



Strasbourg, 17 December 2007

DH-DEV-FA(2007)008

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

**COMMITTEE OF EXPERTS FOR
THE DEVELOPMENT OF HUMAN RIGHTS
(DH-DEV)**

DH-DEV GROUP ON HUMAN RIGHTS
OF MEMBERS OF THE ARMED FORCES

Meeting Report

2nd meeting
Strasbourg, Monday 3 December – Tuesday 4 December 2007

Council of Europe

Item 1: Opening of the meeting and adoption of the agenda

1. The DH-DEV Group on Human Rights of the Armed Forces held its 2nd meeting in Strasbourg (Room G05) on 3-4 December 2007, with Ms Camilla BUSCK-NIELSEN (Finland) in the Chair. The list of participants can be found in Appendix I. The agenda as adopted and the references to the working documents appear in Appendix II.

Item 2: Work on the draft elements for a Committee of Ministers recommendation on human rights of members of the armed forces

2. The Group examined the draft recommendation prepared by the Chair and the Secretariat. The text as revised by the Group can be found in Appendix III. The Group agreed that each delegation is to submit written comments on the revised text, concrete drafting proposals and elements to be included in the explanatory report by 15 February 2008. The Secretariat will put these together into one document for consideration at the Group's next meeting.

Item 3: Other business

3. Mr Henrik KRISTENSEN from the Secretariat of the European Social Charter presented the general scope of the Charter and the case-law of the European Committee of Social Rights to give the Group a more specific idea of what aspects of the relevant social and economic rights could be of particular interest to military staff. The Group thanked Mr Kristensen for his presentation, which can be found in Appendix IV, and expressed the wish to receive further comments from the Secretariat of the European Social Charter on the social and economic rights included in the draft recommendation.

4. The use and practicality of the restricted website accessible only to members of the Group was discussed (<http://www.extraweb.coe.int/team20/gt-dh-dev/default.aspx>) and it was concluded that the website will be maintained for forum use.

5. It was decided that the Group would next meet from Wednesday 9 April until Friday 11 April 2008 in Strasbourg.

6. Finally, the Group noted that Portugal may be interested in hosting a future meeting of the Group in Lisbon in Autumn 2008, subject to verification with the Portuguese authorities and agreement from the Group.

Appendix I

LIST OF PARTICIPANTS

MEMBERS / MEMBRES

AUSTRIA / AUTRICHE

Ms Sonja SCHITTENHELM, Human Rights Coordinator, Ministry of Defense Interministerial Legislation Division

BELGIUM / BELGIQUE

Mme Chantal GALLANT, Conseiller-Adjoint, Service des Droits de l'Homme, Direction générale de la Législation et des Libertés et Droits fondamentaux, Service Public Fédéral Justice

DENMARK / DANEMARK

Mrs Lena MAERSK, Head of Section, Defence Command Denmark

FINLAND / FINLANDE

Ms Camilla BUSCK-NIELSEN, (Chairperson), Legal Officer, Ministry of Foreign Affairs, Legal Department

Ms Satu KASKINEN, Legal Officer, Ministry of Foreign Affairs, Legal Department

Ms Jenni HONKONEN, Legal Adviser, Ministry of Defence, Law-Drafting and General Administration Unit

FRANCE

Mme. Dorothee MERRI, Chargée d'études, Ministère de la Défense, Direction des Affaires juridiques, Sous-Direction du Droit International et du Droit Européen

Mme Marie RUHARD, Chargée d'études, Ministère de la Défense, Direction des Ressources humaines du ministère de la défense (DRH-MD)

HUNGARY / HONGRIE

Dr. Péter KISS, Legal Adviser, Legal Department of the National Police Headquarters

LATVIA / LETTONIE

Mr Emils PLAKSINS, Lawyer of the Office of the Government Agent of the Republic of Latvia, Ministry of Foreign Affairs of the Republic of Latvia

POLAND / POLOGNE

Mr Michal BALCERZAK, Assistant Professor, Nicholas Copernicus University, Faculty of Law and Administration

PORTUGAL

Lieutenant Colonel Francisco José Bernardino da Silva LEANDRO, Portuguese Army, Allied Joint Command Lisbon

RUSSIAN FEDERATION / FÉDÉRATION DE RUSSIE

Mr Alexander KOSMODEMIYANSKIY, Senior Military Prosecutor, Office of the Chief Military Prosecutor of the Russian Federation

Colonel Evgeny POLESHCHUK, Military Officer, Division of Military Discipline, Ministry of Defense of the Russian Federation

SLOVAKIA / SLOVAQUIE

Mr Branislav KADLECIK, Principal State Counsellor, International and European Law Department, Human Rights and Foreign Relations Division, Ministry of Justice of the Slovak Republic

TURKEY / TURQUIE

Mr Orhan ÖNDER, Judge Colonel, Legal Consultancy of the Turkish General Staff

UNITED KINGDOM / ROYAUME-UNI

Mrs Paula WILLIAMS, Deputy Director of Policy Issues Affecting Service Personnel, Service Personnel Policy, Ministry of Defense

Mr John EVANS, Director General Law, Ministry of Defense

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OTHER PARTICIPANTS / AUTRES PARTICIPANTS

Council of Europe Social Charter / Charte Sociale du Conseil de l'Europe

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The Organisation for Security and Co-operation in Europe (OSCE) / the Office for Democratic Institutions and Human Rights (ODIHR) / L'Organisation pour la sécurité et la coopération en Europe (OSCE) / le Bureau pour les institutions démocratiques et les droits de l'homme (ODIHR)

Mr Robert-Jan UHL, Human Rights Officer, OSCE/ODIHR

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OBSERVERS / OBSERVATEURS

Amnesty International

Ms Jill HEINE, Legal Adviser, International Legal and Organizations Program, Amnesty International

Conference of European Churches (KEK) / Conférence des Eglises européenne (KEK)

Ms Elizabeta KITANOVIC, Executive Secretary for Human Rights and Communication Church and Society Commission of CEC

Human Rights Watch

Mr Alexander PETROV, Deputy Director of HRW Russia office

European Organisation of Military Associations (EUROMIL)

Mr Mikko HARJULEHTO (Finland), Secretary General, European Organisation of Military Associations (EUROMIL)

M. Jacques BESSY (France), Organisation: ADEFDROMIL/EUROMIL, Vice Président, Association de Défense des droits des militaires

Mr Poul SØRENSEN (Denmark), Organisation: HKKF/EUROMIL, Political / Legal Adviser

Ms Birte DOLPP (Germany), Organisation: DBwV/EUROMIL, Deutscher Bundeswehrverband

(German Armed Forces Association), Lead Association Legal Advice in EUROMIL / Lawyer in Department of Labour Law and Participation Law

Mr Douglas YOUNG (UK), Organisation: British Armed Forces Federation (BAFF), Chairman

Mr Anatol TICHONIUK (Poland), Organisation: KONWENT/EUROMIL, President

[Coordinator: Mr Derek Gottfried HAELLMIGK, Officer for Fundamental Rights and Social Affairs, European Organisation of Military Associations (EUROMIL)]

European Bureau of Conscientious Objection (EBCO) / Bureau Européen de l'Objection de Conscience (BEOC)

M. Friedhelm SCHNEIDER, Représentant du Bureau Européen de l'Objection de Conscience (EBCO - BEOC) auprès du Conseil de l'Europe

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SECRETARIAT

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Mme Remy JAIN

Appendix II

AGENDA

Item 1: Opening of the meeting and adoption of the agenda

Item 2: Work on the draft elements for a Committee of Ministers recommendation on human rights of members of the armed forces

Working documents

- | | |
|---|--------------------|
| - Relevant texts of the CDDH – terms of reference and opinion on PACE Recommendation 1742(2006) | DH-DEV-FA(2007)001 |
| - Relevant texts of the Parliamentary Assembly and the Committee of Ministers | DH-DEV-FA(2007)002 |
| - Report of the 1 st meeting of the Group (14-15 June 2007) | DH-DEV-FA(2007)005 |
| - Preliminary elements for a CM recommendation | DH-DEV-FA(2007)006 |
| - Overview of the case-law of the European Court of Human Rights on members of the armed forces | DH-DEV-FA(2007)007 |

Information documents and comments of the experts and observers are available on the Group's restricted website.

Item 3: Other business

- Presentation by a member of the Secretariat of the European Social Charter on social and economic rights of relevance to armed forces personnel;
- Date of the next meeting.

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Appendix III

**Revised preliminary elements for a recommendation
of the Committee of Ministers to member states
on human rights of members of the armed forces**

[Preamble]

[1] The Committee of Ministers, under the terms of Article 15 b. of the Statute of the Council of Europe,

[2] Considering that the aim of the Council of Europe is to achieve a greater unity between its member states, inter alia, by promoting the adoption of common rules;

[3] Bearing in mind notably the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights in its binding case-law, the European Social Charter as well as the Revised European Social Charter, in the light of the conclusions and legal decisions of the European Committee of Social Rights, and the standards of the Committee established under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;

[4] Taking into consideration the relevant United Nations instruments, in particular the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, [the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict,] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the observations and decisions of the Committee against Torture;

[5] Taking into account the Committee of Minister's Recommendation No. R (87) 8 regarding conscientious objection to compulsory military service, as well as Parliamentary Assembly's Recommendations 1742(2006) on human rights of members of the armed forces, 1714(2005) on the abolition of restrictions on the right to vote, 1572(2002) on the right of association of the professional staff of the armed forces, 1518(2001) on the exercise of the right of conscientious objection to military service, 1380(1998) on human rights of conscripts;

[6] Having regard to the relevant OSCE commitments [and the ODIHR Handbook on human rights and fundamental freedoms of armed forces personnel];

[Operative part]

[7] Recommends that governments of member states:

1. ensure that the principles set out in the appendix to this recommendation are complied with in national legislation and practice relating to members of the armed forces;

2. ensure, by appropriate means and action, a wide dissemination of this recommendation in society as whole, in particular among competent civil and military authorities and members of the armed forces, with a view to raising awareness of the rights and freedoms of members of the armed forces, and training to increase members of the armed forces' knowledge of human rights;

3. [follow-up]

Appendix to Recommendation [...]

[1] This recommendation concerns the enjoyment of human rights and fundamental freedoms by members of the armed forces in the context of their work and service life.

Alternative text: [1] This recommendation concerns the enjoyment of human rights and fundamental freedoms by members of the armed forces in the context of their work and service life. It applies wherever states exercise personal jurisdiction over them.

General Principles

[2] Members of the armed forces, whatever their status, must, taking into account the special characteristics of military life, enjoy the rights guaranteed in the European Convention on Human Rights (hereafter, the Convention or ECHR) and other relevant human rights instruments such as the European Social Charter. As held by the European Court of Human Rights, human rights do not stop at the gates of barracks¹ and human rights will be presumed to apply in full to members of the armed forces;

Alternative text: [2] Member states should ensure that members of the armed forces, whatever their status, enjoy the rights guaranteed in the European Convention on Human Rights and other relevant human rights instruments such as the European Social Charter in the context of their work and service life. As held by the European Court of Human Rights, human rights do not stop at the gates of barracks² and human rights will be presumed to apply in full to members of armed forces.

UK proposal: [2] Member states should ensure that members of the armed forces enjoy the rights guaranteed in the European Convention on Human Rights and other relevant human rights instruments such as the European Social Charter, in the context of their work and service life, when they are within their territorial jurisdiction and, as far as reasonably practicable, within their personal jurisdiction when acting extra-territorially.

[3] Any restrictions to the rights to respect for private life and family life, freedom of expression, freedom to manifest one's religion or belief and freedom of assembly and association shall be permitted only where they are prescribed by law, and necessary in a democratic society by pursuing a legitimate aim foreseen in the Convention [and being proportionate to this aim]. Restrictions on grounds of national security should be resorted to only where there is a real threat to the armed forces' operational effectiveness.³

[4] The enjoyment of any of the following rights should 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, [disability, age,] sexual orientation or other status.⁴ The principle of non-discrimination will not be violated if the distinction between individuals in analogous situations has an objective and reasonable justification;⁵

[5] According to Article 15 of the Convention, in time of war or other public emergency threatening the life of the nation, states may derogate from their obligations under the Convention to the extent

¹ *Grigoriades v. Greece*, judgment of 25 November 1997, para. 45.

² *Grigoriades v. Greece*, op. cit., para. 45.

³ *Smith and Grady v. UK*, judgment of 27 September 1999, para. 89.

⁴ Reference to Art. 14 ECHR and Art E of the European Social Charter. Additional reference to sexual orientation given the existing case-law and specific relevance of this ground in the military context in recent years. It can be found, alongside age and disability, among the grounds cited under Article 21 of the EU Charter of Fundamental Rights.

⁵ Examples of justifications could be given in the explanatory memorandum, such as combat effectiveness.

strictly required by the exigencies of the situation and provided that such measures are not inconsistent with their other obligations under international law.

[6] However, the following rights suffer no restrictions at any time, including in the military context: the right to life, except in respect of deaths resulting from lawful acts of war, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery and servitude, the principle that no punishment can be inflicted without a law, and the right not to be tried or punished twice.

[7] The following rights should be implemented in accordance with the accompanying principles:

Members of the armed forces should enjoy the right to life (Article 2 ECHR)

[8] Members of the armed forces should not be exposed to situations where their lives would be avoidably put at risk and the competent authorities should therefore take adequate measures in respect of military training, planning of operations, the material used and provided, as well as in ensuring access to health care and treatment.⁶

[9] Member states should protect the lives of members of the armed forces from real and immediate threats to life. The responsibility of the military authorities in case of the death of a member of the armed forces should be engaged if they had or ought to have known of a real and immediate risk to an individual or in circumstances where they disregarded the threat to life.

[10] An independent and effective inquiry should be led into any suspicious death or alleged violation of the right to life of a member of the armed forces. For an investigation into any such case to be effective, the authorities responsible for and carrying out the investigation should be independent and impartial. It should also be carried out promptly and within a reasonable time.⁷ Family members should be duly informed of the progress of investigations and their findings.

[11] Members of armed forces should never be sentenced to death or executed.⁸

No member of the armed forces should be subjected to torture or to inhuman or degrading treatment or punishment. (Article 3 ECHR)

[12] Member states should prevent members of the armed forces from being subjected to torture, inhuman or degrading treatment or punishment. Particular attention should be given to individuals belonging to more vulnerable categories such as minorities and conscripts.

⁶ Regarding health care and policies within the armed forces, see *Kilinç and Others v. Turkey*, judgment of 7 June 2005, para. 42.

⁷ Moved to the explanatory memorandum: *This means not only that there should be no hierarchical or institutional connection but also clear independence. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. 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. (McKerr v. UK, judgment of 4 May 2001, para. 111-115).*

⁸ With reference to Protocols Nos. 6 and 13 to the Convention.

[13] Where a member of the armed forces raises [an arguable] [a] claim that he or she would have suffered treatment in breach of Article 3 of the Convention or when the authorities have reasons to suspect that such treatment has occurred, there should be an independent and effective official investigation. Such investigation should be capable of leading to the identification and punishment of those responsible in order to avoid impunity.⁹ Where practices such as initiation rites, bullying or harassment occur, those responsible should be held accountable and sanctioned accordingly. Member states should put in place a legal or administrative framework to prevent retaliation against those having complained of ill-treatment.

[14] Members of the armed forces deprived of their liberty should be treated with humanity and with respect for the inherent dignity of the human person, in conformity with international and European standards.¹⁰

[15] Insofar as disciplinary punishment is concerned, [collective punishments and] corporal punishment, punishment by placing in a dark cell, and all other forms of inhuman or degrading punishment shall be prohibited. Punishment shall not include a total prohibition of family contact. Solitary confinement should be imposed as a punishment only in exceptional cases and for a specified period of time, which should be as short as possible. Instruments of restraint should never be applied as a punishment.

Members of the armed forces should not be used for forced or compulsory labour. (Article 4 ECHR)

[16] Military service does not constitute forced or compulsory labour.

[17] Members of the armed forces should not be used to perform tasks incompatible with their assignment to the national defence service, with the exception of emergency assistance carried out in accordance with the law.

[18] The authorities should not impose on members of the armed forces a length of service which would constitute an unreasonable restriction on their freedom to choose to leave the armed forces and amount to forced labour.¹¹

[[18 bis] The duration of civil service should not be unreasonable compared to that of military service.¹²]

Military discipline should be characterised by fairness and procedural guarantees should be secured.

[19] Each state is competent to organise its own system of military discipline and enjoys a certain margin of appreciation in the matter.¹³ However, only conduct likely to constitute a threat to military

⁹ Moved to the explanatory memorandum: *The same requirements as for investigations into suspicious deaths of a member of the armed forces are valid.* (*Zelilof v. Greece*, judgment of 24 May 2007, para. 54).

¹⁰ Notably CPT standards and the European Prison Rules.

¹¹ Article 1(2) European Social Charter (revised). *International Federation of Human Rights Leagues v. Greece*, complaint No. 7/2000, decision of 28 June 2000, paras 7 and 25, European Committee on Social Rights.

¹² *Quaker Council for European Affairs (QCEA) v. Greece*, complaint No. 8/2000, decision of 28 June 2000, paras. 24-26, European Committee on Social Rights.

discipline, good order, safety or security may be defined as a disciplinary offence. The severity of any punishment should be proportionate to the offence.

[20] The acts or omissions by members of the armed forces which constitute disciplinary offences, the procedures to be followed at disciplinary hearings, the types and duration of punishment that may be imposed, the authority competent to impose such punishment and access to the authority of the appellate process should be provided for in law.

[21] Any allegation of infringement of the disciplinary rules by a member of the armed forces shall be reported promptly to the competent authority, which shall investigate it without undue delay.

[22] Members of the armed forces charged with disciplinary offences should be informed promptly, in detail, of the nature of the accusations against them.

[23] No collective punishment should be imposed on members of the armed forces as part of military discipline.

<p>Members of the armed forces should enjoy the right to liberty and security. (Article 5 ECHR)</p>
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[24] No member of the armed forces should be deprived of his or her liberty except in cases provided for under Article 5(1) of the Convention, and in accordance with a procedure prescribed by law.

[25] A member of the armed forces who is arrested should be informed promptly of:

- the reasons for his or her arrest;
- any charge against him or her;¹⁴
- his or her [procedural] rights.

[26] He or she should have the right to establish contact with a legal representative without delay after arrest, and consult with and have the representative attend his or her examination. He or she should also have the right to consult with a legal representative out of hearing of third parties and without being monitored by any means.

[27] When a member of the armed forces is arrested or detained in relation to a criminal offence, he or she should not be detained for longer than a reasonable period of time before being brought before a competent court.¹⁵

[28] Any member of the armed forces who is deprived of his or her liberty should be entitled to take proceedings by which the lawfulness of the detention should be decided speedily by a court and his or her release ordered if the detention is not lawful.¹⁶ This right should be considered as an individual right, the guarantee of which should in all circumstances fall within the exclusive jurisdiction of the ordinary courts.

[29] Any member of the armed forces who has been the victim of arrest or detention contrary to the aforementioned principles should have an enforceable right to compensation.¹⁷

¹³ *Engel and Others v. the Netherlands*, op. cit., paras. 57-59.

¹⁴ Article 5(2) ECHR.

¹⁵ Article 5(3) ECHR.

¹⁶ Article 5(4) ECHR.

¹⁷ Article 5(5) ECHR.

[30] Any disciplinary penalty or measure which amounts to deprivation of liberty within the meaning of Article 5(1) of the Convention should comply with the requirements of this provision. A penalty or measure does not escape the terms of Article 5 when it takes the form of restrictions that clearly deviate from the normal conditions of life within the armed forces. In order to establish whether this is so, account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution of the penalty or measure in question.¹⁸ Being held in a cell and excluded from the performance of normal duties amounts to deprivation of liberty within the meaning of Article 5(1). In contrast, being confined to military buildings or premises without being kept under lock and key and without being prevented from performing one's duties does not constitute deprivation of liberty.¹⁹

Members of the armed forces whose civil or other rights guaranteed under national law have been violated or who have been charged with a criminal offence should have the right to a fair trial. (Article 6 ECHR)

[31] In the determination of his or her civil rights and obligations or of any criminal charge against him or her, a member of the armed forces is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgments should 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.

In criminal matters

[32] A member of the armed forces charged with a criminal offence within the meaning of the Convention should be presumed innocent until proved guilty.²⁰ He or she should have the following minimum rights:

- to be informed promptly, in a language which he or she understands and in detail, of the nature and cause of the accusation against him or her;
- to be provided with adequate time and facilities for the preparation of his or her defense;
- to be able to defend himself or herself in person or through the legal assistance of his or her own choosing or, if he or she has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require from the initial stage of the proceedings;²¹
- to consult with a legal representative out of hearing of third parties and without being monitored by any other means;²²
- to be able to examine or have examined witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
- [to have the free assistance of an interpreter if he cannot understand or speak the language used in court].

[33] In order to safeguard the independence and impartiality of judicial authorities acting in criminal proceedings, there should be a clear separation between the prosecuting authorities and those handing down the court decision.

¹⁸ *Engel and Others v. the Netherlands*, op. cit., para. 59.

¹⁹ *Engel and Others v. the Netherlands*, op. cit., para. 61.

²⁰ Article 6(2) ECHR.

²¹ *Imbrioscia v. Switzerland*, judgment of 24 November 1993, para. 36; *Berliński v. Poland*, judgment of 20 June 2002, para 76. Article 6(3) ECHR.

²² *Öcalan v. Turkey*, judgment of 12 May 2005, para. 133

[34] In accordance with the principle of adversarial proceedings and equality of arms between the parties, a member of the armed forces charged with criminal offence should be given access to information submitted by the authorities to the competent court and have the opportunity to present his or her comments on this information.²³

[35] A member of the armed forces who is found guilty of an offence should be able to appeal to a competent and independent higher authority which ultimately should be a civilian court.

[36] No member of the armed forces should be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed. Nor should a heavier penalty be imposed than the one applicable at the time the criminal offence was committed.²⁴ This is without prejudice to the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.²⁵

[37] No member of the armed force should be tried or punished twice in criminal proceedings, within the meaning of the Convention, for an offence based on the same facts and for which he or she has already been finally acquitted or convicted.²⁶

[38] No collective punishment should be imposed on members of the armed forces.

[39] The abovementioned guarantees of a fair trial, enshrined in Article 6 of the Convention, should apply to all criminal proceedings, be they qualified as disciplinary proceedings in national law or as criminal proceedings under the Convention on account of the nature of the offence and the seriousness of the potential penalty as well as its purpose.²⁷

In civil and other matters

[40] Members of the armed forces whose civil or other rights guaranteed under national law have allegedly been violated should have access to an independent and impartial tribunal. Any exclusion should be expressly provided for by law and should be justified on objective grounds in the public interest. The authorities should establish that the subject-matter of the dispute is related to the exercise of state power and that it concerns the special bond of loyalty and trust between the member of the armed forces and the state as an employer.²⁸

[41] Members of the armed forces who lack sufficient resources are entitled to legal aid insofar as such aid is necessary to ensure effective access to justice.²⁹

Competence of military courts and procedural safeguards

[42] The organisation and operation of military courts should fully ensure the right of everyone to a competent, independent and impartial tribunal at every stage of legal proceedings. The persons selected to perform the functions of judges in military courts must display integrity and competence and show proof of the necessary legal training and qualifications. Military judges should have a status

²³ *Aksoy (Eroğlu) v. Turkey, Güner Çorum v. Turkey, Kahraman v. Turkey*, judgments of 31 October 2006

²⁴ Article 7 (1) ECHR

²⁵ Article 7 (2) ECHR.

²⁶ Article 4 Protocol No. 7 ECHR.

²⁷ *Engel and Others v. Netherlands*, judgment of 8 June 1976, para. 82; *Campbell and Fell v. UK*, judgment of 28 June 1984, para. 68.

²⁸ *Vilho Eskelinen and Others v. Finland*, judgment of 19 April 2007, para. 62

²⁹ *Airey v. Ireland*, judgment of 9 October 1979.

guaranteeing their independence and impartiality, in particular they should be separate from the chain of command.³⁰

[43] Public hearings should be the rule. The holding of sessions in camera should be altogether exceptional and be authorised by a specific, well-grounded decision the legality of which is subject to review.³¹

[44] Military courts should have competence only for strictly military offences [and for members of the armed forces]. Ordinary courts should have competence for all issues which do not constitute a breach of military discipline. In a situation of overlapping jurisdictions between military and civilian courts, the choice of assuming jurisdiction over a case should lie with the civilian court.

[45] When criminal offences are tried before a military court, those courts should include a civilian judge.

Members of the armed forces should also enjoy the right to an effective remedy, whether before a judicial authority or other. (Article 13 ECHR)

[46] Where a member of the armed forces has an arguable claim to be the victim of a violation of a right set forth in the Convention, he or she should have a remedy before a national authority in order both to have his or her claims decided and, if appropriate, to obtain redress.

Members of the armed forces have the right to respect for their private and family life, their home and correspondence. (Article 8 ECHR)

[47] There should be no restrictions on the exercise of this right other than as are prescribed by law and 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.

[48] When reliance is placed on national security as a legitimate aim, it is open to states to impose restrictions on the right to respect for private life where there is a real threat to the armed forces' operational effectiveness, but they cannot frustrate the exercise of this right and assertions as to a risk to operational effectiveness must be substantiated by specific concrete examples.³²

[49] Members of the armed forces should not be subjected to investigations into the most intimate aspects of their private life such as their sexual orientation.³³

³⁰ *Findlay v. UK*, judgment of 25 February 1997 and Report on the issue of the administration of justice through military tribunals, UN Special Rapporteur of the sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux, Principle no. 13.

³¹ Report on the issue of the administration of justice through military tribunals, UN Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux, Principle no. 14.

³² *Smith and Grady v. UK*, judgment of 27 September 1999, para. 89, *Lustig-Prean and Beckett v. UK*, judgment of 27 September 1999, para. 82, among other authorities.

³³ *Smith and Grady v. UK*, op. cit., para. 90.

[50] Conscripts should as much as possible be posted near their family and home. Any separation from their family and home should be necessary in the interests of national security and not be arbitrary or disproportionate.

[51] Where members of the armed forces are posted abroad, they should be able to keep in contact with their families/partners as far as possible. Where families/partners accompany the members of the armed forces who are posted abroad, assistance programmes targeted at them should be organised before, during and after deployment.

[52] Members of the armed forces who are parents of young children should have the right to parental leave, access to nursery schools and other child care benefits.

[53] Correspondence of armed forces members should not be intercepted except if the member is in a combat zone. While it is open to states to impose restrictions on the right to respect for correspondence where there is a real threat to the armed forces' operational effectiveness, they cannot frustrate the exercise of this right and assertions as to a risk to operational effectiveness must be substantiated by specific concrete examples.³⁴

Members of the armed forces should enjoy the right to freedom of thought conscience and religion which also includes freedom to manifest religion or belief, in worship, teaching, practice and observance. (Article 9 ECHR)

[54] There should be no restrictions on members of the armed forces' freedom to manifest their religion or beliefs other than such 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.

[55] However, in choosing to pursue a military career, members of the armed forces accept of their own accord a system of military discipline that by its very nature implies the possibility of placing on the right to manifest religion or beliefs limitations incapable of being imposed on civilian.³⁵

[56] There should be no discrimination in the enjoyment of this right between members of the armed forces of different faiths. States should treat differently persons whose situations are significantly different and therefore take accommodating measures to avoid any discrimination between members of different faiths in the practice of their religion.³⁶

[57] Members of the armed forces should have the right to change religion or belief at any time during service, and apply for the granting of conscientious objector status.³⁷ Any application for this status should be examined by an independent body. A member of the armed forces having obtained conscientious objector status and leaving the armed forces on this ground should not be prosecuted or discriminated against. No discrimination should result from a failed application for conscientious objector status.

³⁴ *Smith and Grady v. UK*, judgment of 27 September 1999, para. 89, *mutatis mutandis*.

³⁵ *Kalaç v. Turkey*, judgment 1 July 1999, para. 28.

³⁶ *Thlimmenos v. Greece*, 6 April 2000, para. 44.

³⁷ PACE Recommendation 1518 (2001) on the exercise of the right of conscientious objection to military service.

Members of the armed forces should enjoy freedom of expression.³⁸ (Article 10 ECHR)

[58] The exercise of freedom of expression by everyone including members of the armed forces, carries with it duties and responsibilities. It may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and 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 or impartiality of the judiciary.

[59] Subject to the above requirements being met, it must be open to the state to impose restrictions on freedom of expression where there is a real threat to military discipline, as the proper functioning of an armed forces is hardly imaginable without legal rules designed to prevent members of the armed forces from undermining it.³⁹

[60] Moreover, in specific circumstances, restrictions may be considered if they concern, notably, the disclosure of information objectively considered to be military secrets or a description of how particular military duties are performed⁴⁰ or if the political neutrality of the army is affected.⁴¹

[61] On the other hand, the right to freedom of expression of members of the armed forces should apply even if they are unpopular or disturbing. It is not open to the national authorities to rely on such rules for the purpose of frustrating the expression of opinions, even if these are directed against the armed forces as an institution.⁴²

[62] As far as military discipline is concerned, the provisions allowing for restrictions on freedom of expression must afford sufficient protection against arbitrariness and make it possible to foresee the consequences of their application.⁴³

Members of the armed forces should have the right to have access to relevant information.

[63] In the case of potential recruits who are minors, they and their parents or legal guardians, should be provided with full and detailed information about all aspects of the recruitment and induction process, including the specific nature of the commitment involved in enlisting into the armed forces.

[64] Members of the armed forces and veterans should have access to their own personal data upon request.

[65] Members of the armed forces should have the right to obtain information about potentially hazardous exposure they may have experienced during military service.⁴⁴

³⁸ *Engel and Others v. Netherlands*, judgment of 8 June 1976, para. 100.

³⁹ *Grigoriades v. Greece*, judgment of 25 November 1997, para. 45.

⁴⁰ *Hadjianastassiou v. Greece*, judgment of 16 December 1992

⁴¹ *Erdel v. Germany*, decision of 13 February 2007

⁴² *Grigoriades v. Greece*, op. cit.

⁴³ *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria*, judgment of 19 December 1994, para. 31.

⁴⁴ *Roche v. UK*, judgment of 19 October 2005

[66] Access to information may be restricted if the documents requested are of a confidential or secret nature, or if the restrictions aim to protect national security, defence or international relations.⁴⁵

[67] Members of the armed forces should receive information on their rights, including their human rights.

Members of the armed forces should enjoy the right to freedom of peaceful assembly and to freedom of association with others and to join trade unions for the protection of their interests. (Article 11 ECHR)

[68] Members of the armed forces should have the right to organise and to bargain collectively.⁴⁶

[69] There should be no restrictions on these rights other than such as are prescribed by law and 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.⁴⁷ Unnecessary restrictions on their right to association should be lifted.⁴⁸

[70] Members of the armed forces should have the right to join legal political parties⁴⁹, unless there are legitimate grounds for certain restrictions.⁵⁰ There may be legitimate grounds for certain restrictions on political activities, notably when a member of the armed forces is on duty.

[71] Military associations or unions, including conscripts' associations, should be involved in determining conditions of service of members of the armed forces.

[72] No disciplinary action or discriminatory measures should be taken against members of the armed forces merely because of their participation in the activities of military associations or trade unions.

Members of the armed forces should have the right to marry and found a family without any kind of special authorisation. (Article 12 ECHR)

[73] Members of the armed forces should have the right to form civil partnerships where this possibility is offered to civilians by law.

⁴⁵ See Recommendation Rec(2002)2 of the Committee of Ministers to member states on access to official documents

⁴⁶ CM notes it exists in many member states in its reply to PACE Recommendation 1572 (2002) on the right of association for members of the professional staff of the armed forces. Articles 5 and 6 of the Revised European Social Charter.

⁴⁷ Text of Art. 11 (2).

⁴⁸ PACE Recommendation 1572 (2002) on the right of association for members of the professional staff of the armed forces

⁴⁹ Political parties are covered by Article 11 ECHR, *United Communist Party of Turkey and Others v. Turkey*, judgment of 11 January 1998, paras. 24-25.

⁵⁰ CM reply to PACE Recommendation 1572 (2002) on the right of association for members of the professional staff of the armed forces.

Members of the armed forces should enjoy the right of property. (Article 1 Protocol No. 1 ECHR)

[74] Any possessions of a conscript confiscated upon joining the armed forces should be returned at the end of the military service.

Children of members of the armed forces should have access to an educational system.

Members of the armed forces should enjoy the right to vote and to stand for election.⁵¹ (Article 3 Protocol No. 1 ECHR)

[75] Any restrictions on the electoral rights of a member of the armed forces which are no longer necessary and proportionate in pursuit of an aim considered as legitimate in a democratic society should be removed.⁵²

Members of the armed forces should be provided with accommodation of an adequate standard. (Art. 31 (1) European Social Charter (revised))

[76] The accommodation provided for members of the armed forces, and in particular sleeping accommodation, should respect, privacy, as far as possible, and meet the requirements of health and hygiene.

Members of the armed forces have the right to receive fair remuneration and retirement pension (Article 4 European Social Charter (revised)).

[77] All members of the armed forces, whether volunteers or conscripts, should receive just remuneration for their work, which should be paid on time.

[78] Women in the armed forces should receive the same salary as men of the same rank.

[79] Professional members of the armed forces should be entitled to a fair retirement pension, regardless of their ethnic origin, gender, religious beliefs or sexual orientation.

⁵¹ Article 3 Protocol No. 1. Principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election in *Mathieu-Mohin and Cleyfayt v. Belgium*, judgment of 2 March 1987, para. 54.

⁵² Reply of the Committee of Ministers to PACE Recommendation 1714 (2005) on abolition of restrictions on the right to vote. See also the Venice Commission's Code of Good Practice in Electoral Matters, 3.2.2.2. Military voting

**Members of the armed forces enjoy the right to health protection and security at work.
(Articles 2(4) and 3, European Social Charter (revised))**

[80] Military training and planning of operations should include, as far as possible, time for rest and free time.

[81] Members of the armed forces should enjoy the right of access to preventive health care and the right to benefit from medical treatment.

[82] As far as possible, members of the armed forces should not be exposed to epidemic, endemic or other diseases, or accidents.⁵³

[83] Adequate medical care should also be provided to members of the armed forces during military operations.

[84] Where members of the armed forces are injured or killed in service, adequate health care/allowances should be provided to those members and/or their families.

[85] The families of members of the armed forces should also have access to health and social welfare services.

[86] Veterans of the armed forces should be given benefit packages, including health care/insurance, financial benefits and rehabilitation programmes.

[87] Disability awards should be presented to veterans who have been wounded during service.

Members of the armed forces have the right to decent and sufficient nutrition.

[88] Members of the armed forces should be provided with a nutritious diet that takes into account their age, health, physical condition, religion, culture and the nature of their work.

[89] Clean drinking water should be available to members of the armed forces at all times.

**There shall be no discrimination in the armed forces based 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, disability, age, sexual orientation or other status.
(Article 14 ECHR, Article E European Social Charter (revised))**

[90] Members of the armed forces should have the right to bring allegations of discrimination before civilian courts or tribunals.

[91] Women in the armed forces should not be discriminated against, especially where career perspectives are concerned.⁵⁴

⁵³ Article 11 of the European Social Charter (revised)

⁵⁴ ECJ Cases C-273/97 Sirdar [1999] and C-285/98 Kreil [2000], European Social Charter (revised) Art. 20 (d).

[92] Women in the armed forces should not to be subjected to sexual harassment or sexual violence.

[93] Access to the armed forces cannot be barred on the ground of sexual orientation.⁵⁵

[94] Partners of members of the armed forces belonging to a sexual minority should be entitled to the same benefits as those of heterosexual members of the armed forces where provided for by national law.

Other issues

Special attention should be given to the protection of the rights of minors enroled in the armed forces.

[95] Minors within the armed forces should have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.⁵⁶

[96] Every minor within the armed forces should have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.⁵⁷

[97] Minors within the armed forces should not bear arms or take part in potentially dangerous operations, notably those carried out abroad.

Members of the armed forces have the right to receive training on their human rights

[98] Members of the armed forces should receive training to heighten their awareness of human rights.

[99] During training, military members of the armed forces should be informed that they have the right to object to an order which would entail the commission of war crimes.

Members of the armed forces should have the possibility of lodging a complaint before an independent national human rights body.

[100] Members of the armed forces who claim to have been victims of harassment or violence should have access to independent complaint mechanisms.

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⁵⁵ *Lustig-Prean and Beckett v. UK, Smith and Grady v. UK, Perkins and R. v. UK, etc.*

⁵⁶ Article 24 para. 1 The rights of the child, EU Charter on Fundamental Rights.

⁵⁷ Article 24 para. 3 The rights of the child, EU Charter on Fundamental Rights.

Appendix IV

The European Social Charter and armed forces personnel

Presentation by Mr Henrik Kristensen, Secretariat of the European Social Charter

The European Social Charter was adopted in 1961 and revised in 1996. As a treaty it is a complement to the European Convention on Human Rights in the social and economic field. It has a very broad material scope covering rights in areas such as housing, health, employment, social protection, movement of persons and, of course, it is based on the principle of non-discrimination. It is currently ratified by 39 out of the 47 Council of Europe Member States, and ratification is imminent in several of the remaining States.

Supervision of the application of the Charter takes place on the basis of two procedures, a reporting procedure and a collective complaints procedure. The reporting procedure is mandatory for all States Parties and at present they report on each accepted provision every 4 years. The collective complaints procedure, which allows certain trade unions, employers' organisations and NGOs to lodge complaints, is facultative and so far only 14 States are bound by this procedure.

The supervisory or regulatory body of the Charter is the European Committee of Social Rights, which since 1969 has adopted "conclusions" upon the examination of national reports and, since 1998, [it] has handed down "decisions" in collective complaints cases. These conclusions and decisions containing the legal assessments of state compliance constitute what is commonly called the Committee's "case law". It is on this case law I will draw when making some brief comments on certain rights in the Charter that appear to be relevant to your work.

As a preliminary remark, I have to say that references to the situation of armed forces personnel are few and far between in the Charter, be that in the text of the treaty itself or in the case law of the European Committee of Social Rights. The only reference in the text of the Charter appears in Article 5 on the right to organise, where it is stated that the application to the members of the armed forces of the right to organise "shall be determined by national laws or regulations". The possibility of amending the Charter on this particular point so as to introduce guarantees for armed forces personnel has been discussed in the past. In 2002, the Council of Europe's Parliamentary Assembly adopted a recommendation⁵⁸ to this effect, but agreement between governments on an amendment could not be reached at the time.

As far as the case law is concerned the references boil down to just a few instances. Firstly, as regards the right to organise the Committee has held from the outset that the text of Article 5 permits States "to limit in any way and even to suppress entirely the freedom to organise in the armed forces."⁵⁹ With respect to collective bargaining, which is guaranteed by Article 6, the Committee has said in a collective complaints decision that it may be applicable to the armed forces. However, under Article 6 the Committee has always considered that collective bargaining and collective agreements in the strict sense may not be possible for public officials, civil servants and, by implication, armed forces staff. Consequently, for these categories it will suffice that they are consulted in the process of determining their terms and conditions of work. In its decision in a 1999 collective complaint, *Eurofedop v. France*,⁶⁰ the Committee noted that *France* had provided for a consultation machinery on several levels in the armed forces and it therefore concluded that there was no violation of Article 6.

A second area where the Committee has considered the situation of military personnel is in relation to the free choice of an occupation guaranteed by Article 1§2. Here the Committee has found that the situation in *Ireland* was not in conformity with the Charter because army officers could not seek early

⁵⁸ Parliamentary Assembly Recommendation 1572(2002)

⁵⁹ Conclusions I, p. 31.

⁶⁰ EUROFEDOP v. France, Collective Complaint No. 2/1999.

termination of their commission unless they repaid to the state at least part of the cost of their education and training, and the decision to grant termination was left entirely to the discretion of the Minister of Defence.⁶¹ A somewhat similar breach of the Charter has been found in respect of *Greece*, where career officers in the army, who had received certain training, were subjected to a compulsory service of up to 25 years. The Committee considered this to be excessive and contrary to the freedom to choose and leave an occupation.⁶²

Finally, the Committee has considered the situation of conscientious objectors to military service, also under Article 1§2. It holds that the length of any alternative service required by objectors should be reasonable in comparison with the length of ordinary military service. It has found, for example, that a length of alternative service which exceeds one-and-a-half times the length of military service is excessive and it has found several States (including *Estonia, Finland, Greece, Moldova and Romania*)⁶³ to be in violation of Article 1§2 on this basis.

So that was about the extent of what the Committee has said about armed forces personnel in its case law to date. However, if you allow I would also make some brief comments about the general scope of some of the other Charter rights. [For some of the rights there are already references in your draft “elements” for the Recommendation, for others there are not.]

Harassment is a notion that is mentioned several times in the draft text. Here I would draw your attention to Article 26 of the Revised Charter, which protects the right to dignity at work. Article 26§1 requires States to guarantee effective protection against sexual harassment and Article 26§2 requires the same in respect of other forms of harassment defined as “reprehensible or distinctly negative and offensive actions against individual workers. The Committee considers that the protection must include the right of appeal to an independent body and the right to compensation, which must be “adequate, proportionate and dissuasive”. Article 26 also requires States to conduct information, awareness-raising and prevention campaigns in the workplace to combat harassment.

The education of children of members of the armed forces is also addressed in the draft text. Article 17 of the Revised Charter guarantees the right to primary and secondary education. Education must be free of charge and all children of the relevant age group must be enrolled in school. The Committee has also developed more specific requirements related to geographical distribution of schools, class sizes, teacher-pupil ratios and attendance rates. I might also mention here that Article 16 requires States to provide childcare facilities for children below the school age.

Fair remuneration is guaranteed by Article 4 of the Charter. This covers not only the level of wages, which must not be below 60% of average wages, but also aspects such as overtime pay, equal pay for men and women for work of equal value, adequate notice periods in connection with dismissals and protection against the employer making deductions from wages.

The Charter also guarantees the right to adequate old-age pensions, both in the framework of the right to social security in Article 12 and as an essential element of the right of elderly persons to social protection as guaranteed by Article 23 of the Revised Charter. Under Article 23 pensions must be of a level that allows retired and elderly persons to lead a decent life and play an active part in public, social and cultural life. In order to assess the situation the Committee compares pensions with average wage levels and the overall cost of living.

To conclude this brief and highly selective presentation of the European Social Charter, let me just say that we look forward to seeing the final result of your work on the draft Recommendation. The draft text,

⁶¹ Conclusions 2006, p. 363.

⁶² *International Federation of Human Rights v. Greece*, Collective Complaint No. 7/2000. This problem has since been remedied, see Conclusions XVIII-1, p. 348.

⁶³ See Conclusions 2006, p. 178 (*Estonia*), p. 243 (*Finland*), pp. 556-557 (*Moldova*) and p. 738 (*Romania*) as well as Conclusions XVIII-1, pp. 348-349 (*Greece*).

to me, is very comprehensive in its coverage of social rights and I am quite sure that a Recommendation in this field would inspire the European Committee of Social Rights to probe a bit deeper the possibility of applying the different rights in the Charter to members of the armed forces.

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