



Strasbourg, 5 November 2008

DH-DEV-FA(2008)005

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

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**Meeting report**

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4<sup>th</sup> meeting  
Wednesday 15 October– Friday 17 October 2008

Strasbourg, Agora Building, Room G06  
Council of Europe

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**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 4<sup>th</sup> and last meeting in Strasbourg on 15-17 October 2008, 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 finalised the draft recommendation and its principles on the basis of amendments received from the members. The revised draft can be found in Appendix III.

3.       Owing to lack of the time, the Group did not examine the draft explanatory memorandum prepared by the Secretariat in co-operation with the Chair. The Group was informed that it would be finalised by the Chair and the Secretariat, in the light of any specific comments that members of the Group should wish to make. These comments were to be sent to the Secretariat (gerald.dunn@coe.int) by 3 November 2008.

4.       The Group did not have sufficient time to examine possible follow-up to the recommendation.

5.       The Chair warmly thanked all members of the Groups, including NGOs, for their constructive approach to the drafting of the recommendation.

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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

Mr Jes Rynkebye KNUDSEN, Special Adviser, Judge Advocate Corps

**FINLAND / FINLANDE**

Ms Camilla BUSCK-NIELSEN, (Chairperson / Présidente), 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 Séverine MALRAISON, 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 / Legal Adviser, Ministry of Foreign Affairs, Legal and Treaty Department

**PORTUGAL** – apologised/excusé

**RUSSIAN FEDERATION / FÉDÉRATION DE RUSSIE**

Mr Alexander KOSMODEMIYANSKIY, Senior Military Prosecutor, Office of the Chief Military Prosecutor 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**

Mme Deniz AKÇAY, Adjointe au Représentant permanent de la Turquie auprès du Conseil de l'Europe

Mr Gürçay ŞEKER, Legal Adviser at the Permanent Representation of Turkey to the Council of Europe

**UNITED KINGDOM / ROYAUME-UNI**

Mr John EVANS, Director General Law, Ministry of Defense

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

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**PARTICIPANTS**

**Amnesty International**

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

**Conference of European Churches (KEK) / Conférence des Eglises européennes (KEK)**

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

**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

Silke FLEMMING (Germany), Organisation: DBwV/EUROMIL, Organisation: BwV/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), Executive Chairman

**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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Appendix II

**AGENDA**

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

**Item 2:        Draft recommendation of the Committee of Ministers on human rights of members of the armed forces**

Working documents

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|--|-----------------------|
| - Revised principles for the future recommendation (with recent comments from the Group members) | DH-DEV-FA(2008)004rev |
| - Preliminary draft explanatory memorandum of the future recommendation                          | DH-DEV-FA(2008)002rev |
| - Comments and drafting proposals on the future recommendation provided by the Group members     | DH-DEV-FA(2008)001    |
| - 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 <sup>st</sup> meeting of the Group (14-15 June 2007)                           | DH-DEV-FA(2007)005    |
| - Report of the 2 <sup>nd</sup> meeting of the Group (3-4 December 2007)                         | DH-DEV-FA(2007)008    |
| - Report of the 3 <sup>rd</sup> meeting of the Group (9-11 April 2008)                           | DH-DEV-FA(2008)003    |

**Item 3:        Other business**

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Appendix III**Revised draft principles 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 case-law of the European Committee of Social Rights, and the standards of the European Committee 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 International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, 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 monitoring bodies established under the aforementioned instruments;

[5] Taking into account the Committee of Ministers' Recommendation No. R (87) 8 regarding conscientious objection to compulsory military service, as well as the 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 Handbook on human rights and fundamental freedoms of armed forces personnel, published by the OSCE/ODIHR and the Centre for the Democratic Control of Armed Forces (DCAF) in 2008;

[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 among competent civil and military authorities and members of the armed forces, with a view to raising awareness of the human rights and fundamental freedoms of members of the armed forces, and to providing training aimed at increasing their 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.

**General Principles**

[2] Whilst taking into account the special characteristics of military life, members of the armed forces, whatever their status, shall enjoy the rights guaranteed in the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter, the Convention) and the European Social Charter (hereafter, the Charter), as well as other relevant human rights instruments, to the extent that states are bound by them.

[3] According to Article 15 of the Convention and Article F of the Charter, in time of war or other public emergency threatening the life of the nation, states may derogate from their obligations under the Convention and the Charter to the extent strictly required by the exigencies of the situation and provided that such measures are not inconsistent with their other obligations under international law.

[4] Derogations under Article 15 of the Convention shall not be permitted in relation to the following rights: 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.

[5] The following rights and freedoms should be respected and implemented in accordance with the accompanying principles:

<b>Members of the armed forces have the right to life</b>
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[6] Member states should protect the lives of members of the armed forces from real and immediate threats to life. Where states knew or ought to have known of the existence of such a threat, they should take measures within the scope of their powers, which judged reasonably, might have been expected to avoid that risk. In particular, 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, and the competent authorities should therefore take reasonable measures having regard to the source and degree of danger and the means available to combat it in respect of military training, planning of operations, the equipment used and provided, as well as in ensuring access to health care and treatment.

[7] 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 a member or in circumstances where they disregarded the threat to life.<sup>1</sup>

[8] An independent and effective inquiry should be held 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, within a reasonable time, and be thorough. Such investigation should be capable of leading to the identification and punishment of those responsible.<sup>2</sup> Finally, family members should be duly informed of the progress of investigations and their findings, and have access to an effective remedy.

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<sup>1</sup> *Osman v. UK*, judgment of 28 October 1998, para. 116.

<sup>2</sup> *Zelilof v. Greece*, judgment of 24 May 2007, para. 54.



[9] 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. They should also put in place a legal or administrative framework to prevent retaliation against those who have reported allegations in breach of Article 2 of the Convention affecting a member of the armed forces.

[10] Members of the armed forces shall never be sentenced to death or executed.

**No member of the armed forces shall be subjected to torture or to inhuman or degrading treatment or punishment**

[11] 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 and minorities.

[12] 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. This investigation should be fair, impartial and independent of the chain of command. Such an investigation should be speedy and capable of leading to the identification and adequate punishment of those responsible in order to avoid impunity. Where practices such as initiation rites, bullying or harassment amount to a violation of Article 3 of the Convention, those responsible should be held accountable and punished accordingly. Victims of violations of this Article shall have access to an effective remedy.

[13] Member states should take measures to encourage the reporting of acts of torture or ill-treatment within the armed forces. They should also put in place a legal or administrative framework to prevent retaliation against members of the armed forces having complained of or reported ill-treatment.

[14] Members of the armed forces, notably when deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person, in conformity with their Convention rights, including the case-law of the European Court of Human Rights, as well as other European and international standards.

[15] Insofar as disciplinary punishment is concerned, collective punishments and corporal punishment, punishment by placing in a dark cell, as well as all other forms of inhuman or degrading punishment should be prohibited. Punishment should not include a total prohibition of family contacts. Solitary confinement should be imposed as a punishment only in exceptional cases, as a measure of last resort 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 shall not be used for forced or compulsory labour**

[16] Military service or service exacted instead of compulsory military service shall not be considered as constituting forced or compulsory labour.<sup>3</sup> The nature and duration of service exacted instead of compulsory military service should not be punitive, disproportionate or unreasonable compared to that of military service.<sup>4</sup>

<sup>3</sup> See Complaint No. 8/2000, *Quaker Council for European Affairs (QCEA) v. Greece*, para 22.

<sup>4</sup> See collective *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. See also *Autio v. Finland*, European Court of Human Rights, decision of 6 December 1991, and the UN Human Rights Committee's conclusions in *Jarvinen v. Finland* (25 July 1990) and *Foin v. France* (3 November 1999).

[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 and civil assistance carried out in accordance with the law.

[18] The authorities should not impose on professional members of the armed forces a length of service which would constitute an unreasonable restriction on their right to leave the armed forces such as to amount to forced labour.<sup>5</sup>

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

[19] Each member state should be competent to organise its own system of military discipline and enjoys a certain margin of appreciation in the matter.<sup>6</sup> However, only conduct likely to constitute a threat to military 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 any right of appeal should be provided for in law.

[21] Any allegation of infringement of the disciplinary rules by a member of the armed forces should be reported promptly to the competent authority, which should 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. Where article 6 applies, they should have the right to a fair hearing. They should also be given the opportunity to appeal to a higher and independent body.

**Members of the armed forces enjoy the right to liberty and security**

[23] No member of the armed forces shall 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.

[24] For as long as recruitment of persons under the age of 18 into military service continues, these persons should be detained only as a measure of last resort and for the shortest possible appropriate period of time. Furthermore, if detained, they should be held separately from adults, unless it is in the individual's best interest.

[25] Members of the armed forces who are arrested or detained shall be informed promptly of:<sup>7</sup>

- the reasons for their arrest or detention;
- any charge against them;
- their procedural rights.

<sup>5</sup> 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. *This is also true when it is not possible for members of the armed forces to seek early termination of their commission unless they repay part of the cost of their education and training.* See Conclusions 2004, Ireland, pp. 278-279 (and 2006, p. 367).

<sup>6</sup> *Engel and Others v. the Netherlands*, op. cit., paras. 57-59.

<sup>7</sup> Article 5 (2) ECHR.

[26] Members of the armed forces who are arrested or detained should have the right to contact a legal representative without undue delay after being taken into custody, and should also have the right to a private and confidential consultation with a legal representative, before any examination.

[27] When members of the armed forces are arrested or detained in relation to a criminal offence, they shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and be entitled to trial within reasonable time or to release pending trial.<sup>8</sup>

[28] Members of the armed forces who are deprived of their liberty shall be entitled to take proceedings by which the lawfulness of the detention should be decided speedily by a court and their release ordered if the detention is not lawful.<sup>9</sup> 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] Members of the armed forces who have been victims of arrest or detention contrary to Article 5 of the Convention shall have an enforceable right to compensation.<sup>10</sup>

[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 of the Convention 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 imposed.<sup>11</sup>

<b>Members of the armed forces enjoy the right to a fair trial</b>
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[31] In the determination of their civil rights and obligations or of any criminal charge against them, members of the armed forces shall be entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgments 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.

*In criminal matters*

[32] Members of the armed forces charged with a criminal offence within the meaning of the Convention shall be presumed innocent until proved guilty.<sup>12</sup> They should have the following minimum rights:

- to be informed promptly, in a language which they understand and in detail, of the nature and cause of the accusation against them;
- to be provided with adequate time and facilities for the preparation of their defence;
- to be able to defend themselves in person or through the legal assistance of their own choosing or, if they have 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;<sup>13</sup>

<sup>8</sup> Article 5(3) ECHR.

<sup>9</sup> Article 5(4) ECHR.

<sup>10</sup> Article 5(5) ECHR.

<sup>11</sup> *Engel and Others v. the Netherlands*, op. cit., para. 59.

<sup>12</sup> Article 6(2) ECHR.

- to consult with a legal representative out of hearing of third parties and without being monitored by any other means;<sup>14</sup>
- to be able to examine or have examined witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them;
- to have the free assistance of an interpreter if they cannot understand or speak the language used in court.
- to be tried in their presence, and
- not to be compelled to give testimony against themselves or confess guilt.

[33] Persons who were under the age of 18 at the time of the alleged offence and/or trial should be treated in a way which is in accordance with the case law of the European Court of Human Rights, the Convention on the Rights of the Child and other relevant international standards.

[34] 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.

[35] In accordance with the principle of adversarial proceedings and equality of arms between the parties, members of the armed forces charged with a criminal offence should be given full access, to the same extent as criminal proceedings against civilians, to the criminal case file and have the right to present their defence.

[36] Members of the armed forces who are found guilty of an offence shall to the same extent as in criminal proceedings against civilians be able to appeal to a competent and independent higher authority which ultimately should be a independent and impartial tribunal that fully complies with Article 6 requirements.

[37] No member of the armed forces shall 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 shall a heavier penalty be imposed than the one applicable at the time the criminal offence was committed.<sup>15</sup> This shall be 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.<sup>16</sup>

[38] No member of the armed forces shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same state for an offence for which he or she has already been finally acquitted or convicted in accordance with the law and penal procedure of that state. This shall not prevent the reopening of the case in accordance with the law and penal procedure of the state concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.<sup>17</sup>

[39] The above-mentioned guarantees of a fair trial shall apply to all proceedings that qualify as criminal under the Convention on account of the nature of the offence and the seriousness of the potential penalty as well as its purpose, be they qualified as disciplinary or criminal in national law.<sup>18</sup>

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<sup>13</sup> *Imbrioscia v. Switzerland*, judgment of 24 November 1993, para. 36; *Berliński v. Poland*, judgment of 20 June 2002, para. 76. Article 6(3) ECHR.

<sup>14</sup> *Öcalan v. Turkey*, judgment of 12 May 2005, para. 133

<sup>15</sup> Article 7 (1) ECHR

<sup>16</sup> Article 7 (2) ECHR.

<sup>17</sup> Article 4 Protocol No. 7 ECHR.

<sup>18</sup> *Engel and Others v. Netherlands*, judgment of 8 June 1976, para. 82; *Campbell and Fell v. UK*, judgment of 28 June 1984, para. 68.

*In civil and other matters*

[40] Members of the armed forces shall have access to an independent and impartial tribunal for the determination of their civil rights and obligations. Any exclusion of the right to have access to a tribunal should be expressly provided for by law and should also be justified on objective grounds in the public interest.

[41] Members of the armed forces who lack sufficient resources to cover the costs of legal representation should be entitled to legal aid under the same conditions as civilians, insofar as such aid is indispensable for an effective access to justice.<sup>19</sup>

*Competence of military courts and procedural safeguards*

[42] The organisation and operation of military courts, where they exist, 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 should display integrity and competence and possess the necessary legal training and qualifications. Military judges should have a status guaranteeing their independence and impartiality, in particular they should be separate from the chain of command.<sup>20</sup>

[43] Hearings should be held in public. The holding of sessions in camera should be exceptional and be authorised by a specific, well-grounded decision the lawfulness of which is subject to review.<sup>21</sup>

[44] When members of the armed forces can be brought before a military or ordinary court, where there is a civilian element in any offence, priority should be given to the ordinary court except when it is not compliant with the Convention.

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

<b>Members of the armed forces have the right to an effective remedy</b>
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[46] Where members of the armed forces have an arguable claim of a violation of their human rights, they should have an effective remedy before a national authority in order both to have their claims decided and, if appropriate, to obtain redress.

<b>Members of the armed forces have the right to respect for their private and family life, their home and correspondence</b>
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[47] There shall be no restrictions on the exercise of these rights other than as are prescribed by law and are 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>19</sup> *Airey v. Ireland*, judgment of 9 October 1979.

<sup>20</sup> *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.

<sup>21</sup> 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.

[48] Where states rely on national security in order to impose restrictions on the right to respect for private and family life, they should only do so where there is a real threat to the armed forces' operational effectiveness, but they should not frustrate the exercise of this right and assertions as to such a threat should be well-founded and objectively justified.<sup>22</sup>

[49] Members of the armed forces should not be subjected to investigations into the most intimate aspects of their private life such as, for example, their sexual orientation.<sup>23</sup>

[50] Conscripts should as far as possible be posted near their family and home. Any separation from their family and home should only be for operational reasons and not be arbitrary or disproportionate. Furthermore, postings of professional members of the armed forces far from their families/partners and homes should not be imposed as disciplinary punishment but only for operational reasons.

[51] 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. Where families and 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 enjoy maternity or paternity leave, access to nursery schools and other appropriate child care benefits. Children of members of the armed forces should have access to an educational system.

[53] Private correspondence of members of the armed forces should not be intercepted unless such an interference can be objectively justified in accordance with Article 8(2) of the Convention.

<b>Members of the armed forces have the right to freedom of thought, conscience and religion</b>
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[54] Members of the armed forces enjoy, inter alia, the freedom, either alone or in community with others and in public or private, to manifest their religion or belief, in worship, teaching, practice and observance. There shall be no restrictions on this freedom 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. Such measures should be proportionate, should not be arbitrary and should be reasonably foreseeable.

[55] In choosing to pursue a military career, members of the armed forces accept of their own accord that military life by its very nature implies the possibility of placing on the right to manifest religion or beliefs limitations incapable of being imposed on civilians.<sup>24</sup> Such limitations shall be in accordance with the aforementioned requirements.

[56] There should be no discrimination between members of the armed forces of different faiths in the manifestation of their religion. Military authorities should take into consideration religious practices of members of the armed forces, for example, while granting them time for rest or providing reasonable facilities to allow them to manifest their religions or beliefs.

[57] a. Members of the armed forces have the right to change religion or belief at any time during service.

b. For the purposes of compulsory military service, conscripts should have the right to be granted conscientious objector status and an alternative service of a civilian nature should be proposed to

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<sup>22</sup> *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.

<sup>23</sup> *Smith and Grady v. UK*, op. cit., para. 90.

<sup>24</sup> *Kalaç v. Turkey*, judgment 1 July 1999, para. 28.

them. The principles and rights mentioned in Recommendation No. R (87) 8 of the Committee of Ministers to Member States regarding Conscientious Objection to Compulsory Military Service should be observed.

c. Professional members of the armed forces should be able to leave the armed forces for reasons of conscience

d. Members of the armed forces should be informed of the aforementioned rights and the procedures available to exercise them.

e. A request by a member of the armed forces to leave the armed forces for reasons of conscience should be examined within a reasonable time and they should be transferred to non-combat duties, where possible.

f. Any request to leave the armed forces for reasons of conscience should ultimately, where denied, be examined by an independent and impartial body.

g. Members of the armed forces leaving the armed forces for reasons of conscience should not be subject to discrimination or to any criminal prosecution. No discrimination or prosecution should result from asking to leave the armed forces for reasons of conscience.

<b>Members of the armed forces have the right to freedom of expression<sup>25</sup></b>
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[58] The right to freedom of expression includes freedom to hold opinions and to receive and impart information and ideas. The exercise of these freedoms 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. Such measures should be proportionate, should not be arbitrary and should be reasonably foreseeable.

[59] Any restrictions on freedom of expression which are imposed where there is a real threat to military discipline, given that the proper functioning of the armed forces is not possible without legal rules designed to prevent members of the armed forces from undermining it,<sup>26</sup> should respect the above requirements. These restrictions may concern, for example, how military duties are performed or whether the political impartiality of the armed forces is affected.<sup>27</sup>

[60] States should not seek to frustrate the expression of opinions, including those that are unpopular or disturbing, or those that are directed against the armed forces as an institution.<sup>28</sup>

<b>Members of the armed forces have the right to have access to relevant information<sup>29</sup></b>
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[61] Potential recruits should be provided with full and detailed information about all aspects of recruitment, the induction process and the specific nature of the commitments involved in enlisting in

<sup>25</sup> Article 10 ECHR. *Engel and Others v. Netherlands*, judgment of 8 June 1976, para. 100.

<sup>26</sup> *Grigoriades v. Greece*, judgment of 25 November 1997, para. 45.

<sup>27</sup> *Erdel v. Germany*, decision of 13 February 2007

<sup>28</sup> *Grigoriades v. Greece*, op.cit.

<sup>29</sup> Article 8 and 10 ECHR.

the armed forces. In the case of potential recruits who are under the age of 18, this information should also be provided to their parents or legal guardians.

[62] Former and current members of the armed forces should have access to their own personal data, including medical records, upon request.

[63] Current and, where applicable, former members of the armed forces should have access to information where they are, or have been, exposed during service to situations potentially hazardous to their health.<sup>30</sup>

[64] Access to information, may however be restricted if the documents requested are objectively considered to be classified, or if the restrictions aim to protect national security, defence or international relations. However, any restrictions should be duly justified.<sup>31</sup>

<p><b>Members of the armed forces have the right to freedom of peaceful assembly and to freedom of association with others, including for the protection of their interests</b></p>
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[65] 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 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>32</sup>

[66] Members of the armed forces should have the right to join independent organisations representing their interests and have the right to organise and to bargain collectively. They should also have the right not to join a trade union. Where any of these rights are not granted, the continued justification for such restrictions should be reviewed and unnecessary and disproportionate restrictions on the right to assembly and association should be lifted.

[67] Military associations or trade unions, including conscripts' associations, where applicable, should be involved in determining conditions of service of members of the armed forces and representing their interests.<sup>33</sup>

[68] 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.<sup>34</sup>

[69] Members of the armed forces should have the right to join political parties, unless there are legitimate grounds for certain restrictions. Furthermore, the exercise of political activities may be prohibited on legitimate grounds, in particular when a member of the armed forces is on active duty. The requirements mentioned in Article 11(2) of the Convention are to be fulfilled for any such restrictions.

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<sup>30</sup> *Roche v. UK*, judgment of 19 October 2005; *McGinley and Egan v. UK*, judgment of 9 June 1998.

<sup>31</sup> See Recommendation Rec(2002)2 of the Committee of Ministers to member states on access to official documents

<sup>32</sup> Text of Art. 11 (2).

<sup>33</sup> Article 22 European Social Charter (revised).

<sup>34</sup> Article 28 European Social Charter (revised).



**Members of the armed forces have the right to marry<sup>35</sup>**

[70] Members of the armed forces should have the right to marry and to form civil partnerships in accordance with the rights of civilians.

**All members of the armed forces enjoy the right of property<sup>36</sup>**

[71] The property of members of the armed forces, in particular conscripts, retained upon joining the armed forces should be returned at the end of military service.

**Members of the armed forces enjoy the right to vote and to stand for election<sup>37</sup>**

[72] 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.<sup>38</sup> However, Member States may impose restrictions on membership of the armed forces during a member's candidacy or following election.

**Members of the armed forces have to be provided with accommodation of an adequate standard<sup>39</sup>**

[73] Where accommodation is provided for members of the armed forces and their family, in particular sleeping accommodation, this should allow as far as possible some privacy, as well as meet basic requirements of health and hygiene.

**Members of the armed forces have the right to receive fair remuneration and retirement pension<sup>40</sup>**

[74] All members of the armed forces should receive remuneration such as will give them a decent standard of living. This remuneration should be paid on time.

[75] Men and women in the armed forces should be entitled to equal pay for equal work or work of equal value.

<sup>35</sup> Article 12 ECHR

<sup>36</sup> Article 1 Protocol No. 1 ECHR

<sup>37</sup> 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.

<sup>38</sup> 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

<sup>39</sup> Art. 31 (1) European Social Charter (revised). See notably collective complaints No. 15/2003, European Roma Rights Center (ERRC) v. Greece (decision of 8 December 2004), Nos. 27/2004 European Roma Rights Center (ERRC) v. Italy and 31/2005, European Roma Rights Center (ERRC) v. Greece, Italy and Bulgaria, and 18 October 2006; No. 39/2006, Fédération européenne d'associations nationales travaillant avec les Sans-Abri v. France, and No. 33/2006, Mouvement international ATD-Quart-Monde v. France, European Committee of Social Rights.

<sup>40</sup> Articles 4, 12 and 23 European Social Charter

[76] Full time professional members of the armed forces should be entitled to an adequate retirement pension, which should be paid on time, without any discrimination.

**Members of the armed forces have the right to dignity, health protection, and security at work<sup>41</sup>**

[77] Members of the armed forces should have the right to the protection of their dignity at work and not be subjected to sexual harassment or sexual violence.<sup>42</sup>

[78] Members of the armed forces should be entitled to paid holiday and periods of rest.

[79] Military training and planning of operations should include, as far as possible, periods of rest.

[80] Where members of the armed forces are exposed to epidemic, endemic or other diseases,<sup>43</sup> reasonable measures should be taken to protect their health.

[81] Member states should take appropriate measures to prevent accidents and injury to health arising out of, linked with or occurring in the course of members of the armed forces' work, particularly by minimising the causes of hazard inherent in the military working environment.<sup>44</sup>

[82] Members of the armed forces should enjoy access to health care and the right to receive medical treatment.

[83] Medical care should be provided as quickly as possible to members of the armed forces during military operations.

[84] Where members of the armed forces are injured in service, adequate health care and, where appropriate, allowances should be provided to those members. Members of their families should, where appropriate, also receive allowances.

[85] An appropriate compensation scheme should be available to persons leaving the armed forces who have been injured or become ill as a result of service.

[86] Where members of the armed forces are killed or die in service, adequate allowances should be provided to members of their families.

[87] Members of the armed forces leaving the armed forces should be provided with appropriate benefit packages and rehabilitation programmes.

**Members of the armed forces have the right to decent and sufficient nutrition<sup>45</sup>**

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

<sup>41</sup> Articles 2 and 3 of the European Social Charter and 26 of the Revised Charter. See, for example, collective complaint n°30, *Marangopoulos Foundation for Human Rights v. Greece*, decision of 6 December 2006, European Committee of Social Rights. Article 11 of the European Social Charter

<sup>42</sup> Article 26 of the Revised European Social Charter

<sup>43</sup> Article 11 of the European Social Charter

<sup>44</sup> Articles 2(4) and 3(1) of the European Social Charter.

<sup>45</sup> Article 11 International Covenant on Economic, Social and Cultural Rights.

[89] Clean drinking water should be available to members of the armed forces at all times.<sup>46</sup>

**Members of the armed forces enjoy rights and freedoms without any discrimination.**

[90] In the context of the work and service life of members of the armed forces there shall be no discrimination in the armed forces in relation to their human rights and freedoms 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 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 by pursuing a legitimate aim, such as maintaining combat effectiveness, and employing means which are reasonably proportionate to the aim sought to be realised.

[91] Members of the armed forces should have the right to bring allegations of discrimination in relation to their rights and freedoms before a national authority.

[92] Members of the armed forces should not be discriminated against on grounds of their gender or sexual orientation, especially where career perspectives are concerned.<sup>47</sup>

[93] Access to the armed forces should not be barred on the ground of sexual orientation.<sup>48</sup>

[94] Members of the armed forces belonging to a sexual minority and their partners should be entitled to the same benefits as other members of the armed forces and their partners, where their partnerships are recognised by national law.

**OTHER ISSUES**

**Special attention should be given to the protection of the rights and freedoms of persons under the age of 18 enlisted in the armed forces**

[95] States should ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.<sup>49</sup> Where member states recruit persons under the age of 18 they shall maintain safeguards to ensure, as a minimum, that:

- Such recruitment is genuinely voluntary;
- Such recruitment is carried out with the informed consent of the person's parents or legal guardians;
- Such persons and their parents or guardians are fully informed of the duties involved in such military service;
- Such persons provide reliable proof of age prior to acceptance into national military service.<sup>50</sup>

<sup>46</sup> Rights derived from Articles 11 and 12 combined, International Covenant on economic, social and cultural rights.

<sup>47</sup> European Court of Justice Cases C-273/97 *Sirdar* [1999] and C-285/98 *Kreil* [2000], and European Social Charter (revised) Art. 20(d).

<sup>48</sup> *Lustig-Prean and Beckett v. UK, Smith and Grady v. UK, Perkins and R. v. UK*, etc.

<sup>49</sup> Article 2 of the Optional Protocol to the Convention on the Rights of the Child on involvement of children in armed conflict.

<sup>50</sup> Article 3(3) of the Optional Protocol to the Convention on the Rights of the Child on involvement of children in armed conflict.

[96] Persons under the age of 18 within the armed forces should have the right to such protection and care as is necessary for their well-being and may make representations about their welfare<sup>51</sup>, including the conditions of their employment or military service.

[97] Every person under the age of 18 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.<sup>52</sup>

[98] Persons under the age of 18 within the armed forces should not take part in combat situations.

**Members of the armed forces should receive training on human rights**

[99] Members of the armed forces should receive training to heighten their awareness of human rights, including their own human rights.

[100] 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.

**Members of the armed forces should have the possibility of lodging a complaint with an independent body**

[101] Members of the armed forces should have the possibility of lodging complaints with an independent body in respect of their human rights. If this complaint mechanism is not of a judicial nature, it should operate without prejudice to the ultimate exercise of the right of the individual to a judicial remedy, where appropriate.<sup>53</sup>

[102] Members of the armed forces who claim to have been victims of harassment or bullying should have access to an independent complaint mechanism.

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<sup>51</sup> Article 7(10) European Social Charter.

<sup>52</sup> Article 24 para. 3 The rights of the child, EU Charter of Fundamental Rights, Article 8 ECHR.