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4 Human rights

4.5 Steering Committee for Human Rights (CDDH)

c. Draft Recommendation CM/Rec(2010)... of the Committee of Ministers to member states on the human rights of members of armed forces – Draft Explanatory Memorandum

Item prepared by the GR-H at its meeting of 2 February 2010

Draft Recommendation CM/Rec(2010)... of the Committee of Ministers to member states on the human rights of members of armed forces

DRAFT EXPLANATORY MEMORANDUM

The following explanatory memorandum was prepared by the Secretariat in co-operation with the Chairperson of the Committee of Experts for the Development of Human Rights' Group on Human Rights of Members of the Armed Forces (DH-DEV-FA).

I. Introduction

The starting point of this recommendation is the acknowledgement that members of the armed forces do not surrender their human rights and fundamental freedoms upon joining the armed forces. While the special character of military duties and life may justify certain restrictions on the enjoyment of human rights and fundamental freedoms which would not be acceptable for civilians, members of the armed forces, like any other individuals, should have their rights and freedoms respected and protected. The aim of this recommendation is to provide specific guidance to member states on how to better ensure that individuals serving in the armed forces enjoy their human rights and fundamental freedoms to the fullest extent possible.

This recommendation finds its roots in different texts adopted by the Parliamentary Assembly regarding the armed forces and the human rights of its personnel, including conscripts. It comes as a direct response to Recommendation 1742 (2006) entitled "human rights of members of the armed forces", which was adopted by the Assembly on 11 April 2006. In this Recommendation, the Assembly highlights a number of specific issues requiring particular attention, including cases of ill-treatment such as bullying and cruel initiation rituals, and restrictions on freedom of association and electoral rights, while at the same time inviting the Committee of Ministers to adopt a recommendation designed to guarantee respect for the human rights and fundamental freedoms of members of the armed forces.

At the request of the Committee of Ministers, the Steering Committee for Human Rights (CDDH) examined the Assembly recommendation at its meeting in October 2006 and expressed the opinion that it was feasible to prepare a recommendation along the lines proposed by the Assembly. The CDDH stressed the importance of this topic and, while being conscious of its complexity, indicated its readiness to examine it. At its 984th meeting (17 January 2007), the Committee of Ministers gave the CDDH ad hoc terms of reference to prepare a recommendation.

¹ This document has been classified restricted until examination by the Committee of Ministers.
Internet : <http://www.coe.int/cm>

The CDDH set up a working group under the Committee of Experts for the Development of Human Rights (DH-DEV). The DH-DEV Group on Human Rights of Members of the Armed Forces (DH-DEV-FA) met four times in order to draft the recommendation. The Group decided that in addition to the Recommendation itself an appendix should contain principles based on existing international legal instruments with particular emphasis on the European Convention on Human Rights, in the light of the **relevant** case-law of the European Court of Human Rights, and the European Social Charter, taking into account the **relevant** case-law of the European Committee on Social Rights. The CDDH endorsed the text proposed for the recommendation at its 69th meeting (24-27 November 2009) and transmitted it to the Committee of Ministers which adopted it on **24 February 2010**.

II. Comments

General considerations

The Recommendation invites governments of member states to ensure that the principles set out in its appendix are complied with in national legislation and practice relating to members of the armed forces. These principles are essentially based on the European Convention on Human Rights and the European Charter on Social Rights² (including the revised Charter), but also contain references, inter alia, to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child. Member states are only legally bound to the extent that they have ratified the instruments on which these principles are drawn. However, they are encouraged to respect all principles with a view to improving the protection of members of the armed forces' human rights and fundamental freedoms.

Governments are also invited to ensure, by appropriate means and action, a wide dissemination of the Recommendation to members of the armed forces in order to inform them of their rights and freedoms. Training should also be ensured to increase their awareness of human rights. For the purposes of such dissemination and training, they are invited to translate the recommendation and its principles into languages other than the official languages of the Council of Europe.

Concerning follow-up to the recommendation, governments of member states are invited to examine its implementation within the Committee of Ministers two years after its adoption.

Definition of "members of the armed forces"

For ease of use, in the explanatory memorandum, the term "serviceperson" is used as synonymous with "member of the armed forces". Broadly speaking, and without prejudice to other specific categories included under domestic law, servicepersons' relationship with the armed forces will vary according to whether they are professionals (also referred to as volunteers), conscripts or reservists.

Professional staff members are those who voluntarily join the armed forces, choosing a military career. They join of their own free will for a fixed or indeterminate period of time. The nature of this relationship is akin to that of an employer and an employee, albeit with the specific characteristics essentially linked to military discipline, hierarchy and justice.

A number of countries have a military reserve force composed of reservists. Reservists can enter the armed forces either by choice or by obligation. In some cases they are civilians and in others assimilated to armed forces personnel when they are called up for training or mobilised for operations. During the periods served in the armed forces – i.e. during compulsory regular training and when mobilised – reservists, just as any other members of armed forces, should enjoy their human rights.

By contrast, conscripts do not enlist in their country's armed forces by choice but as a result of being called up to perform compulsory military service. The relationship of conscripts with the armed forces' authorities is by its very essence temporary and lasts only for the duration of the military service.

All three categories have in common the fact that they are bound by military discipline and hierarchy whilst serving in the armed forces.

² The European Social Charter (revised) has been ratified by the following states: Albania, Andorra, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Cyprus, Estonia, Finland, France, Georgia, Ireland, Italy, Lithuania, Malta, Moldova, Netherlands, Norway, Portugal, Romania, Russian Federation (entry into force on 1 December 2009), Serbia, Slovenia, Sweden, Turkey and Ukraine.

The following have ratified the European Social Charter (1961) but not the revised Charter: Austria, Croatia, Czech Republic, Denmark, Germany, Greece, Iceland, Latvia, Luxembourg, Poland, Slovakia, "the former Yugoslav Republic of Macedonia", United Kingdom.

Given the different types of relationship with the armed forces, the specific status of a member may sometimes have an influence on the way human rights are applied. Indeed, certain rights will be more at risk of being violated than others depending, for example, on whether the individual concerned is a conscript or voluntary member of the armed forces.

This recommendation deals with the enjoyment of human rights and fundamental freedoms by members of the armed forces in the context of their work and service life. The reference to both work and service life is made by reason of the special characteristics of military life whereby members of the armed forces are bound by military discipline at all times, i.e. during and outside working time. The recommendation applies to the ordinary service life of members of the armed forces irrespective of whether they are on duty within the state's territory and, as far as possible, when operating abroad **(for example, with civil emergency assistance or peacekeeping duties)**, provided that the State exercises sufficient authority and control over them. For example, a state's obligation not to torture members of its armed forces, its obligations in relation to military discipline, or its obligation to ensure that its armed forces receive their salaries, food, etc., should apply irrespective of where the members of the armed forces are operating.

The principles in the recommendation focus on the work and service life of members of the armed forces. However, it is recognised that in times of armed conflict international humanitarian law and international human rights law are complementary. Member states should therefore, as far as possible, apply the principles set out in the recommendation to their armed forces in all circumstances, including in time of armed conflict.

The reference to "sufficient authority and control" requires that the members of the armed forces are within the jurisdiction of the state, according to Article 1 of the Convention and in the light of the case-law of the Court³. It should however be noted, in this respect, that the relevant case-law of the Court regarding jurisdiction refers mainly to action by members of the armed forces against civilians, rather than to action carried out by military authorities against their servicepersons, or by members of the armed forces against their fellow members. The scope of the recommendation is, on the contrary, limited to internal aspects of human rights and fundamental freedoms of armed forces personnel. It should not include external aspects, which should be understood as respect for human rights by armed forces personnel in the execution of their operations, for instance with respect to civilians. The same principle was applied to the scope of the OSCE/ODIHR/DCAF Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel⁴.

General Principles

All members of the armed forces, as defined above and irrespective of their status, enjoy the civil and political rights guaranteed in the European Convention on Human Rights (hereafter, the Convention), including its additional Protocols, as well as the social and economic rights enshrined in the European Social Charter (hereafter the Charter, or, where appropriate, the revised Charter), and the rights recognised in other relevant human rights instruments (for example, the International Covenant on Civil and Political Rights). As already mentioned, this recommendation does not alter the extent to which member states are legally bound, depending on whether they have ratified these instruments.

The enjoyment of human rights by members of the armed forces can, to a certain extent, be affected by the special characteristics of military life. One of the main characteristics of the armed forces which differentiates it from other sorts of employment is that it is based on military discipline. The ultimate aim of military discipline is to enable operational effectiveness of the armed forces. It is characterised by compliance with rules of conduct, military regulations and orders from superiors. Therefore, military discipline seeks to coordinate the conduct and actions of members of the armed forces and to establish a framework for relations between them which should secure order.

³ See, for example, *Loizidou v. Turkey*, judgment of 18 December 1996 and *Cyprus v. Turkey*, judgment of 10 May 2001, *Banković and Others v. Belgium and 16 other Contracting States*, decision of 12 December 2001, *Issa and Others v. Turkey*, decision of 16 November 2004, *Marković and others v. Italy*, judgment of 14 December 2006, *Behrami v. France and Sarami v. France, Germany and Norway*, decision of 2 May 2007, *Pad and Others v. Turkey*, decision of 28 June 2007.

⁴ See p. 18 of the Handbook

Article 15 of the Convention provides for a right of derogation for contracting parties from their obligations under the Convention in certain exceptional circumstances. The context in which this provision can be invoked – i.e. war and public emergencies threatening the life of the nation – makes it of particular relevance to the armed forces. However, it should be noted that no derogation is ever possible from the full respect of the prohibition of torture (Article 3 of the Convention), slavery and servitude (Article 4(1)), the principle that no punishment can be inflicted without law (Article 7), and the right not to be tried or punished twice (Article 4, Protocol No. 7).⁵ This, of course, also applies in respect of members of the armed forces. There can be no derogation from the right to life (Article 2 of the Convention) save when death results from lawful acts of war. In addition other rights are non derogable under other international treaties, including for example the International Covenant on Civil and Political Rights, applicable to Council of Europe member states.

It falls in the first place to states to determine whether the life of the nation is threatened by a “public emergency”, within the meaning of Article 15, and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide on both the existence of such an emergency and the nature and scope of derogations necessary to assert it. Article 15(1) leaves the authorities a wide margin of appreciation in this matter. Nevertheless, states do not enjoy an unlimited power in this respect. The Court is empowered to rule on whether states have gone beyond the ‘extent strictly required by the exigencies’ of the crisis. The domestic margin of appreciation is thus accompanied by supervision by the Court.⁶ Similarly, Article F of the Revised Charter provides that in time of war or other public emergency threatening the life of the nation any state party may take measures derogating from its obligations under the Charter to the extent strictly required by the exigencies of the situation.

Given that the aim of this recommendation is to provide guidance for member states on how to ensure respect for human rights, the following principles have been drawn up not only in light of the case-law of the Court and the European Committee on Social Rights, but also with a view to specifically addressing issues of practical relevance to members of the armed forces which might not yet have been covered by case-law.

A. Members of the armed forces have the right to life.

Members of the armed forces, despite running a particular risk of death during certain dangerous operations, should not be exposed to situations where their lives would be put at avoidable risk without a clear and legitimate military purpose. Therefore, military authorities are under an obligation to take reasonable measures to ensure that military training, planning of operations and the equipment used does not unnecessarily endanger servicepersons’ lives. Reasonable measures should be taken to ensure proper access of members of the armed forces to health care where their lives are at risk. The degree of danger faced by the servicepersons concerned and the means available to the military authorities in order to combat it are of course elements which may be taken into account when taking these measures.

Furthermore, Article 2 can, in certain well-defined circumstances, place a positive obligation on states to take practical preventive measures to protect an individual against others, or in certain particular circumstances, against him/herself. The Court has reiterated this general principle in a military context.⁷ As part of their general obligation, states should see that sufficient regulations are put in place to protect servicepersons who could be exposed to the risks inherent to military life. The Court has already recognised this in respect of conscripts, for whom it is of particular relevance, given the compulsory nature of military service. Accordingly, in the *Ataman* case, it held that it was the authorities’ duty to display special diligence in respect of a soldier with psychological disorders.

Where there is an allegation that the military authorities have failed in their obligation to protect the life of an individual, including members of the armed forces themselves, it must be established whether the authorities knew or ought to have known whether there was a real and immediate risk that the individual’s life was in danger and, if this was the case, whether they had taken appropriate steps to safeguard the lives of those within its jurisdiction⁸. In the *Kilinç* case, in which a conscript committed suicide, the Court found that the authorities could not deny being aware of a conscript’s serious psychological problems and observed that there were no military rules covering situations such as his. It thus concluded that there had been a failure in

⁵ Protocol No. 7 has been ratified by Albania, Andorra, Armenia, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Sweden, Switzerland, “the former Yugoslav Republic of Macedonia”, Ukraine.

⁶ *Ireland v. the United Kingdom*, judgment of 18 January 1978

⁷ *Ataman v. Turkey*, judgment of 27 April 2006, para. 54; see also *Kilinç and Others v. Turkey*, judgment of 7 June 2005, para. 40

⁸ *Osman v. United Kingdom*, judgment of 28 October 1998, para. 115

the authorities' obligation to protect him and therefore a violation of Article 2. The Court also found that the state was responsible for the conscript's suicide as he had not received appropriate psychiatric care and his state of mental health had not been taken into account when he was sent to serve as a soldier and entrusted with a gun which he later used to take his own life.⁹

On the other hand, where the authorities could not be expected to have known of a risk, no responsibility is incurred. In the case of *Yakuz*, where a soldier was killed by another soldier of the same rank for personal reasons, the authorities were held not to be responsible for his death, for it had not been shown that they knew, nor could have been taken to know, of a real and immediate risk to the life of the victim.¹⁰

The corollary of the protection of the right to life is the obligation to carry out an effective investigation in order for a court to ascertain the circumstances leading to a person's death. There are four requirements for an investigation to be considered effective:

- The investigation should be independent, particularly where there is doubt as to how the individual died. In the *Salgin* case,¹¹ where a conscript died while carrying out his military service, it was held that the procedural protection of the right to life should entail some form of independent inquiry to determine the circumstances surrounding the death and to establish responsibility in cases such as this.¹² The persons responsible for carrying out the investigation should be independent from those implicated in the events.¹³

- Part of the obligation of the state is to provide a legislative and administrative framework for effective protection and includes adequate procedures for collecting evidence in order to determine disciplinary or criminal responsibility, for example, on the part of commanders at various levels.¹⁴

- In addition, there is a requirement of promptness and reasonable expedition in particular where investigations into the deaths caused as a result of force used by members of the armed forces are concerned.¹⁵ "Promptly" means that the investigations should start as soon as possible after death has occurred, and "within a reasonable time" implies that the investigations should not be unduly lengthy. Where death has resulted from the use of force, the Court has found a prompt investigation by the authorities to be essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.¹⁶

- Furthermore, there must also be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny may vary from case to case, but the minimum requirement is that the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.¹⁷ Indeed, in the *Salgin* case, the Court considered that the exclusion of the victim's father from the investigation contributed to its ineffectiveness.

The investigation should also be thorough. This has been found by the Court to mean that the authorities "must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions".¹⁸

It is crucial that member states take action to encourage the reporting by members of the armed forces themselves of any acts of bullying or harassment that directly or indirectly lead to the deaths of other members or threatens their lives. In order to protect those who have come forward to denounce such treatment from pressure from peers or hierarchical superiors, it is particularly important that member states provide for a legal or administrative framework to protect them against any retaliation by taking any appropriate measure in the interests of justice.

⁹ *Kilinç and Others v. Turkey*, judgment of 7 June 2005.

¹⁰ *Yakuz v. Turkey*, decision of 25 May 2000.

¹¹ *Salgin v. Turkey*, judgment of 20 May 2007.

¹² *Idem*, para. 86.

¹³ *McKerr v. UK*, judgment of 4 May 2001, para. 112.

¹⁴ *Kilinç and Others v. Turkey*, op. cit., para. 41.

¹⁵ See, for instance, *Hugh Jordan v. UK*, judgment of 4 August 2001.

¹⁶ *Kelly and Others v. UK*, judgment of 4 May 2001, para. 97.

¹⁷ *McKerr v. UK*, op. cit. para. 115.

¹⁸ *Zelliof v. Greece*, judgment of 24 May 2007, para. 56.

The Court has held that, in view of the fact that all member states have ratified Protocol No. 6 save one, which applies a moratorium, capital punishment in peacetime has come to be regarded as an unacceptable form of punishment that is no longer permissible under Article 2. Moreover, given the high, increasing number of ratifications of Protocol No. 13, there is a clear abolitionist trend in the practice of member states, as regards capital punishment in time of war.¹⁹

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

The prohibition of torture as well as inhuman or degrading treatment or punishment is absolute under the Convention (Article 3). States may not, under any circumstances, have recourse to such treatment or condone it. Furthermore, they should take measures to protect servicepersons against such treatment within the armed forces.

States should ensure that military service is performed in conditions which are compatible with respect for human dignity, that the procedures and methods of military training do not subject servicepersons to distress or suffering of an intensity exceeding the unavoidable level of hardship inherent in military discipline and that, given the practical demands of such service, their health and well-being are adequately secured by, among other things, providing them with the medical assistance they require.²⁰

Bullying, physical violence, cruel initiation rites, harassment, humiliation, and other forms of ill-treatment unfortunately remain commonplace in certain armed forces. Instances of ill-treatment are regularly reported, especially concerning new recruits, be they conscripts or professionals. Other characteristics make certain recruits more likely to suffer from abuse on grounds such as gender, sexual orientation, ethnic origin or religion, thus requiring special attention. This regrettable situation calls for robust action by the state authorities to morally condemn any such treatment and to bring to justice and punish those responsible.

As to a definition of torture, inhuman or degrading treatment or punishment, the Court considers that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this level is relative and depends on all the circumstances of a case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.²¹ More specifically, the Court has identified essential elements constitutive of torture, including the infliction of severe mental or physical pain or suffering, the intentional or deliberate inflicting of the pain and the pursuit of a specific purpose, such as gaining information, punishment or intimidation. Acts which are such as to arouse in someone feelings of fear, anguish, and inferiority capable of humiliating and debasing him or her and possibly breaking his or her physical and moral resistance are sufficiently serious to amount to inhuman and degrading treatment.

As with Article 2 of the Convention, the Court has held that states should also carry out independent and effective investigations when instances of such ill-treatment are reported. 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 should have access to an effective remedy. The claim that such treatment has been suffered should be “arguable”, which means that manifestly unsubstantiated claims will not require a fully fledged investigation. Furthermore, in view of occurrences or patterns of ill-treatment resulting from bullying, cruel or humiliating initiation rituals, and harassment by hierarchical superiors in the armed forces, it is of paramount importance that member states take the necessary practical steps to encourage the reporting by servicepersons themselves of such intolerable behaviour.

In order to protect those who have come forward to denounce such treatment from pressure from peers or hierarchical superiors, it is particularly important that states provide for a legal or administrative framework to prevent any retaliation. Reporting of ill-treatment taking place within the armed forces is also important to promote greater transparency about such treatment having occurred in the armed forces and notably the investigations which are subsequently carried out.

¹⁹ Protocol No. 6 ECHR has been ratified by all member states, except the Russian Federation which applies a moratorium. Protocol No. 13 has been ratified by 40 member states with the exception of Armenia, Italy, Latvia, Poland, and Spain which have signed it, and Azerbaijan and the Russian Federation which have not yet signed it.

²⁰ *Chember v. Russia*, judgment of 3 July 2008.

²¹ *Ireland v. UK*, judgment of 18 January 1978, para. 162; *Soering v. UK*, judgment of 7 July 1989, para. 100.

Ill-treatment often occurs when persons are deprived of their liberty as demonstrated by the abundant case-law of the Court. Therefore, states should take specific steps in order to ensure that members of the armed forces in detention are not subjected to treatment contrary to Article 3. The European Committee for the prevention of torture and inhuman or degrading treatment or punishment (CPT) has also developed standards regarding conditions of detention which are of particular relevance.²²

C. Members of the armed forces shall not be used for forced or compulsory labour.

Article 4(3) of the Convention reads “For the purpose of this article the term “forced or compulsory labour” shall not include ... b. any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service”. The former European Commission of Human Rights ruled that the refusal of military authorities to release four young men, who had, while they were minors, undertaken to serve for 9 years in the British marines, before that period had expired, did not result in “servitude” in view of their parents’ consent to their enrolment.²³

Differences in the length of alternative service for conscientious objectors that cannot be objectively justified may constitute discrimination, breaching Article 14 of the Convention.²⁴ Moreover, the European Committee on Social Rights has held a duration of civilian service of 18 months longer than that of the corresponding military service to be excessive and to amount to a disproportionate restriction on “the right of the worker to earn his living in an occupation freely entered upon”, therefore violating Article 1(2) of the Charter.²⁵

The fact that a person binds him/herself to following orders when entering the armed forces, whether voluntarily, or by conscription, does not mean that those in military authority can exploit their services for personal purposes. In times of national emergency or natural disaster, such as flooding, members of the armed forces may be called upon to join emergency medical teams or the civilian police force, but in principle, servicepersons, particularly conscripts, should be obliged to carry out only the tasks to which they are officially assigned or the ancillary tasks associated with their rank.

Where it is provided in the armed forces terms and conditions of service, the delaying of a serviceperson’s leaving date in order to fulfil a return of service in accordance with properly promulgated rules relating to training or other academic courses, or for overriding operational reasons, would not be regarded as an unreasonable restriction on their right to leave.

Concerning the imposition of unreasonably long periods of service, a legislative decree laying down that professional officers who have received several periods of training may be refused permission to resign their commissions for up to twenty-five years was held by the European Committee on Social Rights to be a violation of Article 1(2) of the Charter, under which Parties undertake to protect the right of the worker to earn his living in an occupation freely entered upon. These words provide protection from forced labour, which the Committee understands as “coercion of any worker to carry out work against his wishes and without his freely expressed consent”.²⁶

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

One of the main characteristics of the armed forces which differentiates it from other sorts of employment is that it is based on military discipline. The ultimate aim of military discipline is to enable operational effectiveness of the armed forces. It is characterised by compliance with rules of conduct, military regulations and orders from superiors. Therefore, military discipline seeks to coordinate the conduct and actions of members of the armed forces and to establish a framework for relations between them which should secure order. Military discipline is closely linked to the hierarchical structure of the armed forces – the chain of command – and the fact that members of the armed forces are required to obey orders given by an officer superior in rank to them or a member with more seniority, without discussion. Failure to obey orders or to respect the existing military regulations and rules of conduct will normally constitute a disciplinary offence.

²² <http://www.cpt.coe.int/en/docsstandards.htm>

²³ *W., X., Y. and Z. v. the United Kingdom*, decision of 19 July 1968.

²⁴ See, for example, *Autio v. Finland*, European Commission of Human Rights, 6 December 1991, *Decisions and Reports*, Vol. 72, 1991, p. 245 and *Raninen v. Finland*, European Commission of Human Rights, 7 March 1996, *Reports of Judgments and Decisions*, Vol. 8, 1997, pp. 2821-22, para. 55.

²⁵ *Quaker Council for European Affairs (QCEA) v. Greece*, para. 25, see also the Conclusions of the UN Human Rights Committee in *Jarvinen v. Finland* (25 July 1990) and *Foin v. France* (3 November 1999).

²⁶ Conclusions III, p. 5.

The Court has already found that a system of military discipline which by its very nature implies the possibility of placing on certain of the rights and freedoms of the members of the armed forces limitations incapable of being imposed on civilians does not in itself run counter to states' obligations under the Convention.²⁷

Systems of military discipline are bound to differ from one country to another as they are the result of long-established national military traditions. States often regard these military traditions as a distinctive feature of their national identity, not least because the armed forces are considered the guarantor of the state's integrity. The Court has considered that each state is competent to organise its own system of military discipline and enjoys a certain "margin of appreciation" in the matter, as is often the case when systems vary greatly between states.²⁸ Nonetheless, 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 the punishment should always be strictly proportionate to the offence. Collective punishment, which by its very nature imposes sanctions on individuals who have committed no offence, should be proscribed.

Military discipline should be governed by a legal framework, in particular regarding the definition of disciplinary offences and related punishments. This echoes the principle that there can be no punishment without law in criminal matters and aims at preventing arbitrary disciplinary punishments. The legal framework should cover the procedures to be followed at disciplinary hearings, the type and duration of punishment and the authorities competent to impose punishment.

It is crucial for the effective protection of victims of abuse within the armed forces that reporting of conduct contrary to military discipline and ethics be prompt and an investigation carried out without delay so that evidence may be collected as rapidly as possible and those responsible punished.

As regards disciplinary hearings and in line with Article 6 of the Convention, the accused should be adequately informed about the accusation at the time of charge or the beginning of the disciplinary proceedings. The disciplinary offence for which the individual concerned is punished should be the one with which he was charged. Where Article 6 applies, all the safeguards of this provision should be guaranteed. There should also be an opportunity to appeal to a higher body which is independent from the chain of command.

E. Members of the armed forces enjoy the right to liberty and security.

Article 5 of the Convention guarantees the right of everyone to liberty and security of person and lists the rights of those arrested or detained in accordance with Article 5(1). Although the right to access to a lawyer after arrest and during detention is not explicitly laid down under Article 5 of the Convention, the Court has found that Article 5(4) which concerns the right to challenge the lawfulness of any detention implies that a person in detention should have access to legal assistance. Several other instruments refer to this. For example, Rule 23.1 of the revised European Prison Rules of the Council of Europe lays down that "[a]ll prisoners are entitled to legal advice, and the prison authorities shall provide them with reasonable facilities for gaining access to such advice".²⁹ This right should also be embodied in domestic law and should extend to members of the armed forces who have been arrested. In addition, those detained should benefit from the right to converse with their legal representative in private, or at least, out of hearing of third parties.³⁰ Rule 23.4 of the European Prison Rules states that all forms of communication about legal matters between prisoners and their legal advisers shall be confidential. This right may, however, be suspended or restricted in exceptional circumstances, prescribed by law, "when it is considered indispensable by a judicial or other authority in order to maintain security and good order".³¹ Detained members of the armed forces should also have the right to request a medical examination by a doctor and the right to have the fact of their detention notified to a third party of their choice.³²

²⁷ *Engel and Others v. the Netherlands*, judgment of 8 June 1976, para. 57.

²⁸ *Idem*, paras. 57-59.

²⁹ See Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules. See also the UN Basic Principles on the Role of Lawyers, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

³⁰ See Principle 18(4) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: "Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official".

³¹ Principle 18(3) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

³² See The CPT Standards (CPT/Inf/E(2002)1 – Rev. 2006, para. 36.

As regards compensation for unlawful arrest or detention, where no enforceable right to compensation exists in the state concerned for a period of detention that has been found to breach any of the provisions of Article 5, the unlawfully detained person will have the right to compensation under paragraph 5 of this Article.³³

Military service does not in itself constitute a deprivation of liberty under the Convention, and rather wide limitations upon the freedom of movement of the members of the armed forces apply by reason of the specific demands of military service. Moreover, each State is competent to organise its own system of military discipline and enjoys a certain margin of appreciation in the matter.³⁴ Several states have made reservations to Article 5 concerning the application of the armed forces' disciplinary regulations.³⁵ While military discipline may dictate short periods of punitive detention, the Court has stated that "military discipline ... does not fall outside the scope of Article 5(1)".³⁶

The question of whether the deprivation of liberty suffered by a member of the armed forces is contrary to Article 5 is decided by the Court on a case-by-case basis, taking account of the particular circumstances and the demands of military life. There are, however, certain criteria that must be met in order for the detention to comply with the provisions of Article 5(1), which were recalled in the *Engel* case: the deprivation of liberty must result from a court decision, it must be pronounced by a competent court having the necessary authority to judge the case, which is independent vis-à-vis the executive and offers adequate judicial guarantees. Moreover, the words "secure the fulfilment of any obligation prescribed by law" contained in Article 5(1)(b) concern only cases where the law permitted the detention of a person in order to compel him or her to fulfil a specific and concrete obligation. Accordingly, in order to be justified under Article 5(1)(b), the detention must not be punitive.

In line with Article 37(b) of the Convention on the Rights of the Child, members of the armed forces under the age of 18 should only be detained as a measure of last resort and for the shortest appropriate period of time. Furthermore, in accordance with the Rule 35.4 of the European Prison Rules and with Article 10 (2) of the International Covenant on Civil and Political Rights, servicepersons under 18 who are held in detention should be held separately from adults, unless this is against their best interest. The Covenant also provides that juvenile offenders should be accorded treatment appropriate to their age and legal status – this aspect should be taken into account in the military context.

Article 5(2) of the Convention states that everyone who is arrested shall be informed promptly of the reasons for their arrest and any charge against them. The same applies to members of the armed forces. In the *Boyle* case, the Court considered it "always desirable" that a detainee having been informed orally of the reasons for his detention should then be provided with a follow-up, written copy of those reasons.³⁷ In addition to being informed of the reasons for arrest and any charge brought against them, members of the armed forces should also be informed of their procedural rights at the moment of arrest.

In the *De Jong, Baljet and van den Brink* case, the Court underlined the importance of bringing any person arrested or detained in accordance with Article 5(1)(c) of the Convention promptly before a judicial authority, as provided for by paragraph 3 of Article 5. It added that the issue of promptness must be assessed in each case according to its special features, taking into account the demands of military life and military justice.³⁸

Furthermore, even though the issue of promptness is to be assessed according to the particular features of each case, the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5(3), that is to the point of effectively negating the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority.³⁹ To help define the word "promptly", the Court has referred to the French text of the Convention, which uses "aussitôt", having a "constraining connotation of immediacy", thus the degree of flexibility attaching to this notion is limited.⁴⁰ In the *Koster* case, the Court considered that special military manoeuvres did not justify waiting five days before bringing a conscript held in detention before a court.⁴¹ In a case concerning the detention of conscripts accused of military criminal offences,⁴² the Court found that periods of six, seven and eleven days' imprisonment, respectively, exceeded the limits laid down by Article 5(3), even having regard to the exigencies of military life and justice.

³³ See for example, *Hood v. UK*, judgment of 18 February 1999, *Stephen Jordan v. UK*, judgment of 14 March 2000 and *Thompson v. UK*, judgment of 15 June 2004. See also *Chitayev and Chitayev v. Russia*, judgment of 18 July 2007, para. 192.

³⁴ *Idem*, para. 59.

³⁵ Armenia, Azerbaijan, Czech Republic, France, Moldova, Portugal, Russian Federation, Slovakia, **Spain** and Ukraine.

³⁶ *Engel and Others v. the Netherlands*, op. cit., para. 57.

³⁷ *Boyle v. UK*, judgment of 8 January 2008, para. 38.

³⁸ *De Jong, Baljet and van den Brink v. the Netherlands*, judgment of 22 May 1984, para. 52.

³⁹ *Koster v. Netherlands*, judgment of 28 November 1991, para. 24.

⁴⁰ *Idem*.

⁴¹ *Idem*, para. 25.

⁴² *De Jong, Baljet and van den Brink v. Netherlands*, op.cit.

The court or legal authority before which the member of the armed forces detained has to be brought promptly must be competent, that is, it must be authorised by law to exercise judicial power and must be independent of the executive and the parties.⁴³

Article 5(4) of the Convention provides that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings in order that a court may decide speedily on the lawfulness of his detention and order his release if the detention is found to be unlawful. Habeas corpus should be considered an individual right, capable of being protected by systems such as the due process of criminal law. The guarantee of this right should also fall within the exclusive jurisdiction of the competent court, which should be impartial.

The exhaustive list of permissible forms of deprivation of liberty is laid down in paragraph 1 of Article 5. While a disciplinary penalty or measure which may be deemed a deprivation of liberty in the case of a civilian may not possess this characteristic when imposed upon a serviceperson, this disciplinary 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 of the Contracting States. 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”.⁴⁴ Thus, the placing of a soldier under open arrest for 21 days by his commanding officer for disobeying military orders did not amount to a detention in order to secure the fulfilment of any obligation prescribed by law within the meaning of Article 5(1)(b) where the soldier was placed under arrest for having disobeyed military discipline in relation to his behaviour in the past, and was therefore of a punitive nature.⁴⁵

Members of the armed forces should have the right to have the lawfulness of the decision on their detention determined by a court. In circumstances where there is such a determination, the Court has pointed out that in order to be lawful, a sentence of detention can only properly be imposed by a tribunal within a system which is independent vis-à-vis the executive and offers adequate judicial guarantees. In the case of *Dacosta Silva v. Spain*,⁴⁶ the Court ruled that a Spanish Civil Guard’s immediate superior, who had imposed a six-day house arrest on him for being absent without leave, was not independent and held that “as the disciplinary proceedings took place before the immediate superior, it did not provide the judicial guarantees required by Article 5 (1)(a)”.

Another important factor to be taken into account is the “concrete situation” of the detainee. In *Engel*, the Court considered that “light arrest”, which involved confinement to dwellings, military buildings or premises where servicemen were not locked up and continued to perform their duties did not constitute a deprivation of liberty. Neither did 12 days’ “aggravated arrest”, applied to another applicant, who, although ordered not to leave his place of arrest, was not kept under lock and key. On the other hand, strict arrest served day and night in a locked cell, the servicemen thus detained accordingly being excluded from the performance of their normal duties, was considered a deprivation of liberty.

F. Members of the armed forces enjoy the right to a fair trial.

The principle of the right of everyone, including members of the armed forces, to a fair trial reflects the guarantees provided for by Article 6 of the Convention, which are that in the determination of their civil rights and obligations or of any criminal charge against them, everyone shall be entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The notions of “civil rights and obligations” and “criminal charge” have an autonomous meaning under the Convention: the Court will not necessarily follow national definitions of what is “civil” or “criminal”. However, national legislation will not be disregarded. The Court has developed substantive case-law on what it considers a “civil right” or “obligation”. As regards criminal charges, the Court takes into account four different criteria to decide whether a charge is “criminal”: the classification in domestic law (although this is not conclusive); the nature of the provision laying down the offence (a provision which does not apply to a group of persons, but to all, is likely to be criminal, as opposed to disciplinary); the purpose of the penalty (whether it is purely administrative or indeed criminal); the nature and severity of the penalty (deprivation of liberty will usually be considered criminal,). The Court has defined “charges” as meaning the official notification by the authorities to an individual of an allegation that he/she is suspected of having committed a criminal offence.

⁴³ *Idem*, para. 47.

⁴⁴ *Idem*, para. 59.

⁴⁵ *A.D. v. Turkey*, judgment of 22 December 2005.

⁴⁶ *Dacosta Silva v. Spain*, judgment of 2 November 2006, paras 43 and 44.

Once a civil right or obligation or a criminal charge has been established, several guarantees will be available to the serviceperson, some emanating from Article 6 itself, others drawn up by the Court in its case-law.⁴⁷ Those laid down explicitly in Article 6 include a hearing within a reasonable time and a hearing before an independent and impartial tribunal established by law.

The additional guarantees developed by the Court's case-law include:

- the right to have access to a court: everyone has the right to bring any claim relating to his or her civil rights and obligations before a court. This right is not absolute and may be restricted if the limitations pursue a legitimate aim and if the means employed are reasonably proportionate to the aim sought to be achieved, however, such restrictions must not impair the substance of the right nor conflict with other Convention rights;⁴⁸
- the right for a person charged with a criminal offence to remain silent and not contribute to incriminating him/herself;⁴⁹ this is not an absolute right and adverse inferences may be drawn under certain circumstances from the silence of an accused during interrogation or trial,⁵⁰ although the Court has also held that the jury should be properly directed by the trial judge when deciding whether or not to draw such inferences;⁵¹
- the right to equality of arms (i.e., everyone has the right to take part in proceedings under conditions which do not place him/her at a disadvantage vis-à-vis his/her opponent)⁵² and to adversarial proceedings (which implies that parties should have knowledge of and be able to comment on all evidence adduced and observations filed).⁵³

Whereas judgments must always be pronounced publicly, some restrictions to the right to a public hearing may be justified under Article 6(1): the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security, where the interests of juveniles or the protection of private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances or where publicity would prejudice the interests of justice.

Members of the armed forces charged with a criminal offence within the meaning of the Convention should be presumed innocent until proved guilty. This principle refers directly to rights which are enshrined in Article 6(2) of the Convention and are valid for anyone who has been charged with a criminal offence, as well as in those civil cases which the Court considers as criminal in the Convention sense, such as certain professional disciplinary proceedings. This guarantee will in principle imply that the burden of proof be on the prosecution.

Members of the armed forces charged with a criminal offence should have the right to an Article 6 compliant hearing, and in those circumstances benefit from the following minimum rights:

- the right 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;
- the right to be provided with adequate time and facilities for the preparation of his or her defence: the adequacy of the time will depend on the complexity of the case. Defence lawyers have prompt, regular and confidential access to their clients in pre-trial detention;
- the right to be able to defend him/herself in person or through the legal assistance of his or her own choosing: while the Court has found that the right to represent oneself in person can be restricted, it has also held that the exclusion of legal representation from a member of the armed forces' summary military trial constitutes a violation of Article 6(3);
- the right to consult with a legal representative out of hearing of third parties and without being monitored by any other means: this principle is very much linked to the previous ones and that of equality of arms. It may be restricted for a legitimate purpose, for example for the maintenance of security and good order;
- the right 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;
- the right to free assistance of an interpreter if he/she cannot understand or speak the language used in court: this principle also includes the translation of those documents or statements in the proceedings instituted against him/her.

⁴⁷ Some states have made reservations to Article 6 in relation to military discipline: Azerbaijan, Czech Republic, France, Slovakia and Spain.

⁴⁸ See, for example, *Golder v. the United Kingdom*, judgment of 21 February 1975.

⁴⁹ *Funke v. France*, judgment of 25 February 1993, para. 44.

⁵⁰ *John Murray v. the United Kingdom*, judgment of 8 February 1996.

⁵¹ See *Condron v. the United Kingdom*, judgment of 2 May 2000.

⁵² See, for example, *De Haes and Gijssels v. Belgium*, judgment of 24 February 2007.

⁵³ *Ruiz-Mateos v. Spain*, judgment of 23 June 1993, para. 63.

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. Article 6(1) may in some cases require states to provide for the assistance of a lawyer when such assistance is indispensable for an effective access to court either because legal representation is compulsory under domestic law, or by reason of the complexity of the case.⁵⁴

In addition to the guarantees provided for by Article 6, members of the armed forces have the right not to be punished without law (Article 7) and the right not to be tried or punished twice (*ne bis in idem*) (Article 4 of Protocol No. 7 to the Convention). The first right provides a crucial safeguard against arbitrary punishments imposed in the military context. It means that 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. The guarantees covered by Article 7(1) include the prohibition of any retrospective application of criminal law to an accused's disadvantage and the principle that a crime must be defined by the law and a penalty be prescribed by it. The law should be accessible to members of the armed forces and should make clear to them which acts and omissions will constitute a criminal offence so that they may adjust their conduct accordingly. Article 7(2) provides that this shall be without prejudice to the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations.

The second right, recognised in Article 4 of Protocol No. 7 means that 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. Therefore, members of the armed forces cannot be tried by both military courts and civilian courts for an offence meeting these criteria. Of course, the case may be reopened 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.⁵⁵

When criminal offences are tried before a military court, those courts should include at least one civilian judge. The Court has found that the presence of a civilian with a pivotal role in the proceedings constitutes one of the most significant guarantees of the independence of court-martial proceedings.⁵⁶

Members of the armed forces under the age of 18 have the same right to a fair hearing as any other person of this age group and Article 40 of the Convention on the Rights of the Child, the case-law of the European Court of Human Rights⁵⁷ and other international standards are therefore applicable to them. Article 40 of the Convention on the Rights of the Child emphasises that a person under 18 who is undergoing a criminal investigation or trial must be treated with dignity and respect, and the aim of the criminal process is to increase the child's respect for human rights of others, and to promote his or her reintegration into society. The best interests of the child should be the guiding principle in any criminal process. This Convention guarantees special protection to persons under the age of 18 at the time of an offence and/or trial through the general and necessary framework of juvenile justice, which recognises and focuses on this specific group's vulnerability.⁵⁸ The provisions of the European Convention on Human Rights are applicable to members of the armed forces under the age of 18 and their particular needs and vulnerabilities must be taken into account, on the basis of the principle of the best interests of the child, requiring that any criminal process involving children must have their needs at heart to prevent any abuse or ill-treatment.

In criminal matters

The general principles of a fair trial apply to proceedings which are considered as "criminal" within the meaning of the Convention. With regard to the classification of proceedings as disciplinary rather than criminal under domestic law the Court stated in *Engel and others*: "When a serviceman finds himself accused of an act or omission allegedly contravening a legal rule governing the operation of the armed forces, the State may in principle employ against him disciplinary law rather than criminal law. [...] However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring".⁵⁹

⁵⁴ *Airey v. Ireland*, judgment of 9 October 1979.

⁵⁵ Article 4(2) of Protocol No. 7 ECHR.

⁵⁶ *Cooper v. UK*, *ibid.*

⁵⁷ See, for example *Nart v. Turkey*, judgment of 6 August 2008.

⁵⁸ Article 37 Convention on the Rights of the Child.

⁵⁹ *Engel and Others v. Netherlands*, *op.cit.*, para. 82; *Campbell and Fell v. UK*, judgment of 28 June 1984, para. 68.

As stated in the above-mentioned general principles, the independence and impartiality of the judicial authorities is an important condition for a trial to be fair. The Court has noted that the practice of using courts staffed in whole or in part by the military to try members of the armed forces is deeply entrenched in the legal systems of many member States and that a military court can, in principle, constitute an “independent and impartial tribunal” for the purposes of Article 6(1) of the Convention. However, it has also held that sufficient safeguards must be in place to guarantee their independence and impartiality. It is vital that the prosecuting authorities be completely separate from those which decide the case. This means that there should be no hierarchical link between the prosecution and the judges.

Members of the armed forces charged with a criminal offence should be given full access, to the same extent as in criminal proceedings against civilians, to their criminal case file and have the right to present their defence. A series of cases before the Court⁶⁰ concerned nurses who, following a disciplinary investigation, were dismissed from the armed forces for conducting ideological and political activities as sympathisers of an illegal organisation. The applicants alleged that the failure to communicate to them the documents from the case file on which the competent military court had based its decision, had breached the principle of equity of arms. The Court held in each of the cases that “upholding the principle of adversarial proceedings and equality of arms between the parties, one of the fundamental aspects of the right to a fair trial under Article 6(1) of the Convention, required the applicant to be given the opportunity to present her comments on information submitted by the Ministry of Defence. The refusal to disclose the case file meant that she was not given this opportunity” (unofficial translation).

The highest court before which the member of the armed forces appeals should be independent and comply with the requirements of Article 6 of the Convention.

In civil and other matters

As regards civil matters, civil servants, including members of the armed forces, may sometimes be excluded from relying on the protection embodied in Article 6 where employment-related disputes are concerned. However, in the latest decision of the Court (following *Pellegrin*⁶¹), *Vilho Eskelinen and others*, the Court established the principles set out in this paragraph. The Court found an autonomous interpretation of the term “civil service” which would make it possible to afford equal treatment to public servants performing equivalent or similar duties in the States Parties to the Convention, irrespective of the domestic system of employment and, in particular, whatever the nature of the legal relation between the official and the administrative authority. It introduced a functional criterion founded on the nature of the employee’s duties and responsibilities based on two conditions which must be fulfilled before the State can rely on a person’s status as a civil servant in order to exclude this protection. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State’s public interest.⁶² In order for the exclusion to be justified, it is not enough for the State to establish that the civil servant in question participates in the exercise of public power or that there exists a “special bond of trust and loyalty” between the civil servant and the State, as employer. It is for the State to show that the subject-matter of the dispute in issue is related to the exercise of State power or that it has called into question the special bond. Therefore, there can in principle be no justification to exclude from the guarantees of Article 6 ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of the relationship between the particular civil servant and the State in question. There will, in effect, be a presumption that Article 6 applies. It will be for the respondent Government to demonstrate that both of the above-mentioned conditions are fulfilled.

Procedural safeguards of military courts

Military courts, where they exist, should be independent and impartial (see above-mentioned requirements), and notably separate from the chain of command, including in terms of career development, in order to be free from any pressure from hierarchy. 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.

⁶⁰ *Aksoy (Eroğlu) v. Turkey*, *Güner Çorum v. Turkey*, *Kahraman v. Turkey*, judgments of 31 October 2006.

⁶¹ *Pellegrin v. France*, judgment of 8 December 1999.

⁶² *Vilho Eskelinen and others v. Finland*, judgment of 19 April 2007.

The general principle of public hearings, which is one of the main features of a fair trial, whether civil or criminal, fully applies to military proceedings. Exceptions should follow the above-mentioned requirements.⁶³

G. Members of the armed forces have the right to respect for their private and family life, their home and correspondence. Any interference by a public authority with the exercise of this right shall comply with the requirements of Article 8, paragraph 2 of the European Convention on Human Rights.

Generally, the right to respect for private and family life applies as much to military personnel as it does to civilians. However, enrolment in the armed forces may involve some degree of interference with private and family life, as well as correspondence. "Private life" includes the physical and psychological integrity of a person, aspects of an individual's physical and social identity, gender identification, name, sexual orientation and sexual life.⁶⁴ "Correspondence" includes telephone communications, e-mails and information derived from the monitoring of personal internet usage. 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 (see below). "Private" correspondence refers to correspondence where content is personal and non official means are used, and/or which is destined for private contacts such as family members and friends.

Paragraph 2 of Article 8 of the Convention authorises contracting states to restrict the right to respect for private and family life, home and correspondence, enshrined in paragraph 1, provided that this restriction is in accordance with the law, pursues a legitimate aim and is necessary in a democratic society.⁶⁵ This applies equally to members of the armed forces. In addition, States enjoy a certain margin of appreciation in respect of such restrictions. The Court will then examine whether these restrictions are justified within the terms of the Convention.

Interference with the right to respect for private and family life must fulfil all three of the above-mentioned criteria. "In accordance with law" means there must be a legal basis in domestic law. This basis must be sufficiently precise to enable a person to foresee, to a reasonable degree, the consequences which a given act may entail and must provide for protection against arbitrariness. In the armed forces, measures may well exist which are regulated by administrative practice or non binding guidelines. These may be "in accordance with law" if they ultimately have a legal basis and as long as there is a safeguard against arbitrariness, e.g. possible review of the decision. "Legitimate aims" include concerns about national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals or the protection of rights and freedoms of others. A measure interfering with rights guaranteed by Article 8(1) of the Convention can be regarded as being "necessary in a democratic society" if it has been taken in order to respond to a pressing social need and if the means employed are proportionate to the aims pursued.⁶⁶ When determining whether a measure is necessary in a democratic society, the Court will balance the rights of the individual against the public interest, applying the principle of proportionality.

In the case of the armed forces, the individual soldier's right will be weighed against military interests, such as operational effectiveness, or the interests of the state as a whole if national security is at stake. The state may impose limitations on an individual's right to respect for his private and family life where there are national security issues or there is a real threat to the armed forces' operational effectiveness, as the proper functioning of an army would be unimaginable "without legal rules designed to prevent service personnel from undermining it".⁶⁷ However, assertions as to a risk to national security or operational effectiveness must be well-founded and objectively justified and therefore be substantiated by specific examples, which should be concrete and convincing.⁶⁸

⁶³ 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.

⁶⁴ See *Pretty v. the United Kingdom*, judgment of 29 April 2002, para. 61.

⁶⁵ It is interesting to note that Article 17(1) of the ICCPR, reiterating Article 12 of the Universal Declaration of Human Rights, only allows for interference with the right to respect for privacy, family, home or correspondence in as far as it is prescribed by law.

⁶⁶ *Slivenko v. Latvia*, judgment of 9 October 2003, para. 113.

⁶⁷ *Smith and Grady v. the United Kingdom*, judgment of 27 September 1999, para.89.

⁶⁸ *Idem*.

Where the right laid down in Article 8 concerns “a most intimate part of an individual's private life”, “particularly serious reasons” are required before the interference can satisfy the requirements of paragraph 2⁶⁹. Particularly intrusive investigations by the competent authorities into servicepersons' sexual orientation or gender identity constitute a direct interference with their right to respect for private life unless there is a suspicion of a criminal offence having been committed, or it is required for the purposes of highest-level security clearance, for particular missions or recruitment to specific posts.⁷⁰ Such investigations and discharge of members of the armed forces on grounds on their sexual orientation or gender identity will breach Article 8 of the Convention if no serious justification for such action can be proved.

Where public interest does not offset the individual's private interests, the state has a positive obligation under Article 8 to protect a person's private life against interference from others. That is, it must take active steps to ensure an individual's private life is respected (for example by enacting appropriate legislation). This obligation extends to protection of members of the armed forces.⁷¹

Since conscripts do not enter into the armed forces on a voluntary basis, they have not consented to any separation from their families for any period of time. Therefore, such separation should not be arbitrary or disproportionate, and should be justified on the basis of possible operational needs. Separation should never be imposed on professional servicepersons as a disciplinary punishment, as this would constitute an abuse of authority.⁷²

It is important for the morale of members of the armed forces to be able to maintain private contact, as far as possible, with those close to them. This notion includes the relatives and other persons in a close relationship with members of the armed forces, such as the partner, (grand)children, parents, siblings and close friends. Member states should provide the necessary means to enable members of the armed forces to enjoy this specific right. In some circumstances, mobile phones might not be the best method of communication in the services, owing to poor reception, restriction, or even prohibition of their use for reasons of security in certain areas. Therefore, other methods of regular communication should be provided by the military authorities. Several European countries have already put in place systems for sending letters and messages to members of the armed forces, by special postal systems or electronic means. Forces' websites containing useful information for families and soldiers have also been set up in some countries. Visits from those close to them are important when servicepersons are away for extended periods of time. By way of example, the United Kingdom enables dependants of deployed soldiers to apply for visitors' passes or spouses ID cards at their local unit or military station for the duration of a deployment.⁷³ Furthermore, assistance programmes should be provided for those close to members of the armed forces travelling with them to another country. These should include information and advice about life in the new country, give details of support networks and provide help with re-adapting to normal life after the deployment. Such programmes already exist in several European countries.

The rights to maternity leave, paternity leave, family benefits and day care services are guaranteed by Articles 8, 16, and 27 of the Charter and should apply to members of the armed forces to the same extent as to civilians, when they serve in their own country and, as far as possible, when they are posted abroad. There appears to be a growing trend among European countries towards better facilities for servicepersons with children. To quote but a few examples, in France, the Ministry of Defence has made assistance for parents with young children a priority of its social policy to better respond to operational constraints, and has increased its day nurseries to over 1000. In the Netherlands, there is the possibility for mothers with babies or young children to work part-time and there are some day-care centre facilities. There is also the possibility for fathers to take parental leave.⁷⁴ The right to maternity and child care leave for members of the armed forces is recognised in Romania and in the Czech Republic female soldiers can ask for up to 13 days holiday in times of family emergency (for example in cases of a child's illness).⁷⁵

⁶⁹ *Idem*.

⁷⁰ *Idem*, para. 71, *Lustig-Prean and Beckett v. the United Kingdom*, judgment of 27 September 1999.

⁷¹ See, for example, *McGinley and Egan v. the United Kingdom*, judgment of 9 June 1998, *Roche v. the United Kingdom*, judgment of 19 October 2005.

⁷² *The Impact of Human Rights of Members of the Armed Forces*, Peter Rowe, p. 43.

⁷³ UK Ministry of Defence Guide for the families of deployed Regular Army personnel.

⁷⁴ *Military and Society in 21st Century Europe: A Comparative Analysis* by Jürgen Kuhlmann and Jean Callaghan, p. 299.

⁷⁵ *Idem*, p. 103.

H. Members of the armed forces have the right to freedom of thought, conscience and religion. Any limitations on this right shall comply with the requirements of Article 9, paragraph 2 of the European Convention on Human Rights.

Members of the armed forces have the right to freedom of thought, conscience and religion. Specific limitations may be placed on the exercise of this right within the constraints of military life. Any restriction must nonetheless meet the requirements of Article 9(2) of the Convention, i.e. they have to be in accordance with the law, pursue a legitimate aim and be necessary in a democratic society. They should also be proportionate, should not be arbitrary and should be reasonably foreseeable.

Furthermore, military commanders should not abuse their position of authority by imposing unwelcome conversations on religious issues with those working immediately under them.⁷⁶

Both believers and non-believers should have the right not to be discriminated against in their enjoyment of the freedom of thought, conscience, and religion. This principle naturally applies to the context of the armed forces. States should thus take measures which allow them to comply as much as possible within the normal constraints of military life with their religious obligations, including allowing time for prayers, permitting special diets or granting special leave for religious days. They should also refrain from obliging non-believers, even indirectly, to observe religious customs.

The right to conscientious objection has not to date been recognised by the Court as being covered by Article 9 of the Convention. However, the current trend in international fora is to consider it part and parcel of the freedom of conscience and religion. The Human Rights Committee has recognised it as an integral aspect of the right to freedom of thought, conscience and religion enshrined in the International Covenant on Civil and Political Rights.⁷⁷ Article 10(2) of the Charter of Fundamental Rights of the European Union, proclaimed on 12 December 2007, explicitly recognises the right to conscientious objection as an integral part of the freedom of thought, conscience and religion. In Recommendation No. R (87) 8 regarding Conscientious Objection to Compulsory Military Service, the Committee of Ministers states that anyone liable to conscription for military service who, for compelling reasons of conscience, refuses to be involved in the use of arms, shall have the right to be released from the obligation to perform such service on certain conditions. As regards the European Social Charter, the European Committee of Social Rights has considered the situation of conscientious objectors to military service under Article 1(2) of the Charter. The length of any alternative service required by objectors should be reasonable in comparison with the length of ordinary military service. For example, the Committee has found a length of alternative service which exceeds one-and-a-half times the length of military service to be excessive⁷⁸.

The right to conscientious objection is enjoyed by conscripts. The Committee of Ministers has already adopted a specific recommendation on this issue.⁷⁹ Conscientious objection for conscripts is recognised by the great majority of member states. Most countries have passed laws setting up procedures for the processing of applications for exemption from military service, and generally providing for the performance of alternative service by those who are exempt.⁸⁰ Being a conscientious objector or having unsuccessfully applied for this status should not lead to any form of discrimination, disciplinary measures or to any judicial prosecution.

A person's beliefs, either religious or philosophical, are not fixed in time and therefore the protection of freedom of thought, conscience and religion cannot be reduced to the time before joining the armed forces. A serviceperson's beliefs may also evolve when experiencing specific situations, notably in armed conflict. Professional members of the armed forces should have the right to make a request to leave the armed forces for reasons of conscience which should be examined within a reasonable time. Pending the examination of such request, the requester should be transferred to non-combat duties where possible. It is therefore necessary to inform members of the armed forces of their rights and the procedures available to them to guarantee the right to change religion or belief at any time during service (that is to say before, during and after conscription or performance of military service). The right to change one's religion or belief may not be evoked by a professional member of the armed forces in order to refuse particular missions.

⁷⁶ *Larissis v. Greece*, judgment of 24 February 1998, para. 51.

⁷⁷ Human rights Committee, *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea* Communications Nos.1321/2004 and 1322/2004. Recommendation 1518(2001), para. 2.

⁷⁸ *Quaker Council for European Affairs (QCEA) v. Greece*, Collective Complaint No. 8/2000.

⁷⁹ Recommendation No. R(87)8 of the Committee of Ministers; see also Parliamentary Assembly Recommendation 1518(2001).

⁸⁰ Explanatory memorandum to the Recommendation 1518(2001), para. 20.

Conscripts who have been granted conscientious objector status, or professional servicepersons who have been authorised to leave the forces for reasons of conscience, cannot be brought to justice on criminal grounds for this reason, in particular on grounds of desertion. This should not preclude national legislation of member States from bringing to justice on grounds of desertion persons leaving the armed forces without authorisation, and from specifying the conditions under which persons having left the armed forces can be brought to justice before civil courts, for example if they have not respected the conditions pertaining to their resignation, or if they have failed to return the sums or items which were entrusted to him or her for the purposes of their service in the armed forces.

I. Members of the armed forces have the right to freedom of expression. Any restrictions on the exercise of this freedom should comply with the various requirements of Article 10, paragraph 2 of the European Convention on Human Rights.

The Court has acknowledged that freedom of expression applies to members of the armed forces, just as it does to other persons within the jurisdiction of the contracting states,⁸¹ stating that “Article 10 does not stop at the gates of army barracks”.⁸² Freedom of expression also includes the freedom to hold opinions and to receive and impart information and ideas.

The right to receive information includes the right to obtain information from the press, radio, television and internet, as long as the source is lawful. Members of the armed forces should be allowed to have access to such sources of information without censorship and as far as the situation will allow (for example, this might not always be possible during field training or operations).

Article 10(2) of the Convention specifies that the exercise of the right to freedom of expression carries with it certain duties and responsibilities, in order to prevent the infringement of other fundamental rights, as well as risks to national security, territorial integrity or public safety, breach of confidentiality rules, and the jeopardising of the authority or impartiality of the judiciary.

Restrictions with the right are permissible. When assessing whether the right to freedom of expression of a serviceperson has been justifiably restricted, the Court has held that it is necessary to take into account “the special conditions attaching to military life and the specific ‘duties’ and ‘responsibilities’ incumbent on the members of the armed forces”.⁸³

Measures to restrict the right to freedom of expression must be proportionate, even where legitimate military interests are at stake. The proportionality of the restriction will depend on its aims. Where this concerns matters of military discipline or national security, a more stringent restriction may in some cases be more justified. States will also be accorded a certain margin of appreciation by the Court when it assesses whether or not such restrictions are justified. Measures to restrict freedom of expression must however provide sufficient protection against arbitrariness and be reasonably foreseeable.⁸⁴

The right to freedom of expression may be subject to formalities, conditions, restrictions, penalties or even, in exceptional cases, certain prohibitions. This is particularly so where the statements are made publicly or in the media (on television, for example⁸⁵). These limitations must be prescribed by law (in particular, have a basis in domestic law) and be necessary in a democratic society (responding to a pressing social need and where the means employed are proportionate to the aim pursued).

Restrictions on the freedom of expression of members of the armed forces where the Court has found no violation of Article 10 have included, (a) when two conscripts were sentenced to a year’s imprisonment after distributing material calling for French army units to withdraw from Germany,⁸⁶ and (b) when a German soldier was suspended for criticising military policies on television.⁸⁷

⁸¹ See, for example, *Engel and others v. Netherlands*, op.cit., para. 100 and *Vereinigung demokratischer soldaten Österreichs and Gubi v. Austria*, judgment of 19 December 1994, para. 27.

⁸² *Grigoriades v. Greece*, judgment of 25 November 1997, para. 45.

⁸³ *Hadjianastassiou v. Greece*, judgment of 16 December 1992, para. 46.

⁸⁴ *Idem*.

⁸⁵ *E.S. v. Germany*, European Commission of Human Rights, 29 November 1995, Decisions and Reports, Vol. 84, 1995, p. 58.

⁸⁶ *Le Cour Grandmaison and Fritz v. France*, European Commission of Human Rights, 6 July 1987, Decisions and Reports, Vol. 53, 1987, p. 150.

⁸⁷ *E.S. v. Germany*, op. cit.

Restrictions on freedom of expression by members of the armed forces where the Court has found a violation of Article 10 have included, (a) a ban on the distribution of a magazine whose articles were written in a critical satirical style, but did not call into question the duty of obedience or the purpose of service in the armed forces⁸⁸; and (b) where a sentence of three months' imprisonment for a junior officer who had sent a long letter of complaint to his superior (which was not otherwise published) was considered to be disproportionate and not "necessary in a democratic society".⁸⁹

J. Members of the armed forces have the right to have access to relevant information⁹⁰.

Given the characteristics of military working conditions, it is important that potential recruits be duly informed of the extent of their commitments upon joining the armed forces. This is, of course, particularly true in the case of prospective recruits who are below the age of 18, who should be given detailed information allowing them to grasp the implications of joining the armed forces. Parents or legal guardians should also receive such information. The information provided to potential recruits should cover all aspects and implications of enlisting in the armed forces including military discipline, with a description of responsibilities and duties; codes of conduct, indicating in particular what constitutes unacceptable behaviour such as harassment and bullying, or discriminatory treatment; conditions of employment including information on housing, possible accommodation on grounds of religion, or conditions for being posted abroad; entitlements and rights, including health and safety policies, available complaint mechanisms and pension rights.

Current and former members of the armed forces should have access, upon request, to their own personal data held by the military authorities. Personal data refers to any information relating to an identified or identifiable natural person.⁹¹ The right to access to one's own personal data held by public authorities is secured by the Convention on access to official documents.

When public authorities, including military authorities, engage in hazardous activities which might have latent adverse effects on health, they should put in place an accessible and efficient procedure which enables persons involved in such activities to access all relevant and appropriate information. In addition, authorities should not only to disclose this type of information, but also to refrain from imposing a long and complex procedure to obtain such information.⁹²

While access to documents should be the rule,⁹³ in certain circumstances, limitations can be imposed. Firstly, documents may be classified for objective reasons. Secondly, the protection of national security, defence, or international relations may constitute legitimate aims for limiting access. In some member states, limitations related to these fields have a constitutional dimension. Any restriction will have to be proportionate to the legitimate aim pursued. With regard to the nature of the interference, it is clear that the more far-reaching and severe it is, the stronger the reasons required to justify it. Weightier reasons are needed to justify a complete prohibition on access to information. Moreover, members of the armed forces are bound by an obligation of discretion in relation to anything concerning the performance of their duties and this forms one of the specific "duties" and "responsibilities" that are incumbent on servicepersons.⁹⁴

K. Members of the armed forces have the right to freedom of peaceful assembly and to freedom of association with others. Any restrictions placed on the exercise of this right shall comply with the requirements of Article 11, paragraph 2 of the European Convention on Human Rights.

The right to freedom of peaceful assembly and of association is enshrined in the Convention and the Charter. The rights include the freedom to form or join trade unions and political parties.

Due to the special circumstances of the military and its crucial function in protecting the security of the nation, more stringent restrictions on the enjoyment of these freedoms by members of the armed forces are often applied by states in order to guarantee the strict neutrality of military personnel as well as military discipline and continuity of service. Both the Convention (Article 11(2)) and the Charter (Article 5) allow for this.

⁸⁸ Idem, para. 49.

⁸⁹ *Grigoriades v. Greece*, op.cit.

⁹⁰ Articles 8 and 10 ECHR.

⁹¹ Article 2(a) of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

⁹² *Roche v. United Kingdom*, judgment of 19 October 2005.

⁹³ Recommendation Rec(2002)2 of the Committee of Ministers to member states on access to official documents.

⁹⁴ Idem, para. 46.

But in principle members of the armed forces should enjoy these rights. The Parliamentary Assembly itself has called on states to lift all unnecessary restrictions. In addition, the Committee of Ministers has invited all states to study the various examples of legal systems where members of the armed forces have the right to organise and bargain collectively. It has also underlined that in principle it favours the idea that all citizens, including members of the armed forces, enjoy the same political rights.

Therefore, the reasons for the restrictions of the exercise of these rights should be regularly reviewed and if it is found that there is no longer a valid justification for such restrictions, they should be lifted.

It is often argued that collective action would run the risk of affecting military discipline and consequently operational effectiveness and national security.⁹⁵ The practice shows, however, that in order to obviate these problems, states which allow members of the armed forces to join organisations have imposed two types of restrictions on the work of collective representative bodies: (i) the representative body is limited to members of the armed forces and is not linked to civilian trade unions, so as to avoid any outside influence; (ii) strikes or other forms of industrial action that could potentially disrupt operational effectiveness or threaten national security are not permitted.⁹⁶

The Court has considered that political parties are a form of association which is essential for the good functioning of democracy, and because democracy is one of the guiding elements of the Convention, political parties therefore come within the scope of Article 11 of the Convention.⁹⁷

Members of the armed forces should have the right not to participate in such associations or trade unions. Where they exercise their right not to participate, no disciplinary action or discriminatory measures should be taken against them for this reason.

L. Members of the armed forces enjoy the right to vote and to stand for election⁹⁸.

The rights to vote and to stand for election are vital components of democratic societies. However, restrictions are possible⁹⁹, provided that they do not curtail these rights to such an extent that their effectiveness is impaired. Such restrictions must also pursue a legitimate aim and the means employed must be proportionate to this aim. States enjoy a wide margin of appreciation in determining their voting systems, the rules and conditions for the right to vote and to stand for election, including in respect of members of the armed forces. Nonetheless, this margin is not unlimited and the Court makes a critical assessment of the proportionality of the restrictions concerned. The challenge arises in balancing the rights of individuals in the armed forces with the interests of the community while maintaining the neutrality of the armed forces.

Effective democratic control and accountability for the armed forces also require a separation of the political and military spheres. If servicepersons were to take an active part in the political scene, for instance by sitting in parliament whilst continuing to serve in the armed forces, this might be seen to undermine democratic accountability and create conflicts of interest. Certain restrictions on the right to stand for election or procedural requirements may appear to be justified in this context (e.g. being suspended from the armed forces during an electoral campaign and, if elected, during the term of office), provided that they are not disproportionate. By contrast, members of the armed forces' right to vote should not be affected by such considerations.

The need for democratic control over the military should not be used as an excuse to automatically deprive members of the armed forces of their electoral rights, in particular their right to vote.¹⁰⁰ Furthermore, States should take appropriate measures to ensure that members of the armed forces can vote. This should require steps to be taken to avoid any undue influence by hierarchical superiors, in particular by ensuring the secrecy of vote. Members of the armed forces posted abroad should as far as possible be able to vote, for instance at consulates, by post or by using e-voting.

⁹⁵ Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel, OSCE/ODIHR DCAF, 2008.

⁹⁶ *Idem*.

⁹⁷ *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998.

⁹⁸ Article 3 Protocol No. 1 ECHR. 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.

⁹⁹ *Mathieu-Mohin and Cleyfayt v. Belgium*, *op. cit.*, para.52.

¹⁰⁰ Parliamentary Assembly Resolution 1459(2005) Abolition of restrictions on the right to vote.

M. Members of the armed forces have the right to marry¹⁰¹.

The right to marry, as protected by Article 12 of the Convention, applies equally to members of the armed forces. No special authorisation should be required. This should also be true where marriage is open to persons of the same sex.¹⁰² As a living instrument, the Convention has to be interpreted in the light of present-day conditions and registered partnerships open to same-sex couples are recognised in many member states. This recognition sometimes ensures equal treatment to that of married couples. A relationship between same sex-couples falls within the ambit of Article 8 of the Convention, because it concerns a most intimate aspect of someone's private life.¹⁰³ In states where civilians of the same sex have the possibility of forming registered partnerships, members of the armed forces should not be barred from entering into such partnerships.

N. All members of the armed forces enjoy the right to protection of their property¹⁰⁴.

Article 1 of Protocol No. 1 to the Convention states that every person has the right to peaceful enjoyment of their possessions and that no-one shall be deprived of these except in the public interest and subject to the conditions provided for by law and the general principles of international law. When possessions are taken by the military authorities from servicepersons or conscripts when they join the forces, these should be returned to them at the end of service.

O. Members of the armed forces should be provided with accommodation of an adequate standard¹⁰⁵.

The right to an adequate standard of housing is protected by Article 11 of the International Covenant on Economic, Social and Cultural Rights and Article 31(1) of the Revised European Social Charter. This extends to accommodation provided for the armed forces.

Whatever the serviceperson's rank, they should have access to accommodation which has adequate lighting and ventilation (including sufficient heating), is clean, in a good state of repair, is suitably furnished, and which offers sufficient living space for the numbers involved. Service accommodation should also be adequately maintained. However, standards of accommodation may vary depending on the rank and the family situation of the member of the armed forces, where accommodation is also provided to families. A serviceperson's personal space, even in dormitories should be considered his/her own private sphere.¹⁰⁶ Hygiene and health are also important where housing is concerned. Toilet facilities should be separated from sleeping accommodation and all areas should be cleaned regularly. Persons with infectious diseases should be removed to a medical building. Where accommodation is provided in barracks, there should be separate dormitories for women and men.

Of course, when forces are on field training or deployed in operations, it is difficult to retain the same standard of accommodation and privacy. Reasonable steps should nonetheless be taken by the authorities to ensure that military personnel are accommodated as adequately as possible. Hygiene standards may also be lower during training periods outside barracks or field operations. However, the authorities should ensure that an adequate level of hygiene is attained, as far as can be reasonably expected in the circumstances.

Although the obligation to provide a decent standard of accommodation for the serviceperson's family applies mainly when the member of the armed forces is stationed on their native territory, a reasonable level of accommodation for families of members of the armed forces who accompany them should be provided, where this is practicable.

¹⁰¹ Article 12 ECHR.

¹⁰² Marriage is open to same-sex couples in Belgium, the Netherlands, Norway, Spain and Sweden.

¹⁰³ *Dudgeon v. the United Kingdom*, judgment of 22 October 1981.

¹⁰⁴ Article 1 Protocol No. 1 ECHR.

¹⁰⁵ Article 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, European Committee of Social Rights.

¹⁰⁶ See, for example, P. Rowe, *The Impact of Human Rights Law on Armed Forces*, 2006, Cambridge University Press, p. 41, footnote 40.

P. Members of the armed forces should have the right to receive fair remuneration and a retirement pension¹⁰⁷.

The right to fair remuneration is guaranteed by Article 4 of the Charter. It aims at ensuring that every worker has a decent standard of living, where the term “decent” in the English version of the recommendation should be understood as referring to a standard of living that is reasonable in all circumstances. States should ensure a payment on time, which means without delay. This of course also applies to members of the armed forces. According to the European Committee of Social Rights, in order to be considered fair, wages must be above the poverty line in a given country, i.e. 50% of the national average wage.¹⁰⁸ However, the Charter stipulates that the right to fair remuneration may be limited, provided that limitations are prescribed by law, necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.¹⁰⁹

The principle of non-discrimination against women concerning remuneration is enshrined in the Charter (Article 4(3)) and protected by several other international instruments.¹¹⁰ Nevertheless, women might still be exposed to discriminatory treatment in respect of remuneration “Equal pay for equal work or work of equal value” means that the equal pay principle applies not only to exactly the same work, whether it is carried out by a man or a woman, but also to work which is comparably of the same value. It is therefore necessary to develop classification methods that enable member states to compare the respective values of different jobs and carry out objective job appraisals. In addition to the actual work performed, other considerations will influence the level of remuneration such as military grades. In order to avoid discrimination, it is therefore important that pay scales, based on military grades, are applied to all members of the armed forces, regardless of gender. The principle of equality should cover all elements of remuneration, that is, for example, basic or minimum wages, hours of work, plus all other benefits paid directly or indirectly in cash or kind by the employer to the worker by reason of the latter’s employment.

Retired full-time professional members of the armed forces should be granted an adequate retirement pension which allows them to live decently and participate in public, social and cultural life. This principle is derived from Article 23 of the Charter. This instrument guarantees the right to adequate retirement pensions, both in the framework of the right to social security (Article 12) and as an essential element of the right of elderly persons to social protection (Article 23). Retirement pensions should be paid on time and without any discrimination.

Q. Members of the armed forces should have the right to dignity, health protection and security at work¹¹¹.

The revised Charter provides that all workers have the right to dignity at work (Article 26). Sexual harassment has been defined as including such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions,¹¹² and other verbal or physical conduct of a sexual nature. These situations constitute a violation of the dignity of persons.¹¹³ Sexual harassment and violence against military personnel are unfortunately still widespread phenomena, which do not only damage the emotional or psychological well-being of the victims, but also harm the work performance, as well as the public image of the armed forces. Member states should take steps to prohibit all conducts of a sexual nature, or other conduct based on sex affecting the dignity of individuals at work, including the behaviour of superiors and colleagues.¹¹⁴ There should be no tolerance of

¹⁰⁷ Articles 4, 12 and 23 European Social Charter.

¹⁰⁸ Conclusions XIV-2, Statement of Interpretation on Article 4 (1), pp. 50-52.

¹⁰⁹ Part V Article G – Restrictions ESC.

¹¹⁰ Article 7 ICESCR; Recommendation 1700 (2005) of the Parliamentary Assembly on discrimination against women in the workforce and the workplace; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

¹¹¹ Articles 2 and 3 of the European Social Charter and 26 of the Revised Charter. See, for example, collective complaint no. 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.

¹¹² UN CEDAW Committee General Recommendation No. 19, para 18.

¹¹³ Recommendation (2002)5 of the Committee of Ministers to member states on the protection of women against violence, para. 60.

¹¹⁴ *Idem*.

sexual harassment or violence in the military and an effective system of sanctions against those responsible for such treatment should be provided.¹¹⁵ Member states should also promote awareness, information and prevention of sexual harassment in the workplace or in relation to work or wherever it may occur and take the appropriate measures to protect women and men from such conduct.¹¹⁶

The Charter provides that all workers have the right to just conditions of work (Article 2). With a view to ensuring the effective exercise of this right, states undertake to provide for public holidays with pay for professional members of the armed forces, in addition to weekly rest periods and annual holiday with pay.¹¹⁷ Conscripts should also be entitled to periods of rest. The nature of the work and the safety and health risks to which servicepersons are exposed are additional aspects that should be taken into account. The specific characteristics of work in the armed forces may justify certain restrictions that would not be conceivable in a civilian context, notably regarding the length of periods when paid leave may not be available, such as during field training or operations. However, these should be kept as short as possible, and restrictions should not be tantamount to depriving servicepersons from paid leave altogether. Moreover, although it may not always be possible to guarantee servicepersons adequate periods of rest in exceptional circumstances, such as field training and operations, long periods without any rest at all should be kept to a minimum.

The Charter provides that everyone has the right to benefit from any measures enabling him or her to enjoy the highest possible standard of health attainable, including the right to a healthy environment (Article 11). As for the Court, it has found that members of the armed forces should not be unduly exposed to environmental hazards which could have adverse effects on their health. During field operations and training, it may not always be possible to fully prevent exposure to diseases. However, in situations where it is likely that the health of members of the armed forces will be adversely affected, states should ensure that reasonable measures are taken to protect them. Furthermore, States should establish regulations and take appropriate measures in the fields of prevention and protection against accidents, certain and specific risks and dangers, including air pollution, nuclear hazards, risks relating to asbestos, and food safety. This is particularly relevant in the military context, where specific problems may be linked to exposure to toxic substances in contaminated training or deployment areas or through the prolonged use of radars. Moreover, adequate training and supervision in the use of military vehicles, especially armoured vehicles, and sophisticated weapons should be provided in order to minimise risks of accident. In addition, Article 3(1) of the Charter requires states to formulate, implement and periodically review a coherent policy on occupational health and safety in consultation with employers and where they exist, workers' organisations.¹¹⁸ This should also apply to the military context.¹¹⁹

Whether through general health care systems or systems which are specific to the armed forces, servicepersons should be entitled to complete health care. Health care is understood as meaning the prevention, treatment, and management of illness and the preservation of mental and physical health through medical services. In addition, states should provide medical treatment through military medical facilities to members of the armed forces not only within the barracks but also during military training taking place outside, and military operations.¹²⁰ Moreover, members of the armed forces involved in military operations, especially those deployed outside their country's territory, should have access to the highest standard of medical care permitted by the circumstances and should be repatriated when necessary. Medical care provided during military operations should be free of charge for the servicepersons and should be financed by the authorities of the home state. To ensure the proper treatment of possible injuries which servicepersons might have received during military operations, they should have free access to medical and health care after their return from military operations as well. The costs of this medical treatment should also be financed by the authorities.

In addition to medical care per se, members of the armed forces should receive adequate allowances in case of injury resulting from the exercise of their military duties, especially where the injury or illness obliges the serviceperson to leave the armed forces and have long-lasting adverse consequences, for instance in preventing a him or her from walking, using his hands or continuing in a normal fashion the activities he or she was capable of performing before the injury occurred. Moreover, the state should put in place an appropriate compensation scheme. In addition, a system of compensation and, where appropriate, allowances should be set up to the benefit of those close to a member of the armed forces who died as a result of service.

¹¹⁵ OSCE/ODIHR DCAF Handbook op cit.

¹¹⁶ Recommendation (2002)5 of the Committee of Ministers to member states on the protection of women against violence, para. 61.

¹¹⁷ Digest of the case law of the European Committee of Social Rights.

¹¹⁸ Conclusions 2003, Statement of Interpretation on Article 3(1) as used in Digest of the case law of the European Committee of Social Rights.

¹¹⁹ Idem.

¹²⁰ OSCE/ODIHR DCAF Handbook op cit.

Except where duly justified, professional servicepersons who leave the armed forces should receive appropriate benefit packages which may include financial benefits, health care benefits, disability allowances and other benefits for their relatives in case of death.

Where professional servicepersons leave the armed forces before the end of their working life, it might be particularly important to provide specific programmes preparing them for civilian life, including educational and vocational training activities, with a view to facilitate their reintroduction into civilian life, which may be particularly difficult for servicepersons having joined the armed forces at a very young age.

R. Members of the armed forces should have the right to decent and sufficient nutrition¹²¹.

Article 11 of the International Covenant on Economic, Social and Cultural Rights guarantees the right to adequate food. Members of the armed forces should also benefit from this right, whether stationed at home or abroad, even during field operations. The military authorities should take into account individual needs when providing meals, particularly as regards the dictates of different religions, health problems, pregnancy and personal ethics (e.g. vegetarianism). Obviously, during field training and operations, it will be more difficult to cater for special dietary needs, but these must be met as far as is reasonably practical.

The rights laid down in Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights, that is, to an adequate standard of living and to the enjoyment of the highest attainable standard of physical and mental health, imply that in addition to decent food, clean drinking water should also be provided, and this at all times. This should be a priority, even during field training and operations. However, in exceptional circumstances, where clean drinking water is not readily available, water may need to be rationed.

S. Members of the armed forces enjoy rights and freedoms without discrimination¹²².

In the context of the work and service life of **All** members of the armed forces, including career perspectives, as well as with respect to access to the armed forces, there should be no discrimination in relation to their human **should enjoy the** rights and freedoms as they appear in the Convention and in the Charter **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, sexual orientation or other status. This principle is taken directly from Article 14 of the Convention and Article E of the revised Charter which prohibit any discrimination in the enjoyment of any of the rights encompassed in the Convention and the Charter.

The list of grounds for discrimination which have been included in these two provisions is not exhaustive. An explicit reference must be made in relation to this Recommendation to discrimination on the basis of sexual orientation, which is not in the list of Article 14, given the specific relevance of this form of discrimination in recent years in the military context and the case-law of the European Court of Human Rights prohibiting it.¹²³ It is also among the grounds cited under the anti-discrimination clause of the EU Charter of Fundamental Rights (Article 21).

The principle of non-discrimination does not prohibit any difference in treatment in the exercise of rights and freedoms. It will not be violated if the distinction between individuals in analogous situations has an objective and reasonable justification. In a military context, combat effectiveness may be invoked to justify a difference in treatment. The Court has stated that the relevance of the justification put forward has to be assessed in relation to the aim and effects of the measure taken by the authorities. Not only should the difference of treatment pursue a legitimate aim but the measures taken should be proportionate to that aim. National authorities however remain free to choose the measures they consider the most adequate to a given situation, as the review of the Court concerns only the conformity of these measures with the requirements of the Convention. Certain nationality restrictions may also be imposed on membership of the armed forces.

¹²¹ Article 11 International Covenant on Economic, Social and Cultural Rights.

¹²² Article 14 ECHR, Article E European Social Charter (revised), Protocol No. 12 ECHR.

¹²³ See, for instance, *Salgueiro da Silva Mouta v. Portugal*, judgment of 21 December 2001; *L. and V. v. Austria*, judgment of 9 January 2003; *Karner v. Austria*, judgment of 24 July 2003; *B. B. v. United Kingdom*, judgment of 10 February 2004.

As regards gender-based discrimination, Article 20 of the revised Charter secures the right to equal opportunities and equal treatment in matters of employment and occupation. This also applies to members of the armed forces. Women should have the same opportunities for promotion as men and should receive equal treatment in their employment in the armed forces. They should not be excluded from the profession because of their gender unless it is a particular type of occupational activity which by reason of its nature or context sex constitutes a genuine determining fact.

Sexual orientation should not prevent access to the profession, nor can it be a valid reason for discharge. According to the case-law of the Court access to the armed forces cannot be barred on this ground¹²⁴. Furthermore, in countries where same-sex partnerships or marriages are recognised by law, members of the armed forces belonging to such partnerships should be treated equally with other servicepersons as regards benefits for them and their partners.

Members of the armed forces enjoy the same rights as civilians to bring allegations of discrimination in relation to their rights and freedoms, particularly those set forth in the Convention before national courts or tribunals. The prohibition of discrimination as regards these rights is laid down in Article 14 of the Convention. Members of the armed forces should also be able to invoke their rights under the Charter, which should be enjoyed free from any discrimination (Article E of the revised Charter), before the competent national bodies. As mentioned above under "General considerations", only states which have ratified the revised Charter and Protocol No. 12 to the Convention are legally bound by their provisions.

T. Special attention should be given to the protection of the rights of persons under the age of 18 enlisted in the armed forces.

The Optional Protocol to the Convention on the Rights of the Child raises the minimum age for the recruitment of persons into the armed forces to 18.¹²⁵ However, although compulsory recruitment of persons under the age of 18 is prohibited under the Protocol, voluntary recruitment of such persons is permitted, as long as certain safeguards are put in place, namely to ensure that the recruitment is not forced or coerced, that at least one of the recruit's parents or legal guardians give their informed consent, that recruits and their parents or guardians are fully informed of the duties involved and that reliable proof of age is provided.¹²⁶ In practice, no Council of Europe member state provides for voluntary recruitment below the age of 16.¹²⁷

Recruits under 18 have special needs which differ from those of other older recruits and must be fully taken into account when they are enlisted in the armed forces. Article 3 of the Optional Protocol to the Convention on the Rights of the Child recalls that under the Convention persons under the age of 18 are entitled to special protection and applies this to recruitment of such persons into the armed forces.

With regard to field operations, all feasible measures must be taken to ensure that only those above 18 take part directly in hostilities (Article 1 of the Optional Protocol). In some cases, it might not be possible for persons under 18 to avoid being exposed to combat situations, for example where they are serving on a naval ship that is sent on an urgent operation. In such cases these persons should be repatriated as soon as practically possible, until which time they should not take an active part in the operation.

Special efforts should be made to provide a safe environment within the armed forces for recruits under 18. There is a particular responsibility on the part of military authorities which implies that the physical and psychological welfare of young recruits must be guaranteed. In practice, this ranges from providing accommodation of a decent standard and access to adequate medical care to ensuring that supervisors are capable of dealing with recruits suffering from psychological problems (including suicidal tendencies). Young recruits usually begin by undertaking training, and it is therefore particularly important to ensure that training environments are suited to their age. Instructors should be properly trained, notably as to their special responsibility as supervisors of young recruits, and carefully selected. Moreover, new recruits under 18 are particularly vulnerable to abusive treatment from their superiors (e.g. overly harsh discipline or harassment) and other recruits (bullying and initiation rituals), and should therefore be duly informed when they join the armed forces to whom they should turn if they face problems of abuse

¹²⁴ For example, *Lustig-Prean and Beckett v. the United Kingdom*, judgment of 27 September 1999.

¹²⁵ Articles 2 and 3.

¹²⁶ Article 3(3).

¹²⁷ OSCE/ODIHR DCAF Handbook, op. cit.

The Convention on the Rights of the Child guarantees the right of a person under the age of 18 who is separated from their parents to maintain personal relations and direct contact with them on a regular basis.¹²⁸ This also applies to those who join the armed forces. The same principles emanating from the right to respect for private life (Article 8 of the Convention) equally apply to recruits under the age of 18. Contact may be made by phone, e-mail, letter or physically, for example during week-end leave. To facilitate such leave, recruits under the age of 18 should as far as possible be posted near their family and home. Cancellation of week-end leave should not be used as a punishment. Of course, where direct contact with parents would be contrary to the serviceperson's interests, as in the case of inadequate care, or ill-treatment at home, members of the armed forces under the age of 18 may choose not to maintain such contact with their parents.

U. Members of the armed forces should receive training on their human rights and international humanitarian law.

Training has an important role to play in ensuring that armed forces uphold and respect human rights, both in relation to civilians and within the military itself. By promoting human rights values within the armed forces themselves, service members are more likely to respect human rights in the exercise of their duties and in the context of military life. In addition, from a purely internal perspective, it provides an opportunity to create a climate of mutual trust between servicepersons and therefore contributes to better cohesion and effectiveness.

Bearing in mind the need to firmly combat bullying and ill-treatment of new recruits and more vulnerable categories of servicepersons, proper training on human rights from the earliest stages of recruitment can contribute to reducing misconduct. Officers in particular should be trained in order to raise their awareness of their responsibility as hierarchical superiors not to condone any conduct of their subordinates which can lead to a human rights violation. Military personnel should be informed of their rights and of the complaints procedures that are available to them if those rights are violated. Military schools have an important role to play in training members of the armed forces to be aware of their own human rights as well as those of their fellow servicepersons.

Members of the armed forces have a duty to object to an order which is manifestly unlawful, which means that they should refuse to carry out such an order. Manifestly unlawful orders are those which notably lead to committing war crimes¹²⁹, crimes against humanity¹³⁰, genocide¹³¹ or acts of torture¹³². Servicepersons should be informed of the precise definition of these concepts during training and of the liability they incur if they commit such acts.

V. Members of the armed forces should have the possibility of lodging a complaint with an independent body in respect of their human rights.

It is important for members of the armed forces to be able to lodge complaints with an independent body about violations of their human rights that have occurred during service. Indeed, Article 13 of the Convention provides for the right to an effective remedy before a national authority, which need not be judicial, but which should provide the same safeguards as judicial bodies to ensure the effectiveness of the remedy. Individuals, including members of the armed forces, are able to benefit from the procedural guarantee of applying for relief at national level for violations of their convention rights before setting in motion the complaint mechanism of the Court if relief is not granted.

¹²⁸ Article 9(3).

¹²⁹ Article 8 of the Rome Statute of the International Criminal Court.

¹³⁰ Article 7 of the Rome Statute of the International Criminal Court; Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia.

¹³¹ Article 6 of the Rome Statute of the International Criminal Court; Article 4 (2) of the Statute of the International Criminal Tribunal for the former Yugoslavia.

¹³² Article 7 of the Rome Statute of the International Criminal Court; Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia.

Where members of the armed forces are concerned, complaints may certainly be made through military channels, however servicepersons using this method may face or fear facing reprisals and further harassment as a result of their complaint. No serviceperson issuing a complaint through military channels should be subject to reprisals and sanctions. An armed forces ombudsperson, an institution which already exists in several European countries, is a good example of such an independent complaints mechanism. There are several advantages to such a body: the independent nature of its oversight means that trust in the military is increased through transparency, without the authority of the military chain of command being undermined; it contributes to the democratic and civilian control of the armed forces; it has a positive effect on the quality of servicepersons' lives, restoring their morale and thus making them more likely to stay in the forces. Independent ombudspersons also have the advantage of being credible to complainants, parliament and the public.¹³³ Bringing a complaint before an independent non-judicial body, such as an ombudsman, should not exclude the possibility of using judicial remedies.

Where members of the armed forces are victims of harassment or bullying, it is especially important that they be able to lodge a complaint with a body independent of the chain of command. Where the procedure consists in making a complaint to a superior, servicepersons may be reluctant to admit to the treatment to which they have been subjected for fear of taunting or dismissal of the complaint by the superior officer as over-sensitivity, or retaliation by the perpetrators of the initial harassment or bullying. An independent body which provides a confidential, sympathetic forum for airing grievances will encourage those who have undergone ill-treatment to speak up and thus ultimately help in preventing further violations of human rights in the armed forces.

¹³³ OSCE-ODIHR/DCAF Handbook, op cit., Chapter 22.