. 5591/72, decision of 2 April 1973).

**286** European Court for Human Rights, *Autio v. Finland* (Application no. 17086/90, decision of 6 December 1991); *Julin v. Finland* (decision of 6 December 1991 [unpublished]); *Raninen v. Finland* (Application no. 20972/92, decision of 7 March 1996), para. 55.

**287** European Court for Human Rights, *Ülke v. Turkey* (Application no. 39437/98, judgment of 24 January 2006), paras 62-64. The practice has also been criticized by the UN Human Rights Committee and the UN Working Group on Arbitrary Detention (UN OHCHR, 2012, op. cit., note 273, pp. 34-36).

**288** European Court for Human Rights, *Bayatyan v. Armenia* (Application no. 23459/03, judgment of 7 July 2011).



### Box 8.1: The European Court of Human Rights and conscientious objection

In *Bayatyan v. Armenia*, the Grand Chamber held that the failure to provide for alternative military service in Armenia interfered with the applicant's rights. The Court recognized that, in some circumstances (where the usual criteria of sufficient cogency, seriousness, cohesion and importance are satisfied), there is a right to manifest one's objections to military service, motivated by religious beliefs. The Grand Chamber treated the failure to report for military service as a manifestation of the applicant's beliefs as a Jehovah's Witness and his conviction for evasion of the draft was, therefore, an interference with the right to manifest his beliefs.

As the Court pointed out: "the applicant [. . .] sought to be exempted from military service not for reasons of personal benefit or convenience but on the ground of his genuinely held religious conviction." The position in Armenia under which "no allowances were made for the exigencies of his conscience and beliefs, could not be considered a measure necessary in a democratic society". Moreover, the Grand Chamber rejected the government's objection that making allowances for conscientious objectors would be a form of positive discrimination:

"[R]espect on the part of the State towards the beliefs of a minority religious group like the applicant's by providing them with the opportunity to serve society as dictated by their conscience might [...] rather ensure cohesive and stable pluralism and promote religious harmony and tolerance in society."<sup>289</sup>

Other Council of Europe institutions have adopted numerous measures recognizing the right of conscientious objection. PACE passed a series of resolutions on the issue between 1967 and 2006.<sup>290</sup> In 1987, the Council of Europe's Committee of Ministers made an important recommendation, in which it endorsed the right of conscientious objectors to be released from military service and supported the provision of alternative service. It invited member states to bring their legislation and practice into line with the right to conscientious objection.<sup>291</sup> The recommendation suggests certain minimum basic principles for states in the implementation of this right.<sup>292</sup> The Committee of Ministers also urged that a "sustained effort" be made to implement the recommendation.<sup>293</sup> In 2006, PACE further affirmed the importance of the right to conscientious objection as "an essential component of the right

<sup>289</sup> *Ibid.*, para. 126.

<sup>290</sup> In 1967, PACE adopted its first resolutions (Nos. 337 and 478) supporting the right of conscientious objection. This was followed in 1977 with Recommendation No. 816, affirming the right of conscientious objection. Also see PACE Recommendation 1518, "Exercise of the Right of Conscientious Objection to Military Service in Council of Europe Member States", 23 May 2001.

<sup>291</sup> Council of Europe, "Recommendation CM/Rec(87)8 of the Committee of Ministers Regarding Conscientious Objection to Compulsory Military Service", 9 April 1987.

<sup>292</sup> *Ibid.*, paras. 2-8.

<sup>293</sup> Council of Europe, "Decision on the Reply from the Committee of Ministers Adopted at the 785th Meeting of the Ministers' Deputies" (26-27 February 2002), Doc. 9379, 1 March 2002.

to freedom of thought, conscience and religion as secured under the Universal Declaration of Human Rights and the European Convention on Human Rights”.<sup>294</sup> In 2010, the Committee of Ministers recommended that, in the case of compulsory military service, “conscripts should have the right to be granted conscientious objector status” and should be offered alternative civilian service, while professional members of the armed forces should be able to leave the armed forces for reasons of conscience.<sup>295</sup>

## **European Union**

In a 1983 resolution, the European Parliament noted that the “protection of freedom of conscience implies the right to refuse to carry out armed military service and to withdraw from such service on grounds of conscience”. It also highlighted that “no court or commission can penetrate the conscience of an individual and that a declaration setting out the individual’s motives must therefore suffice in the vast majority of cases to secure the status of conscientious objector”.<sup>296</sup>

## **Different Approaches**

This section deals with the various approaches of OSCE participating States and the relevant international commitments concerning the following matters: the basis for recognition of conscientious objection, the reasons for conscientious objection, the availability of alternative service, the position of professional members of the regular armed forces, the question of selective conscientious objection and procedural aspects of determining conscientious objection claims.

## **Constitutional and legal recognition**

Most OSCE participating States that responded to the ODIHR-DCAF questionnaire recognize the right of conscientious objection.<sup>297</sup>

National recognition of conscientious objection can be based on constitutional provisions, legislation or administrative procedures, or a combination of these. As summarized in Box 8.2, several OSCE participating States recognize the right to conscientious objection in their constitutions.

<sup>294</sup> PACE, “Recommendation 1742(2006) on Human Rights of Members of the Armed Forces”, 11 April 2006, para. 8.

<sup>295</sup> Council of Europe, Recommendation CM/Rec(2010)4, *op. cit.*, note 26, paras. 41 and 42.

<sup>296</sup> European Parliament, “Resolution on conscientious objection”, *Official Journal of the European Communities*, C 068, 14 March 1983, paras. 2 and 3, p. 14; see also “Resolution on Conscientious Objection and Alternative Civilian Service”, *Official Journal of the European Communities*, C 291, 20 November 1989, p. 122.

<sup>297</sup> According to the ODIHR-DCAF 2018 questionnaire, the following participating States do not recognize conscientious objection: Albania, Bosnia and Herzegovina, Ireland, Latvia, Malta, Poland and Slovakia. Finland did not respond.

## **Box 8.2: Examples of Constitutional provisions concerning conscientious objection<sup>298</sup>**

### **Estonia, Article 124:**

Those who refuse service in the Defence Forces for religious or ethical reasons shall be obliged to participate in alternative service, in accordance with the procedures prescribed by law.

### **Germany, Article 12(a)(2):**

A person who refuses, on grounds of conscience, to render war service involving the use of arms can be required to render a substitute service. The duration of such substitute service may not exceed the duration of military service. Details are regulated by a statute that may not interfere with the freedom to take a decision based on conscience and that must also provide for the possibility of a substitute service not connected with units of the Armed Forces or of the Federal Border Guard.

### **Portugal, Article 276(4):**

Conscientious objectors who by law are subject to the performance of military service shall perform civic service with the same duration and degree of arduousness as armed military service.

### **Slovenia, Article 123(2):**

Citizens who for their religious, philosophical, or humanitarian convictions are not willing to perform military duties must be given the opportunity to participate in national defence in some other manner.

### **Spain, Article 30(2):**

The law shall determine the military obligations of Spaniards and shall regulate, with all due guarantees, conscientious objection, as well as other grounds for exemption from compulsory military service; it may also, when appropriate, impose community service in place of military service.

However, it is important that legislation also provides procedures for implementing the right to conscientious objection, as the UN OHCHR has argued:

*"Legal recognition of conscientious objection or alternative service, without implementing provisions, can lead to legal uncertainty and frustrate the exercise of these rights in practice."<sup>299</sup>*

<sup>298</sup> ODIHR, Legislationline.org, *op. cit.*, note 111.

<sup>299</sup> UN OHCHR 2012, *op. cit.*, note 273, pp. 48-49.

### Box 8.3: Procedures for implementing conscientious objection in Switzerland<sup>300</sup>

The Swiss Army is organized according to the principles of a reservist system, based on general conscription. Professional armed forces personnel are called career officers and NCOs, and are recruited to and discharged from the armed forces based on civil law contracts. Career officers and NCOs are tasked with training and command responsibilities. Any member of the reserve, including career officers and NCOs, has the right to conscientious objection, which is recognized by law.

Specific motivations for conscientious objection are not required, nor are they the object of any examination by the authorities. The applicants declare that they are motivated to make a conscientious objection to military service and that they accept a longer duration of alternative civilian service.

A written application must be submitted to the competent civilian authority, the Executive Office of the Civilian Service (*Vollzugsstelle für den Zivildienst*), a specialized administrative unit within the Swiss federal administration, attached to the Ministry of Economy, Education and Research. After submitting the application, the applicant must attend a one-day information session organized by the civilian authority, followed by a written confirmation that the application is upheld. The applicant is then admitted to alternative civilian service and discharged from the armed forces.

The duration of alternative civilian service is one-and-a-half times longer than military service. It is served at authorized non-profit organizations that carry out activities in eight areas of public interest, with most alternative service conducted in healthcare, social services and environmental protection.

### *Reasons for conscientious objection*

Some religious groups (for example, Jehovah's Witnesses and Quakers) have religious objections to military service. However, conscientious objections are not limited to religious grounds. In Resolution 1998/77, the UN Human Rights Commission stated that "conscientious objection to military service derives from principles and reasons of conscience, including profound convictions, arising from religious, moral, ethical, humanitarian or similar motives". The Commission also calls upon states "not to discriminate between conscientious objectors on the basis of the nature their particular beliefs".<sup>301</sup>

In a 2001 report to the Commission on Human Rights, the UN Special Rapporteur on Freedom of Religion or Belief stated that:

<sup>300</sup> Switzerland's response to the ODIHR-DCAF 2018 questionnaire.

<sup>301</sup> UN Commission on Human Rights, "Conscientious Objection to Military Service", 22 April 1998, E/CN.4/RES/1998/77.

*"First of all, the issue is one of discriminatory or intolerant policies, legislation or State practice, or even indifference on the part of State institutions which is prejudicial to minorities, be they of the 'major religions' or other religious and faith-based communities. Such minorities are mainly affected by [...] non-recognition of conscientious objection, no provision for alternative civilian service, and the punitive nature of this civilian service by reason of its duration, which particularly affects the Jehovah's Witnesses and other religious and faith-based communities [...]."*<sup>302</sup>

#### **Box 8.4: Recognition of grounds for conscientious objection in selected OSCE participating States<sup>303</sup>**

Religious	Ethical/ philosophical	Emotional	Other
Austria, Cyprus, the Czech Republic, Estonia, Germany, Greece, Lithuania, Montenegro, Norway, Romania, Sweden, the United Kingdom	Austria, Cyprus, the Czech Republic, Estonia, Germany, Greece, Norway, Sweden, the United Kingdom	Austria, Denmark, Lithuania, Norway, Sweden	Denmark, Switzerland

As can be seen, a number of OSCE participating States have recognized both religious and non-religious grounds for conscientious objection. In the United States, conscientious objection has been extended by judicial interpretation from the originally limited recognition of religious objections to include other ethical and philosophical objections (see Box 8.5).

#### **Box 8.5: The United States Supreme Court and conscientious objection**

In *United States v. Seeger*, the Supreme Court extended the application of the law on conscientious objection from religious beliefs to those with secular beliefs that are "sincere and meaningful [and occupy] a place in the life of the possessor parallel to that filled by an orthodox belief in God".<sup>304</sup>

In *Welsh v. United States*, the Supreme Court found that conscientious objector status

<sup>302</sup> UN ECOSOC, Commission on Human Rights, "Civil and Political Rights, Including Religious Intolerance, Report submitted by Mr. Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 2000/33", 13 February 2001, E/CN.4/2001/63, para. 182.

<sup>303</sup> Responses to the ODIHR-DCAF 2018 questionnaire, qu. 20(d). Azerbaijan did not respond to the question, despite recognizing conscientious objection.

<sup>304</sup> Supreme Court of the United States, *Seeger v. United States*, 8 March 1965, *United States Reports*, Vol. 380, 1965, pp. 163 and 166

applies to all those whose consciences, spurred by deeply held moral, ethical or religious beliefs, “would give them no rest or peace if they allowed themselves to become a part of an instrument of war”.<sup>305</sup>

## Alternative service (*substitute service*)

As noted above, the right to perform alternative service has been advocated by a number of international bodies, including the UN Human Rights Committee, the European Court of Human Rights and PACE. Box 8.6 shows some of the types of institutions in which alternative service may be fulfilled in OSCE participating States.

### Box 8.6: Examples of institutions where alternative service can be performed<sup>306</sup>

Country	Institutions
Cyprus	In the wider public service.
Denmark	Public or publicly funded institutions or organizations with a particular social or cultural aim, such as nurseries, libraries, day-care centres, peace organizations, environmental movements or organizations connected to the UN.
Estonia	The Defence Resources Agency determines where alternative service can be performed, including healthcare providers, rehabilitation centres, educational institutions for persons with special needs and learning disorders, and at government institutions that provide fire and rescue services.

It is common for alternative service to be longer in duration than military service, to account for the different working conditions and hours. In Europe, alternative service is often around 50 per cent longer than military service, although, in a minority of states (for example, Germany), the duration of service is the same, and in other states alternative service lasts up to twice as long as military service. The European Committee of Social Rights of the Council of Europe found that alternative civilian service that was twice the duration of military service was “excessive” in character and amounted to a “disproportionate restriction on ‘the right of the worker to earn his living in an occupation freely entered upon’” and, as such, contravened Article 1, paragraph 2, of the European Social Charter.<sup>307</sup>

Where a difference between the duration of military service and alternative service is arbitrary or merely designed to deter applicants from claiming alternative service, it may be

**305** Supreme Court of the United States, *Welsh v. United States*, 15 June 1970, *United States Reports*, Vol. 398, 1970, p. 333

**306** Responses to the ODIHR-DCAF 2018 questionnaire, qu. 21(c).

**307** European Committee of Social Rights, *Quaker Council for European Affairs v. Greece*, decision of 27 April 2001; “Under Article 1§2 of the [European Social] Charter, alternative service may not exceed one and a half times the length of armed military service” European Committee of Social Rights, as referenced e.g., in 75604/11, *Adyan I Inni v Armenia*, decision of 12 October 2017.

found to be discriminatory under constitutional<sup>308</sup> or human rights law. General Comment No. 22 of the UN Human Rights Committee states that: "there shall be no discrimination against conscientious objectors because they have failed to perform military service".<sup>309</sup> The Committee has recommended that States Parties recognize the right of conscientious objection without discrimination:<sup>310</sup> "conscientious objectors can opt for civilian service the duration of which is not discriminatory in relation to military service, in accordance with articles 18 and 26 of the Covenant".<sup>311</sup> The Committee has also referred to the need for any difference to be based "on reasonable and objective criteria, such as the nature of the specific service concerned or the need for a special training in order to accomplish that service".<sup>312</sup>

There may be other impediments to exercising the right to alternative service. In some countries, for example, alternative service is supervised by the military itself. Thus, people who opt for alternative service out of pacifist beliefs may have difficulty in fully distancing themselves from the military. Moreover, apart from differences in the length of service, people who opt for alternative service may be denied equivalent economic or social rights in comparison to those who perform military service. Again, this is an impediment to exercising the right to alternative service.

#### Box 8.7: Procedures for applying for alternative service<sup>313</sup>

Country	Procedure	Duration
Cyprus	The interested party submits a request, which is examined by the competent committee foreseen by the law. This committee submits a proposal to the Minister of Defence, who takes the final decision on the matter.	

**308** See the decision of the Italian Constitutional Court (Decision No. 470 of 31 July 1985), declaring that the requirement to perform 20 months of alternative service in comparison with only 12 months of military service was in violation of the constitutional principle of equality. See: José de Sousa e Brito, "Conscientious Objection", in Tore Sam Lindholm et al., *Facilitating Freedom of Religion or Belief: A Deskbook* (Leiden: Martinus Nijhoff Publishers/Brill Academic, 2004).

**309** UN Human Rights Committee, General Comment No. 22, *op. cit.*, note 278.

**310** UN ECOSOC, Commission on Human Rights, "Civil and Political Rights, Including the Question of Conscientious Objection to Military Service: Report of the Office of the High Commissioner for Human Rights", E/CN.4/2004/55, 16 February 2004, para. 14.

**311** *Ibid.*, para. 11.

**312** UN Human Rights Committee, *Foin v. France*, Communication No. 666/1995, 9 November 1999. See also: *Maille v. France*, Communication No. 689/1996; and *Vernier and Nicolas v. France*, Communication Nos. 690-691/1996. In contrast, see the earlier decision of *Järvinen v. Finland*, Communication No. 295/1988.

**313** Responses to the ODIHR-DCAF 2018 questionnaire, qu. 21(a) and (b). See also the example of Switzerland in Box 8.3.

Country	Procedure	Duration
Denmark	An application is submitted to the Administration for Conscientious Objection, where the applicant signs to confirm that military duty is irreconcilable with their conscience. They then choose an institution where alternative service can be fulfilled.	Equal length to military service
Estonia	Conscripts can apply to the Defence Recourses Agency, stating clear reasons for alternative service. The Agency will assess the reasoning of the application and has the right to inquire with the conscript's referred religious organization, place of work or educational institution.	12 months, compared to military service of between 8 and 11 months <sup>314</sup>

### ***Conscientious objection for members of regular armed forces***

While most OSCE participating States recognize that conscientious objection applies to conscripts, fewer countries recognize the right in the case of professional service personnel. Those that do include the Czech Republic, Germany, Slovenia and Switzerland.<sup>315</sup>

The UN OHCHR has pointed out that:

*"The application of the right to conscientious objection to persons who voluntarily serve in the armed forces is based on the view that an individual's deeply held convictions can evolve and that individuals voluntarily serving in armed forces may over time develop conscientious objection to bearing arms."*<sup>316</sup>

In April 2006, PACE called on member states:

*"to introduce into their legislation the right to be registered as a conscientious objector at any time, namely before, during or after military service, as well as the right of career servicemen to be granted the status of conscientious objector".*<sup>317</sup>

**314** "Compulsory Military Service", Estonian Defence Forces website, <http://www.mil.ee/en/defence-forces/compulsory-military-service>.

**315** Responses to the ODIHR-DCAF 2018 questionnaire.

**316** UN ECOSOC, OHCHR report 2004, *op. cit.*, note 310, para. 26.

**317** PACE, Recommendation 1742, *op. cit.*, note 294, para. 9.7.



This was reiterated by the Council of Europe's Council of Ministers, in its 2010 recommendation on the human rights of members of the armed forces.<sup>318</sup>

**Box 8.8: Bodies that determine claims of conscientious objection<sup>319</sup>**

Civilian bodies	Armed forces
Austria, Cyprus, Estonia, Germany, Montenegro, Norway, Slovenia, Sweden, Switzerland	The Czech Republic, Denmark, Estonia, Greece, Italy, Lithuania, Romania, the United Kingdom

*Selective conscientious objection*

Selective conscientious objection is the conscientious objection to participation in a particular military campaign, as opposed to military service in general. Conscientious objection of this type has a long history, with examples ranging from Henry David Thoreau's refusal to pay taxes in 1846 during the United States-Mexico war,<sup>320</sup> to service personnel who refused to fight in the second Gulf War.<sup>321</sup> It applies, in particular, to professional service personnel and reservists.

Selective conscientious objection is potentially problematic for two reasons. First, since the objector is prepared to fight in other conflicts, the sincerity of the claim may be questioned. Second, the motivation may appear to be political rather than a dictate of conscience. In theory, a member of the armed forces with a selective objection could, subject to other considerations of effectiveness, be deployed to perform other duties. In practice, however, the outcome is likely to be the same as for a regular soldier who develops a conscientious objection after enlisting – discharge from the armed forces and loss of one's career.

Few states provide an exemption from service for selective conscientious objection. The United States Supreme Court has held that there is no constitutional requirement under the protection of freedom of religion to do more than provide a general right for those "conscientiously opposed to all war."<sup>322</sup> The German Federal Administrative Court, on the other hand, held in 2005 that freedom of conscience protected an army software engineer who refused to work on a computer program for reasons of conscience because he found the Iraq war to be unjust and illegal.<sup>323</sup>

<sup>318</sup> Council of Europe, Recommendation CM/Rec(2010)4, *op. cit.*, note 26, para. 42.

<sup>319</sup> Responses to the ODIHR-DCAF 2018 questionnaire, qu. 20(e).

<sup>320</sup> Henry David Thoreau, *On Civil Disobedience* (Chicago: Charles H. Kerr, 1989).

<sup>321</sup> "Jail for Iraq refusal RAF doctor", BBC News, 13 April 2006, <http://news.bbc.co.uk/1/hi/uk/4905672.stm>.

<sup>322</sup> Supreme Court of the United States, *Gillette v. United States*, 8 March 1971, United States Reports, Vol. 401, 1974, p. 437.

<sup>323</sup> German Federal Administrative Court, *Wehrdienstsenat* (Military Service Division), 21 June 2005, Decision No. 12 of 2004, Case No. WD 12.04 (see Michael Bohlander, "Superior Orders, Unjust War and the Soldier's Conscience", *Inter Alia*, Vol. 4, 2005, pp. 17-19).

## *Procedures for determining conscientious objection claims*

Depending on the state, claims of conscientious objection may be reviewed by civilian, military or mixed boards. For example, Croatia has a civilian board – the Civil Service Commission – which includes representatives of the Ministries of Defence, of Justice, of Public Administration and for Demography, Family, Youth and Social Policy. In April 2018, the Government of Croatia also appointed an Appeals Commission on conscientious objection (see Box 8.9). In Greece, a mixed civilian-military panel advises the Minister of Defence on individual applications. If the Minister refuses the application, the service member may appeal to a court. In the United States, on the other hand, a military investigative officer prepares a report to the military, in a process that is subject to procedural guarantees for the applicant, such as the ability to be legally represented and to introduce a rebutting statement.<sup>324</sup>

### **Box 8.9: Appeals by conscientious objectors in Croatia**

The Civil Service Commission considers individual requests for conscientious objection to military service. The Commission may reject the request for the following reasons:

- if there is a final court decision that the applicant has committed a criminal offence by using a weapon or force;
- if the applicant possesses a weapon (except if they have a licence to own a firearm as a memento);
- if the applicant did not state whether they were seeking civil service for religious or moral reasons; and
- if a civil service application is not filed for religious or moral reasons.

Decisions of the Civil Service Commission can be appealed within 15 days at the Appeals Commission.

The Appeals Commission acts as a second instance body that annuls or upholds the decision of the Civil Service Commission. It consists of three members and three deputies, who reach decisions by voting. Decisions are issued within 30 days and are final. A further appeal is possible, via an administrative lawsuit before the Administrative Court.

UN Human Rights Commission Resolution 1998/77 calls on states that do not accept claims of conscientious objection as valid without inquiry to establish independent and impartial decision-making bodies tasked with determining whether a conscientious objection is genuinely held. Similarly, Council of Europe Recommendation 1518/2001 states: "The examination of applications shall include all the necessary guarantees for a fair procedure. An applicant shall have the right to appeal against the decision at first instance. The appeal authority shall be separate from the military administration and composed so as to ensure its independence."<sup>325</sup>

<sup>324</sup> UN ECOSOC, OHCHR report 2004, *op. cit.*, note 310, paras. 38–41.

<sup>325</sup> *Ibid.*, para. 37.

## Good Practices and Recommendations

- » Information should be made available to all persons affected by military service about the right to conscientious objection to military service, and the process to be recognized as a conscientious objector.
- » Conscientious objection should be available for conscripts and professional soldiers, both prior to and during military service, in accordance with international human rights standards.
- » Where a state does not accept a statement of conscientious objection at face value, the claim should be assessed by an independent and impartial review panel, with the possibility to appeal the panel's decision.
- » Conscientious objectors should not be punished for their non-performance of military service.
- » Conscientious objectors should be protected from discrimination in relation to their terms or conditions of service and any economic, social, cultural, civil or political rights.
- » Alternative service should:
  - » be compatible with the reasons for the conscientious objection of a non-combatant;
  - » be performed under a purely civilian administration, with no involvement by the military authorities;
  - » involve work in the public interest;
  - » be non-punitive;
  - » last no more than one-and-a-half times the length of military service; and
  - » confer the same economic and social rights as military service.

## Further reading

ODIHR and Venice Commission, *Guidelines for Review of Legislation Pertaining to Religion or Belief* (Warsaw: ODIHR, 2004), <https://www.osce.org/odihr/13993?download=true>.

UN OHCHR, "Analytical Report on Conscientious Objection to Military Service", A/HRC/23/22, 29 April 2013, [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.22\\_AUV.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.22_AUV.pdf).

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## Chapter 9: Religion in the Armed Forces

### Introduction: Issues at Stake

The right to freedom of religion or belief is granted to all individuals, including members of the armed forces. As such, military institutions need to take into account the religious or other beliefs of service personnel.

In some states, legislation requires armed forces to accommodate religious practices. Generally, armed forces that wish to reflect the diverse composition of the societies that they protect and attract the best employees will aim to remove barriers to participation by men and women from different religious or belief backgrounds. Therefore, in addition to meeting their international human rights obligations and implementing national legislation, states should try and accommodate the religious practices of armed forces personnel to the extent that this can be achieved without compromising military effectiveness. While practices differ among states, this may include setting aside space or time for prayer, providing access to spiritual counsellors or other religious representatives, organizing religious burial rites, allowing time off for holy days, permitting the wearing of religious symbols and clothing, and facilitating dietary regimes, among other measures.

This chapter examines the practical issues surrounding the respect for the right of freedom of religion or belief of service personnel in OSCE participating States, including the potential challenges of accommodating the right to freedom of religion or belief in general, and religious practices in particular, within the armed forces. The main human rights obligations recognizing freedom of religion or belief and prohibiting discrimination on grounds of religion or belief are explained. Further, this chapter examines some of the ways in which states provide for the freedom to manifest different religions in the armed forces and identifies good practices. The question of religiously motivated conscientious objection to military service is discussed in depth in “Chapter 8: Conscientious Objection to Military Service”.

International human rights law recognizes that freedom of religion or belief comprises both internal and external dimensions. The internal dimension concerns the freedom to have or to adopt a religion or belief of one’s choice, which also includes the right to change one’s religion or belief. The external dimension concerns the right to manifest one’s religion or belief, including the freedom to worship and the freedom to teach, practice and observe one’s religion or belief.

**Box 9.1: ODIHR Guidelines on the Review of Legislation Pertaining to Religion or Belief (2004), page 10**

1. Internal freedom (*forum internum*). The key international instruments confirm that "[e]veryone has the right to freedom of thought, conscience and religion." In contrast to manifestations of religion, the right to freedom of thought, conscience and religion within the *forum internum* is absolute and may not be subjected to limitations of any kind.  
Thus, for example, legal requirements mandating involuntary disclosure of religious beliefs are impermissible. Both the UDHR (Article 18) and the ECHR (Article 9) recognize that the protection of the *forum internum* includes the right to change one's religion or belief. The UN Human Rights Committee's General Comment No. 22 on Article 18 states that "freedom to 'have or to adopt' a religion or belief necessarily entails the freedom to choose a religion or belief, including, *inter alia*, the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief". In any event, the right to "change" or "to have or adopt" a religion or belief appears to fall within the domain of the absolute internal-freedom right, and legislative provisions that impose limitations in this domain are inconsistent with internal-freedom requirements.
2. External freedom (*forum externum*). Everyone has the freedom, either alone or in community with others, in public or private, "to manifest his [or her] religion or belief in worship, observance, practice, and teaching" (ICCPR, Article 18(1)). As suggested by this phrase, the scope of protected manifestations is broad. Thus, legislation that protects only worship or narrow manifestation in the sense of ritual practice is inadequate. Also, it is important to remember that it is both the manifestations of an individual's beliefs and those of a community that are protected. Thus, the manifestation of an individual's beliefs may be protected even if the individual's beliefs are stricter than those of other members of the community to which he or she belongs. [...] Manifestations of religion or belief, in contrast to internal freedom, may be limited, but only under strictly limited circumstances set forth in the applicable limitations clauses. Limitations are permissible only if warranted under these limitations clauses [...].

There are also positive and negative dimensions to freedom of religion or belief. Positive dimension of freedom of religion or belief relates to protecting and fulfilling this right, including the freedom to believe and to actively manifest one's religion or belief. The right to manifest one's religion may include participating in acts of worship, reading sacred texts, praying, telling others about one's religious beliefs, following certain dress or dietary requirements, and observing holy days.

The negative dimension to freedom of religion or belief relates to respecting this right and, as such, is freedom *from* coercion or discrimination on the grounds of religious or

non-religious belief. For example, Article 1(2) of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981 states that: “No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.”<sup>326</sup> Protection from coercion implies that people shall not be subjected to penalties or disadvantageous treatment on account of their religious or other beliefs, or a lack thereof. The ICCPR outlines a person’s right “to have or to adopt a religion or belief of his choice” (Article 18(1)) and to be free from coercion in so choosing (Article 18(2)). The rights of religious minorities to profess and practise their religion also receive specific recognition in the ICCPR.<sup>327</sup>

If a state were to close its armed forces to certain religious or belief groups or to restrict their opportunities for promotion, this would constitute discrimination. At the same time, insisting that enlisting service personnel swear an oath with a particular religious or non-religious component to the head of state or the constitution, for example, may equally amount to compulsion in matters of religion or belief. Such practices may exclude non-believers, or those of other religions or, indeed, those who object to swearing oaths for religious reasons.

Aspects of external freedom of religion or belief may conflict with the disciplined nature of life in the armed forces. These mostly concern positive aspects of this freedom, where the exercise of certain rites or practices is limited in the interests of daily military routines, manoeuvres, campaigns or the like. However, negative aspects can also be at stake in certain situations, such as if service personnel are required to participate in a religious ceremony.<sup>328</sup>

The positive aspects of freedom of religion or belief may impose challenges on the armed services as an employer, such as the need to free up times or places for believers to pray, to ensure access to spiritual counsellors or chaplains of various religions, to provide burial rites in different religious traditions, to allow time off for holy days, to vary uniform or catering regimes or to facilitate fasting (see Box 9.2). In these instances, the question is essentially one of proportionality, where the right to manifest and exercise one’s freedom of religion or belief needs to be weighed against the military’s interest in neutrality, order, discipline and the safety of service personnel.<sup>329</sup> The manner in which such conflicts are resolved depends on the nature and priorities of an army, and essentially on how it sees itself. The issue can be seen clearly in the example where service personnel in the United Kingdom are permitted to wear religious headdress, depending on the circumstances (see Box 9.7).

**326** UN General Assembly, “Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief”, Resolution A/RES/36/55, 25 November 1981.

**327** See Article 27: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.” ICCPR, *op. cit.*, note 16.

**328** Nolte, *op. cit.*, note 8, pp. 88-89, citing disciplinary requirements in the United Kingdom and in Italy.

**329** In this context, both Article 18 of the ICCPR and Article 9 of the ECHR allow this right to be limited in the interests of public safety, public order, health or morals, or for the protection of the rights and freedoms of others,

The judiciary can play an important role in ensuring that the right to freedom of religion and belief is afforded to armed forces personnel. Equally, the courts will then evaluate, in an objective and independent manner, where military requirements justify the restriction of individual rights. Additionally, religious counsellors or other representatives may be approached to help reach accommodations in individual cases (see Box 9.5).

### **Box 9.2: National courts' protection of freedom of religion or belief of service personnel**

#### **Religious holidays and diet: The Netherlands<sup>330</sup>**

In 1990, the Central Appeals Tribunal decided that Article 6 of the Constitution required facilities to be created for observing Ramadan, which would impact working hours and lead to occasional exemptions from service duties.<sup>331</sup> In a second decision, in 1991, the Central Appeals Tribunal found that a Navy corporal had been discriminated against because of the failure to compensate him for the additional costs of preparing kosher food to meet his religious dietary requirements.<sup>332</sup>

#### **Non-participation in religious ceremonies: Canada and Spain**

The Canadian courts have concluded that requiring a non-believing serviceman to remove his headdress during prayers at a parade violated the right to freedom of religion under section 2 of the Canadian Charter of Rights, stating:

"The fact that the practice of pronouncing prayers at parades [...] has been hallowed by a tradition of many years in the military [...] cannot justify a breach of the appellant's Charter rights."<sup>333</sup>

The Spanish Constitutional Court also ruled that orders to participate in a religious ceremony violate the constitutional right to freedom of religion or belief.<sup>334</sup>

Armed forces that fail to take steps to accommodate religious practice will effectively deter religious minorities from enlisting in the regular forces, so that they forfeit the opportunity to discharge civic obligations, with a resulting loss of an available pool of

<sup>330</sup> Leonhard Besselink, "Military Law in the Netherlands", in Nolte, *op. cit.*, note 8, pp. 594-595.

<sup>331</sup> Central Appeals Tribunal (Centrale Raad van Beroep), 25 October 1990, *Tijdschrift voor Ambtenarenrecht*, p. 245.

<sup>332</sup> Central Appeals Tribunal (Centrale Raad van Beroep), 14 March 1991, *Tijdschrift voor Ambtenarenrecht*, p. 105.

<sup>333</sup> *Scott v. R* [2004] 123 CRR (2d) 371, para. 8. See also *Commodore Royal Bahamas Defence Force and others v. Laramore* [2017] UKPC 13 (Judicial Committee of the Privy Council), where the Judicial Committee of the Privy Council (the final court of appeal for the Bahamas) found that a soldier who had converted to Islam was entitled not to observe the mark of respect (an order to remove caps during prayers) during a parade incorporating elements of Christian worship.

<sup>334</sup> Spanish Constitutional Court, Judgment No. 177/1996, 11 November 1996, Boletín Oficial del Estado, No. 303, 17 December 1996, <http://hj.tribunalconstitucional.es/en/Resolucion/Show/3229>.

skills and personnel. Even if the requirements in question are “facially neutral” (i.e., they do not refer to religion at all), they may, nevertheless, constitute a form of indirect religious discrimination. The same applies to non-religious service personnel obliged to take part in military practices or traditions that have a religious origin or nature, such as swearing a religious oath or participating in a religious ceremony (see Box 9.2).<sup>335</sup>

## International Human Rights Standards

Freedom of religion or belief is recognized under the major human rights treaties, as shown in Box 9.3.

### Box 9.3: Excerpts from human rights instruments that recognize freedom of religion or belief

UDHR, Article 18	Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.
ICCPR, Article 18	<ol style="list-style-type: none"> <li>1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.</li> <li>2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.</li> <li>3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.</li> </ol>
ECHR, Article 9	<ol style="list-style-type: none"> <li>1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.</li> <li>2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.</li> </ol>

**335** See: European Court for Human Rights, *Alexandridis v. Greece* (Application no. 19516/06, judgment of 21 February 2008), paras. 36–41); and *Dimitras and Others v. Greece* (No. 2) (Application nos. 34207/08 and 6365/09, judgment of 3 November 2011) and *Dimitras and Others v. Greece* (No. 3) (Application nos. 44077/09, 15369/10 and 41345/10, judgment of 8 January 2013). All cases dealt with the oath-swearing ceremonies.



Since the Helsinki Final Act of 1975, OSCE participating States have made specific commitments related to freedom of religion or belief.<sup>336</sup> The Vienna Concluding Document (1989) deals with a range of related issues, including discrimination on the grounds of religion or belief, extending protection to non-believers and safeguarding the right to collective worship.<sup>337</sup> At the 1990 Copenhagen Conference, participating States committed to recognize an individual's right to change their religion.<sup>338</sup> These commitments were reaffirmed at the Maastricht Conference (2003)<sup>339</sup> and in Kyiv (2013), where the Ministerial Council emphasized the link between security and full respect for the freedom of thought, conscience, religion or belief.<sup>340</sup> The *Guidelines for Review of Legislation pertaining to Religion or Belief* underline that, while, "most legal systems are highly deferential to the judgement of [...] military officials regarding public safety and efficiency [...] States are becoming increasingly sensitive to the rights of [...] soldiers to have access to religiously sanctioned foods," and provide limited freedoms "for wearing of some types of religious attire, provided that it does not interfere with discipline [...] or efficiency in the military." It also advises to permit, "when reasonable, access to religious books and spiritual counselling."<sup>341</sup>

Article 18 of the ICCPR and Article 9 of the ECHR embrace "the right to freedom of thought, conscience and religion" and protect the right "to manifest one's religion or belief".<sup>342</sup> Both provisions underscore the right to have or adopt a religion or belief of one's choice, and the fact that this right covers the individual or communal exercise of religion or belief, in public and in private. Article 18 of the ICCPR stipulates that no one shall be coerced into a certain religion or belief, while Article 9 of the ECHR stresses that the freedom of religion or belief also includes the right to change one's religion or belief. Unlike Article 9 of the ECHR, however, Article 18 of the ICCPR is listed as a non-derogable right in times of emergency under Article 4(2) of the ICCPR. This means that, even in times of public emergency that threatens the life of the nation, the right to freedom of religion or belief needs to be facilitated and protected, and may not be unduly limited.

As far as restrictions of this right are concerned, the UN Human Rights Committee's General Comment No. 22 underscores that Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. The actual

**336** See Helsinki Final Act, stating that participating States should respect "human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all", *op. cit.*, note 9.

**337** OSCE, Vienna 1989, *op. cit.*, note 139, para. 16.

**338** OSCE, Copenhagen 1990, *op. cit.*, note 141, para. 9.4.

**339** OSCE Ministerial Council, Decision No. 4/03, "Tolerance and Non-discrimination", Maastricht, 2 December 2003, para. 9, <https://www.osce.org/mc/19382>.

**340** OSCE Ministerial Council Decision No. 3/13, *op. cit.*, note 10.

**341** ODIHR, *Guidelines for Review of Legislation Pertaining to Religion or Belief*, *op. cit.*, note 276, p. 22.

**342** On Article 9, see: *Guide to Article 9 Freedom of Thought, Conscience and Religion* (Strasbourg: Council of Europe, last update December 2018), [https://www.echr.coe.int/Documents/Guide\\_Art\\_9\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf). See also: Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001).

freedom of thought and conscience and the freedom to have or adopt a religion or belief of one's choice may not be limited, and are protected unconditionally.<sup>343</sup> It is only the right to manifest one's religion or belief that may be limited.

General Comment No. 22 further stresses that the terms "religion" and "belief" are to be broadly construed, and that Article 18 applies not only to traditional or institutionalized religions or beliefs, but also to those that are newly established or represent religious minorities, among others (see Box 9.4). Similarly, under Article 9 of the ECHR, complaints have been accepted by the European Court of Human Rights on behalf of major traditional world religions,<sup>344</sup> smaller or newer religions,<sup>345</sup> as well as coherent and sincerely held philosophical convictions.<sup>346</sup>

At the same time, the Court has noted that personal or collective convictions will only benefit from the protection of Article 9 if they achieve a level of "cogency, seriousness, cohesion and importance".<sup>347</sup> Once this is attained, the Court has made clear that it is not for state authorities to determine which religions are authentic, correct or deserving of recognition:

*"[T]he State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed".<sup>348</sup>*

The manifestation of one's religion or belief may take many forms, ranging from personal matters, such as religious dress, expression and education, to more public manifestations, such as visiting places of worship, taking part in religious rites, creating and participating in religious communities and organizations, and publishing activities and statements.

**343** UN Human Rights Committee, General Comment No. 22, *op. cit.*, note 278, para. 3.

**344** For example: Alevism; Buddhism; different Christian denominations; various forms of Hinduism, including the Hare Krishna movement; and branches of Islamism, Sikhism and Taoism. See: Council of Europe, Guide to Article 9, *op. cit.*, note 342, para. 17.

**345** For example, the Court has heard cases brought by the Unification Church, the Church of Jesus Christ of Latter-Day Saints (Mormonism), the Raëlian Movement, Neo-Paganism and the Jehovah's Witnesses, among others. *Ibid.*, para. 17.

**346** For example, pacifism, principled opposition to military service. *Ibid.*, para. 17. See also: European Court for Human Rights, *Kokkinakis v. Greece* (Application No. 14307/88, judgment of 25 May 1993), para. 31, which states that freedom of thought, conscience and religion is "a precious asset for atheists, agnostics, sceptics and the unconcerned".

**347** European Court for Human Rights, *İzzettin Doğan and others v. Turkey* (Application no. 62649/10, judgment of 26 April 2016), para 68.

**348** European Court for Human Rights, *Eweida and others v. the United Kingdom* (Application nos. 48420/10, 59842/10, 51671/10 and 36516/10, judgment of 15 January 2013), para. 81.

### **Box 9.4: The UN Human Rights Committee on freedom of religion or belief<sup>349</sup>**

The UN Human Rights Committee has stated the following with respect to the freedom to manifest religion or belief under Article 18(1) of the ICCPR:

"The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group."

### ***Limitations on freedom of religion or belief***

States may limit the right to manifest religious belief under Article 18 of the ICCPR and Article 9 of the ECHR. Such limitations are permissible if they follow the requirements set out in the respective articles, namely, if they are prescribed by law, pursue one of the specified legitimate aims, are necessary and proportionate to achieve these aims, and are not imposed for discriminatory purposes or applied in a discriminatory manner. In this context, both Article 18 of the ICCPR and Article 9 of the ECHR allow this right to be limited in the interests of public safety, public order, health or morals, or for the protection of the rights and freedoms of others, but not in the interests of national security (unlike, for example, Articles 8, 10 and 11 of the ECHR; see Box 4.3 in "Chapter 4: National Protections for the Human Rights of Armed Forces Personnel"). As the approach of the European Court of Human Rights shows, armed forces may legitimately limit the right to manifest religious belief in ways that reflect military discipline for reasons of public order or for the protection of the rights and freedoms of others.<sup>350</sup>

In part, in the case of regular (non-conscripted) service personnel, limits may already result from an individual's decision to enlist and to submit to military life. In general, the European Court of Human Rights has noted that interference with freedom of religion

<sup>349</sup> UN Human Rights Committee, General Comment No. 22, *op. cit.*, note 278, Art. 18. For a discussion on the Committee's interpretation of Article 18 of the ICCPR, see: Martin Scheinin, "The Human Rights Committee and Freedom of Religion or Belief", in Lindholm et al., *op. cit.*, note 308; and Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2005).

<sup>350</sup> See: Council of Europe, Recommendation CM/Rec(2010)4, *op. cit.*, note 26, para. 40, which states that specific limitations may be placed on the exercise of the right to freedom of religion or belief "within the constraints of military life".

or belief in employment will need to be justified. Where such restrictions occur, the employers' and the employees' interests should be balanced, such as where a civilian airline prohibits the wearing of all religious symbols, including a small cross.<sup>351</sup> In an earlier case, however, the Court held that the dismissal of a senior legal adviser in the Turkish air force did not violate Article 9 of the ECHR.<sup>352</sup> The Turkish government had argued that the complainant had manifested a lack of commitment to the secularist foundation of the Turkish state by taking part in the activities of the Süleyman sect, known to have unlawful fundamentalist tendencies. The Court held that the complainant had voluntarily accepted limitations on the manifestation of his beliefs in embracing a system of military discipline. Within these limitations, he was permitted to pray five times daily, to observe Ramadan and to attend Friday prayers. The dismissal was found to be based on his conduct and attitude rather than the way in which he manifested his religion.

Restrictions on certain aspects of freedom of religion or belief of more senior members of the armed forces might be justified on account of the vulnerable position of junior military personnel. In a case against Greece, the European Court of Human Rights found that the conviction of senior service personnel, who were Pentecostal, for proselytizing to other (subordinate) personnel did not contravene Article 9. The Court noted that things in the civilian world would be seen as an innocuous exchange of ideas, which recipients are free to accept or reject, may, within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power. It was thus permissible for the Greek authorities to protect subordinates in this way from the unwanted religious attentions of their superiors. The measures were also not considered disproportionate, since they were "not particularly severe and were more preventative than punitive in nature".<sup>353</sup>

## ***Discrimination on the basis of religion or belief***

The major human rights treaties prohibit discrimination in the enjoyment of human rights on grounds of religion. Article 2(1) of the ICCPR obliges States Parties to respect and ensure to all individuals within their territories and under their jurisdiction the rights recognized in the Convention, without distinction of any kind, such as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Article 26 of the ICCPR likewise prohibits discrimination on religious grounds. These provisions are supplemented by the UN General Assembly's 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief.

**351** European Court for Human Rights, *Eweida and others v. the United Kingdom*, *op. cit.*, note 348, paras. 83-84. The Court held that the employer's commercial interests did not outweigh the employee's rights.

**352** European Court for Human Rights, *Kalaç v. Turkey* (Application no. 20704/92, judgment of 1 July 1997).

**353** European Court for Human Rights, *Larissis v. Greece*, (Application no. 23372/94, judgment of 24 February 1998), paras. 50-55. In those cases where the applicants had proselytized to civilians, the Court found that there had been a violation of the applicants' rights under Article 9. Thus, the Court attached decisive significance to the fact that the civilians whom the applicants had attempted to convert were not subject to pressures and constraints of the same kind as the service personnel.

In General Comment No. 22, the UN Human Rights Committee emphasized that, in cases where a religion has been identified as a state religion, this shall not impair the rights or result in any discrimination against adherents of other religions or non-believers. In particular, the latter should not be excluded from certain public positions or suffer from restrictive practices, nor should adherents of the majority religion be unduly advantaged, economically or otherwise.

The ECHR also provides for the right to non-discrimination. Article 14 states that the enjoyment of a person's Convention rights shall be secured without discrimination on various grounds: "such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". Article 14 applies to any person claiming that a state has discriminated against them on grounds of religion (or belief). Article 14 has been supplemented by Article 1 of Protocol No. 12 to the Convention – a free-standing provision that prohibits discrimination on any grounds, including religion, by public authorities, including the armed forces. In its 2010 Recommendation on human rights of armed forces members, the Council of Europe's Committee of Ministers further emphasized that states must not discriminate between service personnel based on their religion or belief.

The European Court of Human Rights has noted in its case law that discrimination not only exists where persons in the same or similar situations are treated differently and without an objective and reasonable justification, but also where states, for no objective and reasonable justification, fail to treat differently persons whose situations are significantly different.

For European Union states, Council Directive 2000/78/EC on equal treatment in employment and occupation requires that member states provide a legal remedy for discrimination (whether direct, indirect or constituting harassment) in employment and training, including on the grounds of religion or belief. The prohibition of discrimination does not, however, mean that every distinction on grounds of religion or belief is impermissible. The Directive recognizes that, in very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. The exception has been interpreted strictly by the European Court of Justice. In the armed forces, this is only likely to apply to the posts of religious representatives, such as chaplains. In such cases, a requirement that the person appointed be of the religion concerned may, if the other conditions are met, be legally defensible.

## Different Approaches

Around half of the OSCE participating States that responded to the ODIHR-DCAF questionnaire collect data on the religious affiliation of armed forces personnel (namely Austria, Bosnia and Herzegovina, Estonia, Finland, Germany, Ireland, Latvia, Lithuania, Malta, Poland and the United Kingdom). The most commonly stated reason for collecting

such data was to make appropriate funeral arrangements in case of the death of a service member. Other reasons cited include finding out the composition of the defence forces, and being able to make appropriate provisions for the religious needs of personnel. In all states where religious data are collected, service personnel also have the right not to declare their religious affiliation,<sup>354</sup> in line with key human rights standards.<sup>355</sup>

Service personnel's access to relevant religious representatives is a key aspect of freedom of religion or belief in the armed forces. Responses to the ODIHR-DCAF questionnaire indicated clear differences among participating States in terms of the types of religious representatives provided (see Box 9.5).

**Box 9.5: Types of religious representatives in selected OSCE participating States<sup>356</sup>**

Buddhism	The United Kingdom
Christianity	Austria, Bosnia and Herzegovina, Cyprus, the Czech Republic, Finland, Germany, Ireland, Latvia, Lithuania, Malta, Norway, Poland, Romania, Slovakia, Slovenia, Sweden, the United Kingdom
Hinduism	The United Kingdom
Islam	Austria, Bosnia and Herzegovina, Lithuania, Norway, the United Kingdom
Judaism	Austria, Lithuania, the United Kingdom
Sikhism	The United Kingdom

In some countries, such as Norway, the armed forces also provide access to humanist counsellors, who essentially offer support to non-religious service personnel (see Box 9.6). Although the need for religious representatives depends on the number of service personnel affected, it is good practice to provide access to religious representatives for minority religions. The needs of service personnel that do not have access to representatives of their own religion may also be partially met by establishing religious associations among members of the armed forces. In multinational forces, the pooling of religious representatives among contributor countries may also help to address the question of representation for minority religions.

<sup>354</sup> ODIHR-DCAF 2018 questionnaire, qu. 22.

<sup>355</sup> See UN Human Rights Committee, General Comment No. 22, *op. cit.*, note 278, para. 3, stressing that no one can be compelled to reveal her/his thoughts or adherence to a religion or belief. See also: Council of Europe, Guide to Article 9, *op. cit.*, note 342, paras. 54-57, which clarifies that states may not ask after persons' religion or belief, or force them to express such beliefs, either directly or indirectly.

<sup>356</sup> ODIHR-DCAF 2018 questionnaire, qu. 25.

**Box 9.6: Humanist counsellors in the Norwegian Armed Forces<sup>357</sup>**

The Norwegian armed forces appointed its first “field humanist” (*feltlivssynshumanisten*), or chaplain, in February 2017.

This is a military position. Accordingly, the holder (who has no prior military experience) undergoes military officer education and is commissioned with the rank of commander.

In addition, the Norwegian Humanist Association (NHA) has been recognized as an endorsing organization for the new field humanist, meaning that membership of the Association is a requirement of the post and that the NHA certifies and oversees appointees.

The role of religious representatives is to conduct religious services, provide information on religious matters and offer counselling and religious support services to service personnel. Where regular procedures do not exist or are deficient, religious representatives may also deal informally with complaints or handle social or welfare issues affecting service personnel. In nearly all countries, they also advise and assist leaders of the armed forces on matters concerning plans, policies and doctrine that affect the religious, ethical and moral well-being of armed forces personnel. Practice varies over whether religious representatives, such as chaplains, have a military rank.

Only a minority of participating States reported that they accommodate special religious needs, such as dietary requirements, clothing, religious holidays and external signs of religious faith/affiliation. The armed forces of several states strive to meet religious dietary requirements (namely Austria, Bosnia and Herzegovina, Cyprus, Denmark, Estonia, Finland, Greece, Italy, Ireland, Malta, Montenegro, Norway, Romania, Slovenia, Sweden and the United Kingdom). Only Austria, Norway and the United Kingdom allow service members to wear certain authorized religious dress or symbols.

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<sup>357</sup> Col. Erwin Kamp, “Checking in with a new Military Chaplain”, <https://unitedcor.org/checking-new-chaplain/>.

**Box 9.7: Religious dress in the United Kingdom Armed Forces<sup>358</sup>**

All service personnel in the United Kingdom Armed Forces are required to wear standard military uniforms and adhere to clothing policy and instructions. However, the Armed Forces recognize the specific codes of dress of particular religious beliefs. For operational and health and safety reasons, service personnel are asked to be flexible in some circumstances. Guidance on religious clothing is provided for the major religions practised in the United Kingdom.

**Sikhs**

Sikhs are able to adhere to the 5Ks: *Kara* (iron or steel bangle), *Kesh* (uncut hair), *Kanga* (small comb), *Kachera* (special design knee length underwear) and *Kirpan* (small sword). Sikh men can also wear a turban. However, some constraints regarding the wearing of a turban and keeping facial hair uncut do exist:

Some trades require specialist headgear to be worn, especially in operational circumstances, such as combat helmets, breathing apparatus for firefighters and flying helmets for aircrew in some types of aircraft.

**Muslim and Sikh men**

Muslim men may wear neatly trimmed beards. Sikh men can wear their beards and their hair long, in the Sikh tradition. They are also required to keep their beards neat. Fully practising Sikhs may keep their uncut beard folded and tied under the chin.

Aircrew: Muslim personnel may modify their beards as necessary. Sikh Service personnel may wear a *patka* (small turban) underneath their headgear, except where this is not possible for certain trades.

Respirator: Where a respirator is worn, an effective seal is necessary in order to meet health and safety requirements.

**Muslim women**

Muslim women are allowed to wear uniform trousers in place of a skirt and may wear a hijab (headscarf), except when operational or health and safety considerations dictate otherwise. Long-sleeve shirts are also available with most forms of service dress. Tracksuit bottoms may be worn for sport. The Armed Forces require all service personnel to achieve a basic swimming standard as part of their training. Although efforts are made to ensure that such tests take place in an all-women environment, Muslim women applicants are informed that this will not always be possible.

**358** See: "Guide on Religion and Belief in the Armed Forces", United Kingdom Ministry of Defence, 2011, p. 12, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/28127/guide\\_religion\\_belief.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/28127/guide_religion_belief.pdf).



### **Jewish men**

Men who are members of the Jewish faith may wear dark plain or patterned yarmulkes whenever they remove other headaddress.

### **Jewish women**

Orthodox Jewish women can opt to dress modestly, such as by not wearing trousers, short skirts or short sleeves. They are also permitted to keep their heads covered by a scarf or a beret.

### **Buddhists**

Buddhists are allowed to wear either a string or prayer bracelet on their neck or their wrist (usually on the right hand).

Ministries of defence can also help to promote increased understanding of diverse religious practices and prevent religious discrimination in the armed forces. Valuable guides have been produced for the benefit of service personnel, especially superior officers faced with requests based on religious motivation, in Canada,<sup>359</sup> Denmark<sup>360</sup> and the United Kingdom.<sup>361</sup> The United Kingdom's guide gives advice on handling complaints and basic information concerning 11 religions, other ancient religions and non-religious beliefs. It covers requests for leave for festivals/holidays, time off and facilities for prayer, time off for bereavement, dress, dietary needs, fasting, meeting the spiritual needs of personnel, conscientious objection, death in service, emergency burial, and the collection of information on religion and belief. Such guides can be especially useful when assessing states' efforts to recognize and accommodate the diversity of faiths, including minority religions, practised by members of the armed forces.

<sup>359</sup> Canadian Forces Administrative Order 16-1, "Religious Accommodation".

<sup>360</sup> "Forvaltning af religiøst begrundete praktiske ønsker og behov [Administration of religiously motivated practical wishes and needs]", Danish Defence Command, 2004.

<sup>361</sup> United Kingdom Ministry of Defence, *op. cit.*, note 358.

## Good Practices and Recommendations

It is not always easy, or even possible, for military institutions to accommodate everyone's religion or belief, especially as armed forces function according to their own rules of discipline, hierarchies and priorities. Unintentional disparities in the ability of service personnel to practise their religion may occur, especially when the chain of command is unfamiliar with religious or non-religious beliefs that are not part of the major religions.

Additionally, some countries, such as France and Turkey, have constitutional guarantees of secularity, and others, like the United States, have a separation of church and state. In such cases, there may be a concern that state measures that actively facilitate the practice of religion could be found to be unconstitutional. Moreover, practical difficulties may arise when attempting to accommodate diverse and, perhaps, conflicting religious practices, such as in the provision of prayer space or of time off for holy days.

While it may prove difficult, and at times impossible, to adequately meet such challenges, the right to freedom of religion or belief exists for each individual, including service personnel. Restrictions on the manifestation of this right are possible, but only where they are set out in law, follow a legitimate aim, and are necessary and proportionate to the intended aim. Thus, military institutions should seek, as far as possible, to safeguard this right and to restrict it only where it is absolutely necessary and where there are no other (less restrictive) means to ensure discipline, order and safety for armed forces members.

The ensuing recommendations provide further guidance on how to ensure and uphold freedom of religion or belief within the armed forces.

- » Service in the armed forces should be open to everybody regardless of religion or belief.
- » Any impediments to service, such as religious oaths of allegiance, should be relaxed by allowing at least the possibility of non-religious affirmation.
- » Members of the armed forces should be permitted to opt out of religious services and ceremonial duties that incorporate religious elements.
- » Discrimination or harassment on grounds of religion or belief should not be tolerated in the armed forces.
- » States should collect sex-disaggregated data on the religious composition of the armed forces, in order to have an evidential basis for identifying and combating any latent or indirect religious discrimination. However, disclosing any information as part of the data collection needs to be strictly voluntary for personnel of the armed forces.
- » Armed forces should, wherever possible, accommodate religious practices by members, including worship, prayer, access to representatives of their religion or belief, observance of holy days and fasting, and observance of dress and dietary requirements.
- » Where it is not possible to accommodate these practices for reasons of military effectiveness or genuine occupational requirements, any restrictions should be prescribed by law, have a legitimate aim and be necessary and proportionate.

The onus should be on the armed forces to demonstrate what harm would result if the practice in question were permitted.

- » Armed forces should allow access to counsellors or chaplains reflecting the diversity of religious and non-religious beliefs among their service personnel.
- » Ministries of defence should distribute guidance on different religious or belief practices and on how these can be accommodated in the armed forces.

## Further reading

ODIHR, *Freedom of Religion or Belief and Security: Policy Guidance* (Warsaw: ODIHR, 2019), <https://www.osce.org/odihr/429389>.

ODIHR - Venice Commission, *Guidelines for Review of Legislation Pertaining to Religion or Belief* (Warsaw: ODIHR, 2004), <https://www.osce.org/odihr/13993>.

ODIHR, *Guidelines on the Legal Personality of Religion or Belief Communities* (Warsaw: ODIHR, 2015), <https://www.osce.org/odihr/139046>.

Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge: Cambridge University Press, 2005).

Alfred C. Stepan, "Religion, Democracy, and the 'Twin Tolerations'", *Journal of Democracy*, Vol. 11, No. 4, October 2000, pp. 37-57.

## *SECTION III*

# **— EQUALITY AND NON- DISCRIMINATION**

## Chapter 10: Ethnic, Racial and Linguistic Minorities in the Armed Forces

### Introduction: Issues at Stake

This chapter deals with the position of persons belonging to ethnic and linguistic minorities within the armed forces. It also discusses the situation of non-nationals serving in the armed forces.

Protecting and enhancing minorities' rights to their cultures, religions and languages is part of upholding their human rights (see "Chapter 9: Religion in the Armed Forces"). Where a state's armed forces include all of society, including ethnic and other minorities, they can become a source of improved societal cohesion. It follows that efforts should be made to remove institutional barriers to the recruitment and inclusion of everyone within the armed forces. This is not only a question of justice and fairness, and the right to equal treatment without discrimination, but also one of effectiveness – the armed forces will operate more effectively if they are broadly representative and inclusive, and not dominated by specific ethnic or linguistic groups.<sup>362</sup>

This chapter, therefore, discusses the integration of the armed forces, with a view to establishing good practices and procedures for the recruitment, selection and training of all service personnel, including persons belonging to minorities.

#### Box 10.1: OSCE commitments on national minorities

The OSCE has developed broad commitments related to national minorities. As early as the Helsinki Conference of 1975, the OSCE stated that participating States should recognize the contribution that national minorities and regional cultures play in those states.<sup>363</sup> Later, at the Vienna Conference of 1989, participating States agreed to "protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of national minorities on their territory".<sup>364</sup> Added at the Copenhagen Conference of 1990 was the right of those belonging to such a minority or culture to use their own language and to establish their own educational, cultural and religious institutions.<sup>365</sup> Subsequent conferences have re-affirmed these commitments. The participating States agreed in 1992 to establish the High Commissioner on National Minorities as an instrument of conflict prevention; the High Commissioner has observed

<sup>362</sup> Lyall Jason, "The Strongest Military Is an Inclusive one. Why Equality Wins Wars", Foreign Affairs, February 14, 2020, <https://www.foreignaffairs.com/articles/2020-02-14/strongest-military-inclusive-one>.

<sup>363</sup> OSCE, Helsinki Final Act (Co-operation in Humanitarian and Other Fields), *op. cit.*, note 9.

<sup>364</sup> OSCE, Vienna 1989, *op. cit.*, note 139, para. 19.

<sup>365</sup> OSCE, Copenhagen 1990, *op. cit.*, note 141, paras. 32-34.

that “the protection of human rights, including minority rights, is inextricably linked with the preservation of peace and stability within and between States.”<sup>366</sup> The OSCE participating States have also committed to protecting and promoting human rights of Roma and Sinti, including by strengthening policies and practical measures to counter racism and discrimination against them.<sup>367</sup>

The approach in many domestic legal systems of treating members of the armed forces as “citizens in uniform” requires that service personnel be, so far as is consistent with military life, accorded the civil and constitutional rights of other citizens, without discrimination. Article 2(1) of the ICCPR requires its States Parties:

*“to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*

Similarly, Article 1 of the ECHR obliges States Parties to, “secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention” and Article 14 prohibits discrimination when it comes to the enjoyment of rights and freedoms. For example, with regard to the freedom of expression, the European Court of Human Rights has underlined that “Article 10 does not stop at the gates of army barracks. It applies to military personnel as to all other persons within the jurisdiction of the Contracting States.”<sup>368</sup>

Some armed forces have had successful experiences of providing an inclusive environment for all service personnel. In others, a supposedly ethnically representative approach has led to armed forces with units drawn almost exclusively from certain ethnic groups. Different challenges in promoting equality and preventing discrimination arise in each case.

### **Box 10.2: Definition of discrimination**

Discrimination means any differential treatment based on grounds such as “race”, colour, language, religion, nationality or national or ethnic origin, as well as descent, belief, sex, gender, gender identity, sexual orientation or other personal characteristics or status, which has no objective and reasonable justification (see paragraph 7 of explanatory memorandum to ECRI General Policy Recommendation 15).<sup>369</sup>

<sup>366</sup> OSCE High Commissioner on National Minorities (OSCE HCNM), *Ljubljana Guidelines on Integration of Diverse Societies*, (The Hague, OSCE HCNM, 2012), p. 2, <https://www.osce.org/hcnm/ljubljana-guidelines>. See also factsheet on the OSCE HCNM: <https://www.osce.org/hcnm/33317?download=true>.

<sup>367</sup> “ODIHR mandate on Roma and Sinti issues: Key documents”, at <https://www.osce.org/odihr/154691>.

<sup>368</sup> European Court for Human Rights, *Grigoriades v. Greece*, *op. cit.*, note 42, Para. 45.

<sup>369</sup> While there are various definitions of discrimination from relevant international instruments and norms, this

### Box 10.3: Roma and Sinti in armed forces

The European Court of Human Rights has noted that Roma require special protection “as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority.”<sup>370</sup> Armed forces can provide an example of how to promote inclusion and ensure non-discrimination against Roma minorities while emphasizing their role in the national defence. In Serbia, for instance, research has shown that Roma communities highly trust and respect military institutions, and that the Serbian Army is perceived as an egalitarian and open institution when it comes to employment.<sup>371</sup> In 2014, 0.19 per cent of professional staff of the Ministry of Defence and the Serbian Army voluntarily declared themselves as Roma, which was a higher percentage than for many other ethnic minorities in the country. These Roma professionals were employed across all categories of employees, and included individuals with master’s (1.56 per cent) and bachelor’s (7.81 per cent) degrees and high school diplomas (62.5 per cent). Roma civil society also participated in the creation of security policies, such as Roma women’s organizations contributing to the National Action Plan for the Implementation of UN Security Council Resolution 1325 – Women, Peace and Security in the Republic of Serbia, which includes numerous references to “women from multiply discriminated and vulnerable groups,” such as Roma women.<sup>372</sup>

To perform cohesively and effectively in the field and to respect the principle of non-discrimination, the armed forces should adequately reflect society’s composition, while having a vision that transcends the different identities of their members. As a visible symbol of national unity, the armed forces can act as a positive force. By applying successful models of inclusion, they can facilitate the respect for linguistic, cultural and ethnic differences within society. A country’s armed forces aim to instil in their members a shared and common purpose. Minority rights will be violated, however, when armed forces seek only to assimilate or suppress minorities, rather than ensuring their rights to practice their culture, religion and language within the military as in wider society.

one, from the Council of Europe’s European Commission against Racism (ECRI) has been included due to its comprehensive nature. The definition can be found at: <https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01>, p 14.

**370** Paragraph 181 of the *D.H. and Others v. the Czech Republic*, application no. 57325/00, Grand Chamber judgment of 13 November 2007 specifies this as follows: “The vulnerable position of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases”, and referred to “an emerging international consensus among the Contracting States of the Council of Europe recognizing the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves, but also to preserve a cultural diversity of value to the whole community”.

**371** Jelena Radoman and Marina Tadic, *Roma Women and Men and Security Sector in the Republic of Serbia*, (Belgrade: Public Policy Research Centre and the OSCE Mission to Serbia, 2014), <http://www.publicpolicy.rs/documents/4ad35ff7057dde2b65c37e7270862f80c3ec9cdb.pdf>.

**372** Ministry of Defence of the Republic of Serbia, “National Action Plan for the Implementation of UN Security Council Resolution 1325 – Women, Peace and Security in the Republic of Serbia (2017-2020)”, Belgrade, 2017.

For linguistic minorities, there is the question of the use of their mother tongue within the armed forces – whether official communication in the armed forces is conducted in all the official languages of the country or only in the majority or state/official language, and whether minorities are allowed to communicate in their own language while on duty.

In addition, re-establishing inter-ethnic co-operation in the armed forces of countries that have endured ethnic conflict is particularly important. Even where it is necessary to maintain separate structures, measures need to be taken to ensure timely dialogue among the military leaders of different groups and the rapid re-establishment of a national command structure. The military can undertake measures to support reconciliation, such as programmes to promote recruitment among under-represented ethnic groups and considering minority issues when making decisions about downsizing, demobilization, disarmament and reintegration into civilian life.

#### **Box 10.4: The example of Bosnia and Herzegovina**

Bosnia and Herzegovina represents a unique example of how one country's defence structures are coping with the legacy of the past. Although the conflict ended in 1995, it was only in 2006 that Bosnia and Herzegovina established an exclusively state-level defence establishment. This included the creation of a NATO-compatible single military force (the Armed Forces of Bosnia and Herzegovina), thereby replacing the two predominantly mono-ethnic brigades that effectively comprised the former warring factions. The political and legislative solutions for this reform were forged with significant assistance from the multinational NATO headquarters still based in the country.

The defence legislation (principally, the Law on Defence and the Law on Service in the Armed Forces of Bosnia and Herzegovina) strikes a balance between protecting the group rights of Bosnia and Herzegovina's three largest ethnic groups and promoting the individual human rights of military personnel. For example, the legislation ensures that the senior positions in both the Armed Forces and the Defence Ministry are divided fairly among the three constituent peoples. While this has the significant drawback of excluding other ethnic groups, it can be seen as serving as a useful confidence-building mechanism among the constituent peoples. The president has the power to determine the appropriate ethnic representation in the Armed Forces based on census statistics and operational considerations. In terms of individual rights, the defence legislation specifies that military personnel have the same service rights regardless of their ethnicity or entity of residence. These rights are set out in some detail in the Law on Service and cover areas such as language rights, equal opportunities, complaints procedures and due process in the context of military discipline proceedings.

One notable feature of the system is the creation of three infantry regiments, each responsible for maintaining the military heritage and identity of the former units/armies from which they are descended: the Army of the Republic of Bosnia and Herzegovina



(predominantly Bosniak), the Croatian Defence Council (predominantly Croat) and the Army of the Republika Srpska (predominantly Serb). According to legislation, these regiments have no operational or administrative authority, and units from these regiments are organized into multi-ethnic brigades.

## International Human Rights Standards

The right to equal treatment is recognized by international human rights law, including the UDHR, the ICCPR and the ECHR, although there are some differences between these texts (see Box 10.5). Additionally, the ILO Convention C111 protects against discrimination in employment or occupation. These instruments prohibit discrimination on the grounds of race, colour, national origin, religion or other status. Article 27 of the ICCPR specifically extends protection to include discrimination against ethnic, religious or linguistic minorities. Fundamental to the terminology is the declaration in Article 1 of the Universal Declaration of Human Rights, that “all human beings are born free and equal in dignity and rights.”

### Box 10.5: Equality and non-discrimination provisions in selected human rights documents

Article 2 UDHR:	Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
Article 26 ICCPR:	All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. <sup>373</sup>
Article 27 ICCPR:	In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language.
Article 14 ECHR:	The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

**373** In paragraph 44 of the Case of *Thlimmenos v Greece*, Application No. 34369/97, Grand Chamber Judgement of 6 April, 2000, the European Court of Human Rights adds a new facet to the understanding of this article: “The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification (....). However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”

Article 1 of Protocol 12 to the ECHR:	<p>1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.</p> <p>2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.</p>
Article 1, ILO C111	<p>For the purpose of this Convention, the term discrimination includes:</p> <p>(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;</p> <p>(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organizations, where such exist, and with other appropriate bodies.</p>
Article 2, ILO C111	Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

These international standards require states to take active measures to eliminate discrimination, such as enacting anti-discrimination laws or preventing acts of racism or racial or ethnic harassment by others (for example, by fellow service personnel). The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) reiterates these measures and specifies what they require. The Convention applies to "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life" (Article 1.1).

Under Directive 2000/43 of the European Union,<sup>374</sup> member states are obliged to legislate to provide remedies for racial and ethnic discrimination in private and public employment, including remedies for indirect discrimination<sup>375</sup> and harassment. Among other areas, this Directive applies to: "(a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion".<sup>376</sup> Employers are liable for any employment practices that may constitute discrimination, as well as for any actions by employees that contribute to a workplace climate of harassment. States have a

**374** Council of the European Union, "Directive 2000/43/EC Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin", Official Journal of the European Communities, L 180, 29 July 2000, pp. 22-26.

**375** *Ibid.*, Art. 2(2)(b): "indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary".

**376** *Ibid.*, Art. 3.

duty to “ensure that judicial and/or administrative procedures, including, where they deem it appropriate, conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged” (Article 7). Arguably, this requires European Union states to allow members of armed forces access to civilian legal remedies to enforce anti-discrimination provisions, and not only to internal processes.

Article 14 of the ECHR does not establish a free-standing right not to be discriminated against, and only applies to the enjoyment of other rights stipulated in the Convention. At the same time, there is no need to demonstrate the infringement of a right, as a practical link will suffice. Importantly, there is no Convention right to employment or participation in public service. Even where such a link or breach is established, and Article 14 is engaged, it is possible to justify differential treatment. The European Court of Human Rights has stated, for example, that “a difference of treatment is discriminatory if it ‘has no objective and reasonable justification’, that is, if it does not pursue a ‘legitimate aim’ or if there is not a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised’”.<sup>377</sup> However, differential treatment on the grounds of race and nationality are two categories that the European Court of Human Rights has said require “very weighty reasons” or “particularly serious reasons” to be justified.<sup>378</sup>

Unlike Article 14, Protocol 12 to the ECHR is a free-standing provision to protect individuals from discrimination:

- in enjoying any right within national law;
- by public authorities carrying out their legal obligations, including when using discretionary powers such as grant-making; and
- in any other act, or failure to act, by a public authority.

Thus, Protocol 12 prevents discrimination within armed forces on the prohibited grounds in the countries where it applies.<sup>379</sup> In addition, the Council of Europe’s Committee of Ministers provided concrete guidance regarding armed forces personnel in its 2010 Recommendation on human rights of armed forces members.<sup>380</sup>

<sup>377</sup> European Court of Human Rights, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, European Human Rights Reports, Vol. 7, 1985, p. 741, para. 72. See also: “Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium” (Belgian Linguistics Case), European Court of Human Rights, 23 July 1968, European Human Rights Reports, 1979–80, Vol. 1, p. 241.

<sup>378</sup> European Court of Human Rights, *Tekeli v. Turkey*, 16 November 2004, European Human Rights Reports, Vol. 42, 2006, p. 53, referring to “compelling reasons”. It was only in 2007 that the European Court of Human Rights explicitly included the notion of indirect (race) discrimination under Article 14, in *DH and others v. the Czech Republic*, its judgment on Roma education segregation.

<sup>379</sup> Protocol 12 has been signed by 35 Council of Europe states, of which 20 have ratified the Protocol. It entered into force on 25 June 2018. ECRI works with governments to try to remove the obstacles to ratifying Protocol 12.

<sup>380</sup> See, in particular, Article 77: “In the context of the work and service life of members of the armed forces, as well as with respect to access to the armed forces, there should be no discrimination in relation to their human rights and freedoms based on any grounds such as sex, sexual orientation, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property,

Other relevant instruments regarding minority rights include the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities<sup>381</sup> and the Council of Europe Framework Convention for the Protection of National Minorities.<sup>382</sup>

## Different Approaches

This section describes different approaches to dealing with racial discrimination, including legal or complaints processes and employment policies, with a view to identifying good practices. A discussion follows on the position of non-nationals in the armed forces and linguistic minorities.

### *Dealing with complaints of racial discrimination or harassment*

To comply with the human rights obligations described above, it is essential that effective means are in place for dealing with complaints of racial discrimination. Remedies for discrimination may take several forms. One avenue is to allow for civil claims of discrimination to be brought to civilian employment tribunals (see Box 10.6 on the United Kingdom's approach) or to provide a right to direct access to human rights commissions, as in Canada.

#### **Box 10.6: Internal procedures for racial discrimination claims in the United Kingdom<sup>383</sup>**

In the United Kingdom, general legislation preventing racial discrimination was extended to the Armed Forces in 1996 and allows members of the Armed Forces to bring allegations of racial discrimination before a civilian employment tribunal.

Before they do so, however, they must make a complaint under an internal service procedure (known as a complaint for redress). Typically, the Armed Forces requests that tribunal proceedings be deferred until the conclusion of the internal procedure.

The advantages of this approach are that it encourages the internal resolution of these cases and allows for allegations of discriminatory actions by other service personnel to

birth or other status. The principle of non-discrimination will not be violated if the distinction between individuals in analogous situations has an objective and reasonable justification in the pursuit of a legitimate aim, such as maintaining combat effectiveness, and if the means thus employed are reasonably proportionate to the aim pursued." Council of Europe, Recommendation CM/Rec(2010)4, *op. cit.*, note 26.

**381** UN General Assembly "Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities", General Assembly resolution 47/135, 18 December 1992, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/Minorities.aspx>.

**382** The Framework Convention has been ratified by 39 OSCE participating States. More information is available at <https://www.coe.int/en/web/minorities/at-a-glance>.

**383** Appendix 11 to the Minutes of Evidence, "Special Report of Armed Forces Select Committee 2001", 2001 HC (House of Commons Papers) 154, Vol. II; Race Relations Act 1976, Section 75; Race Relations (Complaints to Industrial Tribunals) (Armed Forces) Regulations 1997; the United Kingdom Armed Forces Act 2006, Sections 334–339, [https://www.legislation.gov.uk/ukpga/2006/52/pdfs/ukpga\\_20060052\\_en.pdf](https://www.legislation.gov.uk/ukpga/2006/52/pdfs/ukpga_20060052_en.pdf).

be taken up as a matter of military discipline.

There are important differences between the complaint for redress (which may take on a disciplinary focus, according to a criminal standard of proof) and the tribunal (which requires a lower, civilian standard of proof). Furthermore, tribunal proceedings are brought against the Armed Forces as the employer responsible for the discriminatory actions of its employees, whereas internal procedures may lead to disciplinary proceedings against other service personnel.

The disadvantages of this approach are that it may involve a substantial delay while internal procedures are completed, and the requirement to complain via the chain of command may discourage service personnel from coming forward with complaints.

Sometimes, allegations of racial mistreatment focus on harassment or bullying by other members of armed forces. Armed forces are responsible for maintaining a non-discriminatory, inclusive, tolerant and safe working environment. By not taking action to prevent or address instances of racial harassment within their ranks, armed forces can be found in breach of their obligations to ensure that all members of armed forces can serve in an environment free from harassment and abuse. In addition to anti-discrimination law, there may be added measures to protect against or punish harassment. In the United Kingdom, for example, a military court or superior officer must treat racially or religiously aggravated offences as an aggravating factor. This will be reflected in a more serious punishment.<sup>384</sup>

#### **Box 10.6: Defining harassment<sup>385</sup>**

Harassment is conduct that has the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

In addition, institutions that address complaints of unfair treatment and abuse (such as military ombuds institutions or inspector generals) may have jurisdiction over issues related to ethnicity and/or "race". One noteworthy model is the German parliamentary commissioner for the armed forces (see "Chapter 19: Ombuds Institutions for the Armed Forces"), who has the power to receive and investigate complaints concerning the actions of other soldiers.

<sup>384</sup> *Ibid.*, the United Kingdom Armed Forces Act 2006, Section 240.

<sup>385</sup> Council of Europe, ECRI, "Recommendation N° 7 on National legislation to Combat Racism and Racial Discrimination", 13 December 2002, CRI(2003)8, para. 35.

## ***Implementing equal opportunity in the armed forces***

Dealing with racial discrimination is not simply a question of providing legal avenues for complaints. The experiences of the United States and the United Kingdom highlight the importance of policies and management initiatives.

In the United States, Executive Order No. 9981 was introduced in 1948 to secure equality in the treatment of all persons in the military, regardless of “race, colour, religion or national origin”. In 1971, the Defense Race Relations Institute, later renamed the Defense Equal Opportunity Management Institute, was created to advise the government and to conduct training. The experience of the United States demonstrates the positive impact of treating efforts to combat discrimination and ensure minority representation in armed forces as important public policy goals (see Box 10.7). Thus, the Armed Forces of the United States have a detailed equal opportunity scheme to make sure that persons belonging to minorities have access to and equal treatment in the Army.<sup>386</sup> Similarly, the United Kingdom has devised and implemented a series of proactive policies to enhance representation of Black, Asian and Minority Ethnic (BAME) personnel in the Armed Forces, and to address racial discrimination, bullying and low retention rates.<sup>387</sup>

### **Box 10.7: Promoting equal opportunities in the United States Armed Forces<sup>388</sup>**

Within the Department of Defense, responsibility for promoting equal opportunities in the Armed Forces lies with a senior official – the Deputy Assistant Secretary of Defense for Equal Opportunity. Meanwhile, the Defense Equal Opportunity Management Institute trains personnel working to promote equal opportunities in the Armed Forces, advises on equal-opportunity policy and conducts related research.

The Department requires each service to maintain and review affirmative-action plans and to complete an annual “Military Equal Opportunity Assessment”. This assessment reports whether various equal-opportunity objectives have been met and identifies problems such as harassment and discrimination.

The assessment includes both data and narrative assessments of progress in ten areas, including recruitment and the commissioning of officers, promotions, the completion of education and training, the augmentation of officers into the regular component

<sup>386</sup> See: Office for Diversity, Equity, and Inclusion, <https://diversity.defense.gov/>.

<sup>387</sup> United Kingdom Ministry of Defence, “A Force for Inclusion: Defence Diversity and Inclusion Strategy” [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/746911/20180806-MOD\\_DI\\_Plan\\_A4\\_v14\\_Final-U.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746911/20180806-MOD_DI_Plan_A4_v14_Final-U.pdf)

<sup>388</sup> ODIHR, *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel* (Warsaw: ODIHR, 2008), p. 107, <https://www.osce.org/odihr/31393>. Original source: “Get to know us”, United States Department of Defense, <http://www.dod.mil/prhome/eoteneent.html>; United States Department of Defense Directive 1350.2, 18 August 1995, <http://www.dtic.mil/whs/directives/corres/rft/d13502x.rtf>; and Defense Equal Opportunity Management Institute, <http://www.deomi.org>

(that is, temporary attachment of officers into an active duty military component), the assignment to career-enhancing billets and over- and under-representation of minorities or women in any military occupational category.

Specific programmes have been created for outreach to certain historically disfavoured groups:

- The American Indian/Alaskan Native Employment Program
- The Asian American/Pacific Islander Employment Program
- The Black Employment Program; and
- The Hispanic Employment Program

The above measures have been very effective in diversifying the military. Forty-three per cent of men and 56 per cent of women recruited in 2016 were either Hispanic or from a racial minority. The background of women in the Armed Forces was more diverse than among the general population.<sup>389</sup>

As part of the 2018 ODIHR-DCAF questionnaire, the following OSCE participating States submitted data on representation of minorities in the armed forces: Bosnia and Herzegovina, Cyprus, Denmark, Latvia, Romania, Switzerland and the United Kingdom. Only Romania provided sex-disaggregated data. The absence of data on ethnic and linguistic minorities in the armed forces in many participating States presents a challenge for them to identify possible discrimination and to be able to enhance diversity within their armed forces. Where data does exist, it is often unclear as to what a state classes as an ethnic/linguistic minority. In general, it seems that the representation of ethnic minorities in armed forces is not proportional to the composition of the wider population, and is likely to be much less so when it comes to women who belong to minorities. More research could be done to assess the multifaceted reasons for this and to assist states in addressing the issue.

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**389** The United States Armed Forces categorize race into five groups (white, Black or African American, American Indian or Alaska Native, Asian, and Native Hawaiian or other Pacific Islander). Hispanic, or Latino, is considered an ethnicity, not a race, and is divided into Hispanic, or Latino, and not Hispanic or Latino. For more see: Reynolds George and Amanda Shendruk: "Demographics of the U.S. Military", Council on Foreign Relations website, 24 April 2018. <https://www.cfr.org/article/demographics-us-military>

### Box 10.8: Percentage of ethnic minorities in the armed forces and the general population of selected OSCE participating States<sup>390</sup>

Latvia	Ethnic minorities make up 8.5 per cent of the Armed Forces. Ethnic minorities – including the Russian minority (25.2 per cent) – make up 37.8 per cent of service personnel. <sup>391</sup>
Romania	Ethnic minorities make up 1.1 per cent of military personnel, compared to 11.4 per cent of the general population. <sup>392</sup> Eight per cent of service personnel who are from ethnic minority background are women, <sup>393</sup> which is similar to proportion of Women on active duty service in the Romanian Armed Forces in general (8.4 per cent in 2017). <sup>394</sup>
Switzerland	The Swiss armed forces are, by definition, multi-ethnic and multilingual. Its composition roughly reflects that of the civilian population: Swiss German – 63.5 per cent, Swiss French – 22.5 per cent, Swiss Italian – 8.1 per cent, Rhaeto-Romance – 0.5 per cent, and other ethnicities – 6.6 per cent.
The United Kingdom	A total of 7.6 per cent of Armed Forces personnel are Black, Asian and minority ethnic (BAME), <sup>395</sup> while 19.5 per cent of the overall population of England and Wales are from an ethnic minority. <sup>396</sup>

## Special personnel policies

Affirmative action policies and measures can be controversial, and in some countries have been rendered unlawful or unconstitutional.<sup>397</sup> However, quotas or other policies and measures for under-represented groups aimed at achieving adequate representation and targets of minority participation within a reasonable timeframe, as well as additional policies and institutional measures designed to accompany the implementation of such

<sup>390</sup> Responses to ODIHR-DECAF 2018 questionnaire, qu. 31.

<sup>391</sup> "Latvijas iedzīvotāju nacionālais sastāvs [National Composition of the Population of Latvia]", Central Bureau of Statistics, [https://www.csb.gov.lv/sites/default/files/data/Skoleniem/iedzivotaju\\_etniskais\\_sastavs.pdf](https://www.csb.gov.lv/sites/default/files/data/Skoleniem/iedzivotaju_etniskais_sastavs.pdf).

<sup>392</sup> "Press Release on the Provisional Results of the 2011 Population and Housing Census", Romanian Central Commission for Population and Housing Census, 2 February 2012, [http://www.recensamantromania.ro/wp-content/uploads/2012/02/Comunicat\\_DATE\\_PROVIZORII\\_RPL\\_2011.pdf](http://www.recensamantromania.ro/wp-content/uploads/2012/02/Comunicat_DATE_PROVIZORII_RPL_2011.pdf).

<sup>393</sup> Responses to ODIHR-DECAF 2018 questionnaire, qu. 31.

<sup>394</sup> NATO, "Summary of the National Reports of NATO Member and Partner Nations to the NATO Committee on Gender Perspectives", NATO website, 2018, p227, [https://www.nato.int/nato\\_static\\_fl2014/assets/pdf/pdf\\_2019\\_09/20190909\\_190909-2017-Summary-NR-to-NCGP.pdf](https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2019_09/20190909_190909-2017-Summary-NR-to-NCGP.pdf).

<sup>395</sup> "UK Armed Forces Biannual Diversity Statistics", United Kingdom Ministry of Defence, 1 October 2018, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/763676/1\\_October\\_2018\\_Biannual\\_Diversity\\_Statistics.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/763676/1_October_2018_Biannual_Diversity_Statistics.pdf).

<sup>396</sup> Including Asian ethnic groups (7.5 per cent), Black ethnic groups (3.3 per cent), Mixed/Multiple ethnic groups (2.2 per cent) and Other ethnic groups (1.0 per cent). "Population of England and Wales", Ethnicity Facts and Figures (2011 census data), <https://www.ethnicity-facts-figures.service.gov.uk/uk-population-by-ethnicity/national-and-regional-populations/population-of-england-and-wales/latest>.

<sup>397</sup> E.g., in 18 October 2005, the Slovak constitutional court ruled affirmative action as unconstitutional (Ref No PI US 8/04-202, published as No 539/2005 Coll). In the United Kingdom, positive discrimination, including quotas, is illegal. However, positive action is lawful, as long as employer meets the conditions set out by the Equality Act. (Equality Act 2010)



affirmative action, can be effective and do not constitute discrimination, as long as they pursue a legitimate aim and are proportionate to that aim.<sup>398</sup>

In Canada in the 1960s, one of the issues dividing the Anglophone majority and Francophone minority was the under-representation of the latter group in the Armed Forces and, particularly, in the officer corps. Affirmative-action quotas, special training programmes and changes in language requirements for officers were introduced to increase Francophone representation. These policies were updated in 1998 and, most recently, in 2012.<sup>399</sup> The creation of French-speaking units in all three services and in every military discipline had the most significant impact on increasing the number of French-speaking officers,<sup>400</sup> and 40 per cent of all Canadian Armed Forces members today bilingual, including 73 per cent of regular officers.<sup>401</sup>

### ***Training measures***

Such measures include special training courses to raise awareness of minority issues. For example, the United Kingdom has established the Joint Equality and Diversity Training Centre, which runs racial awareness training.<sup>402</sup> Another example is the Danish Defence Action Plan 2011-2012, which includes measures to mainstream diversity issues into training and personnel policy.<sup>403</sup> It is a good practice to make the completion of such training programmes a pre-condition for promotion, and to establish that evidence of non-compliance with these policies would prevent career advancement.

### ***Approaches to linguistic minorities***

For some individuals belonging to national minorities who speak a language other than the official or state language, this may form a barrier to their full participation in the armed forces. Box 10.9 lists various approaches to language use in several OSCE participating States.

**398** OSCE HCNM *Ljubljana Guidelines on Integration of Diverse Societies*, *op. cit.*, note 366, p. 11.

**399** "Bilingualism in the CAF: Legal, Historical, and Operational Perspectives" NATO Association of Canada, 22 June 2018.

**400** "Multiethnic Armed Forces", DCAF, 2005. Accessible at: [https://www.files.ethz.ch/isn/15007/background-er\\_05\\_multi-ethnic-forces.pdf](https://www.files.ethz.ch/isn/15007/background-er_05_multi-ethnic-forces.pdf).

**401** "Bilingualism in the CAF: Legal, Historical, and Operational Perspectives" NATO Association of Canada, 22 June 2018.

**402** United Kingdom Ministry of Defence: "JSP 887 Diversity Inclusion and Social Conduct: Defence Strategy and Social Conduct Code to Meet Public Sector Equality Duties", 1 November 2014, [http://data.parliament.uk/DepositedPapers/Files/DEP2016-0068/20141217\\_JSP\\_887\\_version\\_for\\_publication\\_3\\_PQ00604.pdf](http://data.parliament.uk/DepositedPapers/Files/DEP2016-0068/20141217_JSP_887_version_for_publication_3_PQ00604.pdf).

**403** "Forsvarskommandoens handleplan for ligebehandling og mangfoldighed 2011–2012" [Defence Command Action Plan for Equal Treatment and Diversity 2011–2012].

### Box 10.9: Approaches to language use in selected OSCE participating States<sup>404</sup>

**Finland:** Finnish is the official language of communication in all but one military unit, in which the official language is Swedish. All important documents are published in Finnish and Swedish, and official duties are carried out in both languages. In case of language difficulties, support is provided to ensure that all personnel have an equal opportunity to engage in military service. During their free time, members of the armed forces are free to use their own languages without any limitations or restrictions.

**Greece:** Only the state language (Greek) may be used for official communication in the military.

**Italy:** It is mandatory to communicate in Italian, except when on international duty.

**Latvia:** According to the Official Language Law, only the official language of Latvia (Latvian) shall be used within the Armed Forces. However, this restriction applies only during the performance of official duties.

**Romania:** During duty hours, all communication must be carried out in Romanian.

**Sweden:** According to the Language Act of 2009, Swedish is the main official language, while Finnish, Meankali, Romani Chiba, Sami and Yiddish are official minority languages. For the purposes of command and control, all armed forces personnel are required to speak and understand Swedish.

Particularly in states with multiple official languages, depending on the historical and cultural context, the creation of distinct units can be an effective solution to the under-representation of minority language groups. For example, the armed forces in Switzerland have a multi-tier structure, with units organized along cantonal and linguistic lines as far as possible. Specialized troops, however, may form multilingual units. Multilingualism is compulsory for Ministry of Defence staff and the officer corps (see Box 10.10).

Belgium and Canada have established dual military structures in response to the Belgian Flemish and Canadian Francophone preferences to be commanded in their own languages. In Canada, the introduction of such units has had several effects:

- Francophone officers are at an advantage in such units because of their better communication skills in their native language;
- Francophone officers in French-language units are more attuned to the cultural specifics of their Francophone soldiers and, therefore, are more successful leaders and promoted at least as rapidly as their Anglophone colleagues in English-speaking units; and

<sup>404</sup> Responses to the ODIHR-DCAF 2018 questionnaire, qus. 26 and 27.

- The creation of French-speaking units throughout the Armed Forces results in a requirement for colonels, generals and staff officers to be bilingual, regardless of promotion quotas.<sup>405</sup>

### **Box 10.10: Multilingualism and the Swiss armed forces<sup>406</sup>**

Switzerland is a state with four official languages: French, German, Italian and Romansh. Although the Swiss armed forces do not have an official policy of multilingualism, they have developed three policies for addressing the multilingual character of the Swiss state.

#### **The principle of language territoriality**

The equitable representation of the linguistic groups in the armed forces is guaranteed by the territorial structure of the armed forces, which are organized by canton (region). Given the fact that most units are recruited from citizens of the same canton, and since 22 out of 26 Swiss cantons are monolingual entities, most units of the Swiss armed forces use one language for internal communication purposes.

#### **The principle of proportionality**

The composition of the Swiss armed forces also aims to ensure the proportional representation of the country's language communities. This policy of representation relies mostly on informal and customary rules, and legal prescriptions are rare.

#### **The language competences of the officer corps**

Officers are required to have excellent communication skills in the official languages. Officers acquire these skills during pre-military and civil education, although recently more attention has been given to ensuring officers' command of English.

## ***Non-nationals in armed forces***

Restrictions preventing non-nationals from entering a country's armed forces are common among OSCE participating States, but they are not universal. At face value, such restrictions could be viewed as a form of discrimination, but may be easily justifiable when considered in terms of other rights that are enjoyed as a result of citizenship.

For example, the UN Convention on the Elimination of All Forms of Racial Discrimination does not apply to "distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens".<sup>407</sup> Although citizens of the

<sup>405</sup> DCAF, "Multiethnic Armed Forces", *op. cit.*, note 400.

<sup>406</sup> ODIHR, *op. cit.*, note 361. Original Source: Bernhard Altermatt, "Der Umgang der Schweizer Armee mit der Mehrsprachigkeit: Proportionalität und Territorialität: Ein historischer Überblick mit Standortbestimmung [The Swiss Army's handling of multilingualism: proportionality and territoriality: a historical overview with a location assessment]", Federal Military Library and Historical Service, Report No. 15, Bern, 2004, pp. 71-74.

<sup>407</sup> ICERD, *op. cit.*, note 20, Art. 2.

European Union are generally free to take up employment in other member states, there are exceptions in the case of public service, and Court of Justice decisions and a statement by the European Commission have included the armed forces among these exceptions.<sup>408</sup>

Despite this, some countries do recruit non-nationals into their armed forces or into specific units, such as the French Foreign Legion and the Gurkha (Nepalese) military units in the British Army. Meanwhile, Belgium allows citizens from any European Union state to be recruited to its army. Outside of the European Union, the United States, for example permits non-citizen legal immigrants with permanent residence to enlist in the military, although only citizens can become commissioned or warrant officers.

## Good Practices and Recommendations

- » Human rights education (see “Chapter 16: Human Rights Education”), including training on the rights of ethnic and linguistic minorities, should form an essential part of training for all members of armed forces, and should be accompanied by appropriate disciplinary sanctions against personnel responsible for discriminatory conduct or harassment.
- » Superior officers have a special responsibility to establish an inclusive environment within armed forces, and a detailed understanding of non-discrimination should be a prerequisite for their promotion.
- » There should be effective means for members of armed forces to raise allegations of discrimination, including indirect discrimination and harassment.
- » Members of armed forces should have access to civilian courts or tribunals to pursue allegations of racial discrimination (including indirect discrimination, harassment on racial grounds, and discrimination or harassment on multiple grounds). Where it is a precondition that they use internal means first, the civilian authority should be able to proceed in the event of an undue delay or inadequate internal investigation.
- » All armed forces should have a transparent recruitment process that includes a hiring code that takes into consideration gender and diversity considerations.
- » States should collect sex-disaggregated data on the ethnic composition of the armed forces, in order to have an evidential basis for identifying and combating any racial or ethnic discrimination.
- » Where an ethnic or linguistic minority is significantly under-represented in the armed forces compared to the population as a whole, active steps should be taken to encourage and facilitate applications from that group, as well as other temporary special measures and targeted actions, as appropriate, such as training opportunities to improve knowledge of the state or official language.

**408** European Parliament factsheet, “Free Movement for Persons”, <http://europarl.europa.eu/factsheets/en/sheet/147/free-movement-of-persons>.

- » Ministries of defence should co-operate with independent anti-discrimination bodies in monitoring and implementing these policies.
- » Where non-nationals are permitted to serve in armed forces, any difference in their treatment compared to the conditions of service for nationals should be reviewed.
- » Consideration could be given to promoting the inclusion of minority language speakers through specific arrangements, such as dual military structures.

## Further reading

Bob Deen and William Romans, "Introduction: Shaping Language Policies to Promote Stability," in Iryna Ulasiuk, Laurentiu Hadirca and William Romans (eds.), *Language Policy and Conflict Prevention* (Leiden, Boston: Brill Nijhoff, 2018).

Tove H. Malloy and Francesco Palermo (eds.), *Minority Accommodation through Territorial and Non-Territorial Autonomy* (Oxford: Oxford University Press, 2015).

OSCE High Commissioner on National Minorities (OSCE HCNM) "Thematic Recommendations and Guidelines", <https://www.osce.org/hcnm/thematic-recommendations-and-guidelines>.

Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge: Cambridge University Press, 2006).

Patrick Thornberry and María Amor Martín Estébanez, *Minority Rights in Europe: A Review of the Work and Standards of the Council of Europe* (Strasbourg: Council of Europe Publishing, 2004).

# Chapter 11: Women in the Armed Forces

## Introduction: Issues at Stake

This chapter explores the main actions that promote and hinder the participation of women in the armed forces. It considers the international human rights framework as it applies to women service personnel, the key issues concerning women's participation in the armed forces and the different approaches taken by OSCE participating States to facilitate inclusive institutional cultures and working environments, and to improve women's representation. It concludes by highlighting different models and good practices.

Instead of responses to the ODIHR-DCAF 2018 questionnaire, this chapter draws on responses to a 2017 questionnaire circulated among the delegations of all 57 OSCE participating States as part of a baseline study on representation of women in the armed forces in the OSCE region. A total of 22 participating States responded to the 2017 questionnaire.<sup>409</sup>

### Box 11.1: OSCE commitments on gender equality

OSCE participating States have repeatedly affirmed their commitment to end any kind of gender-based discrimination, and have promoted initiatives to foster gender equality, including the OSCE Action Plan for the Promotion of Gender Equality (2004), which specifies that:

41. Participating States [...] have committed themselves to making equality between women and men an integral part of policies both at State level and within the Organization. [...]

42. Participating States are therefore recommended to:

– [...] Adhere to and fully implement the international standards and commitments they have undertaken concerning equality, non-discrimination and women's and girls' rights; [...]

— Draw on the experience of the OSCE to develop cross-dimensional gender equality policies and strategies [...]

44. Priorities [...]

(b) Ensuring non-discriminatory legal and policy frameworks; [...]

(c) Preventing violence against women; [...]

<sup>409</sup> Susan Atkins, "Women in the Armed Forces in the OSCE region", ODIHR, July 2018, <https://www.osce.org/odihr/women-armed-forces-baseline-study>.

(d) Encouraging women's participation in conflict prevention, crisis management and post-conflict reconstruction;

(e) Building national mechanisms for the advancement of women.<sup>410</sup>

In 2005, participating States called for action in line with UNSCR 1325 to prevent and combat violence against women and to increase their representation in conflict prevention, crisis management and post-conflict rehabilitation efforts, including within the armed forces of participating States and OSCE institutions and field missions.<sup>411</sup>

In 2009, the OSCE Ministerial Council called on participating States to:

1. Consider providing for specific measures to achieve the goal of gender balance in all legislative, judicial and executive bodies, including security services, such as police services;
2. Consider possible legislative measures, which would facilitate a more balanced participation of women and men in political and public life and especially in decision-making; [...]
3. Consider taking measures to create equal opportunities within the security services, including the armed forces, where relevant, to allow for balanced recruitment, retention and promotion of men and women; [...]
4. Allow for the equal contribution of women and men to peace-building initiatives.<sup>412</sup>

## International Human Rights Standards

During the past decade, the rights of women have been strengthened in international law. In particular, the right not to be subject to gender-based violence is now regarded as a customary human right,<sup>413</sup> and the right to work free from harassment and violence has been recognized in international law.<sup>414</sup> UNSCR 1325 has been supplemented by eight subsequent UN Security Council resolutions on the subject. In 2013, the Committee of the

<sup>410</sup> OSCE Ministerial Council, Decision No. 14/04, "2004 OSCE Action Plan for the Promotion of Gender Equality", Sofia, 7 December 2004, <https://www.osce.org/mc/23295>

<sup>411</sup> OSCE Ministerial Council, Decision No. 14/05, "Women in Conflict Prevention, Crisis Management and Post-Conflict Rehabilitation", Ljubljana, 6 December 2005, <https://www.osce.org/mc/17450>; and OSCE Ministerial Council Decision No.15/05, "Preventing and Combating Violence against Women", Ljubljana, 6 December 2005, <https://www.osce.org/mc/17451>.

<sup>412</sup> OSCE Ministerial Council, Decision No. 14/04, "2004 OSCE Action Plan for the Promotion of Gender Equality", Sofia, 7 December 2004, <https://www.osce.org/mc/23295>.

<sup>413</sup> UN CEDAW Committee, "General Recommendation No. 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19", 2017, para. 2, [https://tbinternet.ohchr.org/\\_layouts/15/treaty-bodyexternal/Download.aspx?symbolno=CEDAW/C/GC/35&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treaty-bodyexternal/Download.aspx?symbolno=CEDAW/C/GC/35&Lang=en).

<sup>414</sup> ILO, "Convention Concerning the Elimination of Violence and Harassment in the World of Work"(No. 190), 21 Jun 2019 (entry into force on 25 June 2021).

legally binding Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) affirmed the linkages between the convention and the UN Security Council's Women, Peace and Security mandate.<sup>415</sup>

### ***Convention on the Status of Women and United Nations Security Council resolutions on Women, Peace and Security***

CEDAW requires States parties to take action both on a legislative level, by incorporating gender equality provisions into national legislation and by abolishing discriminatory laws, and on a procedural level, by establishing effective mechanisms to protect women against any form of discrimination. In particular, Articles 7 and 11 require States parties to take all appropriate measures to eliminate discrimination against women in employment and public life. Article 8 requires appropriate measures to ensure equality of opportunity for women in representing their governments at the international level and participating in the work of international organizations. The CEDAW Committee has further emphasized the importance of including women in decisions on the use of military force, changes within military institutions and control over the performance of the military. The Committee also raised the issue of service women's participation in peacekeeping missions.<sup>416</sup>

UNSCR 1325 affirmed the important role of women in preventing and resolving conflicts, and in peacekeeping, peacebuilding, humanitarian response and post-conflict reconstruction. It urged all actors to increase women's participation in UN peace and security efforts, including in decision-making at all levels. It expressed a willingness to incorporate a gender perspective into peacekeeping operations and called for women's role in field-based operations to be expanded, in particular as military observers. It also called on States parties to take special measures to protect women and girls from gender-based violence in situations of armed conflict.

### ***International labour standards***

International labour standards are of particular relevance to rights of service women in the armed forces of 53 of the OSCE participating States.<sup>417</sup> As of December 2019, 52 OSCE participating States<sup>418</sup> had ratified the ILO conventions on discrimination in employment

<sup>415</sup> UN CEDAW Committee, "General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations", 2013, para. 26, <https://www.refworld.org/docid/5268d2064.html>. The eight subsequent resolutions are: UNSCR 1820 (2008), UNSCR 1888 (2009), UN SCR 1889 (2009), UN SCR 1960 (2010), UNSCR 2106 (2013), UNSCR 2122 (2013), UNSCR 2242 (2015) and 2467 (2019).

<sup>416</sup> UN CEDAW Committee, "Implementation of Article 21 of the Convention on the Elimination of All Forms of Discrimination against Women: Analysis of Articles 7 and 8 of the Convention", CEDAW/C/1994/4, 30 November 1993, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbol-no=CEDAW%2fC%2f1994%2f4&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbol-no=CEDAW%2fC%2f1994%2f4&Lang=en).

<sup>417</sup> Andorra, the Holy See, Lichtenstein and Monaco are not member states of the ILO.

<sup>418</sup> All but the United States (In addition Andorra, the Holy See, Lichtenstein and Monaco are not member states of the ILO)



and occupation, and on pay equity, 38 countries in the OSCE had ratified at least one of the maternity Conventions,<sup>419</sup> and 25 participating States had ratified the standard on Workers with Family Responsibilities.<sup>420</sup>

As covered previously in this compendium, Convention 111 prohibits both *direct* and *indirect* discrimination. Discrimination on the grounds of gender can be direct or indirect. Paying women employees differently than men because they are women would be an example of direct discrimination. Indirect discrimination occurs where a seemingly gender-neutral requirement, policy or practice is more difficult for a member of the less-represented sex to comply with, as well as difficult to justify as necessary to the organization's needs. In the armed forces, policies and practices that have been developed and implemented in an environment dominated by men can disadvantage women. Because such policies and practices are usually well established, it can be difficult to realize their potentially discriminatory effect without focusing additional attention, resources and proactive policies to deal with such discrimination.

The Equal Remuneration Convention addresses this in context of pay and is concerned with redressing the undervaluation of jobs typically performed by women. As such, it specifies the requirement for pay equality not only for jobs that are the same or similar, but also for work that may be "different in content, involving different responsibilities, requiring different skills or qualifications, and is performed under different conditions, but is overall of equal value."<sup>421</sup>

ILO maternity instruments recognize that women's reproductive capacity should not subject them to undue discrimination or interfere with their right to economic and employment security. The conventions also protect pregnant and nursing mothers, and include provisions aimed at preserving the health of both the mother and newborn, protecting women from dismissal and discrimination, and entitling them to paid leave in relation to childbirth, to maintaining earnings and benefits during maternity, and ensuring their right to resume work after giving birth.<sup>422</sup>

<sup>419</sup> C003 is in force in Bulgaria, Croatia, France, Germany, Greece, Italy, Latvia, Luxemburg, North Macedonia, Romania & Spain. C103 is in force in: Croatia, Greece, Kyrgyzstan, Mongolia, Poland, Russian Federation, San Marino, Spain, Tajikistan, Ukraine and Uzbekistan. Convention 183 is in force in: Albania, Austria, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Cyprus, Czech Republic, Hungary, Italy, Kazakhstan, Latvia, Lithuania, Republic of Moldova, Montenegro, the Netherlands, North Macedonia, Norway, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia and Switzerland.

<sup>420</sup> Albania, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Finland, France, Greece, Iceland, Kazakhstan, Lithuania, Montenegro, the Netherlands, North Macedonia, Norway, Portugal, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden and Ukraine.

<sup>421</sup> Martin Oelz, Shauna Olney and Manuela Tomei, *Equal Pay, An Introductory Guide*. (Geneva: ILO, 2013), [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_216695.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_216695.pdf).

<sup>422</sup> ILO, *Care Work and Care Jobs for the Future of Decent Work* 28 June 2018, [https://www.ilo.org/global/publications/books/WCMS\\_633135/lang--en/index.htm](https://www.ilo.org/global/publications/books/WCMS_633135/lang--en/index.htm).

In June 2019, an ILO Convention and an accompanying recommendation to combat violence and harassment in the world of work were adopted and will come into force following ratification by at least two ILO member states.<sup>423</sup> This new instrument will apply to all sectors of work, including armed forces, and to any form of violence and harassment “occurring in the course of, linked with or arising out of work”. This means that the protections applied by the standard on violence and harassment will apply not only at workplaces but also in the context of work-related trips and communications, social events and the commute to work.

## Council of Europe

The principle of non-discrimination against women in employment matters as a social and economic right, and was affirmed in 2005 by PACE recommendation 1700.<sup>424</sup> In 2006, the Parliamentary Assembly recommended that the Council of Europe:

*“pay greater attention to the issue of the status of women in the armed forces. A great many female soldiers are subjected to sexual harassment. The issue of access to military duties and to specific posts in the armed forces, career structures and equal rights are all relevant to discrimination against women, a matter requiring in-depth consideration in itself.”<sup>425</sup>*

In 2010, the Council of Europe Committee of Ministers adopted Recommendation CM/REC(2010)4 on the human rights of armed forces members. The following principles are of particular relevance when intending to ensure gender equality within armed forces:

- Service personnel have a right to respect for their private and family life, which includes postings of conscripts near their family and home;
- Postings for service personnel should be for operational reasons only, and not as punishment;
- Service personnel who are parents of young children should enjoy maternity or paternity leave, appropriate child-care benefits and access to nursery schools and adequate children’s health and educational systems;
- The right to dignity, health protection and security at work explicitly includes the right not to be subjected to sexual harassment;
- Service personnel enjoy rights and freedoms without any discrimination; and

<sup>423</sup> By March 2020, four ILO member states, including Finland and Spain, had formally committed to ratify the Convention.

<sup>424</sup> PACE, “Recommendation 1700 - Discrimination against Women in the Workforce and the Workplace”, 27 April 2005, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17323&lang=en>. In the context of the EU, the right was first recognized by the European Economic Community’s Equal Treatment Directive (76/207/EEC).

<sup>425</sup> PACE, Recommendation 1742, *op. cit.*, note 294.

- Service personnel who claim to have been victims of harassment or bullying should have access to a complaints mechanism that is independent of the chain of command.<sup>426</sup>

As of June 2019, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention) had been ratified by 34 OSCE participating States.<sup>427</sup> The Convention specifically requires states to ensure that state authorities, officials, agents, institutions and other state actors refrain from engaging in acts of violence against women.<sup>428</sup> This is defined as violence that results in – or is likely to result in – physical, sexual, psychological or economic harm to women.<sup>429</sup> There are also provisions with regards to sex-disaggregated statistics, actions to combat gender stereotyping and social and cultural patterns of behaviour that treat women as inferior to men.<sup>430</sup> The levels of gender-based harassment, including gender-based violence, reported among military women make the provisions of the Istanbul Convention particularly relevant.

In 2016, PACE's Committee on Equality and Non-Discrimination published a report on promoting gender equality and preventing gender-based violence in the armed forces.<sup>431</sup> Recalling Committee of Ministers Recommendation CM/REC(2010)4, the report highlights the importance of respect for the human rights of service personnel and calls for measures to counter discrimination against women, promote the recruitment of women, remove restrictions on the roles women can perform, develop flexible career paths and systematically consider the gender dimension in all military operations. The report also called for more efforts to prevent and combat gender-based harassment and violence. The report and its recommendations were adopted in 2016 by PACE Resolution 2120.

Most recently, Council of Europe Recommendation CM/Rec(2019)1 provides the first-ever internationally agreed definition of sexism. It presents guidance on combating and preventing sexism and encourages states to implement legislation, policies and programmes to this end.<sup>432</sup> The Recommendation provides further background and understanding on the conditions in which gender-based violence and discrimination thrive, and stresses that sexism is "widespread and prevalent in all sectors and societies (...) reinforced by gender stereotypes affecting women and men" and notes that sexism "constitutes a barrier to the empowerment of women and girls, who are disproportionately affected by

<sup>426</sup> Council of Europe, Recommendation CM/Rec(2010)4, *op. cit.*, note 26.

<sup>427</sup> Council of Europe, "Chart of Signatures and Ratifications of Treaty 210", [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures?p\\_auth=6l4rZuxp](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures?p_auth=6l4rZuxp).

<sup>428</sup> Council of Europe, "Convention on Preventing and Combating Violence against Women and Domestic Violence", Istanbul, 11 May 2011, Art. 5, <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e>.

<sup>429</sup> *Ibid.*, Art. 3.

<sup>430</sup> *Ibid.*, Arts. 11-12.

<sup>431</sup> PACE, "Women in the Armed Forces: Promoting Equality, Putting an End to Gender-Based Violence", 24 November 2016, Doc. 14073, <https://www.refworld.org/docid/5836fcd4.html>.

<sup>432</sup> Council of Europe, "Recommendation CM/Rec(2019)1 of the Committee of Ministers to Member States on Preventing and Combating Sexism", 27 March 2019, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168093b26a>.

sexist behaviour". This recommendation has particular relevance for armed forces, where military culture inherently values behaviour and characteristics that are aligned with norms of masculinity, where systemic gender bias and different expectations of women's performance exist, and where gender-based harassment and violence is prevalent.<sup>433</sup>

## Different Approaches

Taking part in a nation's defence and armed forces is an integral part of the rights and duties associated with citizenship, and an important aspect of ensuring democratization of the armed forces. Any exclusion of women solely on the grounds of their gender undermines their status as equal citizens.<sup>434</sup> The equal representation of women in armed forces also sets a visible and symbolic precedent, especially in states where the rights of women and girls to participate equally in public life are under threat. In Latvia, which has one of the highest percentages of women in the armed forces in the OSCE region, military service is conceived as an integral part of citizenship and, under national and military law, is to be undertaken on the basis of equality and, explicitly, without discrimination on the grounds of sex.

### Box 11.2: Women in the Armed Forces within the OSCE Region

ODIHR's 2017 survey found that, on average, women make up 10 per cent of the armed forces of 22 OSCE participating States, and comprise 17 per cent of the armed forces in Latvia, 15 per cent in Canada and Greece, and between 10 and 14 per cent in ten states (Albania, Armenia, Estonia, Georgia, Germany, Lithuania, Norway, Portugal, Spain and the United Kingdom). Typically, women's participation in military and peace operations is lower than their overall representation within the armed forces. However, it is largely from the experience of including women in operations that armed forces have begun to appreciate the broader range of skills and approaches to be found in mixed-sex units.

<sup>433</sup> E.g., Kate Germano and Kelly Kennedy, *Fight like a Girl: The Truth Behind How Female Marines Are Trained* (Amherst: Prometheus Books, 2018); Joshua Isbell, "Real Men: Countering a Century of Military Masculinity", 1 March 2019, United States Army War College War Room website, <https://warroom.armywarcollege.edu/articles/century-of-military-masculinity/>; Brandon Locke, "The Military-Masculinity Complex: Hegemonic Masculinity and the United States Armed Forces, 1940-1963", 2013, accessible at <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1065&context=historydiss>; United States Department of Defence, "Department of Defence Fiscal Year 2018 Annual Report on Sexual Assault in the Military", 9 April 2019, [https://www.sapr.mil/sites/default/files/DoD\\_Annual\\_Report\\_on\\_Sexual\\_Assault\\_in\\_the\\_Military.pdf](https://www.sapr.mil/sites/default/files/DoD_Annual_Report_on_Sexual_Assault_in_the_Military.pdf).

<sup>434</sup> E.g., the United States Supreme Court concluded in *United States v Virginia* et al (Case No.94-1941, that the men-only admission policy of the Virginia Military Institution denied women "full citizenship stature".

## Recruitment

A common approach to recruiting more women is to integrate gender perspectives in recruitment materials, including through materials targeted at women applicants alongside more general material. OSCE participating States have found that giving women the opportunity to talk to women service personnel, including at recruitment centres and events and by telephone, is an effective way to turn potential interest into applications. In Canada, Denmark and Germany, women service personnel attend events, including those held for both sexes and women-only events, such as Denmark's Inspirational Day for Women, where potential recruits meet them, are introduced to equipment and receive practical information about military service.

### Box 11.3: How to strengthen interest among women in a military career

Sweden's Metodutveckling för Effektivare Rekrytering av Särskilda Grupper (MER) project was established to identify which factors were likely to attract or deter interest from women. The project concluded that efforts to recruit women should focus more on providing practical information, such as on housing, schedules and benefits, and less on the weapons and heavy machinery that typically feature in military recruitment materials. As a result of this project, the Swedish Armed Forces has set up a system whereby women who are potentially interested in a career in the military can receive information directly from women in active service via telephone.

In Canada, the Women in Force Program (WFP) is made up mostly of women service personnel and provides potential recruits with information on different service occupations and career opportunities, as well as practical information based on real-life experience.

International law also allows for temporary special measures to increase participation by underrepresented groups. Several OSCE participating States, including Canada, Estonia, Sweden and the United Kingdom, have set minimum targets aimed at increasing the recruitment of women over a number of years. Such targets are based on current levels of women's representation and realistic assessments of possible increased levels of interest. Germany has a system of positive action, whereby women candidates who are equally qualified as men candidates are given preferential treatment in roles in which women are under-represented (below 15 per cent). The Swedish Armed Forces have set similar targets to increase women's recruitment and representation by 2027. The representation targets vary by rank and full-time/part-time schedules, while the recruitment targets are the same for all training programmes, so that the officers' programme, the specialist officers' programme and the military training course aim to increase women's representation to 20 per cent by 2020, 25 per cent by 2023 and 30 per cent by 2027. Minimum recruitment targets can also be applied as benchmarks for assessing the success of recruitment policies and practices in attracting qualified women and men.

Reviewing current practices helps to identify potential barriers to the recruitment of women. In Denmark, for example, women applying for voluntary military service are identified as “particularly motivated” and subject to a swifter recruitment process. Since its introduction in 2011, this measure has almost doubled the number of women in basic military training. The Canadian Armed Forces Employment Equity Act, which allows for priority recruitment criteria to be set, has enabled the selection of qualified women and reduced the time it takes to enrol in the Armed Forces.

The experience of opening up all branches of the military to women provides an opportunity to review and re-align physical standards to the needs of the role. This approach was taken by the Canadian Armed Forces, which apply the same physical standards for men and women. Australia, meanwhile, provides pre-conditioning physical training for those who do not pass recruitment tests based on physical fitness alone.<sup>435</sup> Some states have minimum enlistment standards and conduct physical assessments after enlistment to align personnel to appropriate assignments. Others adapt physical training programmes to women’s physiological needs, to help them meet more exacting standards.

## Conscription

In the past, courts have largely upheld the right of states to exclude women from military conscription, justifying this, i.e., with need to prevent the employment careers of women from being delayed,<sup>436</sup> and upholding the constitutionality of a men-only draft, based on women’s (then existing) exclusion from combat roles.<sup>437</sup> However, in the United States, for example, as a natural progression from the lifting by the Pentagon in 2015 of the ban on women in combat roles, the Federal District Court of Houston ruled in 2019 that the men-only draft is unconstitutional.<sup>438</sup>

Some OSCE participating States, such as Norway and Sweden, have also established mandatory conscription for both women and men, while other states have voluntary military service for both.

**435** Women in the Australian Defence Force, 2015/16, 4<sup>th</sup> Report on women’s experiences and participation since Pathways to Change in 2012.

**436** European Court of Justice: *Alexander Dory v. Federal Republic of Germany* (Case C-186/01. Judgement on 16 March 2003)

**437** United States Supreme Court: *Rostker v. Goldberg* (Case 453 US 57. Judgement on June 25, 1981)

**438** United States District Court, Southern District of Texas, *National Coalition for Men v. Selective Service System*. (case 4:16-cv-03362, Judgement on February 22, 2019)

### Box 11.4 Mandatory conscription of women and men in Norway and Sweden

Since Norway introduced universal conscription in 2014, military service is seen by young Norwegian citizens as a desirable, career-enhancing opportunity. In 2017, 26 per cent of private soldiers in Norway were women. Following a change in the law in 2017, Sweden estimates that a quarter of its 4,000 conscripts annually will be women. These are levels of representation not standard in professional military services elsewhere in the OSCE region.

Several OSCE participating States retain mandatory conscription for men and voluntary military service for women, including Denmark, Estonia, Finland, Lithuania, Switzerland, Turkey and Turkmenistan. Such practice is permitted by international law. However, it is likely that this leads to lower levels of women in military service than would be achieved with a draft that did not differentiate between men and women, as it contributes to a perception of armed forces as a profession more suitable for men than for women. It can also be problematic from the perspective of equality of opportunities, as men will be more affected by possible limitations in national regulations governing conscientious objection, particularly if such regulations do not recognize multiple grounds for conscientious objection.

### Equal representation and opportunities

Historically, women have been restricted to support roles in armed forces and have been excluded from combat duties. In 1999, the ECJ held that women's exclusion from special combat units due to the requirement of "interoperability" was justified. Interoperability was specified as "the need for every Marine, irrespective of his specialization, to be capable of fighting in a commando unit".<sup>439</sup> This discretion given to states seems to apply to very particular functions in the military, however, and does not apply to women's *categorical exclusion* from military posts or from military training.<sup>440</sup>

An OSCE Survey in 2017 found that most armed forces in the OSCE region allow women to perform all roles in their armed forces. Only seven states reported that they retain restrictions on the types of roles that women can perform, and the United Kingdom has since removed these, and Armenia was in the process of doing so.

<sup>439</sup> European Court of Justice: *Angela Maria Sirdar v The Army Board and Secretary of State for Defence* (Case C-273/97, Judgement on 26 October 1999)

<sup>440</sup> European Court of Justice: *Tanja Kreil v Bundesrepublik Deutschland* (Case C-285/98, Judgement on 11 January 2000); Canadian Human Rights Tribunal: *Gauthier et al vs Canadian Armed Forces* (Case T. D. 3/89, Judgement on 20 February 1989), <https://decisions.chrt-tcdp.gc.ca/chrt-tcdp/decisions/en/item/7013/index.do?r=AAAAQAIZ2FIdGhpZXIB>. Discussed also in United States District Court: *Hegar et al vs Hagel* (Case Case3:12-cv-06005-EMC) <https://www.aclu.org/legal-document/hegar-et-al-v-hagel-amended-complaint?redirect=womens-rights/hegar-et-al-v-hagel-amended-complaint>; United States Supreme Court: *United States v Virginia et al* (Case No.94-1941. Judgement on 26 June 1996.

Reasons given by the different states for excluding women from serving in certain roles included, protecting their health, including reproductive health, their lesser physical strength, potential disruptions to operational effectiveness and disruption of team cohesion. In 1989, the Canadian Human Rights Tribunal discussed similar concerns. It examined factual records from earlier trials by Canadian Armed Forces regarding women in non-traditional environments and roles, and found that the concerns were either invalid or there were insufficient reasons to deny women equal access to combat roles. The tribunal found that women's performance was indistinguishable from men's performance, that any concerns regarding physical abilities would be eradicated by setting job specific standards, and that "pregnancy was not an issue in the definition of risk to operational effectiveness but simply a matter of temporary 'disability' or medical condition for which leave was appropriate".<sup>441</sup>

Research from the United Kingdom's Ministry of Defence has also allayed concerns about health risks, while recent operations have proved the effectiveness of women in combat situations. Rejecting the notion that women would disrupt team cohesion, the Ministry of Defence concluded in 2014 that:

*"Evidence showed that the key determinants of cohesion were competence, leadership and collective training and any risk to [combat effectiveness] could be sufficiently mitigated through these mechanisms."*<sup>442</sup>

In practice, the concentration of women in support roles continues in many OSCE States. This is despite the fact that technological and other developments in contemporary warfare not only make it easier to deploy women in combat roles but also demand a broader range of skills, intelligence and experience than traditionally required.

### **Box 11.5: Women special forces**

Since 2014, Norway's armed forces have trained a special forces unit, "Hunter Troop", composed exclusively of women. Recruits are selected via a rigorous selection process that applies adjusted physical criteria. In 2015, 196 women applied for the unit, of whom 37 passed the selection process, 17 completed the year-long training and 14 joined the unit after training. Women in the special forces unit have above average results in evaluations.<sup>443</sup>

<sup>441</sup> *Ibid.*, Canadian Human Rights Tribunal: *Gauthier et al vs Canadian Armed Forces*,

<sup>442</sup> A review of women's roles in recent operations in the United Kingdom's Armed Forces found that commanders wanted more women in their teams, especially when operating "among the people". See: "Women in Ground Close Combat, Findings Paper", United Kingdom Ministry of Defence, 17 May 2016, <https://www.gov.uk/government/publications/women-in-ground-close-combat-roles-review-2016>.

<sup>443</sup> Aleksi Korpela, "Jegertroppen: Norway's All-Female Special Forces", NATO Association of Canada, 19 February 2016, <http://natoassociation.ca/jegertroppen-norways-all-female-special-forces-unit/>.



## Promotion

All armed forces experience vertical occupational segregation. Women are more commonly represented among junior ranks, but their levels of representation drop at higher levels of the military hierarchy. Even where women's overall representation in the armed forces is increasing, this will not translate into greater levels of representation in more senior roles over time without efforts to address barriers to promotion.

A minority of states are experiencing slight increases in the number of women in flag officer ranks. Often, however, these women are in support or ancillary branches of the military, such as logistics, medicine, law and education, and not in combat branches. The ODIHR survey found that women held the equivalent of NATO Officer Rank 5 / OF 5 (Colonel) in just eight participating States. In four states (Greece, the Netherlands, Norway and Sweden), the highest rank held by women is OF 6 (Brigadier General), while women held the OF 7 (Major General) rank in Germany and the United Kingdom, and only Canada reported having women at the OF 8 rank (Lieutenant General). In most states, the highest-ranking position in the armed forces is equivalent to NATO OF 9 or 10 (General, Army General or Field Marshal). Women are also under-represented in the lower "feeder" ranks, including in the ranks of commissioned officers and NCOs.

The reasons for women's lower rates of promotion include the use of criteria for determining promotion, which fewer women than men can meet, the promotion systems used, unconscious gender bias and higher staff turnover for women. For example, a 2012 review of women in the Australian Defence Force (ADF) by the Sex Discrimination Commissioner at the Human Rights Commission found that women did not progress through the ADF, in any service, at the same rate as men. Although the reasons were complex, one major reason was the rigidity of career structures, with strong and well entrenched organizational expectations about the age range within which certain promotional pathways and/or types of experience were to be attained.<sup>444</sup>

Gender stereotypes can also subtly influence perceptions of competence, affecting performance evaluation and opportunities for promotion.<sup>445</sup> For example, a study of the United States Marine Corps found outright bias in favour of men (even inexperienced men) as leaders over women.<sup>446</sup>

<sup>444</sup> Australian Human Rights Commission, "Review into the Treatment of Women in the Australian Defence Force, Phase 2 Report," 2012, <https://defence.humanrights.gov.au/report-review-treatment-women-australian-defence-force>.

<sup>445</sup> Catherine Loughlin and Kara A. Arnold, "Seeking the best: Leadership lessons from the military", *Human Resource Management*, Vol. 46, No. 1, 2007, pp.147-167.

<sup>446</sup> Shanan G. Gibson, "Perceptions of U.S. Military Leadership: Are Leaders Created Equally", *Equal Opportunities International*, Vol. 24, No. 2, 2005, pp. 1-18.

Armed forces can use sex-disaggregated data on promotions to review how promotion systems affect men and women, and to consider related actions to take. It can also be useful to consider any differences in promotions in different services or branches of armed forces.

States have implemented a variety of measures to tackle potential discrimination in their promotion policies and processes, including:

- mandatory inclusion of at least one woman on promotion selection boards (such as in Bosnia and Herzegovina, Germany and Spain, and as planned in Turkey);
- mandatory unconscious bias training for men and women (such as in Sweden);
- broadening promotion pathways and reviewing and changing any discriminatory criteria on time served (as per the above example from Australia);
- providing information in advance on any training courses necessary for promotion, and ensuring that those on secondment or leave are informed; and
- providing parental leave for both men and women, and establishing schemes to stay in touch with those on parental leave;

### ***Respect for the right to family life***

Fostering an institutional culture where both men and women are able and encouraged to take parental leave upon adoption or birth of a child is imperative to facilitating women's equal participation in armed forces. Individual entitlement for fathers is of particular relevance to ensuring more gender-equal outcomes, and helps counter the negative impact that women's disproportionate share of care duties often has on women's career tracks. Subsequently, it is important that armed forces recognize the right to family life of both women and men serving, as this will help to reduce barriers to the recruitment, representation and promotion of women.

The ODIHR survey found that most, but not all, OSCE participating States provide parental leave. Armenia and Kazakhstan stated that they only offer maternity leave, although in Kazakhstan adoption leave of 56 days is available to either parent. In most other states, parental leave can be taken by either parent and shared between them. However, the length of parental leave varies widely. In Turkey, for example, both parents are entitled to a week-and-a-half paid leave, while mothers can take an additional 16 weeks of maternity leave. In Portugal, parents are given a total of 21 weeks paid leave that can be shared between them. In Norway, the total amount of paid parental leave is 49 weeks, including 13 weeks for the mother and 10 weeks for the father, and the period can be extended to 59 weeks, at 80 per cent pay.

Of those participating States that responded to the ODIHR survey, just under half said they provide flexible terms of work to enable personnel to care for young or disabled children or other family members, including reduced duty hours, part-time work on a temporary or longer-term basis, and unpaid or partially paid leave. Some states recognize the needs of parents who are both in the military, such as by avoiding simultaneous deployments or by posting them to the same location.

## ***A good working environment for both men and women***

Having properly fitting equipment, shoes, rucksacks and vests is important for occupational safety and health, and the lack of these can cause injuries and force women to abandon their training or active service. It also can negatively affect women's performance. Several states have taken steps to ensure that women personnel have uniforms and military gear (such as bulletproof and ammunition vests) that fit properly, while also incorporating gender considerations into the commissioning, design, testing and delivery of new defence materiel.

The Government of Canada requires that every spending request includes an analysis of how the policy or acquisition affects both men and women. There is a standard tool for this gender-responsive budgeting approach – the Gender-Based Analysis Plus – which applies across all government departments. Such an approach can help armed forces take a wider perspective, for example by considering whether the additional cost of clothing or equipment designed for women might be offset or dwarfed by savings from lower muscular-skeletal injuries and reduced attrition rates.

In most states, the field uniform is the same for men and women and available in appropriate sizes, although formal uniforms may differ. Not all states provide maternity uniforms, requiring women in late pregnancy to work in civilian clothes. This can make women feel that they are no longer part of the team, while the removal of all symbols of rank can also undermine their authority, particularly in environments that are resistant or hostile to women service personnel. Germany has recognized the issue and has introduced maternity uniforms.

Having separate sleeping and washing facilities for women can be important. There have been reported instances of fatally severe dehydration on operations from lack of such facilities, as women reduced necessary liquid intake to avoid the risk of sexual assault during trips to the toilet at night.<sup>447</sup> However, the armed forces in Germany and Norway use shared facilities and have management measures in place to protect dignity and security. Norway reported a reduction in gender-based harassment and bullying of women as a result of integrated accommodation.

## ***Gender-based violence, and preventing and challenging abuse***

Bullying, harassment and other abuse can affect both men and women in the armed forces. Complaint data, satisfaction surveys and other research show, however, that this is an issue that disproportionately affects women. In 2014, Lt. Gen David Morrison, then head of the Australian Army, referred to his experience in tackling this issue:

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**447** Stephanie Groothedde, *Gender Makes Sense: A Way to Improve Your Mission*, (The Hague: Civil-Military Cooperation Centre of Excellence, 2003), 2013, p. 9, <https://issat.dcaf.ch/Learn/Resource-Library2/Policy-and-Research-Papers/Gender-Makes-Sense-A-Way-to-Improve-Your-Mission>.

*"I can state without hesitation that an end to sexual violence will not be achieved without fundamental reforms to how all armies recruit, retain and employ women; and how they realize the improved military capability that is accrued through more effective gender and ethnic diversity. [...] Armies that revel in their separateness from civil society, that value male over female, that use their imposed values to exclude those who do not fit the particular traits of the dominant group, who celebrate the violence that is integral to my profession rather than seeking ways to contain it – they do nothing to distinguish the soldier from the brute."<sup>448</sup>*

Since the adoption of UNSCR 1325, the phenomenon of gender-based violence within armed conflict has been widely recognized, and the subject is an integral part of pre-deployment training. However, armed forces have been much slower to recognize the phenomenon among their personnel and/or to take effective action. In the ODIHR study, nine states reported receiving complaints about gender-based harassment, bullying and other abuse. In all cases, women made a significantly higher number of complaints than men. Twelve out of 29 participating States reported having no complaints, and seven states did not have any system for capturing complaints.

Some states equated the lack of complaints with a lack of incidences, but this is misleading. Those states that conduct anonymous surveys or separate research have found that many service personnel experience harassment, bullying and other abuse, and different factors, such as sex, age or ethnicity, contribute to the likelihood of being targeted by such behaviours. Where such reports are not reflected in data on complaints, this indicates a culture of under-reporting. In an anonymous climate survey, Finland found that 12 per cent of professional women service personnel had experienced sexual harassment and 74 per cent had experienced bullying, compared to fewer than 1 per cent and 4 per cent of servicemen, respectively. As a result, the Finnish Defence Forces have drawn up a national action plan to tackle the problem, requiring unit commanders to develop and implement their own local action plans.

<sup>448</sup> Speaking at the UN Conference on Women, Peace and Security, London, June 2014, quoted in: *Preventing Conflict, Transforming Justice, Securing the Peace: A Global Study on the Implementation of the United Nations Security Council Resolution 1325* (New York: UN Women, 2015), p. 138, <http://wps.unwomen.org/~media/files/un%20women/wps/highlights/unw-global-study-1325-2015.pdf>.

**Box 11.6: Collecting data and preventing abuse**

Germany found that introducing a reliable and rigorous new data collection and monitoring system led to a 50 per cent yearly increase in complaints. Analysis of the resulting data showed that 90 per cent of the victims of sexual offences and sexual harassment were women, and 99 per cent of the perpetrators were men.

The United Kingdom's Service Complaints Commissioner initiated an audit of the complaints recording and information system, which was found to be inadequate. A second audit of the replacement information management system found that there were deficiencies in training that had to be rectified.<sup>449</sup>

States that proactively address the issue of sexual and gender-based harassment and abuse within armed forces undertake the following measures: the establishment of effective information collection and management systems; imposing duties on commanders and all those in chains of command to prevent harassment, mobbing, hazing and other types of bullying; and putting in place mandatory reporting systems to hold commanders to account for their actions. They also have multiple channels through which those who are affected by harassment and bullying to receive informal advice and support. Examples include Denmark's special counsellors and Armenia's Centre for Human Rights and Integrity, which runs a hotline service and organizes regular visits, lectures and awareness-raising campaigns on gender-based harassment, bullying and other abuse. Women members of the Armenian military police have been engaged in the Centre's activities since 2017.

Providing alternatives for making complaints outside the chain of command is most important. This can include a focal point within the armed forces or ministry of defence (such as Spain's Harassment Protection Unit, France's Themis Unit or Germany's central Point of Contact Unit) or externally, to ombuds institutions or human rights commissioners.

**Box 11.7: Effective action to tackle gender-based harassment, violence and abuse**

In Canada, policies and training were found to be insufficient in tackling gender-based harassment, violence and abuse. Following media reports of serious and widespread sexual assaults and gender-based harassment, the Canadian government tasked a former Supreme Court judge, Justice Marie Deschamps, to undertake an independent review.<sup>450</sup>

<sup>449</sup> Responses to a 2017 questionnaire circulated among the delegations of all 57 OSCE participating States as part of a baseline study on representation of women in the armed forces in the OSCE region. A total of 22 participating States responded to the 2017 questionnaire.

<sup>450</sup> Marie Deschamps, "External Review Report on Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces", Canadian Department of National Defence, 27 March 2015, <https://www.canada.ca/en/department-national-defence/corporate/reports-publications/sexual-misbehaviour/external-review-2015.html>.

The Deschamps Review found that a military ethos based on respect for the dignity of all persons was embedded in policies and regulations, but there was a disconnect between the high professional standards contained in policies and the day-to-day experiences of service personnel. Mandatory training on prohibited sexual conduct had had little impact on a sexualized culture and harmful environment. Incidents of sexual assault and harassment were under-reported, owing to a fear of the consequences and a deep lack of trust that the chain of command would take complaints seriously. The complaint system was complex and support for victims patchy. The review made ten recommendations to drive a change in culture. Consequently, the Armed Forces established a comprehensive strategy, titled Operation Honour, which seeks to bring about a positive change in institutional culture via four strategies:

- understanding the issue of harmful and inappropriate sexual behaviours;
- responding more decisively to incidents;
- supporting victims more effectively; and
- preventing incidents from occurring.

The Sexual Misconduct Response Centre was established to provide information and support to victims. Other measures included the creation of an improved information management system to capture, analyse and monitor occurrences.

Progress reports suggest that Operation Honour has improved awareness of harmful and inappropriate sexual behaviour, strengthened understanding of the critical role of bystanders and increased confidence in the chain of command, military police and military justice. From a previously very low level, 80 per cent of military personnel now say they trust that their leaders will deal effectively with harmful and inappropriate sexual behaviour.

In other states, the personal engagement of senior military leaders, such as by meeting with victims and acknowledging the impact of harassment and abuse on them, has been critical in driving the necessary culture change in armed forces.

### ***Retention and attrition***

Many states conduct exit surveys to monitor the reasons why service personnel leave, and review these data by gender. Some states also collect and review sex-disaggregated data on the average length of service. The ODIHR survey found that, in most participating States, there was no difference between women and men in terms of the average length of service and reasons for leaving. Where differences were reported, women tended to have shorter careers in the armed forces.

For both men and women, the top three reasons for leaving were the expiry of the service contract and economic or family reasons. In some states, women cite difficulties in balancing

work and family and poor career opportunities more frequently than men. Women also mentioned organizational culture and a lack of respect from their superiors and peers. This appears to be linked to issues of harassment, bullying and other abuse, which satisfaction and complaint data show are experienced more frequently by women. If women are leaving armed forces because of a culture of gender-based harassment and fear of sexual violence, this would constitute a breach of their human rights. Along with the economic loss suffered by the women themselves, the avoidable loss of women service personnel will have economic consequences and negatively impact the operational effectiveness of the armed forces.<sup>451</sup>

### **Box 11.8: Sweden's avoidable losses**

In Sweden, women tend to have shorter careers than men in the Armed Forces. In 2017, the probability of serving more than three years was 57 per cent for men and 49 per cent for women. Women service personnel tend to experience work-related difficulties more than men, for example, feeling that their competence and qualities are under-valued, experiencing pressure and stress, and/or a lack of career opportunities and development. Sweden undertook a qualitative study to find out why these differences exist.<sup>452</sup>

## ***Structures to support women service personnel and promote change***

### ***Networks***

Half of the OSCE participating States that responded to the ODIHR survey reported having networks of varying types to support gender equality and non-discrimination within armed forces. These include networks and support groups run by women service personnel, as well as centralized networks that may consist of both women and men that report to and advise the military leadership on working conditions and barriers to gender equality and women's representation in the armed forces. Some states, including Denmark and Germany, also provide mentoring services for women armed forces members.

Some states have found that networks support women service personnel's professional and personal development and provide access to role models and career guidance. Some networks have automatic membership. Many provide opportunities for women to meet, including via social media and virtual conferencing. In Denmark, the network additionally provides an informal mechanism for dealing with incidents of gender-based discrimination, harassment, bullying or abuse. This includes information about the professional help and

<sup>451</sup> New Zealand has identified monetary and opportunity costs resulting from the high attrition rates among servicewomen. Most women service personnel leave before or at the 12-year mark, and the estimated annual cost of avoidable attrition is \$NZ 100 million. See: New Zealand Ministry of Defence, "Maximizing Opportunities for Military Women in the New Zealand Defence Force, Ministry of Defence, Evaluation Division", February 2014, <https://www.defence.govt.nz/publications/publication/maximising-opportunities-for-military-women-in-the-new-zealand-defence-force>.

<sup>452</sup> ODIHR 2017 baseline survey, *op. cit.* note 449.

formal mechanisms available, as well as peer-to-peer support for victims that is separate from more formal counselling services.

### *Strategic oversight*

The ODIHR survey found that a large majority of OSCE participating States have entities within the armed forces or ministry of defence that are responsible for ensuring equal opportunities for men and women. In several states, this body reports to a government minister. Although different models exist across the OSCE region, such entities often provide oversight and strategic policy advice, and gather qualitative information about service conditions. A centralized body within the military or ministry of defence that has oversight of all aspects of military service and that analyses and reports on progress can be a powerful mechanism for promoting change.

#### **Box 11.9: Strategic oversight in selected OSCE participating States<sup>453</sup>**

In Germany, the Equal Opportunities, Diversity and Inclusion unit, which develops the policy framework based on its analyses, is also supported by a network of equal opportunities officers, who are elected by and from among women in each Armed Forces division.

Portugal's Ministry of Defence has a strategic oversight team made up of representatives from across the ministry, the General Staff and the Armed Forces.

The Netherlands' armed forces have two personnel dedicated to improving gender equality at a policy level. Their work is informed by feedback from the various organizations that handle complaints, advise women service personnel and conduct satisfaction surveys.

In 2011, Spain established a Military Observatory for Equality between Women and Men in the Armed Forces. It is an advisory board reporting to the Undersecretary of Defence and is composed of 16 members, representing all branches of the military apparatus. The Observatory analyses and reports on a wide range of issues regarding gender equality, including recruitment, military careers, military education and work-life balance. It is responsible for updating regulations and guidance, delivers conferences and training to units, liaises with civil society, and provides a hotline that received nearly 600 enquiries in 2016. Since 2011, Spain issued six pieces of legislation to improve gender equality in the Armed Forces, including measures to enhance work-life balance and prevent sexual harassment (now a criminal offence), and legislation establishing the Harassment Protection Unit.

<sup>453</sup> ODIHR 2017 baseline survey, *op. cit.* note 449.



In some states, this function is performed or supplemented by parliamentary commissioners or ombuds institutions for the armed forces. These internal and external bodies often meet with service personnel, including on operations, as part of their fact-finding role. They also issue annual reports, often to parliaments, providing quantitative and qualitative data to support their recommendations.<sup>454</sup> Council of Europe Resolution 2120 (2016) encouraged such independent bodies to undertake reviews into gender balance and the treatment of women in armed forces.<sup>455</sup> For more information on the role of ombuds institutions for the armed forces, see “Chapter 19: Ombuds Institutions for the Armed Forces” of this compendium.

## Good Practices and Recommendations

Research and survey findings show that states across the OSCE region are facing similar challenges, including how to attract the best recruits with the required aptitudes, abilities and values, and how to support all service personnel in performing their best.

Including women in the armed forces expands the pool of talent available and broadens the abilities, skills and experience needed for effective operations at home and abroad. The actions required, however, to enable women and men to develop and contribute effectively are not just those required to increase their representation. The focus needs to be on how armed forces create a non-discriminatory working environment and support for women and men. That requires a strategic approach by senior military leadership.

The following good practices are aimed to ensure non-discrimination of women in the armed forces:

- » All restrictions to women’s full participation across the armed forces should be removed, thus enabling women to perform all roles on an equal footing with men.
- » Legislation on military conscription should be revised, so that it does not discriminate against women or men.
- » Physical fitness standards should be reviewed and aligned to the requirements of particular roles.
- » Mixed recruitment and promotion panels should be ensured, and promotion policies, processes and pathways should be reviewed to ensure that these do not disadvantage women.
- » Unconscious bias training should be provided to all personnel.
- » Flexible working arrangements should be provided for all service personnel, to support those with families by making parental leave available to men and women,

<sup>454</sup> For further good practices, see: Megan Bastick, *Integrating Gender into Oversight of the Security Sector by Ombuds Institutions and National Human Rights Institutions* (Geneva: ODIHR/DECAF, 2014); and *Ombuds Institutions for the Armed Forces: Selected Case Studies* (Geneva: DCAF, 2017).

<sup>455</sup> PACE, “Resolution 2120 – Women in the Armed Forces: Promoting Equality, Putting an End to Gender-Based Violence”, 21 June 2016, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?file-id=22939&lang=en>.

including individual entitlement for fathers and, where possible, ensuring the co-location of military parents.

- » Appropriate physical fitness training should be provided that takes into account the musculoskeletal differences of men and women, as well as possible individual circumstances (e.g., ante and post-natal physical training needs of expecting or returning mothers).
- » A safe and comfortable working environment should be ensured, by providing women with appropriate uniforms and equipment, as well as secure accommodations and facilities.
- » Women service personnel should have multiple trusted channels – such as support groups and networks – to receive advice and support and to report harassment, bullying and other abuse.
- » A central monitoring unit on gender equality should be established, with a duty to advise military leadership, inform policy development, issue publicly available reports and monitor the implementation of gender equality provisions.
- » Rigorous and reliable data collection and information management systems should be in place, training those responsible for collecting and entering data, conducting systematic audits to guarantee data integrity, and ensuring all data on service personnel are disaggregated by sex.
- » Key indicators for and monitoring the career progression of women and men should be set, including with regard to applications, recruitment, participation, training, promotion, retention, attrition and abuse.
- » Anonymous satisfaction and exit surveys should be undertaken, and the results analysed and published by sex.
- » Regular dialogue should take place with an external and independent body, such as an ombuds institution or a human rights commissioner, on how to ensure military policies, programmes and structures are non-discriminatory and integrate gender perspectives, and conducting gender and human rights assessments in co-ordination with them, or having them conduct gender audits.
- » High-level military leadership should be engaged in leading by example in developing and adopting policies to promote gender equality.
- » Ministries of defence and armed forces general staffs should be engaged in the development of national action plans on women, peace and security, and ensuring consultation with the service personnel throughout the process.

## Further reading

Susan Atkins, "Baseline Study Report: Women in the Armed Forces in the OSCE Region", ODIHR, July 2018, <https://www.osce.org/odihr/women-armed-forces-baseline-study>.

Australian Human Rights Commission, *Review into the Treatment of Women in the Australian Defence Force, Phase 2 Report*, (Sydney: Australian Human Rights Commission, 2012), <https://defence.humanrights.gov.au/sites/default/files/adf-complete.pdf>.

Megan Bastick, *Integrating a Gender Perspective into Internal Oversight within the Armed Forces* (Geneva: ODIHR/DCAF, 2014), <<https://www.osce.org/odihr/118325>>.

Marie Deschamps, "External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces", Canadian Department of National Defence, 27 March 2015. <https://www.canada.ca/en/department-national-defence/corporate/reports-publications/sexual-misbehaviour/external-review-2015.html>.

NATO, "NATO Annual Report on Gender Perspectives in Allied Armed Forces: Progress Made in Pre-Deployment Training and Work-Life Balance", 15 December 2017, [https://www.nato.int/cps/en/natohq/news\\_149993.htm](https://www.nato.int/cps/en/natohq/news_149993.htm).

PACE, "Women in the Armed Forces: Promoting Equality, Putting an End to Gender-Based Violence", 24 November 2016, Doc. 14073, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22939&lang=en>.

UN Women, *Preventing Conflict, Transforming Justice, Securing the Peace: A Global Study on the Implementation of United Nations Security Council Resolution 1325* (New York: UN Women, 2015), [https://www.peacewomen.org/sites/default/files/UNW-GLOBAL-STUDY-1325-2015%20\(1\).pdf](https://www.peacewomen.org/sites/default/files/UNW-GLOBAL-STUDY-1325-2015%20(1).pdf).

## Chapter 12: LGBTI Members of the Armed Forces

### Introduction: Issues at Stake

Legal recognition and protections for LGBTI persons are increasingly being incorporated into international human rights law by supervisory bodies.<sup>456</sup> National legislatures and civil society have played a key role in promoting the rights to equality and non-discrimination of LGBTI persons by overturning homophobic and transphobic policies, pledging to end discrimination and curbing hate-crime-related violence. Beyond the first step of decriminalizing same-sex acts,<sup>457</sup> many states have made strides to extend equal rights to gays and lesbians by offering civil unions or same-sex marriage and other social benefits. In some countries across the OSCE region, a growing understanding of sexual orientation and gender identity is being reflected in greater protections and recognition of the rights of LGBTI service personnel.

#### Box 12.1: Key terms<sup>458</sup>

**LGBTI:** Lesbian, Gay, Bisexual, Transgender and Intersex.

**Sexual Orientation and Gender Identity:** Sometimes extended to include Gender Expression and Sex Characteristics ("SOGIESC").

**Sex:** Typically assigned at birth as either male or female, in accordance with how an individual's reproductive anatomy and secondary sex characteristics are interpreted.

**Intersex:** Umbrella term used to describe people whose biological sex structures, including combinations of genital-gonadal structures and chromosomes, do not exclusively conform to typical classifications of male or female. Some intersex people may continue to identify with the binary sex they were assigned at birth or come to identify as a different gender.

<sup>456</sup> See on ICCPR: *Toonen v Australia*, HRC Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992, para. 8.7 (1994); on ECOSOC "General Comment No. 14: The Right to the Highest Attainable Standard of Health", August 11, 2000, E/C.12/2000/4. [www.unhcr.org/refworld/docid/4538838d0.html](http://www.unhcr.org/refworld/docid/4538838d0.html); on ECHR, *X v. Turkey* (application no. 24626/09); on Inter American Commission on Human Rights [www.cidh.oas.org/basicos/english/basic3.american%20convention.htm](http://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm). *Atala Riffo and Daughters v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. 83-84 (February 24, 2012); References to sexual orientation are also included in three international labour standards: the Private Employment Agencies Recommendation, 1997 (No. 188), the HIV and AIDS Recommendation, 2010 (No. 200), and the Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205).

<sup>457</sup> For example, homosexual acts were decriminalized in Albania in 1995, in the Russian Federation in 1993, in the United Kingdom in 1967 and in Poland in 1932. For more data on decriminalization, see: "Minorities Report 2017: Attitudes Toward Sexual and Gender Minorities around the World", ILGA-RIWI, 2017, [https://ilga.org/downloads/ILGA\\_RIWI\\_Minorities\\_Report\\_2017\\_Attitudes\\_to\\_sexual\\_and\\_gender\\_minorities.pdf](https://ilga.org/downloads/ILGA_RIWI_Minorities_Report_2017_Attitudes_to_sexual_and_gender_minorities.pdf).

<sup>458</sup> The Hague Centre for Strategic Studies (HCSS), "LGBT Military Personnel: A Strategic Vision for Inclusion", 2014, [https://hcss.nl/sites/default/files/files/reports/HCSS\\_LGBT\\_webversie.pdf](https://hcss.nl/sites/default/files/files/reports/HCSS_LGBT_webversie.pdf). See also: "Minorities Report 2017", *Ibid*.

**Gender Identity:** A person's personal, internal experience of their own gender. This may or may not agree with their physical sex assigned at birth.

**Cisgender:** Describes a person whose gender identity is the same as their sex assigned at birth.

**Transgender:** Describes a person whose gender identity differs from their sex assigned at birth.

**Gender Dysphoria:** A condition experienced by transgender people wherein their social perception and/or physical body is misaligned with their internal gender identity, causing anxiety and/or severe discomfort. This is often alleviated by an individual's decision to transition socially, physically and/or medically.

**Non-binary, or Third Gender:** Umbrella terms for gender identities not described by the traditional categories of female/male or man/woman. Non-binary identities may incorporate both, neither or a combination of binary genders. Can describe broad identities, such as genderqueer or the culturally specific categories (e.g., the hijra of India).

**Sexual Orientation:** Describes the gender of the persons to whom someone is romantically and/or sexually attracted; thus, bisexual (attracted to persons of similar and different genders), homosexual (attracted to persons of the same gender) or heterosexual (attracted to persons of a different gender).

Prejudice and hostility based on a person's sexual orientation and gender identity mean that LGBTI persons often face discrimination or invasion of their privacy, including in the military. Discrimination in the armed forces can lead to questions and investigations into private aspects of LGBTI members' lives and the disclosure of protected information about their sexual orientation and gender identity. Therefore, states should take measures to ensure that LGBTI individuals enjoy full recognition and enjoyment of their human rights and equitable treatment in the armed forces.

The situation of LGBTI persons serving in the armed forces reflects broader issues of equal rights and discrimination in society. People of various sexual orientations and gender identities have always served in the armed forces, but have often been obliged to remain closeted and have frequently been exposed to discriminatory policies and violence. LGBTI personnel in the OSCE region have only been able to serve openly in some countries since the 1970s, when some states began to lift prohibitions on their participation in the military.<sup>459</sup> Although these policy changes initially focused on gay and lesbian personnel, a number of participating States have since formally expanded them to include other

<sup>459</sup> The Netherlands was the first to act in 1974. See also the Equal Treatment Act, adopted on 2 March 1994, <http://www.equalrightstrust.org/content/netherlands-equal-treatment-act-1994>.

groups, including transgender service members and put in place basic protections against discrimination on the grounds of sexual orientation and gender identity.

As a practical measure, various OSCE participating states have adopted policies to tackle discrimination and to promote equal opportunities within the armed forces. However, even in countries with inclusive policies, barriers to achieving *de facto* equality remain. Accountability through outcomes assessment and ongoing education and outreach can facilitate continued progress in this field.

This chapter explores policies and attitudes towards LGBTI personnel in the armed forces, with the understanding that promoting diversity can result in greater operational effectiveness, while protecting human rights. It underlines the main barriers facing LGBTI service personnel in their military careers and proposes good practices for ensuring an inclusive environment. It also deals with mechanisms and policies for promoting equality among all military personnel and reducing harassment. Finally, this chapter addresses military culture in the armed forces as both a barrier and a solution to the problem of discrimination against LGBTI persons. In particular, it explains how training and awareness-raising among military commanders can contribute to promoting equal opportunities.

### ***The central issue***

Excluding LGBTI persons from military service violates the principle of equality both in terms of employment opportunities and in terms of citizenship. Because military service has historically been associated with citizenship, excluding LGBTI persons from the armed forces prevents them from fully enjoying their rights and duties as citizens. Furthermore, in many OSCE participating States, the military is the biggest employer and supplier of social benefits.

There are two standard arguments against admitting LGBTI persons to the armed forces, both of which are based on cultural beliefs, rather than scientific proof or objective evidence: that LGBTI persons (1) exhibit personality disorders or mental illness; and (2) that they pose a threat to the operational effectiveness of the armed forces.

First, those against admitting members of the LGBTI community to the armed forces argue that people who experience same-sex attraction or do not identify with the gender they were assigned at birth suffer from a psychological disorder and, therefore, are not fit to work in the armed forces.<sup>460</sup> However, since 1973 the American Psychiatric Association has officially stated that there is no medical or scientific proof for classifying homosexuality as a mental disorder or defect.<sup>461</sup> In 2014, the World Health Organization confirmed that variances in gender and

<sup>460</sup> See, for example: "Military Document Suggests that Homosexuality is a Defect", Michael D. Palm Centre, University of California, Santa Barbara, press release, 17 November 2006, <https://www.palmcenter.org/military-document-suggests-homosexuality-defect/>.

<sup>461</sup> American Psychiatric Association, "Position Statement on Homosexuality and Civil Rights", *American Journal of Psychiatry*, Vol. 131, No. 4, 1973, p. 497. For more information, see the website of the American Psychiatric Association: <http://www.psych.org/index.cfm>.

sexual identities are not pathological mental health disorders.<sup>462</sup> Likewise, the American Medical Association has ruled that there are no medical grounds for barring transgender individuals from military service, including those diagnosed with gender dysphoria.<sup>463</sup>

The second major argument is that the presence of LGBTI persons in the armed forces would interfere with combat readiness and effectiveness, by reducing troop cohesion, discipline and morale. There have been no reports, however, that the presence of lesbian and gay personnel in military units has compromised military performance in any way.<sup>464</sup> Since Canada lifted its ban on LGBTI service personnel, for example, there has been no appreciable effect on any aspect of military life or performance.<sup>465</sup> Moreover, recent analysis demonstrates that open service by LGBTI persons does not affect productivity or performance.<sup>466</sup>

### ***Cultural attitudes towards LGBTI persons***

The main arguments against admitting LGBTI persons to the armed forces are not based on scientific proof or objective evidence, but on cultural grounds and prejudices. Concerns do exist that a homophobic mentality prevails in the armed forces, whereby anyone who is different or does not fit in may face hurdles.<sup>467</sup> Cultural barriers pose problems in countries that continue to prohibit LGBTI persons from serving, and also persist in countries where such bans have been lifted. In the latter countries, LGBTI personnel may still encounter significant resistance from within the military, even when the top military leadership speaks out against discriminatory practices. Thus, some OSCE participating States have taken

<sup>462</sup> World Health Organization, "The ICD-10 Classification of Mental and Behavioural Disorders: Clinical Descriptions and Diagnostic Guidelines", 2014, p. 11, <http://www.who.int/classifications/icd/en/bluebook.pdf>.

<sup>463</sup> "Transgender individuals have served, and continue to serve, our country with honor, and we believe they should be allowed to continue doing so", from communication to the United States Department of Defense from the American Medical Association, 3 April 2018, <https://www.politico.com/f/?id=00000162-927c-d2e5-ade3-d37e69760000>. See also the American Psychological Association <http://www.apa.org/news/press/releases/2018/03/transgender-military.aspx>, and American Psychiatric Association <https://www.psychiatry.org/newsroom/news-releases/apa-reiterates-its-strong-opposition-to-ban-of-transgender-americans-from-serving-in-u-s-military?>

<sup>464</sup> Aaron Belkin, "Don't Ask, Don't Tell: Is the Gay Ban Based on Military Necessity?", *Parameters*, Summer 2003, pp. 108-119, [http://www.gaymilitary.ucsb.edu/Publications/2003\\_BelkinInParameters.pdf](http://www.gaymilitary.ucsb.edu/Publications/2003_BelkinInParameters.pdf).

<sup>465</sup> Aaron Belkin and Jason McNichol, "Effects of the 1992 Lifting of Restrictions on Gay and Lesbian Service in the Canadian Forces: Appraising the Evidence", Palm Center White Paper, 2000; and Bernard Rostker et al., *Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment* (Santa Monica, California: RAND Corporation, 1993), pp. 74-79, [https://web.archive.org/web/20110725185044/http://www.palmcenter.org/publications/dadt/effects\\_of\\_the\\_1992\\_lifting\\_of\\_restrictions\\_on\\_gay\\_and\\_lesbian\\_service\\_in\\_the\\_canadian\\_forces\\_appraising\\_the\\_e](https://web.archive.org/web/20110725185044/http://www.palmcenter.org/publications/dadt/effects_of_the_1992_lifting_of_restrictions_on_gay_and_lesbian_service_in_the_canadian_forces_appraising_the_e).

<sup>466</sup> "LGBT Military Personnel", HCSS, op. cit., note 458, p. 31. See also Bonnie Morandi, "Sexual Orientation Disclosure, Concealment, Harassment, and Military Cohesion: Perceptions of LGBT Military Veterans", *Military Psychology*, Vol. 21, No. 4, October 2009, pp. 513-533, <https://doi.org/10.1080/08995600903206453>. Furthermore, cost analysis research shows that also the cost of transition-related care is too low to warrant consideration in the current policy debate over the possible financial cost of covering the medical fees of transition. See: Aaron Belkin, "Caring for Our Transgender Troops --The Negligible Cost of Transition-Related Care", *The New England Journal of Medicine*, Vol. 373, No. 12, September 2015, p. 1089-1092, available at <https://www.nejm.org/doi/full/10.1056/NEJMp1509230>.

<sup>467</sup> Finding based on opinions of experts, ODIHR-DCAF Human Rights of Armed Forces Review Workshop, Warsaw, December 2006.

measures to guarantee not only *de jure* equality, but also to promote *de facto* equality (see “Policies and mechanisms for promoting equality”, below).

## ***Harassment and discrimination***

Even though the legal position of the international LGBTI community has improved, service personnel of different sexual orientation and gender identities still face various forms of discrimination, including unofficial policies or practices that can impact on their career advancement.<sup>468</sup> Other forms of discrimination include unequal treatment in relation to housing and other benefits for same-sex partners.

LGBTI service members are often obliged to work in a hostile environment and are sometimes subject to abuse and harassment based on their sexual orientation, gender identity and gender expression. Such harassment ranges from offensive speech and jokes and name-calling to sexual violence and violent assaults. According to the United States Department of Defense, service members identifying as LGBT are statistically more likely to experience sexual assault and sexual harassment than those who do not identify as LGBT.<sup>469</sup>

Intrusive investigations that disclose details of a service member’s personal life without their consent, such as those that make public or scrutinize their sexual orientation or gender identity, are breaches of privacy and are effectively a form of harassment.

Thus, even where LGBTI service members can serve openly in the armed forces, this does not preclude or prevent harassment and discrimination.

Anti-LGBTI bias in the armed forces can negatively impact all service personnel. Anti-LGBT harassment is not strictly limited to those who actually identify as LGBTI, but also affects heterosexual and cisgender personnel who are *perceived* as being not straight or gender conforming. In workplace climates where LGBTI persons are targeted, all staff may be subject to bullying, irrespective of their actual sexual orientation, gender identity and expression, and sex characteristics.

All of these scenarios undermine unit cohesion and military performance, by producing an antagonistic environment where personnel are unable to work safely, equally and effectively.

<sup>468</sup> M. Wechsler Segal, “Sexuality and the Military”, in Jean Callaghan and Franz Kernic (eds.), *Armed Forces and International Security: Global Trends and Issues* (Piscataway, New Jersey: Transaction Publishers, 2003), pp. 217-220.

<sup>469</sup> “Overall, the estimated sexual harassment rate for active duty members identifying as LGBT is 22.8 per cent, compared to 6.2 per cent for those who do not”, from “Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2016”, United States Department of Defense, p. 15, [https://sapr.mil/public/docs/reports/FY16 Annual/FY16 SAPRO Annual Report.pdf](https://sapr.mil/public/docs/reports/FY16%20Annual/FY16%20SAPRO%20Annual%20Report.pdf).



## International Human Rights Standards

A person's sexual orientation and gender identity are created by "a complex interplay of biological, neurological, psychological, cultural, moral and social factors."<sup>470</sup> Rules that make distinctions based on sexual orientation and gender identity constitute a challenge not only to the principle of non-discrimination, but also to the right to privacy of all individuals, including those in the armed forces. Discrimination based on sexual orientation and gender identity is often the result of laws and policies that undermine the right to privacy by requiring intrusive questions on intimate behaviour and public disclosure of sexual, romantic or medical data. The supervisory bodies of the Universal Declaration of Human Rights and subsequent international treaties have made clear that it is the responsibility of states to protect against discrimination based on sexual orientation and gender identity, as well as other protected categories.<sup>471</sup>

### *Prohibition of discrimination*

Article 26 of the International Covenant on Civil and Political Rights affirms that:

*"The law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status."*

The UN Human Rights Committee has concluded that Article 26 "prohibits discrimination in law or in fact in any field regulated and protected by the public authorities", whether or not the legislation covers a right guaranteed in the covenant.<sup>472</sup> The Human Rights Committee has interpreted the ICCPR's prohibition on discrimination based on sex to include discrimination on the basis of sexual orientation.<sup>473</sup> Furthermore, Committee on Economic, Social and Cultural Rights on its general Comment No. 18 to the CESCR has specified that "under its article 2, paragraph 2, and article 3, the Covenant prohibits any discrimination in access to and maintenance of employment on the grounds of (...) sexual orientation (...), or

<sup>470</sup> "LGBT Military Personnel", HCSS, *op. cit.*, note 458, p. 21.

<sup>471</sup> "Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law", UN OHCHR, 2012, <https://www.ohchr.org/EN/Issues/Discrimination/Pages/BornFreeEqualBooklet.aspx>. Human rights legislation regarding gender and sexual orientation may have been informed by the 2006 Yogyakarta Principles, although they are not legally binding. Likewise, the 2013 Malta Declaration and the 2017 additions to the Yogyakarta Principles set out aspirational standards for human rights protections in this area. See: The Yogyakarta Principles (2006) and The Yogyakarta Principles plus 10 (YP+10) (2017), ARC International, <http://yogyakartaprinciples.org/>; Malta Declaration of the Third International Intersex Forum (2013), Organisation Intersex International Europe, <https://oiieurope.org/malta-declaration/>.

<sup>472</sup> UN Human Rights Committee, "CCPR General Comment No. 18: Non-discrimination", 10 November 1989, para. 12.

<sup>473</sup> Nicholas Toonen v. Australia, UN Human Rights Committee, 4 April 1994, *International Human Rights Reports*, Vol. 1, 1994, p. 97.

other status, which has the intention or effect of impairing or nullifying exercise of the right to work on a basis of equality".<sup>474</sup>

Although OSCE Ministerial Council decisions have not specified the rights of LGBTI, the 1990 Copenhagen Document prohibits discrimination "on any ground",<sup>475</sup> which international treaty bodies have considered to include sexual orientation and gender identity.<sup>476</sup> Non-discrimination, equality, and the right to privacy are also reflected upon across a variety of OSCE Commitments (see "Chapter 2: OSCE Commitments").

In this context, the OSCE Parliamentary Assembly (OSCE PA) has called upon participating States

*"[...]to ensure that all persons belonging to different segments of their populations be accorded equal respect and consideration in their constitutions, legislation and administration and that there be no subordination, explicit or implied, on the basis of ethnicity, race, colour, language, religion, sex, sexual orientation, national or social origin or belonging to a minority [...]"*<sup>477</sup>

In the 2017 Minsk Declaration, the OSCE PA expressed concern over manifestations of intolerance against and the persecution of LGBTI persons. Furthermore, in paragraph 152, the Parliamentary Assembly "urgently calls upon participating States to eliminate all forms of discrimination based on sexual orientation or gender identity", and advocates legislative provisions to fully protect and promote the rights of LGBTI individuals, "including recognition of same-sex relationships and allowing adoption and parenting".<sup>478</sup>

In a 1996 survey on Equality in Employment and Occupation, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) drew attention to discrimination against LGBTI persons in the workplace and called for specific legislative provisions to protect against such discrimination. The issue of LGBTI discrimination was covered in subsequent ILO declarations and global reports on workplace rights. In a general survey published in 2012, the CEACR noted an encouraging increase in the number

**474** UN Committee on Economic, Social and Cultural Rights, CESCR General Comment No.18: "The Right to Work", 24 November 2005, para 12. (b) (i):

**475** OSCE, Copenhagen 1990, *op. cit.*, note 141, para. 5.9.

**476** Five treaty bodies and 26 Special Rapporteurs, Working Groups and Independent Experts have engaged with sexual orientation and gender identity as part of their mandate. International Commission of Jurists, Sexual Orientation and Gender Identity in International Human Rights Law: The ICJ UN Compilation, [www.icj.org/sogi-un-database/](http://www.icj.org/sogi-un-database/).

**477** OSCE PA, "Ottawa Declaration of the OSCE Parliamentary Assembly", 8 July 1995, <<https://www.osce.org/pa/38133>>. Note: OSCE PA Declarations are based on majority vote and do not require a consensus by OSCE participating States.

**478** OSCE PA, "Minsk Declaration and Resolutions Adopted by the OSCE Parliamentary Assembly at the Twenty-Sixth Annual Session", 5-9 July 2017, <https://www.oscepa.org/documents/annual-sessions/2017-minsk/declaration-25/3555-declaration-minsk-eng/file>. Note: OSCE PA Declarations are based on majority vote and do not require a consensus by OSCE participating States.

of ILO member states that had included protection of LGBTI individuals in constitutional guarantees and legislative provisions on equality.

The Council of Europe armed forces guidelines explicitly include sexual orientation among the prohibited grounds for discrimination in the “work and service life of members of the armed forces.”<sup>479</sup> The principle of non-discrimination is reaffirmed in Article 14 of the ECHR and in Article 13 of the Treaty establishing the European Union, which mandates the Council to take appropriate action to combat discrimination based, among other things, on sexual orientation.<sup>480</sup>

A European Union employment directive establishes a general framework for equal treatment in employment and adequate means of legal protection in cases of discrimination. The directive prohibits discrimination based on sexual orientation, among other grounds. Article 3 notes that the directive applies to the entire public and private sector, with no exception for national security. According to the same article, the armed forces of European Union member states are only allowed to discriminate on the basis of age or disability in order to safeguard combat effectiveness. This implies that sexual orientation cannot be a justification for excluding LGBTI persons from the armed forces.

The directive recognizes that, in very limited circumstances, a difference of treatment may be justified where a characteristic related to “religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate.”<sup>481</sup> However, “neither cultural, traditional nor religious values, nor the rules of a “dominant culture” can be invoked to justify hate speech or any other form of discrimination, including on grounds of sexual orientation or gender identity.”<sup>482</sup>

Since its 2011 Resolution on “Human Rights, Sexual Orientation and Gender Identity,”<sup>483</sup> the UN Human Rights Council has called on states to end discrimination against LGBTI military personnel.

<sup>479</sup> Council of Europe, Recommendation CM/Rec(2010)4, *op. cit.*, note 26, para. 77.

<sup>480</sup> The ICCPR and ECHR do not explicitly mention sexual orientation and gender identity as protected categories, but provide broad protections against discrimination.

<sup>481</sup> Council of the European Union, “Directive Establishing a General Framework for Equal Treatment in Employment and Occupation”, 2000/78/EC, 27 November 2000, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32000L0078>. This directive is only applicable in European Union Member States.

<sup>482</sup> Council of Europe, “Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity, 31 March 2010, <https://www.coe.int/en/web/sogi/rec-2010-5>.

<sup>483</sup> UN OHCHR, “Discriminatory Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity”, A/HRC/19/41, 14 July 2011, [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/RES/17/19](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/17/19).

## Right to privacy

The OSCE participating States acknowledged the right to the protection of private and family life in Moscow in 1991, and affirmed that it would be harmful to democratic societies if states were to arbitrarily intrude into the realm of the individual, and further highlighted that any restrictions to the right to private life would need to be prescribed by law and be consistent with internationally recognized human rights standards. At the same time, the OSCE participating States agreed to ensure that “searches and seizures of persons and private premises and property will take place only in accordance with standards that are judicially enforceable”.<sup>484</sup>

Prohibitions on LGBTI persons serving in the armed forces contravene the right to private life, which is also protected by both the ICCPR (Article 17) and the ECHR. Article 8 of the ECHR states:

*“There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”*<sup>485</sup>

On the basis of this provision, the European Court of Human Rights ruled that the United Kingdom’s policy prohibiting gays and lesbians from serving in the Armed Forces violated the principle of respect for private life, owing to the surveillance activities conducted to investigate persons suspected of being LGBTI (see Box 12.3). Such surveillance violates the privacy not only of LGBTI personnel, but also others who may be targeted for a variety of reasons. Likewise, military personnel in same-sex partnerships and marriages recognized by law “should be treated equally with other servicepersons as regards benefits for them and their partners.”<sup>486</sup>

The right to privacy has also been a basis for successful challenges before the European Court of Human Rights to military medical and personnel decisions related to gender identity, as in the case of *AP, Garçon, and Nicot v. France*, in which three women challenged a requirement that they undertake irreversible medical interventions before being able to change their gender legally.<sup>487</sup>

<sup>484</sup> OSCE, “Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE”, Moscow, 3 October 1991, <https://www.osce.org/odihr/elections/14310>.

<sup>485</sup> The prohibition of discrimination and the right to respect for private and family life within the military context are reaffirmed in PACE Recommendation 1742, *op. cit.*, note 294, paras. 10.1.5 and 10.2.3.

<sup>486</sup> Council of Europe, Recommendation CM/Rec(2010)4, *op. cit.*, note 26.

<sup>487</sup> Zhan Chiam, Sandra Duffy and Matilda González Gil, *Trans Legal Mapping Report 2017: Recognition before the*

### **Box 12.3: The right to privacy and sexual orientation – the case of *Smith and Grady v. the United Kingdom*<sup>488</sup>**

Two applicants – Jeanette Smith and Graeme Grady – were dismissed from the Royal Air force on the sole ground of their sexual orientations. They complained that such actions constituted violations of Article 8 (respect for private and family life) of the Convention, taken alone, and in conjunction with Article 14 (prohibition of discrimination).

The European Court of Human Rights found that “[...]the perceived problems [of homosexual relations] which were identified in the Homosexual Policy Assessment Team (HPAT) report as a threat to the fighting power and operational effectiveness of the Armed Forces were founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation.

“To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants’ rights outlined above any more than similar negative attitudes towards those of a different race, origin or colour.

“Accordingly, the Court concludes that convincing and weighty reasons have not been offered by the Government to justify the policy against homosexuals in the armed forces or, therefore, the consequent discharge of the applicants from those forces.

“In sum, the Court finds that neither the investigations conducted into the applicants’ sexual orientation, nor their discharge on the grounds of their homosexuality in pursuance of the Ministry of Defence policy, were justified under Article 8 § 2 of the Convention. [...] Accordingly, there has been a violation of Article 8 of the Convention.”

Following these rulings, the Ministry of Defence announced a new policy on sexual conduct in the Armed Forces Code of Social Conduct in 2000. The policy is founded on maintaining combat effectiveness based on the principles of group cohesion and discipline, which are, in turn, underpinned by factors such as mutual trust, respect and a requirement to avoid conduct that offends others. Together with the Armed Forces Disciplinary Act, the Code of Social Conduct “enabled homosexuals to be legally employed by the Armed Forces and allowed those who had been dismissed from the military because of their sexual orientation to take legal action.”<sup>489</sup>

*law* (Geneva: International Lesbian, Gay, Bisexual, Trans and Intersex Association, November 2017), [https://ilga.org/downloads/ILGA\\_Trans\\_Legal\\_Mapping\\_Report\\_2017\\_ENG.pdf](https://ilga.org/downloads/ILGA_Trans_Legal_Mapping_Report_2017_ENG.pdf).

<sup>488</sup> European Court for Human Rights, *Smith and Grady v. the United Kingdom*, *op. cit.*, note 142, p. 493 et seq., paras. 96, 97, 105, 110, 111 and 112.

<sup>489</sup> Dia Anagnostou (ed.), *European Court of Human Rights: Implementing Strasbourg’s Judgments on Domestic Policy* (Edinburgh: Edinburgh University Press, 2013), p. 192.

After 2000, the operational effectiveness of the Armed Forces did not collapse or decrease, as was feared by the United Kingdom's defence policymakers, and the shift towards greater equity also led to more opportunities for transgender personnel. An internal government report appraising the policy change characterized it as a solid achievement, with fewer problems than expected.<sup>490</sup> Furthermore, the Royal Navy started a campaign to hire gay service members and to promote fair treatment of gay, lesbian and bisexual recruits.<sup>491</sup> The Royal Navy, British Army and Royal Air Force have had a presence at London Pride since 2008.

## Different Approaches

Many OSCE participating States have begun applying a human rights and equal-opportunities approach to the armed forces, including by relaxing or lifting bans on gay and lesbian service personnel, and are working towards the same standards for gender identity and expression.

In the past, policies regarding LGBTI persons in the armed forces have been categorized by three broad approaches: *exclusion*, in which LGBTI service personnel are barred by law and, if found to be serving, can be legally removed from the service; *inclusion*, in which LGBTI personnel can participate fully in the armed forces, in line with international non-discrimination standards; and "Don't ask, don't tell" policies, which allow LGBTI service personnel to serve as long as they do not declare and/or manifest their non-conforming sexual orientation or gender identity.<sup>492</sup>

States that have lifted bans on LGBTI service personnel are developing new and more nuanced approaches to ensuring equality and privacy rights, requiring new language to describe the spectrum of policies concerning LGBTI service personnel. After conducting the world's first survey of LGBT military policies (the LGBT Military Index), the Hague Centre for Strategic Studies (HCSS) proposed a new framework in 2014 for evaluating states' approaches according to the principles of inclusion, admission, tolerance, exclusion and persecution.<sup>493</sup>

<sup>490</sup> Belkin, *op. cit.*, note 464.

<sup>491</sup> "Navy's New Message: Your Country Needs You, Especially If You Are Gay", The Guardian, 21 February 2005, <http://www.guardian.co.uk/gayrights/story/0,1418932,00.html>.

<sup>492</sup> ODIHR 1st edition Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel, *op. cit.*, note 361, p. 133-137.

<sup>493</sup> "LGBT Military Personnel", HCSS, *op. cit.*, note 458, p. 13.

## ***Inclusion***

States in this category actively seek to integrate LGBTI personnel into their armed forces. Beyond admitting service members regardless of their sexual orientation and gender identity, systems of inclusion recognize the barriers that remain for LGBTI service members and seek to achieve equality among all personnel.

At a basic level, “open service” means that armed forces do not treat variations in sexual orientation and gender identity as a valid warrant for discharge or barrier from service. Systems that allow LGBTI personnel to serve openly provide an environment where service members may disclose their sexual orientation and gender identity not only safely, but proudly.

Additionally, these systems offer support through inclusive personnel policies and benefits, LGBTI associations, and official statements of inclusion and non-discrimination (see “Policies and Mechanisms for Promoting Equality”, below). OSCE participating States with militaries that follow these practices are ranked among the most inclusive in the world, including the Netherlands, the United Kingdom and Sweden.<sup>494</sup>

## ***Admission***

States in this category allow open service, but do not provide support to mitigate against discrimination based on sexual orientation and gender identity. Many OSCE participating States entitle LGBTI to serve in their armed forces. Under this approach, guaranteeing military readiness does not imply the exclusion of LGBTI personnel. The military evaluates performance against professional criteria and standards that do not discriminate based on sexual orientation or gender identity. In these countries, abuse and harassment are completely prohibited, including on the grounds of sexual orientation or gender identity.

## ***Tolerance***

After lifting their anti-gay bans, some OSCE participating States adopted practices that fall between explicit inclusion and exclusion by technically allowing LGBTI personnel to serve, but not openly.

This approach is exemplified by the former “Don’t ask, don’t tell” policy in the United States, which differentiated between sexual orientation and sexual behaviour. This legal regulation permitted gays and lesbians to serve in the Armed Forces as long as they did not declare and/or manifest their sexual orientation. According to a United States Defense Department directive, “Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, whether a member is a heterosexual, a homosexual, or a bisexual.”<sup>495</sup>

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<sup>494</sup> *Ibid.*, p. 58.

<sup>495</sup> “Guidelines for Fact-Finding Inquiries into Homosexual Conduct”, Department of Defense Directive No. 1332.4, Enclosure E4, 21 December 1993, <http://www.dtic.mil/whs/directives/corres/pdf/133214p.pdf>.

Accordingly, while a person's sexual orientation was considered a private matter, so-called "homosexual conduct" – even a simple statement – provided justification for exclusion or expulsion from the Armed Forces.

After severe criticism from human rights groups and a co-ordinated political and legal reform effort,<sup>496</sup> the United States repealed this policy in 2011, allowing lesbian, gay and bisexual personnel to serve openly. Despite the repeal, transgender service members were still disqualified from military service due to medical transition or were otherwise unable to serve openly owing to a number of provisions until June 30, 2016, when the Pentagon announced the introduction of a new policy, stating that it was in the interest of the military "to recruit and retain the best troops, regardless of their gender identity".<sup>497</sup> That policy was overturned, however, in 2017.<sup>498</sup>

## Exclusion

No OSCE participating States indicated an explicit ban on LGBTI in the military. However, in their responses to the ODIHR-DCAF questionnaire in 2018, two of the OSCE participating States did not indicate whether or not they allow lesbians, gays, bisexual, transgender and intersex people (LGBTI) to serve/be employed in the armed forces. It is possible that these states do not technically allow LGBTI persons to be service personnel.

## Persecution

States that fall into this category not only ban LGBTI personnel from the military, but actively victimize these individuals through policies that "aim to prevent them from developing a positive identity, or even expressly stigmatize them."<sup>499</sup> It is relevant to note that these practices may be a reflection of broader societal trends against the LGBTI community, such as laws against same-sex activities.<sup>500</sup>

<sup>496</sup> Jamie Fellner, "U.S. Military's 'Don't Ask, Don't Tell' Policy Panders to Prejudice: Anti-Gay Harassment Flourishes", Human Rights Watch, 23 January 2003, <http://www.hrw.org/press/2003/01/us012303.htm>; Human Rights Campaign, "Transgender Military Service": <https://www.hrc.org/resources/transgender-military-service>

<sup>497</sup> Adam F. Yerke and Valory Mitchell, "Transgender People in the Military: Don't Ask? Don't Tell? Don't Enlist!", *Journal of Homosexuality*, Vol. 60, Nos. 2-3, 2013, pp. 436-457, <https://doi.org/10.1080/00918369.2013.744933>.

<sup>498</sup> "Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security", United States White House website, 25 August, 2017, <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-defense-secretary-homeland-security/>.

<sup>499</sup> "LGBT Military Personnel", HCSS, *op. cit.*, note 458, p. 13.

<sup>500</sup> *Ibid.*, p. 62.



## ***Policies and mechanisms for promoting equality***

In states where bans on the grounds of sexual orientation and gender identity have been lifted, the issue is how to translate *de jure* non-discrimination into *de facto* equal opportunities for LGBTI service personnel, including by combating harassment.

As highlighted by the HCSS, the institutional practices of *admission* and *tolerance* are only initial steps towards more aspirational policies. OSCE participating States that adopt systems of inclusion for LGBTI recognize that safeguarding diversity is “critically important for defence organisations to survive and thrive in the 21st century security environment.”<sup>501</sup>

Several OSCE participating States have taken action to address LGBTI issues in the armed forces and to render the armed forces a more attractive employer for all. These actions range from developing adequate policy frameworks, establishing standards for social conduct and providing training and awareness raising, to establishing anti-discrimination measures, complaints procedures and support networks.<sup>502</sup> Strategies that work towards *de facto* equality are distinct from *de jure* admissions policies because they seek to redress the particular challenges and needs of openly LGBTI personnel and instil institutional accountability. Such policies help to ensure opportunities for all and allow service personnel to perform their best regardless of their sexual orientation and/or gender identity.<sup>503</sup>

### **Box 12.5: Examples of anti-discrimination provisions in armed forces<sup>504</sup>**

**Denmark:** The Danish Ministry of Defence Personnel Agency has published several guides on handling offensive behaviour and discrimination on the basis of sex and sexual orientation.

**Finland:** Finland’s Conscript Act includes sexual orientation among the grounds on which discrimination is prohibited.

**Germany:** Since 2006, Germany’s “Act on the Equal Treatment of Female and Male Military Personnel” has prohibited discrimination on the grounds of sexual orientation, among other personal characteristics. Furthermore, since 2004, the “Act on Equal Opportunities for Female and Male Military Personnel” has prohibited discrimination on the grounds of gender.

<sup>501</sup> *Ibid.*, p. 11.

<sup>502</sup> *Ibid.*, p. 52.

<sup>503</sup> Gregory Herek and Aaron Belkin, “Sexual Orientation and Military Service: Prospects for Organizational and Individual Change in the United States”, in T.W. Snider, A.B. Adler and C.A. Castro (eds.), *Military Life: The Psychology of Serving in Peace* (Westport, Connecticut: Praeger, 2005), p. 26.

<sup>504</sup> Responses to ODIHR-DCAF 2018 questionnaire, qu. 34.

**Latvia:** According to the Military Service Law, the Labour Law on anti-discrimination applies to the Armed Forces irrespective of a person's sexual orientation, among other personal characteristics. The Law covers both direct and indirect discrimination.

**Montenegro:** The Law on the Armed Forces of Montenegro proscribes any conduct that offends the dignity of a person serving in the military, in particular sexual abuse or harassment, or behaviour that discriminates on the basis of sex, race, colour, religion, nationality or other personal characteristics.

**Switzerland:** Switzerland's Department of Defence's 2008 Order on Diversity Management prohibits discrimination in the armed forces and explicitly addressed LGBTI issues.

## Policy framework

Systems that aim to integrate LGBTI persons into the armed forces should recognize differences in identity, expression and behaviour.<sup>505</sup> Furthermore, addressing the needs of LGBTI personnel should not be seen as accessory to the primary interests of the armed forces, but as integral to maintaining a functional organization.<sup>506</sup>

This includes giving the same-sex partners of service members the same status as heterosexual spouses, recognizing the gender identity of individual personnel and eroding barriers of entry for transgender personnel, allowing in-service gender transition and establishing protocols for changing identity documents. Policies and practices should be informed by values of accountability in order to maintain a professional environment for all.

The Netherlands' system of inclusion (see Box 12.6) aims to incorporate LGBTI personnel through educational training, transparent communication and respectful attitudes.

### Box 12.6: The Netherlands – policies for accepting and integrating gays and lesbians into the armed forces<sup>507</sup>

According to an opinion poll, 90 per cent of Dutch armed forces personnel accept gay service members as colleagues. Current official policy aims at the acceptance of homosexuality within the armed forces and at protection against discrimination and harassment. The policy makes use of an information campaign, education, support and legal procedures to achieve its aims.

<sup>505</sup> Herek and Belkin, *op. cit.*, note 505, p. 45.

<sup>506</sup> "LGBT Military Personnel", HCSS, *op. cit.*, note 458, p. 68.

<sup>507</sup> Anna Adolfsen and Saskia Keuzenkamp, "Uniform uit de kast: Homosexualiteit binnen de krijgsmacht [Coming Out in Uniform: Homosexuality within the Armed Forces]", The Hague: Social-Cultural Planning Office, 2006, [https://www.ru.nl/publish/pages/941800/uniform\\_uit\\_de\\_kast.pdf](https://www.ru.nl/publish/pages/941800/uniform_uit_de_kast.pdf).

### **Information campaign**

The information campaign aims at increasing the acceptance of homosexuality within the armed forces, including through information brochures and the work of an independent foundation on homosexuality and the armed forces. In particular, commanding officers are expected to play an exemplary role in promoting the values and norms necessary for acceptance and non-discrimination of gays and lesbians. The information campaign reaches out to both military personnel and society at large.

### **Education**

Education on acceptance and protection against discrimination on the grounds of sexual orientation is included within the initial training of all recruits, with particular attention paid to policies, regulations, values and norms. These topics are further addressed during in-work training courses for NCOs, officers and specialists.

### **Support and counselling**

Gay and lesbian service personnel can turn to counsellors within their unit or to specialist counsellors within the Office of the Inspector-General. These counsellors are trained by external institutions on obtaining information and dealing with complaints. In addition, a special telephone hotline has been created for the victims of discrimination and harassment, and social workers are also available to deal with complaints.

### **Legal framework**

The entire policy is based on a legal framework that includes a ministerial decree on the complaints procedure for harassment and discrimination, a ministerial decree on submitting complaints about demeaning and unfair treatment by military superiors, and a code of conduct of the armed forces.

## ***Standards of social conduct***

Some OSCE participating States have adopted a code of conduct regulating the behaviour of all armed forces personnel, regardless of their sexual orientation or gender identity. These codes of conduct are regarded as necessary for safeguarding operational effectiveness and as a means to reduce discrimination and abuse in the military. Requiring respectful behaviour from all service members contributes towards maintaining professionalism and unit cohesion.<sup>508</sup>

In the United Kingdom, for example, the Armed Forces' Code of Social Conduct emphasizes equal standards for all personnel, regardless of their sexual orientation and gender identity. Accordingly, individual service members are judged on the basis of their performance

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**508** "LGBT Military Personnel", HCSS, *op. cit.*, note 458, p. 45.

relevant to military goals, all personnel must respect each other's privacy; interpersonal harassment — whether verbal, sexual or physical — is not tolerated, regardless of the genders of the people involved, and no service member is permitted to engage in conduct that undermines unit cohesion (see Box 12.7).

### **Box 12.7: The Armed Forces' Code of Social Conduct in the United Kingdom<sup>509</sup>**

The Code of Social Conduct outlines the Armed Forces' policy on personal relationships involving service personnel. It applies to all members of the Armed Forces, regardless of their gender, sexual orientation, rank or status.

In the area of personal relationships, the Armed Forces require standards of social behaviour that are more demanding than those required by society at large. Such demands are equally necessary during peacetime and on operations.

Examples of behaviour that can undermine operational effectiveness include unwelcome sexual attention in the form of physical or verbal conduct, displays of affection that might cause offence to others and taking sexual advantage of subordinates. Unacceptable social conduct requires prompt and positive action to prevent damage.

When dealing with possible cases of social misconduct and in determining whether there is a duty to intervene in the personal lives of personnel, commanding officers at every level are expected to consider whether the actions or behaviour of an individual have adversely impacted – or are likely to impact – on the efficiency or operational effectiveness of the Armed Forces.

## ***Training and awareness raising***

Continual training of senior military officers is essential to eradicating any prevailing prejudiced attitudes towards LGBTI service members and to enhance awareness of sexual orientation and gender identity among all personnel. Training also reinforces the role of the chain of command in preventing and punishing cases of discrimination and mistreatment. Leaders play a critical role in enforcing proper conduct in the workplace. If lower-level leaders are convinced that active monitoring and support for non-discriminatory behaviour will be noticed and rewarded, they will be more supportive of an environment that is free from abuse. Sufficient training of leaders and personnel at all levels is essential for achieving genuine equity. This may include specific training for human resources specialists, military police, inspectorates, military ombuds offices and

<sup>509</sup> United Kingdom Ministry of Defence, "JSP 887: Diversity Inclusion and Social Conduct", November 2014, pp. 6-8, [http://data.parliament.uk/DepositedPapers/Files/DEP2016-0068/20141217\\_JSP\\_887\\_version\\_for\\_publication\\_3\\_PQ00604.pdf](http://data.parliament.uk/DepositedPapers/Files/DEP2016-0068/20141217_JSP_887_version_for_publication_3_PQ00604.pdf).

military academies. Military medics should also receive specific training to address the historical stigma surrounding LGBTI issues in medicine.

### ***Partners of LGBTI service members***

In upholding the human rights of their LGBTI service members, the non-discrimination principle would indicate that armed forces treat same-sex relationships of their personnel as equal to heterosexual ones. Additionally, all families should be afforded the same access to military benefits, such as health insurance and survivor allowances, as they would for the spouses of heterosexual service members.

While some states do not provide any benefits to the partners of LGBTI personnel, others provide housing and other benefits. In the United Kingdom, for example, civil partners<sup>510</sup> or same-sex spouses<sup>511</sup> have the same rights to allowances and housing as heterosexual couples, including equal pension rights. In Denmark, the partners of gays and lesbians receive the same social benefits in case of death or disability as the partners of heterosexual service members. Canada provides gay and lesbian service members with medical and other benefits for their partners.<sup>512</sup> In Spain, Law 29/1999 on Measures for the Geographic Mobility of Soldiers provides housing for those in stable partnerships, including if the service member's partner is of the same sex (Article 6).<sup>513</sup>

#### **Box 12.8: Equal opportunity or affirmative action provisions for LGBTI military personnel<sup>514</sup>**

**Denmark:** Listings for available positions within the Danish Ministry of Defence explicitly encourage applications from all interested candidates, regardless of their personal background (e.g., sexual orientation).

**Finland:** According to internal military regulations, a person's sex or other person-related cause may not affect their treatment. All members of the Defence Forces (including conscripts and reservists) must be treated equally.

**Italy:** Article 1468, paragraph 1, generally prohibits any "direct or indirect" discrimination or sexual harassment.

<sup>510</sup> Simon Evans, "Armed Forces Allow Gay Couples Family Quarters", The Scotsman, 21 February 2005, <http://news.scotsman.com/uk.cfm?id=194672005>.

<sup>511</sup> See: Parliament of the United Kingdom, Marriage (Same Sex Couples) Act 2013 (c. 30), <http://www.legislation.gov.uk/ukpga/2013/30/contents/enacted>.

<sup>512</sup> M. Wechsler Segal, *op. cit.*, note 469, p. 218.

<sup>513</sup> Nolte, *op. cit.*, note 8. The Armed Forces were the first public institution in Spain to confer legal rights to stable partnerships of the same sex.

<sup>514</sup> Responses to the ODIHR-DCAF 2018 questionnaire, qu. 35.

**Montenegro:** The Law on the Armed Forces of Montenegro prescribes that persons applying to enlist are guaranteed transparency, fairness and equal rights, without discrimination on any grounds, including sexual orientation, among others.

## ***Recognition of gender identity***

It is important that states officially recognize service personnel according to the gender with which they identify. For example, a transgender woman who was assigned male at birth may wish to change her identity documents to reflect her identity as a woman, present herself in a way that reflects her gender comfortably and be identified by others with the appropriate language, including pronouns.

Each of the aspects of the transition process of military personnel (see Box 12.1) calls for compliance of multiple overlapping systems. In this context, Government agencies would need to make the opportunity to alter one's documentation accessible, including for service personnel. An individual's right to personal expression should not be limited by their gender identity, but be equal for both cisgender and transgender personnel (e.g., a transgender woman in the armed forces shall adhere to the dress code expected of other women personnel).

### **Box 12.9: New Zealand – recognizing transgender personnel**

The HCSS has outlined five standards for evaluating good practices in the military regarding gender identity, namely:

1. Gender change is possible;
2. Non-binary gender identities are recognized (e.g., hijra, two-spirit, X-gender and genderless);
3. Gender change is possible *without* surgery;
4. Approval for gender change from a doctor or court *not required*; and
5. Probation period for transgender personnel is *shorter than one year*.

New Zealand was the only country to meet all five standards of inclusionary policies for transgender servicemembers. In addition to these policies, New Zealand also offers peer support and networking for LGBTI personnel through OverWatch, a group established in 2012.

The HCSS report placed New Zealand in the number one rank for integrating LGBTI personnel and highlighted it as a model for other countries to follow.

Regulations on gender identity pose specific obstacles for transgender personnel compared to cisgender personnel. Therefore, strategies that seek to erode discrepancies between transgender and cisgender people are crucial in integrating LGBTI personnel equitably. Policies that place minimal or no restrictions on individuals' ability to change their gender classification on legal documents recognize and validate an individual's gender identity.<sup>515</sup>

Interventions that delay progress in an individual's desired transition process or challenge a transgender person's right to change their legal gender are unnecessary and strain the individual's right to privacy. Practices that pressure transgender personnel to undergo unwanted surgeries before being recognized and admitted as their identified gender may be considered coercive and are likewise not recommended (see Box 12.9).

#### **Box 12.10: Conditional barriers for transgender personnel in the OSCE region**

Some OSCE participating States have a range of limitations on the participation of transgender persons in the armed forces.<sup>516</sup>

For example, in the United Kingdom, transgender individuals are required to have "completed transition" before they are allowed to serve.

Belgian transgender personnel are required to undergo gender reassignment surgery. However, the European Court of Human Rights ruled in 2017 that making sterilization procedures a prerequisite for changing an individual's legal gender status is a human rights violation.<sup>517</sup>

In the Netherlands, "expert approval" (from a doctor or judge, etc.) must be secured before an individual may change the gender indicated in their documentation.

Elsewhere, states have "experience periods" during which the individual must live as their identified gender without legal recognition.

Although most states treat gender as binary, some people do not experience their gender as strictly man or woman, and instead prefer to use different language to describe it (see the entry on "Non-binary, or Third Gender" in Box 12.1). Some non-binary/third gender people may also identify as transgender and/or choose to transition. In terms of documentation, some states are introducing a gender-neutral marker on documents (such as an "X" in Canada) or allow individuals to leave it blank. Such legal alternatives hold significance for a range of people who do not identify as men or women, such as intersex people or those who identify as gender neutral.

<sup>515</sup> "LGBT Military Personnel", HCSS, *op. cit.*, note 458, p. 47-48.

<sup>516</sup> *Ibid.*

<sup>517</sup> See: European Court of Human Rights, *A.P. v. France* (Application no. 79885/12); *Garçon v. France* (Application no. 52471/13); and *Nicot v. France* (Application no. 52596/13).

## Complaints procedures and counselling

In most countries, there are no special complaints procedures for cases of harassment based on sexual orientation. Complaints mechanisms for LGBTI personnel are often incorporated into general complaints mechanisms, with the aim of providing equitable, non-stigmatizing opportunities for all personnel to report violations and seek redress. Therefore, LGBTI military personnel who are victims of discriminatory practices can initiate regular informal procedures by reporting the case to their superior, who may investigate the complaint or refer it to the commanding officer. If the victim finds this unsatisfactory, they may ask that the claim be reviewed by a civil court (e.g., in France and Sweden) or by the military prosecutor's office (e.g., in Ukraine). Complaints mechanisms should include effective witness protection, confidentiality provisions and the possibility of a temporary transfer of either the alleged victim or perpetrator, depending on the situation, to another unit while the investigation is ongoing.

Some states have introduced specific advisers on the rights of LGBTI personnel, such as in the Netherlands, where a special counsellor has been established at the Inspector General's Office. While such counselling services can help to inform armed forces LGBTI personnel about their rights and the procedures available in case of harassment, this issue remains the primary responsibility of all within the chain of command.

Many states fail to track and share data on cases of discrimination, harassment and abuse against LGBTI military personnel.<sup>518</sup> Those that do track and share data cannot always ensure that the data are accurate, and may only include those who openly identify as LGBTI or have been forced to disclose their sexual orientation or gender identity. Without the victim's perspective or ethnographic account, it is impossible to fully understand the true impact of discrimination and harassment. Even in countries that have included protections for LGBTI persons in their anti-discrimination legislation and allow them to serve in the armed forces, it is critical to be transparent and accountable when handling cases of discrimination and harassment.

## Support networks

Legal associations, support groups and trade unions designed to address the needs of LGBTI personnel can provide essential frameworks for the protection of their rights, as well as support during military service.<sup>519</sup> To meet the needs of LGBTI personnel, including transition-related guidance and recourse in harassment cases, these groups must be guided by experts in relevant human rights legislation.

In the OSCE region, only the Netherlands, the United Kingdom and the United States provide LGBTI support groups with financial and other resources.<sup>520</sup> The Netherlands'

**518** Responses to the ODIHR-DCAF 2018 questionnaire, qu. 37.

**519** "LGBT Military Personnel", HCSS, *op. cit.*, note 458, p. 46.

**520** Responses to the ODIHR-DCAF 2018 questionnaire, qu. 36. The Netherlands, the United Kingdom and the United States are also some of highest-ranking states in the HCSS LGBT Military Index.



Foundation on Homosexuality and the Armed Forces has represented gay and lesbian personnel since 1987, and receives financial and organizational support from the Ministry of Defence.<sup>521</sup> Similar support groups exist in Germany, Sweden and Switzerland, but do not receive government funding.

## Good Practices and Recommendations

Research and survey findings show that states across the OSCE region are facing similar challenges, including how to attract the best recruits with the required aptitudes, abilities and values, and how to support all service personnel in performing at their best.

The following good practices are recommended for all armed forces:

- » A state's policies on the participation of LGBTI persons in the armed forces should be in line with its international human rights obligations, in particular those on anti-discrimination and the right to privacy.
- » Anti-discrimination and equal-opportunities legislation should be (made) applicable to the military.
- » Standards of social conduct should be adopted within the armed forces that aim to safeguard operational effectiveness, while reducing discrimination and abuse. Such standards should regulate the behaviour of all armed forces personnel regardless of their sexual orientation, gender identity or gender expression.
- » The ministry of defence should undertake special measures to ensure that policies of LGBTI acceptance and non-discrimination are implemented in practice. Such measures include information campaigns, education and training, and complaints and sanctions procedures for cases of harassment and discrimination.
- » Governments should provide funding to maintain oversight groups that allow for accountability and upholding of human rights of LGBTI service members.
- » All militaries should have their own active LGBTI support organizations and/or engage with external LGBTI organizations. This is to ensure that LGBTI personnel are granted equal access to the resources available to all other personnel, such as medical benefits and protections, recognition of spouse and gender identity.

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<sup>521</sup> For more information, see the Foundation's website: [www.shk.nl](http://www.shk.nl).

## Further reading

The Hague Centre for Strategic Studies, "The LGBT Military Index", 2014, <http://projects.hcss.nl/monitor/88/>.

The Palm Center, various publications, particularly by Director Aaron Belkin, <https://www.palmcenter.org>.

"The Yogyakarta Principles plus 10", Second International Panel of Experts in International Human Rights Law, Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics, 10 November 2017, <http://yogyakartaprinciples.org/>.



## *SECTION IV*

# **— SPECIFIC ISSUES IN MILITARY LIFE**

## Chapter 13: Children Associated with Armed Forces

### Introduction: Issues at Stake

In recent years, the international community has progressively acknowledged the forced or compulsory recruitment, or use in hostilities, of persons under the age of 18 (both boys and girls) by armed forces or armed groups as illegal and one of the worst forms of child labour. The *voluntary enlistment* of persons younger than 18 years is illegal in the case of armed groups, but remains legal under certain conditions for national armed forces. A minority of OSCE participating States permit the voluntary recruitment or enlistment of persons under the age of 18 (see Box 13.5)

The recruitment, enlistment or use of children under the age of 15 is a war crime that invokes the culpability of the responsible adult. This applies to both armed forces and non-state armed groups engaged in international or non-international conflict. This crime has been prosecuted at the International Criminal Court (ICC) and the Special Court for Sierra Leone (SCSL) (see Box 13.3).

The vast majority of children associated with armed forces or groups worldwide are 16 and 17-year-olds. While they may consider themselves not as children, but as young adults,<sup>522</sup> international law considers them as children and, as such, affords them special protections.

This chapter begins with an overview of international law and policy, including international human rights standards, regarding minors in armed forces and groups. The chapter then examines the different practices in the OSCE region, and discusses the separate but related question of the children of military personnel in OSCE participating States.<sup>523</sup> The chapter concludes by identifying good practices.

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**522** See: Mark A. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford: Oxford University Press, 2012).

**523** Article 23.1 states: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State". ICCPR, *op. cit.*, note 16.

## International Human Rights Standards

### *Recruitment, enlistment and use of children*

The UN Convention on the Rights of the Child (CRC) affirms that states “shall take all feasible measures to ensure that persons who have not attained the age of fifteen years (15) do not take a direct part in hostilities.”<sup>524</sup> CRC Article 38(3) provides that:

*“States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.”*

The Optional Protocol to the CRC on the Involvement of Children in Armed Conflict, which entered into force in 2002, aims to remedy some of the CRC’s perceived inadequacies.<sup>525</sup> It specifies that states “shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.”<sup>526</sup> On the one hand, the Optional Protocol represents an incremental move, in that the language “all feasible measures” does not plainly read as imperative. On the other hand, the Optional Protocol has been interpreted as “elevating the minimum age for combat participation to 18.”<sup>527</sup> A firmer ban emerges in Article 2, which provides that States Parties “shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.”

Regarding voluntary recruitment, Article 3(1) of the Optional Protocol adds that States Parties “shall raise the minimum age for the voluntary recruitment of persons into their national armed forces [...] recognizing that under the [CRC] persons under the age of 18 years are entitled to special protection.”

Thus, Article 3(1) mandates states to increase the threshold age for voluntary recruits in national armed forces to older than 15 – ostensibly, then, to 16 at the very least. Therefore, while the Optional Protocol is understood to permit the recruitment of 16 and 17-year-olds

<sup>524</sup> UN General Assembly, “Convention on the Rights of the Child” [CRC], A/RES/44/25, 20 November 1989 (entered into force 2 September 1990), Article 38(2), <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>. In addition, the Committee on the Rights of the Child is a UN treaty body of independent experts that monitors implementation of the CRC. All States Parties are required to submit regular reports.

<sup>525</sup> UN General Assembly, “Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict”, A/RES/54/263, 25 May 2000, <https://www.ohchr.org/en/professionalinterest/pages/opaccrc.aspx>. As of 2018, 167 states are parties to this protocol.

<sup>526</sup> *Ibid.*, Art. 1.

<sup>527</sup> Michael Wessells, *Child Soldiers: From Violence to Protection* (Harvard University Press, 2009), p. 234.

into national armed forces, their recruitment is subject to strict conditions (see Box 13.1).<sup>528</sup>

### **Box 13.1: Voluntary recruitment of children aged under 18 – safeguards provided by Optional Protocol Article 3(3)**

States Parties that permit voluntary recruitment into their national armed forces under the age of 18 years shall maintain safeguards to ensure, as a minimum, that:

- (a) Such recruitment is genuinely voluntary;
- (b) Such recruitment is carried out with the informed consent of the person's parents or legal guardians;
- (c) Such persons are fully informed of the duties involved in such military service;
- (d) Such persons provide reliable proof of age prior to acceptance into national military service.

Other international and regional instruments<sup>529</sup> also address the recruitment of children or their use in hostilities by armed forces or armed groups. One example is the ILO's Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour<sup>530</sup> which defines a child as a person under the age of 18 years.<sup>531</sup> This convention explicitly links "forced or compulsory recruitment of children for use in armed conflict" to "slavery or practices similar to slavery", and obliges ratifying member states to "take immediate and effective measures to secure the prohibition and elimination" thereof.<sup>532</sup>

### **Box 13.2: OSCE Commitments on the rights of the child**

OSCE participating States have on several occasions expressed their commitment to recognize, promote and protect children's rights, including their right to special protection against all forms of violence and exploitation:

#### **Copenhagen Document (1990), Paragraph 13:**

The participating States decide to accord particular attention to the recognition of the rights of the child, his civil rights and his individual freedoms, his economic, social and cultural rights, and his right to special protection against all forms of violence and

<sup>528</sup> Optional Protocol to the CRC, *op. cit.*, note 527, Art. 3(3).

<sup>529</sup> I.e., The African Charter on the Rights and Welfare of the Child, establishing higher standards to those in the CRC, specifies at Article 22 that no-one under 18 years of age should be recruited as a soldier, nor should they take a direct part in fighting wars.

<sup>530</sup> Ratified by 53 of the OSCE participating States (all but Andorra, the Holy See, Lichtenstein and Monaco, which are not member states of the ILO).

<sup>531</sup> ILO, "Convention on the Worst Forms of Child Labour Convention" (No. 182), 17 June 1999, Article 2, [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C182](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182).

<sup>532</sup> *Ibid.*, Arts. 1 and 3(a).

exploitation. They will consider acceding to the Convention on the Rights of the Child, if they have not yet done so, which was opened for signature by States on 26 January 1990. They will recognize in their domestic legislation the rights of the child as affirmed in the international agreements to which they are Parties

**Charter for European Security: III. Our Common Response (Istanbul, 1999), paragraph 24:**

We will undertake measures to [...] end violence against [...] children as well as sexual exploitation [...]. We will look at ways of preventing forced or compulsory recruitment for use in armed conflict of persons under 18 years of age.

**Budapest Document (1994), Decisions: IV. Code of Conduct on Politico-Military Aspects of Security, paragraph 27:**

Each participating State will ensure that the recruitment or call-up of personnel for service in its military, paramilitary and security forces is consistent with its obligations and commitments in respect of human rights and fundamental freedoms.

**Ministerial Council Decision No. 08/07 on Combating Trafficking in Human Beings for Labour Exploitation (Madrid 2007):**

The Ministerial Council, (...) Calls on participating States to: (...) 20. Intensify efforts to prevent child labour, by considering signing and ratifying the ILO Convention on the Worst Forms of Child Labour, 1999, if they have not already done so, and if they are already parties to it, by implementing its provisions; (...).

The 2007 Paris Commitments and Paris Principles (endorsed by 108 states)<sup>533</sup> connected non-binding instruments and synthesized language to underscore the diversity of roles that children play in armed conflict. Thus, according to the Paris Principles:

*"A 'child associated with an armed force or armed group' refers to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys, and girls used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities."*

The phrase "children associated with armed forces and armed groups" is often abbreviated with the acronym CAAFAG. An armed force refers to the national militaries of a state,

**533** UNICEF, "Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups", February 2007, <https://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf>. The Principles were adopted together with the "Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups". These Principles and Commitments build on the 1997 "Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa".



whereas an armed group refers to a fighting force that is separate from a state. The Paris Principles supplement international law on the rights of the child by reaffirming the age of 18 as the transition point between childhood and adulthood.

## ***Special protection***

Article 38(1) of the CRC requires that states “undertake to respect and to ensure respect for rules of IHL applicable to them in armed conflicts which are relevant to the child.”

The Fourth Geneva Convention, which concerns civilian persons, grants special protections to children.<sup>534</sup> These protections, which take effect at different ages (12, 15 or 18), include barring the occupying power from compelling persons under the age of 18 to work. Article 77(1) of Additional Protocol I on international armed conflict mandates for parties to a conflict that “[c]hildren shall be the object of special respect and shall be protected against any form of indecent assault.”<sup>535</sup> Article 77(2) states that:

*“Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces,”*

while also specifying that:

*“In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavor to give priority to those who are oldest.”*<sup>536</sup>

Additional Protocol II, which covers non-international armed conflict, asserts in article 4(3)(c) that:

*“children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.”*<sup>537</sup>

This prohibition is firmer than its counterpart for international armed conflict in Additional Protocol I. Article 4(3) of Additional Protocol II, which generally requires that “children shall be provided with the care and aid they require,” and makes specific (though not exclusive)

<sup>534</sup> ICRC, Fourth Geneva Convention, op. cit., note 39, Arts. 14, 17, 23, 24, 38, 50, 51, 68, 82, 89, 94 and 132, <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-0173.pdf>.

<sup>535</sup> ICRC, Protocol I to the Geneva Conventions, op. cit., note 40.

<sup>536</sup> *Ibid.*

<sup>537</sup> ICRC, Protocol II to the Geneva Conventions, op. cit., note 40.

reference to education, family reunification and the temporary removal of children from areas of hostilities to safer areas. Similar to Additional Protocol I, Article 4(3)(d) of Additional Protocol II extends special protection to children younger than 15 years, even “if they take a direct part in hostilities despite the provisions of subparagraph (c) and are captured.”

### ***Responsibility for illicit recruitment, enlistment or use of children***

In international or non-international armed conflict, the conscription, enlistment or use of children under the age of 15 to participate actively in hostilities is a war crime, to which individual criminal responsibility attaches under conventional and customary international law. Thus, in the case of children under the age of 15, the unlawfulness of illicit recruitment includes both state responsibility and individual penal culpability. It is clear that penal responsibility is placed on the adult who recruits, conscripts or enlists, and prosecutions have occurred at the Special Court for Sierra Leone (SCSL) and ICC (see Box 13.3).

Jurisprudence from the ICC and SCSL has clarified important aspects of the war crime of child recruitment. For example, in the case of the Armed Forces Revolutionary Council (AFRC) in Sierra Leone, an SCSL Trial Chamber defined conscription as implying “compulsion” and as encompassing “acts of coercion, such as abductions and forced recruitment.”<sup>538</sup> It defined enlistment as “accepting and enrolling individuals when they volunteer to join an armed force or group,” which it immediately qualified by adding: “Enlistment is a voluntary act, and the child’s consent is therefore not a valid defence.”<sup>539</sup> Thus, the enlistment of children under the age of 15 is impermissible regardless of the circumstances, including when the child consented.

Furthermore, the SCSL Appeals Chamber assessed the required nexus – or connection – between a defendant and a child at the time of enlistment to mean “any conduct accepting the child as part of the militia”, though it added that “there must be a nexus between the act of the accused and the child joining the armed force or group”, in addition to “knowledge on the part of the accused that the child is under the age of 15” and knowledge that the child “may be trained for combat.”<sup>540</sup> In the case of the Revolutionary United Front in Sierra Leone, the SCSL found that active participation in hostilities included committing crimes against civilians, engaging in arson, guarding military objectives and mines, and serving as spies and bodyguards.<sup>541</sup>

**538** Special Court for Sierra Leone (SCSL), *Prosecutor v. Brima, Kamara, and Kanu*, Case No. SCSL-04-16-T, Trial Judgement (SCSL Trial Chamber, 20 June 2007), para. 734.

**539** *Ibid.*, para. 735.

**540** SCSL, *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-A, Appeals Judgement (SCSL Appeals Chamber, 28 May 2008), paras. 141, 144. If the child “is allowed to voluntarily join [...], his or her consent is not a valid defence.” *Ibid.*, para. 140.

**541** SCSL, *Prosecutor v. Sesay, Kallon, and Gbao*, Case No. SCSL-04-15-T, Trial Judgement (SCSL Trial Chamber, 2 March 2009), paras. 1712-1731. Domestic chores, farm work and conducting food finding missions were found not to constitute active participation in hostilities, however. *Ibid.*, paras. 1739 and 1743.

The SCSL has also addressed crimes against humanity that may disproportionately affect children. SCSL Statute Article 2(i) proscribes “other inhumane acts”, which the AFRC appeals judgement interpreted as including acts of forced marriage perpetrated against girls. The ICC’s Rome Statute prohibits violence that may disproportionately harm children. This includes intentionally attacking buildings dedicated to education (provided they are not military objectives), and the crimes against humanity of enslavement, sexual slavery and enforced prostitution, the forcible transfer of children and child trafficking.<sup>542</sup> Furthermore, Rome Statute Article 6(e) includes within the definition of genocide the forcible transfer of children from one group to another.

### Box 13.3: ICC jurisprudence on child soldier crimes

The ICC issued its very first conviction on three counts of child soldier crimes. The defendant, Thomas Lubanga, had been a rebel leader in the Democratic Republic of the Congo (DRC), and was sentenced to fourteen years’ imprisonment.

In the *Lubanga* case, the ICC judges applied similar definitions as the SCSL; “enlistment” was understood to mean “to enroll on the list of a military body”, while “conscriptio[n]” was defined as to “enlist compulsorily”.<sup>543</sup> In terms of the use of children, the *Lubanga* Appeals judgement underscored the need for a case-by-case approach to establish the link between the activity for which the child was used and the combat in which the armed group or force was engaged.<sup>544</sup>

Another person accused before the ICC, Katanga, was acquitted in a subsequent case involving child soldiering charges because of a lack of nexus between him and the illicit practices of child soldiering in the DRC. In terms of sentencing, crimes against or affecting children are regarded as particularly grave, given that children enjoy special recognition and protection under international law.<sup>545</sup>

## Different Approaches

<sup>542</sup> UN General Assembly, “Rome Statute of the International Criminal Court” (last amended 2010), 17 July 1998, Articles 7(1)(c), 7(1)(g), 7(1)(k), 7(2)(c), 8(2)(b)(ix), 8(2)(b)(ix), 8(2)(e)(iv) and 8(2)(e)(iv). The Office of the Special Representative has identified attacks on schools and hospitals as “one of the most disturbing trends documented in 2016”, see: UN General Assembly, “Annual report of the Special Representative of the Secretary General for Children and Armed Conflict”, 22 December 2016, p. 9, [https://www.un.org/ga/search/view\\_doc.asp?symbol=A/HRC/34/44&Lang=E&Area=UNDOC](https://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/34/44&Lang=E&Area=UNDOC).

<sup>543</sup> SCSL, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06 (ICC Trial Chamber I, 14 March 2012), para. 608.

<sup>544</sup> *Ibid.*

<sup>545</sup> SCSL, *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07 (ICC Trial Chamber II, 7 March 2014).

## Legal recruitment into armed forces

The Optional Protocol to the CRC requires States Parties to make a binding declaration setting forth the minimum age of voluntary recruitment under national law. About three-quarters of declarations list the minimum age of voluntary recruitment as 18 years or older. A general practice, therefore, is emerging towards setting 18 years as the minimum age for voluntary recruitment in national armed forces (see Box 13.5).

For example, in 2015, after previously permitting the voluntary recruitment of 17-year-olds and 16-year-olds as apprentices, Ireland amended the minimum age for voluntary recruitment to 18 years. In 2013, Luxembourg and Poland both increased their minimum age for voluntary recruitment from 17 to 18.

### Box 13.5: Minimum age for voluntary recruitment in OSCE participating States<sup>546</sup>

Minimum age	OSCE participating States
16	Canada and the United Kingdom.
17	Austria, Cyprus, <sup>547</sup> France, Germany, the Netherlands, <sup>548</sup> Turkmenistan and the United States.

<sup>546</sup> Taken from: "Status of Treaties: Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict - Declarations and Reservations", [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-b&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&clang=en); and responses to the ODIHR-DCAF 2018 questionnaire.

<sup>547</sup> In its response to the ODIHR-DCAF 2018 questionnaire, Cyprus indicated a minimum age of 18 years, noting that obligatory military service in times of peace begins on 1 January of the year the citizen turns 18. Ostensibly, then, the majority of the recruits are 17 years of age at the beginning of the compulsory military service. Article 2 of the Optional Protocol to the CRC requires States Parties to set a minimum age of 18 for compulsory recruitment and, as such, the current legislation and practice go against the object and purpose of the Optional Protocol, which has also been noted by the Committee on the Rights of the Child in their concluding observations on the report submitted by Cyprus under article 8, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/OPAC/CYP/CO/11&Lang=En](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/OPAC/CYP/CO/11&Lang=En).

<sup>548</sup> Upon ratifying the Optional Protocol, the Netherlands declared 18 as the minimum age for "soldiers and commissioned or non-commissioned officers", adding that "persons that have reached the age of seventeen years, may on a strictly voluntary basis be recruited as military personnel in probation."

Minimum age	OSCE participating States
18	Albania, Armenia, Azerbaijan, <sup>549</sup> Belarus, <sup>550</sup> Belgium, Bosnia and Herzegovina, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, Georgia, <sup>551</sup> Greece, Hungary, Ireland, Italy, <sup>552</sup> Kyrgyzstan, Latvia, Lithuania, Luxembourg, Malta, <sup>553</sup> Moldova, Mongolia, Montenegro, North Macedonia, Norway, <sup>554</sup> Poland, Portugal, Romania, the Russian Federation, <sup>555</sup> San Marino, <sup>556</sup> Serbia, <sup>557</sup> Slovakia, Spain, Sweden, Switzerland, Tajikistan, Turkey and Uzbekistan.
19	The Holy See, Kazakhstan and Ukraine.
21	Monaco. <sup>558</sup>
N/A	Andorra, <sup>559</sup> Iceland <sup>560</sup> and Liechtenstein.

**549** Upon ratifying the Optional Protocol, Azerbaijan declared that its citizens “may voluntarily enter and be admitted in age of 17 the active military service of the cadets military school”, further noting that the country’s legislation “guarantees that this service shall not be forced or coerced, shall be realized on the basis of deliberative consent of the parents and the legal representatives of those persons, that those persons shall be provided with the full information of the duties regarding this service, and that the documents certifying their age shall be required before the admission to the service in the national armed forces.”

**550** With the exception of military academies, which accept 17-year olds and those who turn 17 in the year they are admitted.

**551** Applies to the minimum age of recruitment to obligatory military service.

**552** Law 226/2004, enacted in August 2004, provided 18 as the minimum age for voluntary recruitment into the Armed Forces. However, the declaration made by the government at the time of the ratification of the Optional Protocol, which indicated 17 years as the voluntary recruitment age, has neither been withdrawn nor amended.

**553** As per the response by Malta to the ODIHR-DCAF 2018 questionnaire, 18 is the minimum age provided in Subsidiary Legislation 220.03 – Appointments and Conditions of Service. While noting that the Regular Force Regulations Malta Armed Forces Act (of 22 September 1970, last amended by Act XV of 2002), Part II, Title II, 3 and 4, at Ministry of Justice and Home Affairs, specifies minimum age for voluntary recruitment as 17.5, upon ratifying the Optional Protocol, Malta declared that: “In practice the Armed Forces of Malta do not recruit and have not since 1970 recruited persons under the age of 18 years. The Government of Malta further declares that if in future recruitment of persons under 18 years were made such members of the armed forces will not take part in hostilities.”

**554** With the exception of apprentices, who must be at least 17 years old, and the volunteers in the youth branch of the National Guard, who must at least 16 years old.

**555** With the exception of citizens 16 years of age who are admitted to professional military educational institutions.

**556** Upon ratifying the Optional Protocol, San Marino noted that its Law on Regulation and Discipline of Military Corps’ provides for the general mobilization of all citizens aged between 16 and 60 “in exceptional circumstances”. It notes that the provision, which it intends to repeal, “represents a historical heritage and such circumstances have never arisen in the whole history of the Republic”.

**557** Upon ratifying the Optional Protocol, Serbia noted that: “The person of military age may only exceptionally be recruited in the calendar year in which he turns seventeen, at his own request, or during a state of war.”

**558** Applies to the Prince’s Guard and Fire Brigade. In line with the Franco-Monaguesque Treaty of 17 July 1918, Monaco relies on France for its defence.

**559** Andorra has no armed forces. Upon ratifying the Optional Protocol, Andorra declared that it “wishe[d] to reiterate [...] its disagreement with the content of article 2, in that that article permits the voluntary recruitment of children under the age of 18 years”.

**560** Upon ratifying the Optional Protocol, Iceland noted that minimum age does apply, as it has no national armed forces.

The voluntary recruitment of children under the age of 18 years remains contentious. In some cases, children demonstrate considerable initiative in their recruitment, which can promise significant returns for them in terms of training, skills acquisition, professionalism and secure employment, as well as long-term social and economic gains. In other cases, however, economic and cultural factors, coupled with aggressive or invasive recruitment policies by the military, such as its active presence in educational institutions, could impinge on children's freedom of choice as to whether to join the armed forces. Poverty, a dysfunctional family life or pervasive unemployment may render a military career one of the few opportunities available to children living in unfavourable circumstances. At the same, the social and economic impact of recruitment to the armed forces on such children remains insufficiently researched and documented.

States Parties' declarations on ratifying the Optional Protocol provide some insight into the principles applied when setting the minimum age for voluntary recruitment. For example, the United Kingdom noted that its recruitment age of 16 years reflected the minimum statutory school-leaving age, "that is the age at which young persons may first be permitted to cease full-time education and enter the full-time employment market." The United Kingdom also asserted that safeguards were maintained by informing the potential recruit about the nature of military duties, ensuring that the decision to enlist was voluntary and obtaining free and informed parental consent.

However, a recent study of military recruitment in the United Kingdom raises some concerns.<sup>561</sup> The study examines how recruitment campaigns, such as a recent one titled "This is Belonging", specifically target young people by focusing on camaraderie and community without demonstrating the difficulties of military life. These campaigns are disseminated through YouTube and social media platforms popular with young people. In addition, recruiters conduct outreach that includes toys, cadet programmes and visits to schools. Officials from the United Kingdom's Armed Forces "visit approximately 8,800 schools per year and engage with 900,000 students through presentations, lessons, away days, mentoring, and careers events."<sup>562</sup> These presentations have been criticized for enabling the military "to reach a large proportion of children, and bypass parents and other gatekeepers."<sup>563</sup> Statistics show that, between September 2013 and September 2017, an annual average of 19 per cent of the Armed Forces' recruits were between the ages of 16 and 18 years. The majority of these young recruits (12,560 since 2011) joined the Army, representing 26.1 per cent of the Army's total intake.<sup>564</sup> The study notes that:

**561** Rhys Crilley, "This is Belonging: Children and British Military Recruitment", in Mark A. Drumbl and Jastine Barrett (eds.), *Research Handbook on Child Soldiers* (Cheltenham, United Kingdom: Edward Elgar Publishing, 2019).

**562** *Ibid.*, p. 7.

**563** Emma Sangster, "The military's influence in UK education," in O. Everett (ed.), *Sowing Seeds: The Militarisation of Youth and How to Counter It* (London: War Resisters' International, 2013), p. 89.

**564** Crilley, *op. cit.*, note 563, citing the Ministry of Defence, "Freedom of Information Request: Personnel Recruited under the Age of 18", 2017, <https://www.gov.uk/government/uploads/system/uploads/attach->

*"Children can begin the application process to join the Army at the age of 15 years and 7 months, and all under 18s require parental consent when enlisting. Despite this, there are no requirements for recruiters to meet with parents or guardians at any point of the enlistment process, and child rights groups have expressed concern that many child recruits do not fully comprehend the enlistment process. A freedom of information request recently revealed that three-quarters of under 18 enlistees have a reading age of 11 or less [...]"<sup>565</sup>*

From 2013 to 2015, the United States recruited 49,035 17-year-olds (35,581 men and 13,454 women), or about six per cent of total voluntary enlistments.<sup>566</sup> In 2017, the number of minors those under the age of 18, in the German army rose to 2,128, up from the previous high mark, established the year before, of 1,907 (in 2011, the year that mandatory military service for men ended, there were only 689).<sup>567</sup> Of those 2,128 recruits in 2017, 448 were women – an eightfold increase since 2011, when there were 57 women soldiers under the age of 18.

Accelerating rates of women under the age of 18 in the military is a broader contemporary phenomenon. In 2016, 8.1 per cent of recruits in Germany were under the age of 18 on their first day of service, and women under the age of 18 made up 1.5 per cent of recruits. In 2017, these figures had risen to 9.1 per cent and 1.9 per cent, respectively.<sup>568</sup> Germany allows 17-year-olds to join the Bundeswehr provided they have parental permission, with strict limitations on the use of weapons during training and no deployment on international missions. In 2014, the UN Committee on the Rights of Children recommended that Germany raise its recruitment age<sup>569</sup>.

[ment\\_data/file/659984/2017-10006.pdf](https://www.child-soldiers.org/shop/the-british-armed-forces-why-raising-the-recruitment-age-would-benefit-everyone).

**565** *Ibid.*, note 563, p. 5, citing "Child Soldiers International, The British armed forces: Why raising the Recruitment Age Would Benefit Everyone" (2016), <https://www.child-soldiers.org/shop/the-british-armed-forces-why-raising-the-recruitment-age-would-benefit-everyone>.

**566** "OPAC Annex 2 - Voluntary Recruits (Accessions) of Persons Under 18", United States Third and Fourth Periodic Report on the Children's Protocols, 22 January 2016.

**567** "German Army Recruits More Minors than ever Before," *The Local*, 9 January 2018, <https://www.thelocal.de/20180109/german-army-recruits-more-minors-than-ever-before-report>.

**568** Germany's responses to the ODIHR-DCAF 2018 questionnaire, qus. 38-42.

**569** UN Committee on the Rights of the Child, "Concluding Observations on the Combined Third and Fourth Periodic Reports of Germany, 25 February 2014, CRC/C/DUE/CO/3-4, para. 77, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fDEU%2fCO%2f3-4&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fDEU%2fCO%2f3-4&Lang=en).

**Box 13.6: Germany's guidelines for recruitment and training**

Germany provides extensive guidelines on the recruitment, training and assignment of persons under the age of 18, including:

- To enrol, they require the consent of their legal representatives and must present their personal identity card/passport;
- They must be given comprehensive information and advice about the opportunities and risks of the military profession, and must undergo a thorough, scientific suitability assessment procedure to ensure that only those 17-year-olds are enrolled who have thoroughly considered the requirements of the military profession and are suited to it;
- They are enrolled only with a view to starting military training;
- During training, recruits under the age of 18 are given special supervision by their superiors;
- Outside of their military training, recruits under the age of 18 must under no circumstances perform tasks that may require them to use weapons; the use of weapons is confined to training only and is subject to strict supervision; and
- Recruits under the age of 18 are not permitted to participate in Bundeswehr deployments abroad under any circumstances; and
- There are provisions permitting recruits under the age of 18 to withdraw their enlistment. During the six-month probationary period, a recruit may terminate their service status at any time without stating reasons. Furthermore, a release may be requested even after the probationary period has expired.<sup>570</sup>

In some states, such as Sweden and Switzerland, adult recruits are trained in human rights, including the rights of the child.<sup>571</sup> In addition to the safeguards required by the Optional Protocol to the recruitment of minors, some states that recruit minors, such as Austria or Germany, permit them to withdraw their enlistment by requesting a release. Box 13.7 contains an example of safeguards guaranteed in Austria, where the voluntary recruitment of minors is permitted.

<sup>570</sup> *Ibid.*

<sup>571</sup> UN Committee on the Rights of the Child, "Initial Reports of States Parties under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights on the Involvement of Children in Armed Conflict", Sweden, CRC/C/OPAC/SWE/1, 22 February 2006, para. 51, <https://www.refworld.org/type.STATEPARTIES-REP,,462f72052,0.html>. See also the report by Switzerland, CRC/C/OPAC/CHE/1, available at <https://www.refworld.org/docid/54af8d654.html>: "Every soldier acquires a basic grounding in international humanitarian law (IHL) and children's rights during training provided at the various stages of Swiss military service (officer training, recruit training school, etc)" (para. 51).



**Box 13.7: Austria - special safeguards for recruits aged under 18 years of age<sup>572</sup>**

**Recruitment:** According to the 2001 Military Service Act, persons who have reached their 17th birthday can request to start their service early, provided they have their parents' written approval.

**Direct participation in hostilities:** In general, there are no differences in the service of personnel under the age of 18 from those over the age of 18. However, personnel under the age of 18 are not allowed to directly participate in hostilities or be deployed on missions abroad.

**Consent:** If their parents' consent is withdrawn, a person under the age of 18 must not be called up for service until they reach 18 years of age.

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In 2016, 0.25 per cent of the men and 1 per cent of the women recruited in Austria were under the age of 18.

In 2017, 0.22 per cent of the men recruited and 1.85 per cent of the women recruited in Austria were under the age of 18

In line with the Optional Protocol, special safeguards should be in place to ensure that volunteer recruits under the age of 18 do not participate directly in hostilities. On ratifying the Optional Protocol, the United States – which has a minimum voluntary recruitment age of 17 – issued an understanding concerning its implementation of the obligation not to permit children to take direct part in hostilities:

*"The United States understands that, with respect to Article 1 of the [Optional] Protocol:*

*(A) the term 'feasible measures' means those measures that are practical or practically possible, taking into account all the circumstances ruling at the time, including humanitarian and military considerations;*

*(B) the phrase 'direct part in hostilities' -*

*(i) means immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy; and*

<sup>572</sup> Austria's response to the ODIHR-DCAF 2018 questionnaire, qu. 40.

*(ii) does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions, or other supplies, or forward deployment.”<sup>573</sup>*

## Cadet programmes

Cadet programmes and military schools are mentioned in Article 3(5) of the Optional Protocol, which states that the requirements to raise the age of voluntary recruitment do not “apply to schools operated by or under the control of the armed forces of the States parties”. In several states, young people, including those under the age of 16, are involved in cadet programmes that provide them with early exposure to military life and a military environment. The status of cadet programmes can appear ambiguous, since they are often organized by regular schools but funded or sponsored by the armed forces. Cadet programmes provide children with military training courses alongside their regular academic studies, and are often designed to encourage military recruitment. Since 2012, the United Kingdom government has allocated a further £11 million (12.42 million euros) to increase the number of military cadet programmes in state schools.<sup>574</sup> In the United Kingdom, “[a]t present there are almost as many military cadets (130,000) as there are soldiers in the regular Armed Forces (138,000).”<sup>575</sup>

Some OSCE participating States with a minimum voluntary recruitment age of 18 permit younger persons to enter military academies (for example, Azerbaijan, Belarus and Italy). In its response to the ODIHR-DCAF questionnaire (question 39), Italy noted that:

*“Students of military schools have access to these [military] training institutes at the age of 15, and assume the status of private, pursuant to article 627 of legislative decree no. 66/2010, but cannot be employed in activities/operational tasks.”*

On ratifying the Optional Protocol, the Russian Federation declared a minimum recruitment age of 18, and added the following:

*“In accordance with the legislation of the Russian Federation, citizens who have reached the age of 16 are entitled to admission to professional military educational institutions. Upon enrolment in these institutions they shall acquire the status of members of the military performing compulsory*

<sup>573</sup> “Declarations and Reservations”, *op. cit.*, note 548, United States, [https://treaties.un.org/Pages/ViewDe-tails.aspx?src=IND&mtdsg\\_no=IV-11-b&chapter=4&clang=en#EndDec](https://treaties.un.org/Pages/ViewDe-tails.aspx?src=IND&mtdsg_no=IV-11-b&chapter=4&clang=en#EndDec).

<sup>574</sup> Crilley, *op. cit.* note 563, pp.7-8, which also notes that “[s]uch programmes are growing, and 350 new cadet units have been created in schools, mainly in deprived areas”.

<sup>575</sup> *Ibid.*, p. 7.

*military service. The legislation of the Russian Federation guarantees that such citizens shall conclude military service contracts on reaching the age of 18, but not before they have completed the first year of education in these educational institutions."*

Cyprus has a minimum voluntary recruitment age of 18, but on ratifying the Optional Protocol issued an extensive declaration regarding the recruitment of persons aged 17 and older. In its response to the ODIHR-DCAF questionnaire, Cyprus stated that there is no specific policy in place for personnel under the age of 18. Such personnel can enlist by declaring their intention in written form (together with a letter indicating their parents' consent), and can serve in all capacities and functions. There are no provisions permitting them to withdraw their enlistment. Cyprus also noted that 20 per cent of recruits are under the age of 18.<sup>576</sup>

Compulsory military training for children violates international human rights standards in various ways. The UDHR and the ECHR both guarantee parents' rights to choose the form of their children's education and to ensure that it conforms with their own religious and philosophical convictions.<sup>577</sup> Furthermore, as elaborated elsewhere in this compendium, everyone has the right to freedom of conscience, and "no one shall be subject to coercion which would impair [one's] freedom to have or to adopt a religion or belief ... of [one's] choice".<sup>578</sup> In addition, compulsory military training at schools might violate the right to hold or manifest pacifist beliefs.<sup>579</sup> Therefore, it follows that international law allows for military training at schools as long as it is voluntary or if provisions are made for the children of parents who object to opt out.

There is some variation among OSCE participating States regarding cadet programmes. Some states have mandatory programmes, while others offer them on a voluntary basis. In some states, no basic military education is offered in general or vocational schools, while others offer such education as part of civil defence courses. It is important to ensure that cadet programmes adopt appropriate policies, such as codes of conduct, to ensure that children live in a safe environment that takes into account their specific needs.

Apprenticeship programmes also constitute an area where safeguards are needed. In Norway, for example, the armed forces hire civilian and military apprentices under the age of 18.<sup>580</sup> These apprentices must be in high school, be at least 17 years old and sign a written labour contract. They are educated as mechanics, electricians and cooks, among other professions. The National Guard also has a voluntary youth branch for those aged 16 to 21.

<sup>576</sup> Cyprus' response to the ODIHR-DCAF 2018 questionnaire, qus. 38-42.

<sup>577</sup> See: UDHR, *op. cit.*, note 14, Art. 26; and ECHR, *op. cit.*, note 24, Protocol 1, Art. 2.

<sup>578</sup> ICCPR, *op. cit.*, note 16, Art. 18(2).

<sup>579</sup> CRC, *op. cit.*, note 526, Art. 14.

<sup>580</sup> Norway's responses to the ODIHR-DCAF 2018 questionnaire, qus. 39 and 40.

In both cases, those under the age of 18 are not given combat-related training or used for combat functions, and are exempt from service in case of mobilization or war.

## ***Children of military personnel***

This section focuses on the children of military personnel, not on children enlisted into the armed forces. This is an important issue, as stipulated by Article 5 of the CRC:

*"States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."*

Indeed, parents who serve in armed forces potentially face significant challenges created by distance and the amount of time spent away from their families. During deployments, caretakers may miss out on significant developments and events in their children's lives. Military families may also face very specific social challenges (such as living in barracks and managing care during deployment of a single-parent families) and stress associated with the requirements of military service and their living conditions. Shifting work schedules and long hours, as well as the recurrent possibility of foreign unaccompanied deployments, can affect the lives of the children of these families.

Children are particularly vulnerable when separated from their families during deployment. While children's individual responses may depend on a variety of factors, including age, maturity, gender and their relationship with their parents, their unique developmental viewpoint and limited life experience can result in an increased risk of emotional stress during the deployment period. As a result, children of armed forces personnel have many deployment-related educational, social and emotional needs/issues.

Some countries have developed specific programmes to support the families of armed forces personnel. These programmes work with the military command, military law enforcement personnel, medical staff and family centre personnel, as well as with civilian organizations and agencies, to provide a co-ordinated response to service members' families in need of support. In Canada, for example, the Kingston Military Family Resource Centre (KMFRC) organizes local and regional programmes targeted mainly at military families.<sup>581</sup> The Canadian example is particularly interesting, since the KMFRC is a non-profit organization that is not part of military structures.

**581** See: "Kingston Military Family Resource Centre", <https://www.cafconnection.ca/Kingston/Contact-Us/Military-Family-Resource-Centre.aspx>.

**Box 13.8: The United States - overview of the Military Child Care Act of 1989<sup>582</sup>**

The goal of the act is to improve the availability, management, quality and safety of childcare provided for members of the Armed Forces. Its major components include:

- an increase in the military's financial contribution to the operation of child development centres;
- the development of training materials and requirements for childcare staff at centres;
- a pay increase for childcare employees directly involved in providing care;
- employment preference for military spouses;
- an increase in the number of childcare positions;
- uniform parent fees, based on family income;
- expanded child-abuse prevention and safety measures;
- a report on five-year demand for childcare;
- subsidies for home day care; and
- early childhood education demonstration programmes.

Furthermore, several states have adopted legislation regarding the protection of children of military personnel. The system in place in the United States is considered exemplary (see Box 13.8). In 2015, the United States government spent approximately \$700 million on military childcare and after-school programmes, including "staff salaries, equipment and supplies, food costs, program accreditation fees and support services."<sup>583</sup>

The children of military families move frequently during their educations. Academic standards, courses, access to programmes, promotion and graduation requirements, special needs programmes, and the transfer and acceptance of records vary greatly from country to country, and even among schools. This highlights the need to ensure standardization, consistency and seamless academic transitions for military children. Moreover, as children gain and lose friends along the way, this roving lifestyle may create difficulties in terms of developing relationships and adapting to responsibilities.

<sup>582</sup> United States Congress, "Military Child Care Act of 1989", H.R.1277, Congress.gov, [https://www.congress.gov/bill/101st-congress/house-bill/1277](https://www.congress.gov/bills/101st-congress/house-bill/1277).

<sup>583</sup> See: Sarah Butrymowicz and Jackie Mader, "How the Military Created the Best Child Care System in the Nation", The Hechinger Report, 20 March 2016, <http://hechingerreport.org/how-the-military-created-the-best-child-care-system-in-the-nation/>.

## Good Practices and Recommendations

- » Each state's national legislation should be in line with its international legal obligations, in particular, the principles set forth by Article 3 of the CRC on the best interests of the child, and the Optional Protocol to the CRC on the involvement of children in armed conflict.
- » Recruiters and other military officials should be accountable for ensuring effective implementation of national legislation and international obligations as they pertain to safeguarding the rights of those who are under 18 years of age.
- » Prior to giving their final consent, potential recruits and their parents or legal guardians should be provided with full and detailed information about all aspects of military life, including the specific nature of the commitment and risks involved in enlisting in the armed forces.
- » Special protection should be provided for recruits under the age of 18, while also addressing the gendered differences, needs and vulnerabilities of boys and girls to violence and exploitation. Commanding officers should bear the ultimate responsibility for guaranteeing the implementation of such protections.
- » Clear procedures and guidance are required on responding to the alleged abuse or neglect of recruits under the age of 18 or the children of armed service personnel. Where necessary, such procedures should include the involvement of external agencies.
- » Each state with voluntary recruitment of persons under 18 years of age is recommended to review its recruitment practices and consider amending the legislation so that the minimum age for voluntary recruitment is 18 years.

## Further reading

Child Soldiers International, *Why 18 matters: A Rights-Based Analysis of Child Recruitment* (London: Child Soldiers International, 2018), <https://resourcecentre.savethechildren.net/node/13864/pdf/why18matters-download.pdf>.

Child Soldiers World Index, at [childsoldiersworldindex.org](https://childsoldiersworldindex.org).

Mark A. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press, 2012).

Brandon Kohrt, "Recommendations to Promote Psychosocial Well-Being of Children Associated with Armed Forces and Armed Groups (CAAFAG) in Nepal", UNICEF, 14 May 2007.

Milfred Tonheim, "'Who Will Comfort Me?' Stigmatization of Girls Formerly Associated with Armed Forces and Groups in Eastern Congo", *The International Journal of Human Rights*, Vol. 16, Issue 2, 2012, pp. 278-297.

Gus Waschefort, *International Law and Child Soldiers* (Oxford: Hart Publishing, 2015).

# Chapter 14: Preventing Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Other Forms of Abuse of Armed Forces Personnel

## Introduction: Issues at Stake

The military profession can maintain its dignity and professionalism only if their human rights are respected. As “citizens in uniform”, armed forces personnel are entitled to all human rights, regardless of their rank or whether they are professionally contracted or conscripted.<sup>584</sup> Torture or other cruel, inhuman or degrading treatment or punishment (hereafter “ill-treatment”) constitute grave violations of the human rights of service personnel that cannot be justified under any circumstances. Other forms of abuse, such as bullying or harassment, do not always amount to ill-treatment but have similar negative impacts on the individual service member and the military unit as a whole.

This chapter explores good practices concerning the protection of service members from acts that may amount to cruel, inhuman or degrading treatment or punishment (ill-treatment) or even torture, forced labour<sup>585</sup> or, in extreme cases, actions leading to wrongful death.<sup>586</sup> It examines the ways in which international human rights law and, in particular, the absolute prohibition of torture and other forms of ill-treatment applies to the armed forces. It also explores the various approaches that can be taken to prevent such incidents or, if they occur, to investigate, prosecute and punish those responsible and provide redress to the victims.

The issue of ill-treatment or other abuse is closely connected to topics discussed in other chapters of this compendium, notably “Chapter 10: Ethnic, Racial and Linguistic Minorities in the Armed Forces” (minorities may be at a greater risk of ill-treatment, harassment or bullying on racial or ethnic grounds); “Chapter 11: Women in the Armed Forces” (owing to the prevalence of sexual harassment and sexual violence in the armed forces, disproportionately committed against women); “Chapter 12: LGBTI Members of the Armed Forces” (as sexual orientation or gender identity may also be a factor in ill-treatment and harassment);

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**584** See: Council of Europe, Committee of Ministers, “Explanatory Memorandum to Principle K of Recommendation CM/Rec(2010)4 on the Human Rights of Members of the Armed Forces”, 24 February 2010. See also: Peter Rowe, “The Soldier as a Citizen in Uniform – a Reappraisal”, *New Zealand Armed Forces Law Review*, Vol. 7, 2007, p. 1-17.

**585** Noting, however, as outlined in “Chapter 8: Conscientious Objection to Military Service”, definition of forced labour does not include service of purely military character or service exacted instead of compulsory military service.

**586** Wrongful death herewith referring to any situation where “lives would be avoidably put at risk without a clear and legitimate military purpose or in circumstances where the threat to life has been disregarded”, as stated by the Council of Europe, Recommendation CM/Rec(2010)4, *op. cit.*, note 26.

"Chapter 13: Children Associated with Armed Forces" (young recruits are frequently subjected and particularly vulnerable to ill-treatment); "Chapter 15: Working Conditions and Support for Veterans" (poor working conditions often contribute to the occurrence of ill-treatment); "Chapter 17: The Role of Commanders and Individual Accountability" (competent leadership is the first line of defence against ill-treatment); and "Chapter 18: Discipline and Military Justice" and "Chapter 19: Ombuds Institutions for the Armed Forces", dealing with discipline and military justice and ombuds institutions.

One phenomenon that has been observed in the armed forces over many decades is institutionalized bullying,<sup>587</sup> as well as traditions such as hazing (initiation ordeals), where members of the armed forces inflict severe physical or mental pain and suffering on others, and which may at times escalate into violence and various forms of ill-treatment or abuse. Of particular concern is the custom of subjecting younger recruits to various (often informal) initiation ordeals, a practice that is still followed in some OSCE participating States. If bullying leads to severe mental pain or suffering and is inflicted with the consent or acquiescence of a superior, it may constitute cruel, inhuman and degrading treatment. A 2006 report to PACE stated that:

*"Ill-treatment, bullying, brutality, torture, malnutrition, illness, over-exploitation, sometimes causing physical ill-effects or even resulting in death ... too many young conscripts in Europe suffer such fates during their military service."*<sup>588</sup>

Other forms of abuse may include harassment, constant malnutrition or illnesses that are not treated with the necessary medical care, as well as pain and suffering caused by overly harsh penalties or substandard detention conditions. Depending on the level of physical and/or mental suffering caused, such treatment may amount to cruel, inhuman or degrading treatment or punishment, or even torture (if the suffering is inflicted intentionally and with a particular purpose in mind).

In extreme cases, such situations may even lead to the death of a service member, either as a result of the ill-treatment or because the circumstances of events lead them to commit suicide. The immediate investigation of such instances by the military leadership sends a strong signal that acts of torture or other ill-treatment will not be tolerated.

**587** According to the UN Special Representative of the Secretary-General on Violence against Children, "[b]ullying can be defined as intentional and aggressive behaviour occurring repeatedly against a victim where there is a real or perceived power imbalance, and where the victim feels vulnerable and powerless to defend himself or herself". "Bullying and Cyberbullying", UN, <https://violenceagainstchildren.un.org/content/bullying-and-cyberbullying-0>.

**588** PACE, "Report to the Committee on Legal Affairs and Human Rights on 'Human Rights of Members of the Armed Forces'", 24 March 2006, para. 19.



## ***Factors contributing to torture or other ill-treatment***

A variety of situations or conditions increase the risk of torture or other ill-treatment, including hazing or bullying in the armed forces. This may involve rituals organized during or at the end of the recruits' initial basic training, during which the recruit is physically and mentally tested.<sup>589</sup> The majority of initiation rituals are organized by peers and take place in absolute isolation, without supervision but frequently with the consent, acquiescence or approval of officers or other military personnel. Although it is widely acknowledged that initiation rituals can fulfil a positive symbolic function and may foster unit cohesion and morale, they may also result in excesses and can lead to physical or mental harm and suffering. A distinction should, therefore, be made between positive rituals that enhance esprit de corps, possibly requiring official approval and, therefore, entailing responsibility and oversight, and those involving or developing into outright bullying and abuse of power.<sup>590</sup>

Certain activities that do not in themselves qualify as cruel, inhuman or degrading treatment may become so if excessive or carried out over a protracted period, or when involving a threat of violence.<sup>591</sup> For example, food or sleep deprivation as part of an initiation ritual does not necessarily constitute cruel, inhuman or degrading treatment but may, if carried out over an extended period of time, reach this threshold.<sup>592</sup>

Additionally, the need to maintain discipline, if pushed to extremes, may lead to violations. Relations between service personnel and commanders are often characterized by strict rules of subordination and unconditional obedience to orders. The prevailing approach is that discipline must be introduced among soldiers as early as possible in order to be effective and sustainable. Verbal or physical punishment may be perceived as necessary when disciplining subordinates. Moreover, the subordinate status of soldiers may prevent them from openly expressing their concerns. An extreme interpretation of military values that demands total subordination may thus contribute to an environment in which ill-treatment and other forms of abuse are more likely to occur.

**589** Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (New York: Doubleday, 1961). See also: Kirsten M. Keller et al., *Hazing in the U.S. Armed Forces: Recommendations for Hazing Prevention Policy and Practice* (Santa Monica, California: RAND Corporation, 2015), pp. 23-25.

**590** "The Wrongs of Passage: Inhuman and Degrading Treatment of New Recruits in the Russian Armed Forces", Human Rights Watch, October 2004, <http://hrw.org/reports/2004/russia1004>.

**591** See: European Court for Human Rights, *Campbell and Cosans v. the United Kingdom* (Application nos. 7511/76 and 7743/76, judgment of 25 February 1982), para. 26.

**592** See, *mutatis mutandis*, European Court for Human Rights, *Ireland v. United Kingdom* (Application no. 5310/71, judgment of 18 January 1978), paras. 165-168, where the combined use of the so-called five techniques for about a week's time (forcing detainees to stand in a "stress position" for protracted lengths of time, placing a hood over detainees' heads during interrogation, constant subjection to noise, deprivation of sleep and deprivation of food and drink) was considered to constitute inhuman and degrading treatment. See also: Human Rights Watch, *op. cit.*, note 593, pp. 27-28. Using extreme physical exercise as a form of punishment in the context of initiation practices is not, in and of itself, degrading or inhuman, but forced physical exercise to the point of collapse under threat of violence would constitute degrading treatment or punishment. Making recruits perform chores as part of an initiation phase does not, in and of itself, constitute degrading treatment, but forcing a recruit to live in servitude for extended periods of time, under threat of violence, reaches this threshold.

Beyond the imperative of maintaining discipline, military training intended to prepare personnel for warfare may result in human rights violations. Training in peacetime tries to simulate battle conditions. Pushing service personnel to physical limits, often combined with extreme pressure and hardships, is seen as an essential part of military training. Service personnel are required to “train as you fight” and have to undergo severe challenges in order to achieve combat readiness. The dualism between peacetime training and wartime practice may make it difficult for commanders to distinguish between legitimate methods of training and more extreme activities that may cause pain and suffering or humiliation among service members.

Poor working conditions, inadequate facilities and malnutrition may also amount to ill-treatment. Armed forces personnel in general, and conscripts in particular, are sometimes employed for non-military purposes. If such work is not of a military character and part of military training, it constitutes forced labour.<sup>593</sup> Military personnel may also be subjected to extortion, such as when parents send money or food to recruits, who are then forced to give it to their superiors or peers.<sup>594</sup>

In many cases, investigations of alleged torture or other ill-treatment remain in the hands of commanding officers instead of independent oversight bodies. Commanding officers may themselves be perpetrators of such acts, may have provided or implied consent, or may have other interests in covering up the abuse.

Also, as noted by the European Committee for the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CPT):

*“[t]oo often the esprit de corps leads to a willingness to stick together and help each other when allegations of ill-treatment are made, to even cover up the illegal acts of colleagues. Positive action is required, through training and by example, to promote a culture where it is regarded as unprofessional – and unsafe from a career path standpoint – to work and associate with colleagues who have resort to ill-treatment, where it is considered as correct and professionally rewarding to belong to a team which abstains from such acts.”<sup>595</sup>*

Quite apart from the violation of the fundamental human right to be free from torture or other ill-treatment, there are other practical reasons to address torture and other ill-treatment effectively. The use of torture and ill-treatment creates fear and mistrust among military personnel. Terror and suspicion are not good foundations for forging cohesive

**593** See: ICCPR, *op. cit.*, note 16, Art. 8(3); and ECHR, *op. cit.*, note 24, Art. 4(2). See also: ILO Convention No. 29, *op. cit.*, note 27, Art. 2(2).

**594** Human Rights Watch, *op. cit.*, note 593, pp. 13 and 20.

**595** Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), “The CPT Standards”, 8 March 2011, CPT/Inf/E (2002) 1 - Rev. 2011, para. 26.

military units and may imperil operational effectiveness. Moreover, state institutions that mistreat and abuse armed forces personnel are unlikely to be trusted by the families of ill-treated conscripts and society at large. Systematic ill-treatment will lead to societies that disrespect, mistrust or even fear the military, which may, in turn, increase draft evasion and lead to a rise in the number of military dropouts.

To counter acts of torture or other ill-treatment in the armed forces, it is imperative that military personnel are informed of their rights and of rules and procedures, including complaint mechanisms, and that commanding officers receive clear guidelines and adequate training to enable them to exert their authority while respecting the human rights of their subordinates. Furthermore, effective external and internal monitoring mechanisms will raise awareness of abuse and may help deter future ill-treatment in the armed forces. Prevention may also be enhanced if commanding officers take complaints seriously and initiate effective investigations, which will then lead to the identification and punishment of perpetrators, following criminal and/or disciplinary proceedings. Indeed, the reputation and effectiveness of armed forces are conditional on the elimination of impunity for such offences.

**Box 14.1: Council of Europe recommendation on the human rights of members of the armed forces<sup>596</sup>**

A. Members of the armed forces have the right to life.

6. Members of the armed forces should not be exposed to situations where their lives would be avoidably put at risk without a clear and legitimate military purpose or in circumstances where the threat to life has been disregarded.

7. There should be an independent and effective inquiry into any suspicious death or alleged violation of the right to life of a member of the armed forces.

8. Member states should take measures to encourage the reporting of acts which are inconsistent with the right to life of members of the armed forces and to protect from retaliation those reporting such acts.

[...]

B. No member of the armed forces shall be subjected to torture or to inhuman or degrading treatment or punishment.

10. Member states should take measures to protect members of the armed forces from being subjected to torture or inhuman or degrading treatment or punishment. Particular attention should be given to more vulnerable categories such as, for example, conscripts.

<sup>596</sup> Council of Europe, Recommendation CM/Rec(2010)4, *op. cit.*, note 26.

11. Where members of the armed forces raise an arguable claim that they have suffered treatment in breach of Article 3 of the Convention, or when the authorities have reasonable grounds to suspect that such treatment has occurred, there should promptly be an independent and effective official investigation.

12. Member states should take measures to encourage the reporting of acts of torture or ill-treatment within the armed forces and to protect from retaliation those reporting such acts.

[...]

U. Members of the armed forces should receive training on human rights and international humanitarian law.

83. Members of the armed forces should receive training to heighten their awareness of human rights, including their own human rights.

84. During training, military members of the armed forces should be informed that they have a duty to object to a manifestly unlawful order amounting to genocide, a war crime, a crime against humanity or torture.

V. Members of the armed forces should have the possibility of lodging a complaint with an independent body in respect of their human rights.

85. Members of the armed forces who claim to have been victims of harassment or bullying should have access to a complaint mechanism independent of the chain of command.

## International Human Rights Standards

### *The right to life*

Article 6 of the ICCPR states that nobody shall be arbitrarily deprived of the right to life.

Article 2 of the ECHR goes into more detail, and states that nobody shall be deprived of their life intentionally (unless in execution of a court sentence after being convicted of a crime).

Article 2(2) also states that if the deprivation of life results from an (absolutely) necessary use of force in specifically listed circumstances, then this will not violate the Convention.<sup>597</sup>

While Article 4(2) of the ICCPR lists Article 6 as a non-derogable right, Article 15(2) of the ECHR states that derogations from the right to life may be possible on an exceptional basis with respect to deaths resulting from lawful acts of war.

The right to life obliges states not only to refrain from the intentional and unlawful taking of life, but also to take appropriate measures to safeguard the lives of those within their jurisdiction.<sup>598</sup> This obligation is met primarily by providing effective legal protection from offences against individuals and special measures where the authorities know, or ought to know, of a real and immediate risk to an individual's life. In the specific context of persons undergoing compulsory military service, the European Court of Human Rights equates their position with persons in custody, in that conscripts are within the exclusive control of the authorities. Any events that occur in the army lie wholly, or in large part, within the exclusive knowledge of the military institutions, who are under a duty to protect armed forces members.<sup>599</sup>

In some extreme cases, bullying, whether by other conscripts or by their superiors, may lead conscripts to commit suicide.<sup>600</sup> In several instances of this kind, the European Court of Human Rights has found the state liable for breaching the right to life because of the systemic failure of the armed forces to protect conscripts in their care (see Box 14.2).

At times, service members may die in circumstances that military authorities conclude as suicides. Where relatives dispute a finding of suicide or raise concerns about ill-treatment or other suspicious circumstances, the failure by the military authorities to adequately

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**597** These circumstances are: in defence of a person from unlawful violence, in the course of a lawful arrest, or following lawful actions taken in order to quell a riot or insurrection.

**598** See: European Court for Human Rights, *L.C.B. v. the United Kingdom*, 9 June 1998, para. 36, "Reports of Judgments and Decisions" 1998-III, concerning exposure of military personnel to radioactivity during atomic tests.

**599** See: European Court for Human Rights, *Beker v. Turkey* (Application no. 27866/03, judgment of 24 March 2009), paras. 41-42, and *Mosendz v. Ukraine* (Application no. 52013/08, judgment of 17 January 2013), paras. 92 and 98.

**600** For discussion of state liability and duties see: Sotirios Kyrkos, "Suicide in the Military as a Breach of the Right to Life, under the Provision of Art. 2 of the European Convention on Human Rights and Fundamental Freedoms (ECHR)", in Jean-Paul Jacqué et al., *On the international community: legal, political, diplomatic issues*, *Liber Amicorum Stelios Perrakis* (Athens: I. Sideris, 2017), pp. 447-462

explore alternative causes of death or to safeguard the interests of the next-of-kin may lead to a finding that there has been a breach of the procedural duty under Article 6(1) ICCPR,<sup>601</sup> Article 2 of the ECHR (the right to life)<sup>602</sup> and/or Article 12 of the CAT (“Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed”).<sup>603</sup>

#### **Box 14.2: State liability under Article 2 of the ECHR**

In *Abdullah Yilmaz v. Turkey*, the European Court of Human Rights found that Turkey was liable for the failings of its Armed Forces due to the appointment of a Sergeant known for insubordination, who bullied and physically abused a conscript, resulting in the latter committing suicide. Here, the Court also found problematic the fact that the ensuing investigations into the Sergeant focused only on his physical abuse of the conscript, and not on his possible responsibility for the circumstances leading up to the suicide.

In the similar case of *Mosendz v. Ukraine*, concerning the supposed suicide of a young conscript following abusive behaviour by a Sergeant, the European Court of Human Rights found that there had been a failure by the Ukrainian authorities to duly investigate the case, as well as to discharge their positive obligations under Article 2. The Court also noted the then-endemic nature of bullying in the army (evidenced by a report from the Parliamentary Commissioner on Human Rights).

In yet another case, (*Perevedentsev v. Russia*), the awareness of the Russian Armed Forces of widespread practices of bullying and abuse (including extortion, beatings and sleep deprivation), leading to lawlessness and gross abuse of human rights, was a key factor in the European Court of Human Rights’ determination that the right to life (Article 2) had been breached. The Court concluded that the Russian authorities had failed in their duty of care towards him because, while aware of his psychological difficulties, they had failed to determine whether these put his life at risk in the context of a climate of widespread bullying in the military.

During military service, as in other situations in which persons are deprived of their liberty, the state has a heightened responsibility. In this sense it is useful to refer to the Nelson Mandela Rules<sup>604</sup>, which lay out clearly the importance of investigations into alleged wrongdoing. A

**601** See, for example: UN ECOSOC, Report by the Special Rapporteur, Mr. S. Amos Wako, pursuant to Economic and Social Council resolution 1987/60, E/CN.4/1988/22, 19 January 1988, para. 194. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G88/101/60/PDF/G8810160.pdf?OpenElement>.

**602** See, for example: European Court for Human Rights, *Sergey Shevchenko v. Ukraine* (Application no. 32478/02, judgment of 4 April 2006); and *Babayev v. Azerbaijan*. (Application no. 30500/11, judgment of 1 June 2017).

**603** CAT, *op. cit.*, note 22.

**604** General Assembly Resolution 70/175: “United Nations Standard Minimum Rules for the Treatment of Prisoners” (the Nelson Mandela Rules). Adopted on 7 December 2015. Accessible at: <https://undocs.org/A/>

properly conducted investigation is necessary to establish accountability, and is necessary if military authorities want to learn from past mistakes or shortcomings and to improve policy and practice accordingly. Promptness is of the utmost importance, because the longer the investigation is delayed, the harder evidence and testimony will be to secure. Perhaps more consequentially in the longer term, investigations send a clear signal that human rights violations are taken seriously and will not be tolerated, and that investigations are an important first step in restoring trust and confidence in the institution.<sup>605</sup>

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Amos Wako, elaborated the following “standards for proper investigations into all cases of suspicious death”:<sup>606</sup>

*“(a) Promptness: The investigation should be carried out immediately following the discovery of such a death;*

*(b) Impartiality: The investigation should be carried out by a person or persons or an authority whose impartiality is guaranteed and protected;*

*(c) Thoroughness: The investigation should include an adequate autopsy, collection and analysis of evidence, and statements from witnesses, hence the person(s) or authority investigating should be given the necessary powers, assistance and logistic support;*

*(d) Protection: Complainants, witnesses and persons investigating and their families should be given effective protection from violence or any form of threats;*

*(e) Representation of the family of the victim: The family of the victim and its legal counsel should be able to participate in the investigatory proceedings and have access to substantive information at various stages of the investigation;*

*(f) Publication of the findings: The methods and findings of the investigation should be made public;*

*(g) Independent commission of inquiry: in cases in which the normal*

[RES/70/175.](#)

**605** See more on investigations of deaths and torture in prisons in: *Guidance Document on the Nelson Mandela Rules: Implementing the United Nations Revised Standard Minimum Rules for the Treatment of Prisoners*, (Warsaw: ODIHR and Penal Reform International, 2018), pp. 91-95, [https://www.osce.org/files/f/documents/7/b/389912\\_0.pdf](https://www.osce.org/files/f/documents/7/b/389912_0.pdf).

**606** UN ECOSOC, Report by the Special Rapporteur, Mr. S. Amos Wako, pursuant to Economic and Social Council resolution 1987/60, E/CN.4/1988/22, 19 January 1988, para. 93, <https://documents-dds-ny.un.org/doc/UN-DOC/GEN/G88/101/60/PDF/G8810160.pdf?OpenElement>.

*investigatory procedure is inadequate, an independent commission of inquiry or similar procedure should be secured. Such a commission should have the necessary authority and powers to carry out impartial and effective investigations.”<sup>607</sup>*

The European Court of Human Rights has similarly set out the necessary elements of an effective investigation:

*“[...] [W]here a positive obligation to safeguard the life of persons in custody or in the army is at stake, the system required by Article 2 must provide for an independent and impartial official investigation that satisfies certain minimum standards as to effectiveness. Thus, the competent authorities must act with exemplary diligence and promptness and must of their own motion initiate investigations capable of, firstly, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and, secondly, identifying the State officials or authorities involved. There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests [...]”<sup>608</sup>*

Each element of the investigation may be examined in detail to establish whether the investigation itself has been sufficiently thorough and independent.<sup>609</sup> This is particularly important if military prosecutors do not enjoy hierarchical independence from the commanding officer of the military unit where an unexplained death of a service member has occurred.

<sup>607</sup> *Ibid*, para 194.

<sup>608</sup> European Court for Human Rights, *Perevedentsevy v. Russia*, Application no. 39583/05 (European Court of Human Rights, 24 April 2014), para. 105. The Court found that the failure to conduct an effective investigation into a conscript's death constituted a breach of procedural duty under Article 2: There had been substantial delays, a lack of determination to resolve conflicts of evidence and to interview all relevant witnesses, and his next of kin had been denied an opportunity to participate at an early enough stage to have any meaningful effect on the investigation. See also: *Muradyan v. Armenia* (Application no. 11275/07, judgment of 24 February 2017).

<sup>609</sup> See: European Court for Human Rights, *Mustafa Tunc and Fecire Tunc v. Turkey* (Application no. 24014/05, Grand Chamber judgment of 14 April 2015), paras. 217-253. Applicable also under UN human Rights Council, to safeguard the mandatory standard of maintaining independence of the investigating authority. (Report by the Special Rapporteur, Mr. S. Amos Wako (no. 21), para 194)



## ***Protection from torture and other cruel, inhuman or degrading treatment or punishment***

Service personnel are also protected from torture and other ill-treatment under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),<sup>610</sup> Article 7 of the ICCPR, Article 5 of the Universal Declaration of Human Rights and the four 1949 Geneva Conventions. The same right can be found in Article 3 of the ECHR.

Under international human rights law, the right to be free from torture and inhuman and degrading treatment is an absolute and non-derogable right. Actions constituting torture or other ill-treatment are never permissible or justified, not even in times of war or other public emergencies. This is also reflected in the wording of Article 2 of the CAT, Article 7 of the ICCPR and Article 3 of the ECHR, which contain no exceptions to this right and permits no limitations. The CAT specifically enshrines the absolute prohibition of torture (Article 1), obligates the State Party to take effective measures to prevent torture (Article 2), prohibits cruel, inhuman, and degrading treatment or punishment (Article 16), requires prompt and impartial investigation (Article 12), establishes the right to lodge a complaint and be protected against ill-treatment or intimidation as a consequence of the complaint (Article 13), and secures the right to obtain redress and fair compensation (Article 14). Thus, if any state action against an individual crosses the threshold of what is considered to be torture or inhuman or cruel, inhuman or degrading treatment or punishment, then this will automatically mean that the individual's rights have been violated. In General Comment No. 2, the Committee against Torture emphasized that, under Article 2 of the CAT, a State Party violates the Convention where its authorities "know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish" such officials or actors.<sup>611</sup> Such inaction constitutes complicity, consent or acquiescence to the torture or ill-treatment.

This also applies to the armed forces, so that service personnel must not suffer from any form of ill-treatment, nor may they be subjected to torture under any circumstances.

In order to classify an act as torture, the suffering needs to be inflicted for a purpose, such as to obtain information from or punish or intimidate the victim.<sup>612</sup> It is also clear that mental suffering may also constitute torture if it is sufficiently serious.<sup>613</sup> In European

<sup>610</sup> All 57 OSCE participating States have ratified the CAT.

<sup>611</sup> UN Committee against Torture, General Comment No. 2 Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2. Available at: <https://www.refworld.org/docid/47ac78ce2.html> Para 18

<sup>612</sup> European Court for Human Rights, *Ihlán v. Turkey* (Application no. 22277/93, judgment of 27 June 2000), para. 85.

<sup>613</sup> UN Committee against Torture, *Ashim Rakishev and Dmitry Rakishev v. Kazakhstan*, 7 September 2017, CAT/C/61/d/661/2015. Para 8.2: "The Committee recalls provisions of the Istanbul Protocol according to which the methods of torture can be both physical and psychological"; European Court for Human Rights, *Nicolae Virgiliu Tănase v. Romania* (Application no. 41720/13, Grand Chamber judgment of 25 June 2019) para

Court of Human Rights case law, mental suffering (such as that caused by incommunicado detention, being kept blindfolded and being paraded naked) has been considered to amount to torture.<sup>614</sup>

Abusive or violent acts amount to cruel or inhuman treatment or punishment once they “exceed a particular level”<sup>615</sup> and “attain a minimum level of severity”;<sup>616</sup> such as if they cause actual bodily harm or intense physical or mental suffering.<sup>617</sup> Here, the act and its effect are paramount – the ill-treatment does not need to have a purpose, nor does there need to be the intent to cause suffering.<sup>618</sup>

To qualify as degrading treatment or punishment, an act must “arouse in the victims feelings of fear, anguish and inferiority capable of humiliating or debasing them”.<sup>619</sup> As with inhuman treatment, there does not need to be an intention to humiliate or debase.<sup>620</sup>

In many instances, an examination of individual cases will determine whether a certain treatment amounts to permissible treatment commensurate with the requirements of military service, or whether it exceeds such treatment. In this context, the age, sex and other characteristics of the individual are relevant factors.<sup>621</sup> Also, “the suffering and humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment”.<sup>622</sup> The European Court of Human Rights has accepted that suffering and humiliation are often a part of mandatory military service and may be tolerated, provided that they contribute to the specific mission of the armed forces, such as training for battlefield conditions.<sup>623</sup> However, where such actions are excessive and serve no legitimate military purpose, they then may amount to ill-treatment, or even torture. Similarly, the Court has stated that:

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**614** European Court for Human Rights, *El-Masri v. “The Former Yugoslav Republic of Macedonia”* (Application no. 39630/09, Grand Chamber judgment of 13 December 2012) paras 202-203 and 211.

**615** UN Human Rights Committee (HRC), *Vuolanne v. Finland*, CCPR/C/35/D/265/1987, 2 May 1989. Available at: <https://www.refworld.org/cases,HRC,50b8ee372.html> Para 9.2.

**616** *Ibid*, para. 196.

**617** *Ibid*.

**618** European Court for Human Rights, *Bujak v. Poland* (Application no. 686/12, judgment of 21 March 2017), para 66.

**619** European Court for Human Rights, *Boyd v. Belgium* (Application no. 23380/09, Grand Chamber judgment of 28 September 2015), para. 87.

**620** *Ibid*, para 86.

**621** See, European Court for Human Rights, *Ireland v. United Kingdom*, op. cit., note 595, para. 162. See also: Anna Salado Osuna, “Treatment Proscribed under Article 3 of the European Convention on Human Rights”, in Javier García Roca and Pablo Santolaya, *Europe of Rights: A Compendium on the European Convention of Human Rights* (Leiden, Boston: Martinus Nijhoff, 2012), p. 74.

**622** European Court for Human Rights, *Kudla v. Poland*, European Court of Human Rights, 26 October 2000, European Human Rights Reports, Vol. 35, 2002, p. 198, para. 92. When applied to military recruits, treatment should go beyond suffering and humiliation ordinarily connected with military service for it to be considered degrading.

**623** European Court for Human Rights, *Lyalyakin v. Russia* (Application no. 31305/09, judgment of 12 March 2015), para 69.

*"Even though challenging physical exercise may be part and parcel of military discipline, [...] to remain compatible with Article 3 of the Convention, it should not go beyond the level above which it would put in danger the health and well-being of conscripts or undermine their human dignity."*<sup>624</sup>

Box 14.3 illustrates the application of these principles in two complaints brought by military conscripts.

### **Box 14.3: Judgments of the European Court of Human Rights on inhuman or degrading treatment or punishment**

#### **Inhuman treatment or punishment**

In *Chember v. Russia*, the European Court of Human Rights found that a Russian conscript was subjected to inhuman treatment under Article 3 of the ECHR while serving at a military unit in Astrakhan. The applicant had been examined by two medical commissions and was found fit to undergo military service. However, by the time of his transfer to the unit in February 2001, he was known to be suffering from a medical condition that affected his knees and spine. His immediate supervisor thus exempted him from physical exercise and squad drill. In March 2001, the competent platoon commander made the applicant and other servicemen do 350 knee-bends outdoors as punishment for their failure to adequately clean the barracks. The applicant's immediate commander was present but did not contradict the order. During the punishment exercises, the applicant collapsed and, despite receiving medical treatment, was diagnosed with a spinal injury combined with an impairment of blood circulation to parts of his spinal cord. In June 2001, the applicant was discharged from military service on medical grounds and assigned a second-degree disability.

The European Court of Human Rights found that the punishment administered reached the level of inhuman treatment in the applicant's case. It stated that:

"[n]otwithstanding their awareness of the applicant's specific health problems, the commanders forced the applicant to do precisely the kind of exercise that put great strain on his knees and spine. In these circumstances, the Court cannot but find that the treatment was both deliberate and calculated to cause the applicant physical suffering. The severity of the punishment cannot obviously be accounted for by any requirements of military service or discipline, or said to have contributed to the specific mission of the armed forces".<sup>625</sup>

<sup>624</sup> European Court for Human Rights, *Chember v. Russia* (Application no. 7188/03, judgment of 3 July 2008), para. 52.

<sup>625</sup> *Ibid.*, para. 54.

## Degrading treatment

In *Lyalyakin v. Russia*, the applicant, a conscript in the Russian Armed Forces, was transferred to a military unit in Volgograd, where the atmosphere among service personnel was tense and violent. Shortly afterwards, the applicant fled the unit, along with a junior sergeant. They were apprehended the following day. The arresting officers threatened that they would be executed. The applicant and his companion were brought before the battalion commander, stripped naked and made to parade in front of the battalion. The applicant was threatened by fellow service personnel, who shaved his head, repeatedly struck him and threatened him with sexual violence.

The Court found that this treatment reached the threshold of degrading treatment under Article 3 of the ECHR. The fact that the applicant was 19 years of age at the time was an aggravating factor. The Court noted that forcibly stripping a person was a strong measure that involved a certain level of distress, and its public nature meant that it had amounted to degrading treatment. The state had also not convincingly demonstrated the need to use such measures.

The Court noted further that, although the authorities had responded to the applicant's complaint, they had refused to open a criminal investigation. Bearing in mind the credibility of his allegations and the seriousness of the circumstances, this fell short of the duty implied under Article 3 to conduct an effective official investigation into allegations of torture or ill-treatment. By failing to do so, the state had fostered a sense of impunity within the military.<sup>626</sup>

Other aspects of military life may also potentially violate the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment. According to the jurisprudence of the European Court of Human Rights, poor physical conditions of detention – such as where facilities are unsanitary,<sup>627</sup> in poor repair,<sup>628</sup> severely cramped<sup>629</sup> or overcrowded<sup>630</sup> – can amount to a violation, as can prolonged solitary confinement.<sup>631</sup> These conditions amount to a violation of the right to be free from torture and other

<sup>626</sup> European Court for Human Rights, *Lyalyakin v. Russia*, op. cit., note 627.

<sup>627</sup> European Court for Human Rights, *Ananyev and others v. Russia* (Applications no. 42525/07 and no. 60800/08, judgment of 10 January 2012), paras 156-159. See also: European Court for Human Rights, *Harachiev and Tolumov v. Bulgaria* (Applications no. 15018/11 and no. 61199/12, judgment of 8 July 2014), para 211.

<sup>628</sup> European Court for Human Rights, *Modarca v. Moldova* (Application no. 14437/05, judgment of 10 May 2007), paras 66, 69.

<sup>629</sup> *Ibid*, para 68.

<sup>630</sup> European Court for Human Rights, *Ananyev and others v. Russia*, op. cit., note 631, para 145.

<sup>631</sup> European Court for Human Rights, *Ilaşcu and others v. Moldova and Russia* (Application no. 48787/99, Grand Chamber judgment of 8 July 2004), para 432. On prolonged solitary confinement in adjunction to other concerns: European Court for Human Rights, *Khider v. France* (Application no. 39364/05, Judgement on 9.7.2009) See also the "United Nations revised Standard Minimum Rules for the Treatment of Prisoners" (Nelson Mandela Rules), Rule 43, [https://www.unodc.org/documents/justice-and-prison-reform/GA-RESO-LUTION/E\\_ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/GA-RESO-LUTION/E_ebook.pdf).

ill-treatment, regardless of the reason for detention of the service members (see also “Chapter 18: Discipline and Military Justice”). The CPT has also written extensively about this, stating that minimum standards for personal living space are “intrinsically linked to the commitment of every [...] member state to respect the dignity of persons [...]”.<sup>632</sup>

As noted above, both the right not to be subjected to cruel, inhuman or degrading treatment or punishment or torture and the right to life impose significant procedural and investigative standards upon states. The CAT<sup>633</sup> contains specific obligations to investigate allegations of torture or inhuman or degrading treatment. Article 12 of the CAT states that whenever there is reasonable ground to believe that an act of torture has been committed in any territory under a state’s jurisdiction, its competent authorities shall proceed to a prompt, effective and impartial investigation,<sup>634</sup> and article 16 of the CAT imposes the same obligation for allegations of cruel, inhuman or degrading treatment or punishment.<sup>635</sup> According to the UN Committee against Torture, effective investigations of torture should be:

- prompt;<sup>636</sup>
- impartial;<sup>637</sup>
- with the participation of the victim or their next-of-kin;<sup>638</sup>
- with the publication of findings<sup>639</sup>; and
- capable of determining the nature and circumstances of the alleged acts and establishing the identity of any person who might have been involved in them.<sup>640</sup>

**632** CPT, “Living space per prisoner in prison establishments: CPT standards”, paras 5-6

**633** CAT, *op. cit.*, note 22.

**634** UN Committee against Torture, *Rached Jaidane v. Tunisia*, 3 October 2017, CAT/C/61/D/654/2015, para 7.10.

**635** CAT, *op. cit.*, note 22.

**636** UN Committee against Torture, *Ashim Rakishev and Dmitry Rakishev v. Kazakhstan*, 7 September 2017, CAT/C/61/D/661/2015, para 8.7: “promptness [is] essential both to ensure that the victim cannot continue to be subjected to acts of torture and also because, in general, unless the methods employed have permanent or serious effects, the physical traces of torture, and especially of cruel, inhuman or degrading treatment, soon disappear.”

**637** *Ibid*, para 8.7: “an investigation in itself is not sufficient to demonstrate the State party’s conformity with its obligations under article 12 of the Convention if it can be shown not to have been conducted impartially.”

**638** UN Committee against Torture, *Estela Deolinda Yrusta and Alejandra del Valle Yrusta v. Argentina*, 31 January 2019, CAT/C/65/D/778/2016, para 7.10: “in accordance with article 14 of the Convention, the concept “victim” includes persons who have individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute violations of the Convention. This concept of victim also encompasses the immediate family, such as Mr. Yrusta’s sisters, the authors of the present complaint.”

**639** *Ibid*, para 7.9: “when investigating allegations of torture, the State party is required to verify the facts and to disclose the truth publicly and fully, to the extent that such disclosure does not cause further harm or threaten the safety and interests of the complainants.”

**640** UN Committee against Torture, *Taoufik Elaiba v. Tunisia*, 9 August 2016, CAT/C/57/D/551/2013, para 7.6: “criminal investigation must seek both to determine the nature and circumstances of the alleged acts and to establish the identity of any person who might have been involved in them.”

The European Court of Human Rights has interpreted Article 3 of the ECHR as imposing a similar procedural duty on states to carry out an effective and independent investigation in relation to allegations of ill-treatment in the military (see Box 14.4).<sup>641</sup>

**Box 14.4: Effective investigations under the ECHR – the case of *Zalyan and others v. Armenia***<sup>642</sup>

The applicants were conscripts in the Armed Forces of Armenia. Following the murder of two members of their military unit, they alleged that they were repeatedly questioned as witnesses by investigators and military police, placed in isolation and subjected to beatings, threats and verbal abuse over a period of three days. Following this, one of the applicants made a confession, which he later retracted, stating that it had been forced out of him. The applicants' allegations of ill-treatment were rejected by the Military Prosecutor and by the courts that tried the case against them and heard their appeals. Their convictions were later quashed by the Court of Cassation. Nonetheless, the Military Prosecutor refused to open a criminal investigation into the allegations.

The European Court of Human Rights found that the applicants had made a credible assertion of ill-treatment, which engaged the responsibility of the state to carry out an effective investigation under Article 3. In particular, the allegations were sufficiently detailed, contained precise dates, locations and names of the alleged perpetrators, and the methods of ill-treatment applied. The prosecuting authorities had failed to carry out any enquiry, much less a prompt one, into the allegations, as required both by Article 3 and national law. One of the applicants was interviewed by the same investigators who were the alleged perpetrators, and no detailed questions were asked. Moreover, the Court did not find that the Military Prosecutor had any good reasons for refusing to institute criminal proceedings. After the convictions were quashed, an investigation into the allegations was carried out by members of the same authorities (the investigators and members of the Military Prosecutor's Office) who were alleged to have been responsible. The investigation was conducted in such a superficial way that the Court concluded that it was not a serious attempt to establish the facts.

The Court concluded that the authorities failed to carry out an effective investigation into the applicants' allegations of ill-treatment, as required under Article 3 of the Convention.

In addition, the prohibition of forced or compulsory labour is set out in Article 8(3) of the ICCPR.<sup>643</sup> This provision does not apply to service of a military character, but does apply in cases where service personnel are required to perform tasks that are not of a military

<sup>641</sup> See, for example: European Court for Human Rights, *Lyalyakin v Russia*, *op. cit.*, note 627, and Box 14.3. See also: *Zalyan and others v. Armenia* (Application nos. 36894/04 and 3521/07, judgment of 17 March 2016), para. 269.

<sup>642</sup> *Ibid.*, *Zalyan and others v. Armenia*.

<sup>643</sup> Within the Council of Europe, it is prohibited by Article 4(2) of the ECHR.

character or that are incompatible with their assignment. Nevertheless, the right may be derogated in times of emergency, and there are certain circumstances where all individuals (and not just service personnel) may be forced to undertake certain forms of labour.<sup>644</sup>

## Different Approaches

### Prohibition

The first step in addressing torture and other ill-treatment in the armed forces is to ensure that military law and codes of conduct are fully aligned with the international and national standards prohibiting respective acts, and also to include the prohibition of bullying and other forms of abuse. Aligned with this, military institutions should also establish an explicit ban on unauthorized initiation ceremonies, as this will provide a clear basis for the prosecution and punishment of illegal practices. Many states have adopted such bans in an effort to tackle bullying.<sup>645</sup>

#### **Box 14.5: The United States Department of Defence instruction on harassment prevention and response<sup>646</sup>**

##### 1.2 Policy

a. The Department [DoD] does not tolerate or condone harassment.<sup>647</sup> Harassment jeopardizes combat readiness and mission accomplishment, weakens trust within the ranks, and erodes unit cohesion. Harassment is fundamentally at odds with the obligations of Service members to treat others with dignity and respect.

b. DoD will hold leaders at all levels appropriately accountable for fostering a climate of inclusion that supports diversity, is free from harassment, and does not tolerate retaliation against those filing harassment complaints.

[...]

<sup>644</sup> Both Article 8(3) of the ICCPR and Article 4(2) of the ECHR foresee exceptions from the prohibition of forced labour in the following circumstances: where it is imposed by court sentence as punishment for a crime (ICCPR only), where it constitutes work that is normally required of a person under detention by court order, or on conditional release, during an emergency or calamity that threatens the life or well-being of the community, or any work or service that forms part of normal civil obligations.

<sup>645</sup> James K. Wither, "Battling Bullying in the British Army 1987 – 2004", *The Journal of Power Institutions in Post-Soviet Societies*, No. 1, 2004, <https://journals.openedition.org/pipss/46>.

<sup>646</sup> United States Department of Defence, "Instruction 1020.03 on Harassment Prevention and Response in the Armed Force", 8 February 2018, <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/102003.pdf>.

<sup>647</sup> *Ibid.* According to Section 3.1 of the Instruction, harassment is all behaviour, whether oral, written or physical, that is unwelcome or offensive to a reasonable person, and that creates an intimidating, hostile or offensive environment. Section 3 covers, among others, bullying (3.4), hazing (3.5) and retaliation or reprisals for making such cases known.

d. Violations of the policies in this instruction may constitute violations of specific articles of [...] the "Uniform Code of Military Justice (UCMJ)" and may result in administrative or disciplinary action.

### ***Combating impunity through accountability***

Swift and effective action must be taken in response to cases of ill-treatment and abuse, leading to criminal investigations and disciplinary procedures. Military institutions need to send the message that ill-treatment and abuse will not be tolerated but, instead, will be met with immediate, effective and independent investigations, leading to proportionate sentences, demotion or exclusion from the army, where appropriate. There should be an obligation for military prosecutors to investigate these types of cases, including by collecting evidence and proof.

### ***Complaints procedures in cases of ill-treatment***

Military commanders are responsible for the safety and welfare of all personnel assigned to them. Thus, commanders who come across evidence of abusive practices are obliged to investigate and inform their superiors. If a criminal offence is identified, the disciplinary superior is obliged to inform the appropriate investigating authorities (in Germany, for example, this is the competent public prosecutor, while in the Czech Republic this is the military police<sup>648</sup>), who may bring the case before the court.

Victims must be protected from retaliation, reassured that coming forward will lead to the end of abusive practices, and provided with any medical and psychological support they need.<sup>649</sup> To prevent further victimization, both the abuse of the victim and the victim's needs must be met with appropriate responses.

Military personnel must be held responsible if they torture, ill-treat or otherwise abuse or harass their subordinates or peers, or if they allow such practices to occur. In the United States, for example, the Uniform Code of Military Justice includes a specific punitive article, Article 93, on "Cruelty and Maltreatment". Commanders often bear a particular responsibility over the safety of their subordinates, and may be forced to have counselling or may be punished with reprimands, refused promotion, prevented from re-enlisting, discharged from service or may face a loss of pay. For serious cases involving assault, aggravated assault or the ill-treatment of subordinates, commanders may be prosecuted in a court martial. Box 14.7 gives an indication of how perpetrators and officers who endorse ill-treatment can be held accountable. For more information, see also "Chapter 18: Discipline and Military Justice".

<sup>648</sup> Responses to the ODIHR-DCAF 2018 questionnaire, qu. 45.

<sup>649</sup> See: Council of Europe, CPT standards, *op. cit.*, note 636, paras. 25-42.



### Box 14.6: Examples of measures implemented in cases of bullying or alleged ill-treatment<sup>650</sup>

**Austria:** The unit commander can initiate disciplinary proceedings. The disciplinary authorities are authorized to secure any necessary and available evidence for proper prosecution. Where necessary, the Austrian Federal Army's psychological service provides prompt medical attention for non-combat injuries.

**Azerbaijan:** Manuals cover different issues, including securing evidence in case of investigation of criminal acts and on providing prompt medical treatment in context of both combat and non-combat injuries. Measures for effective investigation and consideration of criminal charges and / or disciplinary offences are regulated by law.

**Denmark:** The disciplinary system is responsible for securing evidence of bullying or ill-treatment in order to conduct disciplinary or criminal investigations. Access to medical treatment is provided to service personnel regardless of the reason for the injury. Those reporting bullying or harassment can do so anonymously, to prevent victimization or intimidation. Victimization or intimidation can also amount to disciplinary or criminal offences.

**Finland:** Service members are encouraged to report all cases of bullying and harassment. Legislation provides sufficient and effective jurisdiction to investigate and prosecute all such offences. It is an offence to intimidate those who report bullying or harassment. Service members are entitled to receive appropriate medical attention and care, without delay.

**Ireland:** Allegations of bullying or ill-treatment are investigated by an investigating officer or the Military Police. Investigation reports are passed to commanding officers or the Director of Military Prosecutions (depending on the seriousness of the alleged offence) for subsequent hearing/court martial. The Medical Corps will examine any injuries and report as necessary. Protecting victims from intimidation forms an important part of such investigations.

**Italy:** Under Article 331 of the Penal Code, Armed Forces personnel have a duty to report any crimes they come across in the course of their duties. In cases of disciplinary wrongdoing that can give way to ill-treatment, the commander must appoint a disciplinary commission. Medical staff is required to report any cases of alleged bullying or ill-treatment to the commander. No measures exist to protect those who report such offences from victimization or intimidation, but the commander of a unit can introduce specific measures on a case-by-case basis.

**Malta:** Commanding officers are empowered to investigate reports and collect evidence. Medical and psychological support is readily available. Those reporting cases of bullying or harassment are protected from victimization or intimidation on an ad hoc

<sup>650</sup> Responses to the ODIHR-DCAF 2018 questionnaire, qu. 44

basis, depending on the nature of the case. Disciplinary offences are investigated and considered in accordance with the rules of procedure set out in national legislation.

**Slovenia:** In cases of alleged bullying or ill-treatment, detail procedures are in place for Military Police and disciplinary commissions to secure evidence, investigate and file criminal charges and/or disciplinary offences. Medical units provide services around the clock to ensure prompt medical attention, including for non-combat injuries.

## ***Preventing torture and other ill-treatment***

Several measures may be taken to prevent ill-treatment and abuse within the armed forces and to combat an environment that tolerates these practices. These measures include establishing effective safeguards against torture and other ill-treatment, such as regular contact with relatives/families and access to lawyers and medical examinations upon request, instructing and training new recruits and commanders, including on human rights, ensuring that there is competent leadership at the level of officers and NCOs, and establishing external monitoring procedures and complaints mechanisms.

## ***Training***

Training is important to ensure that military personnel are informed of their rights. Training courses can also cultivate camaraderie and trust among armed forces personnel. Awareness-raising efforts and practical courses on addressing torture and ill-treatment or other forms of abuse, such as bullying, should be part of the curriculum at officer schools, and training on these should be repeated on a regular basis throughout the service for all ranking levels.

### **Box 14.6: Training to prevent bullying in Ireland's Defence Forces**

In several OSCE participating States, officers are trained in dealing with bullying and in spotting and preventing illegal practices.<sup>651</sup> In Ireland, for example, all new entrants into the Defence Forces receive instruction from a commanding officer on what constitutes inappropriate behaviour and on how to seek redress or make a complaint against someone who treats them inappropriately. The instruction also outlines the role that the commanding officer plays in resolving complaints. The information is also included in a handbook provided to all new recruits.

<sup>651</sup> Austria, Bosnia and Herzegovina, Cyprus, the Czech Republic, Estonia, Finland, Germany, Greece, Ireland, Malta, Norway, Sweden and the United Kingdom. Source: ODHIR-DCAF 2018 questionnaire, qu. 43.

### *Competent leadership*

In addition to training, competent leaders play an essential role in cultivating a sense of purpose, direction and motivation among personnel to create cohesive fighting units. They do so by inculcating discipline and a sense of duty within their units. Commanders also play an important role in undertaking measures to prevent and address practices that may amount to torture, cruel inhuman or degrading treatment or other forms of abuse, such as bullying. In many OSCE participating States,<sup>652</sup> officers are instructed to investigate any form of abusive practice and to strictly and consistently apply disciplinary punishments. In this context, commanding officers are not only responsible for the safety and welfare of all assigned personnel, but also have a duty to report offences against military law and military codes to the appropriate authorities for investigation, consideration, adjudication and legal action. Many OSCE participating States have in place penalties for failing to investigate and report alleged abuse and harassment.<sup>653</sup>

### *External monitoring*

In addition to measures taken within the armed forces, external supervision by non-military bodies can play a fundamental role in ensuring respect for human rights within the barracks and in preventing abuse.

Parliaments, ombuds institutions and other independent bodies, such as the UN Special Rapporteur on torture or national preventive mechanisms (NPMs), often conduct investigations into the human rights situation within the armed forces and publish their findings in thematic or yearly reports. This oversight function is very important in spreading information and raising awareness of the issue among civil society and military personnel. Civil society organizations and the media may conduct similar investigations, often in a way that commands greater public confidence.

Furthermore, several OSCE participating States have established ombuds institutions for the armed forces. Ombuds institutions can support the chain of command and the military justice system to ensure that the rule of law is respected and to promote transparency and accountability in defence structures. They can also focus attention on any problems in military practice requiring corrective action (see "Chapter 19: Ombuds Institutions for the Armed Forces").

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**652** Including: Albania, Austria, Bosnia and Herzegovina, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Greece, Ireland, Latvia, Lithuania, Malta, Norway, Poland, Slovakia, Slovenia, Sweden, Switzerland and the United Kingdom.

**653** Albania, Austria, Bosnia and Herzegovina, Cyprus, the Czech Republic, Estonia, Finland, Greece, Latvia, Lithuania, Malta, Norway, Sweden and the United Kingdom. Source : ODHIR-DCAF 2018 questionnaire, qu. 43.

## Good Practices and Recommendations

In order to combat torture and other forms of ill-treatment or abuse and to ensure accountability and redress, states should consider the following recommendations:

- » During training, military personnel, and especially commanders, should be vetted and properly informed about their rights and about what constitutes torture or cruel, inhuman or degrading treatment or punishment and other forms of abuse, such as bullying. Training for officers should cover the appropriate treatment of personnel under their command, as well as of complaints procedures.
- » Where abuse is suspected or alleged by junior officers, it should be swiftly reported so that prompt and effective action can be taken. Armed Forces should consider making available different reporting channels both within and outside the chain of command. Commanders should use their position of leadership to promote a culture of mutual trust and respect and to prevent and punish cases of ill-treatment. The military as a whole should take a zero-tolerance approach to torture and other cruel, inhuman or degrading treatment or punishment, as well as to other forms of abuse, such as bullying.
- » Complaints mechanisms should be available for service personnel who have been subjected to such acts. All such complaints should be investigated and, if substantiated, should result in the punishment of the perpetrators.
- » Military legislation should:
  - » contain the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment, in accordance with international and national law;
  - » contain an explicit ban on unauthorized initiation practices;
  - » define ill-treatment, bullying, humiliation, degrading behaviour and any form of sexual violence and harassment as offences;
  - » include procedures for investigating complaints of torture or ill-treatment and all other forms of abuse, including sexual violence and harassment, and specify penalties that reflect the gravity of the offence; and
  - » make it an offence to fail to investigate or report allegations of torture or ill-treatment and all other forms of abuse, including bullying, sexual violence and harassment.
- » Specific measures should be taken to protect those armed forces personnel who are known to be psychologically vulnerable.
- » All cases of unexplained deaths in the armed forces should be investigated independently and impartially. The investigation should be prompt, impartial and effective, seeking to establish the circumstances and explore all avenues of inquiry, including any shortcomings in the responses by the officials involved, and should allow the effective participation of the next-of-kin.

- » Trials and prosecution of serious human rights violations, such as extrajudicial executions, enforced disappearances and torture, should be transferred to civilian courts. (For more on military justice systems, see “Chapter 18: Discipline and Military Justice”).
- » External bodies, including parliamentary committees, ombuds institutions, human rights commissions and civil society organizations, should be allowed to monitor how human rights are being upheld in the armed forces and provide relevant recommendations. To enhance transparency, ministries of defence should “open the doors” of the military to civil society and the media.

## Further reading

Irish Defence Forces, *Defence Forces New Entrants Information Handbook*, (Curagh Camp: Defence Forces Headquarters, Ireland, November 2006).

Camille Giffard and Polona Tepina, *The Torture Reporting Handbook: How to Document and Respond to Allegations of Torture within the International System for the Protection of Human Rights* (Colchester: University of Essex, 2nd edition, 2015), <https://www1.essex.ac.uk/hrc/documents/practice/torture-reporting-handbook-second-edition.pdf>.

David Harris, Michael O’Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 4th edition, 2018).

# Chapter 15: Working Conditions and Support for Veterans

## Introduction: Issues at Stake

This chapter explores good practices concerning the working conditions of armed forces personnel and the situation of personnel who have left the armed forces. It addresses the rights of veterans as a sub-group of former service personnel, acknowledging that, in some OSCE participating States, veterans can still be in service.

The “enjoyment of just and favourable conditions of work” forms part of a broad set of social and economic rights that include the right to work, to form or join unions, to equal opportunities, to an adequate standard of living and to the highest attainable standards of physical and mental health.<sup>654</sup> An important feature of civilian-military relations is how states recognize the service and sacrifices that armed forces personnel make for their country, as well as the care and support they and their families receive once they have left the military.<sup>655</sup>

In some OSCE participating States, the social and economic rights granted to armed forces personnel differ from those granted to other civil servants or to civilians.<sup>656</sup> This is because the military profession is subject to specific risks and demands that have an impact on the health and safety of service personnel. In peacetime, a substantial number of service personnel perform jobs that expose them to similar health and safety risks as those found in the private sector, such as guards, doctors, canteen personnel, engineers and computer specialists. A minority of military roles are subject to specific health and safety risks, including those of combat personnel, minesweepers and intelligence personnel. These risks are partly linked to the stress inherent in the military profession, and partly to exposure to physical, chemical and biological agents (e.g., contaminated exercise locations/deployment areas, radiation and noise).

Just and favourable conditions of work for armed forces personnel are relevant for a variety of reasons. First, adequate working conditions, such as effective health and safety policies, contribute to the prevention of accidents, sickness and casualties in the workplace. Second, upon ratification of the ICESCR,<sup>657</sup> OSCE participating States have a legal obligation to implement just and favourable working conditions “by all appropriate means”. Third, just and favourable conditions have a positive impact on work and life in the barracks. Fourth, they help to improve unit cohesion and operational effectiveness.

<sup>654</sup> ICESCR, *op. cit.*, note 16.

<sup>655</sup> Dandeker, *op. cit.*, note 599, pp. 161-177.

<sup>656</sup> Nolte, *op. cit.*, note 8, p. 97.

<sup>657</sup> Ratified by 54 of the 57 OSCE participating States - all but Andorra, the Holy See and the United States of America (the latter State has signed but not ratified the Covenant).

As a responsible employer, armed forces have a duty of care for their current and former employees. While on duty, particularly in a conflict or other operational environment, armed forces personnel often experience dangerous and life-threatening situations. Many veterans suffer from the consequences of their service even after they have left the armed forces, experiencing, for example, mental health problems such as post-traumatic stress disorder, physical health problems and disabilities. These problems do not only need to be treated to allow veterans to live in health and dignity, but also to avoid any potential negative impacts on their transition to civilian life (in particular, their ability to find employment in the civilian labour market).

In general, working conditions and support for veterans are not only important for the individuals concerned, but can greatly impact recruitment. By taking care of current and former employees, the armed forces can signal to current and future employees that they are a responsible – and more attractive – employer. On the other hand, negative publicity about the poor treatment of service personnel and veterans could deter potential recruits from enlisting in the armed forces.

Military unions and representative associations can play an important role in achieving just and favourable working conditions and providing support for veterans.<sup>658</sup> They are essential for developing a strategy to improve working conditions and care within the military. Military unions and representative associations act on behalf of soldiers to identify and raise awareness of existing problems and can assist with the adoption and implementation of legislation.<sup>659</sup>

The chapter will analyse relevant international human rights standards and will conclude by presenting good practices on working conditions and support for veterans.

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**658** See Chapters 14-19 for other mechanisms that play an important role in realizing just and favourable working conditions.

**659** See further “Chapter 7: Military Unions and Associations” and [www.euromil.org](http://www.euromil.org).

## International Human Rights Standards

### *Working conditions*

It is important to stress that social and economic rights differ from civil and political rights, in that they are “programmatic” rights or “positive” rights that oblige states to take measures to promote the realization of these rights.<sup>660</sup> Thus, the question arises as to which legal standard has been violated when economic, social and cultural rights are infringed. This does not imply that economic, social and cultural rights are non-enforceable. It means, rather, that “many states and many human rights systems have chosen not to enforce them through the judicial process but through other means”.<sup>661</sup>

In addition to the ICESCR, other relevant international standards include OSCE commitments, ILO conventions, the ESC of the Council of Europe<sup>662</sup> and relevant directives of the Council of the European Union.

The ICESCR covers a range of rights relevant to this chapter, including the right to:

- remuneration that provides workers with – at a minimum – fair wages and equal remuneration, as well as a decent standard of living for themselves and their families; safe and healthy working conditions; equal opportunities for everyone; and rest, leisure and a reasonable limitation of working hours, as well as holidays (Article 7);
- social security, including social insurance (Article 9);
- protection and assistance for families, the provision of childcare and special measures to protect and assist children and young people (Article 10);
- an adequate standard of living for everyone and their family, including adequate food, clothing and housing (Article 11);
- the highest attainable standard of physical and mental health (Article 12); and
- education (Article 13).<sup>663</sup>

Except for the right to join or form a union (Article 8), the ICESCR does not limit the enjoyment of these rights in the interest of national security or for members of the armed forces.<sup>664</sup> The ESC also includes many relevant social and economic rights discussed in this chapter, including the right to.<sup>665</sup>

**660** UN Committee on Economic, Social and Cultural Rights, “General comment No. 9: The Domestic Application of the Covenant”, E/C.12/1998/24, 3 December 1998, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1998%2f24&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1998%2f24&Lang=en)

**661** E. Nii Ashie Kotey, “Some Fallacies About Rights: of Indivisibility, Priorities and Justiciability”, in *Report of a Regional Seminar on Economic, Social and Cultural Rights* (Geneva: International Commission of Jurists, 1998).

**662** Council of Europe Recommendation (2010)4 also contains elements concerning the working conditions of service personnel. See: Council of Europe, Recommendation CM/Rec(2010)4, *op. cit.*, note 26.

**663** ICESCR, *op. cit.*, note 16.

**664** See “Chapter 7: Military Unions and Associations”, in particular Box 7.9.

**665** Council of Europe, European Social Charter, *op. cit.*, note 268.



- just conditions of work (Article 1);
- safe and healthy working conditions (Article 3);
- fair remuneration (Article 4);
- protection of employed women, especially in the case of maternity (Article 8);
- vocational guidance and training (Articles 9 and 10);
- protection of health (Article 11);
- social security (Article 12);
- social and medical assistance (Article 13); and
- the right to benefit from social welfare services (Article 14).

The ESC stipulates that these rights can be limited, provided that limitations are prescribed by law, necessary in a democratic society and are in the interest of, *inter alia*, the protection of national security (Article 31).

The abovementioned rights have been reaffirmed in several ILO conventions covering a broad range of issues, including equality of opportunity and treatment; employment security; wages; working time, hours of work, weekly rest and paid leave; maternity protection; and occupational safety and health.<sup>666</sup>

While these treaties and covenants are general in nature, the European Union has adopted a range of specific directives on working conditions. These include minimum requirements for health and safety at the workplace, which are guided by a policy of prevention, as well as requirements on working time.<sup>667</sup> Both the Framework Directive on Safety and Health at Work and the Working Time Directive make exceptions that are relevant to the armed forces. The European Commission has established that, based on the case law of the European Court of Justice, the Working Time Directive is applicable to the armed forces. Moreover, the exclusion of workers – including service personnel – from the scope of the Directive must be interpreted restrictively and take into account the nature of the tasks performed rather than the sector of employment.<sup>668</sup>

OSCE participating States have also expressed their commitment to ensuring acceptable working conditions and employment rights for citizens (see Box 15.1).

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**666** For the full list of ILO Conventions and Recommendations, see: "Conventions and Recommendations", ILO, <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>.

**667** See Council Directive 89/391/EEC, Council Directive 89/654/EEC, Directive 2009/104/EC of the European Parliament and of Council, Council Directive 89/655/EEC, Council Directive 89/656/EEC, Council Directive 90/269/EEC, Council Directive 90/270/EEC and Directive 2003/88/EC of the European Parliament and of Council, available at: EUR-Lex, <https://eur-lex.europa.eu/homepage.html>.

**668** European Commission Communication on Directive 2003/88/EC, *op. cit.*, note 101.

### Box 15.1: OSCE commitments on economic and social rights

#### Excerpts from the 1989 Vienna Document:<sup>669</sup>

12. [The participating States] recognize that [...] economic, social [...] and other rights and freedoms are all of paramount importance and must be fully realized by all appropriate means.

13. In this context they will

13.1. develop their laws, regulations and policies in the field of [...] economic, social [...] and other human rights and fundamental freedoms and put them into practice in order to guarantee the effective exercise of these rights and freedoms;

13.2. consider acceding to the [...] International Covenant on Economic, Social and Cultural Rights [...] and other relevant international instruments, if they have not yet done so; [...]  
[...]

21. The participating States will ensure that the exercise of the above mentioned rights will not be subject to any restrictions except those which are provided by law and are consistent with their obligations under international law, in particular the International Covenant on Civil and Political Rights, and with their international commitments, in particular the Universal Declaration of Human Rights. These restrictions have the character of exceptions. The participating States will ensure that these restrictions are not abused and are not applied in an arbitrary manner, but in such a way that the effective exercise of these rights is ensured.

The **OSCE Code of Conduct on Politico-Military Aspects of Security** commits participating States to ensure that military, paramilitary and security service personnel will be able to enjoy and exercise their human rights and fundamental freedoms, including economic and social rights, "in conformity with relevant constitutional and legal provisions and with the requirements of service"<sup>670</sup>

## Veterans

Veterans are entitled to the same social and economic rights as other citizens, and OSCE commitments also apply to veterans. The right to a fair trial is another important right in this context. If veterans have disputes with their government over their treatment, they should have access to redress through the justice system. However, there is no internationally agreed definition of a veteran (see Box 15.5). How states define veterans and the benefits veterans are granted is discussed later in this chapter.

<sup>669</sup> OSCE, Vienna 1989, *op. cit.*, note 139.

<sup>670</sup> OSCE Code of Conduct, *op. cit.*, note 13, para. 32.

# Different Approaches

## Work schedules

Traditionally, many countries do not schedule a set number of working hours for armed forces personnel but, instead, expect service personnel to be permanently available.<sup>671</sup> However, the extent to which states adhere to this practice varies. In Europe, armed forces personnel are expected to work between 36 and 50 hours per week.<sup>672</sup> Some countries require similar working hours as for the civil service. In the majority of OSCE participating States, armed forces personnel are entitled to periodic holidays, while some states also grant post-mission leave.<sup>673</sup>

### Box 15.2: Work schedules of service personnel<sup>674</sup>

#### Countries where work schedules are based on permanent availability

Bosnia and Herzegovina, Cyprus, Denmark, Ireland, Latvia, Lithuania, Poland, Romania, the United Kingdom

#### Countries where service personnel work a set number of hours

#### Average number of work hours per week

Albania	40
Austria	41
Azerbaijan	41
Czech Republic	40
Estonia	40
Finland	35.75
Germany	41
Greece	40
Italy	36
Malta	47
Montenegro	40
Norway	37.5
Slovakia	40
Slovenia	40
Sweden	40
Switzerland	According to service needs within the framework of adequate shift organizations.

<sup>671</sup> "EUROMIL Position: Working Time in the Armed Forces", EUROMIL, 4 June 2010, [http://euromil.org/wp-content/uploads/2015/04/1006\\_WTD\\_EUROMIL\\_Position.pdf](http://euromil.org/wp-content/uploads/2015/04/1006_WTD_EUROMIL_Position.pdf).

<sup>672</sup> Nolte, *op. cit.*, note 8, pp. 101-103.

<sup>673</sup> *Ibid.*, p. 104.

<sup>674</sup> Responses to the ODIHR-DCAF 2018 questionnaire, qu. 46

## Remuneration

Regulations concerning salary and pensions for armed forces personnel vary from country to country. In particular, differences arise in terms of the authority that decides on remuneration, special incentives and allowances, safeguards for the timely payment of remuneration, dispute/complaint mechanisms and how the salaries of service personnel compare to those of private and public sector employees performing comparable roles.

In some countries, in addition to a regular salary, armed forces personnel are eligible for special incentives and pay that recognize the arduous, hazardous and specific duties they undertake.

Specific measures, such as legislative statutes or service instructions, are usually in place to ensure that salary, allowances and pensions are paid on time.<sup>675</sup> Moreover, a reliable IT-based salary/pensions system, ensures correct and timely payments to armed forces personnel.

In case of disputes concerning salary, different procedures exist for seeking redress. For example, service personnel in Spain can attempt to resolve a dispute by reporting the case to the administrative branch, before addressing a military court. In Germany, personnel can immediately appeal to a military court, while in Poland higher-level bodies may be informed before the case is taken up by an administrative court. In other states, such as Ireland, the individual should first turn to employee representatives and then, if the problem persists, bring the case to an administrative court.<sup>676</sup>

Among participating States, differences exist between the salaries/pensions of service personnel and the salaries/pensions for civilian occupations requiring similar skills and experience (see Box 15.3). States that are also members of the ILO may wish to consider reviewing these to be more aligned with the principle of equal pay for work of equal value, as established by the ILO Convention 100.

Compared to those for similar civilian occupations, participating States reported that the salaries, allowances, pensions, compensations and other benefits of armed forces personnel are:

### Box 15.3: Salaries of armed forces personnel compared with other sectors

**lower** in Albania, Bosnia and Herzegovina, Estonia, Ireland, North Macedonia, Slovakia, Slovenia and Spain;

**higher** in Azerbaijan, the Czech Republic, Latvia, Lithuania, Montenegro and Poland; and

<sup>675</sup> "EUROMIL Position on Military Pensions", EUROMIL, 20 April 2017, [http://euromil.org/wp-content/uploads/2017/04/1704\\_EUROMIL\\_Position\\_Pensions.pdf](http://euromil.org/wp-content/uploads/2017/04/1704_EUROMIL_Position_Pensions.pdf).

<sup>676</sup> Responses to the EUROMIL 2018 Survey.

**approximately the same** in Austria, Finland, Germany, Norway, Romania, Sweden, Switzerland and the United Kingdom.<sup>677</sup>

## ***Health and safety at work***

In most OSCE participating States, armed forces personnel are entitled to full healthcare benefits. In this regard, two main approaches exist. In some states, service personnel are provided with specific healthcare insurance (as is the case in Azerbaijan, the Czech Republic, Denmark, Finland and Poland). In others, there is no separate healthcare system for service personnel, who rely on civilian or national healthcare insurance systems (as is the case in Albania, Austria, Bosnia and Herzegovina, Cyprus, Estonia, Greece, Italy, Lithuania, Montenegro, Slovakia, Slovenia and Sweden).<sup>678</sup>

Armed forces are responsible for providing medical care to service personnel deployed on international missions. Once repatriated, sick and/or wounded personnel can be transferred to the military or public healthcare system. In addition, armed forces are required to provide on-site medical care to service personnel in the barracks and during military exercises.

There are diverging rules in OSCE participating States about whether spouses, children and other family members may enjoy the same healthcare entitlements as armed forces personnel. In some states, the families of armed forces personnel are entitled to full free medical care. In others, families are entitled to medical support only when accompanying service personnel abroad. There are also states where the families of armed forces personnel are not entitled to any free healthcare.

Almost all OSCE participating States have specific policies in place in case of the injury or death on duty of armed forces personnel. In case of death, disability or injury, the family members and relatives of armed forces personnel in these states are entitled to financial benefits, disability compensation, pension rights and the payment of damages.

### **Box 15.4: Policies dealing with the injuries and death of armed forces personnel while on duty<sup>679</sup>**

#### **Bosnia and Herzegovina**

Service personnel who are injured while on duty are entitled to the reimbursement of treatment costs and a full salary. Service personnel are not insured, but they do have health insurance. Deminers are insured by the day during the execution of demining duties. In the event of the death of a service personnel while on duty, the family has the right to be reimbursed for the funeral costs and to receive six months of the salary of

<sup>677</sup> Responses to the ODIHR-DCAF 2018 questionnaire, qu. 49; and the EUROMIL 2018 Survey.

<sup>678</sup> Responses to the ODIHR-DCAF 2018 questionnaire, qu. 51.

<sup>679</sup> Responses to the ODIHR-DCAF 2018 questionnaire, qu. 52.

the deceased or a sum equal to the average six-month salary in Bosnia and Herzegovina (whichever is greater).

### **The Czech Republic**

In case of the death of service personnel while on duty, the Ministry of Defence normally provides for the transportation of the deceased, a funeral with military honours, and psychological assistance and financial compensation for the family.

### **Germany**

Germany's Federal Ministry of Defence has a Commissioner for Surviving Dependents' Affairs, which provides round-the-clock personal assistance to the dependents of service personnel killed or injured on duty. The Commissioner addresses dependents' concerns and ensures they receive information, financial support, counselling and care, as well as support in commemorating the deceased. Military service benefits and accident-related benefits and pensions for armed forces members vary according to their career status, such as whether they are career service members, temporary-career volunteers, civil servants or regular employees.

In general, states have specific laws on working conditions for service personnel. In the majority of OSCE participating States, national laws and regulations on civilian working conditions also apply to service personnel. In other states, there are specific regulations governing occupational/environmental health and safety on regular military duty, although these mainly follow laws and regulations on civilian working conditions.<sup>680</sup> In Poland, for example, there are no legal provisions for ensuring safe and healthy working conditions for service personnel.<sup>681</sup>

It is important that national parliaments, relevant ministries and associations of armed forces personnel work together to develop appropriate standards on the working conditions of service personnel. Where disagreements arise in the implementation of such standards, it should be possible for armed forces personnel to turn to independent arbiters (such as courts, tribunals, ombuds institutions, committees and commissioners). These independent arbiters should have full powers to investigate or mediate cases, including access to military premises, opportunities to question armed forces personnel and access to classified information, as well as the authority to make recommendations, where necessary.

**680** Namely, Bosnia and Herzegovina, the Czech Republic, Finland, Lithuania, Slovakia and Switzerland.

**681** Responses to the ODIHR-DCAF 2018 questionnaire, qu. 50.

## Family life

The specific nature of military life – including life on military bases, international deployments, and frequent relocations – can have a significant impact on the family members of armed forces personnel. Military institutions in many OSCE participating States increasingly recognize the importance of achieving a good balance between private and military life for service members, acknowledging the influence that private life can have on military performance.

In this context, the majority of OSCE participating States have introduced legislation on maternity, paternity and care leave for service personnel. Maternity leave is guaranteed for women service members in at least 29 states,<sup>682</sup> while at least 28 states provide for paternity leave.<sup>683</sup> In a further 22 participating States, both men and women are entitled to leave to take care of close relations (care leave).<sup>684</sup> The length and the conditions of such leave varies. More information on parental leave is provided in “Chapter 11: Women in the Armed Forces”.

Furthermore, many armed forces recognize the importance of supporting the family of service personnel, including via family relocation programmes and programmes to assist the families of personnel deployed abroad. This often includes pre-deployment preparations and support to facilitate the reintegration of service personnel and their families following a military mission.

In some states, specific institutions within the armed forces are responsible for providing support to service personnel and their families. In France, for example, an organization called Army Social Welfare organizes social events to help service personnel with any problems and to improve their quality of life. It can also grant financial aid to armed forces personnel in need. Furthermore, it manages the Ministry of Defence budget for holiday houses and apartments in mountain and sea resorts.<sup>685</sup>

<sup>682</sup> Responses to the ODIHR-DCAF 2018 questionnaire, qu. 53; and the EUROMIL 2018 survey. The states that provide maternity leave are: Albania, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Malta, Montenegro, North Macedonia, Norway, Poland, Portugal, Romania, Spain, Slovakia, Slovenia, Sweden, Switzerland and the United Kingdom.

<sup>683</sup> *Ibid.* The states that provide paternity leave are: Albania, Austria, Belgium, Bosnia and Herzegovina, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Malta, Montenegro, North Macedonia, Norway, Poland, Portugal, Romania, Spain, Slovakia, Slovenia, Sweden, Switzerland and the United Kingdom. In *Konstantin Markin v. Russia*, the European Court of Human Rights found that the Russian military authorities had violated Article 14 of the ECHR (non-discrimination) in conjunction with Article 8 (right to family life), when they denied Markin – a service personnel – three years’ paternity leave to care for his three children, despite the fact that he was the children’s sole care giver. See: *Konstantin Markin v. Russia*, *op. cit.*, note 47.

<sup>684</sup> *Ibid.* The states that provide care leave are Albania, Austria, Azerbaijan, the Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Malta, Montenegro, Norway, Poland, Romania, Slovakia, Slovenia, Sweden and the United Kingdom.

<sup>685</sup> Responses to the ODIHR-DCAF 2008 questionnaire, qu. 61, p. 128.

## *Transition from military to civilian life*

Some armed forces increasingly offer short-term, non-career positions. Consequently, growing numbers of middle-aged personnel must transition from military to civilian life. Ensuring an effective transition is important for society as a whole (as it reduces unemployment), the armed forces (as part of being an attractive employer) and, of course, for former service personnel. Most OSCE participating States have policies in place to support the transition of personnel from military to civilian life. It is important, however, that such policies not only exist, but that they are also effectively implemented. For example, the German armed forces' Vocational Promotion Service supports personnel before the end of their military careers by providing advice, funding vocational training and establishing contacts with firms in the civilian labour market. The available measures depend on the amount of time served in the armed forces.<sup>686</sup>

### *Who is a veteran?*

For historical and cultural reasons, the definition of a "veteran" varies among OSCE participating States (see Box 15.5). This has implications for service personnel in terms of the benefits they are entitled to receive after leaving the armed forces. The definition of a veteran is usually determined by: (a) whether personnel served on active duty or as reserve forces; and (b) whether personnel have conflict experience. Generally speaking, states that adopt a more exclusive definition provide more generous benefits to their veterans.<sup>687</sup>

#### **Box 15.5: Definitions of a veteran in selected OSCE participating States<sup>688</sup>**

**Czech Republic:** The status of veterans is defined by law. A "war veteran" is a Czech citizen who has served as a member of the Armed Forces or civilian employee of the Ministry of Defence in a foreign mission for more than 90 days in a place of conflict, or for more than 360 days in non-conflict locations.

**Denmark:** The Veteran Policy defines a veteran as someone who has been deployed – as an individual or in a unit – in international operations for more than 28 consecutive days following a decision of the Danish Parliament, the Danish Government or a minister.

**Estonia:** A veteran is defined in policy as an Estonian citizen who: 1) has defended the state within the Estonian Defence Forces (EDF); 2) has participated in an international military operation or collective self-defence operation within the EDF; or 3) has obtained

<sup>686</sup> For more information, see: "Der Berufsförderungsdienst der Bundeswehr [The Vocational Promotion Service of the Bundeswehr]", Bundeswehr website, <http://bfd.bundeswehr.de>.

<sup>687</sup> Christopher Dandeker, Simon Wessely, Amy Iversen, and John Ross, "What's in a Name? Defining and Caring for 'Veterans': The United Kingdom in International Perspective", *Armed Forces & Society*, Vol. 32, No. 2, January 2006, pp. 161-177.

<sup>688</sup> Responses to the ODIHR-DCAF 2018 questionnaire.



a permanent disability while on duty in the EDF (at home or abroad).

**Finland:** Veterans are those who fought in World War II. They receive pensions and rehabilitation support. Those who have performed crisis management tasks also have veteran status. They receive the same benefits as service personnel if they are injured or killed on duty. Currently, there are around 15,000 former service personnel and around 45,000 veterans who have participated in crisis management operations.

**Latvia:** A veteran certificate is provided to those who have participated at least once in an international operation of the national Armed Forces.

**Norway:** A veteran is someone who has participated in international operations.

**Romania:** A veteran is defined as someone who took part in World War I or II, or who was deployed as a soldier in a UN mission. The Ministry of National Defence can grant veteran status on the basis of the relevant documentation.

**Sweden:** There is no legal definition of a veteran. In the armed forces, a veteran is defined as someone who has been employed by the armed forces and has served as military or civilian personnel in a national operation or an international mission abroad (such as the UN, European Union or the OSCE).

**The United Kingdom:** A veteran is someone who has served for at least one day in the Armed Forces. There are an estimated 2.56 million veterans in the United Kingdom.

## ***Different approaches to defining veterans***

### ***All former service personnel are veterans***

Some OSCE participating States take a broad approach and define a veteran as anyone who has served in the armed forces, regardless of whether they were deployed in conflict zones. To benefit from special policies, however, veterans must usually meet specific criteria, such as having a disability or illness, or having served in a conflict or conflict conditions. In the United States, for example, all former service personnel are considered veterans, provided that they served for at least 90 days and were honourably discharged. In addition, service personnel who have served in conflict conditions, even if only for one day, are recognized as veterans of wartime service.<sup>689</sup>

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<sup>689</sup> J.M.P Weerts, "Het Nederlands veteranenbeleid in internationaal perspectief [Dutch Veterans Policy in an International Perspective]", *Militaire Spectator*, Vol. 169, No. 5, 2000, pp. 245-253.

## *Former service personnel with active service deployment are veterans*

In other states, only former armed forces personnel who have served in conflicts or conflict conditions (such as peacekeeping operations) qualify as veterans. In Poland, for example, there are two legal acts to distinguish “combatants” from “veterans”. According to the 1991 “Act on Combatants and the Victims of War and Post-War Repressions”, combatants include those who participated in wars, armed operations and national uprisings for the sovereignty and independence of the Republic of Poland. This act does, however, not reflect the situation of those who participated in overseas peacekeeping missions and military operations from 1953 onwards. Thus, in 2012, a separate act was adopted that defines veterans as military and civilian personnel who have participated in military operations abroad for no less than 60 days. Those who meet these requirements can obtain the status of a veteran or an injured veteran.<sup>690</sup>

## *States with fragmented legislation*

In some states, legislation on the definition of a veteran does not adequately address the situation of former armed forces personnel today. For example, in Bulgaria, a veteran is defined by law as “a person who, as a military official, has taken a direct part in combat operations during a war led by the Bulgarian State in defence of the national interests and the territorial integrity of Bulgaria.”<sup>691</sup> This definition includes those who fought in the two world wars, but not personnel deployed in more recent missions or operations such as Operation Althea (formerly the European Union Force Bosnia and Herzegovina (EUFOR)). In such states, legislative changes – such as those introduced in Poland – are needed to clarify the status of former service personnel.

## *No formal definition of veterans*

Some states, including Austria, Germany and Lithuania, lack a formal definition of a veteran altogether. In 2013, the German Minister of Defence, Thomas de Maizière, proposed defining veterans as personnel who have been honourably discharged from active service in the Bundeswehr and who were deployed abroad. The definition was never made legally binding, however, and the question remains as to who is considered a veteran and to which rights and obligations they are entitled.<sup>692</sup>

**690** “Ustawa o kombatantach oraz niektórych osobach będących ofiarami represji wojennych okresu powojennego [Act on Combatants and Persons Who Are Victims of War and Post-War Repressions]”, The Chancellery of the Polish Sejm, 24 January 1991, <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19910170075/U/D19910075Lj.pdf>.

**691** “акон за ветераните от войните на република България [Law for the War Veterans of the Republic of Bulgaria]”, Lex.bg, 2016, <https://www.lex.bg/bg/laws/ldoc/2134454784>.

**692** “Einsatzrückkehrer und Veteranen [Mission Returners and Veterans]”, Bundeszentrale für politische Bildung Bundeszentrale, <http://www.bpb.de/politik/grundfragen/deutsche-verteidigungspolitik/220648/veteranen>.

## Caring for veterans

OSCE participating States have developed different approaches to determining the benefits granted to veterans. In many states, different categories of veterans receive different kinds of support, depending on the type of service they performed and whether or not they were disabled while on duty, among other factors.

Homeless veterans are a particularly vulnerable group and require special attention. Systematic research and media reports show that a higher than average proportion of veterans are homeless. Many other veterans are considered near homeless or at risk of becoming homeless because of poverty, lack of support from family and friends, and substandard, temporary and overcrowded housing.<sup>693</sup> Special attention should also be given to the risks of domestic violence and suicide among former service personnel.

Concerning the provision of care to veterans, states have developed a variety of models and strategies to reach out to them.<sup>694</sup> Those states that grant veteran status to all former service personnel, in particular those that suffered a high number of casualties during the two world wars, have dedicated ministries for supporting veterans, such as Veterans Affairs Canada and the United States Department of Veterans Affairs (VA). The VA, for example, is responsible for all matters concerning veterans, including their transition to civilian life and their healthcare and benefits.<sup>695</sup>

In other states, the provision of care for veterans is a shared responsibility of the ministry of defence and other ministries, while special institutes, foundations or agencies implement the policy on veterans. A good example of this is the Netherlands, where the 2012 Veterans Law provided a legal definition and established the support available to veterans and their families. The Dutch Veteran Institute and the Dutch National Care System for Veterans work in close co-operation to provide medical and social care for veterans, while at the same time undertaking academic research and initiating public remembrance activities.<sup>696</sup>

In some states, such as Sweden, care for veterans is the responsibility of a ministry dealing with social affairs and health. Such states do not provide veterans with special or exclusive care but, rather, strive to meet their needs through general healthcare and social care systems. In Sweden, however, the armed forces realized that veterans have specific psychological needs, and began offering veterans the services of private psychiatrists. In

<sup>693</sup> Richard Tessler, Robert Rosenheck and Gail Gamache, "Homeless Veterans of the All-Volunteer Force: A Social Selection Perspective", *Armed Forces & Society*, Vol. 29, No. 4, Summer 2003, pp. 509-524; "Homeless Veterans", United States Department of Veterans Affairs, <http://www1.va.gov/homeless>; Dandeker et al., *op. cit.*, note 690, pp. 166-167.

<sup>694</sup> Weerts, *op. cit.*, note 693.

<sup>695</sup> "Access and Manage Your VA benefits and Health Care", United States Department of Veteran Affairs, <https://www.va.gov/>.

<sup>696</sup> See: Netherlands Veterans Institute, <https://www.veteraneninstituut.nl/>; and Dutch National Care System for Veterans, <http://www.lzv-groep.nl/>.

addition, a Department of Veteran Affairs was set up within the General Headquarter of the Swedish Armed Forces to co-ordinate care, social and memorial activities for veterans, as well as to conduct scientific research. Such states often have a dedicated association that represents the interests of veterans and provides its members with support and some financial assistance for volunteer activities.

Veterans associations and not-for-profit private organizations exist in states across the OSCE region. The World Veterans Federation (WVF), an international non-governmental organization, comprises 172 veterans' associations in 121 countries, representing some 45 million veterans worldwide.

The WVF brings together the veterans and victims of conflicts that have occurred since World War II, including the veterans of peacekeeping operations.<sup>697</sup> In 2003, at its 24th General Assembly, in Johannesburg, South Africa, the WVF adopted a Declaration on the Rights of War Veterans and Victims of War (see Box 15.7).

#### **Box 15.7: Declaration of the World Veterans Federation on the rights of war veterans and victims of war**

The World Veterans Federation:

[...]

6. Calls upon the United Nations Member States to undertake urgent measures providing for:

- improvement and updating of legislation concerning war veterans and victims of war;
- social security, medical care and other relevant benefits;
- alleviation of hardships of psycho-social consequences of war and integration of war veterans and victims of war into society;
- adequate care for former personnel of peace-keeping and similar operations, before, during and after the mission.

An interesting example is provided by Denmark, where care for veterans is a shared responsibility of the state, its regions and municipalities, together with civil society organizations, the business community, foundations and individual citizens. Denmark's 2010 Veteran Policy was adjusted in 2016, following a broad evaluation of the existing policy.<sup>698</sup>

<sup>697</sup> The World Veterans Federation homepage, <http://www.wvf-fmac.org/>.

<sup>698</sup> "The Veteran Policy of Denmark", Danish Ministry of Defence, <http://www.fmn.dk/eng/allabout/Pages/the-veteran-policy-of-denmark.aspx>.

There are three main types of benefits and support provided for veterans by states:

1. Material or financial support for veterans, such as disability pensions and free or subsidized use of public transportation, healthcare, etc;
2. Non-material support, such as counselling and other mental health care. Such support is crucial, as many veterans experience post-traumatic stress disorder (PTSD) following deployment in conflict zones. PTSD sufferers exhibit various symptoms, including intense anxiety, intrusive memories and flashbacks, and they may be more prone to alcoholism, drug abuse and depression. PTSD requires care not only immediately following deployment, but also needs to be addressed before and during deployment; and
3. Commemorative and social activities to acknowledge and foster respect in society of the sacrifices made by veterans. These can include maintaining cemeteries and organizing and supporting commemorative events on national memorial days.

## Good Practices and Recommendations

- » Legislation concerning the armed forces should be consistent to the highest extent possible with economic and social rights and international labour standards, and should take into account the specific risks and demands of the military profession and its impact on health and safety of service personnel.
- » Legislative provisions and regulations on working conditions should be implemented in practice. The armed forces and responsible ministries should have in place all necessary measures to ensure that the working conditions of service personnel correspond to national law and international obligations.
- » Administrative measures should be in place to ensure that salaries, pensions and allowances are paid on time.
- » National parliaments, relevant ministries and representative associations of armed forces personnel should engage in social dialogue on working conditions, including to develop appropriate standards on issues such as salaries, allowances, pensions, working time, health, safety at work and issues related to achieving a balance between private/family life and working life.
- » Where disagreements related to working conditions arise, service personnel should be able to turn to independent arbiters with the powers to investigate such cases and provide recommendations, such as courts, tribunals, ombuds institutions, committees and commissioners. These independent arbiters should have full powers to investigate or mediate cases, including access to military premises, opportunities to question armed forces personnel and access to classified information, and they should have the authority to make recommendations wherever necessary.

### *Health, Safety and Medical care:*

- » Safety and health policies and relevant standard operating procedures should be developed and implemented to eliminate, mitigate and minimize risks and hazards encountered in the military profession.
- » Service personnel should be adequately trained on matters of physical and mental health and safety.
- » Ministries of defence should provide medical and psychological care to armed forces personnel in the barracks and during military operations and exercises. Medical care should respond to different health needs of women and men.
- » Armed forces should have a programme in place to support personnel with young children, including parental leave, childcare and preschool programmes and other benefits.
- » In case of injury or death on duty, the authorities should provide adequate health-care and benefits to armed forces personnel and their partners/families.
- » Armed forces should organize programmes to assist the families of service personnel before, during and after deployments abroad. Tailored to the needs of the personnel, this may include educational and psycho-social services and provisions to support

different caretaking responsibilities. All the above should be made available without any discrimination based on sex, gender, marital or other status of the parent.

### ***Transition to civilian life:***

- » Special support and job placement programmes should be in place to support former service members' transitions to the civilian labour market.

### ***Support for veterans:***

- » Policies on the status of veterans should be included in legislation and in line with international obligations, including OSCE commitments.
- » Veterans policies should serve to: (1) define veterans; (2) establish effective communication between veterans and care-providing agencies; and (3) ensure the provision of effective care that meets the needs of veterans.
- » All former service personnel who have participated in conflict or conflict conditions should be included within the definition of *veteran*.
- » Defence agencies should co-ordinate the development, implementation and evaluation of veterans' policy with veterans' organizations/associations, as well as with other ministries and local government agencies.
- » Veterans belonging to vulnerable groups in society (such as homeless and incarcerated veterans) should be afforded special attention. Special attention is also needed with regard to intimate partner violence and with regard to mental health and the risk of suicide.
- » Veterans should be provided with benefits packages that include, for example, rehabilitation programmes, financial support and advice, comprehensive healthcare/health insurance covering both physical and mental health care, and disability benefits, as well as other benefits in case of death.
- » Veterans policies and/or care providers should not discriminate against veterans on grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

## **Further reading**

Council of Europe Committee of Ministers, Recommendation CM/Rec(2010)4 of the Committee of Ministers to Member States on Human Rights of Members of the Armed Forces, 24 February 2010, [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805cf8ef](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf8ef).

OSCE, "Code of Conduct on Politico-Military Aspects of Security", 3 December 1994, <https://www.osce.org/fsc/41355>.

## *SECTION V*

# **— PROMOTING AND ENFORCING COMPLIANCE WITH HUMAN RIGHTS**



## Chapter 16: Human Rights Education

### Introduction: Issues at Stake

This chapter discusses various methods that are used to educate armed forces personnel about human rights and fundamental freedoms. Human rights education is valuable for recruits and service personnel at all stages of their military careers. Officers have a special responsibility for cultivating an ethos in which human rights are respected. In addition to training, this chapter presents other means of communicating the importance of human rights, such as through professional codes of conduct, ethical guidelines and the involvement of military colleges.

Human rights education means learning about human rights standards as encoded into international conventions and national legislation, understanding the principles<sup>699</sup> of human rights and the underlying concept of human dignity, being aware of the obligations of the State,<sup>700</sup> understanding the conditions for limiting rights<sup>701</sup> and being able to translate human rights in the professional and private context (a human rights-based approach).

Training programmes form an important part of the induction and development of armed forces personnel. In addition to separate courses on human rights, the subject of human rights should be mainstreamed into training programmes on codes of conduct. In the human rights context, mainstreaming entails improving, developing and evaluating policy process so that a human rights perspective is incorporated into all policies at all levels and at all stages. Human rights mainstreaming in such training programmes provides an opportunity to promote shared values, a common vision and cohesion among service personnel. For this reason, it is important that the contents and quality of training programmes be monitored by qualified individuals.

Training courses can introduce and sensitize service personnel to the human rights discussed in this compendium. By internalizing the values of human rights, armed forces members will be better able to take a human rights-based approach to their work.

In countries that have experienced inter-communal conflict or violence, training service personnel on respect for human rights, democratic values and international standards can facilitate post-conflict reconciliation and recovery. In more established democracies, human rights education is a means to combat intolerance and discrimination and to strengthen democracy. This is especially important in view of the changing context in which today's armed forces operate, including peacekeeping and multilateral missions.

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**699** Universality, inalienability, interdependence, non-discrimination, participation and accountability.

**700** To respect, protect and fulfill human rights.

**701** "Limitations Permitted by Human Rights Law", UNODC website, <https://www.unodc.org/e4j/en/terrorism/module-7/key-issues/limitations-permitted-by-human-rights-law.html>.

Human rights education can also play a crucial role in combating bullying and mistreatment in the armed forces, including as part of initiation rituals for recruits. Where such rituals aim to promote a sense of belonging through the mistreatment and humiliation of recruits, human rights education can help foster a positive shared identity based on respect, inclusion and human dignity.

Specialized training courses can also be organized for officers on the human rights issues discussed in this compendium, including on the observance of religion or belief ("Chapter 9: Religion in the Armed Forces"), ethnic and linguistic minorities ("Chapter 10: Ethnic, Racial and Linguistic Minorities in the Armed Forces"), sexual orientation and gender identities ("Chapter 12: LGBTI Members of the Armed Forces") and preventing mistreatment ("Chapter 14: Preventing Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Other Forms of Abuse of Armed Forces Personnel"). Such training programmes can strengthen officers' understanding of particular human rights issues and risks, including those related to specific groups of armed forces personnel.

## International Human Rights Standards

International legal instruments have recognized the importance of education and training in promoting respect for human rights. Indeed, the UN General Assembly views human rights education itself as a human right. According to the UN Declaration on Human Rights Education and Training:

*"Human rights education and training comprises all educational, training, information and learning activities aimed at promoting universal respect for and observance of all human rights and fundamental freedoms and thus contributing [...] to the prevention of human rights violations and abuses by providing persons with knowledge, skills and understanding and developing their attitudes and behaviours, to empower them to contribute to the building and promotion of a universal culture of human rights."*<sup>702</sup>

Moreover, paragraph 4 of Article 7 of the abovementioned Declaration requires that States Parties provide human rights education to military personnel. Other relevant instruments include Article 13.1 of the ICESCR, which recognizes the right to education aimed at strengthening respect for human rights, and Article 10(c) of CEDAW, which places education and training at the centre of combating gender stereotypes. The same is true of Article 7 of the ICERD (see Box 16.1).

<sup>702</sup> UN General Assembly, "United Nations Declaration on Human Rights Education and Training", A/RES/66/137, 19 December 2011, <https://undocs.org/A/RES/66/137>.

### **Box 16.1: Relevant international legal instruments**

#### **Article 13.1 of the ICESCR:**

The States Parties to the present Covenant recognize the right of everyone to education. They agree that education [...] shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

#### **Article 7 of the ICERD:**

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnic groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

#### **Article 7.4 of the UN Declaration on Human Rights Education and Training:**

States, and where applicable relevant governmental authorities, should ensure adequate training in human rights and, where appropriate, international humanitarian law and international criminal law, of State officials, civil servants, judges, law enforcement officials and military personnel [...].

Regional intergovernmental organizations are also active in the field of human rights education and training. Education plays a key role in promoting the core values of the Council of Europe, including democracy, human rights and the rule of law, as well as in preventing human rights violations and combating violence, racism, extremism, xenophobia, discrimination and intolerance. In 2010, the Council of Europe's 47 member states adopted a Charter on Education for Democratic Citizenship and Human Rights Education.<sup>703</sup> The Charter was preceded by several recommendations for the promotion of human rights and/or democracy education.

OSCE participating States have acknowledged the importance of human rights education in combating intolerance and discrimination and have committed themselves to promote human rights education to combat violence and hate crimes, including through the Internet.<sup>704</sup> Participating States have also specifically recognized the importance of human

<sup>703</sup> Council of Europe, "Charter on Education for Democratic Citizenship and Human Rights Education", <https://www.coe.int/en/web/edc/charter-on-education-for-democratic-citizenship-and-human-rights-education>.

<sup>704</sup> OSCE Ministerial Council, Decision No. 10/07, "Tolerance and Non-discrimination: Promoting Mutual Respect and Understanding", *op. cit.*, note 339; and OSCE Ministerial Council, Decision No. 13/06, "Combating Intol-

rights education for the armed forces, and committed themselves to:

*"encourage their competent authorities for educational programmes to design effective human rights related curricula and courses [...] for those attending military schools".<sup>705</sup>*

## Different Approaches

Various measures can be applied to reinforce the role of human rights education in the armed forces. This section describes the inclusion of human rights issues in training curricula, military oaths and codes of conduct, as well as the role of military colleges in raising awareness of human rights.

### Box 16.2: Inclusion of human rights issues in training programmes for armed forces personnel<sup>706</sup>

Training manuals	Training weeks	Publications/ pamphlets	Other
Albania, Austria, Azerbaijan, Cyprus, Czech Republic, Cyprus, Denmark, Finland, Germany, Greece, Ireland, Italy, Latvia, Malta, Montenegro, Norway, Poland, Romania, Slovakia, Sweden, Switzerland, the United Kingdom	Austria, Cyprus, Czech Republic, Finland, Germany, Greece, Ireland, Italy, Malta, Montenegro, Norway, Romania, Slovenia, the United Kingdom	Albania, Cyprus, Czech Republic, Finland, Germany, Ireland, Italy, Lithuania, Malta, Montenegro, Poland, Romania, Slovakia, Slovenia, Sweden, Switzerland, the United Kingdom	Denmark: Mission-specific training on human rights  Finland: Human rights issues mainstreamed across all training programmes and materials  Lithuania: Human rights lecture  Romania: Human rights issues included in training materials

erance and Discrimination and Promoting Mutual Respect and Understanding", Brussels, 5 December 2006, <https://www.osce.org/mc/23114>.

**705** OSCE, Moscow 1991, para. 42.3, *op. cit.*, note 486.

**706** Responses to the ODIHR-DCAF 2008 and 2018 questionnaires

## Inclusion in core curricula

It is essential that human rights have a formal place in armed forces' training curricula. All 25 participating States that responded to the ODIHR 2018 questionnaire stated that human rights issues are included in training programmes for armed forces personnel (see Box 16.2). However, only 15 participating States inform and educate their armed forces personnel about the OSCE Code of Conduct on Politico-Military Aspects of Security (see Box 16.3).

### Box 16.3: Inclusion of the OSCE Code of Conduct on Politico-Military Aspects of Security in training programmes<sup>707</sup>

Training manuals	Training weeks	Publications/ pamphlets	Other
Albania, Czech Republic, Germany, Greece, Italy, Latvia, Malta, Montenegro, Norway, Romania, Sweden, Switzerland, the United Kingdom	Germany, Romania, Slovenia	Germany, Italy, Montenegro, Romania, Slovenia, Switzerland, the United Kingdom	<p>Austria: Special lectures within training courses</p> <p>Czech Republic: Special preparation, including prior to deployment on foreign missions</p> <p>Lithuania: Lectures and briefings given by defence staff and legal department</p> <p>Malta: Mandatory training sessions held for all personnel twice a year</p> <p>Romania: Additional training materials</p> <p>Slovakia: Lectures</p>

Training is a means of ensuring that members of the armed forces are aware of their legal rights and obligations, including rights arising under international conventions, such as the ECHR, the Geneva and Hague Conventions, and the OSCE Code of Conduct on Politico-Military Aspects of Security. An understanding of these rights and obligations is central to any military training on human rights. In Germany, for example, Section 33 of the Legal Status of Military Personnel Act stipulates that armed forces personnel must be instructed about their rights and duties under international law in peacetime and war.

Since 2015, Azerbaijan's Commissioner for Human Rights has held various human rights education events in military units and institutions of the ministries of Defence, Interior and

<sup>707</sup> Responses to the ODIHR-DCAF 2018 questionnaire.

Emergency Situations. These include events on joint action plans, meetings with service personnel and attendance at military oath-swearing ceremonies.<sup>708</sup> A similar programme is implemented in Armenia with the support of the Council of Europe.<sup>709</sup>

#### **Box 16.4: Training programmes incorporating UN Security Council Resolution 1325**

The following OSCE participating States have incorporated UNSCR 1325 into training programmes for armed forces personnel:

- Albania and Austria: Included as part of general curriculum on international law.
- Bosnia and Herzegovina: Included as an integral part of training in military units, as well as in specialized courses.
- Czech Republic: The Ministry of Defence has an action plan on implementing UNSCR 1325.
- Finland: Military academies and peacekeeping training programmes include content on UNSCR 1325 in their curricula.
- Germany: Covered both in basic and pre-deployment training, with appropriate education provided for all ranks.
- Greece: Relevant programmes are included in standard national training.
- Italy: Covered in basic to advanced education and training programmes, including in lessons dedicated to UNSCR 1325 and on integrating UNSCR 1325 into the NATO command structure. Other relevant lessons include those on gender terms and definitions, on human rights and on integrating a gender perspective at the strategic, operational and tactical levels.
- Denmark: Covered only as part of pre-deployment training. There are plans to mainstream the gender perspective throughout all training and education programmes

Having civilian experts conduct human rights training courses, especially where such expertise cannot be found in the armed forces, may help to strengthen relations between the military and civil society. For example, the International Committee of the Red Cross (ICRC) has a training programme on humanitarian and human rights law that has been used in the Norwegian armed forces. The ICRC also has specialized delegates who support

**708** See: "Summary of the Activities of the Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan During 2015-2016 within the Third Phase (2015-2019) of the World Programme for Human Rights Education", UN OHCHR, [https://www.ohchr.org/Documents/Issues/Education/Training/thirdphase/ProgressReport/NHRIs/Azerbaijan\\_NHRI\\_3rd\\_phase\\_midterm\\_2017.pdf](https://www.ohchr.org/Documents/Issues/Education/Training/thirdphase/ProgressReport/NHRIs/Azerbaijan_NHRI_3rd_phase_midterm_2017.pdf).

**709** See: "Strengthening the Application of European Human Rights Standards in the Armed Forces in Armenia", Council of Europe, <https://www.coe.int/web/national-implementation/projects-by-geographical-area/armenia-armedforces>.

national armed forces to disseminate knowledge of international humanitarian and human rights law, including by integrating these norms into their doctrines and their education and training programmes, and by adopting disciplinary and penal sanctions in the event of violations.<sup>710</sup> It is particularly important to mainstream human rights issues into officer training, and especially when forces are deployed on missions. Officer training is also of particular importance in combating bullying, xenophobia and intolerance.

## ***Professional codes of conduct***

Although legal measures are an important guarantee for human rights, professional codes of conduct can be a vital aspect in achieving awareness of and respect for human rights. The best regional-level example is the OSCE Code of Conduct on Politico-Military Aspects of Security, the ultimate goal of which is to regulate the role of armed forces in democratic societies.

### **Box 16.5: Human rights-related excerpts of codes of conduct**

The Netherlands<sup>711</sup>

[...] The basic values set out in the Defence Code of Conduct describe how we interact with each other [...] These apply to everyone, in the workplace, on missions, in the barracks and at the top of the organization. By naming these values we make clear what we stand for and what others may expect from us [...]

[...] I treat everyone with respect. I realize that bullying, aggression, (sexual) intimidation, discrimination or other undesirable behaviour has no place in the Ministry of Defence. In case of undesirable behaviour or unacceptable risks, I intervene, discuss or report such behaviour. This keeps our organization safe and enables us to carry out our duties.

**710** For more information, see: "ICRC relations with armed forces", ICRC, 29 October 2010, <https://www.icrc.org/eng/what-we-do/building-respect-ihl/dialogue-weapon-bearers/armed-forces/overview-armed-forces.htm>; and *To Serve and to Protect: Human Rights and Humanitarian Law for Police and Security Forces*, (Geneva: ICRC, 2014), <https://www.icrc.org/eng/assets/files/publications/icrc-002-0698.pdf>.

**711** "Gedragscode Defensie [Defence Code of Conduct]", website of the Ministry of Defence of the Netherlands (unofficial translation), <https://www.defensie.nl/onderwerpen/integriteit/downloads/publicaties/2018/12/04/gedragscode-defensie>.

France<sup>712</sup>

- 1) Soldiers are dedicated to serve France, at all times and in all that they do;
- 3) Soldiers control the use of force, respect their adversary, and endeavour not to harm civilian populations; [...]
- 8) Soldiers are attentive to the needs of others and to overcoming obstacles [difficulties] in order to support the cohesion and capacity of their unit;
- 9) Soldiers are open to the world, other societies and respect diversity;
- 10) Soldiers are careful in expressing philosophical, political or religious views, not to compromise the neutrality of the army;

Canada<sup>713</sup>

## 1. Respect the dignity of all persons

At all times and in all places, Department of National Defence employees and Canadian Forces members shall respect human dignity and the value of every person by:

- 1.1: Treating every person with respect and fairness.
- 1.2: Valuing diversity and the benefit of combining the unique qualities and strengths inherent in a diverse workforce.
- 1.3: Helping to create and maintain safe and healthy workplaces that are free from harassment and discrimination.
- 1.4: Working together in a spirit of openness, honesty and transparency that encourages engagement, collaboration and respectful communication.

A well-known system of professional ethics in the armed forces is Germany's guidance on moral leadership and civic education, which was developed as part of the country's post-war reconstruction efforts. The guidance provides for the internal organization of the armed forces on the one hand, and for their integration into state and society on the other. Similarly, Sweden has a regularly updated guidebook on the "Swedish Soldier" that underscores the armed forces' role in defending human rights. A key principle of the guidebook is that the leadership behaviour of superior officers must respect human dignity.

Codes of conduct provide easy-to-comprehend summaries of professional military ethics and, as such, are a practical resource for training purposes. They can also provide a reference point for the investigation of alleged misconduct. Tolerance, equality and neutrality are key virtues that feature in many codes (see the examples in Box 16.4). Some countries have codes of conduct for specific groups within the military, such as Canada's code for the military police.<sup>714</sup>

**712** "Code du soldat [Code of the soldier], website of the French Ministry of Defence (unofficial translation), <https://www.defense.gouv.fr/terre/bloc-les-essentiels/code-du-soldat>.

**713** "The DND and CF Code of Values and Ethics", National Defence and the Canadian Armed Forces, website of the Government of Canada, <http://www.forces.gc.ca/en/about/code-of-values-and-ethics.page>.

**714** See: "Military Police Professional Code of Conduct", website of the Government of Canada, <https://laws-lo->



## ***Human rights training in military colleges***

There are various ways in which human rights can be mainstreamed into the training programmes of military colleges, including the following:

- devoting direct attention to human rights in terms of classroom hours and assessment;
- assessing knowledge of human rights as a core educational outcome in military training. No member of the armed forces should be permitted to pass initial training without demonstrating a basic awareness of human rights;
- including appropriate human rights aspects in all subsequent training for officer ranks; and
- appointing a human rights officer or specialist at the faculty of military colleges and encouraging the secondment of existing staff to specialist international human rights bodies.

In Finland, the Legal Division of the Finnish Defence Forces provides guidelines and instructions on human rights education. Grassroots-level education is conducted in units and military academies through military and peacekeeping training programmes. Awareness about human rights and duties are incorporated into military training programmes via training manuals, training weeks and the dissemination of publications and pamphlets. Similarly, Ireland and Sweden have incorporated human rights education into training programmes for soldiers and other armed forces members. However, unlike in Sweden, Finland and Ireland do not inform their armed forces personnel about the OSCE Code of Conduct on Politico-Military Aspects of Security.

## Good Practices and Recommendations

- » Human rights education should be adopted as an effective means to combat violence, racism, extremism, xenophobia, discrimination and intolerance in the armed forces. Human rights education forms a basis for good societal relations and allows military personnel to be aware of the inalienable rights and freedoms they are endowed with and the means and avenues available to seek redress if their rights are violated.
- » The OSCE Code of Conduct on Politico-Military Aspects of Security, and the contents of this compendium should be studied as part of armed forces training programmes.
- » Human rights education should form a core part of initial military training, including training of those performing military service. It should be offered as a separate course to all career soldiers, and commissioned officers and NCOs should receive regular refresher courses on human rights issues. Such training courses should focus on combating bullying and mistreatment and accommodating the specific needs of all minorities present within the armed forces.
- » Armed forces should draw on the expertise of civilian experts and civil society organizations when providing training on human rights.
- » An ombuds institution or other independent body should monitor the content and quality of human rights training for the armed forces.
- » Demonstrated familiarity with and commitment to human rights principles should be a requisite for career advancement, and assessed during performance evaluations.

## Further reading

Monisha Bajaj (ed.), *Human Rights Education: Theory, Research, Praxis* (Philadelphia: University of Pennsylvania Press, 2017).

Tracey Holland and J. Paul Martin (eds.), *Human Rights Education and Peacebuilding: A Comparative Study* (New York: Routledge, 2014).

ODIHR, *Human Rights Education in the School Systems of Europe, Central Asia and North America: A Compendium of Good Practice* (Warsaw: ODIHR, 2010), <https://www.osce.org/odihr/39006>.

## Chapter 17: The Role of Commanders and Individual Accountability

### Introduction: Issues at Stake

Commanders play a crucial role in the military, social and moral aspects of their units. Their leadership is critical for ensuring respect for human rights within the barracks. In this context, commanders have a responsibility to play an assertive and proactive role in creating a climate of trust and mutual respect among soldiers, as well as an obligation to take appropriate measures to prevent or punish the misconduct of subordinates.

Individual accountability means that armed forces personnel committing offences may be held responsible for their conduct even if they are acting on orders received from a superior. This is predominantly the case in national law, and also holds in some instances of international law. Equally, commanders bear responsibility for their own unlawful acts under national and international law, as well as for any orders they give that are unlawful under international law. Such an individualized approach to accountability is important in terms of avoiding impunity. It reduces the scope for impunity by holding commanders responsible for the actions of their subordinates, including any crimes they may commit.

This chapter explores the duties of a commander, and the importance of a responsible command structure and individual accountability in the protection of the human rights of armed forces personnel during peacetime. Peacekeeping operations and other military deployments abroad fall outside the scope of this chapter, as does IHL (laws governing armed conflict), although the latter is examined in terms of the obligation to train armed forces personnel on IHL. It should also be noted that most members of the armed forces are at the same time both commander and subordinate, except for those in the highest or lowest ranks.

### *The role of commanders*

The duties of commanders are wide-ranging. They arise from laws on national defence, the operation of the armed forces and the status of armed forces personnel. These duties are further elaborated in military regulations, disciplinary codes and penal laws.

Transmitting and maintaining values and standards of proper behaviour among subordinates is a core responsibility of commanders. Values typically emphasized in the military include personal integrity, moral and physical courage, loyalty to superiors and subordinates, perseverance, and individual and group discipline. Within this ethical construct, commanders are understood to have both a moral and legal role in ensuring that military leadership is effective. An intrinsic element of this role is preventing subordinates from committing offences established both by law and by human rights standards. Commanders responsibilities' can vary from country to country, and often

encompass, among other roles, ensuring that military orders are in full compliance with the law, providing service personnel with a working and living environment that is free from harassment, unlawful discrimination and intimidation, preventing and punishing bullying and other forms of mistreatment, ensuring adequate working and living conditions, and maintaining military discipline, including reprimanding misbehaviour, such as alcohol and drug abuse. Box 17.1 provides examples of commanders' responsibilities in the Russian Federation and Italy.

### **Box 17.1: The responsibilities of military commanders**

#### **Russian Federation:**

Commanders [...] in peacetime and wartime are responsible for constant combat and mobilization readiness; the successful fulfilment of combat tasks; combat training; education; military discipline; law and order; the moral and psychological state of subordinate personnel and the safety of military service; the condition and safety of weapons, military equipment and materiel; material, technical, financial and welfare support; and medical services.<sup>715</sup>

#### **Italy:**

1. Superiors are responsible for ensuring that their subordinates respect laws, regulations and military orders. They should serve as a good example of discipline and of how regulations should be respected.
2. Superiors are responsible for maintaining discipline among their subordinates and should aim to achieve the maximum degree of efficiency in their unit.<sup>716</sup>

### ***Accountability of commanders***

Commanders bear individual responsibility for serious breaches of human rights within the armed forces. The abuse of command authority, especially where such abuse causes humiliation or suffering to subordinates, constitutes an offence under the disciplinary or criminal law of most states. National law may also recognize the mistreatment of subordinates as a discrete offence.

Commanders are not only responsible for any abuse that they themselves perpetrate, but also for human rights breaches committed as a result of their orders. Thus, commanders have a duty not to issue improper or unlawful orders, as these may unduly interfere with the enjoyment of human rights by armed forces personnel.

**715** Федеральный закон «О статусе военнослужащих» [Federal Law "on the Status of Military Personnel"], Federal Law No. 76-FZ, 27 May 1998, Article 27(2).

**716** Decree No. 545/1986 of the President of the Italian Republic, Article 21.

## ***Accountability of subordinates***

In all military systems, members of the armed forces have a general duty to obey superiors' orders. This is the foundation of military discipline and effectiveness. Thus, failure to comply with an order generally constitutes a disciplinary or even a criminal offence. In virtually no national legal system is the obligation to comply with orders absolute, however. To a greater or lesser degree, members of the armed forces have the right and the obligation not to comply with unlawful orders, including any orders that would go against international human rights.

## **International Human Rights Standards**

### ***International humanitarian law (IHL) and human rights law***<sup>717</sup>

IHL and international human rights law are two distinct but complementary bodies of law. They are both concerned with the protection of the life, health and dignity of individuals. IHL applies in armed conflict, while human rights law applies at all times, in peace and in war.

The interplay between IHL and human rights law remains the subject of much legal attention, especially in terms of the implications for the conduct of military operations. In 1996, in a groundbreaking statement on the application of human rights law in situations of armed conflict, the International Court of Justice observed that the protections provided by the ICCPR do not cease in times of war and that, in principle, the right not to be arbitrarily deprived of one's life also applied in hostilities.<sup>718</sup>

States have a legal duty to respect and implement both IHL and human rights law. Compliance with IHL requires that states introduce national legislation to implement their obligations, train their militaries and bring to trial those in grave breach of such law. Human rights law also contains provisions requiring states to take legislative and other appropriate measures to implement its rules and punish violations.

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**717** "IHL and human rights law", ICRC, 29 October 2010, <https://www.icrc.org/en/doc/war-and-law/ihl-other-legal-regimes/ihl-human-rights/overview-ihl-and-human-rights.htm>

**718** "What is the difference between IHL and human rights law?", ICRC, 22 January 2015, <https://www.icrc.org/en/document/what-difference-between-ihl-and-human-rights-law>.

## ***The International Criminal Court (ICC)***

The ICC has the jurisdiction to prosecute individuals for the international crimes of genocide, crimes against humanity and war crimes. The ICC is intended to complement existing national judicial systems and may, therefore, exercise its jurisdiction only when certain conditions are met, such as when national courts are unwilling or unable to prosecute suspected criminals or when the UN Security Council or individual states refer situations to the Court. The ICC was established by the Rome Statute.

Concerning superior orders, Article 33 of the Rome Statute states that subordinates who carry out unlawful orders bear criminal responsibility unless:

- (a) "The person was under a legal obligation to obey orders of the Government or the superior in question;
- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful."

Article 33 also notes that "orders to commit genocide or crimes against humanity are manifestly unlawful."<sup>719</sup>

## ***Customary international law***<sup>720</sup>

International law derives both from treaty law and customary international law. Treaties are written conventions in which states formally establish certain rules. Customary international law is not written down but develops as general practices, which are then accepted as law. To prove that a rule is customary, it is necessary to show that it is practiced by states and is recognized by the international community as a requirement under international law. Customary IHL fills the gaps left by treaty law in both international and non-international conflicts, and so strengthens the human rights protections provided.

Compliance with IHL requires that states introduce national legislation to implement its obligations, bring to trial those in grave breach of such law, and train their militaries on IHL. This last obligation makes IHL an important feature of human rights in the armed forces. Training on IHL should cover the following key concepts and practices:<sup>721</sup>

**Command responsibility for failure to prevent, repress or report war crimes:** Commanders and other military superiors are criminally responsible for war crimes committed by their subordinates if they knew, or should have known, that the subordinates were about to commit or were committing such crimes and did not take all

<sup>719</sup> UN General Assembly, Rome Statute, op. cit., note 499.

<sup>720</sup> "Customary international humanitarian law", ICRC, 29 October 2010, <https://www.icrc.org/en/document/customary-international-humanitarian-law-0>.

<sup>721</sup> "Customary IHL", ICRC IHL database, <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>.

necessary and reasonable measures in their power to prevent their commission or punish the persons responsible.

**Command responsibility for orders to commit war crimes:** Commanders and other superiors are criminally responsible for war crimes committed in accordance with their orders.

**Obedience to superiors:** Every combatant has a duty to disobey a manifestly unlawful order.

**Defence of superior orders:** Obeying the order of a superior does not relieve a subordinate of criminal responsibility if the subordinate knew that the act ordered was unlawful, or if they should have known because the act was manifestly unlawful.

It is important that commanders and subordinates are trained on the IHL concepts of responsibility and accountability during peacetime, as required under international law. These concepts contribute to the environment, expectations, roles, responsibilities, ethics and military culture within which armed forces personnel act during peacetime.

## Different Approaches

### *Role of commanders*

To ensure that the human rights of armed forces personnel are respected, it is necessary to have in place laws and regulations protecting those rights, as well as effective remedies to deal with any breaches (see “Chapter 19: Ombuds Institutions for the Armed Forces”). The existence of an appropriate regulatory framework, however, is not enough to ensure respect for these rights in day-to-day military life. Commanders, including officers and NCOs, play a central role in ensuring that the rule of law and respect for human rights prevail in the armed forces.

Commanders’ ability to ensure respect for human rights largely depends on their leadership style, which, in context of the military, may be comprised of different elements of two broad styles of leadership: one based on fear and mistrust, and the other centred on creating an environment of mutual trust and respect.

According to the first approach, the main task of commanders is to make their subordinates respect their leadership by closely supervising their activities and imposing severe sanctions whenever the rules are infringed. A leadership approach based on fear and the threat of punishment is usually not effective in gaining and cultivating trust among subordinates, and may also encourage commanders to enact irregular punishments. Irregular punishment includes collective punishment and punishment resulting in demeaning treatment, humiliation or torture, and should be prohibited.

The second approach underscores the role of trust in maintaining discipline in the barracks. According to this approach, commanders cultivate respect for human rights among their subordinates through daily training exercises and minor disciplinary sanctions. This approach is considered to be far more effective in instilling discipline and in reducing human rights violations. In contrast to the first leadership style, military leadership based on mutual trust provides the foundation for well-functioning armed forces in which human rights are respected.

Individuals can turn to military or civilian courts to ensure that their human rights are respected, especially in the case of serious crimes. Recourse to military or civilian justice does, however, represent the last resort. In the majority of cases, commanders' role in ensuring respect for human rights and maintaining discipline helps to prevent human rights violations. Discipline is achieved by fostering an atmosphere of interdependence among armed forces personnel, such as by delegating responsibilities to subordinates. Moreover, when offences specific to military life occur, commanders have the primary responsibility to deal with them and impose sanctions. In this way, commanders play a crucial role in transmitting to personnel that there is no place in the armed forces for bullying, misbehaviour, offences, discrimination, harassment or human rights violations. Commanders are the first line of defence against all forms of misconduct.

Commanders' prominent role in ensuring respect for human rights among armed forces personnel requires that they receive adequate training not only in the exercise of leadership, but also in military law, human rights law and standards, and IHL. Such training will ensure that commanders acquire a thorough knowledge of their duties, develop a sense of justice and learn to be a model for their subordinates.

### ***Improper and unlawful orders***

Commanders give improper orders when they ask their subordinates to perform activities that fall outside their specific mandate or that serve no military purpose. For example, where members of the armed forces are ordered to clean the commander's house or buy their groceries, questions about the appropriateness of such orders can – and should – arise. That said, many countries allow the use of armed forces for certain non-military purposes, such as in support of law enforcement or when dealing with public emergencies. Whether orders may be given to members of the armed forces to perform such duties depends on national law.

Unlawful orders violate national law and can lead to the commission of an offence by subordinates. For example, an order to kill an individual during peacetime would, in human rights terms, irretrievably adversely impact the individual right to life and the prohibition on arbitrary execution, and in domestic law would be understood as murder. Unlawful orders also include those that contravene constitutional values and rules, such as where the armed forces become involved in activities that endanger the constitutional order.



## **Box 17.2: Mistreatment of subordinates and the abuse of authority**

### **The United Kingdom**

A person subject to service law who is an officer, warrant officer or non-commissioned officer commits an offence if—

- (a) he ill-treats a subordinate ("B");
- (b) he intends to ill-treat B or is reckless as to whether he is ill-treating B; and
- (c) he knows or has reasonable cause to believe that B is a subordinate.<sup>722</sup>

### **Estonia**

A commander who makes excessive use of his or her authority or exceeds the limits of the authority or acts in excess of the authority arising from his or her position in service and thereby causes significant damage to the rights or interests of another person that are protected by law or to the interests of the state, is punishable by up to five years' imprisonment.

The same act, if committed during a state of emergency or a state of war, is punishable by one to five years' imprisonment.<sup>723</sup>

### **Finland**

A superior officer who:

- (a) through abuse of his or her authority causes a subordinate suffering or a health hazard that is unnecessary as regards duty, or treats a subordinate in a humiliating manner, or
- (b) as a disciplinary superior imposes a disciplinary punishment or a disciplinary correction on a person whom he or she knows to be innocent

shall be sentenced for *abuse of superior position* to disciplinary punishment or to imprisonment for at most two years.

A superior officer who orders a subordinate to perform work which does not form part of duty or training shall likewise be sentenced for abuse of superior position.<sup>724</sup>

<sup>722</sup> The United Kingdom Armed Forces Act 2006, *op. cit.*, note 356, Article 22(1).

<sup>723</sup> Penal Code of Estonia, "Chapter 24: Offences relating to service in defence forces", Article 446, available at Legislationline, <https://www.legislationline.org/documents/section/criminal-codes/country/33/Estonia/show>.

<sup>724</sup> Criminal Code of Finland, Chapter 45: Military offences, Section 16, available at Legislationline, <https://www.legislationline.org/documents/section/criminal-codes/country/32/Estonia/show>.

Commanders may be subject to administrative, disciplinary or criminal sanctions for orders that exceed their authority or are otherwise unlawful. Disciplinary or criminal responsibility for orders given can take different forms, depending on the particular military law system and the nature of the order:

- Giving an unlawful order that is then carried out may result in the commander being treated as having carried out the order directly. In the United Kingdom, for example, if the person in command of a military aircraft orders another person to fly the aircraft below the minimum required height, the person giving the order will be treated as flying the aircraft.<sup>725</sup>
- Giving an unlawful order that leads to the commission of an offence may mean that the commander is liable for inciting the offence.

In most cases, national law imposes on commanders the duty to maintain discipline, and may hold them responsible if they fail to take steps to prevent or punish offences. Commanders may be charged under criminal or military disciplinary law, depending on the type of offence committed and on the circumstances of the case and, in particular, on whether they could have reasonably been expected to foresee the risk of the offence or crime committed by their subordinates.

The responsibility of commanders may arise in at least two ways:

- The commander may commit the offence of dereliction of duty, by failing to maintain adequate disciplinary standards among subordinates; or
- In certain circumstances, the failure to intervene may amount to the facilitation of an offence, in which case the commander could be held responsible as an accessory.

In cases of human rights violations, if the commander's involvement takes the form of an omission or acquiescence rather than a positive act, it may be more difficult to prove their culpability. Therefore, in such instances it is less likely that serious charges would be pressed against senior officers under criminal or disciplinary law. Commanders might, however, be punished with administrative sanctions for the misdeeds of their subordinates. They could, for example, be relieved of their duties as a commander, demoted, or even discharged.

Commanders' responsibility extends even further under the doctrine of command responsibility (or superior responsibility). The doctrine was established in the law of armed conflict in the early 20th century and developed more fully during the war crimes trials conducted after World War II.<sup>726</sup> Command responsibility was recognized in the 1977 Additional Protocol I to the Geneva Conventions, the statutes of international criminal

**725** The United Kingdom Armed Forces Act 2006, *op. cit.*, note 356, Article 34(2).

**726** The doctrine of command responsibility was applied for the first time by the German Supreme Court in Leipzig after World War I in the trial of Emil Muller and further developed through international and national jurisprudence, in particular in the Yamashita case after World War II: *Application of Yamashita*, 327 US 1, United States Supreme Court, 4 February 1946, <https://caselaw.findlaw.com/us-supreme-court/327/1.html>.

tribunals<sup>727</sup> and in national law, to the extent that it constitutes customary international law.

Although command responsibility generally pertains to wartime situations, there are two contexts in which command responsibility is relevant to peacetime operations. The first is the offence of conscripting or enlisting children under the age of 15 into the armed forces, which triggers command responsibility and has implications for military operations. Moreover, under contemporary international law, command responsibility attaches not only to war crimes but also to a number of other international crimes, specifically genocide, crimes against humanity and torture, which may also occur in peacetime and against the nationals of the commander's own state.

### ***Duty to comply with orders***

As noted earlier, armed forces personnel have a general duty to obey superiors' orders. At the same time, members of the armed forces have the right and the obligation not to comply with unlawful orders. There are, however, significant differences among states in terms of the nature of the obligation to obey orders and what a member of the armed forces must do when faced with an unlawful order:

- The obligation of armed forces personnel to obey orders only extends to "lawful" orders, as is the case under United Kingdom law;
- The duty to obey only covers orders that are not "clearly" or "manifestly" unlawful. Examples of this approach include the armed forces of Finland and Ireland; or
- The law distinguishes between orders that violate criminal law or are issued by an incompetent authority, which should not be obeyed, and orders that do not violate criminal law but are still unlawful, which must be obeyed. In several states, orders must not be obeyed if doing so would entail committing a crime (Austria, Bosnia and Herzegovina, Estonia and Montenegro) or degrading human dignity (Estonia and Germany).

Different approaches are taken to orders that have been issued by a military superior who did not have the authority to issue such orders. In Estonia, for example, such orders are to be obeyed, whereas in Austria they are not (see Box 17.3).

<sup>727</sup> UN Security Council, *Statute of the International Criminal Tribunal for the former Yugoslavia*, 25 May 1993, Article 7.3, [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf); and UN Security Council, *Statute of the International Criminal Tribunal for Rwanda*, 8 November 1994, Article 6(3) [http://legal.un.org/avl/pdf/ha/ict\\_rwanda.pdf](http://legal.un.org/avl/pdf/ha/ict_rwanda.pdf).

**Box 17.3: The duty of armed forces personnel to comply with orders****Austria**

(1) Every subordinate is obedient to his superiors. He has to carry out the commands given to him fully, conscientiously and punctually. The mere literal observance of orders, regardless of their obvious underlying purpose, is not enough to fulfil this duty.

(2) Orders issued by an unauthorized person or body, as well as orders that would violate the law, shall be disregarded. The intention to disobey a command must be reported immediately to the controller.

**Bosnia and Herzegovina**

(1) Military personnel shall be obliged to execute orders of their superiors that are related to the service, with the exception of orders that contain elements of a criminal offence.

(2) When they receive an order with elements of a criminal offence, military personnel shall be obliged to immediately inform the superior officer of the superior who issues the order.

**Finland**

A subordinate must carry out the orders given to him/her by a superior. If the subordinate thinks that the legality of the order is unclear, he/she may, for his/her legal protection, request the order to be given in writing. If the order is such that the subordinate would have to clearly violate the law or his/her service obligations, he/she must so notify the superior. If the superior repeats the order, the subordinate must refuse to carry it out. The subordinate must notify his/her immediate superior of this refusal without delay. If the superior giving the order is the immediate superior, the notification must be made to the superior of the superior giving the order.

**Germany**

(1) The soldier must obey his superiors. He has to execute his orders to the best of his ability fully, conscientiously and promptly. Disobedience does not take place if a serviceman does not obey to a command that violates human dignity or has not been given for official purposes; the erroneous assumption that regarding the order may release the soldier from responsibility only if he could not avoid the error and, in the circumstances known to him, it was unreasonable for him to defend himself against the order by means of legal remedies.

(2) An order may not be obeyed if it would lead to committing of an offense. If the subordinate continues to obey the order, he is only guilty if he recognizes or if, in the circumstances known to him, it is obvious that an offense is being committed [...].

### **The United Kingdom**

A person subject to service law commits an offence if—

- (a) he disobeys a lawful command; and
- (b) he intends to disobey, or is reckless as to whether he disobeys, the command.

Recognizing that armed forces personnel have the right, and in many countries the obligation, to refuse to execute an illegal order is of fundamental importance. It implies that the obligation to execute orders does not require unconditional obedience. In specific circumstances, individual soldiers should be allowed to evaluate the consequences of carrying out an order. This requires that service personnel understand their legal responsibility to obey “lawful” commands, while assessing the illegality of an order in domestic law (during peacetime) or in international law (during wartime). Similarly, it requires that service personnel be aware of their human rights, the human rights of others and the scope of limitations that can be justified on both in times of conflict.

Because of the power that superiors have over their subordinates, it is not easy for armed forces personnel to correctly assess whether an order is illegal in domestic law, and even less easy to project an order’s potential adverse impacts on human rights. By virtue of the power of their rank, it is possible that commanders, or even peers, could force their subordinates or colleagues to execute an illegal order. Therefore, the concept of individual accountability implies individual courage among armed forces personnel. This, in turn, represents a rather high-risk strategy, as it requires a personal judgment on the part of the service member receiving an order where the binding force of that order is uncertain. In the case where the subordinate uses poor judgement, they bear responsibility for not obeying an order.

Several mechanisms can be devised to address this problem. The first is for service personnel to take into consideration whether an order contravenes the country’s constitution or is otherwise inconsistent with the country’s legislation, and to use this as a benchmark to evaluate whether the order must be obeyed. Other than domestic laws, service personnel should also take into account human rights standards as internationally recognized. Another possibility is to give armed forces personnel recourse to complaint mechanisms in order to protest orders that they believe to be illegal. The vast majority of OSCE participating States have mechanisms to protect members of the armed forces from reprisals when they report illegal behaviour.

Another solution is to allow armed forces personnel, under certain conditions, to invoke the plea that they were complying with orders as a defence for illegal actions they may have committed as a result (as in the Russian Federation). The justification that an armed forces member was acting based on a superior’s orders is not regulated in the same manner in all countries. In Germany, for example, Section 5 of the Military Criminal Code states that a subordinate who commits a crime pursuant to an order will be responsible only

if they knew, or should have known, that they would be committing a criminal offence by executing the order. In other countries, including Poland and Switzerland, a plea of compliance with orders is only considered as a mitigating factor in sentencing. Finally, in a few states, including Estonia, the justification of acting according to a superior's orders is not recognized as a defence under military or civil law. Box 17.4 provides examples of the different approaches to this defence.

The defence of obeying superior orders is further restricted or altogether eliminated in case of international crimes, such as aggression, genocide, crimes against humanity, torture and war crimes. In particular, the defence of obeying superior orders may only be available when the order was not *manifestly* unlawful (that is, when the subordinate did not necessarily know that the act ordered was unlawful). As already noted, the Rome Statute of the ICC always regards orders to commit genocide or crimes against humanity to be manifestly unlawful, though that presumption is not expressly reflected in all national legal systems. Finally, subordinates who are coerced by superiors into perpetrating unlawful acts – including through threats of violence – may be able to rely on the defence that they were acting under duress.<sup>728</sup>

#### **Box 17.4: Plea of compliance with orders as a defence in selected OSCE participating States**

##### **Austria**

According to the Military Penal Code, armed forces personnel are responsible for offences committed when obeying an order. At the same time, a member of the armed forces may not be prosecuted in such cases if the offence carries no consequences, or if a punishment is not required to deter further offences.<sup>729</sup>

##### **Bosnia and Herzegovina**

Subordinates are liable for carrying out illegal orders of a superior, but acting pursuant to an order of a Government or of a superior “may be considered in mitigation of punishment if the court determines that justice so requires.”<sup>730</sup>

##### **Denmark**

In Denmark, the plea of compliance with an order from a superior does not release a subordinate from criminal liability unless they were “under an obligation to obey orders from the superior in question and did not know that the order was illegal”, and provided that the order was not manifestly illegal.<sup>731</sup>

**728** UN General Assembly, Rome Statute, op. cit., note 499, Art. 31(1)(d). See also: *Prosecutor v. Erdemović (Appeal Judgement)*, IT-96-22-A, International Criminal Tribunal for the former Yugoslavia, 7 October 1997.

**729** Militärstrafgesetz [Military Penal Code], 30 October 1970, para. 3(1).

**730** Criminal Code, 2003, Amended 2015, Art. 180 (3).

**731** Military Penal Code 4/06/2005 (Denmark) para. 9.

## Estonia

The plea of compliance with orders is not a justification for committing crimes against peace, crimes against humanity, genocide, war crimes and crimes against international security, and does not preclude punishment of the perpetrator of the offence.<sup>732</sup>

## Germany

According to Germany's Military Penal Code, a subordinate is guilty of an unlawful act committed pursuant to a superior order only if they know, or should have known based on the circumstances, that the act was unlawful.

Moreover, depending on the situation in which the order was carried out, the court may reduce the sentence or refrain from punishment.<sup>733</sup>

Regarding crimes under international law, including war crimes, committed pursuant to a military order or "an order comparable in its actual binding effect", a subordinate is not criminally liable if they do not realize that the order is unlawful and if the order is not manifestly unlawful.<sup>734</sup>

## The Netherlands

1. Any person who commits an offence in carrying out an official order issued by the proper authority shall not be criminally liable.
2. Any person who carries out an official order issued without proper authority shall not be exempted from criminal liability, unless, acting as a subordinate, he believed in good faith that the order was issued by the proper authority and he complied with it in his capacity as subordinate.<sup>735</sup>

## Poland

A member of the Armed Forces who commits a prohibited act in carrying out an order does not commit an offence unless, while carrying out the order, he commits an offence intentionally.<sup>736</sup>

## The Russian Federation

In line with the Russian Criminal Code, criminal responsibility for a crime is borne by the person who gave the illegal order or instruction, and not by a subordinate.

However, if a subordinate intentionally commits an offence when executing an order or instruction that is "known to be illegal", they will be held liable. Conversely, the failure

<sup>732</sup> Karistusseadustik [Penal Code], para. 88(2).

<sup>733</sup> Wehrstrafgesetz [Military Penal Code], 30 March 1957, para. 5.

<sup>734</sup> Völkerstrafgesetzbuch [Code of Crimes against International Law], 26 June 2002, para. 1(3).

<sup>735</sup> Wetboek van Strafrecht [Penal Code], 3 March 1881, section 43.

<sup>736</sup> Penal Code of Poland, 1997, Art. 318.

to execute an order that is known to be illegal precludes criminal liability.<sup>737</sup>

### **Slovenia**

The plea of compliance with orders is recognized, unless a subordinate has committed "a war crime or any other grave criminal offence", or if they knew that carrying out the order constituted a criminal offence.<sup>738</sup>

### **Sweden**

According to Sweden's Penal Code, a subordinate is not liable for carrying out the order of a superior if it was their duty to obey "in view of the nature of obedience due, the nature of the act and the circumstances in general".<sup>739</sup>

### **Switzerland**

Switzerland's Military Criminal Code states that the commander or superior who issued an order shall be liable if the commission of the order constitutes an offence. At the same time, a subordinate may also be liable if they were aware of the punishable character of the act, in which case a reduced sentence may be issued. In such cases, judges may reduce the penalty.<sup>740</sup>

In addition to an effective command structure, the principle of individual accountability plays a crucial role in cultivating respect for human rights, by promoting responsible individual behaviour. Indeed, it obliges each member of the armed forces to behave in conformity with human rights standards, regardless of orders.

Moreover, the principle of individual accountability favours a balanced distribution of responsibilities between commanders and subordinates in case of violations, so that if an unlawful order is given, moral and legal responsibility is borne both by those giving and by those executing the order. Therefore, armed forces personnel executing unlawful orders or acting illegally on their own initiative are, in general, held individually accountable for offences or crimes committed.

Depending on national legislation and on the gravity of the violation, armed forces personnel executing an illegal order are subject to disciplinary measures or criminal sanctions. Disciplinary measures against those giving and those executing an illegal order are taken by superior commanders, while criminal sanctions are normally applied by special military or civilian courts (see "Chapter 18: Discipline and Military Justice").

**737** Criminal Code of the Russian Federation, 1996, Amended in 2012, Art. 42.

**738** Penal Code of Slovenia, 2012, Art. 278.

**739** Penal Code of Sweden, 1962, Amended in 2008, Chapter 24, para. 8.

**740** Military Criminal Code of Switzerland, 1927, Art. 20.



## Good Practices and Recommendations

- » The responsibilities of commanders and subordinates should be clearly defined in legislation.
- » Commanders, including officers and NCOs, should be provided with adequate training, not only in the exercise of leadership but also on military law and human rights law.
- » Commanders should use their positions of leadership to build effective working relationships among their troops, thus fostering a climate of mutual trust and respect.
- » An effective system of sanctions should be provided for in cases of the abuse of the command function.
- » In training, commanders should be made aware of their duty not to issue illegal orders or to impose irregular punishments.
- » Irregular punishment (in particular, collective punishment and punishment resulting in demeaning treatment, humiliation, ill-treatment or torture) should be prohibited.
- » As part of their training, armed forces personnel should be made aware of the duty to disobey illegal orders and be provided with information on what constitutes an illegal order.
- » Complaint mechanisms should be available for armed forces personnel who have been given an illegal order.
- » Adherence to ethical codes of conduct should be made mandatory for service personnel.

## Further reading

Alfred Avins, "A Military Superior's Duty to His Subordinates", *Missouri Law Review*, Vol. 31, No. 3 (1966), pp. 329–363.

Sarah Finnin, *Elements of Accessorial Modes of Liability: Article 25 (3)(b) and (c) of the Rome Statute of the International Criminal Court* (Leiden: Brill, 2012).

Chantal Meloni, *Command Responsibility in International Criminal Law* (The Hague: T.M.C. Asser Press, 2010).

Guénaél Mettraux, *The Law of Command Responsibility* (Oxford: Oxford University Press, 2009).

Héctor Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Oxford: Hart, 2009).

# Chapter 18: Discipline and Military Justice

## Introduction: Issues at Stake

This chapter discusses the role of military justice systems in protecting the human rights of armed forces personnel. As citizens in uniform, members of the armed forces are, during times of peace, subject to the same criminal laws as civilians. In addition, they have specific duties under military law that are designed to maintain a disciplined environment and ensure operational effectiveness.<sup>741</sup> In human rights terms, the challenge is to determine how to enforce military law in a way that is consistent with the rights to a fair trial and due process. This challenge arises in relation to summary trials for minor disciplinary offences, as well as trials in military courts for more serious offences. The existence of separate military justice systems raises concerns about the rights of members of the armed forces compared to civilian defendants in ordinary criminal courts, as well as concerns about the independence of military courts and the judges and lawyers who work in them.

This chapter begins by discussing the rationale for separate military justice systems, together with the international treaty obligations protecting the right to a fair trial. Next, different approaches to managing the relationship between criminal offences and military discipline, including the division of jurisdiction between civilian and military courts, are examined. Questions of judicial independence are addressed by examining the composition and appointment of courts, prosecutors and defence counsel, and the right of appeal to a superior court. One consistent theme that emerges from these discussions, in particular in efforts to reform military justice, is the move to “civilianize” military justice systems through the adoption of civilian elements or the involvement of civilian institutions.<sup>742</sup>

Several aspects of life in the armed forces necessitate the existence of a military justice system. The armed forces regulate the lives of personnel more pervasively than most other professions. This is because personnel frequently live on military bases and, when on active service, most of their time and efforts are under the command of a superior. In situations involving potential conflict, the urgent and overriding importance of military tasks and the risk to life justify the need for consistent obedience. Under these circumstances, the division between work and private life that exists in other professions virtually disappears. Consequently, military discipline extends to many areas of the lives of armed forces members above and beyond those regulated by criminal law applicable to citizens. The need for service personnel to be constantly ready for active military deployment means that discipline must also be maintained under peacetime conditions, although it can be

**741** See: Michael R. Gibson, “International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving Utility while Precluding Immunity”, *Journal of International Law and International Relations*, Vol. 4, 2008, pp. 1 and 10.

**742** See: G. R. Rubin, “United Kingdom Military Law: Autonomy, Civilianisation, Juridification”, *Modern Law Review*, Vol. 65, 2002, p. 36; and Christopher Waters, “Beyond Lawfare: Juridical Oversight of Western Militaries”, *Alberta Law Review*, Vol. 46, 2009, p. 885.

argued that a more nuanced approach to discipline should be taken, bearing in mind actual circumstances.

Moreover, the international legal regime presupposes the existence of a system of military discipline. Thus, IHL requires that, in order for captured troops to be treated as prisoners of war, they should be subject to a disciplinary code.<sup>743</sup> This ensures that armed forces personnel can be disciplined by superior officers for any contraventions of the laws of war.<sup>744</sup> In addition, the four Geneva Conventions and Additional Protocol I require that States Parties have penal sanctions in place to prosecute “grave breaches” of the Conventions.<sup>745</sup> In the case of service personnel, such prosecutions can take place in civilian or military courts, depending on the legislative provisions of the state in question. Military justice arrangements for deployments abroad depend on a Status of Force Agreement, according to which the state of deployment has either shared jurisdiction with the sending state or has relinquished jurisdiction over certain offences by visiting forces.<sup>746</sup>

In the context of crimes of sexual violence in armed conflict, the UN Security Council has reinforced the need for states to have an appropriate disciplinary system and to uphold the principle of command responsibility.<sup>747</sup>

Military justice systems also help to ensure that all members of the armed forces are subject to common legal standards, whether they are deployed at home or abroad. A single system of military discipline can be a unifying factor among different units, regiments and branches of the armed forces.<sup>748</sup> In states that do not deploy their armed forces abroad, however, the argument for a military justice system that tries criminal offences committed by service personnel (as well as disciplinary offences) is weaker. This difference assists in explaining some of the variations that can be found among states’ military justice systems.

**743** See: International Conferences (The Hague), *Hague Convention* (IV), 18 October 1907, Annex, Art. 1; ICRC, Third Geneva Convention, *op. cit.*, note 37, Art. 4(2); and Additional Protocol I, *op. cit.*, note 38, Art. 43.

**744** Rowe, *op. cit.*, note 7, p. 67. The role of the commander in military justice is discussed in Victor Hansen, “The impact of military justice reforms on the law of armed conflict: how to avoid unintended consequences”, in Alison Duxbury and Matthew Groves (ed.), *Military Justice in the Modern Age* (Cambridge University Press, 2016), p. 106.

**745** ICRC, First Geneva Convention, Art. 49; Second Geneva Convention, Art. 50; Third Geneva Convention, Art. 129; Fourth Geneva Convention, Art. 146, *op. cit.*, note 39; and Additional Protocol I, *op. cit.*, note 38, Art. 85.

**746** See: Rain Liivoja, *Criminal Jurisdiction Over Armed Forces Abroad* (Cambridge: Cambridge University Press, 2017), pp. 132–8.

**747** See: Security Council Resolution 1820 (2008), para. 3; Security Council Resolution 1888 (2009), para. 3; Security Council Resolution 2272, available at: “Resolutions”, UN Security Council, <https://www.un.org/security-council/content/resolutions-0>. The literature on the jurisdiction over crimes of sexual violence committed in peace operations is extensive. See, for example: Marco Odello and Róisín Burke, “Between Immunity and Impunity: Peacekeeping and Sexual Abuses and Violence”, *The International Journal of Human Rights*, Vol. 20, 2016, p. 839.

**748** This was a significant factor influencing the adoption of a unified system in the United Kingdom. See: The United Kingdom Armed Forces Act 2006, *op. cit.*, note 356.

Enforcing discipline is a task closely linked to the chain of command. Most armed forces provide for minor disciplinary matters to be dealt with speedily and relatively informally by a superior officer. In addition, concerns with military efficiency, discipline and morale have in many states given rise to military courts and tribunals that are distinct from the civilian court system. The Supreme Court of Canada, for example, has summarized the reasons for having a separate military justice system (see Box 18.1).

**Box 18.1: The purpose of military courts according to the Supreme Court of Canada<sup>749</sup>**

The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. [...] There is thus a need for separate tribunals to enforce special disciplinary standards in the military.

Such courts may deal with offences under criminal law and offences under the disciplinary code. For example, the Supreme Court of Canada has held that it is not necessary to establish a "direct link" between the circumstances of an alleged criminal offence and the "discipline, efficiency or morale of the military."<sup>750</sup> Alternatively, civilian courts may have jurisdiction over criminal offences committed by members of the armed forces when they are in their home countries. Finally, not all states perceive the necessity of a separate court for service personnel (see the example of Germany in Box 18.2).<sup>751</sup> In some cases, civilian courts may deal with offences committed by members of the military, both at home and abroad, and may include personnel with military expertise. Variations in terms of personnel, process and appeals are discussed below.

<sup>749</sup> *R. v. Généreux*, 1 S.C.R. 259, Canada: Supreme Court, 13 February 1992, para. 293.

<sup>750</sup> *R. v. Moriarity*, SCC 55, Canada: Supreme Court, 19 November 2015, para. 35.

<sup>751</sup> "Conference on Military Jurisdiction, Rhodes (Greece), 28 September to 2 October 2011", International Society for Military Law and Law of War (ISMLLW), 2013, p. 270.

**Box 18.2: Integrating military crimes in civilian courts (Germany)<sup>752</sup>**

After World War II Germany instituted a distinct separation between penal sanctions and disciplinary sanctions within the armed forces. Additionally, there was a conscious political decision to minimize the catalogue of military criminal offences and to hand over prosecution of military criminal offences to the civil criminal justice system. The reason for this was the conviction that a soldier was to be integrated as [far as] possible into the political and social life of the German society, meaning that separate legal realms were to be avoided as much as possible.

Despite these variations, two major concerns arise in relation to military justice systems: independence and equal treatment.

The issue of independence is related to the chain of command. The nature of military discipline means that superior officers have the authority to make decisions that could affect the safety, health and family life of individual personnel. Disciplinary matters may need to be dealt with under extreme conditions of service. Equally, a miscarriage of justice may lead to the imposition of severe punishments that have far-reaching consequences.

The independence of military courts may be determined by the process of appointing judges or other members of the court, the origin of court members (whether they are from the same unit or a different one, or whether they are military or civilian), access to legal representation and the choice of prosecuting and defence counsels. If any court members are under the direct influence or control of the superior officers of the person charged, this can raise concerns about their independence.

Concerns about equal treatment focus on the extent to which armed forces members who are subject to military justice enjoy comparable rights to the due process guarantees applicable to civilians. This is of particular concern in military justice systems that try offences that, if committed by a civilian, would be dealt with in civilian courts. The issue is whether fair trial rights apply to defendants before military courts, including the rights to remain silent, to the presumption of innocence, to have access to a lawyer, not to be detained except on specified grounds, to know the prosecution's case, to equality of arms and, in some justice systems, to be released on bail. The European Court of Human Rights has recognized that some military disciplinary proceedings fall outside the scope of article 6 of the ECHR. For instance, arrest for two days has been held to be of too short a duration to belong to the "criminal law" sphere. On the other hand, the right to a fair trial has been considered applicable to a penalty of committal to a disciplinary unit for a period of several months.<sup>753</sup>

<sup>752</sup> *Ibid.*

<sup>753</sup> See, for instance, *Engels and Others v. The Netherlands*, 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, 19.

There is also a distinction between the adversarial legal system applied in common law states, where the judge acts as umpires between the prosecution and defence lawyers, and civil law systems that use the investigating-judge model. The important point, however, is that any variations in procedure should be fully justified by military exigencies and within the grounds for restricting procedural trial rights contained in relevant human rights conventions. Where military justice systems depart from civilian procedures, the question is whether they then provide equivalent protections for the defendant.

In recent years, based on concerns about independence and equal treatment, several states have given civilian courts jurisdiction over cases involving armed forces members that were previously tried in military courts. Such cases are sometimes tried in specialized divisions of civilian courts or according to specific procedural rules. Even where this has not occurred, the incorporation of constitutional or human rights guarantees into military justice systems has led to significant reforms, with the consequence that trials in military justice systems are beginning to resemble those of their civilian counterparts.

## International Human Rights Standards

OSCE participating States have, on a number of occasions, affirmed the importance of minimum fair trial standards for all persons, including members of armed forces. These commitments emphasize the need to ensure that detained persons are guaranteed certain pre-trial rights<sup>754</sup> and that they are tried by independent and impartial tribunals.<sup>755</sup> The latter aspect, which is of most relevance to this chapter, was elaborated in some detail in the Copenhagen Document of 1990 (see Box 18.3). Subsequently, the OSCE has reaffirmed the importance of an independent and impartial judiciary, equality of treatment to all before the courts and the strict separation of the prosecutorial function from the judicial function in criminal justice systems.<sup>756</sup>

### Box 18.3: OSCE commitments on fair trials (Copenhagen 1990)<sup>757</sup>

(5) [OSCE participating States] solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following: [...]

(5.12) the independence of judges and the impartial operation of the public judicial service will be ensured;

<sup>754</sup> OSCE, Moscow 1991, para. 23, *op. cit.*, note 486.

<sup>755</sup> OSCE, Vienna 1989, *op. cit.*, note 139.

<sup>756</sup> OSCE Ministerial Council, "Declaration on Criminal Justice Systems", Brussels, 5 December 2006, <https://www.osce.org/mc/23017>. See also: OSCE Ministerial Council, Decision No. 12/05, "Upholding Human Rights and the Rule of Law in Criminal Justice Systems", Ljubljana, 6 December 2005, <https://www.osce.org/mc/17347>.

<sup>757</sup> OSCE, Copenhagen 1990, *op. cit.*, note 141.

(5.13) the independence of legal practitioners will be recognized and protected, in particular as regards conditions for recruitment and practice;

(5.14) the rules relating to criminal procedure will contain a clear definition of powers in relation to prosecution and the measures preceding and accompanying prosecution;

(5.15) any person arrested or detained on a criminal charge will have the right, so that the lawfulness of his arrest or detention can be decided, to be brought promptly before a judge or other officer authorized by law to exercise this function;

(5.16) in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone will be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law;

(5.17) any person prosecuted will have the right to defend himself in person or through prompt legal assistance of his own choosing or, if he does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require

(5.18) no one will be charged with, tried for or convicted of any criminal offence unless the offence is provided for by a law which defines the elements of the offence with clarity and precision;

(5.19) everyone will be presumed innocent until proved guilty according to law;

International human rights treaties and declarations provide international standards for assessing the fairness of trials (see Box 18.4). The applicability of fair trial principles to military courts and tribunals has been explicitly affirmed by the UN Human Rights Committee.<sup>758</sup>

#### **Box 18.4: International human rights concerning detention and criminal trial**

Article 9 ICCPR	1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
Article 14 ICCPR	1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law [...].
Article 10 UDHR	Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

<sup>758</sup> UN Human Rights Committee, "General Comment No. 32, Article 14, Right to Equality Before Courts and Tribunals and to a Fair Trial, 23 August 2007, CCPR/C/GC/32, para. 22.

Article 11 UDHR	1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
Article 5 ECHR	<p>1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:</p> <p>(a) the lawful detention of a person after conviction by a competent court; [...]</p> <p>(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence. [...]</p> <p>3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.</p> <p>4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.</p> <p>5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.</p>
Article 6 ECHR	<p>1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.</p> <p>Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.</p>
Article XXVI American Declaration on the Rights and Duties of Man	<p>Every accused person is presumed to be innocent until proved guilty.</p> <p>Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.</p>

The Special Rapporteur of the UN Sub-Commission on the Promotion and Protection of Human Rights has also drafted principles governing military tribunals.<sup>759</sup>

**759** UN Commission on Human Rights, "Draft Principles Governing the Administration of Justice through Military Tribunals", E/CN.4/2006/58, 13 January 2006 (Decaux Principles). At the time of writing, these principles had not been adopted by the Human Rights Council. They were most recently discussed at a workshop at Yale University in March 2018.



It has been recognized that military courts and tribunals are not, by their very nature, incompatible with international human rights law. The European Court of Human Rights has affirmed that “each State is competent to organise its own system of military discipline and enjoys in that matter a certain margin of appreciation.”<sup>760</sup> Nevertheless, challenges to military courts have been a fruitful source of jurisprudence under the ECHR, leading to substantial reforms in countries such as the United Kingdom, Belgium and Ireland. The overriding sentiment in many cases is that greater civilian involvement in military justice can help to ensure independence and impartiality.<sup>761</sup> The following section examines some of the features of military justice systems that have been questioned in the context of challenges to their jurisdiction.

Article 6 of the ECHR and similar treaty provisions provide for the right to a fair hearing in relation to a “criminal charge”. In determining what constitutes a criminal charge, it is not sufficient merely to look at whether national law distinguishes between “criminal” and “disciplinary”.<sup>762</sup> The concept of a criminal charge may extend beyond the national legal definition to include disciplinary measures, taking into account the nature of the punishment, particularly whether an armed forces member facing trial for a disciplinary offence may be detained if convicted.<sup>763</sup> Consequently, cases that are considered “disciplinary” under national law may be deemed “criminal” and, therefore, subject to the fair trial protections provided in international human rights law.<sup>764</sup>

Service personnel, when faced with a minor (disciplinary) charge, can sometimes elect to face a summary trial before a commanding officer, rather than a military court/court martial. From the service member’s perspective, this may have the advantage of ensuring a lesser penalty if found guilty, although it also means that they may not receive the full protections afforded by a court. The European Court of Human Rights has, however, held that such a choice may not be genuine, such as where decision by the accused is influenced by the fact that a longer sentence may be imposed by a superior court.<sup>765</sup> Thus, service members cannot necessarily “waive” their rights to the fair trial guarantees provided in Article 6 by electing for a summary procedure.<sup>766</sup>

The European Court of Human Rights has drawn attention to the practice in many Council of Europe member states of using military courts “staffed wholly or in part

<sup>760</sup> European Court of Human Rights, *Engel and others v. The Netherlands*, *op. cit.*, note 45, para. 59.

<sup>761</sup> *Cooper v. the United Kingdom*, *op. cit.*, note 225, para. 117; *Grievs v. the United Kingdom*, *op. cit.*, note 225, para. 78.

<sup>762</sup> *Engel and others v. The Netherlands*, *op. cit.*, note 45, para. 82.

<sup>763</sup> *Ibid.*, para. 82.

<sup>764</sup> European Court of Human Rights, *Bell v. the United Kingdom*, EHRR 23, 16 January 2007, paras. 42-3 (regarding the deprivation of liberty).

<sup>765</sup> European Court of Human Rights, *Thompson v. the United Kingdom*, EHRR 11, 15 June 2004, para. 44; *Bell v. the United Kingdom*, EHRR 24, 16 January 2007, para. 47.

<sup>766</sup> For a discussion of summary trials and human rights provisions, see: Aifheli Enos Tshivase, “The Future of Military Summary Trials”, in Duxbury and Groves, *op. cit.*, note 748, pp. 347-364.

by the military to try members of the Armed Forces".<sup>767</sup> Article 6 of the ECHR does not prohibit this practice.<sup>768</sup> However, the Court has found that it is incompatible with the right to a fair trial by an independent and impartial tribunal if the superior officer of the defendant appoints the judges to try the case, appoints the prosecuting and/or defence counsel or prepares the evidence against the accused.<sup>769</sup> The power of a superior officer to quash or change a military court's decision has also been considered incompatible with Article 6.<sup>770</sup> The European Court of Human Rights has listed the factors that may impact on the independence of military members of a military court, including whether the member is subject to "military authority and discipline."<sup>771</sup> Where civilians are present in the system, they must have the ability to exercise sufficient "influence and involvement in the tribunal proceedings" to satisfy Article 6.<sup>772</sup>

In order to ensure judicial independence, courts have favoured a degree of security of tenure for military judges.<sup>773</sup> Whether this means appointment until retirement (as distinct from appointment for a number of years) may depend, in part, on national legislation. For example, the European Court of Human Rights has found that the presence of a military member with a four-year (renewable) term on the Military Chamber of the Arnhem Court of Appeal, in the Netherlands, is compatible with the procedural obligation in Article 2 of the ECHR to hold an effective investigation where a person has been killed by a state agent's use of force.<sup>774</sup>

In Canada, however, in the context of a criminal charge, the Court Martial Appeal Court declared that domestic legislation providing military judges with five-year renewal terms and requiring ministerial power to reappoint past retirement age raised a "reasonable apprehension" that the judges' "independence may be undermined."<sup>775</sup>

Armed forces may deploy with civilians, including civilian contractors. In such circumstances, states may legislate to subject civilians to military jurisdiction. For example, Malta enables courts martial to try civilians who are employed in the service

**767** European Court of Human Rights, *Mikhno v. Ukraine* (Application No. 32514/12), 1 September 2016), para. 164.

**768** *Ibid.*

**769** European Court of Human Rights, *Findlay v. the United Kingdom*, EHRR 221, 25 February 1997; and *Grievies v. the United Kingdom*, *op. cit.*, note 225 (concerning the lack of independence of a naval judge advocate). Revisions to the procedures in the United Kingdom introduced by the Armed Forces Act of 1996 have been found to satisfy Article 6 of the ECHR: *Cooper v. the United Kingdom*, *op. cit.*, note 225.

**770** *Ibid.*, *Findlay v. the United Kingdom*; and *Morris v. the United Kingdom*, EHRR 52, 26 February 2002.

**771** European Court of Human Rights, *Jaloud v. The Netherlands*, EHRR 29, 20 November 2014, para. 196.

**772** European Court of Human Rights, *Martin v. the United Kingdom*, EHRR 31, 24 October 2006, para. 52.

**773** *Cooper v. the United Kingdom*, *op. cit.*, note 225, para. 118; *Morris v. the United Kingdom*, *op. cit.*, note 775, para. 69; and Alison Duxbury, "The Curious Case of the Australian Military Court", *Oxford University Commonwealth Law Journal*, Vol 10, 2010, pp. 155 and 168.

**774** *Jaloud v. The Netherlands*, *op. cit.*, note 776, paras. 64 and 196. *Jaloud* concerned an allegation that the Military Chamber's decision not to order additional investigations into a death in Iraq as a result of the use of force by a Dutch service member violated the procedural obligations in Article 2 of the ECHR.

**775** *R. v. Leblanc*, CMAC 2, 2 June 2011 para. 62. The National Defence Act (Canada) was subsequently amended.

of the armed forces while on active service. The United States extends military justice in times of war or military operations to “persons serving with or accompanying an armed force in the field.”<sup>776</sup> In Bulgaria, military courts have jurisdiction over civilians employed in the Ministry of Defence and the Bulgarian Army.<sup>777</sup> Civilians in the service of the United Kingdom Armed Forces are subject to the Service Civilian Court when deployed overseas.<sup>778</sup>

While courts have accepted jurisdiction over civilians in such circumstances,<sup>779</sup> in other situations, subjecting civilians to the jurisdiction of military courts or civilian courts that include military judges is controversial. The UN Human Rights Committee has stated that the trial of civilians before military courts should be “exceptional” or “very exceptional.”<sup>780</sup> Although the European Court of Human Rights has not prohibited the trial of civilians before military courts, it has repeatedly affirmed that such jurisdiction should be exercised with caution.<sup>781</sup> Furthermore, in the context of United States military commissions judging detainees in European soil, the European Court of Human Rights has reinforced the relevance of Article 6 of the ECHR and judicial independence. The Court has held that States Parties to the ECHR cannot co-operate in the transfer of a person within their territory where there is a real risk that they will be tried by military commissions that do not constitute tribunals “established by law” or in other way lack the independence or impartiality required by Article 6.<sup>782</sup>

A number of OSCE participating States have made reservations to Articles 5 and/or 6 of the ECHR in relation to their military disciplinary measures, namely: Armenia, Azerbaijan, the Czech Republic, France, Moldova, Portugal, Russia, Slovakia, Spain and Ukraine.<sup>783</sup>

Finally, it should be noted that human rights institutions have questioned the ability of military courts to try military personnel for their alleged involvement in serious

<sup>776</sup> Uniform Code of Military Justice, 10 USC, para. 802, Article 2(a)(10).

<sup>777</sup> ISMLLW, *op. cit.*, note 756, p. 182.

<sup>778</sup> United Kingdom Armed Forces Act 2006, *op. cit.*, note 356, Section 51.

<sup>779</sup> See: Rain Liivoja, “Trying civilians in military courts: a necessary evil?”, in Duxbury and Groves, *op. cit.*, note 748, pp. 81-105.

<sup>780</sup> See, for example: UN Human Rights Committee, *Abbassi v. Algeria*, Communication No. 1172/2003, 28 March 2007, para. 8.7; *Benhadj v. Algeria*, Communication No. 1173/2003, 20 July 2007, para. 8.8; and *El Abani v. Libya*, Communication No. 1640/2007, 14 September 2010, para. 7.8. See also: UN Human Rights Committee, General Comment No. 32, *op. cit.*, note 763; Vashakmadze, Mindia: Understanding Military Justice, A Practice Note, p.34. DCAF, 2018.

<sup>781</sup> European Court of Human Rights, *Öcalan v. Turkey*, EHRR 985, 12 May 2005; *Martin v. the United Kingdom*, *op. cit.*, note 777, para. 44. See also: *Ergin v. Turkey*, EHRR 36, 4 May 2006, para. 45.

<sup>782</sup> European Court of Human Rights, *Al Nashiri v. Poland*; *Husayn v. Poland*, EHRR 16, 16 February 2015, paras. 555-60; and European Court of Human Rights, *Al Nashiri v. Romania* (Application No. 33234/12, judgment of 31 May 2018), para. 721. Fair trials guarantees in proceedings before military commissions were also addressed in the ODIHR report “Human Rights Situation of Detainees at Guantánamo”, 2015, page 69, <https://www.osce.org/odihr/198721?download=true>.

<sup>783</sup> “Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms”, Council of Europe, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations>.

human rights violations. Such cases concern the rights of victims of human rights abuses, including the right to an effective remedy. Concerning allegations of human rights violations by military personnel outside their official duties, the UN Human Rights Committee has called for military criminal jurisdictions to have a “restrictive and exceptional scope.”<sup>784</sup> In particular, the Committee referred to Principle 9 of the Decaux Principles, which states that “the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.”<sup>785</sup> Jurisprudence in the Inter-American Human Rights System indicates a trend against the exercise of military jurisdiction where allegations of human rights abuses are made.<sup>786</sup>

## Different Approaches

Military justice is a complex field, in which a great variety of national systems operate. This section focuses on the relationship between criminal offences and military discipline, the type of court dealing with military offences, the choice of military or civilian judges, the position of prosecutors and defence lawyers, and the need for independent appeals.

### *The relationship between criminal offences and military discipline*

A distinction should be drawn between criminal offences and disciplinary offences. For example, theft or assault would amount to a criminal offence, whereas failing to report for duty would be a disciplinary offence. While civilian courts can usually only deal with criminal offences, military courts may (depending on the state concerned) deal with both criminal and disciplinary offences or only with disciplinary offences. The distinction between criminal offences and disciplinary offences, however, is not always clear. Criminal conduct, particularly when it relates in some way to the member’s service (for example, theft of military property) may be a criminal offence under civilian law, but also have consequences for military discipline. In such a situation, prosecution in a military justice system may be deemed more appropriate. The approach in the United Kingdom is to permit military courts to deal with both criminal charges and disciplinary offences by incorporating all criminal offences into its Armed Forces legislation (the Armed Forces Act of 2006) along with disciplinary offences. This eliminates the potential problem of double punishment. A variation on this model is found in Canada, where military courts can try soldiers for some criminal offences, while certain serious offences (such as murder and manslaughter) are reserved for civilian courts.<sup>787</sup>

<sup>784</sup> UN Human Rights Committee, *Kholodova v. Russian Federation*, Communication 1548/2007, 11 December 2012, para. 10.5.

<sup>785</sup> *Ibid.*

<sup>786</sup> See Christina M. Cerna, “The Inter-American System and Military Justice”, in Duxbury and Groves, *op. cit.*, note 748, pp. 325–346.

<sup>787</sup> National Defence Act (*Revised Statutes of Canada*, 1985, c N-5), Pt. III.

Countries that differentiate between disciplinary and criminal matters must take measures to avoid double punishment, which contravenes both the rule of law and international human rights standards.<sup>788</sup> It is true that disciplinary procedures and criminal law can be regarded as serving different functions that are not mutually exclusive. Accordingly, the objective of disciplinary action – to ensure the effectiveness of the armed forces – may not be fully realized by criminal penalties that focus on the circumstances and the severity of the offence committed. In this context, disciplinary action may, depending on the circumstances, be comparable to an employer’s decision to dismiss an employee following a criminal conviction.

As explained above, one of the main human rights issues concerning military discipline is the question of ensuring the independence of courts vis-à-vis chains of command. This problem has several dimensions: whether ordinary courts or military courts have jurisdiction, whether military courts include civilian judges, how the judges of military courts are appointed, the role of the prosecution and defence lawyers, and how appeals are handled. These are discussed, in turn, below.

### ***The type of court dealing with criminal offences in the military***<sup>789</sup>

Military justice systems in OSCE participating States take a variety of forms (see Box 18.5).

#### **Box 18.5: Types of military justice systems with jurisdiction over criminal offences**

Model	Examples
Ordinary civilian courts	Albania, Austria, Czech Republic, Denmark, Estonia, Germany, Lithuania, Montenegro, Norway, Slovakia, Slovenia, Sweden
Jurisdiction invested in military chambers of civilian courts	Hungary, the Netherlands
Jurisdiction invested in both civilian and military courts	Cyprus, Malta, the United Kingdom, the United States
Military courts with exclusive jurisdiction	Azerbaijan, Greece, Poland, Romania

In the first model, ordinary civilian courts may deal with all criminal allegations against members of the armed services. This approach adheres to strict equality of treatment. There may be potential disadvantages, however, in so far as some offences arising in

<sup>788</sup> ICCPR, *op. cit.*, note 16, Art. 14(7): “No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.” The UN Human Rights Committee has stated that “someone acquitted by a civilian court cannot be tried again for the same offence by a military or special tribunal”, UN HRC General Comment No. 32, *op. cit.*, note 763, para. 54.

<sup>789</sup> Unless otherwise stated, information in this section is compiled from the answers to the ODIHR-DCAF 2018 questionnaire, qu. 65; and ISMLLW, *op. cit.*, note 756.

a military context may be handled by judges unfamiliar with military conditions and culture. It is also possible that the intervention of a civilian court may negatively impact on military effectiveness and requirements, such as if a trial is subject to lengthy delays.

A second approach, designed to overcome these potential difficulties, is to create a specialized division or procedure within the civilian courts. In the Netherlands, for example, special chambers exist for trying military personnel for criminal offences. These courts include a judge who is a member of the armed forces. The cases are dealt with initially at the canton section of a district court (for minor offences) or by the District Court in Arnhem for other offences, with appeals to the military chamber of the Appeals Court in Arnhem. In Finland, a professional judge presides over criminal cases involving military personnel, along with two military members of the court.<sup>790</sup>

In the third model, civilian and military courts have overlapping jurisdictions. Cases are divided between the courts according to various factors, including the seriousness of the offence, where it was committed, the identity of the victim and whether it was committed in peacetime or wartime. In the United Kingdom, for example, criminal offences committed by members of the Armed Forces against civilians are normally dealt with in the civilian courts, whereas criminal offences committed by one soldier against another are usually heard in military courts (courts martial). This is intended to ensure judicial independence and to enhance public confidence in the handling of the most serious cases. In Switzerland, for example, "common" crimes committed by service personnel are heard in the civilian courts, while crimes against military law are heard in the military courts.

#### **Box 18.6: Examples of states where military courts have the power to try civilians<sup>791</sup>**

**Cyprus** – Civilians can be tried in military courts for specific military offences.

**Greece** – A civilian can be tried by a military court if the offence was committed during military service. In such cases, the case can also be heard by civilian courts.

**Latvia** – Military courts can try civilians who, in the event of war or a state of emergency:

- a) commit a criminal offence against a soldier, prisoner of war, movable or immovable property used by the Armed Forces, or commit an offence that otherwise endangers the country's defence capabilities;

<sup>790</sup> See: Code of Military Judicial Procedure (Finland), paras. 3 and 10, cited in Rain Liivoja, "Military Justice", in Markus D. Dubber and Tatjana Hörnle (eds.), *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014), p. 337. Military courts may be created in the event of a conflict on the territory of Finland, see: Code of Military Judicial Procedure (Finland), Chapter 6.

<sup>791</sup> Information compiled in part from the ODIHR-DCAF 2018 questionnaire, qu. 66.

- b) commit a criminal offence together with a soldier;
- c) commit a criminal offence connected to other criminal offences within the military court's jurisdiction so that, for the sake of a faster and more objective examination of the case, the same court may consider multiple cases; and
- d) commit crimes against humanity and peace, war crimes and genocide, and "crimes against the state" (with the exception of certain types of electoral fraud), as well as the crimes of avoiding mobilization, hindering mobilization activities and the non-fulfilment of mobilization orders.

**Malta** – Military courts may only try civilians who are employed by the Armed Forces.

**Switzerland** – Per a decision of the Swiss Parliament and according to the Swiss Military Criminal Procedure Code, civilians may be tried in military courts in times of war, for specific threats to national military interests (e.g., a breach of military secrets) or at any time for violations of IHL at home and abroad.

**The United Kingdom** – Military courts can try civilians deployed overseas or working on a military base.

Other states explicitly differentiate between times of peace and war. For example, in peacetime, French civilian courts specializing in military matters try military personnel for offences committed on French soil, whereas military courts are responsible for offences committed by soldiers in times of war. In Latvia, Lithuania and Portugal, there are no military courts in peacetime – they can only be established in the event of a war or a state of emergency. In Spain, following changes enacted in 2016, the jurisdiction of military courts in peacetime is confined to offences against the military criminal code, with jurisdiction extended to troops stationed abroad. The jurisdiction of military courts can also be extended during armed conflict.<sup>792</sup>

Finally, there are countries where military courts are solely responsible for handling all criminal offences involving members of the armed forces. The advantages of this approach are that the courts are familiar with military life, while any interference with military effectiveness may be minimized. However, this arrangement may give rise to concerns regarding public perception of judicial independence and the equal treatment of military and civilian defendants.

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<sup>792</sup> See: Christina Cerna, "Spain's New Code of Military Justice Enters into Force", Global Military Justice Reform website, 13 March 2016, <http://globalmjreform.blogspot.com>.

## ***The composition of military courts***

There are a variety of arrangements for the composition of military courts. Some countries include a civilian element, such as Azerbaijan and the United Kingdom. Although a civilian judge may be less familiar with the context in which disciplinary decisions are taken in the military, the advantage is that a civilian judge enhances the appearance of independence and, thus, public confidence in military justice.

Another approach is to have a mixed composition of military and civilian court members, as is the case in Cyprus and Italy. This helps to ensure that military courts are integrated into the civilian legal system.

Where military courts are staffed solely by members of the military, as is the case in Greece, Poland and Romania, the appearance of independence is enhanced if appeals can be heard in a higher court that is outside the military court system or the Ministry of Defence. In Greece and Poland, for example, the final court of appeal is the Supreme Court.

## ***Prosecution and defence lawyers***<sup>793</sup>

The existence of a separate military prosecutor largely depends on whether cases involving military personnel are tried in civilian or military courts. In the Czech Republic, Estonia, Finland, Germany and the Netherlands, military personnel are prosecuted by civilian prosecutors, who may be assigned mainly to military cases (such as in the Czech Republic). Other states, including Canada, have distinct military prosecutors or military prosecution services. Generally speaking, military prosecutors specialize in military law and are familiar with the military context. The United Kingdom's Director of Service Prosecutions can either be a member of the military or a civilian, although in practice is usually a civilian, and appoints military officers as prosecuting officers. It is important to have in place constitutional, legislative or administrative safeguards to guarantee prosecutors' independence. This is particularly important in legal systems that grant prosecutors broad powers in terms of determining charges, when to discontinue prosecution, the examination of evidence and the possible cross-examination of defendants and other witnesses. For example, Denmark's Military Prosecution Service does not form part of the chain of command and is subordinate only to the Minister of Defence.

It is important that armed forces personnel accused of a serious criminal offence or disciplinary violation have access to independent legal advice and representation. In the 1990 Copenhagen Document, OSCE participating States declared that a person facing a criminal charge has the right "to defend himself in person or through prompt legal assistance of his own choosing or, if he does have not sufficient means to pay for legal

<sup>793</sup> The information in this section is taken from the responses question 67(c) of the ODIHR-DCAF 2018 questionnaire, and ISMLLW, *op. cit.*, note 756.



assistance, to be given it free when the interests of justice so require". This may be applied to both criminal cases and those disciplinary offences that have similar consequences<sup>794</sup>. Professional standards regulating the conduct of lawyers provide an additional safeguard for the independence of the defence counsel. Attorney-client privilege may also act as a safeguard against command influence in cases where the defence lawyer is a member of the armed services. In many states, such as Denmark, Finland, Ireland and Switzerland, defence lawyers are civilian lawyers and, therefore, separate from the military chain of command.

## ***Appeals from military courts***

As noted earlier, the ability to appeal the judgement of a military court in a civilian court provides an important safeguard. It helps to ensure that the lower court is correctly applying the law, and can also help to correct procedural defects, including those that may arise from command influence. In these respects, the integration of military courts into the civilian legal system acts as an important safeguard, allowing for the correction of possible miscarriages of justice, and can help instil public confidence in the military justice system. Just as the military should ultimately be under civilian control, so, it can be argued, should military courts be subject to the civilian court system.<sup>795</sup> Moreover, in the case of criminal charges, the right of appeal against conviction or sentence is recognized by major human rights treaties, although they do not stipulate the type of court.<sup>796</sup> Where less serious disciplinary matters are punished by a superior officer, an appeal may be the first opportunity for a formal hearing with procedural safeguards.

In practice, countries provide for appeals in a variety of ways. In a few participating States, a case can only be appealed in a higher military court. Most states allow final appeals to be made to the state's supreme court, although sometimes on restricted grounds. The situation in different OSCE participating States demonstrates the range of possible appellate bodies. In Bulgaria, for example, appeals from the five military courts are heard by the Military Court of Appeal, and then, potentially, by the Supreme Court of Cassation.<sup>797</sup> In some countries, there is an intermediate appeal – to the Court Martial Appeal Court (Canada) or the Court of Appeals for the Armed Forces (the United States) – staffed by civilian judges. In Ireland, the jurisdiction to hear appeals has been transferred from the Court-Martial Appeal Court to the state's Court of Appeal.<sup>798</sup>

**794** For example, in the United Kingdom, legal representation is provided to military personnel in both criminal cases and "incidents arising during the course of duty". For more details, check the guidance of the Ministry of Defence "JSP 838 The Armed Forces Legal Aid Scheme" [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/387711/20141215\\_JSP\\_838\\_Pt2\\_DRU\\_Version\\_FI-NAL.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/387711/20141215_JSP_838_Pt2_DRU_Version_FI-NAL.pdf), page 2.

**795** Rowe, *op. cit.*, note 7, p. 87.

**796** See, for example: ICCPR, *op. cit.*, note 16, Art. 14(5).

**797** See: Website of Bulgaria's Military Court of Appeals (in Bulgarian), <http://vasbg.com/bg>.

**798** This occurred via the Court of Appeal Act 2014, section 7A. There is a possible appeal right to the Supreme Court in the Constitution of Ireland, section 34(5)(3).

## Good Practices and Recommendations

- » Military judges and prosecutors should be drawn from independent services not under the command of the unit concerned and, preferably, appointed by civilian ministries of justice or prosecutor's offices. Military judges appointed to standing courts should enjoy security of tenure.
- » The process for allocating judges and prosecution lawyers to military trials should be insulated from intervention by the chain of command.
- » Defendants in military trials should have access to legal advice and representation of their choice and, if unable to pay, should be granted legal aid on conditions no less favourable than those applicable to normal criminal trials in the country concerned.
- » Where offences are tried before military courts, a civilian judge should be included at first instance. Alternatively, a civilian court should have the jurisdiction to hear an appeal. In every case, final appeals should be heard within the civilian court system.
- » Safeguards should be incorporated to prevent members of the armed services from being doubly punished for the same act in successive criminal and disciplinary proceedings.
- » Key trial safeguards as established by international standards should be respected in all military tribunal proceedings. In general, tribunal hearings should be public, when possible.<sup>799</sup> The accused should have adequate time and facilities for preparing their defence,<sup>800</sup> be provided with the assistance of legal counsel<sup>801</sup> and have a right to appeal in the event of a conviction.<sup>802</sup> In addition, an extensive use of classified information should be prohibited and the person should have access to their full case file, without undue restrictions.<sup>803</sup>

**799** Possible grounds for closed hearings may be protection of morals, public order or national security in a democratic society, protection of juveniles, protection of parties' private life or situations when publicity would prejudice the interests of justice. Source: Council of Europe Fundamental Rights Agency, *Handbook on European Law Relating to Access to Justice*, (Vienna: Council of Europe Fundamental Rights Agency, 2016), p. 45, [https://www.echr.coe.int/Documents/Handbook\\_access\\_justice\\_ENG.pdf](https://www.echr.coe.int/Documents/Handbook_access_justice_ENG.pdf).

**800** European Convention on Human Rights, Article 6 (3) (b).

**801** *Ibid*, Article 6 (3) (c),

**802** Council of Europe, Protocol No. 7 to the ECHR, CETS No. 117, 1984, Art. 2

**803** Mark Denbeaux, Joshua Denbeaux et al., "No-Hearing Hearings - CSRT: the Modern Habeas Corpus?", Seton Hall Public Law Research Paper No. 951245, pp. 4-6, <[https://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID951245\\_code492310.pdf?abstractid=951245&mirid=1](https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID951245_code492310.pdf?abstractid=951245&mirid=1)>.

## Further reading

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# Chapter 19: Ombuds Institutions for the Armed Forces

## Introduction: Issues at Stake

Ombuds institutions are independent oversight bodies that receive complaints and investigate matters pertaining to the protection of human rights and prevention of maladministration. Through their investigations and subsequent reports and recommendations, ombuds institutions improve the good governance and effectiveness of all government bodies, including the armed forces.

Ombuds institutions help to ensure that the armed forces are fulfilling their missions in a fair, transparent and accountable way that does not lead to human rights abuses within and/or by the armed forces. By receiving and investigating complaints, as well as through reporting on thematic questions and systemic problems, ombuds institutions can improve how the armed forces operate and how they are managed and overseen. Their work requires independence and impartiality, as well as the necessary resources and powers to ensure that the armed forces remain democratic, accountable and transparent.

The principles of good governance and democratic oversight apply to all public institutions, including the armed forces. Ombuds institutions can enhance the good governance of the armed forces by increasing public participation, engagement and accountability. In doing so, they help to create more effective, efficient and participatory armed forces in which human rights are respected. A key role for ombuds institutions is investigating abuse and mismanagement within the armed forces and issuing reports and recommendations on how to rectify these issues. Ombuds institutions aim to protect the rights of both serving personnel and the public at large, by receiving complaints of abuses of human rights, investigating such allegations and issuing public recommendations to rectify any abuses and adverse impacts on human rights identified.

As ombuds institutions are usually independent of the armed forces' chain of command, they are well placed to identify needs and facilitate the changes needed. The fundamental purpose of an ombuds institution is to protect the rights and well-being of armed forces personnel in order to improve their quality of life and morale and, in doing so, to improve the effectiveness of the armed forces as a whole.

# International Human Rights Standards

It is the responsibility of ombuds institutions to ensure that the human rights of military personnel are respected and applied fairly and consistently. As highlighted elsewhere in this compendium, armed forces personnel are citizens in uniform and should enjoy the same rights and freedoms as civilians.

## Box 19.1: Key human rights and their relevance to armed forces personnel

Right	Examples of relevance
Right to life	Extreme bullying of conscripts leading to death. Inquests into deaths on military premises or during military service and training.
Right to liberty	Detention under military justice systems.
Right to equality	Discrimination in the treatment of women, religious and ethnic minorities, and LGBTI service personnel (e.g., discharge following pregnancy or upon discovery of sexual orientation, sexual harassment, limitations on the promotion of women and their deployment to combat zones).
Right to a fair trial, hearing and remedy	Courts martial, military justice systems and due process procedures.
Right to freedom of thought, conscience, religion or belief	Conscientious objection. Restrictions on the manifestations of religion or belief (e.g., religious dress, religious dietary requirements, opportunities for religious worship and observance, access to co-members of religious communities, proselytism of fellow service personnel).
Right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment	Bullying of conscripts and initiation rituals. Informal punishments. Sexual violence and abuse.
Right to freedom of opinion and expression	Limits on public statements by members of the armed forces. Public interest disclosures.
Rights to freedom of association and peaceful assembly	Participation by service personnel in trade unions, military associations or civil society groups.

The UN General Assembly has issued several resolutions recognizing and supporting the role of ombuds institutions in promoting and protecting human rights.<sup>804</sup> In particular, the General Assembly has encouraged ombuds institutions, *inter alia*:

*"To operate, as appropriate, in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights*

<sup>804</sup> UN General Assembly Resolutions A/RES/71/200 of 19 December 2016, A/RES/65/207 of 21 December 2010, A/RES/67/163 of 20 December 2012 and A/RES/69/168 of 18 December 2014, see: "General Assembly Resolutions", UN, <https://www.un.org/en/sections/documents/general-assembly-resolutions/>

*(the Paris Principles) and other relevant international instruments, in order to strengthen their independence and autonomy and to enhance their capacity to assist Member States in the promotion and protection of human rights’.*<sup>805</sup>

In 2010, the Council of Europe’s Committee of Ministers – which includes 47 of the OSCE’s 57 participating States – adopted a “Recommendation on Human Rights of Members of the Armed Forces”. In particular, it noted that:

*“Members of the armed forces who claim to have been victims of harassment or bullying should have access to a complaint mechanism independent of the chain of command.”*<sup>806</sup>

This Recommendation was further expanded on in 2019, when the Council of Europe’s Venice Commission adopted the “Principles on the Protection and Promotion of the Ombudsman Institution”, also known as “The Venice Principles”.<sup>807</sup> These Principles enumerated 25 standards that should be upheld to ensure strong and effective ombuds institutions. The Venice Principles range from establishing sound legal status and independence, terms of mandate, financial guarantees and the functioning of the office.

### **Box 19.2: OSCE commitments related to ombuds institutions with regard to specific groups of people**

Annex to Ministerial Council Decision No. 3/03: Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area (Maastricht 2003):

Recommended action by OSCE institutions and structures:

20. The ODIHR and, where appropriate, other OSCE institutions and structures, including OSCE field operations, will assist participating States, at their request, in developing anti-discrimination legislation, as well as in establishing anti-discrimination bodies. [...]

22. Upon request, the ODIHR will provide advice on how a participating State’s existing mechanisms, such as ombudsman offices, commissions for combating discrimination, police disciplinary commissions, and other relevant bodies can alleviate tensions between Roma and Sinti and non-Roma communities.

**805** UN General Assembly, “The Role of the Ombudsman, Mediator and Other National Human Rights Institutions in the Promotion and Protection of Human Rights”, 18 December 2014, A/RES/69/168, para. 6(a), [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/69/168](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/168).

**806** Council of Europe, Recommendation CM/Rec(2010)4, *op. cit.*, note 26.

**807** Council of Europe Venice Commission, “Principles on the Protection and Promotion of the Ombudsman Institution”, 3 May 2019, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=C-DL-AD\(2019\)005-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=C-DL-AD(2019)005-e).

Annex to Ministerial Council Decision No. 14/04: 2004 OSCE Action Plan for the Promotion of Gender Equality (Sofia 2004):

44. (g) Building national mechanisms for the advancement of women: The ODIHR will continue to provide know-how and support for the building-up of democratic institutions for advancing gender equality, such as Ombudsman's offices at local and national levels, as appropriate.

## Different Approaches

### *Types of ombuds institutions for the armed forces*

Ombuds institutions take a number of forms, ranging from national human rights institutions mandated to oversee and address complaints and concerns relating to all government bodies, to independent bodies with exclusive oversight of the armed forces. There exist three models of ombuds institutions for the armed forces in OSCE participating States:

- general ombuds institutions;<sup>808</sup>
- inspectors general;<sup>809</sup> and
- military ombuds institutions.<sup>810</sup>

### *General ombuds institutions*

In many states, oversight of the armed forces lies within the mandate of a broader civilian complaints mechanism, such as a national human rights institution or ombudsperson that reports directly to parliament. These mechanisms are usually tasked with protecting the rights of all members of society and addressing complaints related to all branches of government.

General ombuds institutions often hold a powerful position within the political system and, for this reason, can offer several advantages:

- A broad mandate can bring political importance, making it difficult for decision makers to ignore ombuds recommendations;
- A prominent status means that the public (including members of the armed forces) are more likely to know about and understand the role of the ombuds institution, and to come forward with concerns;

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**808** Found in: Albania, Armenia, Austria, Azerbaijan, Belgium, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Georgia, Greece, Hungary, Kazakhstan, Kyrgyzstan, Latvia, Malta, Mongolia, Montenegro, the Netherlands, North Macedonia, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Sweden, Tajikistan, Ukraine and Uzbekistan.

**809** Found in Belgium, the Czech Republic, the Netherlands and the United States.

**810** Found in Austria, Bosnia and Herzegovina, Canada, Germany, Ireland, Norway and the United Kingdom.

- Civilians and members of the armed forces are more likely to be treated equally and their interests balanced in any recommendations; and
- Concentrating oversight functions in one office can be less costly than having several specialized offices.

In the context of the armed forces, general ombuds institution can be disadvantaged by a lack of specific military knowledge and credibility. A broad mandate can also draw attention away from the particular problems facing armed forces personnel to focus on other pressing issues. Insufficient resources devoted to military-specific cases can cause significant delays in the resolution of complaints. A solution to these problems could be the introduction of specializations within an ombuds institution's office, such as by appointing a deputy to deal specifically with military affairs (see Box 19.3).

### **Box 19.3: The special representative for military affairs within the ombuds institution in Ukraine**

Ukraine's Law "On Democratic Civilian Control of State Military Organization and Law Enforcement Bodies" sets out the role of the ombuds institution in protecting the rights of service personnel and establishes a special representative to this end:

1. The Ombudsman of the Verkhovna Rada for Human Rights (hereinafter, the Ombudsman), in accordance with his or her powers determined under the Constitution and the Laws of Ukraine:

- Holds a self-regulated position and, at the request of the Verkhovna Rada or at the request of a citizen or civil organization, opines on the state of constitutional rights and freedoms observances for conscripts, military servicemen, military servicemen transferred to the reserve or exempt from military service and members of their families;
- Has the right to request and obtain documents, materials and explanations necessary to exercise his/her legal authority from Chiefs and other senior Frameworks for National Security Policy officials of the Armed Forces and other State Military and law enforcement Organizations while observing the strict legislative codes relating to state secrecy;
- Has the right to call urgent meetings with officials of the Armed Forces and other State Military and law enforcement organizations;
- Has the right and purpose of fulfilling his/her functions without restraint and warning, i.e., attending meetings of military units and sub-units, as well as being present at joint meetings held between the Armed Forces and other State Military and law enforcement organizations, when the issues relating to the purview of the Ombudsman are discussed.



The appointment of the Ombudsman and of his/her representative for the protection of military servicemen's rights and dismissal procedures is carried out in accordance with the following Law of Ukraine: 'On the Ombudsman of the Verkhovna Rada of Ukraine for Human Rights'.

The Ombudsman's annual report envelopes the observances of the constitutional rights and freedoms of military servicemen, it makes proposals on ways to enhance the rule of law, and eliminates deficiencies and violations in the activities of the components of State Military and law enforcement Organizations. The Ombudsman's report is made public.

The Ombudsman regularly informs the public through the media, of his/her activities and on the State observances of constitutional rights and freedoms of citizens in the Armed Forces and other State Military and law enforcement Organizations.<sup>811</sup>

### *Inspectors general*

Inspectors general are independent oversight bodies integrated within the armed forces' chain of command. This lack of institutional separation means that many inspectors general are not considered to be ombuds institutions. Inspectors general are usually (although not always) serving members of the armed forces and are usually situated within the chain of command, reporting to and/or taking direction from superior officers. However, some inspectors general achieve such a high degree of independence and impartiality that they, de facto, serve as ombuds institutions for the armed forces. In the United States, for example, the Inspector General of the Department of Defence is always a civilian, which serves as additional guarantee of their independence.<sup>812</sup>

By integrating oversight within the armed forces, inspectors general can provide the following advantages:

- They may be more attentive to command and control issues affecting the operational effectiveness of the armed forces;
- They have specialist knowledge of military life, which can make them more receptive to military-specific problems and issues; and
- They are more accessible for members of the armed forces with whom they may be deployed, for example, in remote or foreign postings.

The main drawback of inspectors general is that their position within armed forces can reduce their ability to address controversial issues or pursue investigations that run counter

**811** Oleksandr Lytvynenko, Philipp Fluri and Valentyn Badrack, *The Security Sector Legislation of Ukraine* (Kyiv: Center for Army, Conversion and Disarmament Studies, 2017), [https://www.dcaf.ch/sites/default/files/publications/documents/Security%20Sector%20Legislation%20Ukraine%202017\\_eng.pdf](https://www.dcaf.ch/sites/default/files/publications/documents/Security%20Sector%20Legislation%20Ukraine%202017_eng.pdf).

**812** "No member of the Armed Forces, active or reserve, shall be appointed Inspector General of the Department of Defense." The United States, "Inspector General Act of 1978," §8a.

to the interests of the military hierarchy. This can, in turn, undermine confidence in the complaints mechanism in the eyes of the complainants or the public, and reduce the credibility of the ombuds institution and the armed forces they are supposed to oversee.

Making inspectors general report directly to a minister of defence can overcome this problem, as it provides direct access to the most senior defence official, while also removing potential conflicts of interest within the military hierarchy. In the Netherlands, for example, the Inspector General is customarily selected to be a high-ranking officer, typically a lieutenant general, who is due to retire after serving in the role. This ensures that the individual not only commands a high degree of respect and authority, but that they are also less likely to prioritize career prospects and more willing to criticize the military hierarchy. Another approach is that adopted in the United States, where the Inspector General must be a civilian and, although under the supervision of the Secretary of Defense, has a duty to report to Congress (see Box 19.4).

#### **Box 19.4: The United States' Inspector General for the Armed Forces**

The United States' Inspector General Act of 1978 sets out provisions for appointing, supervising and dismissing an Inspector General within the Department of Defense, as well as the duties and responsibilities of the role, as summarized below:<sup>813</sup>

- a) *Appointment*: The Inspector General is appointed "without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations." Acting or reserve members of the Armed Forces cannot be appointed to the role.
- b) *Independence*: The Inspector General operates within the Department of Defense. However, "[n]either the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation."

#### *Duties and responsibilities:*

1. Provides policy direction for and conducts, supervises and co-ordinates audits and investigations related to the programmes and operations of the Department of Defense.
2. Reviews existing and proposed legislation and regulations related to programmes and operations of the Department of Defense, and provides recommendations for the biannual reports submitted to Congress, including with the aim of preventing and detecting fraud and abuse in the Department's programmes and operations.

**813** "IG Act", Council of the Inspectors General on Integrity and Efficiency, <https://www.ignet.gov/content/ig-act>; and "About DoD Office of Inspector General", Department of Defense Office of Inspector General, <https://www.dodig.mil/About/>.

3. Keeps the Secretary of Defense and Congress informed of fraud and other serious problems, and recommends corrective actions and reports on their implementation.

*Reporting to Congress:* The Inspector General issues biannual reports that are submitted to the appropriate committees or subcommittees of Congress.

### *Military ombuds institutions*

Several states have opted for a third model – the specialized military ombuds institution – to provide independent oversight of the armed forces. Despite this military focus, such institutions are civilian and independent of the military chain of command. Military ombuds institutions have the advantage of being able to devote their attention exclusively to the armed forces, thus developing specialized knowledge of military matters. Their ability to issue public reports strengthens the oversight capacity of other democratic institutions, such as legislature, by providing them with information to which they may not otherwise have access, and also ensures greater transparency and accountability of the armed forces. Their independent status and specialist knowledge give them credibility in the eyes of complainants, the legislature and the public. The main drawback is that separate military ombuds institutions can be costly and, especially for states with small or inactive militaries, there may be insufficient complaints to justify their existence.

#### **Box 19.5: Bosnia and Herzegovina's military ombuds institution**

Bosnia and Herzegovina's Parliamentary Military Commissioner was established to strengthen the rule of law and protect the human rights and freedoms of Armed Forces personnel, in accordance with the Constitution and international agreements.

The Military Commissioner is tasked with investigating specific issues under the direction of the Parliamentary Assembly and the Joint Committee on Defence and Security. The Military Commissioner can demand reports from the Minister of Defence and Security, as well as access to documentation related to disciplinary proceedings. Furthermore, the Military Commissioner receives and considers complaints of human rights violations by military personnel and cadets.

In fulfilling their duties, the Military Commissioner co-operates with the Ministry of Defence and Security, the General Inspectorate within the Ministry of Defence and Security, the Armed Forces and the Human Rights Ombudsman of Bosnia and Herzegovina.<sup>814</sup>

<sup>814</sup> "Parliamentary Military Commissioner", Parliamentary Assembly of Bosnia and Herzegovina, <https://www.parlament.ba/committee/read/31?lang=en>.

## Multiple models

In most states, several institutions have the authority to receive complaints from armed forces personnel. Nearly all states possess some form of internal complaints body, but these often lack the independence and/or mandate of ombuds institutions. Nevertheless, it is important that they co-operate with ombuds institutions to avoid duplication in their work. One way that duplication can be avoided is to include a provision in the law prohibiting the investigation of complaints that are already under investigation. Another method is to establish a formal or informal working relationship between institutions to determine if a complaint has been filed with multiple authorities and to transfer complaints to the more appropriate authority. Finland, for example, has passed a law regulating co-operation between its Parliamentary Ombudsman and Chancellor of Justice, which possess very similar mandates.<sup>815</sup> In Belgium, the Inspector General of the Ministry of Defence and the Federal Ombuds Institution signed a memorandum of understanding to facilitate co-operation.<sup>816</sup>

## Independence

It is the role of all ombuds institutions to receive complaints and investigate matters pertaining to the protection of rights and the prevention of maladministration. They must, however, do so *independently* from the regular chain of command. Without independence, conflicts of interest and a lack of confidence in ombuds institutions can undermine the credibility of their work. Independence cannot be guaranteed simply by setting up the office outside the chain of command. Instead, an ombuds institution must be granted institutional independence, which should include an independent budget,<sup>817</sup> the ability to make its own staffing decisions and the ability to operate without undue interference or instruction, including the freedom to conduct investigations.<sup>818</sup> The personal independence from political influence of the head of office and other staff is especially important.<sup>819</sup> Even if institutional independence is guaranteed, this can be undermined if the ombuds institution's personnel are perceived to be too friendly or close to senior security officials, or if they have previously served in the armed forces. For this reason, the effectiveness of an ombuds institution depends on the personal independence and impartiality of its leader and its staff. Achieving institutional and personal independence for an ombuds institution is a significant challenge in ensuring effective democratic oversight of the armed forces (see Box 19.6).

**815** "Lag om fördelningen av åligganden mellan justitiekanslern i statsrådet och riksdagens justitieombudsman [Law on the Allocation of the Duties between the Chancellor of Justice and the Parliamentary Ombudsman]", No. 1224, 21 December 1990, the Parliamentary Ombudsman of Finland, <https://www.oikeusasiamies.fi/sv/web/guest/lag-om-fordelningen-av-aligganden-mellan-justitiekanslern-i-statsradet-och-riksdagens-justitieombudsman>.

**816** "Meilleure collaboration pour la gestion des plaintes [Better Collaboration for Complaint Management]", 2 June 2015, website of Belgium's Defence Ministry, <https://www.mil.be/fr/article/meilleure-collaboration-pour-la-gestion-des-plaintes>.

**817** Council of Europe Venice Commission, "Principles on the Protection and Promotion of the Ombudsman Institution", *op. cit.*, note 812, Principle 21.

**818** *Ibid.*, Principle 16.

**819** *Ibid.*, Principle 6.

## **Box 19.6: National legislation on the independence of ombuds institutions**

### **Institutional independence**

**Poland** – Article 210 of the Constitution:

The Commissioner for Human Rights [the ombudsperson] shall be autonomous and independent from other state bodies and shall be responsible only before the Sejm as stipulated by the Law.

### **Operational independence**

**Romania** – Article 2 of Law no. 35 on the organization and functioning of the institution of the advocate of the people (1997):

The Institution of the Advocate of the People is an autonomous public authority, independent of any public authority, under the terms of the law.

In the exercise of their powers, the Advocate of the People shall not be a substitute for any other public authorities.

The Advocate of the People cannot be subjected to any imperative or representative mandate. No one can compel the Advocate of the People to obey any instructions or orders.

### **Personal independence**

**The Netherlands** – Section 5 of the National Ombudsman Act:

The Ombudsman may not:

- be a member of a public body to which elections take place in a manner prescribed by law;
- hold public office for which they receive a fixed salary or remuneration;
- be a member of a permanent government advisory body; or
- act as an advocate, *procurator litis* or notary.

The Ombudsman shall not hold any position which is incompatible with the proper performance of their official duties or with their impartiality and independence or with public confidence therein.

The Ombudsman shall publish a list of any offices they hold other than the office of National Ombudsman.

## Complaints

### *Types of complaints*

Ombuds institutions may deal with a wide variety of complaints but are mostly concerned with human rights protection or maladministration – the failure of an institution to respect the rule of law or the principles of legal and efficient administration. Maladministration often concerns contractual and administrative issues, including pay and benefits, recruitment and discharge from service, and issues of status and postings, where policies and procedures were either intentionally or unintentionally not followed, leading to a violation of rights. For example, a delay in the provision of benefits might not, from the outset, constitute an abuse, but an extended and unnecessarily long delay would amount to a rights abuse, although both delays would constitute maladministration.

### *Who can complain?*

Ombuds institutions receive complaints from a wide variety of groups, typically including those currently employed by the armed forces, both serving military personnel and civilian staff, and sometimes non-professional members of the armed forces, such as conscripts. The family of armed forces personnel may also be afforded the right to file a complaint, as policies of the armed forces may adversely affect them as much as personnel themselves. In addition, though less commonly, civilians negatively affected by the armed forces may also have recourse to file a complaint. This includes not only nationals of the country, but also civilians from countries where the armed forces are deployed abroad, as well as military associations (see Box 19.7).

#### Box 19.7: Who can complain to ombuds institutions

	Armed forces personnel	Veterans	Family	Citizens/ residents	Military associations
<b>Albania</b> – People's Advocate Institution	✓	✓	✓	✓	✓
<b>Austria</b> – The Austrian Parliamentary Commission for the Federal Armed Forces	✓	✓	✓	✓	✓
<b>Belgium</b> – Ministry of Defence Complaints Manager	✓			✓	✓
<b>Bosnia and Herzegovina</b> – The Parliamentary Military Commissioner of Bosnia and Herzegovina	✓	✓	✓		✓

	Armed forces personnel	Veterans	Family	Citizens/ residents	Military associations
<b>Canada</b> – Ombudsman for the Department of National Defence and the Canadian Forces	✓	✓	✓		
<b>Czech Republic</b> – Chief Inspector for Human Rights Protection, Ministry of Defence	✓	✓	✓	✓	✓
<b>Estonia</b> - The Chancellor of Justice	✓	✓			
<b>Finland</b> - The Parliamentary Ombudsman of Finland	✓	✓	✓		✓
<b>Georgia</b> – The Public Defender	✓	✓	✓	✓	✓
<b>Germany</b> – Parliamentary Commissioner for the Armed Forces	✓	✓			
<b>Hungary</b> – Commissioner for Fundamental Rights	✓	✓	✓	✓	✓
<b>Ireland</b> – Ombudsman for the Defence Forces	✓	✓			
<b>Kazakhstan</b> – Commissioner for Human Rights	✓	✓	✓	✓	✓
<b>Kyrgyzstan</b> – Ombudsman	✓	✓	✓	✓	✓
<b>Latvia</b> – Ombudsman		✓	✓	✓	✓
<b>Lithuania</b> – Inspector General	✓	✓			✓
<b>Malta</b> – Parliamentary Ombudsman	✓				
<b>Montenegro</b> – Protector of Human Rights and Freedoms	✓	✓	✓	✓	✓
<b>The Netherlands</b> – The Inspector General of the Royal Netherlands Armed Forces					

	Armed forces personnel	Veterans	Family	Citizens/ residents	Military associations
<b>Norway</b> – Parliamentary Ombudsman for the Armed Forces	✓	✓	✓	✓	✓
<b>Poland</b> – Commissioner for Human Rights	✓	✓	✓	✓	✓
<b>Portugal</b> – Ombudsman (Provedor de Justiça)	✓	✓	✓	✓	✓
<b>Romania</b> – People's Advocate	✓	✓	✓		
<b>Serbia</b> – Ombudsman	✓	✓	✓	✓	
<b>Slovakia</b> – Inspector General	✓	✓	✓	✓	✓
<b>Slovenia</b> – Human Rights Ombudsman	✓	✓	✓	✓	✓
<b>Sweden</b> – The Parliamentary Ombudsman	✓	✓	✓	✓	✓
<b>Tajikistan</b> – Ombudsman	✓	✓	✓	✓	✓
<b>Ukraine</b> – Ukrainian Parliament Commissioner for Human Rights	✓	✓	✓	✓	✓
<b>The United Kingdom</b> – Service Complaints Ombudsman for the Armed Forces	✓	✓			



## ***Complaints as an indication of trust and support***

Complaints indicate that people are using the system and trust that the ombuds institution is able to address their concerns. Though it may seem counter-intuitive, if an ombuds institution is receiving complaints, it suggests not that the system is broken but, rather, that the institution is working as designed. One common problem pertaining to ombuds institutions is that of under-reporting. If someone has a problem and does not raise a complaint formally, it could mean that the individual was able to informally and quickly resolve their complaint. Conversely, the individual might have had less favourable reasons for not coming forward, such as a distrust of the institution's impartiality. Therefore, ombuds institutions should periodically monitor complaints and assess perceptions of the institution to determine if armed forces personnel feel comfortable making complaints and whether they trust the ombuds institution to act constructively on their behalf (see Box 19.8).

### **Box 19.8: Monitoring complaints and perceptions of the United Kingdom's ombuds institution for the Armed Forces**

Each year, the United Kingdom's Office of the Service Complaints Ombudsman conducts an Armed Forces Continuous Attitude Survey (AFCAS). The AFCAS is one of the main mechanisms through which the Ombudsman gathers information on the attitudes of service personnel regarding the perceived efficiency and effectiveness of the Ombudsman's oversight and investigations. Considering that, in the last five or six years, the Ombudsman has averaged around 1,000 complaints per year for a regular armed force of about 140,000, this survey plays an important role in measuring whether or not this low number reflects the satisfaction level of personnel with the complaints system.

The 2018 AFCAS revealed that the vast majority (approximately 90 per cent) of Armed Forces personnel are aware of the existence of the Service Complaints Ombudsman as a venue for filing complaints regarding bullying, discrimination or harassment. At the same time, the survey brought to light several shortcomings in the complaints handling system, including the fear that filing a complaint could cause retaliation and harm one's career, and discouragement at the long timescale for the Ombudsman to reach a verdict. The 2018 AFCAS indicated that a lack of confidence in the institution, and not the absence of grievances, could explain the low numbers of complaints. This, in turn, provided insight into which aspects of the Ombudsman's services and activities required restructuring or improvement. Without the survey, the Ombudsman would be at high risk of perpetuating the same flaws that had caused the general attitude of distrust. The AFCAS, thus, takes a constructive and proactive approach to counteracting negative perceptions among Armed Forces personnel and to encouraging them to take full advantage of the complaints mechanisms with the utmost confidence and trust.

## Investigations

Complaints are the most common way in which investigations by ombuds institutions can be triggered, and individual complaints are the only thing that can trigger investigations in some states. There are, however, other ways ombuds institutions may initiate an investigation in addition to those based on an individual complaint.

### Own-motion investigations

Own-motion investigations are initiated by the ombuds institution without the need for a specific complaint. Such investigative powers are common.<sup>820</sup> They are particularly useful for investigating systemic problems or thematic issues, such as bullying or harassment, where victims may be deterred or inhibited from coming forward themselves. The possibility of own-motion investigations ensure ombuds institutions can investigate all possible issues that come to their attention, regardless of whether or not the source is permitted to make an official complaint. Such investigations can be triggered, for example, by media or other reports, by the friends or family of an affected person, or by requests from members of the legislature or other government agencies (see Box 19.9).

Own-motion investigations are a particularly effective method of identifying systemic problems, especially:

- when the person affected is unaware that their individual problem is not unique;
- where a person is unable to make a complaint;
- in cases where a person may be in danger for making a complaint; or
- with regard to matters that, while important, may not be raised by individuals.

#### Box 19.9: Own-motion investigations in Canada

Canada's Ombudsman for the Armed Forces may conduct own-motion investigations on "any matter concerning the [Department for National Defence] or [the Canadian Forces]" after advising Canada's Minister of National Defence.<sup>821</sup>

- a) In 2015, the National Defence and Canadian Armed Forces Ombudsman began an investigation into the Canadian Rangers, a military unit that is traditionally stationed in remote regions of the country, with an emphasis on healthcare services provided by the Canadian Armed Forces. As no complaints had been filed on the matter, this

<sup>820</sup> ODIHR and DCAF, *Mapping Study: Ombuds Institutions for the Armed Forces in the OSCE Region* (Geneva: ODIHR/ DCAF, 2015), p. 29, <https://www.osce.org/office-for-democratic-institutions-and-human-rights/277616?download=true>.

<sup>821</sup> "Ministerial Directives of the National Defence and Canadian Forces Ombudsman", Department of Defence and Canadian Forces, Article 4, <http://www.ombudsman.forces.gc.ca/en/ombudsman-about-us/ministerial-directives.page#construction>.

was an “own motion” investigation. Preliminary research of the Canadian Rangers revealed numerous areas of concern, and the Ombudsman decided to undertake a comprehensive, fact-finding investigation of the Rangers’ access to healthcare entitlements and related benefits. Interviews with Canadian Rangers uncovered more difficulties regarding their access to adequate healthcare services. Thus, the subject of the investigation was progressively expanded, leading the Ombudsman’s Office to launch its first systemic investigation aimed at ensuring the fair treatment and improved well-being of Canadian Rangers.

As a result of the investigation, the Ombudsman’s Office provided several recommendations. For example, it recommended that the Department of National Defence eliminate ambiguity and inconsistency in the policy framework of Canadian Rangers, ensure the delivery of healthcare to those living in remote and isolated areas, and take concrete steps to ensure that Canadian Rangers have a clear understanding of their healthcare benefits and the importance of reporting injuries, so that they can access the services to which they are entitled. The Ministry of National Defence welcomed the recommendations and asked the Canadian Army to work with the Ombudsman to address the issues by implementing practical solutions to improve the mental and physical well-being of Canadian Rangers.

### *Systemic investigations*

Own-motion investigations often concern systemic or thematic issues, which sometimes creates considerable overlap between own-motion and systemic investigations. Investigations into systemic issues can arise both from individual complaints and from the institution’s own motion. Systemic issues generally pertain to widespread problems (such as bullying or inadequate equipment), or laws or regulations that are either non-existent, harmful or misleading. In this way, systemic issues can be distinguished from those originating from the actions of an individual (for example, one person abusing authority or improperly applying regulations). A key attribute of systemic investigations is that they provide evidence of a broader pattern of abuse or wrongdoing.

While addressing the needs of individual complainants is an important function of ombuds institutions, identifying and resolving broader patterns of abuse or wrongdoing is perhaps the area in which they can have the greatest impact. The ability of ombuds institutions to monitor issues from a wide perspective puts them in a unique position to identify broader issues existing across the armed forces. For example, a commander may be aware that several subordinates are concerned with the quality of their military-issue body armour (see Box 19.10), but the same commander is unlikely to be in a position to discover that numerous armed forces personnel under other commands have the same problem, and that this relates to a widespread concern with the standard of issued materiel. The ability of an ombuds institution to identify such cross-cutting issues and organization-wide problems is among its greatest assets. The institution should be careful to identify and recommend solutions

that remedy such systemic problems. In the case of systemic investigations stemming from individual complaints, the ombuds institution should also take care to provide redress to those who initially filed the complaints.

The ability to conduct investigations into matters that the ombuds institution deems relevant to its work, whether it be own-motion or systemic investigations, is crucial to maintaining its operational independence.

### **Box 19.10: Conducting systemic investigations and improving the operational effectiveness in the United States**

In 2009, the United States Department of Defense Inspector General (DoD IG) issued a report identifying several deficiencies in the testing procedures of companies awarded contracts to make body armour. An investigation conducted following a Congressional request found that that proper testing had not been conducted on nearly 50 per cent of the contracts awarded for components of body armour, the functionality of which could not be assured. Moreover, the DoD IG's assessment discovered that mandatory weathered and altitude tests had not been performed, that numerous inserts had been distributed despite incomplete testing, and that a consistent methodology for measuring and recording velocity was lacking.

As a result of the investigation, the United States Army recalled more than 16,000 sets of body armour.<sup>822</sup> After additional testing, the DoD IG found that the recommendations had been implemented, including comprehensive procedures to standardize testing across various defence authorities.

The investigation conducted by the DoD IG and the positive responses in implementing the report's recommendations contributed to the increased operational effectiveness of the United States Army. As more rigorous tests were incorporated into the evaluation of body armour contracts, the criticisms raised by troops and their supporters dissipated, and safety concerns within the Army decreased. The DoD IG recommendations promoted a more secure environment among soldiers, boosting their confidence levels and proactive attitude and, ultimately, enhancing their performance.

## ***Access to (classified) information***

Access to information is essential to ombuds institutions. Without information, it is unlikely that an ombuds institution will be able to properly investigate any issue or assess the compliance of the armed forces with the law. Incomplete access to information may even provide a false sense of accountability, transparency and public confidence.

<sup>822</sup> Mike Mount, "Army Recalls 16,000 Body Armor Sets Amid Testing Dispute", CNN website, 29 January 2009, <http://edition.cnn.com/2009/US/01/29/pentagon.body.armor/index.html>.

Access to information is closely linked to the issue of independence, because restrictions on the information available to an ombuds institution imply that it is not at liberty to do what is necessary to conduct a full investigation. In many states, the armed forces and political authorities are legally bound to supply ombuds institutions with all requested information, without grounds for refusal. The section below focuses primarily on access to people, documents and records. Access to physical locations and premises could also be covered by access to information, but this will be discussed in more detail in the following section, on inspections.

Access to information may be based on either a *right to request* information or a *right to demand* information. This distinction is significant because the armed forces may not be legally obliged to fulfil a right to request from an ombuds institution that, consequently, would be unable to enforce such access. By contrast, the right to demand access to information implies that the armed forces are required to comply and that the ombuds institution must be provided with the means to enforce compliance, usually by a court order. For such access to be effective, the power to demand information is essential, supported by appropriate investigative powers and the necessary expertise and resources. Therefore, all ombuds institutions should be granted the *right to demand* information so that their investigations may not be unduly limited.

If limitations on access to information are imposed, particularly if the information is classified or otherwise confidential, it is essential that they be clearly and narrowly defined in law, according to the following conditions:

1. The invocation of such clauses should be adequately motivated and accompanied by a detailed written justification;
2. Ombuds institutions should be able to apply for judicial review of, or refer to the legislature, any decision to invoke a particular clause; and
3. Ombuds institutions should have and make use of the right to publicize the fact that they have been denied access to information and to explain the impact this has had on their work.

Despite these conditions, it is vital that any staff conducting investigations into military affairs be endowed with the appropriate security clearances to handle sensitive or classified information that is necessary for their investigations.

### **Box 19.11: Access to information of Germany's Parliamentary Commissioner for the Armed Forces**

Regarding access to information, Germany's Parliamentary Commissioner for the Armed Forces has the following powers:

1. He may demand information and access to records from the Minister of Defence and all the Minister's subordinate agencies and personnel. These rights can only be denied to him in the case of compelling reasons of secrecy. Such denial shall be determined by the Minister of Defence himself or his permanent official deputy; he shall state the reasons for it before the Defence Committee. [...] the Commissioner shall have the right to hear the petitioner as well as witnesses and experts. These persons shall be reimbursed [...]
2. He may give the agencies concerned the opportunity to settle a matter.
3. He may refer a matter to the authority competent for the institution of criminal or disciplinary proceedings.
4. He may, at any time, visit any units, headquarters, agencies and authorities of the Federal Armed Forces and their institutions even without prior announcement. This right shall exclusively be vested in the person of the Commissioner. Sentences 2 and 3 of paragraph (1) shall apply *mutatis mutandis*.
5. He may request both summary reports from the Minister of Defence on the exercise of disciplinary power in the Armed Forces and statistical reports from the competent federal and Land authorities on the administration of criminal justice whenever the Armed Forces or their service personnel are affected.
6. In the case of criminal or disciplinary proceedings he may attend the court proceedings even when the public is excluded. He shall be given access to records to the same extent as the public prosecutor or the representative of the initiating authority. The right pursuant to sentence 1 shall also apply in matters of request and complaint proceedings under the Military Disciplinary Code and the Military Complaints Regulations before courts having jurisdiction over military disciplinary offences and in proceedings before administrative courts relating to his area of responsibility; in such proceedings he shall have the same right of access to records as a party to the proceedings.<sup>823</sup>

<sup>823</sup> "Law on the Parliamentary Commissioner for the Armed Forces", Section 3 – Official Powers, website of the Centre for the Study of Democracy, <http://old.csd.bg/artShow.php?id=4088>.

## ***Inspections and outreach***

In many countries, an ombuds institution has the right to visit the premises of any unit at any time and without prior notice. Field visits or inspections enable the ombuds institution to meet and talk to service personnel of all ranks, thereby gaining a direct impression of the conditions within the military. During such visits, personnel may bring up any problem they encounter in performing their everyday military duties, as well as their personal concerns, which are often not expressed in complaints. This is particularly important in operational settings and missions, when military personnel are often less inclined to file a complaint, for fear of disturbing operational readiness and effectiveness.

Additionally, personnel serving abroad in missions may be distanced from their traditional support networks and more dependent on formal mechanisms, such as an ombuds institution, to resolve their problem. Thus, ombuds institutions should be able to inspect and visit all locations where armed forces personnel are deployed, and not just within national boundaries (see Box 19.13). When ombuds institutions proactively seek out problems and complaints and resolve or prevent them, this has a positive effect on morale and operational effectiveness. Visits to military installations may also help to improve the perception and authority of the ombuds institution as a viable solution to the problems of service personnel (see Box 19.12).

### **Box 19.12: Ombuds institutions' powers of inspection in the Czech Republic and Georgia**

#### **The Czech Republic**

According to Act No. 349/1999, the Public Defender of Rights is entitled to carry out their own inquiry and to propose remedial measures to the relevant state bodies. In case of a refusal, the Public Defender of Rights is entitled to make the case public and to request that measures be taken by a superior or the government. The Chief Inspector of Human Rights is entitled to perform all types of inspections inside the Armed Forces and to propose remedial measures.<sup>824</sup>

#### **Georgia**

Article 18 of the Law on the Public Defender of Georgia:

When conducting an inspection, the Public Defender of Georgia may:

- a) freely enter any state or local self-government body, [...] including military unit, prison and confinement facilities and other places of detention and restriction of liberty;
- b) request and receive, immediately or not later than 10 days, from state and local self-government authorities or from officials all certificates, documents and materials

<sup>824</sup> Response to the ODIHR-DCAF 2008 questionnaire, qu. 4(d).

necessary for conducting an inspection;

- c) request and receive written explanations from any official, officer or equivalent person on the matters to be examined by the Public Defender;
- d) conduct expert examinations and/or prepare conclusions by means of state and/or non-state institutions; invite specialists/experts in order to perform expert and/or consultation works.<sup>825</sup>

### **Box 19.13: Provisions for Finland's ombuds institutions to visit personnel deployed abroad**

According to Finland's Parliamentary Ombudsman Act, the ombuds institution is required to conduct on-site inspections of public institutions. Specific reference is made to inspecting Finnish defence forces units and peacekeeping contingents, with the aim of monitoring the "treatment of conscripts, other military personnel and peacekeepers".

The law also guarantees the ombuds institution the right to access all premises and information systems of the public institution under inspection, as well as the right to "have confidential discussions with the personnel of the office or institution and the inmates there."<sup>826</sup>

## ***Ombuds reporting and recommendations***

Issuing reports to the legislature and to the public at large is a key function of ombuds institutions, and nearly all such institutions are mandated to produce regular reports on their work and activities. Reports can be used to share information on all aspects of an ombuds institution's work, including statistics and details of complaints, significant and thematic issues, and policy or other recommendations. Reports are typically annual (or biannual). Institutions may also release reports on an ad hoc basis. Ad hoc reports may be case-specific or aimed at addressing thematic issues that have come to the ombuds institution's attention.

Reporting contributes to the following:

1. Announcing the outcome of a specific investigation and publicizing its recommendations. Publicity plays an important role in ensuring that recommendations are complied with, through pressure from the legislature and the public;

**825** "The Organic Law of Georgia on the Public Defender of Georgia (adopted on 7 June 1996)", the Legislative Herald of Georgia, <https://matsne.gov.ge/en/document/download/33034/14/en/pdf>.

**826** "Parliamentary Ombudsman Act (197/2002)", Section 5 – "Inspections, Parliamentary Ombudsman of Finland", <https://www.oikeusasiamies.fi/en/parliamentary-ombudsman-act>.



2. Providing and drawing attention to policy-making recommendations, such as to reform defective laws or policies or to establish new ones to prevent the recurrence of similar issues. These legal and policy recommendations serve the purpose of achieving institutional reform in the armed forces; and
3. Educating the public or members of the armed forces about their rights and the role of ombuds institutions in protecting these rights. Reporting can draw considerable attention to an ombuds institution and can ensure that their services are more commonly utilized.

#### **Box 19.14: Ireland's provisions on reporting by the ombuds institution**

The following is an excerpt of Ireland's Ombudsman (Defence Forces) Act of 2004:

(1) Where, following the making of a complaint, the Ombudsman decides not to carry out an investigation or to discontinue an investigation, he or she shall notify the complainant and any person concerned with the complaint, stating the reasons, in writing, for the decision.

(2) Where the Ombudsman conducts an investigation under this Act into an action that is the subject of a complaint, he or she shall send a statement in writing of the results of the investigation to—

- a) the Minister and to all persons concerned with the complaint, and
- b) any other person to whom he or she considers it appropriate to send the statement.

(5) Where it appears to the Ombudsman that the measures taken or proposed to be taken in response to a recommendation [...] are not satisfactory, the Ombudsman may, if he or she so thinks fit, cause a special report on the case to be included in a report under subsection. [...]

(7) The Ombudsman shall, as soon as may be, but not later than 4 months after the end of each year, cause a report on the performance of his or her functions under the Act to be laid before each House of the Oireachtas [parliament] and may from time to time cause to be laid before each such House such other reports with respect to those functions as he or she thinks fit. [...].<sup>827</sup>

Ombuds institutions are meant to complement the judiciary – they uphold the rule of law but are not part of enforcing the law. Instead, they must rely on making recommendations, rather than binding decisions such as the judiciary issues, and on persuading the armed forces to comply with the findings of their investigations.

<sup>827</sup> "Ombudsman (Defence Forces) Act 2004", House of the Oireachtas, <https://www.oireachtas.ie/en/bills/bill/2002/2/>.

Ombuds institutions have several ways to ensure that their recommendations are implemented:

- Using moral authority: High levels of public trust in ombuds institutions may grant them a degree of moral authority, which can then be used to persuade public institutions to comply with their recommendations;
- Public pressure: Ombuds institutions can draw public attention to cases of non-compliance by issuing reports, engaging with the media and releasing public statements;
- Political escalation: Ombuds institutions can increase the pressure to implement their recommendations by taking them to another authority, such as the legislature, the executive or a superior within the chain of command; and
- Legal enforcement: Some ombuds institutions can compel the authorities to comply with their recommendations or findings by applying to the judiciary. In cases where the legality of an act or regulation is in question, institutions may decide to take the matter to court.

## Good Practices and Recommendations

- » All armed forces personnel should be able to file a complaint with an independent ombuds institution. Former armed forces personnel, the family of armed forces personnel, civilians and associations should also be given the ability to file a complaint if they have been concretely harmed by the armed forces.
- » Where ombuds institutions with similar or overlapping mandates exist, these bodies should co-operate to streamline procedures and avoid duplication.
- » All ombuds institutions must remain institutionally, operationally and personally independent from the armed forces.<sup>828</sup>
- » Complaints should be viewed as symptoms of a functioning, rather than a malfunctioning, system. Complaints demonstrate trust in ombuds institutions.
- » Ombuds institutions should be able to conduct own-motion and systemic investigations.<sup>829</sup>
- » Ombuds institutions should have access to all information necessary to carry out an investigation. Any limitations on their access to information must be clearly and narrowly defined by law.<sup>830</sup>
- » Ombuds institutions should have the right to visit the premises of any military installation at any time and without prior notice. Ombuds institutions should also be authorized to visit all personnel stationed abroad.
- » Ombuds institutions should be authorized to issue periodic (typically annual) and ad hoc reports.<sup>831</sup>
- » Ombuds institutions should be authorized to issue recommendations to resolve complaints and to prevent their recurrence.<sup>832</sup>

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**828** Council of Europe Venice Commission, "Principles on the Protection and Promotion of the Ombudsman Institution", *op. cit.*, note 812, Principle 9.

**829** *Ibid.*, Principle 16.

**830** *Ibid.*, Principle 16.

**831** *Ibid.*, Principle 20.

**832** *Ibid.*, Principle 19.

## Further reading

Asia Pacific Forum of National Human Rights Institutions, *Undertaking Effective Investigations: A Guide for National Human Rights Institutions*, (Sydney: Asia Pacific Forum of National Human Rights Institutions, 2013).

Megan Bastick, *Gender and Complaints Mechanisms: A Handbook for Armed Forces and Ombuds Institutions* (Geneva: DCAF, 2015).

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# Human Rights of Armed Forces Personnel:

COMPENDIUM OF STANDARDS,  
GOOD PRACTICES AND RECOMMENDATIONS

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This compendium is a flagship publication of the OSCE's Office for Democratic Institutions and Human Rights (ODIHR) and DCAF - Geneva Centre for Security Sector Governance, which explores existing laws, policies and mechanisms for ensuring the protection of the human rights of armed forces personnel in line with international standards and OSCE commitments. Good practices and recommendations for protecting and respecting the human rights of armed forces personnel are presented at the end of each chapter. The compendium highlights the importance of human rights in the armed forces to maintain the military's accountability and embody the democratic commitments of every state. In doing so, it underscores the primary role of commanders in cultivating a climate in which the human rights of all service personnel are respected.