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Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel



OSCE ODIHR

DCAF

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Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel

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Abbreviations and Acronyms

BVerfGE - Bundesverfassungsgericht (German Federal Constitutional Court)
CAP - Civil Air Patrol (United States)
CRC - Convention on the Rights of the Child
CEDAW - Convention on the Elimination of All Forms of Discrimination against Women
CF - Canadian Forces
CSFM - Conseil Supérieur de la Fonction Militaire (Higher Military Council, France)
DACOWITS - Defense Department Advisory Committee on Women in the Services (USA)
DCAF - Geneva Centre for the Democratic Control of Armed Forces
DoD - Department of Defense (United States)
EC - European Community
ECHR - European Convention for the Protection of Human Rights and Fundamental Freedoms
EEC - European Economic Community
ESC - European Social Charter
EU - European Union
EUROMIL - European Organisation of Military Associations
FBI - Federal Bureau of Investigation (United States)
HC - House of Commons Papers (United Kingdom)
HPAT - Homosexual Policy Assessment Team of the UK Armed Forces
ICCPR - International Covenant on Civil and Political Rights
ICERD - International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR - International Covenant on Social, Economic and Cultural Rights
IGK - Inspecteur-Generaal der Krijgsmacht (Inspector-General for the Armed Forces, the Netherlands)
ILO - International Labour Organization
IOM - International Organization for Migration
KMFRC - Kingston Military Family Resource Centre (Canada)
LUVA - Luchtmacht Vrouwenafdeling (women's volunteer force of the Dutch Air Force)
MARVA - Marine Vrouwenafdeling (women's volunteer force of the Dutch Royal Marine Corps)
MILVA - Militaire Vrouwenafdeling (women's volunteer force of the Dutch Army)
NATO - North Atlantic Treaty Organization
NCO - Non-commissioned officer
NGO - Non-governmental organization
ODIHR – OSCE's Office for Democratic Institutions and Human Rights
OSCE - Organization for Security and Co-operation in Europe
PRISMA - Project for Resettlement and Retraining (Serbia)
PTSD - Post-traumatic stress disorder
QC - Queen's counsel
SAMO - Swedish Association of Military Officers
SPARS - United States Coast Guard Women's Reserve
UDHR - Universal Declaration of Human Rights
UN - United Nations
UNDP - United Nations Development Programme
UNICEF - United Nations Children's Fund
VA - United States Department of Veterans' Affairs
WAC - Women's Army Corps (United States)
WAVES - Women Accepted for Volunteer Emergency Service (United States)

Preface

Armed forces are an integral part of a democratic state and society. By fulfilling their defence and national-security functions, the armed forces play a key role in enabling a security environment that allows us to enjoy the inalienable rights and freedoms to which we are all entitled as human beings. As representatives of the state structure, armed forces personnel are bound to respect human rights and international humanitarian law in the exercise of their duties. But only when their rights are guaranteed within their own institution will armed forces personnel be likely to uphold these in the discharge of their tasks — both when in the barracks and during operations.

Many states have had to adapt their military structures in order to respond to a rapidly changing security environment. An increasing number of OSCE participating States have transformed their military from conscription-based to a fully volunteer professional force. The role and tasks of the military are also changing, with many participating States involved in international peace-keeping and humanitarian missions. In addition, there is an increasing realization of the necessity for participating States to ensure democratic control over their military forces and to review their military structures with the aim of making them consistent with international human rights obligations.

These changes reflect a recognition that, as "citizens in uniform", armed forces personnel — whether they are career servicemen or -women or conscripts — are entitled to the same human rights and fundamental freedoms as all other citizens. Indeed, the cornerstone of all international human rights treaties to which OSCE participating States are bound is that all human beings, regardless of their professional situation or position in society, are entitled to their inalienable rights and freedoms.

The ODIHR-DCAF project to develop this *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel* was inspired by the OSCE Code of Conduct on Politico-Military Aspects of Security. This document, adopted by the participating States in 1994, requires states to "reflect in their laws or other documents the rights and duties of armed forces personnel" and to "ensure that the military, paramilitary and security forces personnel will be able to enjoy and exercise their human rights and fundamental freedoms". It also requires participating States to "provide appropriate legal and administrative procedures to protect the rights of all its forces personnel".

As the world's largest regional security organization, the OSCE is uniquely positioned to address the issue of human rights of members of the armed forces. In our comprehensive approach to security, the protection and promotion of human rights and fundamental freedoms is an integral precondition for regional stability and security.

DCAF has proven experience in research, analysis, advice, and operational support in the field of promoting democratic governance of the security sector. DCAF is active in providing advice, training, and support to governments and parliaments all over the world, as well as to the United Nations, the OSCE, the European Union, the Council of Europe, NATO, and the Economic Community of West African States.

This handbook presents an overview of legislation, policies, and mechanisms for ensuring the protection and enforcement of the human rights and fundamental freedoms of armed forces personnel. While recognizing that no single model can apply equally to every individual country, the handbook presents examples from across the OSCE region of

practices that have proved successful. It also contains recommendations for participating States of measures that should be taken in order to ensure that policies and practices are in full compliance with international human rights standards and OSCE human dimension commitments.

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

Ambassador Christian Strohal
Director
ODIHR, Warsaw

Ambassador Theodor H. Winkler
Director
DCAF, Geneva

Section I

Chapter 1
How to Use This Handbook

This handbook is divided into six sections, each of which comprises several chapters. The handbook can be used in different ways depending on what each reader hopes to gain from it. Reading the handbook in its entirety will naturally provide the most comprehensive understanding of the human rights (including their implementation) of members of the armed forces. Readers may, however, opt to focus only on those sections and chapters that are of particular interest to them. Readers interested in policy-oriented practices and recommendations are advised to focus on the best-practices boxes and the recommendations featured in each chapter.

Throughout the handbook, readers will find boxes containing facts and figures that clarify or illustrate complex issues described in the main text by providing examples of policies, laws, and procedures of OSCE participating States or relevant information from international organizations such as the OSCE itself, the Council of Europe, the United Nations, and the European Union. Furthermore, most chapters include a section entitled "Best Practices and Recommendations", where information about how to improve respect for human rights in the barracks may be found.

Section I maps out the scope of the handbook and explains the relevance of human rights of members of the armed forces. The major questions addressed in this section are:
- What is the relevance of respect for human rights in the armed forces?
- What does the "citizen in uniform" concept mean and how can it contribute to integration of human rights in military structures?
- How was information on this topic collected and analysed before subsequently being presented in the handbook?

Section II sets out the regulatory framework, norms, and standards for human rights in the armed forces. It provides the national and international legal context for the exercise of human rights by members of the armed forces. The main questions addressed in this section are:
- What are the relevant OSCE commitments? What is the relevance of the OSCE Code of Conduct on Politico-Military Aspects of Security?
- Where can we find international norms and standards for human rights in the armed forces? Which are the relevant international human rights treaties? What safeguards exist at the international level?
- Why is it necessary to enact national laws dealing with human rights of armed forces? Which human rights of armed forces are normally codified by a constitution? Which issues should be included in national legislation?
- What are permissible grounds for restricting the exercise of human rights by armed forces personnel? Which human rights cannot be restricted?
- How can parliaments contribute to ensuring respect for human rights in the barracks?

Section III deals with the civil and political rights of armed forces personnel. Political rights, in particular, refer to those rights that allow people to participate in public affairs. Major questions addressed in this section are:
- What are the relevant international treaties and instruments that proclaim and guarantee the full enjoyment of civil and political rights?

- What are justified reasons for limiting the exercise of civil and political rights by armed forces personnel?
- How do various OSCE participating States reconcile the political neutrality of the armed forces with the exercise of political rights by service personnel (e.g., the right to join political parties, freedom of expression, and the right to stand for political office)?
- Which approaches do various OSCE participating States take with regard to freedom of assembly and the right to join military unions and associations?
- How are the right to conscientious objection and the right to undertake alternative service codified in international treaties and instruments, as well as constitutional, and domestic legislation? How are these rights guaranteed in practice?
- How can the right to religious freedom (including wearing religious headwear and dress, as well as partaking in religious practices) be integrated in military structures? What are the relevant international instruments and what good practices can be discerned in the OSCE region?

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

- Which international treaties and instruments safeguard equal opportunities in the armed forces? What best practices may be identified for effectively implementing the principle of equality in the armed forces?
- How can both the members of the armed forces and the military as an institution take a "managing diversity" approach to equality?
- How can discriminatory treatment be outlawed in the barracks? How can harassment be prevented?
- What approaches to equal opportunities in the armed forces do various states in the OSCE region take?

Section V deals with specific issues of military life, including recruiting and selecting underage armed forces personnel, proper treatment of armed forces personnel, as well as standards of working and living conditions. The major questions addressed in this section are:

- What kind of substantive and procedural safeguards do OSCE participating States have in place to ensure the human rights of underage members of armed forces? What are proper policies towards cadet schools and military training at general secondary schools?
- What type of benefit packages and policies for veterans exist in various OSCE participating States?
- What are the causes of institutionalized bullying and mistreatment of members of the armed forces, in particular those who are fulfilling their obligatory military service? How can institutionalized bullying and mistreatment be prevented and adequately addressed?
- What approaches to working times and working conditions are followed in the OSCE region?

Finally, **Section VI** covers the important field of promoting and enforcing human rights in the barracks. It includes human rights education, the responsibility of commanders to hold individual soldiers accountable for their conduct, as well as military justice and ombudsman institutions. The major questions addressed in this section are:

- How can human rights training raise awareness and contribute to a professional culture within armed forces that respects human rights?

- Why and how can commanders be the first line of defence against human rights abuses in the barracks? Why and how can individual members of the armed forces be held accountable for their conduct, and how can this contribute to respect for human rights?
- What are the proper approaches to a fair and independent military justice system within the OSCE region?
- What are the different approaches available to set up an ombudsman institution in the OSCE region?

Chapter 2

Human Rights in the Armed Forces: Scope and Issues at Stake

Objectives

This *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel* focuses on the human rights and fundamental freedoms enjoyed by members of the armed forces.[1] The handbook is not aimed at setting new standards; instead, it seeks to contribute to the effective implementation of existing standards by presenting a number of models, or best practices, from within the OSCE region that demonstrate how military structures can successfully integrate human rights and fundamental freedoms. At the same time, necessary limitations on the human rights and fundamental freedoms of armed forces personnel are taken into account, bearing in mind the requirements of military life and national security. While recognizing that there is no single applicable model and that the particularities of individual contexts will always influence a given country's approach, this handbook provides guidance to OSCE participating States by advancing models that have proven successful in a variety of countries.

Approach: Citizens in Uniform

The starting point for the handbook's approach is the OSCE Code of Conduct on Politico-Military Aspects of Security (see Chapter 4, "OCSE Commitments"). The Code of Conduct refers to the rights of armed forces personnel on several occasions, the most important of which is para. 32:

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

This paragraph underlines the notion that the members of armed forces are entitled to enjoy their human rights and fundamental freedoms subject to the limitations and duties of military service as provided for by the laws and/or constitution of the respective country. Other provisions of the Code of Conduct refer to the human rights of armed forces personnel, and in particular to human rights within the context of the political neutrality of the armed forces (para. 23); recruitment and call-up (para. 27); rights and duties, as well as exemptions from, or alternatives to, military service (para. 28); and the obligation of states to provide for appropriate legal and administrative procedures in order to protect the rights of military personnel (para. 33).[2]

1 In this handbook, the terms *soldier*, *armed forces personnel*, and *servicemen* are used interchangeably. This is not done to make a distinction between armed forces personnel of different ranks or with different jobs except where otherwise indicated. Furthermore, for reasons of convenience, the term *serviceman* or *servicemen* is used to refer to both men and women unless otherwise indicated.

2 The OSCE Code of Conduct on Politico-Military Aspects of Security is available at <http://www.osce.org/documents/sg/1994/12/702_en.pdf>. For a detailed commentary on the Code of Conduct, see Victor-Yves Ghébali and Alexander Lambert, *The OSCE Code of Conduct on Politico-Military Aspects of Security: Anatomy and Implementation* (Leiden/Boston: Brill Academic Publishers, 2005).

The approach enshrined in the Code of Conduct can be summarized as the "citizen in uniform" approach, according to which members of the armed forces retain their human rights and fundamental freedoms, but these are subject to certain limitations and duties imposed by military service. Though the OSCE participating States agree that armed forces personnel are entitled to enjoy universal human rights, the understanding of the concept of citizens in uniform is likely to vary from country to country, depending on its particular history, military culture, a possible recent transition from authoritarian rule to democracy, as well as experiences with war and conflict.[3] For these reasons, there is no single model for protecting the human rights of armed forces personnel. Therefore, the emphasis of this handbook is on putting forward various models and best practices that can be found in participating States on how armed forces have successfully integrated human rights.

Scope

Human rights

In this handbook, human rights are clustered into four groups: (1) civil and political rights; (2) rights related to equal opportunities and non-discrimination in the armed forces; (3) rights related to military life; and (4) procedural rights related to implementing and ensuring human rights in the barracks. While these rights are further elaborated in Chapter 5, they are addressed in each chapter with respect to issues at stake, relevant rights, policies, and specific recommendations about how to ensure that human rights are respected. Each chapter also contains several boxes that illustrate the laws, policies, and practices found in participating States.

The handbook focuses specifically on the internal aspects of human rights and fundamental freedoms of armed forces personnel. It does not include external aspects, which are here understood as respect for human rights **by** armed forces personnel in the execution of their operations. Therefore, the impact of the conduct of armed forces personnel on civilians remains outside the scope of this handbook.

Armed forces

Though the OSCE Code of Conduct refers in its provisions to "military, paramilitary and security forces" (e.g., in para. 32), this handbook focuses on members of the armed forces. The reason for this is that "military, paramilitary and security forces" can quite easily be interpreted as including all elements of a state's security sector, including the military, police, border guards, paramilitary forces, private security and military companies, internal security services, as well as foreign and military intelligence services. As these services have very different mandates, different operational procedures, and different legal regimes, the handbook has been limited to consideration of armed forces proper.

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

3 Peter Rowe, paper presented at the conference "Citizen in Uniform: Implementing Human Rights in the Armed Forces", jointly organized by DCAF, ODIHR, and the German Defence Ministry, Berlin, 7-8 September 2006.

Armed forces personnel

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

In particular, the concept of citizens in uniform cannot refer solely to conscripted soldiers. While the conscripted soldier is under arms as part of compulsory military service, the professional soldier agrees to join the armed forces on a voluntary basis. The mere fact of joining the armed forces voluntarily does not result in a waiver of human rights, as confirmed by the European Court of Human Rights in 1999.[4] At times, however, special safeguards are necessary to protect certain groups within the armed forces, e.g., soldiers under 18 years of age. On the other hand, superior officers do have such a powerful position within the armed forces that their freedom of expression towards subordinates has to be limited, e.g., to protect subordinates from unwanted religious attention (e.g., proselytism) on the part of superiors.[5]

Peacetime situations: ensuring rights in the barracks

This handbook deals with peacetime situations only. Hence, armed forces deployed abroad, such as for peacekeeping operations, or at home during crisis or emergency situations do not fall within its scope.

Methodology

Studying the human rights of armed forces personnel in different countries presents some significant challenges. First, it is not a topic that has been extensively researched, with very few publications according much attention to the human rights of armed forces personnel in the barracks. In spite of some excellent studies on specific legal systems and particular aspects of this issue, there is a clear lack of comprehensive studies of comparative data and analysis of national practice.[6] Another challenge is the gap between legal provisions and reality. Norms and standards enshrined in a country's constitution and laws are not always respected in reality. For these reasons, the authors of the handbook adopted a research strategy that involved the following steps.

1. ODIHR-DCAF questionnaire

A questionnaire was devised to consider the issue of the human rights of armed forces personnel, given the lack of comparative data on the subject, in particular concerning policies and practices.[7] Box 2.1 provides more details about the questionnaire, which resulted in a wealth of data on laws, procedures, and practices in participating States. These are referred to in the text and in the numerous illustrative boxes throughout the handbook.

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

5 *Larissis and others v. Greece,* European Court of Human Rights, 24 February 1998, *European Human Rights Reports,* Vol. 27, 1999, p. 329; Ian Leigh, "Human Rights and Fundamental Freedoms of Armed Forces Personnel: The European Court of Human Rights", DCAF Working Paper No. 165, 2005, p. 4.

6 See, for example, Rowe, *op. cit.*, note 4; Georg Nolte (ed.), *European Military Law Systems* (Berlin: De Gruyter Recht, 2003); M. Sassoli and A. McChesney, *Conscripts' rights and military justice training manual* (Chisinau: Centre for Recruits' and Servicemen's Rights Protection of the Republic of Moldova, 2002); Ghébali and Lambert, *op. cit.,* note 2.

7 The ODIHR-DCAF questionnaire can be accessed online at <http://www.dcaf.ch/odihr/_index.cfm>.

Box 2.1 shows that not all OSCE participating States maintain regular armed forces. In cases where countries with regular armed forces failed to reply to the questionnaire, it was nevertheless sometimes possible to describe parts of their human rights policies and practices in the armed forces by using information obtained from open public sources, NGOs, the media, and academic institutions.

Box 2.1

The ODIHR-DCAF Questionnaire on Human Rights of Armed Forces Personnel in OSCE Participating States

Within the framework of the project on human rights of armed forces personnel, a background study of the 2004 Information Exchange on the OSCE Code of Conduct on Politico-Military Aspects of Security was undertaken. Due to the great disparity in the quality and nature of information available, it was necessary to develop a detailed questionnaire to obtain data on laws, policies, and practices concerning human rights of armed forces in the OSCE region. Both English and Russian versions of the questionnaire, which included 85 questions, were distributed among the permanent missions of the OSCE participating States at the end of 2005. The questionnaire is available online at www.dcaf.ch.

1. Extensive replies were received from the following countries:

Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Ireland, Latvia, Lithuania, Luxembourg, Malta, Norway, Poland, Portugal, the Russian Federation, Serbia and Montenegro,[8] Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Ukraine, the United Kingdom, and the United States.

2. A note verbale was received from:

Liechtenstein (without regular armed forces), Tajikistan, and the Holy See (without regular armed forces).

3. The following countries did not reply to the questionnaire:

Albania, Andorra (without regular armed forces), Armenia, Cyprus, Greece, Hungary, Iceland (without regular armed forces), Italy, Kazakhstan, Kyrgyzstan, the former Yugoslav Republic of Macedonia, Moldova, Monaco (palace guard with ceremonial function), the Netherlands, Romania, San Marino (without regular armed forces), Turkmenistan, and Uzbekistan.

2. ODIHR-DCAF roundtables

In order to collect information on practices and policies, ODIHR and DCAF held two roundtables on selected issues that were organized in co-operation with the governments of OSCE participating States. The first, in September 2006, entitled "Citizen in Uniform: Implementing Human Rights in the Armed Forces", was jointly organized with the German Defence Ministry, and the second, in October 2006, on "Military Unions and Associations", was jointly organized with the Romanian Defence Ministry and the European Organisation of Military Associations (EUROMIL). These roundtables contributed both to the handbook and to an informed debate on relevant issues among representatives of OSCE participating States.[9]

3. Input from NGOs and OSCE field operations

During the project, the authors of the handbook profited from the valuable experiences and insights of NGOs and OSCE field operations, which provided a specific insight into the reality of the human rights of armed forces personnel. Among others, good use was made of information and documents from NGOs such as EUROMIL, the Moscow Office of Hu-

8 The survey was conducted before the separation of Serbia and Montenegro in 2006.

9 More information about the ODIHR-DCAF roundtables on human rights of armed forces personnel is available on the project website: <http://www.dcaf.ch/odihr/_events.cfm>.

man Rights Watch, the German *Bundeswehrverband* (Federal Armed Forces Association), the Spanish Association of Veterans, as well Soldiers' Mothers of St. Petersburg.[10]

4. Expert review

Drafts of the handbook were subjected to close scrutiny and debate by various experts in the field of human rights of armed forces personnel throughout the OSCE region so as to ensure that the ideas presented and conclusions drawn were valid. In December 2006, ODIHR organized an expert review workshop in Warsaw that brought together experts from a variety of fields. This led to numerous changes and ultimately to an improved version of the handbook.

10 See, for example, <http://www.euromil.org or <http://soldiersmothers.ru>.

Chapter 3

The Importance of Human Rights of Armed Forces Personnel

As mentioned in the previous chapter, para. 32 of the OSCE Code of Conduct on Politico-Military Aspects of Security commits participating States to ensure that military, paramilitary, and security-service personnel are able to enjoy and exercise their human rights and fundamental freedoms in conformity with the relevant constitutional and legal provisions and with the requirements of service. One valuable source of guidance is the jurisprudence under the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. Like the OSCE Code of Conduct, the Convention, as interpreted by the European Court of Human Rights, treats members of the armed forces as citizens in uniform, i.e., service personnel retain their civil and political rights, although they are modified in accordance with the military context.

The "citizen in uniform" approach implies that armed forces personnel, whether professional or conscripted, are entitled to the same rights and protections as all other persons, subject to certain limitations imposed by military life. Indeed, respect for human rights and fundamental freedoms for all, including armed forces personnel, is part of the OSCE's comprehensive concept of security, which links the maintenance of peace to respect for human rights and fundamental freedoms.[11]

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

In some states, the enjoyment of human rights by members of the armed forces is disproportionately restricted by the constitution or by law. For instance, in many countries, armed forces personnel are not allowed to fully exercise their rights to freedom of speech and freedom of assembly. As a consequence, armed forces personnel are hindered from speaking for themselves or voicing concern about cases of human rights violations. As this situation can be exacerbated by the closed nature of military institutions, it is important for governments to ensure that human rights are protected in the barracks.

Human rights are conceptually indivisible and an entitlement of being human. Indeed, the exercise of some human rights cannot be limited at all.[12] However, the exercise of other

11 OSCE Code of Conduct on Politico-Military Aspects of Security, principle 2: "The participating States confirm the continuing validity of their comprehensive concept of security, as initiated in the Final Act, which relates the maintenance of peace to the respect for human rights and fundamental freedoms. It links economic and environmental co-operation with peaceful inter-State relations"; cf. Title VII of the Code of Conduct, discussed in greater detail in Chapter 4.

12 These are human rights from which there can be no derogation, including the right to life; prohibition of torture; prohibition of slavery; prohibition of imprisonment on the grounds of the inability to fulfil a contractual obligation; prohibition of being found guilty of any criminal offence, when the act committed did not constitute a criminal offence under national or international law at the time that it was perpetrated; and the right to be recognized as a person before the law. Also see Chapters 5 and 16 of this handbook.

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

Box 3.1
The importance of Ensuring Human Rights in the Armed Forces

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

Differences in the ways that states choose to limit the human rights of their soldiers will depend on the aforementioned factors. These differences are rooted in the perception of the wider role and position of the armed forces in society. When answering the question "How different should the military be?", some take the view that the military is a unique institution entirely different from civilian institutions. This uniqueness is imperative for militaries of all times and all countries, as it is the only way of preserving operational effectiveness. According to this view, a member of the armed forces is not an ordinary public servant but is someone who answers a calling, is dedicated to duty, country, and honour. Contrary to this position, other commentators take the view that the distinctiveness of the military is only of relative importance because the military was subject to "civilianizing" trends in the 20th century as a result of political, legal, cultural, technological, and economic pressures from society.[13] Therefore, the military profession of today is the result of broader transformations in society. The effect of these transformations is illustrated by the Institution/Occupation model. The underlying thesis of this model is that the military profession is shifting away from an institutional format to one that is similar to the occupational format of other professions in society. Increasingly, the military profession is becoming "just another job" driven by financial incentives, job security, and attractive working conditions, instead of a unique institution based on country, duty, and honour.[14] According to the institution model, soldiers' human rights will be greatly restricted because the military profession

13 Cf. Bernard Boene, "How Unique Should the Military Be? A Review of Representative Literature and Outline of a Synthetic Formulation", *European Journal of Sociology*, Vol. 31, No. 1, 1990.

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

cannot be compared with any other profession in society. According to the occupation model, however, soldiers will generally have the same rights as other citizens because of the commonalities between the military profession and other professions in society.

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

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

In many OSCE participating States, the mechanisms for protecting the rights of armed forces personnel remain inadequate. Even in states where laws and regulations have been improved, they are often not respected at the practical level.

The question of effective implementation of human rights is therefore crucial. This handbook emphasizes not just the role of national and international courts, but also other methods of investigating complaints concerning violations of human rights and sanctioning violations, including military ombudsmen and international monitoring bodies. The first line of defence, however, has to come from within the armed forces themselves. In particular, protection of the human rights of their subordinates features among the key responsibilities of superior officers. Human rights education is crucial in raising awareness and creating a professional culture within the military that includes respect for human rights as part of a commitment to democratic values. When this is achieved, the armed forces are not just defenders of a state's territorial integrity, they also defend and embody its democratic commitments.

Section II

Chapter 4
OSCE Commitments

The OSCE regards norms and activities promoting democracy, human rights, and the rule of law — the so-called human dimension — as an essential aspect of security, which is directly linked to the OSCE's other two areas of operation, the politico-military and economic/environmental dimensions. The term human dimension also indicates that OSCE norms in this field cover a wider area than traditional human rights law. This chapter will deal with the nature and scope of OSCE human dimension commitments in the field of human rights, and will also discuss the human rights aspects of the cross-dimensional OSCE Code of Conduct on Politico-Military Aspects of Security.

1. The Nature and Status of OSCE Commitments on Human Rights

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

> promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for free and full development.[15]

This commitment to human rights has been reaffirmed on a number of occasions (for example, in Madrid, 1983; Vienna, 1989; and Moscow, 1991).

The commitments made by OSCE participating States on human rights are politically binding for those states, as well as for new members that accept the *acquis* upon joining the OSCE. We summarize below the main areas in which the participating States have made these commitments, and the major individual commitments in those fields are considered in greater detail in the respective chapters of Sections III-IV.

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

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

15 Helsinki 1975, Questions Relating to Security in Europe: 1 (a) Declaration on Principles Guiding Relations between Participating States - Principle VII.

victim. Box 4.1 highlights some of the key features of effective remedies for violations of human rights contained in the 1990 Copenhagen Document.

Where no remedy, or an insufficiently effective one, is provided at the national level, recourse may be had to individual complaint mechanisms at the international level. OSCE human rights commitments do not themselves provide for an individual complaint mechanism, but complaints mechanisms are available under various UN and regional human rights treaties to which OSCE participating States are parties. These are discussed in Chapter 5.

OSCE participating States have agreed that any limitations on human rights must be provided for by law and must be consistent with other international obligations (Copenhagen 1990). Any restrictions on human rights should be exceptional, applied consistently, and should be applied strictly proportionately with regard to the aim of the law. In this, the commitments are structured in a manner similar to international human rights treaties.

2. OSCE Monitoring and Implementation Mechanisms

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

In addition to regular implementation meetings, the OSCE has also created so-called human dimension mechanisms, the Vienna Mechanism[16] and the Moscow Mechanism,[17] the latter partly constituting a further elaboration of the Vienna Mechanism. Together, they set out a process for supervising the implementation of human dimension commitments to be invoked on an *ad hoc* basis by OSCE participating States. The Vienna Mechanism allows a participating State, through a set of procedures, to raise questions relating to the human dimension in another OSCE participating State. The Moscow Mechanism builds on this and provides for the additional possibility of establishing *ad hoc* missions of independent experts to assist in the resolution of a specific human dimension problem. This includes the right to investigate alleged violations of human dimension commitments, in exceptional circumstances even without the consent of the accused state.

In practice, the human dimension mechanisms are only rarely applied, partly due to the development of the OSCE into a permanently functioning organization and partly due to the political considerations involved in invoking such *ad hoc* mechanisms.[18] Various bodies exist at the OSCE level to monitor implementation of human dimension commitments, including the OSCE's Office for Democratic Institutions and Human Rights and the OSCE's Representative on Freedom of the Media. Participating States are ultimately responsible for implementation of commitments, however, and also engage in peer review on implementation of commitments in their fellow participating States.

16 As established in Vienna in 1989, see Concluding Document of the Vienna Meeting (Third Follow-up Meeting to the Helsinki Conference).

17 1991 Moscow Document, paras. 1-16, amended by the 1993 Rome Document (Chapter IV, para. 5).

18 ODIHR continues to maintain a list of experts as required by the Moscow Mechanism.

3. Relevant OSCE Commitments

The participating States have agreed to a number of binding commitments concerning specific human rights. These are summarized in Box 4.1 and will be referred to in greater detail in the following chapters. In so far as these commitments refer to everyone, they apply to members of the armed forces, as well as to others.

Box 4.1
OSCE Commitments and Human Rights[19]

RIGHT	OSCE COMMITMENT	FURTHER DETAILS
Right to Life	"In participating States where capital punishment has not been abolished, sentences of death may only be imposed for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to international commitments." (Vienna 1989)	Chapter 16
Torture, Inhuman and Degrading Punishment or Treatment	"The participating States strongly condemn all forms of torture as one of the most flagrant violations of human rights and human dignity. They commit themselves to strive for its elimination." (Budapest 1994)	Chapter 16
Freedom of Association	"[The participating States] affirm that, without discrimination, every individual has the right to … freedom of association and peaceful assembly." (Paris 1990)	Chapters 8 and 9
Freedom of Expression	"The participating States will ensure ... that everyone will have the right to freedom of expression including the right to communication. This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." (Copenhagen 1990)	Chapter 8
Freedom of Thought, Conscience, Belief and Religion	"The participating States … agree to take the action necessary to ensure the freedom of the individual to profess and practise, alone or in community with others, religion or belief acting in accordance with the dictates of his own conscience." (Madrid 1983)	Chapter 11
National, Cultural, and Linguistic Identities	"The participating States will protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of national minorities on their territory." (Vienna 1989)	Chapter 12
Equality on Grounds of Sex	"[The participating States undertake to] eliminate all forms of discrimination against women, and to end violence against women and children as well as sexual exploitation and all forms of trafficking in human beings." (Istanbul 1999)	Chapter 13
Human Rights Education	"Human rights education is fundamental and it is therefore essential that [participating States'] citizens are educated on human rights and fundamental freedoms." (Moscow 1991)	Chapter 19
Freedom from Arbitrary Arrest and Trial	"No one will be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." (Moscow 1991)	Chapter 21
Right to a Fair Trial	"The participating States will … effectively apply … the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal." (Vienna 1989)	Chapter 21
Right to Effective Remedies	"[The participating States will] ensure that effective remedies as well as full information about them are available to those who claim that their human rights and fundamental freedoms have been violated." (Vienna 1989) "The participating States will consider acceding to a regional or global international convention concerning the protection of human rights, such as the European Convention on Human Rights or the Optional Protocol to the International Covenant on Civil and Political Rights, which provide for procedures of individual recourse to international bodies." (Copenhagen 1990)	Chapters 5 and 7

19 *OSCE Human Dimension Commitments* (Warsaw: OSCE/ODIHR, 2005), 2nd ed., Vol. 1, Thematic Compilation. A more extensive selection of OSCE commitments can be found in Annex 1.

In addition to these general human rights commitments, there are three specific areas in which the participating States have agreed commitments referring to members of the armed forces. First, participating States have pledged to consider introducing alternatives to military service (Copenhagen 1990 and Budapest 1994; conscientious objection is discussed further in Chapter 10). Second, states have made commitments on the minimum age of recruitment to the armed forces. At Copenhagen in 1990, states agreed to consider acceding to the UN Convention on the Rights of the Child where they had not yet done so. States have also committed to reviewing whether their practices for the recruitment or call-up of personnel for service in their military, paramilitary, and security forces are consistent with their human rights obligations (Budapest 1994). Third, states have made commitments to give legal protection to human rights for members of the armed forces. These find their fullest expression under the OSCE Code of Conduct on Politico-Military Aspects of Security (Budapest 1994).

4. OSCE Code of Conduct on Politico-Military Aspects of Security: Key Features

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

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

It can be seen, then, that the Code of Conduct takes a dual approach to human rights. First, participating States are to ensure that their armed forces respect the human rights of civilians and follow international humanitarian law. For example, care must be taken to avoid injury to civilians, and the use of force must be proportionate. Individual members of the military must be accountable for any violations of international law. Equally, the human rights of members of the armed forces themselves are to be protected by states. This means that domestic legislation must be in place establishing effective procedures to safeguard their rights, whether through the courts or through other independent means, such as a military ombudsman.

The provisions of the Code of Conduct concerning human rights are summarized in Box 4.2. As can be seen from para. 23, dealing with political neutrality, and para. 32, providing that members of the armed forces should enjoy the standard human rights and fundamental freedoms embodied in OSCE documents and international law "in conformity with relevant constitutional and legal provisions and with the requirements of service", the

20 For the complete text, see <http://www.osce.org/documents/fsc/1994/12/4270_en.pdf>; for commentary, see Ghébali and Lambert, *op. cit.*, note 2.

Code adopts a "citizen in uniform" approach. In the words of one commentator, "the Code of Conduct clearly establishes that the rights of their individual members do not stop at the barracks".[21]

OSCE participating States have agreed to exchange information on the implementation of the Code of Conduct on an annual basis, responding to a questionnaire by 15 April every year.[22]

Box 4.2

The OSCE Code of Conduct: Key Human Rights Features[23]

Rights of Armed Forces

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

Duties of Armed Forces to Respect Rights

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

21 Victor-Yves Ghébali, "Revisiting the OSCE Code of Conduct on Politico-Military Aspects of Security (1994)", in Heiner Hänggi and Theodor H. Winkler, *Challenges of Security Sector Governance* (Berlin: DCAF and LIT Verlag, 2003).

22 OSCE Forum for Security Cooperation, Decision No. FSC.DEC/4/98 of 8 July 1998.

23 OSCE Code of Conduct on Politico-Military Aspects of Security, Sections VII and VIII.

Chapter 5

International Human Rights Law

International human rights law emerged from the 1948 Universal Declaration on Human Rights and constitutes a dense body of numerous international and regional treaties. At the practical level, it is complemented by numerous declarations and other documents, such as the OSCE human dimension commitments. Human rights treaties (especially the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the European Convention for the Protection of Human Rights and Fundamental Freedoms) constitute the main basis for the rights discussed in this handbook (see Box 5.1 for the main provisions).

This chapter discusses the main treaties and explains their potential application to members of the armed forces. The treatment of members of the armed forces as citizens in uniform under human rights law is introduced. Next, the chapter deals with the relationship between these treaties and domestic law, and then with the conditions under which these rights can be limited under international law. Finally, the chapter deals with the issue of safeguards for breaches of human rights law.

1. The Main Treaties

The modern law of international human rights is based on the UN Charter (in particular its Preamble and Arts. 1.3, 55, and 56), supplemented by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. In addition, there are UN treaties dealing with discrimination with respect to race and women; the Convention on the Rights of the Child; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment;[24] and conventions concerned with refugees and citizenship (see Box 5.1 below, summarizing the main provisions).

Human rights law is also complemented during times of armed conflict by international humanitarian law.[25] The main treaties are the Geneva Conventions of 1949, with the 1977 Protocols to those Conventions. A number of other treaties also protect human rights by dealing with the criminal liability of individuals, rather than state liability. These include 13 general treaties on terrorism, treaties on genocide and slavery, and the Rome Statute on the International Criminal Court. A number of these provisions can potentially apply to armed forces personnel. This handbook, however, focuses on the human rights of members of the armed forces rather than their duties to respect the human rights of civilians or combatants. We will therefore not discuss international humanitarian law or personal liability in international criminal law except in the limited sphere of commanders' responsibility (see Chapter 20, "The Responsibility of Commanders and Individual Accountability").

UN treaty obligations are further complemented by regional human rights systems. In practice, the main system of relevance to OSCE states is the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, which has been ratified

24 Also see the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

25 See D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1995); I. Detter, *The Law of War* (Cambridge: Cambridge University Press, 2000), 2nd edition.

by 46 states.[26] The European Convention is applicable to all but nine OSCE states: Belarus, Canada, the Holy See, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, the United States of America, and Uzbekistan. Art. 1 of the Convention obliges the contracting states to secure to "*everyone* [emphasis added] within their jurisdiction" the rights and freedoms under the Convention. It therefore applies to members of the armed forces as well as to civilians.

2. The Relevance of Human Rights for Members of the Armed Forces

The approach of treating members of the armed forces as citizens in uniform is long-standing in many domestic legal systems. This requires that service personnel be, so far as is consistent with military life, accorded the normal civil and constitutional rights of other citizens. As we explain further in Chapter 8, treating members of the armed forces as citizens in uniform clearly favours integrating the military into society, rather than the alternative approach of insulating the military from political and social life. For example, the US courts have stated: "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes".[27] At the international level, the same

Box 5.1
Main Human Rights Treaty Obligations and Their Relevance

RIGHT	LEGAL SOURCE	EXAMPLES OF RELEVANCE
Right to Life	**Art. 2 ECHR** **Art. 6 ICCPR** **Art. 6 CRC** **Art. 3 UDHR** (life, liberty, and security)	Extreme bullying of conscripts; inquests into unexplained deaths on military premises or during military service
Right to Liberty	**Art. 5 ECHR** (lists circumstances where scope of the right may be curtailed in cases prescribed by law) **Art. 9 ICCPR** **Art. 5 ICERD** **Art. 10 ICCPR** **Art. 1 UDHR** (liberty and equality) **Art. 3 UDHR** (life, liberty, and security)	Detention under military justice systems
Right to Equality	**Art. 14 ECHR** **Art. 3 ICCPR** (does not list grounds on which discrimination may be based) **Art. 14 ICCPR** (equal before courts and tribunals) **Art. 2 CEDAW** **Art. 15 CEDAW** **Art. 2 ICERD** **Art. 3 ICESCR** **Art. 2 CRC** **Art. 1 UDHR** (liberty and equality) **Art. 2 UDHR** **Art. 6 UDHR** (right to recognition before the law) **Art. 7 UDHR** **Preamble UN Charter**	Differences in treatment of women, religious and ethnic minorities, gay and lesbian service personnel (for example, discharge following pregnancy or upon discovery of sexual orientation, sexual harassment, limits on deployment of women to combat zones)

26 For ratifications by individual states, see: <http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Basic+Texts/Dates+of+ratification+of+the+European+Convention+on+Human+Rights+and+Additional+Protocols>.

27 *Chappell v. Wallace*, United States Supreme Court, 13 June 1983, *United States Reports*, Vol. 462, 1983, pp. 296, 304 (quoting Earl Warren, "The Bill of Rights and the Military", *New York University Law Review*, Vol. 37, 1962, pp. 181, 188).

RIGHT	LEGAL SOURCE	EXAMPLES OF RELEVANCE
Right to a Fair Trial, Hearing, Remedy	**Art. 6 ECHR** (fair and public hearing within a reasonable time) **Art. 7 ECHR** (non-retroactivity) **Art. 13 ECHR** (effective remedy) **Art. 14 ICCPR** (equality before courts and tribunals – gives minimum guarantees) **Art. 15 ICCPR** (non-retroactivity) **Art. 5 ICERD** **Art. 6 ICERD** **Art. 12 CRC** **Art. 6 UDHR** (right to recognition before the law) **Art. 8 UDHR** (effective remedy) **Art. 10 UDHR** (right to a public and fair hearing by an independent and impartial tribunal) **Art. 11.1 UDHR** (innocent until proven guilty)	Courts martial and military justice systems
Right to Freedom of Thought, Conscience, Religion or Belief	**Art. 9 ECHR** **Art. 10 ECHR** **Art. 18 ICCPR** **Art. 5 ICERD** **Art. 12 CRC** (conferred on those capable of forming their own views) **Art. 13 CRC** **Art. 14 CRC** **Art. 18 UDHR** **Art. 19 UDHR** **Art. 5 ICERD**	Right of conscientious objection; restrictions on manifestation of religion (e.g., religious dress conflicting with military uniform requirements, religious dietary requirements, opportunities for religious worship and observance, access to co-members of religious communities, proselytism of fellow service personnel)
Right to not be Subjected to Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment	**Art. 3 ECHR** **Art. 7 ICCPR** (no medical or scientific experimentation without consent) **Art. 12 UDHR**	Bullying of conscripts and initiation rituals
Right to Freedom of Opinion and Expression	**Art. 19 ICCPR** **Art. 19 UDHR** **Art. 10 ECHR** **Art. 13 CRC**	Limits on public statements by members of the armed forces
Right to Peaceful Assembly or Protest	**Art. 11 ECHR** **Art. 21 ICCPR** **Art. 5 ICERD** **Art. 8 ICESCR** **Art. 20 UDHR**	Participation by service personnel in trade unions or civil society groups

approach has been taken by one important human rights body, the European Court of Human Rights, described below.

The human rights of members of the armed forces have additional importance in the contemporary context for two reasons. The first is the changing nature of military operations. Armed forces are now more likely to be deployed on peace-keeping operations than in conventional warfare. Servicemen and -women in peace-keeping operations are frequently called upon to assist political institutions within societies fractured by conflict to re-establish a culture of respect for human rights in their area of operations. They will be in a better position to do this if they themselves have knowledge of, and are accustomed to, such a culture within their own armed forces. Also, where armed forces are not engaged

in conventional combat but in roles analogous to policing, the case for restrictions on their rights for reasons of military discipline is substantially weakened.

Second, the increasing use of multinational military task forces in these and other operations draws attention to differences in the working conditions and rights enjoyed by members of the armed forces in different states. Unless there are good reasons to justify such variations, the differences will inevitably impact the morale and effectiveness of those units enjoying fewer rights.

In April 2006, the Parliamentary Assembly of the Council of Europe affirmed the importance of ensuring that member states respect the human rights of members of the armed forces:

> [A]t a time when armies in many member states are seeing action in the same theatres of operation, the Assembly resolutely promotes shared principles to be used to guide army action and govern the conditions under which they discharge their duties. Members of the armed forces cannot be expected to respect humanitarian law and human rights in their operations unless respect for human rights is guaranteed within the army ranks. It is therefore essential that the Council of Europe's efforts to lay down guidelines on human rights protection within the armed forces be accompanied by a policy in the member states of heightening human rights awareness among their own military personnel.[28]

The "citizens in uniform" approach mentioned above can be seen in relation to several of the most important civil and political rights under the ECHR: freedom of expression; the right to respect for private life, home and correspondence; freedom of thought, belief and conscience; and freedom of association. These are all qualified rights within the convention system, i.e., they are rights that states may restrict provided certain conditions are met. Limitations must be "in accordance with law" or "authorized by law" and "necessary in a democratic society" for one of a number of specified interests. The limitations most relevant to the armed forces are "in the interests of national security", although on occasion "the prevention of disorder" and the protection of the "rights and freedoms of others" have also been cited.

The "citizens in uniform" approach is of relevance not only to armed forces with large numbers of conscripts. It also encapsulates an important more general fundamental point about the position of the armed forces in a democracy under the rule of law. By encour-

Box 5.2

Citizens in Uniform: The Approach of the European Court of Human Rights

The general approach can be seen in the case of *Engel v. Netherlands* (1976).[29]

> "54. … the Convention applies in principle to members of the armed forces and not only to civilians. It specifies in Articles 1 and 14 that 'everyone within (the) jurisdiction' of the Contracting States is to enjoy 'without discrimination' the rights and freedoms set out in Section I. …
>
> "Nevertheless, when interpreting and applying the rules of the Convention in the present case, the Court must bear in mind the particular characteristics of military life and its effects on the situation of individual members of the armed forces."

28 Council of Europe, Parliamentary Assembly Recommendation 1742 (2006). See <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/EREC1742.htm>.

29 *Engel v. Netherlands*, European Court of Human Rights, 8 August 1976, *European Human Rights Reports*, Vol. 1, 1979, p. 647.

aging members of the armed forces to regard themselves as citizens to the fullest extent possible, respect for democratic institutions is enhanced.

3. Relationship between International Human Rights Law and National Law

An initial difficulty that members of the armed forces may encounter in enforcing their human rights stems from the sometimes weak legal status of those rights within the domestic legal system.

Many states have constitutional provisions providing that treaty obligations (such as the human rights provisions discussed earlier) are automatically part of domestic law and, in some cases, giving them priority.

In other states (so-called dualist systems), however, treaties concluded by the executive do not automatically become part of the law of the land and, therefore, do not modify legal rights and duties. While the state is bound in international law, if a change in rights and duties under domestic law is required, there must be specific national legislation.[30] Some states have passed legislation to give international human rights obligations a particular domestic legal status, e.g., placing a duty on the courts to interpret legislation in the light of these commitments where possible but without overriding plainly inconsistent legislation.

In many states, whether or not international treaties have a privileged status, domestic constitutional provisions overlap with the content of these human rights obligations.

Irrespective of these differences, it is relatively common for either parliamentary or other constitutional bodies to vet draft legislation with reference to human rights standards.

Even in the absence of specific constitutional provisions or other legislation, domestic courts frequently refer to international human rights standards, for example:

> "(a) as a foundation of the constitution;
> "(b) as relevant to the determination of the common law;
> "(c) as a declaratory statement of customary international law which is itself part of the law of the land;
> "(d) as evidence of public policy; and
> "(e) as relevant to the interpretation of a statute."[31]

30 See, for example, the "Parlement Belge" case, English Court of Appeals, 1880, *Probate Division Reports,* Vol. 5, 1880, p. 179.

31 *A New Zealand Guide to International Law and its Sources, Report 34* (Wellington: New Zealand Law Commission, 1996), p. 23, available at <http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_38_101_R34.pdf>.

Box 5.3

The Constitution of Bosnia and Herzegovina[32]

Article II Human Rights and Fundamental Freedoms

Paragraph 1 Human Rights

Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. To that end, there shall be a Human Rights Commission for Bosnia and Herzegovina. …

Paragraph 2 International Standards

The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.

Paragraph 3 Enumeration of Rights

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above.

Paragraph 4 Non-Discrimination

The enjoyment of rights and freedoms … shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. …

Paragraph 6 Implementation

Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities shall apply and conform to human rights and fundamental freedoms. …

Paragraph 8 Co-operation

All competent authorities in Bosnia and Herzegovina shall co-operate with, and provide unrestricted access to: any international human rights monitoring mechanisms established for Bosnia and Herzegovina … .

4. Types of Limitations and Derogations

In the context of the rights of members of the armed forces, the extent and scope of restrictions on human rights is of particular significance. Members of the armed forces are likely to assume a central role in dealing with public emergencies, when human rights (including their own) may be suspended. Even in more normal times, however, the special circumstances under which the armed forces operate mean that some restrictions on their rights may be acceptable. Nevertheless, there is an obvious danger that the need for limiting rights will be too easily accepted and that fundamental democratic values will suffer as a consequence. The key issues are to determine which rights may be restricted, under what circumstances, with what procedural protections, and to what extent.

International human rights fall into three basic categories:

- Those that cannot be derogated from (non-derogable rights);
- Those that can be derogated from in a public emergency (derogable rights); and
- Those that *may* be limited by law according to some specified societal interest (qualified rights).

Derogable rights and qualified rights overlap to some extent. These are, however, distinct concepts with very different practical applications. Only where the qualifications permissible to qualified rights are inadequate in an emergency situation need a state consider

32 Constitution of Bosnia and Herzegovina, 1995 (unofficial translation).

derogating from the rights in question, and for that reason derogations of these rights are rarely necessary. Derogations require the observation of certain formalities.

For the most part, where the rights of members of the armed forces are limited, this is because the right is a qualified right, rather than because of a derogation.

Some states enter international human rights treaties with *reservations* (which means that they are not legally bound to recognize the rights in question). One illustration relevant to members of the armed forces is that several OSCE participating States have entered reservations to Art. 6 of the ECHR (the right to a fair trial before an independent and impartial tribunal) with respect to their military justice systems. This applies to the Czech Republic, France, Lithuania, Moldova, Portugal, the Russian Federation, Slovakia, Spain, Turkey, and Ukraine. France, Ireland, and the United Kingdom have similarly made reservations to the ICCPR concerning discipline in their armed forces.[33]

Non-derogable rights

Under Art. 4.2 of the ICCPR, some rights cannot be limited even in emergencies. These are listed in Box 5.4 below.

Box 5.4

Non-derogable Human Rights[34]

According to Art. 4.2 of the ICCPR, no derogation is permitted from the following rights:

- To life (Art. 6);
- Not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Art. 7);
- Not to be held in slavery or servitude (Art. 8);
- Not to be imprisoned for failure to perform a contractual obligation (Art. 11);
- Not to be subject to retroactive penal measures (Art. 15);
- To recognition as a person before the law (Art. 16);
- To freedom of thought, conscience, and religion or belief (Art. 18).

Similar restrictions on the derogation of rights can be found in Art. 15.2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The following rights may not be derogated from: the right to life (Art. 2), except in the case of deaths resulting from lawful acts of war; the right not to be tortured or subjected to inhuman or degrading treatment or punishment (Art. 3); the right not to be held in slavery or servitude (Art. 4.1); the right not to be punished by retroactive laws, i.e., for actions that were not in violation of criminal law when performed (Art. 7).

Derogable rights and emergencies

In emergency situations, there is a heightened risk of human rights violations.[35] For this reason, international treaties both set limits on which rights can be derogated from and impose procedural requirements on states.

Art. 4 of the ICCPR states:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the states parties to the present Covenant

33 Rowe, *op. cit.*, note 4, p. 78.

34 International Covenant on Civil and Political Rights (entered into force in 1976).

35 For principles governing emergencies, see <http://www.dcaf.ch/_docs/backgrounder_02_states_emergency.pdf>.

may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any state party to the present Covenant availing itself of the right of derogation shall immediately inform the other states parties to the present Covenant, through the intermediary of the Secretary-General of the UN, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

More detailed procedural stipulations concerning emergency situations have been made by the UN Human Rights Committee[36] and also by meetings of internationally recognized expert jurists.[37]

5. Safeguards for Human Rights Violations

International human rights treaties offer a variety of means of protecting rights and providing remedies for violations.[38] These include:

- *Reporting requirements* for member states (in the case of the ICCPR, the ICESCR, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, and the UN Convention on the Rights of the Child);
- *International monitoring committees of experts* (in the case of the ICCPR, the ICESCR, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, and the UN Convention on the Rights of the Child);
- *Reference by another state* (in the case of the ICCPR, the International Convention on the Elimination of All Forms of Racial Discrimination, and the European Convention for the Protection of Human Rights and Fundamental Freedoms);
- *The right of individual petition to an international court* for a person who claims that their rights have been violated (the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Optional Protocols to the ICCPR and CEDAW).

It must be pointed out, however, that before recourse is made to an international body, a person complaining of a human rights violation must usually first exhaust the available domestic remedies.[39] This principle emphasizes two things: the importance of national institutions in providing redress; and that international courts and other institutions are the

36 Human Rights Committee, "General Comment 29: States of Emergency (Article 4)", UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), <http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/71eba4be3974b4f7c1256ae200517361/$FILE/G0144470.pdf>.

37 Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, <http://wwwserver.law.wits.ac.za/humanrts/instree/siracusaprinciples.html>; also see the Paris Minimum Standards of Human Rights Norms in a State of Emergency, International Law Association, 1984, reprinted in *American Journal of International Law*, Vol. 79, 1985, p. 1072.

38 See D. Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 2005), 2nd edition.

39 For example, Art. 35.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

second line of defence against violations of human rights. The rule requiring the exhaustion of domestic remedies also points to the importance of domestic constitutional and legislative protections for the human rights of members of the armed forces, as discussed in Chapters 6 and 7 of this handbook.

Several of the international mechanisms above are discussed in more detail in the chapters that follow, e.g., those dealing with women in the armed forces, as well as ethnic and linguistic minorities. We conclude this chapter, however, by providing an overview of two major UN treaties — the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights — and the major regional human rights treaty relevant to most OSCE participating States: the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.

International Covenant on Civil and Political Rights

Art. 2 of the International Covenant on Civil and Political Rights (ICCPR) obliges states parties to respect and to ensure to everyone within their territory and subject to their jurisdiction the rights recognized in the Covenant, without distinction of any kind. States parties also undertake to take the necessary steps, to adopt any laws or other measures that may be necessary to give effect to these rights. States also undertake to ensure that any person whose Covenant rights or freedoms are violated will have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity. They must also ensure that any person claiming such a remedy will have their right to such a remedy determined by competent judicial, administrative, or legislative authorities, or by any other competent authority provided for by the legal system of the state, and they undertake to develop the possibilities of judicial remedy. Finally, they undertake to ensure that the competent authorities will enforce such remedies when granted.

The Human Rights Committee set up under the ICCPR monitors measures adopted by states parties in implementing their obligations under the Covenant (Art. 28.1). This Committee, or monitoring body, is comprised of 18 experts "of high moral character and recognized competence in the field of human rights", elected by states parties (Arts. 29-39).

States parties are required to submit a report to the Secretary-General of the United Nations, for consideration by the Committee, on the various measures adopted in order to meet the objectives of the Covenant. States parties are required to do this within one year of the Covenant entering into force in a particular state party and, thereafter, at any time the Committee so requests (Art. 40). It is also possible for one state party to refer another state party to the Committee if it believes that that state party is not giving effect to the provisions of the Convention (Art. 41).[40]

Under the First Optional Protocol to the ICCPR, it is possible for an individual to petition the Human Rights Committee. If the Committee finds that a state party has violated the

40 The Committee may only take action if the state party being reported has made a declaration recognizing the Committee as competent to hear complaints that it has failed in its obligations (Art. 41.1). Arts. 41 and 42 go on to deal with the process. In brief, the stages are as follows:

1. Written communication from the complaining state party to the receiving state party. Within three months, the receiving state party should reply to the complaining state party (Art. 41.1).
2. If no solution is found within six months, then either state party may refer the matter to the Committee (Art. 41.1.b).
3. The Committee shall only deal with the matter once it has obtained all the relevant information from the states parties concerned (Art. 41.1.c).
4. The Committee shall produce a report within 12 months of the matter being referred to it (Art. 41.1.h).
5. The report shall contain all the pertinent facts and the solution to the matter in hand (Art. 41.1.h.ii).

Should no satisfactory solution be found after this process, then the Committee may appoint an ad hoc conciliation commission of five members agreeable to all concerned parties. This commission will then produce its own report, adopting a procedure very similar in nature to that outlined above.

Covenant, it relates its views to the state concerned and publishes them. The Committee often specifies a particular remedy or action to be taken by the state concerned, either specifically to provide an effective remedy to the complainant or more generally.[41]

International Covenant on Economic, Social and Cultural Rights

According to Art. 16 of the Covenant, enforcement is achieved, at first instance, by states parties submitting reports on measures adopted in pursuit of the aims and objectives of the Covenant. These are delivered to the Secretary-General, who then transmits them to the Economic and Social Council (Art. 16.2).

The reports should contain such information as "factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant" (Art. 17.2). The Economic and Social Council may submit reports to the General Assembly that include general recommendations applicable to all states parties in order to meet the aims and objectives of the Covenant (Art. 21). In 1985, the Council created an expert body, the Committee on Economic, Social and Cultural Rights, to assist it in monitoring compliance by states parties with their obligations under the Covenant and in monitoring the level of implementation. States make reports to the Committee every five years.[42]

European Convention for the Protection of Human Rights and Fundamental Freedoms

The Convention established a court (the European Court of Human Rights) at Strasbourg, which may be petitioned by individuals, companies, and non-governmental organizations that claim that their Convention rights have been violated. The Court may award what the Convention calls "just satisfaction", usually monetary compensation for damage resulting from a violation of the Convention,[43] to individuals whose rights have been violated. State compliance with the determinations of the European Court of Human Rights is overseen by the Council of Ministers. In addition, various Convention rights impose obligations on states concerning remedies for human rights violations.

Art. 13 states that parties to the Convention have agreed to provide effective domestic remedies for people who claim that their Convention rights have been violated. The European Court of Human Rights has also interpreted certain Convention rights to impose positive obligations, i.e., a state has the duty not merely to refrain from certain actions through official bodies but also to take steps to protect everyone from such actions by private individuals. Hence, where a claim involving a violation of the right to life (Art. 2) is involved, states are required to have effective and independent means of investigating the circumstances of death.[44] This is especially relevant in cases of alleged mistreatment or bullying in the armed forces. In addition, the right not to be subject to torture or inhuman or degrading treatment or punishment (Art. 3) imposes on states a positive duty to prevent such acts and to punish those responsible through the legal process.

Fundamental rights in European law

Finally, the protection of fundamental rights under European Union law should be mentioned. This is a matter of potential importance since 27 OSCE participating States are

41 Shelton, *op. cit.*, note 38, pp. 183-187.

42 Office of the High Commissioner for Human Rights, "Fact Sheet No.16 (Rev.1), The Committee on Economic, Social and Cultural Rights", <http://www.unhchr.ch/html/menu6/2/fs16.htm>.

43 In some cases, the Court may issue specific measures to remedy the situation complained of beyond ordering monetary compensation, though this is quite rare. See, for example, the case of *Broniowski v. Poland*, European Court of Human Rights, 22 June 2004, *European Human Rights Reports*, Vol. 40, p. 21.

44 *McCann v. UK*, European Court of Human Rights, 27 September 1995, *European Human Rights Reports,* Vol. 21, 1996, p. 97; *Kaya v. Turkey*, European Court of Human Rights, 19 February 1998, *European Human Rights Reports*, Vol. 28, 1998, p. 1; *Hugh Jordan v. UK*, European Court of Human Rights, 4 May 2001, *European Human Rights Reports*, Vol. 37, 2001, p. 52.

members of the European Union. The Treaty on European Union proclaims in Art. 6 the importance of human rights within both member states and European institutions.

Article 6 of the Treaty on European Union

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles that are common to the Member States.

2. The Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

The European Council may, with the assent of the European Parliament, decide to investigate persistent and serious human rights breaches in a member state and impose sanctions by suspending the rights of the state.[45] In addition, the Charter of Fundamental Rights of the European Union was adopted in Nice in 2000.[46] European law also protects human rights more specifically and narrowly through Treaty provisions, regulations, and directives dealing with issues such as equality (see Chapters 12-14). Moreover, judicial doctrine requires effective enforcement of the fundamental rights of citizens of the Union not just at the European level (for example, the European Court of Justice) but also in the national legal systems of each member state.

The application of these principles to members of the armed forces within European Union states tends, however, to be more problematic because of arguments about the competence of European institutions to make law concerning national armed forces. Both the treaties and specific directives contain a number of exceptions protecting national sovereignty over defence matters. Nonetheless, in specific instances where these do not apply, European law may be successfully used to protect the rights of members of the armed forces (see, for example, the *Kreuil* case discussed in Chapter 13, Box 13.4).

45 Treaty of European Union, Art. 7.

46 "Charter of Fundamental Rights of the European Union", *Official Journal of the European Communities*, 18 December 2000, 2000/C 364/01, <http://ec.europa.eu/external_relations/human_rights/doc/charter_364_01en.pdf>.

Chapter 6
General Constitutional Framework

This chapter concerns the treatment of armed forces and the rights of servicemen at the constitutional level. It first explains the relevance of constitutional provisions in this area, especially within the movement towards democratic reform. It then examines the ways in which constitutions apply to the role of the armed forces, especially in defining their mission and in providing for constitutional approval of decisions to deploy the military, whether in wartime or in peace-keeping operations. Finally, it deals with the constitutional rights enjoyed by service personnel and the impact of these rights on military justice.

1. Issues at Stake

A clear constitutional basis for the armed forces is important for several reasons. In nearly all countries, a written constitution provides the basis for the legitimacy of state institutions, and the armed forces are a key state institution, one that protects citizens, territorial integrity, the system of government, and essential services.[47] These vital tasks should be clearly recognized and brought under the constitutional order so that the military is not beyond the law. In that way, the military will enjoy legitimacy and the support of democratic institutions. Although the security of the state may ultimately be founded on the possible use of force, such force should be used in support of the constitutional order, and not above or beyond it.

Constitutions commonly deal with the following matters:

- *Legal structure*: legislative mechanisms, principles governing non-legislative sources of power (e.g., royal prerogative), procedures for passing emergency legislation, constitutional provisions for derogations from human rights, processes governing entering international agreements for security co-operation;
- *Accountability mechanisms*: the allocation of authority for national defence, security, and intelligence between branches of the state; prohibition on defence or security officials holding parliamentary or ministerial office; powers of the legislature; constitutional powers of the courts (e.g., constitutional review);
- *Independent review:* security of tenure for officials, constitutional guarantees for independence of the judiciary, the position of military courts;
- *Individual rights*: As citizens in uniform, members of the armed forces enjoy constitutional rights and freedoms. In addition, a number of constitutional provisions deal in detail with the right of conscientious objection to military service (see Box 6.2 below).

In transition states especially, the adoption of a new constitution is a significant watershed in bringing the military under civilian control and ensuring its future political neutrality. The constitutions of transition states commonly contain explicit guarantees defining and limiting the role of the military.

For the armed forces themselves, the constitution provides a firm foundation for their actions in times of crisis. Hence, the constitution may deal with the prerequisites for engaging in armed conflict and specific powers or duties during a state of emergency. It may also provide protection for the military from unconstitutional commands, e.g., instructions to act against political protesters, to engage in civilian law enforcement, or to occupy buildings housing democratic institutions.

47 Art. 9 of the Constitution of Bulgaria (Armed Forces): "The armed forces shall guarantee the sovereignty, security, and independence of the country and shall defend its territorial integrity."

Moreover, much of the role of the armed forces in modern societies involves international co-operation, whether in strategic security alliances or in peace-keeping missions. The constitution will usually specify the effect and importance of international treaties and any process for approval at the domestic level. This is of crucial significance in the case of duties of mutual support (e.g., the effect of Art. 5 of the NATO treaty).

Finally, constitutions commonly specify the rights and duties of citizens. The constitution will therefore limit the powers of the armed forces over civilians. In addition, individual members of the armed forces will look to the constitution for guarantees of their own position.

Although many constitutions do not deal with the human rights of armed forces personnel specifically, they do establish the context for the functioning of the armed forces at home and abroad. Where constitutional provisions do deal with the armed forces, they commonly concern two distinct issues: specifying the role of the armed forces and dealing with the allocation of authority for their control.

Some older established democracies (e.g., France and the United Kingdom) have not found it necessary to prescribe the role of the military in detail. Instead, they rely on general principles establishing the competences of the organs of the state, recognized within the constitution (e.g., the presidential prerogative in military matters under the 1958 Constitution in France's case). However, this is not a pattern that can be generally advocated, especially for states that have undergone profound change. Even some older democracies have found it useful to provide more precise guarantees. For example, the Netherlands' Constitution (Art. 100) requires Parliament to be informed if the armed forces are employed "for the maintenance or promotion of the international rule of law", and Art. 19 of the Danish Constitution imposes a duty to inform Parliament of military operations.

Keeping in mind that government behaviour is guided not only by constitutions but also by laws, customs, and practices, the remainder of this chapter will discuss the role of the armed forces, as well as control of the armed forces.

2. The Role of the Armed Forces

Several broader constitutional features may affect the way a constitution specifies the various roles of the armed forces. One is the extent to which ordinary legislation (as opposed to the constitution) deals with matters of detail concerning state bodies. Another is the status of international agreements, whether, for example, international treaty commitments are treated as part of the constitution.

Many constitutions simply specify in broad terms the mission of the armed forces in maintaining security and protecting territory and the constitutional order. In some cases, more specific tasks may be defined in the constitution. The German Constitution, for example (Box 6.1 below), makes particularly detailed reference to the tasks and powers of the armed forces, a feature resulting from German history. For the most part, however, these matters are dealt with at the level of more detailed legislation (discussed in Chapter 7, "Domestic Legislation"). More rarely, as in the case of the UK and France, the tasks of the armed forces are specified at the governmental level.[48] The level at which the tasks of the armed forces are specified will affect the ease with which their role can be changed and whether specific deployments of the military can be challenged on constitutional grounds. Constitutional

48 Nolte, *op. cit.*, note 6, pp. 34-39.

reform may be difficult to effect and may promote a national debate on the state's place within the international community.

Box 6.1

The German Constitution[49]

The tasks and powers of the German armed forces are defined in the Constitution (Basic Law) of the Federal Republic of Germany: territorial and alliance defence against an attack with military means (Art. 87.a, Basic Law). Once a state of defence (Art. 115, Basic Law) or a state of tension (Art. 80.a, Basic Law) has been determined by the *Bundestag*, the domestic tasks of the armed forces will be extended (Art. 87.a (3), Basic Law): they will then have the additional power to protect civilian property against attacks of non-combatant provocateurs and to discharge functions of traffic control as necessary to fulfil their actual defence tasks.

Due to a 1968 amendment to the Basic Law in case of an "internal emergency" the armed forces may — upon a decision of the Federal Government — also be deployed to support the police and the Federal Border Police in protecting civilian property and combating organized and militarily armed insurgents (Art. 87.a.4 and Art. 91, Basic Law).

Finally, based on a decision of the Federal Constitutional Court of 1994 (BVerfGE 90, p. 286) armed forces may participate in international peace missions to the extent that these are implemented within the framework and according to the rules of a system of mutual collective security (United Nations, NATO) (Art. 24.2, Basic Law). The Basic Law obliges the Federal Government to obtain the prior consent of the *Bundestag* for any such participation.

Upon the request of one of the German states (Art. 35.2, Basic Law), the armed forces may also be deployed for internal relief operations in the event of a natural disaster or an especially serious accident.

Reference may be made, as in the case of the Hungarian Constitution, to international obligations. A principle of neutrality for the armed forces may be explicit, as in the case of the Austrian Constitution. Some constitutions (such as those of Denmark and Ireland — see below) do not limit the specific tasks that may be undertaken but instead apply a negative restriction, that of parliamentary approval before the use of armed force against any foreign state. A prohibition on aggression may be contained in the constitution. Reference to international peace-keeping is made in the Netherlands' Constitution.

Box 6.2

Examples of Constitutional Provisions

Spain: Art. 8.1 (Armed Forces)

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

Romania: Art. 117 (Armed Forces, Police)

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

Hungary: Art. 40A (Duty)

(1) The fundamental duty of the armed forces (Hungarian Army, Border Guard) is the military defence of the country and participation in collective defence duties under an international treaty.

Austria: Art. 9a (Defence, Military Service)

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

49 German response to the 2004 Information Exchange on the OSCE Code of Conduct on Politico-Military Aspects of Security. For an explanation of the OSCE Code of Conduct on Politico-Military Aspects of Security, see Chapter 4.

Box 6.2 (cont.)

Denmark: Art. 19.2
2) Except for purposes of defence against an armed attack upon the Realm or Danish forces, the King shall not use military force against any foreign state without the consent of the Parliament. Any measure that the King may take in pursuance of this provision shall immediately be submitted to the Parliament. If the Parliament is not in session, it shall be convoked immediately.

Republic of Ireland: Art. 28.3
(3.1) War shall not be declared and the State shall not participate in any war save with the assent of the House of Representatives.

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

Examples of Non-Aggression Provisions

Azerbaijani Constitution (1995)
Art. 9 (Military Forces)
(2) The Republic of Azerbaijan rejects war as a means of infringement on the independence of other states and as a means for settling international conflicts.

Italian Constitution
Art. 11 (Repudiation of War)
Italy repudiates war as an instrument offending the liberty of peoples and as a means for settling international disputes; it agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed; it promotes and encourages international organizations furthering such ends.

German Constitution
Art. 26 (Ban on Preparations for War of Aggression)
(1) Acts with the potential to, and undertaken with intent to, disturb the peaceful relations between nations, especially to prepare war or aggression, are unconstitutional. They have to be made a criminal offence.

Art. 87a (Establishment and Powers of the Armed Forces)
1. The Federation shall establish Armed Forces for purposes of defence. Their numerical strength and general organizational structure must be shown in the budget.

3. Constitutions and Human Rights of Armed Forces

Constitutional provisions dealing with the human rights of members of the armed forces tend to be introduced for two reasons. First, in countries with conscript armies, the constitution may provide a right of conscientious objection to the duty of military service. A number of these constitutional provisions are summarized in Box 6.3 below, and the whole question of conscientious objection to military conscription is discussed in greater detail in Chapter 10.

Second, the history of a particular country may suggest that it is necessary to guarantee the neutral role of the armed forces at the highest normative level in the constitution. For example, the constitution may enforce a separation between the military and political leadership. In such a case, the human rights of members of the armed forces are to some extent restricted in pursuit of a higher constitutional goal. Restrictions on the political rights of members of the armed forces are dealt with at greater length in Chapter 8.

These two concerns apart, it is uncommon for matters touching on the human rights of members of the armed forces to be referred to in a written constitution. The tendency has been to regard members of the armed forces as citizens in uniform, i.e., they enjoy the same basic civil and political rights as the remainder of the population, subject, where necessary because of their role, to legal restrictions.

Box 6.3

Examples of Constitutional Provisions Concerning Conscientious Objection

Estonia	Those who refuse service in the Defence Forces for religious or ethical reasons shall be obliged to participate in alternative service, in accordance with the procedures prescribed by law.	Art. 124.2
Germany	A person who refuses, on grounds of conscience, to render war service involving the use of arms can be required to render a substitute service. The duration of such substitute service may not exceed the duration of military service. Details are regulated by a statute that may not interfere with the freedom to take a decision based on conscience and that must also provide for the possibility of a substitute service not connected with units of the Armed Forces or of the Federal Border Guard.	Art. 12a.2
Portugal	Conscientious objectors who by law are subject to the performance of military service shall perform civic service with the same duration and degree of arduousness as armed military service.	Art. 276.4
Slovenia	Citizens who for their religious, philosophical, or humanitarian convictions are not willing to perform military duties must be given the opportunity to participate in national defence in some other manner.	Art. 123.2
Spain	The law shall determine the military obligations of Spaniards and shall regulate, with all due guarantees, conscientious objection, as well as other grounds for exemption from compulsory military service; it may also, when appropriate, impose community service in place of military service.	Art. 30.2

Box 6.4

Constitutions and Human Rights of Armed Forces: Selected Examples

Polish Constitution

Art. 26.2

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

More general is **Art. 52 of the Italian Constitution**

1. The defence of the fatherland is the sacred duty of every citizen.
2. Military service is compulsory within the limits and under the terms of the law. The fulfilment of military duties may not prejudice a citizen's position as an employee or the exercise of his political rights.
3. The rules about armed forces must conform to the democratic spirit of the republic.

4. Constitutional Provisions and Military Courts

Three patterns exist. In some countries with military court systems, the constitution is simply silent and makes no reference to them, e.g., Slovakia, Hungary, Lithuania, and Romania. In other instances, the constitutional provisions merely recognize existing military law (in effect giving it priority over other constitutional provisions): Luxembourg (Art. 94 of the 1868 Constitution) and Latvia (Art. 86 of the Constitution) are in this category. Third, there are constitutions that seek to govern to a greater or lesser extent the application of military law and the jurisdiction of military courts (for example, Art. 38.4 of the Irish Constitution of 1937). In this third category, the variations essentially concern the detail with which the provisions delimit offences and personnel within the permissible reach of these tribunals.

The whole question of military justice and human rights for members of the armed forces is discussed further in Chapter 21.

Chapter 7
Domestic Legislation

This chapter is concerned with the recognition in domestic law of the human rights of members of the armed forces, whether civil and political rights such as the right to vote and to participate in political affairs, privacy, freedom of expression and so on, or social and economic rights, such as social security, education, and housing.

This is a narrower focus than military law in general, much of which is concerned with imposing specific legal *duties* upon members of the armed forces to underline the disciplined environment in which they operate, e.g., dealing with issues such as desertion, absence without official leave, insubordination, mutiny, aiding the enemy, and sleeping on duty. We are not concerned in general with such offences in this study, although human rights aspects of military justice procedures are examined in Chapter 21.

However, the *rights* of members of the armed forces may also be spelled out in law. One advantage of doing so explicitly, rather than relying upon general constitutional or legal provisions applicable to all citizens, is that the legal parameters of the rights in question can then be specified in a way that is appropriate to a military environment.

This chapter deals first with the need for defence legislation, and then with its scope, with the connection between legislation and broader methods of parliamentary accountability. We address these matters because the human rights protection given to members of the armed forces operates within a broader context of the position of the military within a democratic state. Finally, the chapter deals with legislation and the human rights of armed forces personnel.

1. The Need to Legislate on Defence Matters

The rule of law is a fundamental and indispensable element of democracy. National security should not be used as a pretext to abandon the commitment to the rule of law that characterizes democratic states, even in extreme situations. The need for legislation and parliamentary accountability to govern the armed forces is also recognized by a range of international organizations, as Box 7.1 indicates.

Legislation is the legal embodiment of democratic will. In most states, approving legislation (along with scrutiny of government actions) is among the key roles of the parliament. It is therefore appropriate that, in democracies, where the rule of law prevails, the armed forces derive their existence and powers from legislation, rather than from customary or common-law powers such as the common-law doctrine of prerogative. Legislation enables conscious consideration and design by law-makers of the principles in this area, rather than their evolution or chance survival from a different historical era. Moreover, in order to claim the benefit of legal exceptions to human rights standards for reasons of national security, it is necessary that the armed forces derive their authority from legislation.

The competence to legislate on defence matters is often dealt with by the constitution. In this sense, it is a constitutional duty for parliaments to legislate. However, there are also pragmatic considerations. Parliamentary involvement gives legitimacy and direct democratic accountability. It can help to ensure that the armed forces are serving the state as a

Box 7.1

The Need for Democratic Oversight of Armed Forces as Adopted by Selected International Organizations

Organization	Norm/Standard	Source
UNDP	Democratic civilian control of the military, police, and other security forces (report enumerates principles of democratic governance in the security sector)	Human Development Report (2002)
OSCE	"The democratic political control of military, paramilitary and internal security forces as well as of intelligence services and the police" (specified by a detailed set of provisions)	Code of Conduct on Politico-Military Aspects of Security (1994)
Council of Europe (Parliamentary Assembly)	Government measures must be both lawful and legitimate. Consequently, some form of democratic supervision is required, the essence of which must be carried out by parliament. The judiciary, in turn, plays a crucial role because it can punish any misuse of exceptional measures in which there may be a risk of human rights violations. International organizations also play an increasing role in guiding policies and harmonizing rules.	Recommendation 1713 (2005)
EU (European Parliament)	Specifying the Copenhagen Criteria for accession to include: "legal accountability of police, military and secret services …".	Agenda 2000, § 9
Summit of the Americas	"The constitutional subordination of armed forces and security forces to the legally constituted authorities of our states is fundamental to democracy."	Quebec Plan of Action (2001)

whole and protecting the constitution, rather than narrower political or sectional interests. Proper control ensures a stable, politically bi-partisan approach to defence that is to the benefit of the state and of the armed forces themselves. The involvement of parliamentarians can help to ensure that the use of public money on defence is properly authorized and accounted for.

Parliamentary approval of the creation, mandate, and powers of the armed forces is a necessary but insufficient condition for upholding the rule of law. A legal foundation increases the legitimacy both of the existence of the armed forces and the (often exceptional) powers that they possess. As in other areas, one key task of the legislature is to delegate authority to the administration but also to structure and confine discretionary powers in law.

2. Legislation and Parliamentary Accountability

As Box 7.2 shows, law-making is only one of a number of roles that parliaments usually play. In addition, in the context of control of the armed forces, parliaments may call the

Box 7.2

Instruments or Tools That May Be Used by Parliament in Legislating for the Armed Forces

1. General Powers

a. To initiate legislation;

b. To amend or to rewrite laws;

c. To question members of the executive;

d. To summon members of the executive to testify at parliamentary meetings;

e. To summon military staff and civil servants to testify at parliamentary meetings;

f. To summon civilian experts to testify at parliamentary meetings;

g. To obtain documents from the executive;

h. To carry out parliamentary inquiries;

i. To hold hearings.

executive to account and also hear relevant testimony, perform budgetary control, approve military missions, examine defence procurement, and approve defence policy and manpower. All these roles can complement the legislative process and some (e.g., approval of military missions and procurement) may be the subject of specific legislation. Some of the general powers that parliaments may exercise in relation to law-making are illustrated in the following box dealing with the case of Poland.

Box 7.3

Parliament's Wider Role: Poland[50]

Parliament, i.e., the Sejm and the Senate, being the supreme legislative organ, deals with defence-related issues, including those pertaining to the Armed Forces, in the course of the legislative process and when setting the basic course for the state's activities and establishing its policy principles. These issues also come to the fore when financial plans and normative acts associated with the state budget are being drafted. Furthermore, Parliament passes laws regulating basic defence-related matters, thereby directly influencing the functioning of both the Minister of National Defence and of the Ministry; adopts the defence budget of the state and controls its implementation, with the transparency of both defence budget framing and implementation oversight guaranteed; has a say in appointing to the post of Minister of National Defence a civilian who is a member of a democratically elected government and holds him to account for his discharge of state defence-related responsibilities.

Both Parliament and parliamentary committees also exercise specific oversight functions, with state defence in the Sejm being the preserve of the National Defence Committee.

The said oversight functions are the responsibility of the Sejm National Defence Committee, the Sejm Committee for Special Services, the Senate Committee for National Defence, as well as of individual Sejm deputies and senators whenever they query government representatives during parliamentary proceedings. The Sejm National Defence Committee's area of authority and responsibility encompasses national-defence-related matters, especially those falling within the remit of the Armed Forces. It further controls the system and functioning of the country's Territorial and Civil Defence, and the actual discharge by state organs, co-operative and social organizations, individual citizens, and defence industries of their respective duties to strengthen the defence capability of the nation.

Parliament makes political and economic decisions to ensure internal security and establish a system for the state's internal security. It decides on the principles of the state's internal security, the authority of public bodies in this respect, and the size of government spending on internal security. Parliament together with its commissions exercises oversight over the internal security forces.

It should be noted that individual legislators often perform the additional function of redressing grievances by officially pursuing complaints that are raised by citizens. In a number of states, this function is formalized through legislators' representation of voters in a specific geographical area or constituency. The more general concern of legislators with maladministration by public bodies, including the armed forces, has led to the establishment in many countries of independent offices such as ombudsmen to investigate individual cases and to report to Parliament. The importance of a number of these offices – especially military ombudsmen — in protecting human rights of members of armed forces is discussed further in Chapter 22.

3. The Scope of Defence Legislation

Legislation concerning defence and the armed forces in general may address a wide range of issues, e.g., the role of the military, the chain of command, political neutrality, the status of military personnel, conscientious objection, states of emergency, military discipline and

50 Polish response to the Information Exchange on the OSCE Code of Conduct, 2004.

offences, military justice systems, legal redress and complaints mechanisms, liability for unlawful orders and for violations of human rights, rights of complaint, redress and appeal, salaries and pensions, and insurance rights for family members in case of accidental death of, or injury to, members of the armed forces.

Box 7.4

The Scope of Defence Legislation: United States[51]

Many of the specific statutes that apply to the Department of Defense are contained in Title 10 of the United States Code, which describes the functions of the Department of Defense, its powers, and its key officials. It establishes the Joint Chiefs of Staff, combatant commands, the reserve components and their inter-relationships. Special rules within Title 10 provide authority for military support to civilian law enforcement agencies (chapter 18), humanitarian and other assistance to foreign countries (chapter 20), Department of Defense intelligence matters (chapter 21), and the Uniform Code of Military Justice (chapter 47). Title 10 also includes provisions pertaining to training, pay, procurement, and financial accountability.

There are statutory positions such as the general counsel for the secretary of defence, and for the Army, Navy, and Air Force, and judge advocates general for the Army, Navy, and Air Force who assure proper legal advice, reviews of programmes and operations, and oversight.

In legislating for the armed forces, parliaments can ensure that the rule of law is applied not merely in the superficial sense of providing legal authority for the work of the armed forces but also in a deeper sense: parliamentarians can ensure that the law governing the armed forces is clear, comprehensive, consistent, and in conformity with human rights standards.

Much of military law, however, is concerned with imposing specific legal *duties* upon members of the armed forces to underline the disciplined environment in which they operate, e.g., dealing with desertion, absence without official leave, insubordination, mutiny, aiding the enemy, and sleeping on duty. Those parts of military justice dealing with ordinary crimes and disciplinary offences with no human rights implications are not of interest to this study. Other aspects of military justice systems touching on the right to a fair trial or where a member of the armed forces stands to be disciplined under military law for exercising a human right such as free speech are, however, inseparable from this concern with human rights (the question of how military justice conforms to fair-trial standards is covered in Chapter 21).

4. Legislation and Human Rights of Armed Forces Personnel

Legislation may be utilized to set out in positive terms the civil, political, and social rights of members of the armed forces. An example of a wide-ranging piece of legislation dealing with the rights of members of the armed forces is the Law of the Russian Federation on the Status of Military Personnel[52] (see Box 7.5).

51 US response to the Information Exchange on the OSCE Code of Conduct.

52 The legal basis of the national system for the protection of the human rights of members of the armed forces is the Constitution of the Russian Federation, the laws on "Defence", "Military Obligation, Service and Army", "Status of Members of the Armed Forces", "Providing Pensions for Persons Who Performed Military Service and Officials of Internal Affairs and Their Families", and a number of other legal acts.

Box 7.5

Legislating for the Rights of Members of the Armed Forces: Russian Federation[53]

Status of Military Personnel – **Federal Law No. 76 of 27 May 1998 on the Status of Military Personnel**

Protection of the Freedoms, Honour, and Dignity of Military Personnel – **Art. 5**

Right to Freedom of Movement and Choice of Residence – **Art. 6**

Freedom of Speech, Participation in Meetings, Rallies, Demonstrations, Processions, and Picketing – **Art. 7**

Freedom of Conscience and Religion – **Art. 8**

Right to Participation in Management of Government and Public Unions – **Art. 9**

Right to Work – **Art. 10**

Service Time and Right to Rest – **Art. 11**

Monetary Allowance – **Art. 12**

Additional Payments – **Art. 13**

Clothing Supply – **Art. 14**

Right to Housing – **Art. 15**

Right to Health Care and Medical Aid – **Art. 16**

Property Rights: Tax Privileges – **Art. 17**

Right to Education and Rights in the Field of Arts – **Art. 19**

Use of Transport – **Art. 20**

Right to Appeal against Illegal Orders – **Art. 21**

Rights in Legal Proceedings – **Art. 22**

Social Security Rights – **Art. 24**

Additional Privileges during Service in a State of Emergency – **Art. 25**

General Duties – **Art. 26**

Official and Special Duties – **Art. 27**

Laws are especially important if the human rights of armed forces personnel are to be limited for reasons of national security. Because human rights are essential for every member of a polity, including the military, it is important that limitations on the human rights of armed forces personnel be backed up with safeguards in order to avoid abuse or otherwise unjustified limitations.

OSCE participating States committed themselves in the Code of Conduct on Politico-Military Aspects of Security[54] to "reflect in their laws or other relevant documents the rights and duties of armed forces personnel" (para. 28) and to "ensure that military, paramilitary and security forces personnel will be able to enjoy and exercise their human rights and fundamental freedoms as reflected in [O]SCE documents and international law, in conformity with relevant constitutional and legal provisions and with the requirements of service" (para. 32).

Where it is necessary to place restrictions on the rights of members of the armed forces, these should be clearly based on legal authority and conform to relevant treaty provisions.

53 Federal Law No. 76 of 27 May 1998 (as amended) on the Status of Military Personnel. An unofficial translation is available on the website of the Geneva Centre for the Democratic Control of the Armed Forces at <http://www.dcaf.ch/_docs/eng-book/24_StatusMilPersons.pdf>.

54 OSCE Code of Conduct on Politico-Military Aspects of Security, 3 December 1994.

For most members of the OSCE, the European Convention for the Protection of Human Rights and Fundamental Freedoms sets minimum standards for legal restrictions on the rights of service personnel, such as limitations on their right to respect for private life, freedom of thought and belief, freedom of expression, and freedom of association (Arts. 8-11, respectively). Similarly, in order to conform to the right to a fair trial under Art. 6 of the ECHR, military justice must operate through "an independent and impartial tribunal *established by law* [emphasis added]".

The European Convention for the Protection of Human Rights and Fundamental Freedoms stipulates that, in a democratic society, the right to privacy (Art. 8); the freedom of thought, conscience, and religion or belief (Art. 9); the freedom of expression (Art. 10); and the freedom of association and assembly (Art. 11) can be limited where necessary in the interests of a democratic society if the restrictions are "in accordance with law" and in pursuit of certain interests. Different permitted restrictions apply in each case, as the box below shows.

Box 7.6

Restrictions under Arts. 8-11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[55]

Permitted Grounds for Restriction	Convention Right			
	Respect for Private Life (Art. 8)	Freedom of Thought, Conscience, and Religion or Belief (Art. 9)	Freedom of Expression (Art. 10)	Freedom of Assembly and Association (Art. 11)
National Security	✓	✗	✓	✓
Public Safety	✓	✓	✓	✓
Economic Well-being	✓	✗	✓	✗
Prevention of Disorder or Crime	✓	✓	✓	✓
Protection of Health or Morals	✓	✓	✓	✓
Protection of the Rights and Freedoms of Others	✓	✓	✓	✓
Protecting Territorial Integrity	✗	✗	✓	✗
Preventing Disclosure of Information Received in Confidence	✗	✗	✓	✗
Protecting the Reputation of Others	✗	✗	✓	✗
Maintaining Authority and Impartiality of the Judiciary	✗	✗	✓	✗

In addition, Art. 11 also provides that "this article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State" (see Chapter 9, "Military Unions and Associations").

Restrictions must not be discriminatory. Art. 14 prohibits discrimination in the enjoyment of Convention rights on "any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

In addition, the international principles set by the European Court of Human Rights are relevant. The Court has established a careful approach to how and when states may use the

55 European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

available limitations on human rights for reasons of national security. These could also be consulted by those OSCE states that are not party to the ECHR. The Court has stipulated certain criteria that legislation should meet: these are referred to in Box 7.7 below as the "quality of law" test. They include the need for laws to be foreseeable, that they should restrain the discretion of those to whom they confer powers, and that safeguards should be created to guard against the abuse of such powers.

Box 7.7

The European Convention 'Quality of Law' Test[56]

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

- Laws include common-law rules, as well as statutes and subordinate legislation. In this case, the Court has stated that to qualify as "law", a norm must be adequately accessible and formulated with sufficient precision to enable citizens to regulate their conduct;[57]
- A law that "allows the exercise of unrestrained discretion in individual cases will not possess the essential characteristics of foreseeability and thus will not be a law for present purposes. The scope of the discretion must be indicated with reasonable certainty",[58] and safeguards must exist against abuse of the discretion established by law;[59]
- As far as these safeguards are not written in the law itself, the law must at least establish the conditions and procedures for interference.[60]

56 European Court of Human Rights' website: <http://www.echr.coe.int>; Ian Cameron, *National Security and the European Convention on Human Rights* (Dordrecht/Uppsala: Kluwer Law International, 2000).

57 *Sunday Times v. United Kingdom,* European Court of Human Rights, 26 April 1979, *European Human Rights Reports*, Vol. 2, 1979, p. 45, para. 47.

58 *Silver and Others v. United Kingdom,* European Court of Human Rights, 25 March 1983, *European Human Rights Reports,* Vol. 5, 1983, p. 347, para. 85.

59 *Ibid*., paras. 88-89.

60 *Klass v. Federal Republic of Germany,* European Court of Human Rights, 9 March 1977, *European Human Rights Reports,* Vol. 2, 1979, p. 214, para. 63; *Kruslin v. France,* European Court of Human Rights, 24 April 1990, *European Human Rights Reports,* Vol. 12, 1990, p. 547, para. 35; *Huvig v. France,* European Court of Human Rights, 24 April 1990, *European Human Rights Reports*, 1990, Vol. 12, p. 528, para. 34.

Section III

Chapter 8
Civil and Political Rights

In principle, soldiers, as citizens in uniform, enjoy the same fundamental rights as every citizen. Many countries' armed forces consider, however, that political activities are detrimental to the need for discipline and are incompatible with the military profession. For this reason, the political neutrality of soldiers is a controversial issue for all military systems. While the rules on political neutrality within the armed forces are fairly similar, the extent of the obligation to refrain from political activities outside the armed forces varies widely. In a related fashion, restrictions are often imposed on the freedom of speech of the military, in part because of the need for them to be seen as politically neutral and, partly, to prevent dissent and insubordination.

This chapter first deals with the arguments concerning restrictions on political rights. It then addresses limitations on rights concerning political neutrality that affect the rights to vote, to stand for office, and to participate in political demonstrations, as well as the freedom of expression. Examples are provided of different approaches by OSCE participating States towards political neutrality and freedom of expression, ranging from those that are less restrictive to those that impose strict standards of neutrality and restrict rights accordingly.

1. Issues at Stake

The most frequent limitations on the political activities of members of the armed forces are:

- Prohibitions on participation in political parties;
- Prohibitions on eligibility for elected political office;
- Prohibitions on taking part in public demonstrations while in uniform;
- Restrictions on the freedom of expression.

There are several justifications for restrictions of this kind. First, the armed forces, as defenders of territorial integrity and the constitutional order, need to be seen to be independent and above political controversy. Neutrality helps to ensure that voters alone determine who is to govern the state. In many transitional democracies, the armed forces have had a tainted and repressive history of association with the dominant political party, and neutrality requirements are a means of breaking with the past.

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

Third, effective civilian control and accountability for the armed forces require a separation of the political and military spheres. If members of the armed forces are significant actors within the political sphere, it will undermine democratic accountability and create conflicts of interest. Consequently, restrictions may be necessary to prevent the active involvement of members of the armed forces in politics.

Although democratic societies usually regard a person's political views as their own private affair, there may be a limited case for debarring people with extreme political views or

associations (for example, those advocating unconstitutional behaviour) from membership of the armed forces. This is because such political associations are regarded as lacking the commitment of other political parties to the constitutional order. The need for restrictions in public service on people with extremist views has, for example, been recognized as a justifiable ground for restricting civil and political rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms.[61]

Equally, however, some countries (Germany, for example) take the view that the best education in democratic practice for members of the armed forces is active citizenship. They therefore impose minimal restrictions on political activities. Where restrictions are imposed on the political activities of members of the armed forces, it is clear that they should be no more than proportionate to the objectives of securing constitutional order or protecting military discipline. They should be legally grounded in a way that makes them transparent, predictable, and open to challenge. For example, a restriction on active participation in national politics may be justified by the need to separate the military and politics, but the case is weaker with regard to local politics, especially if there is no control or involvement of local authorities in military matters. The requirement for the appearance of neutrality may be served by codes restricting *public identification* in political parties (for example, prohibiting the wearing of uniforms at party meetings), rather than prohibiting participation as such. Restrictions may be relaxed after a member of the armed forces has left the service, and the case for restrictions is weaker when dealing with reservists rather than regular serving members of the armed forces.

2. International Human Rights Commitments

The main rights at stake are the freedoms of expression (e.g., to express and communicate political views) and of association (e.g., to join a political party). In addition, the right to vote and stand for office are guaranteed by human rights treaties.

The OSCE has consistently affirmed the importance of civil and political rights and of ensuring that they can be fully exercised.[62] In Paris in 1990, the OSCE affirmed the right to freedom of association and peaceful assembly, and, at its Copenhagen conference the same year, it stressed the importance of the right to establish political parties. In Copenhagen, the OSCE also affirmed that: "Everyone will have the right to freedom of expression including the right to communication … [and the] freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."[63] Further human rights commitments make clear that freedom of expression includes the rights to disseminate and publish views and information.[64]

61 During the Cold War, the Court was relatively uncritical of political restrictions on state employment against Communists. See *Glasenapp v. Federal Republic of Germany,* European Court of Human Rights, 28 August 1986, *European Human Rights Reports*, Vol. 9, 1987, p. 25, and *Kosiek v. Federal Republic of Germany*, European Court of Human Rights, 28 August 1986, *European Human Rights Reports,* Vol. 9, 1987, p. 328, where the Court found no violation of Art. 10 because it considered the real issue at the heart of the cases to be that of access to the civil service, which was not protected by the Convention (as it was then interpreted). Contrast *Vogt v. Germany*, European Court of Human Rights, 26 September 1995, *European Human Rights Reports*, Vol. 21, 1995, p. 205, however, where a teacher dismissed for actively campaigning for the Communist Party successfully invoked Art. 10. Restrictions on members of the armed forces would, however, be easier for a state to defend under limitations for national security under Arts. 10 and 11 of the ECHR.

62 Helsinki 1975 (Questions Relating to Security in Europe: 1. (a) Declaration on Principles Guiding Relations between Participating States – Principle VII); Madrid 1983 (Questions Relating to Security in Europe: Principles); Vienna 1989 (Questions Relating to Security in Europe: Principles).

63 Copenhagen 1990, para. 9.1.

64 *Ibid*., para. 10.1.

Box 8.1
Freedoms of Expression and Association

Art. 19 UDHR	Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.
Art. 19 ICCPR	1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.
Art. 21 ICCPR	The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.
Art. 10 ECHR	1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority. … 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
Art. 20 UDHR	(1) Everyone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association.
Art. 11 ECHR	Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

Limits to freedom of expression: the ECHR approach

In a military context, freedom of expression may be problematic in various forms. These range from communications complaining about conditions of service, to publishing barracks newssheets, to public dissent from military orders or voicing criticism in the media. Military discipline implies some limit on freedom of expression, and it is not surprising that, whereas these activities may be unregulated in the case of civilians, restrictions may be imposed upon serving members of the armed forces. Similarly, national security will obviously justify constraints on freedom to disclose military secrets.

These interests are recognized as legitimate reasons for restrictions under human rights law. In the *Engel* case, the European Court of Human Rights stated:

> the freedom of expression guaranteed by Article 10 applies to servicemen just as it does to other persons within the jurisdiction of the Contracting States. However, the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline, for example by writings.[65]

Accordingly, in later cases, the Court found no violation of Art. 10 when two conscripts were imprisoned for a year after distributing material calling for French army units to

65 *Engel v. Netherlands*, *op. cit.*, note 29, para. 100.

withdraw from Germany[66] or when German military personnel were dismissed for criticizing government policy on television.[67]

Overall, the European Court has tended to give states a wide margin of appreciation in cases involving restrictions of the rights of service personnel. In part, this is due to a generally deferential attitude to claims of national security. Nevertheless, if a state is unable to show that a restriction has a legal basis, it would be unable to take advantage of these restrictions. The proportionality test employed by the Convention system requires consideration of the nature and extent to which a restriction on rights is justified by a legitimate objective. We return to this below.

Political neutrality

As mentioned above, restrictions on these rights may be justified because of the need to ensure the political neutrality of the armed forces. This is an objective that is recognized in international human rights law and practice. Para. 23 of the OSCE Code of Conduct on Politico-Military Aspects of Security states that, "while providing for the individual service member's civil rights, each state will ensure that its armed forces are politically neutral". It is also clear that the European Convention for the Protection of Human Rights and Fundamental Freedoms will allow restrictions on the rights of members of the armed forces designed to achieve this purpose, as the box below shows.

Box 8.2

Political Neutrality: The ECHR and Hungary[68]

In a case involving restrictions imposed in Hungary that prevented members of the armed forces, the police, and security services from joining any political party and from engaging in any political activity, the European Court of Human Rights found that there was no violation of Arts. 10 or 11 of the ECHR since the restrictions pursued legitimate aims, namely the protection of national security and public safety and the prevention of disorder. The limits were intended to depoliticize the police and hence to contribute to the consolidation and maintenance of pluralistic democracy. Bearing in mind the important role of the police in society, the Court found the restrictions to be consistent with democratic principles. The Court stated:

> 41. … Police officers are invested with coercive powers to regulate the conduct of citizens, in some countries being authorised to carry arms in the discharge of their duties. Ultimately the police force is at the service of the State. Members of the public are therefore entitled to expect that in their dealings with the police they are confronted with politically neutral officers who are detached from the political fray.

Similar principles would apply to members of the armed forces. In their case, however, restrictions on participation in local politics are perhaps harder to justify because the need for neutrality in order to avoid a conflict of interest applies primarily at the national level.

The right to vote and stand for office

Art. 25 of the International Covenant on Civil and Political Rights states:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

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

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

68 *Rekvényi v. Hungary,* European Court of Human Rights, 20 May 1999, *European Human Rights Reports,* Vol. 30, 2000, p. 519.

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country.[69]

The UN Human Rights Committee has remarked that, if there are reasonable grounds for regarding certain elective offices as incompatible with tenure of specific positions (e.g., the judiciary, high-ranking military office, public service), measures to avoid any conflicts of interest should not unduly limit the rights protected by para. (b).[70] In one case, restrictions imposed in the Netherlands preventing a serving police officer from taking his elected place in a local council were upheld: the Committee took the view that there was no violation of Art. 25 because the restrictions were designed to prevent a conflict of interest.[71] Similar principles would apply to restrictions in the armed forces.

The right to demonstrate

The freedom of peaceful assembly is guaranteed by Art. 21 of the ICCPR and Art. 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is clear that, in general, the imposition of punishment (including a professional disciplinary penalty) for participating in a demonstration will be regarded as a breach of Art. 11 and that any legitimate restrictions must satisfy the criterion of proportionality.[72] However, Art. 11.2 of the ECHR states:

> This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.

There is no such equivalent wording under Art. 21 of the ICCPR (see Box 8.3). Accordingly, it could be argued that, for the purposes of the ECHR, a state might be permitted to impose restrictions on demonstrations by members of the armed forces beyond those permitted under the ICCPR or that did not satisfy the proportionality test. This, however, is a somewhat unrealistic prospect since to do so would nevertheless constitute a violation of the ICCPR (which refers to specified reasons for limitations where "necessary in a democratic society"). Moreover, most restrictions on members of the armed forces are related to national security, public order, or public safety, in any event.

3. Different Approaches

Para. 23 of the OSCE Code of Conduct on Politico-Military Aspects of Security states that, "while providing for the individual service member's civil rights, each state will ensure that its armed forces are politically neutral". The balance between the communal interest in the political neutrality of the armed forces as a whole and the political rights of individual members of the armed forces can be drawn in various ways. As can be seen from Box 8.3, restrictions on the right to belong to a political party or to stand for political office that apply to members of the armed forces exist in a number of OSCE states. Georg Nolte and Heike Krieger submit that three positions can be seen to operate within European coun-

69 In addition, Art. 3 of the First Protocol to the ECHR states: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

70 United Nations Human Rights Committee, General Comment 25 (57), UN Doc. CCPR/C/21/Rev.1/Add.7 (1996), para. 25.

71 *Debreczeny v. The Netherlands*, UN Human Rights Committee, 3 April 1995, Communication No. 500/92, UN Doc. CCPR/C/53/D/500/1992.

72 *Ezelin v. France,* European Court of Human Rights, 26 April 1991, *European Human Rights Reports*, Vol. 14, 1992, p. 362.

Box 8.3

Recognition of Civil and Political Rights of Members of Armed Forces[73]

	The Right to Join a Political Party	The Right to Stand for Elections	The Right to Freedom of Association	The Right to Freedom of Expression
Recognized in Legislation	Austria, Belgium, Canada, Denmark, Germany, Luxembourg, Norway, Portugal, Sweden, Switzerland, United Kingdom, United States of America	Austria, Azerbaijan, Belarus, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Latvia, Luxembourg, Norway, Poland, Russian Federation, Slovenia, Sweden, Switzerland, Ukraine	Austria, Belgium, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Ireland, Lithuania, Luxembourg, Norway, Poland, Portugal, Russian Federation, Serbia and Montenegro, Slovenia, Sweden, Switzerland, Ukraine, United States of America	Austria, Azerbaijan, Belarus, Belgium, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Ireland, Latvia, Lithuania, Luxembourg, Norway, Poland, Portugal, Russian Federation, Serbia and Montenegro, Slovakia, Slovenia, Sweden, Ukraine, United Kingdom, United States of America
Prohibited or Not Recognized	Azerbaijan, Belarus, Bosnia and Herzegovina, Croatia, Czech Republic, Estonia, Finland, France, Georgia, Ireland, Latvia, Lithuania, Poland, Russian Federation, Serbia and Montenegro, Slovakia, Slovenia, Spain, Ukraine	Bosnia and Herzegovina, Canada, Croatia, Ireland, Lithuania, Portugal, Serbia and Montenegro, Slovakia, Spain, United Kingdom, United States of America	Azerbaijan, Belarus, Bosnia and Herzegovina, Latvia, Slovakia, Spain, United Kingdom	Spain

The right to freedom of association is recognized in Spain's Constitution but not in military law.
The right to freedom of expression is recognized in Spain's Constitution but not in military law.

tries as to what level of participation in the political process is allowed for members of the armed forces. These are:

1. Highly restrictive policies of political neutrality;
2. Moderately restrictive policies of political neutrality;
3. Least restrictive policies of political neutrality.[74]

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

Restrictions in Poland exemplify this approach. Poland requires members of the armed forces to refrain completely from the political sphere. Art. 26.2 of the Constitution provides that "The Armed Forces shall observe neutrality regarding political matters and shall be subject to civil and democratic control." In 2002, the Polish Constitutional Tribunal held that severe restrictions on the political activities of members of the armed forces were not unconstitutional.[75] The Tribunal found that the challenged statutory provisions prohibiting membership of a political party conformed to constitutional principles of the freedom of creating and functioning of political parties, proportionality, equality, freedom of association and equal access to the public service, as well as to Art. 22 of the International

73 ODIHR-DCAF project questionnaire, question 54; correspondence with EUROMIL.

74 G. Nolte and H. Krieger, "Comparison of European Military Law Systems", in Nolte, *op. cit.*, note 6, pp. 77 ff.

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

Covenant on Civil and Political Rights and Arts. 11 and 17 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Tribunal stated:

> The neutrality of the armed forces in political matters (Art. 26.2 of the Constitution) has two aspects. Firstly, it means that the armed forces cannot be an autonomous entity within the state political structure, capable of influencing political decisions of state constitutional organs. This political neutrality is secured in particular through civil control, by subjecting the military to the constitutional organs of the republic. The second aspect of the neutrality of the armed forces is that they must be removed from the sphere of direct influence of political parties.[76]

Moderately restrictive policies of political neutrality, on the other hand, seek to restrict the *mode* of participation in public life of members of the armed forces. The objective is to avoid the appearance that the military or individuals identified as servicemen or -women are publicly aligned with a political cause. For example, in Italy, Belgium, and the United Kingdom, restrictions exist on political activities *while in uniform*.[77] Limitations may be imposed (as in the United Kingdom) on serving soldiers holding office in political parties but not on membership per se.

There may be duties to seek permission or notify the authorities before engaging in political activities. In Croatia, for example, the right to stand for election, the right to join a political party, and the right to freedom of expression relating to military issues all require prior approval at the ministerial level.[78] In Luxembourg, members of the armed forces are permitted to stand for election but *if elected* must leave the service.

Least restrictive policies of political neutrality aim to encourage political participation by limiting restrictions on members of the armed forces provided the exercise of political rights does not interfere with military duty. The Netherlands follows this approach and even permits, under certain circumstances, demonstrations at military installations or the participation of soldiers in uniform in public meetings. The rationale of minimal restrictions may be — as with highly restrictive means — to protect democratic values, albeit by different means. The German "citizen in uniform" approach, for example, aims to inculcate active promotion of democracy in the military by permitting the participation of individual members of the forces.

All of these approaches have something to be said for them in terms of guaranteeing democratic practice and balancing this with the individual rights of members of the armed forces. It is submitted that, while no one approach can be prescribed, what is needed is sensitivity to when political activity genuinely calls neutrality into question and to when restrictions on rights are excessive. Restrictions on the rights of service personnel that are contextual in taking account of different layers of political office, differing degrees of political involvement, and the military requirements of different places and occasions are more easily defended. In that sense, less restrictive policies are to be preferred, although the particular history or situation in a country may, exceptionally, justify a more restrictive approach to ensure neutrality. It would also be exceptional that prohibitions based on the type of political view supported by a member of the armed forces could be justified; in the case of a political party advocating the overthrow of democratic institutions, however, such restrictions might be justified.

76 An unofficial translation from the website of the Polish Constitutional Tribunal, <http://www.trybunal.gov.pl/eng/index.htm>.

77 Nolte and Krieger, *op. cit.*, note 74, pp. 79-80.

78 ODIHR-DCAF project questionnaire, question 54.b, 2006.

As one example of how guidance on political activity may seek to do this, we refer in Box 8.4 below to guidance from the US Department of Defense.

Box 8.4
Political Involvement: Detailed Guidance from the United States[79]

It is DoD policy to encourage members of the Armed Forces (hereafter referred to as "members") to carry out the obligations of citizenship. While on active duty, however, members are prohibited from engaging in certain political activities.

4.1. General

4.1.1. A member on active duty may:

4.1.1.1. Register, vote, and express his or her personal opinion on political candidates and issues, but not as a representative of the Armed Forces.

4.1.1.2. Make monetary contributions to a political organization.

4.1.1.3. Attend partisan and non-partisan political meetings, rallies, or conventions as a spectator when not in uniform.

4.1.2. A member on active duty shall not:

4.1.2.1. Use his or her official authority or influence for interfering with an election; affecting the course or outcome of an election; soliciting votes for a particular candidate or issue; or requiring or soliciting political contributions from others.

4.1.2.2. Be a candidate for, hold, or exercise the functions of civil office except as authorized in paragraphs 4.2. and 4.3., below.

4.1.2.3. Participate in partisan political management, campaigns, or conventions (unless attending a convention as a spectator when not in uniform).

4.1.2.4. Make campaign contributions to another member of the Armed Forces or an employee of the Federal Government.

Freedom of expression

Nearly all OSCE participating States recognize the right to freedom of expression for members of the armed forces. However, the more pertinent issue is the form and extent of restrictions imposed. Some examples are given below.

Under Art. 7 of the Russian Federal Law on the Status of Armed Forces Personnel, while servicemen exercise their right to freedom of speech, they may not disclose state or military secrets or criticize the orders of a commander. In Lithuania, the right to freedom of expression excludes public political statements that criticize individuals democratically elected to state institutions (parliament, president, or government) or that contain political requests for state institutions. All freedoms are limited as far as is necessary for the completion of military duties and the maintenance of military order, and in so far as this is compatible with the service. Both the Russian and Lithuanian examples concern the subject matter of speech. In Switzerland, however, restrictions operate according to the manner of expression: members of the armed forces are prohibited from making political statements while in uniform.

As with limitations on political activity, it is important that even restrictions on free speech that are related to legitimate military interests such as national security, military discipline,

79 Department of Defense Directive No. 1344.10, "Political Activities by Members of the Armed Forces on Active Duty".

or military secrecy, should be proportionate when considered in context and that, wherever possible, measures that inhibit speech to a lesser degree should be adopted.

Applying these principles, the European Court of Human Rights has demonstrated a more sceptical approach in two free-speech cases involving members of the armed forces. In the first, the Court found that a magazine distributed by soldiers was not a threat to discipline since, although sometimes critical, it contained information about complaints and appeals procedures and did not recommend disobedience to orders.[80] In the second, the Court found that Art. 10 had been violated when a junior officer sent a long letter of complaint to his superior (which was not otherwise published) and was sentenced to three months' imprisonment for insulting the armed forces.[81] Accordingly, the prosecution was not "necessary in a democratic society" as required by Art. 10.2.

As these instances show, the Court will, on occasion, exercise an independent assessment of whether a justified ground for restricting rights exists. It is clear, then, that even restrictions on the freedom of expression of members of the armed services that serve a legitimate aim must be demonstrably proportionate in order to be acceptable.

4. Best Practices and Recommendations

- Any remaining restrictions on the electoral rights of members of the armed forces should be removed;
- Members of the armed forces and military personnel should be permitted to join legal political parties;
- Where restrictions are imposed on the holding of office in political parties, on political campaigning, or on members of the armed forces standing for election to political office, these should be prescribed in legislation, be strictly proportionate, and be applied in a non-discriminatory fashion;
- Any restrictions on the rights of peaceful protest or freedom of speech by members of the armed forces should be prescribed in legislation, be strictly proportionate, and be applied in a non-discriminatory fashion.

80 *Vereinigung Demokratischer Soldaten Österreichs and Gübi v. Austria,* European Court of Human Rights, 18 December 1994, *European Human Rights Reports*, Vol. 20, 1995, p. 56.

81 *Grigoriades v. Greece,* European Court of Human Rights, 25 November 1997, *European Human Rights Reports*, Vol. 27, 1997, p. 464.

Chapter 9

Military Unions and Associations

Some countries have long-standing arrangements for members of the armed forces to join associations representing their interests. Several other states have granted this right in recent years. In a number of countries, however, the unionization of military personnel has been viewed as conflicting with the unique nature of the military and its role in maintaining national security and public order. Moreover, a distinction should be made between different models of association, e.g., professional associations, trade unions, and other informal mechanisms of consultation. The advantages and disadvantages of each are discussed below.

There appears to be no internationally agreed definition of a trade union. The International Labour Organization Convention on Freedom of Association and Protection of the Right to Organise of 1948 refers instead to "workers' organisations", i.e., "any organisation of workers ... for furthering and defending the interests of workers". The central question in the debate on military unions or associations is not what the body representing the interests of members of the armed forces is called but rather how to respect the rights of military personnel to the freedom of association and assembly while at the same time meeting the needs and legitimate concerns of the military, given its unique function.

1. Issues at Stake

The freedom to associate with others is a fundamental right that is clearly recognized in the major human rights treaties, and this extends to the freedom to join professional bodies and trade unions. Collective action may involve public demonstrations or public statements representing the group interests of members of the armed forces, aspects that are covered in Chapter 8. Chapter 16 discusses specific issues related to working conditions. The focus of this chapter, however, is a series of questions concerned with the recognition of military associations and unions.

Collective bodies can play a valuable role in representing their members' interests, including protecting their human rights. Military associations or unions may promote the welfare of individual members by pursuing grievances on their behalf, represent their interests at different levels from that of the unit upwards, and consult or negotiate on collective conditions of service in the armed forces. They may also play a valuable role as intermediaries between the Ministry of Defence and armed forces personnel when issues such as restructuring the military are discussed.

Where these associations exist, they vary in nature from country to country.[82] Some major variations concern the extent to which they are autonomous, their links with external professional or union federations, and whether they are legally permitted to engage in industrial action. In countries such as Sweden or Germany, independent military associations exist that are financed by members' fees and that employ their own advisory staff. In other countries, such as Bulgaria, finance comes from the Ministry of Defence. It is more common for associations to define themselves as bodies representing professional servicemen and -women rather than as military unions, although this is partly a consequence of

82 For a full survey, see V.S. Nesterov and A.D. Pruefert, *Military Unionism: The Establishment of Professional Organisations/Trade Unions of Servicemen and their Present Position* (Moscow: Ves Mir, 2006).

the legal culture in specific countries. For professional associations, links with external confederations of trade unions are not normal, although they do exist, e.g., in Sweden and the Netherlands. In other cases, military associations have joined umbrella associations representing professionals or public servants. In addition, many military associations or unions are members of international associations promoting the interests of servicemen and -women. The largest by far is the European Organisation of Military Associations (EUROMIL), with more than 30 associations (both professional associations and trade unions) from over 20 countries, but a number of others exist on a regional basis. Most OSCE participating States prohibit industrial action by members of the armed forces.

It is common in many countries for the freedom of association of public servants, including members of the armed forces, to be limited. This difference in treatment in comparison with other workers may be justified because of the public interest in ensuring that essential public services are not disrupted. It can be argued that members of the armed forces are not workers in a conventional sense in that, when enlisting, they subject themselves to a comprehensive system of restrictions under a system of military discipline that is far more extensive than the usual control of an employer over an employee. Nevertheless, it is notable that some legal bodies have treated members of the armed services as "workers".[83]

Membership by servicemen and -women of trade unions or other collective representative bodies poses two distinct problems. The first is the question of military discipline and possible interference with the esprit de corps. The raising of collective grievances on the part of members of the armed forces has traditionally been seen as equivalent to insubordination or even the serious military offence of mutiny. It is argued that the disciplined nature of the armed forces requires that orders should not be questioned. Moreover, industrial action could disrupt vital operations in a way that threatens national security. Whether this interest also forbids any discussion of the conditions of service in general is more debatable, however. There is also cause for scepticism about the general argument, based on surveys of countries that have permitted military associations (see surveys by the French Senate and prepared for the Joint Services Command and Staff College in the UK).[84]

The second issue is related to allegiance and outside influence. Membership of trade unions is seen as undesirable because members of a union may act collectively on the instruction of union officials (for example, in taking industrial action), and this can be seen as a rival source of authority and allegiance to the chain of command within the armed forces. The objection is all the greater if the union in question is a civilian one.

In order to address these problems to some extent, collective representative bodies — in countries where they are permitted — commonly work under two constraints. The first is that the representative body may be limited to members of the armed forces (so countering the objection of outside influence) and not linked to other trade unions. Second, legal barriers may be imposed that forbid strikes or other forms of industrial action that could disrupt operations or threaten security.

The changing context in which military forces now operate prompts a re-evaluation of restrictions on association, for two distinct reasons. The first is that the nature of the tasks

83 In 1999, the South African Constitutional Court found that members of the South African Defence Force fell within the scope of a right in Section 23.2 of the Constitution of South Africa for "workers" to be members of a trade union, to participate in its activities, and to strike.

84 And see G. Caforio, "Unionization of the Military: Representation of the Interests of Military Personnel", in G. Caforio (ed.), *Handbook of the Sociology of the Military* (New York: Kluwer Academic/Plenum Publishers, 2003), pp. 311-322, suggesting (from the experience in Austria) no discernible effect on operational performance. Also see the unpublished study for the UK Joint Services Command and Staff College by H. Akiwumi, "Would an Armed Forces Federation Undermine the Chain of Command?".

that armed forces personnel are now given and the setting in which the military is deployed are often non-traditional. Members of the armed forces are now more likely to be part of a multinational force or engaged in peacekeeping operations than in conventional conflict. These types of missions lead naturally to comparisons between the conditions of service of different national forces working alongside each other. Soldiers from a state where rights of association are restricted may quite reasonably question the operational necessity of this when they work alongside service personnel from a state that takes a more relaxed view. Unfavourable comparisons of conditions of service may produce discontent and a loss of morale (and, in turn, of operational efficiency).

The second cause for re-evaluation is the increasing professionalization of armed forces, which means that the military needs to compete effectively in the labour market in order to attract high-quality personnel. Any conditions of service that make the armed forces less attractive as a career will be scrutinized by potential entrants. It is advisable therefore for the armed services themselves to reappraise whether restrictions on freedom of association remain strictly necessary.

International human rights commitments

The freedom to associate with others is a fundamental right that is clearly recognized in the Universal Declaration of Human Rights and the major human rights treaties, including the International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter (see Box 9.1 for relevant texts), and this extends to the freedom to join trade unions.

Box 9.1
Freedom of Association in Human Rights Law[85]

Art. 20 UDHR	(1) Everyone has the **right to freedom of peaceful assembly and association.** (2) No one may be compelled to belong to an association.
Art. 21 ICCPR	The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.
Art. 11 ECHR	Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
Art. 8 ICESCR	1. The States Parties to the present Covenant undertake to ensure: (a) The right of everyone **to form trade unions and join the trade union of his choice**, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations; (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (d) The **right to strike**, provided that it is exercised in conformity with the laws of the particular country. 2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State. 3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

85 All emphasis in the texts reproduced in Box. 9.1 has been added by the authors.

Box 9.1 (cont.)

Art. 5 ESC	With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.
Art. 6 ESC	With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake: 1 to promote joint consultation between workers and employers; 2 to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements; 3 to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise: 4 the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

In addition to these, Art. 12 of the EU's Charter of Fundamental Rights provides that everyone has the right to freedom of association at all levels, in particular in political, trade-union, and civic matters. This implies the right of everyone to form and to join trade unions for the protection of their interests. The Charter is notable because the right is not qualified in the case of members of the armed services. However, it does not have the status of a directly enforceable legal norm.

Since the Madrid Conference of 1983, the OSCE has recognized the right of workers to "establish and join trade unions", within the law of the respective state.[86] At the Copenhagen Conference in 1990, the OSCE added the right of individuals to form political parties and political organizations,[87] along with the corollary right to peaceful assembly and demonstration.[88] Any restrictions of these rights should be prescribed by law.[89] The Copenhagen Conference also recognized the right of trade unions to determine their own membership.[90] Alongside these rights are the more general provisions relating to freedom of expression, respect for others, and minority cultural differences.[91] None of the OSCE documents contain any specific commitments in relation to unions in the armed forces.

The International Labour Organization recognizes union rights in a number of international conventions, including the Freedom of Association and Protection of the Right to Organise Convention, 1948; the Right to Organise and Collective Bargaining Convention, 1949; and the Collective Bargaining Convention, 1981. These establish important rights for workers, including the right: to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization (1948 Convention, Art. 2); to trade-union autonomy, free from interference by public authorities (1948 Convention, Art. 3); and to establish and join federations of trade unions (1948 Convention, Art. 5). The 1981 Convention encourages states to provide and promote the use of voluntary negotiations between employers or employers' organizations and work-

86 Madrid 1983 (Questions Relating to Security in Europe: Principles).

87 Copenhagen 1990, para. 7.6.

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

89 Copenhagen 1990, para. 9.2.

90 *Ibid*., para. 9.3.

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

ers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Although these conventions are expressed in terms that apply to all workers and all sectors,[92] they nevertheless contain important provisos. Art. 9 of the 1948 Convention states:

> The extent to which the guarantees provided for in this convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

Similar wording appears in the other conventions (Art. 5 of the 1949 Convention and Art. 1.2 of the 1981 Convention). In complaints to the Freedom of Association Committee of the International Labour Organization about the propriety of such restrictions, the Committee has found that provisions dealing with exceptions should be interpreted restrictively (and should not apply, for example, to civilians working for the armed forces in manufacturing establishments or in a country's army bank[93]). The committee has stated that, in cases of doubt, workers should be treated as civilians.[94]

An equally restrictive approach is evident from the text of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Art. 11.2 states:

> This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.

Similar restrictions appear in Art. 22 of the International Covenant on Civil and Political Rights.

The ECHR restriction was applied by the European Commission on Human Rights to reject the claim of a violation of Art. 11 by workers at a UK intelligence establishment affected by a change in their conditions of service denying the right to belong to a trade union.[95] Likewise, in a more recent case from Hungary (*Rekvényi v. Hungary*[96]), it was found that there was no violation of Art. 11 in prohibiting members of the armed forces, the police, and security services from joining any political party or taking part in various forms of public protest.

It is clear from this jurisprudence that the concept of a "lawful restriction" under Art. 11.2 does not mean that all domestic laws restricting rights will necessarily be compatible with the Convention. The Convention organs employ a qualitative test: a legal restriction must be foreseeable in its effect and there must be an absence of arbitrariness.[97]

Some commentators have questioned whether a restriction under Art. 11.2 can operate to take away the right of association altogether. In the *Rekvényi* case, the Court preferred to leave open the related issue of whether Art. 11.2 was subject to a proportionality test when

92 For example, Art. 1 of the Collective Bargaining Convention, 1981: "1. This Convention applies to all branches of economic activity."

93 ILO Freedom of Association Committee, 238th Report, Case No. 1279, para. 140.a, and 284th Report, Case Nos. 1588 and 1595, para. 737.a.

94 ILO Freedom of Association Committee, 295th Report, Case No. 1771, para. 499.

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

96 *Rekvényi v. Hungary, op. cit.*, note 68, p. 519.

97 *Ibid.,* para. 59.

it applied to the police, members of the administration of the state, and the armed forces.[98] The issue is best regarded as undecided. It could certainly be argued that the state's interest could be adequately protected by restrictions on the taking of industrial action rather than on membership of unions per se.

This conclusion favouring a proportionate response is also supported by the outcome of domestic challenges to such restrictions in the constitutional courts of Poland and Spain. In Poland in 2000, the Constitutional Court ruled that a ban on membership of trade unions in the military was constitutional *provided* there were alternative means of exercising the right to freedom of association.[99] In Spain, the Constitutional Court ruled in 2000 that members of the armed forces had a constitutional right to participate in bodies representing their social and economic interests, provided these bodies did not intend to engage in industrial action.[100]

Different approaches

Approaches to the recognition of freedom of association within OSCE participating States vary from countries that prohibit such bodies entirely, to those that have officially sponsored (non-autonomous) associations, to those that allow military associations or unions that are usually, though there are some exceptions, subject to a restriction on the taking of strike action.

The first approach is a paternalistic one that focuses on the *chain of command*. Traditionally, the military commander has seen it as his or her task to ensure the welfare (for example, food, housing, health) of those serving in the armed forces. Hence, the rights of individual members of the armed forces to associate are restricted, and military associations or industrial action are prohibited. This approach treats the welfare of members of the armed forces as a prerequisite of operational effectiveness. Grievances of individual members of the armed forces are referred through the chain of command; no machinery is provided for collective grievances. Restrictions on association may also be balanced (as in Canada) by strong legal rights for servicemen and -women to raise individual complaints with an independent military ombudsman or with external human rights bodies (see Chapter 22, "Ombudsmen"). However, in other countries — notably Germany — such systems exist alongside military associations.

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

98 *Ibid*., para. 61. In its earlier admissibility decision in the *Council of Civil Service Unions* case, however, the Commission found that the term "lawful restrictions" in the second sentence of para. 2 of Art. 11 could include a prohibition of arbitrariness, though it did not pronounce itself firmly on this matter.

99 Polish Constitutional Court, Judgment K 26/28 of 7 March 2000.

100 Nolte, *op. cit*., note 6, p. 84.

The second approach is to make *non-autonomous arrangements*. Here, the state provides the legal machinery for representation of the interests of members of the armed forces, e.g., in bargaining over pay or negotiating changes to conditions of service, pensions, and so on. The formal position of these arrangements may be buttressed by a legal requirement that they be used before changes are made.

A developed example of these arrangements is that of France, where the General Statute of the Military of 24 March 2005 prohibits members of the armed forces from joining professional associations, but the Higher Military Council (Conseil Supérieur de la Fonction Militaire, or CSFM) provides for participation in discussions concerning conditions of service.[101] Created in 1990, the CSFM gives advice on questions related to the conditions of service and must be consulted if legislation or regulations are proposed that are related to these conditions. It is composed of members elected by the armed forces councils. The CSFM may deal with various topics, e.g., career development, transition to civilian life, welfare in the armed forces, pension reform, housing, and the conditions of international operations. An item may be put on the CSFM's agenda by a majority of the members. Seven councils have been created at forces level covering: the army, the air force, the navy, the military constabulary, the medical corps, the procurement agency, and the energy agency. The members of the councils are picked randomly from among those members of relevant forces who stand for office. The councils have two functions: to study any question related to the conditions of service or to the organization of work in the forces; and to represent the viewpoint of forces personnel on the topics submitted to the CSFM. A similar approach is followed in Italy.[102]

As the name suggests, non-autonomous arrangements may suffer from the disadvantage that they are perceived to have less credibility or legitimacy in representing the interests of members of the armed forces owing to the fact that they are not created by the members themselves, but are imposed from above by the government. While this may make it easier for the armed forces themselves to consult them, the absence of democratic accountability to those whose interests they represent will necessarily also undermine their authority to speak on behalf of members of the armed forces.

Box 9.2
Military Associations in Selected Countries

Swedish Association of Military Officers (SAMO)

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

101 See <http://www.defense.gouv.fr/csfm>.

102 See the Act on the Defence of Rights and Interests of Servicemen, January 1980. Also see Nesterov and Pruefert, *op. cit.*, note 82, pp. 119-121.

Box 9.2 (cont.)

Poland

Ministry of Defence decisions from 1994 allow for meetings of officers at all levels and for the election of commissioners to act as advocates for soldiers' interests (Decisions No. 81 and 82 of 22 August 1994).

In 2000, the Constitutional Tribunal ruled that a ban on membership of trade unions in the military was constitutional *provided* there were alternative means of exercising the right to freedom of association (decision of 7 March 2000).

Art. 10, Sec. 3.4 of the Act on Military Service of Professional Soldiers (11 September 2003) allows professional soldiers to form representative bodies under regulations issued by the Ministry of Defence and establishes a consultative council (the Council of Senior Officers of the Corps of Professional Soldiers).

Hungary

Following a 1989 amendment to the Constitution granting the right of freedom of association to servicemen, the Association for Protection of the Interests of Military Personnel was established with 56 individual members and seven local associations in 1991.

The Trade Union of Military Servicemen was created in 1995 as an organization with individual members. It now has more than 10,000 members.

The law prohibits strikes but permits demonstrations and meetings by members of the armed forces. There is an interest conciliation forum (Military Interest Conciliation Forum) that operates within the armed forces at the level of the Ministry of Defence.

These developments were confirmed in legislation for the defence forces in 1996 and 2003.

Bulgaria[103]

The Rakowski Bulgarian Officers League is an independent professional organization of active servicemen, reserve servicemen, and their families. Formed in 1991, it now has 10,000 members in the Ministry of Defence and the Ministry of Interior.

Its main objectives are defence of the professional and social interests of its members and the professionalization of the armed forces. The League has been especially active in lobbying for legislative reform leading to the civilianization of the armed forces, and has actively supported Bulgaria's membership of NATO and of the EU.

It has worked in partnership with the Ministry of Defence, and they signed a formal co-operation agreement in 2002.

The third approach is for there to be an authorized but autonomous *military association*. Some associations of this kind are long-standing, such as those in the Netherlands, Belgium, and Sweden (the first was formed in the Netherlands in the late 19th century), whereas others, such as the arrangements in Poland, Hungary, Bulgaria, and Romania, have come about due to recent legal or constitutional changes. In countries following this third approach, members of the armed forces are not legally restricted from joining military associations.

These military associations enjoy autonomy and accountability to their members, and are therefore able to speak with authority on their behalf. They may be recognized by their respective ministry of defence for negotiating purposes and some (for example, in Germany) have very high rates of participation by eligible members of the armed forces. In practice, they may be insulated from mainstream trade unionism, e.g., by not participating in federations of unions.

Notwithstanding freedom of association, members of the armed forces may be legally prohibited from engaging in certain forms of industrial action, especially strikes. It should

103 Presentation of the Rakowski Bulgarian Officers League, ODIHR-EUROMIL Roundtable on Military Unions, Bucharest, October 2006 (unpublished).

be mentioned, however, that even where a military association itself is prohibited from or voluntarily forswears industrial action, this may not prohibit secondary industrial action by another union in support of its cause.

Finally, and more rarely, in a few countries (for example, the Netherlands), a trade union for members of the armed forces may exist that is associated with other trade unions through a federation. Although there could clearly be risks of external influence and of industrial militancy in such arrangements, it is worth noting that the experience in the Netherlands has been one of self-restraint: strike action, for example, has never been taken.

2. Best Practices and Recommendations

The Parliamentary Assembly of the Council of Europe considered in Recommendation 1572 (2002) that the Committee of Ministers should call on the governments of the member states to allow members of the armed forces and military personnel to organize themselves in representative associations (with the right to negotiate on matters concerning salaries and conditions of employment), to lift the restrictions on their right to association, to allow them to be members of legal political parties, and to incorporate all the appropriate rights in military regulations.

According to Assembly Recommendation 1572 (2002), with respect to the professional staff of the armed forces, freedom of association covers the following rights: the right of association, including the right to negotiate salaries and conditions of employment, and the right to belong to legal political parties. Arguably, members of the armed forces should fully enjoy the right, where the army is not involved in action, to set up specific associations geared to protecting their professional interests in the framework of democratic institutions, to join them, and to play an active part in them, while discharging their normal duties.[104] The Assembly reiterated this view in Recommendation 1742 (2006), which additionally called on member states to permit members of the armed forces to join professional representative associations *or trade unions* entitled to negotiate, and to set up consultative bodies involving these associations representing all categories of personnel.

Recommendations

- States should permit all members of the armed forces to join either a professional association or a trade union representing their interests;
- These associations or unions should enjoy the right to be consulted in discussions concerning conditions of service for members of the armed forces;
- Disciplinary action or victimization of individual members of the armed forces for participation in the activities of such professional associations or trade unions should be prohibited;
- Any restrictions on freedom of association (for example, with regard to industrial action) should be: prescribed by law, proportionate to legitimate state interests recognized in human rights treaties, and also be non-discriminatory.

104 Of the 46 states parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms, only Spain has officially lodged a reservation to Art. 11.

Chapter 10

Conscientious Objection to Military Conscription and Service

This chapter provides an inventory of the legislation, policies, and good practices that various countries use in dealing with conscription and the right to conscientious objection. This is a subject where countries have taken a variety of approaches: while some have a fully established legal right of conscientious objection without penalties, in others conscientious objectors are still treated harshly, and in a minority of countries the right is not recognized at all.

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

1. Issues at Stake

Many people have religious, philosophical, or ethical objections to the use of violence or to the deliberate taking of life, either on a personal basis or by state bodies acting on their behalf. Historically, these beliefs have been associated with groups such as the Quakers (Society of Friends) or Jehovah's Witnesses, but they are by no means exclusive to them. Within a democracy, people with pacifist or non-violent convictions are free to hold and propagate these views and to argue that state policy should adhere to them, for example, by pursuing peaceful diplomacy rather than armed intervention. Moreover, the freedom to do so is recognized by protections for freedom of thought, belief and conscience found within international human rights treaties (these are discussed at greater length in Chapter 11, "Religion in the Armed Forces").

The question of conscientious objection is a narrower and personal one: it involves a person's freedom to act upon their beliefs by refusing to join the armed forces or to take part in military action. Naturally, where the armed forces of a state are made up entirely of volunteers, a person with conscientious objections can satisfy their conscience by not enlisting. It is significant therefore that there is a clear trend within Europe towards professionalization of the armed forces and for states to relinquish conscription, or where it is retained, to shorten the period of military service. In 2005, the Quaker Council for European Affairs noted that 10 European countries had suspended conscription in the previous decade, although at that time it remained in force in 29 European states.[105] The movement away from conscription means that those individuals with conscientious objections are less likely to be put involuntarily in a position of conflict between their conscience and military duties.

The issue of conscientious objection is one that is not exclusive to countries with conscripted armed forces, however, since a conscientious objection may also develop at any point

105 *The Right to Conscientious Objection in Europe: A Review of the Current Situation* (Brussels: Quaker Council for European Affairs, 2005), p. 4.

after a volunteer has enlisted, especially if the serviceman or -woman's religious or other beliefs change. In addition, a person who does not have a general objection to the use of violence or the taking of life may nevertheless have a conscientious objection to a particular military campaign that they regard, for example, as immoral or contrary to international law. This is sometimes referred to as "selective conscientious objection" and is discussed later in this chapter.

All of these situations raise common concerns, on the one hand of giving effective protection so that people are not compelled to act against their deepest convictions, but on the other hand of the need for the authorities to be satisfied that the conscientious objection is genuine and not an attempt to evade legal responsibilities. The question of assessing the authenticity of beliefs is by no means unique to conscientious objection, nor is it unresolvable. It arises in many other contexts in which the law recognizes the freedom to act upon religious beliefs.[106] A state may either take a claim of conscientious objection at face value (particularly where there is little or no other advantage in making insincere claims), or, as many states do, it may establish a formal process for testing the sincerity of an individual's professed beliefs through an inquiry by a panel of some type.

Where states recognize conscientious objection to conscription, they generally do so by providing for alternative or substitute service in non-military work for other public authorities, such as health care, social services, or education. There may nevertheless be issues concerning whether the alternative service is comparable to military service. Clearly, if it is perceived as significantly less onerous, then there may be an incentive for insincere claims of conscientious objection. On the other hand, if alternative service is significantly more onerous, it may be seen as a form of punishment of, or deterrence to, conscientious objectors. Moreover, the making of a strict comparison between military service and alternative service may be difficult because of features of conscription that may have no civil counterpart: a requirement to live in barracks, to take part in military exercises, or even to be deployed to the battlefield, for example.

A number of issues also remain concerning the practical recognition of conscientious objection. As detailed in a recent report from the UN's Office of the High Commissioner for Human Rights, these include:

> the basis on which conscientious exemption from military service can be granted and the process for obtaining such exemption; the provision, length and conditions of alternative service and the rights of those who object to alternative service; whether alternative service provides the same rights and social benefits as military service; the length and conditions of alternative service; and whether there can be repeated punishment for failure to perform military service … [the] lack of an independent decision-making process, disproportionate lengthy alternative service and States parties that recognize the right to conscientious objection in a discriminatory manner, e.g. by granting exemption only to religious groups and not others.[107]

106 R. Ahdar and I. Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005), ch. 6.

107 "Civil and Political Rights, Including the Question of Conscientious Objection to Military Service: Analytical report of the Office of the High Commissioner for Human Rights on best practices in relation to conscientious objection to military service", United Nations Economic and Social Council, E/CN.4/2006/51, Commission for Human Rights, 62nd session, 27 February 2006, available at <http://www.ohchr.org/english/bodies/chr/sessions/62/listdocs.htm> (under "Item 11").

2. International Human Rights Commitments

Conscientious objection is an example of a human right that has become recognized in the last fifty years, largely through interpretation of the existing treaty obligations protecting freedom of thought, belief, and religion. In the case of the ICCPR, the UN Human Rights Committee stated in its General Comment 22:

> The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief.

Whereas the texts of the ECHR and the ICCPR do not recognize the right, the more recent Charter of Fundamental Rights of the European Union[108] does. Art. 10.2 states:

> The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

In 2006, the Parliamentary Assembly of the Council of Europe affirmed the importance of the right of conscientious objection as "an essential component of the right to freedom of thought, conscience and religion as secured under the Universal Declaration of Human Rights and the European Convention on Human Rights". The Parliamentary Assembly requested the Council of Ministers to reconsider its proposal to introduce the right to conscientious objection to military service into the European Convention for the Protection of Human Rights and Fundamental Freedoms by means of an additional protocol amending Arts. 4.3.b and 9.

Box 10.1
Conscientious Objection: Key Events in the United Nations[109]

1984	Report of two special rapporteurs to the Sub-Commission on the Promotion and Protection of Human Rights recommending that states should be recognized by law.[110]
1987	Commission on Human Rights adopted Resolution 1987/46, in which it appealed to states to recognize that conscientious objection to military service should be considered a legitimate exercise of the right to freedom of thought, conscience, and religion.
1989	Commission Resolution 1989/59 appealing to states to enact legislation aimed at exemption from military service on the basis of genuinely held conscientious objection.
1993	Resolution 1993/84 recommending that states with a system of compulsory military service introduce alternative service for conscientious objectors and emphasizing that "such forms of alternative service should be of a non-combatant or civilian character, in the public interest and not of a punitive nature".
1998	In Resolution 1998/77, the Commission called upon states to establish independent and impartial decision-making bodies to determine whether a conscientious objection is genuinely held, taking account of the requirement not to discriminate.

108 "Charter of Fundamental Rights of the European Union", *op. cit.*, note 46.

109 "Civil and Political Rights", *op. cit.*, note 107.

110 In the following cases:
"(a) the right of persons who, for reasons of profound religious, ethical, moral, humanitarian or similar conviction, refuse to perform armed service and, at a minimum, should extend the right of objection to persons whose conscience forbids them to take part in armed service under any circumstances; and
"(b) the right to be released from service in armed forces which the objector considers likely to be used to enforce apartheid, in action amounting to genocide and for illegal occupation of foreign territory; [or] … which the objector holds in gross violations of human rights … [or] likely to use weapons of mass destruction or other weapons outlawed by international law or which cause unnecessary suffering."
A. Eide and C.L.C. Mubanga-Chipoya, *Conscientious Objection to Military Service, Study for the 36th Session of United Nations Sub-Commission on the Promotion and Protection of Human Rights* (New York: United Nations, 1983), ch. III, sect. B, para. 153.

Box 10.2

Human Rights Commission Resolution 1998/77[111]

2. *Welcomes* the fact that some States accept claims of conscientious objection as valid without inquiry;

3. *Calls upon* States that do not have such a system to establish independent and impartial decision-making bodies with the task of determining whether a conscientious objection is genuinely held in a specific case, taking account of the requirement not to discriminate between conscientious objectors on the basis of the nature of their particular beliefs;

4. *Reminds* States with a system of compulsory military service … of its recommendation that they provide for conscientious objectors various forms of alternative service which are compatible with the reasons for conscientious objection, of a non-combatant or civilian character, in the public interest and not of a punitive nature; …

6. *Reiterates* that States, in their law and practice, must not discriminate against conscientious objectors in relation to their terms or conditions of service, or any economic, social, cultural, civil or political rights.

The tendency towards increasing recognition of conscientious objection can be seen in the attitude of the European Court of Human Rights and of the Human Rights Commission. The text of the European Convention for the Protection of Human Rights and Fundamental Freedoms expressly exempts military service from being treated as forced labour under Art. 4[112] and fails to refer to conscientious objection *per se*. In a 1966 case from Germany, the European Court of Human Rights found that conscientious objectors do not have the right to exemption from military service, but that each contracting state may decide whether or not to grant such a right.[113] Conscientious objectors may be required to perform civilian service instead of compulsory military service, and they do not have the right to be exempted from substitute civilian service.

Later decisions have, however, refined this position in important respects. The Court has found that, although Art. 9 (protecting freedom of thought, conscience, and religion) does not confer a right of conscientious objection as such, nevertheless conscientious objection falls within its ambit. This means that, where states do recognize conscientious objection, they must do so in a way that is not discriminatory. Art. 14 of the Convention prevents discrimination in the enjoyment of Convention rights on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Differences in the length of alternative service relative to the period of conscription that cannot be objectively justified may therefore breach Art. 14.[114] In addition, in one instance, repeated punishment of a conscript who refused to wear a uniform for religious reasons reached the level of severity required to be seen as degrading treatment contrary to Art. 3 of the Convention.[115]

111 Adopted at the 58th meeting of the Human Rights Commission, 22 April 1998.

112 Art. 4 ECHR:
"2 No one shall be required to perform forced or compulsory labour.
"3 For the purpose of this article the term 'forced or compulsory labour' shall not include: ...
"b any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service; …
"d any work or service which forms part of normal civic obligations."

113 *Grandrath v. Federal Republic of Germany*, European Commission of Human Rights, 23 April 1965, *Yearbook of the European Convention on Human Rights*, Vol. 10, 1967, p. 626.

114 *Autio v. Finland*, European Commission of Human Rights, 6 December 1991, *Decisions and Reports*, Vol. 72, 1991, p. 245; *Julin v. Finland*, European Commission of Human Rights, 6 December 1991 (unpublished); *Raninen v. Finland*, European Commission of Human Rights, 7 March 1996, *Reports of Judgments and Decisions*, Vol. 8, 1997, pp. 2821-2822, para. 55.

115 *Ülke v. Turkey*, European Court of Human Rights, 24 January 2006 (unpublished).

Council of Europe institutions have adopted numerous measures recognizing the right of conscientious objection.[116] The Parliamentary Assembly passed a series of resolutions on the issue from 1967 through 2006,[117] and an important recommendation was also made by the Committee of Ministers of the Council of Europe in 1987. In its recommendation, it endorsed the right of conscientious objectors to be released from military service and supported the provision of alternative service. It invited member states to bring their legislation and practice into line with the right to conscientious objection.[118] The recommendation suggests certain minimum basic principles for states in the implementation of this right.[119] The Committee of Ministers also urged that a "sustained effort" be made to implement the recommendation.[120]

Box 10.3

Council of Europe Committee of Ministers, 1987

- Relevant due process protections need to be provided to applicants, including the right to be informed in advance of their rights.
- Applications can be made during military service and during military training after the initial service.
- Alternative service shall not be of a punitive nature.
- Alternative service shall (within reasonable limits) be of comparable length to military service.[121]

Within the EU, the European Parliament noted in a resolution in 1983 "that protection of freedom of conscience implies the right to refuse to carry out armed military service and to withdraw from such service on grounds of conscience" (para. 2) and pointed out that "no court or commission can penetrate the conscience of an individual and that a declaration setting out the individual's motives must therefore suffice in the vast majority of cases to secure the status of conscientious objector" (para. 3).[122]

The OSCE has taken the lead from the United Nations, highlighting that participating States should note the resolution of the UN Commission on Human Rights that everyone should have a right to conscientious objection.[123] The Copenhagen Conference also resolved that participating States with obligatory military service should consider introducing various forms of alternative service for those with conscientious objections.[124] The OSCE Code of Conduct (see Chapter 4, "OSCE Commitments") reflects these commitments in paras. 27 and 28:

116 The information in this paragraph is from the Office of the United Nations High Commissioner for Human Rights, "Civil and Political Rights, Including the Question of Conscientious Objection to Military Service", UN Doc. E/CN.4/2004/55, 26 February 2004.

117 In 1967, the Parliamentary Assembly of the Council of Europe adopted its first resolutions (Nos. 337 and 478) supporting the right of conscientious objection. This was followed in 1977 with Recommendation No. 816 affirming the right of conscientious objection. Also see Parliamentary Assembly of the Council of Europe, Recommendation 1518, "Exercise of the right of conscientious objection to military service in Council of Europe member states", 23 May 2001.

118 Committee of Ministers of the Council of Europe, "Recommendation No. R (87) 8 of the Committee of Ministers to member states regarding Conscientious Objection to Compulsory Military Service", 9 April 1987.

119 *Ibid*., para. 10.

120 Decision on the reply from the Committee of Ministers adopted at the 785th meeting of the Ministers' Deputies (26-27 February 2002), Doc. 9379, 1 March 2002.

121 "Recommendation No. R (87) 8", *op. cit*., note 118, Art. B8.

122 European Parliament, "Resolution on conscientious objection", *Official Journal of the European Communities*, C 068, 14 March 1983, p. 14; also see European Parliament, "Resolution on conscientious objection and alternative civilian service", *Official Journal of the European Communities*, C 291, 20 November 1989, p. 122.

123 Copenhagen 1990, para. 18.1.

124 *Ibid*., para. 18.4. This was reiterated at the Budapest Conference of 1994 (Decisions: IV. Code of Conduct on Politico-Military Aspects of Security).

> 27. Each participating State will ensure that the recruitment or call-up of personnel for service in its military, paramilitary and security forces is consistent with its obligations and commitments in respect of human rights and fundamental freedoms.
> 28. The participating States will reflect in their laws or other relevant documents the rights and duties of armed forces personnel. They will consider introducing exemptions from or alternatives to military service.

Constitutional and legal recognition

As mentioned in Chapter 6, a number of OSCE participating States recognize the right of conscientious objection in their constitutions. However, it is important that implementing procedures be provided in legislation, as the UN Office of the High Commissioner for Human Rights has argued:

> The existence of legal recognition of conscientious objection or alternative service, without implementing provisions, can lead to legal uncertainty and frustrate the exercise of these rights, making it difficult, although not necessarily impossible, to exercise in practice.[125]

Box 10.4
Constitutional Provisions Concerning Conscientious Objection

Croatia	Conscientious objection shall be allowed to all those who for religious or moral reasons are not willing to participate in the performance of military service in the armed forces. Such persons shall be obliged to perform other duties specified by law.	Art. 47.2
Estonia	Those who refuse service in the Defence Forces for religious or ethical reasons shall be obligated to participate in alternative service, in accordance with the procedures prescribed by law.	Art. 124.2
Finland	Provisions on the right to exemption, on grounds of conscience, from participation in military national defence are laid down by an act.	Art. 127.2
Germany	A person who refuses, on grounds of conscience, to render war service involving the use of arms can be required to render a substitute service. The duration of such substitute service may not exceed the duration of military service. Details are regulated by a statute, which may not interfere with the freedom to take a decision based on conscience and which must also provide for the possibility of a substitute service not connected with units of the Armed Forces or of the Federal Border Guard.	Art. 12.a.2
Netherlands	Exemption from military service because of serious conscientious objections shall be regulated by an act of Parliament.	Art. 99
Norway	As a general rule, every citizen of the state is equally bound to serve in the defence of the country for a specific period, irrespective of birth or fortune. The application of this principle, and the restrictions to which it shall be subject, shall be determined by law.	Art. 109.2
Poland	Any citizen whose religious convictions or moral principles do not allow him to perform military service may be obliged to perform substitute service in accordance with principles specified by a statute.	Art. 85.3
Portugal	Conscientious objectors who by law are subject to the performance of military service shall perform civic service with the same duration and degree of arduousness as armed military service.	Art. 276.4
Russian Federation	A citizen of the Russian Federation whose convictions and faith are at odds with military service, and also in other cases stipulated by federal law, shall have the right to the substitution of alternative civilian service for military service.	Art. 59.3
Slovakia	No one must be forced to perform military service if this runs counter to his conscience or religious belief. The details will be specified in a law.	Art. 25.2
Slovenia	Citizens who for their religious, philosophical or humanitarian convictions are not willing to perform military duties must be given the opportunity to participate in national defence in some other manner.	Art. 123.2
Spain	The law shall determine the military obligations of Spaniards and shall regulate, with all due guarantees, conscientious objection as well as other grounds for exemption from compulsory military service; it may also, when appropriate, impose community service in place of military service.	Art. 30.2

125 "Civil and Political Rights", *op. cit.*, note 107, para. 22.

3. Approaches

This section deals with the various approaches of OSCE participating States and the relevant international commitments concerning: the reasons for conscientious objection; the availability of alternative service; the position of professional members of the regular armed forces; the question of selective conscientious objection; and procedural aspects of determining conscientious-objection claims.

Reasons for conscientious objection

Some religious groups (for example, Jehovah's Witnesses and Quakers) have a religious objection to military service. However, conscientious objections are not limited to religious reasons. UN Human Rights Commission Resolution 1998/77 states that "conscientious objection to military service derives from principles and reasons of conscience, including profound convictions, arising from religious, ethical, humanitarian or similar motives", and also calls upon states "not to discriminate amongst conscientious objectors on the basis of their particular beliefs".

In a 2001 report to the Commission on Human Rights, the UN special rapporteur on freedom of religion or belief stated:

> First of all, the issue is one of discriminatory or intolerant policies, legislation or State practice, or even indifference on the part of State institutions which is prejudicial to minorities, be they of the "major religions" or other religious and faith-based communities. Such minorities are mainly affected by … non-recognition of conscientious objection, no provision for alternative civilian service, and the punitive nature of this civilian service by reason of its duration, which particularly affects the Jehovah's Witnesses and other religious and faith-based communities … .[126]

Box 10.5
Recognition of Grounds for Conscientious Objection

Grounds	Religious	Ethical/Philosophical	Emotional	Other
Countries	Austria, Belarus, Canada, Croatia, Czech Republic, Estonia, Georgia, Germany, Latvia, Lithuania, Norway, Poland, Portugal, Russian Federation, Serbia and Montenegro, Sweden, Switzerland, Ukraine, United States	Austria, Belgium, Canada, Croatia, Czech Republic, Georgia, Germany, Latvia, Lithuania, Norway, Poland, Portugal, Serbia and Montenegro, Sweden, Switzerland, United States	Austria, Denmark, Georgia, Germany, Norway, Portugal, Russian Federation, Serbia and Montenegro, Sweden	Canada, Estonia, Germany, Russian Federation, United States

Notes:

Participating States not replying: Bosnia and Herzegovina, Slovenia, United Kingdom.

In Belgium, the relevant provisions have been suspended, together with the legal provisions regarding conscription, as conscription has been suspended since 1992.

126 "Civil and Political Rights, Including Religious Intolerance, Report submitted by Mr. Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 2000/33", UN Economic and Social Council, Commission on Human Rights, Fifty-seventh session, 13 February 2001, E/CN.4/2001/63, para. 182.

As can be seen, many European states have recognized both religious and non-religious grounds for conscientious objection. In the United States, conscientious objection has been extended by judicial interpretation from the originally limited recognition of religious objections, to include other ethical and philosophical objections (see Box 10.6 below).

Box 10.6
The US Supreme Court and Conscientious Objection

- *United States v. Seeger,* Supreme Court of the United States, 8 March 1965, *United States Reports*, Vol. 380, 1965, pp. 163, 166 (extending application of law on conscientious objection from religious beliefs to those who have secular beliefs that are "sincere and meaningful [and occupy] a place in the life of the possessor parallel to that filled by an orthodox belief in God");
- *Welsh v. United States,* Supreme Court of the United States, 15 June 1970*, United States Reports*, Vol. 398, 1970, p. 333 (plurality opinion) (conscientious-objector status applies to all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, "would give them no rest or peace if they allowed themselves to become a part of an instrument of war").

Alternative service (substitute service)

As can be seen above, the right to perform alternative service has been advocated by a number of international bodies, including the UN Human Rights Commission and the Council of Europe Parliamentary Assembly. Box 10.7 shows some of the variety among OSCE participating States concerning the institutions in which alternative service may be fulfilled.

Box 10.7
Examples of Organizations or Institutions in Which Alternative Service Can Be Fulfilled[127]

Country	Institution
Austria	In hospitals, in rescue services, within social and handicapped services, within geriatric care, within care services for drug abusers within prisons, in the service for refugees and asylum seekers, within disaster relief and civil defence, service at memorial sites especially for victims of National Socialism, in providing for public security and traffic safety, service in the area of environmental protection and in the area of youth movements.
Croatia	Schools, universities, hospitals, child care, etc., in any kind of nonprofit institution.
Estonia	Structural units determined by the government that are in areas covered by the Interior Ministry or the Ministry of Social Affairs and that include rescue, social care, or emergency work (Defence Forces Services Act).
Finland	Unarmed military service in military units and alternative civilian non-military service first at the National Centre for Civilian Service and then in civilian jobs.
Germany	Social or charitable institutions (e.g., hospitals, homes for senior citizens, the German Red Cross and similar institutions or agencies).
Latvia	State or municipal institutions, state or municipal companies or public organizations that engage in firefighting, search-and-rescue operations, social care, medical assistance, public-utility and public-transport services, improving state or municipal property or grounds, and customs control (specific institutions are approved by the cabinet upon a proposal of the minister of defence).
Russian Federation	Art. 4 of the Federal Law on Alternative Civilian Service: (a) in organizations within the jurisdiction of federal executive bodies; (b) in organizations within the jurisdiction of executive bodies of subjects of the Russian Federation; (c) in organizations within the Armed Forces of the Russian Federation, other forces, military units, and military structures as civilian personnel.
Switzerland	Health, social welfare, preservation of cultural property, environmental protection, forestry, agriculture, development co-operation and humanitarian assistance, disaster and emergency relief.
Ukraine	Enterprises, institutions, or organizations that belong to the state and whose activities are directed at social protection of the population, health protection, and environmental protection.

127 ODIHR-DCAF questionnaire, question 43.

It is common for alternative service to be longer in duration than military service to take account of the different work conditions and hours. A European norm of around 1 1/2 times the length of military service is common, although, in a minority of states (for example, Germany), the period is the same, and some have alternative service lasting up to twice as long as military service. The European Committee of Social Rights of the Council of Europe found that alternative civilian service twice the duration of military service was "excessive" in character and amounted to a "disproportionate restriction on 'the right of the worker to earn his living in an occupation freely entered upon', and was contrary to article 1, paragraph 2, of the European Social Charter".[128]

Where a difference between the duration of military service and alternative service is arbitrary or is merely designed to deter applicants from claiming alternative service, there is a possibility that it may be found to be discriminatory under constitutional[129] or human rights law. General Comment 22 of the UN Human Rights Committee states: "there shall be no discrimination against conscientious objectors because they have failed to perform military service".[130] The Committee has recommended that states parties recognize the right of conscientious objection without discrimination:[131] "conscientious objectors can opt for civilian service the duration of which is not discriminatory in relation to military service, in accordance with articles 18 and 26 of the Covenant".[132] The UN Human Rights Committee has also referred to the need for any difference to be based "on reasonable and objective criteria, such as the nature of the specific service concerned or the need for a special training in order to accomplish that service".[133]

There may be other impediments to exercising the right to alternative service. In some countries, for example, alternative service is supervised by the military itself. Thus, people who opt for alternative service out of pacifist beliefs may have difficulty in fully distancing themselves from the military. Moreover, apart from differentials in the length of service discussed above, people who opt for alternative service may be denied equivalent economic or social rights in comparison with those who undergo military service. Again, this is an impediment to exercising the right to alternative service.

128 *Quaker Council for European Affairs v. Greece*, European Committee of Social Rights, 27 April 2001, *International Human Rights Reports*, Vol. 8, 2001, p. 1158.

129 See the decision of the Italian Constitutional Court (Decision No. 470 of 31 July 1985) declaring that the requirement to perform 20 months of alternative service in comparison with only 12 months of military service was a violation of the constitutional principle of equality. See José de Sousa e Brito, "Conscientious Objection", in T. Lindholm, W. Cole Durham, and B. Tahzib-Lie, *Facilitating Freedom of Religion or Belief: A Deskbook* (Leiden: Martinus Nijhoff Publishers/Brill Academic, 2004).

130 Office of the High Commissioner for Human Rights, "General Comment No. 22: The right to freedom of thought, conscience and religion", 30 July 1993, Art. 18, CCPR/C/21/Rev.1/Add.4.

131 "Civil and Political Rights, Including the Question of Conscientious Objection to Military Service: Report of the Office of the High Commissioner for Human Rights", E/CN.4/2004/55, UN Commission on Human Rights, Sixtieth session, 16 February 2004, para. 14.

132 *Ibid*., para. 11.

133 *Foin v. France*, Human Rights Committee, 9 November 1999, Communication No. 666/1995, *International Human Rights Reports*, Vol. 7, 2000, p. 354. Also see *Maille v. France*, Human Rights Committee, 31 July 2000, Communication No. 689/1996, *International Human Rights Reports*, Vol. 7, 2000, p. 947; *Vernier v. France*, Human Rights Committee, 10 July 2000, Communication No. 690, and *Nicolas v. France*, Human Rights Committee, 10 July 2000, Communication No. 691/1996, both in *International Human Rights Reports*, Vol. 8, 2001, p. 26. Contrast the earlier decision in *Järvinen v. Finland*, Human Rights Committee, 23 March 1989, Communication No. 295/1988, *Human Rights Committee Annual Report 1990*, Annex IX.L., p. 367.

Box 10.8

Procedures in Selected Participating States That Recognize Alternative Service

Participating State	Procedures for Applying Alternative Service
Austria	According to the Austrian Constitution, civilian service is not an alternative but a replacement for military service. However, if a person does not want to complete his military service, he simply has to file a declaration that he wants to perform civilian service instead. Upon his declaration, the Interior Ministry decides in a notice of assessment that the person has to perform civilian service.
Croatia	If a request to the legally established commission meets the requirements determined by law, the applicant may perform alternative service in an approved institution (list of apropriate institutions regulated by an administrative act).
Estonia	An individual has to submit an application to the Defence Forces agency stating that he wants to substitute compulsory military service with alternative service. Then the Defence Forces collect testimony from the applicant and his friends and relatives. Inquiries are made at the applicant's place of work or study, as well as any religious organizations that he has specified. The Defence Forces may summon the applicant or request additional documentation, or they may decide without taking either of those steps whether to satisfy or deny the application.
Finland	Alternatives include civilian non-military service and unarmed military service. The Labour Ministry is in charge of civilian non-military service, and the Defence Ministry is in charge of unarmed military service. In case of civilian non-military service, applications are sent to the relevant military body, which sends them to the Labour Ministry. The Labour Ministry then orders applicants to enter civilian non-military service.
Georgia	Procedures provided in accordance with the Law on Alternative Non-military Service.
Germany	Persons liable for military service have to apply to the selection and induction office for recognition as conscientious objectors. A handwritten curriculum vitae and an explanation of the motives for this application are to be submitted. If their applications are rejected, persons liable for military service can contest the decision of the Federal Office of Civilian Service before an administrative court.
Latvia	A candidate receiving a draft notice must submit an application to the head of the Military Service Recruitment Centre.
Lithuania	An applicant must submit an application to a commission composed of representatives of NGOs, religious organizations, and educational institutions.
Russian Federation	The procedure for filing an application to undergo alternative civilian service is regulated by Art. 11 of the Federal Law on Alternative Civilian Service. In accordance with this article, citizens have the right to submit an application for substitution of conscripted military service with civilian service to the military directorate where they are registered for military service in accordance with the following terms: before 1 April for those citizens who are eligible to be conscripted for military service between October and December of that year; before 1 October for citizens who are eligible to be conscripted for military service between April and June of the following year.
Serbia and Montenegro	Requests are submitted to the competent regional military body.
Sweden	The same procedures as for compulsory military service are applicable to alternative service.
Switzerland	Applicants must undergo a test of conscience conducted by a special commission.
Ukraine	An application must be submitted to a special commission, along with documentation proving religious convictions.

Conscientious objection for members of regular armed forces

While most OSCE participating States recognize that conscientious objection applies to conscripts, fewer countries recognize it in the case of professional service personnel. In their responses to the ODIHR-DCAF questionnaire, the following states replied that their legislation does provide a legal right to conscientious objection for professional soldiers: Belarus, Germany, Norway, Poland, the Russian Federation, Slovakia, Spain, Switzerland, and the United States.[134]

However, the UN High Commissioner for Human Rights has pointed out:

> The application of the right to conscientious objection to persons who voluntarily serve in the armed forces is based on the view that an individual's deeply held

134 ODIHR-DCAF questionnaire, question 37.

> convictions can evolve and that individuals voluntarily serving in armed forces may over time develop conscientious objection to bearing arms.[135]

In April 2006, the Parliamentary Assembly of the Council of Europe called on member states:

> to introduce into their legislation the right to be registered as a conscientious objector at any time, namely before, during or after military service, as well as the right of career servicemen to be granted the status of conscientious objector.[136]

Selective conscientious objection

Another issue is so-called selective conscientious objection, i.e., conscientious objection to participation in particular military campaigns rather than to military service in general. Conscientious objection of this type has a long history (examples range from Henry David Thoreau's refusal to pay taxes in 1846 during the US-Mexico war[137] to servicemen who refused to fight in the second Gulf War[138]) and is often connected with Just War Theory. It is an issue of particular importance for professional service personnel and reservists.

Selective conscientious objection is problematic for two reasons. First, since the objector is prepared to fight in other conflicts, his or her sincerity in making the claim may be questioned. Second, the motivation may appear to be political rather than a dictate of conscience. Although in theory a member of the armed forces with a selective objection could, subject to other considerations of effectiveness, be deployed to perform other duties, in practice the outcome of such a claim is likely — as with the regular soldier who develops a conscientious objection after enlisting — to be discharge from the armed forces and loss of career.

Few states provide an exemption from service for selective conscientious objection. The US Supreme Court has held that there is no constitutional requirement under protection of freedom of religion to do more than to provide a general right.[139] The German Federal Administrative Court, on the other hand, held in 2005 that freedom of conscience protected an army software engineer who refused to work on a computer program for reasons of conscience because he found the Iraq war to be unjust and illegal.[140]

Box 10.9
Selective Conscientious Objection[141]

Countries That Recognize Selective Conscientious Objection	Countries That Do Not Recognize Selective Conscientious Objection
Austria, Belarus, Belgium, Canada, Denmark, Georgia, Germany, Norway, Poland, Portugal, Russian Federation, Serbia and Montenegro, Sweden, Switzerland	Croatia, Czech Republic, Finland, Ireland, Lithuania, United States

135 "Civil and Political Rights", *op. cit.*, note 107, para. 26.

136 Council of Europe Parliamentary Assembly Recommendation 1742 (2006), "Human rights of members of the armed forces", text adopted by the Assembly on 11 April 2006 (11th sitting).

137 H.D. Thoreau, *On Civil Disobedience* (Chicago: Charles H. Kerr, 1989).

138 "Jail for Iraq refusal RAF doctor", BBC News, 13 April 2006, <http://news.bbc.co.uk/1/hi/uk/4905672.stm>.

139 *Gillette v. United States*, Supreme Court of the United States, 8 March 1971, *United States Reports*, Vol. 401, 1974, p. 437.

140 German Federal Administrative Court, *Wehrdienstsenat* (Military Service Division), 21 June 2005, Decision No. 12 of 2004, Case No. WD 12.04 (see M. Bohlander, "Superior Orders, Unjust War and the Soldier's Conscience", *Inter Alia*, Vol. 4, 2005, pp. 17-19).

141 ODIHR-DCAF questionnaire, question 35; participating States not replying: Bosnia and Herzegovina, Estonia, Latvia, Slovenia, Ukraine, United Kingdom.

Procedures for determining conscientious-objection claims

In practice, options vary from those countries that have predominantly civilian boards, to those that have military bodies, while some countries have an intermediate system. An example of a country with a civilian board is Croatia, where the Civil Service Commission includes a representative of the Ministry of Defence; the Ministry of Justice, Administration, and Local Self-Government; and the Ministry of Health and Social Welfare. The Greek system is an intermediate one, in that a mixed civilian-military panel advises the minister of defence (if the minister refuses the application, the member of the armed forces may appeal to a court). In the United States, on the other hand, a military investigative officer prepares a report to the military, subject to procedural guarantees for the applicant, such as the ability to be legally represented and to introduce a rebutting statement.[142]

Box 10.10

Bodies That Determine Claims of Conscientious Objection[143]

Body Concerned	Armed Forces	Court	Commission
Countries	Czech Republic, Denmark, Norway, Russian Federation, Serbia and Montenegro, United States	Belarus, Finland, Germany, Russian Federation	Belarus, Belgium, Croatia, Czech Republic, Georgia, Latvia, Lithuania, Norway, Poland, Russian Federation, Switzerland, Ukraine, United States

UN Human Rights Commission Resolution 1998/77 calls upon states that do not accept claims of conscientious objection as valid without inquiry to establish independent and impartial decision-making bodies with the task of determining whether a conscientious objection is genuinely held in a specific case. In a similar fashion, Council of Europe Recommendation 1518/2001 states: "The examination of applications shall include all the necessary guarantees for a fair procedure. An applicant shall have the right to appeal against the decision at first instance. The appeal authority shall be separate from the military administration and composed so as to ensure its independence."[144]

4. Best Practices and Recommendations[145]

- Information should be made available to all persons affected by military service about the right to conscientious objection to military service, and the means of acquiring conscientious-objector status;
- Conscientious objection should be available both for conscripts and for professional soldiers both prior to and during military service, in line with the recommendations of international bodies;
- Where a state does not accept a statement of conscientious objection at face value, there should be independent review panels (or where not independent, adequate procedural safeguards should be in place);
- Conscientious objectors should not be subject to repeated punishment for failure to perform military service;
- There should be no discrimination against conscientious objectors in relation to their terms or conditions of service, or any economic, social, cultural, civil, or political rights;

142 "Civil and Political Rights", *op. cit.*, note 107, paras. 38-41.

143 ODIHR-DCAF questionnaire, question 34.a; participating States not replying:
Armed Forces question: Bosnia and Herzegovina, Canada, Finland, Lithuania, Slovenia, United Kingdom;
Court/Commission question: Austria, Bosnia and Herzegovina, Canada, Denmark, Estonia, Slovenia, Sweden, United Kingdom.

144 "Civil and Political Rights", *op. cit.*, note 107, para. 37.

145 A number of these are adapted from "Civil and Political Rights", *op. cit.*, note 107.

- Alternative service should be compatible with the reasons for the conscientious objection, of a non-combatant or civilian nature, in the public interest and not punitive;
- Alternative service should be performed under a purely civilian administration, with no involvement by the military authority;
- Those performing alternative service should enjoy the same economic and social rights as those undergoing military service;
- The duration of alternative service should be no more than 1 1/2 times the length of military service.

Chapter 11

Religion in the Armed Forces

This chapter examines the practical issues surrounding the recognition of freedom of religion or belief in the armed forces in OSCE participating States. The potential challenges of accommodating religious freedom in general, and religious practices in particular, within the armed forces are discussed. The main human rights obligations recognizing religious freedom and prohibiting discrimination on grounds of religion are explained.

Aspects of religious practice may require accommodation by the armed services as an employer, such as allowing times or places for prayer, providing access to spiritual counsellors or chaplains of various religions, providing burial rites in different religious traditions, allowing time off for holy days, and varying uniform or catering regimes, or facilitating fasting. Accommodation of religious practices is in some cases required by law. Armed forces that wish to reflect the diverse composition of the societies that they protect will wish to remove as far as possible barriers to participation by members of different religions. It makes sense therefore to accommodate religious practice by members of the armed forces where this can be achieved without compromising military effectiveness. More importantly, religious accommodation means that employers can attract and retain the best possible employees regardless of religion or belief. This chapter examines some of the ways in which states provide for freedom to practise different religions in the armed forces and identifies best practices.

1. Issues at Stake

Human rights law recognizes that freedom of religion comprises both internal and external dimensions. Internal religious freedom concerns the freedom to believe, what the European Commission of Human Rights has called the inner forum (*forum internum*).[146] This rarely raises practical issues concerning the enjoyment of the right since it is concerned with a person's inner beliefs. The external dimension, however, is problematic: it concerns the right to act or abstain from behaviour based on religious beliefs or conscience. The issue of conscientious objection to military service (whether for religious or other reasons) is discussed in Chapter 10. This chapter is concerned with other aspects of behaviour motivated by religion.

Box 11.1

Freedom of Religion: The Approach of the Supreme Court of Canada[147]

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination. But the concept means more than that. Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the State or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free.

146 *C v. United Kingdom*, European Commission of Human Rights, 15 December 1983, *Decisions and Reports*, Vol. 37, 1983, pp. 142, 147.

147 *R* v. *Big M Drug Mart Ltd.*, Supreme Court of Canada, 24 April 1985, *Dominion Law Reports*, 4th Series, Vol. 18, 1985, pp. 321, 353-354, as delivered by Justice Dickson.

The external dimension can be divided into positive religious freedom and negative religious freedom. Positive religious freedom is the freedom to actively manifest one's religion or belief. The right to *manifest* one's religion may include participating in acts of worship; reading sacred texts; praying; telling other people about one's religious beliefs, requirements concerning dress, and diet; or observing holy days. As a social freedom, however, this positive freedom is necessarily subject to certain limitations to preserve social order and the rights of other citizens.

Negative religious freedom is freedom *from* coercion or discrimination on the grounds of religious (or non-religious) belief. For example, Art. 1.2 of the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981 states: "No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice."[148] Immunity from coercion implies that people not be subjected to penalties or disadvantageous treatment on account of their religious beliefs. The ICCPR includes a person's right "to have or to adopt a religion or belief of his choice" (Art. 18.1) and to be free from coercion in so choosing (Art. 18.2). The rights of religious minorities also receive specific recognition.[149]

If a state were to close its armed forces to certain religious groups or to restrict their opportunities for promotion, clearly this could constitute religious discrimination. However, insisting that enlisting service personnel swear an oath with a religious component to the head of state or to the constitution, for example, may equally amount to compulsion in matters of religion. This may exclude non-believers or those who, for religious reasons, object to swearing oaths.

Aspects of external religious freedom may conflict with the disciplined nature of life in the armed forces. These mostly concern positive aspects of religious liberty. However, negative aspects of liberty can be at stake in certain situations, e.g., if the ceremonial duties of the armed forces require the participation of a serviceman or -woman in a religious ceremony.[150] The Spanish Constitutional Court has ruled that orders of this kind violate religious liberty.[151] In Denmark, the constitutional guarantees on religious liberty are taken to forbid this also.[152]

Positive aspects of religious liberty may impose burdens on the armed services as an employer, such as allowing times or places for believers to pray, providing access to spiritual counsellors or chaplains of various religions, providing burial rites in different religious traditions, allowing time off for holy days, varying uniform or catering regimes, or facilitating fasting. In these instances, the question is essentially one of proportionality, i.e., assuming that there is a genuine military reason for the practice in question, whether or to what extent it would be compromised by accommodating the religious practice.

The issue can be seen clearly in the example (taken from the United States Supreme Court) of an Air Force doctor who was an Orthodox Jew and an ordained rabbi.

148 The Declaration was adopted by General Assembly Resolution 36/55, 36 UN GAOR, Supp. (No. 51), 171, 25 November 1981.

149 See Art. 27.

150 Nolte (ed.), *op. cit.*, note 6, pp. 88-89, citing disciplinary requirements in the United Kingdom and in Italy.

151 Spanish Constitutional Court, Judgment No. 177/1996, 11 November 1996, *Boletín Oficial del Estado*, No. 303, 17 December 1996, also retrievable through the website of the Spanish Constitutional Tribunal at <http://www.boe.es/g/es/bases_datos/tc.php> (enter the judgment number under "referencia-número" and click "Buscar").

152 Nolte, *op. cit.*, note 6, p. 250, citing Arts. 67-70 of the Danish Constitution.

Box 11.2

Religious Headwear and Uniform Requirements According to the US Supreme Court[153]

An Orthodox Jew and ordained rabbi was ordered not to wear a yarmulke while on duty and in uniform as a commissioned officer in the Air Force at March Air Force Base. This order was pursuant to an Air Force regulation that provides that authorized headgear may be worn out of doors but that indoors "[h]eadgear [may] not be worn ... except by armed security police in the performance of their duties". The petitioner claimed that this violated the right of free exercise of his freedom of religion under the first Amendment to the US Constitution.

The United States Supreme Court held by a majority of 5:4 that there was no violation of the First Amendment since the purpose of the regulation was a legitimate military one.[154] In the words of Chief Justice Rehnquist, they encouraged "the subordination of personal preferences and identities in favor of the overall group mission" and "a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank". It was vital to develop "the necessary habits of discipline and unity" in peacetime in advance of trouble.

Armed forces that fail to take steps to accommodate religious practice will effectively deter religious minorities from enlisting in the regular forces, so that they forfeit the opportunity to discharge civic obligations, with a resulting loss of an available pool of skills and personnel. Such failure may also weaken the allegiance of certain religious sections of the community that the armed forces represent. Even if the requirements in question are "facially neutral" (i.e., they do not refer to religion at all), they may nevertheless constitute a form of indirect religious discrimination.

In addition, if religious liberty is taken as a positive right, it could be said to include a duty to protect service personnel from discrimination, bullying, or harassment because of their religion.

Recognition of religious freedom in all its aspects presents some difficulties that do not apply to other civil or political rights. The first is assessing the genuineness of religious-freedom claims based on conscience.

Clearly, recognition and accommodation should not be limited to the major religions, e.g., Christianity, Islam, Judaism, Sikhism, and Buddhism (whose practices and beliefs are generally well known), since to do so would discriminate against minority or new religions. Under human rights treaties, these are equally entitled to respect. In these cases, however, the armed forces are less likely to be familiar with the beliefs in question.

Second, some countries, e.g., France and Turkey, have constitutional guarantees of secularity, and others, like the United States, have a separation of church and state. There may be a concern in these cases that state measures that actively facilitate the practice of religion could be found to be unconstitutional.

Third, practical difficulties may arise from the complexity of providing equal accommodation for diverse and perhaps conflicting religious practices on certain matters. The question of observance of holy days is the area that demonstrates this most vividly: if the armed forces were to allow time off for all holy days for all religions, it might affect operational efficiency.

153 *Goldman v. Weinberger,* Supreme Court of the United States, 25 March 1985, *United States Reports*, Vol. 475, 1985, p. 503.

154 The dissenting judges argued that the Air Force had not sufficiently demonstrated why making an exception to the uniform regulations would compromise military objectives.

Box 11.3

Major Human Rights Treaties Recognizing Religious Freedom

Art. 18 UDHR	Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.
Art. 18 ICCPR	1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
Art. 9 ECHR	1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Art. 6 of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief[155] provides what is perhaps the most detailed (albeit still non-exhaustive) list of the various aspects of freedom of religion. Some extracts, so far as they concern members of the armed forces, are set out in Box 11.4.

Since the Helsinki Final Act (1975), OSCE commitments in this area have become ever more specific.[156] The commitments made in the Vienna Concluding Document of 1989 are the most specific and comprehensive,[157] dealing with a range of issues, including discrimination on the grounds of religion,[158] extending protection to non-believers as well as believers,[159] safeguarding the right to collective worship,[160] and allowing the religious and moral education of children.[161] The Copenhagen Conference (1990) committed participating States to recognize an individual's right to change their religion.[162] More recently, these sentiments were reaffirmed at the Maastricht Conference (2003).[163]

Art. 9 of the ECHR[164] embraces "the right to freedom of *thought, conscience* and religion [emphasis added]" and also protects the right "to manifest one's religion *or belief* [emphasis added]". Nevertheless, thought and conscience carry no right to be manifested under Art. 9.2, whereas religion and belief do.

155 *Op. cit.*, note 148.

156 Helsinki 1975 (Questions Relating to Security in Europe: 1.a Declaration on Principles Guiding Relations between Participating States – Principle VII): participating States should respect "human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all".

157 Vienna 1989 (Questions Relating to Security in Europe: Principles).

158 *Ibid*., para. 16.1.

159 *Ibid*., para. 16.2.

160 *Ibid*., para. 16.4.

161 *Ibid*., para. 16.6.

162 Copenhagen 1990, para. 9.4.

163 Maastricht 2003 (Decisions: Decision No. 4/03 on Tolerance and Non-discrimination).

164 On Art. 9, see C. Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001).

Box 11.4

Freedom of Religion: The UN Declaration (Extracts)[165]

The right to freedom of thought, conscience, religion or belief shall include, *inter alia*, the following freedoms:

(a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes; …

(d) To write, issue and disseminate relevant publications in these areas;

(e) To teach a religion or belief in places suitable for these purposes; …

(h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;

(i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

It is not only mainstream or traditional religions that enjoy protection under Art. 9. Complaints have also been accepted by the Court from smaller or newer religions: for example, the Druids,[166] Scientologists,[167] and the Divine Light Zentrum.[168] For that reason, in 2004 the Royal Navy accommodated a Satanist by making available a space on board a Navy ship for him to practise his religion.[169]

The European Court of Human Rights has stated that:

> As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.[170]

Religious discrimination

Discrimination in the enjoyment of human rights on grounds of religion is prohibited under the major human rights treaties, as discussed below. The European Convention contains a right, in Art. 14, not to be discriminated against in the enjoyment of a person's Convention rights on various grounds: "such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

Art. 14 may be used by a person claiming that a state has discriminated on grounds of his or her religion, especially in instances of the failure to accommodate religious practice in

165 Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, 1981.

166 *Chappell v. UK*, European Commission of Human Rights, 14 July 1987, *Decisions and Reports*, Vol. 53, 1987, p. 241.

167 *X and Church of Scientology v. Sweden*, European Commission of Human Rights, 5 May 1979, *Decisions and Reports*, Vol. 16, 1978, p. 68.

168 *Omkarananda and the Divine Light Zentrum v. Switzerland*, European Commission of Human Rights, 19 March 1981, *Decisions and Reports*, Vol. 25, 1981, p. 105.

169 "Navy approves first ever Satanist", BBC News, 24 October 2004, <http://news.bbc.co.uk/1/hi/uk/3948329.stm>.

170 *Kokkinakis v. Greece*, European Court of Human Rights, 25 May 1993, *European Human Rights Reports,* Vol. 17, 1993, p. 397, para. 31.

otherwise facially neutral laws. Art. 14 has been supplemented by Protocol No. 12 — a free-standing discrimination provision that includes religion among its prohibited grounds — which applies to all actions by public authorities, including the armed forces.[171]

More general provisions prohibiting discrimination on religious grounds also appear in the ICCPR.[172] These are supplemented by the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief,[173] which provides in Art. 2.1 that "No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief." By virtue of Art. 4, states are to take "effective measures" to enact protections against religious discrimination and to rescind discriminatory legislation.

Within EU states, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation requires that member states provide a legal remedy for discrimination in employment and training (whether direct, indirect, or constituting harassment) on grounds of religion. The prohibition of discrimination does not mean that every distinction on grounds of religion is impermissible, however. The directive recognizes that, in very limited circumstances, a difference of treatment may be justified where a characteristic related to religion constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate.[174] In the armed forces, this is only likely to apply to the posts of religious representatives, such as chaplains. In such cases, a requirement that the person appointed be of the religion concerned may, if the other conditions are met, be legally defensible.

Box 11.5

The Netherlands: Courts and Religious Holidays/Diet

The judiciary can play an important role in pressurizing the armed forces to respect religious freedom, as developments in the Netherlands demonstrate.[175]

One example was the decision in 1990 of the Central Appeals Tribunal that Art. 6 of the constitution required facilities to be created for observing Ramadan, with regard to working hours and occasional exemption from service duties.[176]

In a second decision in 1991, the Central Appeals Tribunal found that a Navy corporal had been discriminated against because of the failure to compensate him for the additional costs of preparing kosher food to meet his religious dietary requirements.[177]

171 Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 1 – General prohibition of discrimination: 1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status; 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

172 Art. 26.

173 This, however, does not have the status of a binding international agreement.

174 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *Official Journal of the European Communities*, L 303, 2 December 2000, p. 16, Art. 4, para. 1.

175 L. Besselink, "Military Law in the Netherlands", in Nolte, *op. cit.*, note 6, pp. 594-595.

176 Central Appeals Tribunal (Centrale Raad van Beroep), 25 October 1990, *Tijdschrift voor Ambtenarenrecht,* p. 245.

177 Central Appeals Tribunal (Centrale Raad van Beroep), 14 March 1991, *Tijdschrift voor Ambtenarenrecht*, p. 105.

Limitations on religious freedom

Freedom of religion is a *qualified right* (see Chapter 5, "International Human Rights Law"). For example, it is possible for a state to limit the right to manifest religious belief under Art. 9 ECHR if the limitations are prescribed by law "in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others". It is notable that the list of possible grounds for limitation does not include the interests of national security (unlike, for example, Art. 8 or Arts. 10 and 11; see Box 11.6). In practice, however, as the approach of the European Court of Human Rights shows, armed forces may legitimately limit the right in ways that reflect military discipline for reasons of public order or for the protection of the rights and freedoms of others. Any such limits must be "prescribed by law" and "necessary in a democratic society" (see Chapter 5, "International Human Rights Law").

In part (although this obviously applies only to regular servicemen and -women and not to conscripts), limits may result from what the Court takes as the *voluntary surrender* of the right to manifest one's religion by the individual by submitting to military life. The European Court of Human Rights, in *Kalaç v. Turkey*,[178] held that the dismissal of a senior legal adviser in the Turkish air force did not violate Art. 9, which protects freedom of thought, belief, and conscience. The Court ruled that he had been dismissed for having adopted "unlawful fundamentalist opinions". The Turkish government argued that the complainant had manifested a lack of commitment to the secularist foundation of the Turkish state. The Court held that the complainant had voluntarily accepted limitations on manifestation of his beliefs in embracing a system of military discipline. Within these limitations, he was permitted to pray five times daily, to observe Ramadan, and to attend Friday prayers. The dismissal was found to be based on his conduct and attitude rather than the way in which he manifested his religion. In the words of the Court, "in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account".[179] The limitations here on his rights, said the Court, were self-chosen.[180]

The vulnerable position of junior military personnel may also justify additional restrictions on the religious liberty of members of the armed forces. In a case from Greece, the European Court of Human Rights found that convictions of Pentecostal servicemen for proselytism of other (subordinate) airmen were not contrary to Art. 9.[181] It was permissible for the Greek authorities to protect subordinates in this way from the unwanted religious attentions of their superiors, and it was relevant that the measures were not disproportionate since they were "not particularly severe and were more preventative than punitive in nature".[182]

3. Different Approaches

The approach that a state takes to the religious liberty of its employees is inevitably coloured to some degree by the approach that it takes to religion generally. As mentioned above, states with a constitutional commitment to secularism may tend to take a narrower view of the permitted manifestation of religious belief. In the French armed forces, for exam-

178 *Kalaç v. Turkey*, European Court of Human Rights, 1 July 1997, *European Human Rights Reports*, Vol. 27, 1999, p. 552.

179 *Ibid*., para. 27.

180 *Ibid*., para. 28.

181 *Larissis v. Greece*, European Court of Human Rights, 24 February 1998, *European Human Rights Reports*, Vol. 27, 1999, p. 329.

182 Proselytism of civilians was treated differently, however. Here, the authorities could not intervene since the potential element of misuse of power was absent. *Ibid*., paras. 58-61.

ple, proselytism is not permitted in the interests of neutrality.[183] In Turkey, the religious freedom of armed forces personnel is limited by the secular nature of the republic; personnel cannot manifest their beliefs while on official duty or in such a way as to impose them on others.[184]

In their responses to the ODIHR-DCAF questionnaire, relatively few states cited legislation giving entitlements to recognition of freedom of religion in the armed forces over and above the normal constitutional requirements. Two that did were Slovakia and the Russian Federation.[185]

Box 11.6

Examples of Legal Recognition of Freedom of Religion in the Armed Forces[186]

Slovakia	According to Art. 118.1.f of Act No. 346/2005 in the Collection of Laws of the Slovak Republic, a professional soldier has the right to adequate spiritual care and to participate in religious activities, if this does not contradict the needs of the armed forces and the performance of the state service.
Russian Federation	In accordance with Art. 8 of the Federal Law of the Russian Federation on the Status of Armed Forces Personnel, armed forces personnel have a right to participate in public worship and religious ceremonies when free from their duties and have no right to refuse to perform their military service duties for the reason of their relation to a religion. The state has no responsibility for satisfaction of particular needs of a serviceman concerned with his religious beliefs; establishment of religious associations in military units is not permitted; religious ceremonies may be held on the territory of the military unit at the request of servicemen upon obtaining the permission of a commanding officer and at their own expense.

A number of states responded to the questions concerning practice of religion and restrictions on freedom of worship[187] by pointing out that the only restrictions applied were when religious practice interfered with the performance of military duties. This was the case in Azerbaijan, Belgium, the Czech Republic, Denmark, Estonia, Georgia, Lithuania, and Switzerland.

Access for a member of the armed forces to representatives of his or her religion is a key issue of religious freedom. Responses to the ODIHR-DCAF questionnaire showed that there is a clear divide among states. Fourteen states made available only a representative of Christianity, whereas six states also made available other religious representatives: Belgium (Christianity, Judaism, and other), Canada (Islam, Christianity, and other), France (Islam, Christianity, Judaism), the Czech Republic (Christianity and Judaism), Spain (Islam, Christianity, Judaism), the Russian Federation (Islam, Christianity, Judaism, and Buddhism), and the United States (Islam, Christianity, Buddhism, Judaism, and other). In the Netherlands, there are also Humanist counsellors. Although the need for access to representatives of minority religions obviously depends on the numbers of service personnel affected, it is nevertheless submitted that this is the better practice. The needs of some religious groups within the armed forces without a formal representative may be partially met by the establishment of religious associations among servicemen and -women (in Germany, for example, an association of Jewish soldiers was recently set up). In multinational forces, flexible pooling of religious representation between contributor countries may help address the question of representation for minority religions. Where religious representatives are permitted, their role is: to conduct religious services, to provide information to armed forces personnel on religious matters, to provide counselling services, and to provide religious support services. Where other procedures do not exist or are deficient,

183 ODIHR-DCAF questionnaire.

184 ODIHR-DCAF questionnaire.

185 Also see Order of the Minister of Defence of the Czech Republic No. 19/1998.

186 ODIHR-DCAF questionnaire, question 71.b.

187 ODIHR-DCAF questionnaire, question 71.

religious representatives may also take on the role of dealing informally with complaints, or social or welfare issues affecting members of the armed forces. In nearly all countries, they also advise and assist leaders of the armed forces on matters concerning plans, policies, and doctrine that affect the religious, ethical, and moral well-being of armed forces personnel. Practice varies between countries (and indeed different services within countries) over whether religious representatives such as chaplains have a military rank.

In a clear majority of states responding to the ODIHR-DCAF questionnaire, some account was taken of special needs related to the practice of religion (food requirements, clothing, religious holidays, external signs of religious faith/affiliation).[188] In relatively few cases, however, did states describe any active measures taken to facilitate religious practices by members of the armed forces. Examples that were given were the provision of rooms for worship or prayer in military units (Azerbaijan and France); the assignment of chaplains or spiritual counsellors to military units (Belgium, Ireland, and Spain) and facilities for religious organizations to make these arrangements independently (Slovakia); the availability of food to meet religious dietary requirements (France and Norway); the possibility to observe religious holy days (Belgium, Denmark, and France); and consideration of the need to observe special traditions with regard to external signs (such as turbans for Sikhs) (Norway).

Box 11.7

Religious Dress in the Armed Forces: The UK Approach[189]

"All Service personnel are required to wear standard pattern uniforms and adhere to Service clothing policy and instructions. However, the Armed Forces recognise the need to observe specific codes of dress in accordance with particular religious beliefs. For operational and health and safety reasons, members of the Armed Forces may have to be flexible in some circumstances."

Sikhs are permitted to wear the 5Ks: Kara (steel bangle), Kesh (uncut hair), Kanga (small comb), Kaccha (special-design knee-length underwear), and Kirpan (small sword); male Sikhs can also wear a turban.

However, some constraints on the wearing of a turban exist: especially in operational circumstances (for example, commander's helmets in armoured fighting vehicles, combat helmets, breathing apparatus (full hood) for firefighters, and flying helmets for aircrew in some types of aircraft).

Muslim and Sikh Men

Muslim and Sikh men are permitted to wear short, neatly trimmed beards. However, for occupational or operational reasons, where a hazard clearly exists, personnel authorized to wear beards on religious grounds will have to be prepared to modify or remove their beards to such an extent as to enable the correct wearing of a respirator or breathing apparatus.

Muslim Women

Muslim women are allowed to wear uniform trousers, rather than a skirt, and may wear a hijab except when operational or health and safety considerations dictate otherwise.

Jewish Men

A male member of the Jewish faith may wear a dark plain or patterned yarmulke whenever he removes other headdress.

Ministries of defence can also make a positive contribution to promoting increased understanding in the armed forces of diverse religious practices and to avoiding religious discrimination. Valuable guides have been produced for the benefit of army personnel,

188 ODIHR-DCAF questionnaire, question 71.c.

189 *Guide on Religion and Belief in the MOD and Armed Forces*, UK Ministry of Defence, 2006.

especially superior officers, faced with requests based on religious motivation from members of the armed forces in Canada,[190] Denmark, and the United Kingdom.[191] These guides can also be especially useful in providing practical assistance in assessing the sincerity of claims to recognition of religious diversity in the case of minority religions by members of the armed forces.

Box 11.8
Guidance on Accommodating Religious Liberty (Denmark)[192]

The Danish Defence Command has published guidelines on how to handle religiously motivated practical requests and needs, which includes the following topics:

Holidays

In Denmark, holidays are on days specified by the Evangelical Lutheran Church. However, employees who work on these days are compensated for the hours worked and may, if they choose, take as unpaid holiday other days off according to the calendar of a different religious community, provided that this does not conflict with duty requirements. Every year, a Defence Command order publishes the dates of Islamic and Jewish holidays in the year in question.

Food

In all permanent workplaces of the Danish Defence Command, the cafeterias serve a variety of foods, making it possible for employees with special wishes to make up a meal that meets their wishes to the maximum extent possible. Furthermore, the Danish Defence Command produces field rations that do not contain pork, to accommodate Jews and Muslims who consider it unclean.

Prayer

The Danish Defence Command accommodates requests relating to prayer (including requests concerning times of day and location) to the extent this is compatible with duty requirements. Furthermore, within the existing framework, a room may, if possible, be designated for prayer.

Disease, death, and funerals

Employees with special religious needs in the event of disease or death in service are allowed to register these, and the Defence Command tries to accommodate such wishes and needs. An appendix giving practical guidance on rituals appropriate to different religions has been distributed.

4. Best Practices and Recommendations

- Service in the armed forces should be open to everybody regardless of religion; any impediments such as religious oaths of allegiance should be relaxed by allowing at least the possibility of affirmation;
- States should collect data on the religious composition of the armed forces in order to have an evidential basis for identifying and combating any latent or indirect discrimination;
- Armed forces should, wherever possible, accommodate religious practices by members, including worship, prayer, access to representatives of their religion or denomination,

190 Canadian Forces Administrative Order 16-1, "Religious Accommodation".

191 The Ministry of Defence issued guidance following the adoption in 2005 of regulations prohibiting religious discrimination in employment. In addition to explaining the regulations and giving advice on handling complaints and basic information concerning about 10 major religions, this guidance covers the following matters: time off and facilities for prayer, requests for leave for religious festivals/holidays, time off for bereavement, dress, dietary needs, fasting, meeting the spiritual needs of personnel, conscientious objection, death in service, emergency burial, and the collection of information on religion and belief. See <http://www.army.mod.uk/linked_files/ag/soldierwelfare/sol_support/Guide_on_Religion.pdf>.

192 Unofficial English translation of the document "Forvaltning af religiøst begrundete praktiske ønsker og behov" (Administration of Religiously Motivated Practical Wishes and Needs), Danish Defence Command, 2004.

observance of holy days and fasting, and observance of dress and dietary requirements. Where it is not possible to accommodate these practices for reasons of military effectiveness (or genuine occupational requirements), any restrictions should be based on clear legal authority and be proportionate. The onus should be on the armed forces to demonstrate what harm would result if the practice in question were permitted;

- Ministries of defence should distribute guidance on different religious practices and on how these can be accommodated in practice in the armed forces;
- States should ensure that the working environment in the armed forces is free from harassment and victimization on the grounds of religion.

Section IV

Chapter 12

Ethnic and Linguistic Minorities in the Armed Forces

This chapter deals with the position of ethnic and linguistic minorities (those who are of minority populations in a country) within the armed forces. It also deals with the position of non-nationals serving in the armed forces.

Where a state's armed forces represent all sections of society, including ethnic and other minorities, they can become a source of national unity and cohesion. It follows that unnecessary barriers to the recruitment and participation of ethnic minority groups within the armed forces should, as far as possible, be removed. This is a question of fairness and non-discrimination, but it is also a question of *effectiveness* – the armed forces will operate more effectively in the national interest if they are broadly representative and not dominated by specific ethnic elites.

This chapter therefore discusses issues concerning the integration of these groups with a view to establishing best practices, procedures, and legislation within recruitment, selection, and training processes in the armed forces.

1. Issues at Stake

There are two broad approaches that a state can adopt to the challenges of a multiethnic population. The first can be called *assimilationist,* where the over-riding objective is to eliminate or minimize visible differences between ethnic groups by subsuming them under a common national identity. If successful, such a policy will reduce conflict and rivalry between ethnic groups, but it will do so by weakening the ties that members of the ethnic group have to their common history and values and may produce inter-generational conflict. Education and official practice are key tools in an assimilationist approach – the official language may, for example, be the only one permitted in schools.

The alternative approach is called *multiculturalist.* This approach acknowledges, accommodates, and even celebrates ethnic differences. It runs the risk, however, that these differences may remain a prominent source of separation and conflict, especially if ethnic groups are permitted to exist in parallel communities that have little effective contact with each other.

The approach that armed forces take towards ethnic differences inevitably reflects this same dichotomy between assimilationism and multiculturalism.

Some armed forces have had successful experiences in terms of racial integration. In others, a multicultural approach has led to armed forces with units drawn almost exclusively from ethnic sub-groups. Different challenges in promoting equality and preventing discrimination arise in each case.

In a multiethnic state, the armed forces should adequately reflect the composition of society while having a vision that transcends the different identities of its members in order for them to perform cohesively and effectively in the field. The armed forces can act as

a positive force for integration and, because of their importance as a visible symbol of national unity, successful integration models can have a broader impact within society at large and in facilitating the acceptance of the immigrant community.

A country's armed forces aim to instil in their members an overriding unity of purpose. Minority rights can be jeopardized, however, by armed forces that seek only to *assimilate* minorities rather than ensuring that the values and the cultural sensibilities of the nation's minorities are fully protected within the military.

States have typically in the past sought to ensure the allegiance of those recruited to the armed forces by means of a nationality restriction. Such restrictions do not impact solely on ethnic minorities, of course, but they are likely to affect recently established immigrant

Box 12.1
The Example of Bosnia and Herzegovina[193]

Bosnia and Herzegovina represents a unique example of how one country's defence structures are coping with the legacy of a tragic conflict.

Though the conflict ended with the Dayton Peace Agreement in 1995, it was only in 2006 that Bosnia and Herzegovina was able to establish an exclusively state-level defence establishment replacing the sub-state (entity) defence structures that had remained largely untouched since the end of the conflict. This included the creation of a NATO-compatible single military force (the Armed Forces of Bosnia and Herzegovina) that is still being implemented, thereby replacing the three predominantly mono-ethnic brigades that existed previously, and that effectively comprised the former warring factions. The political and legislative solutions for this sea-change reform were forged with significant assistance from the multinational NATO headquarters still based in the country.

The new defence legislation (principally the Law on Defence and the Law on Service in the Armed Forces of Bosnia and Herzegovina) strikes a balance between protecting the group rights of Bosnia and Herzegovina's three ethnic groups (and others not belonging to those groups) and promoting the individual human rights of military personnel. For example, the legislation ensures that the senior positions in both the Armed Forces and the Defence Ministry are divided fairly between the ethnic groups (or constituent peoples, namely Serbs, Croats, Bosniaks, and others), additionally serving as a useful confidence-building mechanism. The legislation also provides the country's presidency with the power to determine the appropriate ethnic representation in the Armed Forces as a whole, taking into account both census statistics and operational considerations. In terms of individual rights, this is the first time that defence legislation has been enacted at the state level, meaning, in turn, that military personnel in the country now have the same service rights regardless of ethnicity or entity of residence. These are set out in some detail in the Law on Service and cover areas such as language rights, equal opportunities, complaints procedures, and due process in the context of military discipline proceedings.

One notable feature of the new system is the creation of three infantry regiments, each responsible for maintaining the military heritage and identity of the former units/armies from which they are descended: the Army of the Republic of Bosnia and Herzegovina (predominantly Bosniak), the Croatian Defence Council (predominantly Croat), and the Army of the Republika Srpska (predominantly Serb). According to legislation, these regiments have no operational or administrative authority, and units from these regiments are organized in multiethnic brigades. As such, while the Armed Forces will preserve ethnic traditions, they will also be authentically multiethnic from the operational and administrative perspective.

In conclusion, Bosnia and Herzegovina has sought to ensure that its defence establishment provides for the equality of its members through a well-established legal framework while also taking due care to protect the constitutional guarantees for the country's constituent peoples. The challenge that now remains is the implementation of this framework through the required policies and regulations.

193 Transition Management Group, NATO Headquarters Sarajevo.

communities within a society more acutely. For linguistic minorities, there is the question of the use of their mother tongue within the armed forces: whether official communication takes place in the armed forces in all the official languages of the country or only the majority language, and whether they are allowed to communicate in their own language while on duty.

The re-establishment of ethnic co-operation within unified armed forces is of particular significance in countries that have endured ethnic conflict. This is particularly challenging, as it requires the (re)integration of former enemies. Even where it is necessary to maintain separate structures, measures need to be taken to ensure timely dialogue among the military leaders of different communities and the rapid re-establishment of a national command structure. The military can face a number of special tasks in the post-conflict phase that are designed to support reconciliation, such as special programmes to encourage the recruitment of members of ethnic groups under-represented in the armed forces and by giving prominence to multiethnic considerations when decisions about downsizing, demobilization, disarmament, and reintegration into civilian life are under discussion. The temporary presence of an international peacekeeping force can be a further opportunity to demonstrate the possibility of co-operation among different groups. Moreover, where international deployments are concerned, their effectiveness in peacekeeping may be enhanced if they are obviously composed of different ethnic groups.

2. International Human Rights Commitments

The right to equality is well recognized in international human rights law, as Box 12.2 below shows. It is recognized in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms, although there are some significant differences between these texts. All of these instruments ban discrimination on the grounds of race, colour, national origin, and religion. Art. 27 of the ICCPR specifically extends protection to include discrimination against ethnic, religious, or linguistic minorities.

Box 12.2
Equality and Non-discrimination Provisions in Selected Human Rights Treaties

Art. 2 UDHR	Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
Art. 26 ICCPR	All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
Art. 27 ICCPR	In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.
Art. 14 ECHR	The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
Art. 1 of Protocol 12 to the ECHR	1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

There are, however, several difficulties in treating these provisions as an outright prohibition of any of these forms of discrimination in the armed forces. First, there is no right to become a member of the armed forces as such. In the cases of discriminatory provisions contained in legislation, this presents no obstacle, at least so far as the ICCPR is concerned. However, the position under Art. 14 ECHR is more problematic and is discussed below. Second, it is not clear that these treaty obligations, by themselves, require states to take active measures to eliminate discrimination, such as enacting anti-discrimination laws or preventing acts of racism or racial or ethnic harassment by others (for example, by fellow service personnel).

For this reason, the more specific International Convention on the Elimination of All Forms of Racial Discrimination, which requires such steps, is relevant (see Box 12.3). The Convention applies to "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life" (Art. 1.1).

Box 12.3

International Convention on the Elimination of All Forms of Racial Discrimination[194]

Prohibits discrimination by reason of race, colour or ethnic origin in the enjoyment of political and citizenship rights in his country and states that everyone is entitled to equal access to public service in his country (Art. 2).

Everyone has the right to an effective remedy and protection against any discrimination with respect to his fundamental rights and freedoms through independent national tribunals (Art. 6).

The Committee on the Elimination of Racial Discrimination (comprising 18 experts "of high moral standing and acknowledged impartiality", elected by states parties) monitors state compliance (Art. 8).

States parties report every two years to the UN Secretary-General or when the Committee so requests on the various measures adopted in order to meet the objectives of the Convention (Art. 9.1.a and b). The Committee reports annually to the General Assembly of the United Nations (Art. 9.2).

A state party may report another state party to the Committee if it believes that that state party is not giving effect to the provisions of the Convention (Art. 11). The Committee then investigates through a commission and considers recommendations for an "amicable solution of the dispute" (Art. 13.1).

Individuals are also able to petition the Committee if they believe they are victims of a violation of the Convention by a state party (Art. 14) where the state has recognized the right of individual communication. In these cases, the state establishes a body competent to deal with petitions from individuals and dealing directly with the Committee. The Committee is responsible for considering all evidence adduced by individuals and for making recommendations.

European Union states are obliged under Directive 2000/43[195] to legislate to provide remedies for racial and ethnic discrimination in private and public employment, including

194 Source: International Convention on the Elimination of All Forms of Racial Discrimination, <http://www2.ohchr.org/english/law/cerd.htm>.

195 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *Official Journal of the European Communities*, L 180, 19 July 2000, pp. 0022-0026.

unjustifiable indirect discrimination[196] and racial harassment. Among other areas, this Directive applies to: "(a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion".[197] Apart from practices of employers themselves that might constitute discrimination, employers will also be liable for any actions taken by their employees that contribute to a workplace atmosphere constituting harassment. States have the duty to "ensure that judicial and/or administrative procedures, including, where they deem it appropriate, conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged" (Art. 7). Arguably, this requires EU states to allow members of the armed forces access to civilian legal remedies in order to enforce anti-discrimination provisions and not merely internal processes.

Art. 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms does not establish a free-standing right not to be discriminated against. It only applies to the enjoyment of another Convention right or "within the ambit" of a Convention right (i.e., there is no need to demonstrate a breach, a practical link will suffice). There is, however, no Convention right to employment or to take part in public service as such. Even where such a link or breach is established, and Art. 14 is engaged, it is possible to justify differential treatment. The European Court of Human Rights has stated, for example, that "a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'".[198] It follows that justification is possible under Art. 14 if these conditions are satisfied. However, race and nationality discrimination are two categories that the European Court of Human Rights has said require "very weighty reasons" or "particularly serious reasons".[199]

In addition, because of the difficulties of establishing racial motivation in cases of discrimination, the European Court of Human Rights has found that a failure by a state to investigate obvious lines of inquiry in investigations into violence by state agents or disregarding of apparent evidence of discrimination by the authorities, may lead to the drawing of negative inferences. Consequently, the burden of proof will shift to the state to show that discrimination has not taken place.[200] This is of relevance, for example, if bullying in the armed forces is apparently racially motivated (see Chapter 17, "Working Conditions").

Unlike Art. 14, Protocol 12 to the ECHR is a free-standing provision to protect individuals from discrimination:

- In enjoying any right within national law;
- By public authorities carrying out their legal obligations, including when using discretionary powers such as grant-making;
- Any other act, or failure to act, by a public authority.

196 Art. 2.2.b: "indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary".

197 Art. 3.

198 *Abdulaziz, Cabales and Balkandali v. the United Kingdom,* European Court of Human Rights, 28 May 1985, *European Human Rights Reports*, Vol. 7, 1985, p. 741, para. 72 (also see the *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (*Belgian Linguistics* Case), European Court of Human Rights, 23 July 1968, *European Human Rights Reports*, 1979-80, Vol. 1, p. 241).

199 *Tekeli v. Turkey*, European Court of Human Rights, 16 November 2004, *European Human Rights Reports*, Vol. 42, 2006, p. 53, referring to "compelling reasons".

200 *Nachova v. Bulgaria*, European Court of Human Rights, 26 February 2004, *European Human Rights Reports*, Vol. 39, 2004, p. 793, para. 169.

Since the armed forces are certainly public authorities, Protocol 12 would prevent discrimination by them on the prohibited grounds in the countries where it applies. Protocol 12 has been signed by 35 Council of Europe states, and it entered into force — for the 14 that have ratified it[201] — on 1 April 2005.

The OSCE has developed broad commitments in the area of discrimination against ethnic minorities. As early as the Helsinki Conference of 1975, the OSCE stated that participating States should recognize the contribution that national minorities and regional cultures can play in those states.[202] Later, at the Vienna Conference of 1989, participating States agreed to "protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of national minorities on their territory".[203] Added to this at the Copenhagen Conference of 1990 was the right of those belonging to such a minority or culture to use their own language and to establish their own educational, cultural, and religious institutions.[204] Subsequent conferences have re-affirmed these principles relating to cultural identity. The OSCE has also turned its attention in numerous resolutions to the issue of migrant workers.[205]

3. Approaches

In this section, the approaches of various countries to dealing with racial discrimination, either through legal or complaints processes and employment policies, are described with a view to identifying best practices. Similar discussion follows on the position of non-nationals in the armed forces and linguistic minorities.

Dealing with Complaints of Racial Discrimination or Harassment

In order to comply with the human rights obligations described in the previous section, it is essential that effective means be provided for dealing with complaints of racial discrimination. Remedies for discrimination may take several forms. One avenue is to allow for civil claims of discrimination to be brought to civilian employment tribunals (permissible in the UK after prior discussion internally, see Box 12.4) or to provide a right to direct access to human rights commissions (as in Canada).

201 As of 31 January 2007, Protocol No. 12 had been ratified by: Albania, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Georgia, Luxembourg, the Netherlands, Romania, San Marino, Serbia and Montenegro, the former Yugoslav Republic of Macedonia, and Ukraine. See <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=7&DF=1/31/2007&CL=ENG>.

202 Helsinki 1975 (Co-operation in Humanitarian and Other Fields).

203 Vienna 1989, para. 19.

204 Copenhagen 1990, paras. 32-34.

205 Specifically, at the Vienna Conference of 1989, the OSCE invited "host countries and countries of origin to make efforts to improve further the economic, social, cultural and other conditions of life for migrant workers and their families legally residing in the host countries", such as education and training. Of particular interest here, the OSCE stated that the "participating States recognize that issues of migrant workers have their human dimension".

Box 12.4

The UK Approach: Prior Discussion of Racial Discrimination Claims[206]

General legislation preventing racial discrimination was extended to the armed forces in 1996 and allows members of the armed forces to bring allegations of racial discrimination before an (civilian) employment tribunal.

Before they do so, however, they must make a complaint under an internal service procedure (known as a complaint for redress). It is possible for the armed forces to request that tribunal proceedings be deferred until the conclusion of the internal procedure, which is the course usually followed in practice.

The advantages of this approach are that it encourages internal resolution of these cases and allows for allegations to be taken up as a matter of military discipline where discrimination is the result of actions of other service personnel.

There are, though, important differences between the complaint for redress (which may also take on a disciplinary focus according to a criminal standard of proof) and the tribunal (where proof is to the lower civilian standard). Furthermore, tribunal proceedings will be brought against the armed forces as the employer responsible for the discriminatory actions of its employees, whereas internal procedures may lead to disciplinary proceedings against other service personnel.

The disadvantages of this approach are that it may involve substantial delay while internal procedures are completed, and the requirement to complain via the chain of command may inhibit servicemen and -women coming forward with complaints.

Sometimes allegations of racial mistreatment focus on harassment or bullying by other members of the forces. The armed forces are, of course, responsible for maintaining a non-discriminatory, racially tolerant, and safe working environment. Racial harassment may be regarded as a form of discrimination for which the armed forces are vicariously responsible. Apart from discrimination law, however, there may be added measures of protection or signals of official disapproval under offences of military discipline. In the UK, for example, a military court or superior officer must treat racial or religious aggravation in a violation of military law as an aggravating factor. This will be reflected in potentially more serious punishment.[207]

Box 12.5

Defining Racial Harassment[208]

Harassment shall be deemed to be discrimination … when unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

In addition, institutions that address complaints of unfair treatment and abuse (such as military ombudsmen or an inspector general) may have jurisdiction over issues related to ethnicity. One noteworthy model is the German parliamentary commissioner for the armed forces (see Chapter 22, "Ombudsmen"), which has the power to receive and investigate complaints concerning the actions of other soldiers.

206 Appendix 11 to the Minutes of Evidence, "Special Report of Armed Forces Select Committee 2001", 2001 HC (House of Commons Papers) 154, Vol. II; Race Relations Act 1976, Section 75; Race Relations (Complaints to Industrial Tribunals) (Armed Forces) Regulations 1997; Armed Forces Act 2006, Sections 334-339.

207 Under Section 240 of the Armed Forces Act 2006.

208 EC Directive 2000/43, Art. 2.3.

Implementation of equal opportunity in the armed forces

Dealing with racial discrimination is not simply a question of providing legal avenues for handling complaints. US and UK experience stresses the importance of policies and management initiatives.

In the US, Executive Order No. 9981 was introduced in 1948 to secure equality in the treatment of all persons in the military, regardless of race, colour, religion, or national origin. In 1971, the Defense Race Relations Institute, later renamed the Defense Equal Opportunity Management Institute, was created to advise the government and to carry out training. As Box 12.6 shows, from the US experience, if combating discrimination and minority representation in the armed forces is seen as a sufficiently important goal of public policy, significant steps may be taken.

Box 12.6

Promoting Equal Opportunities in the US Military[209]

Within the Department of Defense, responsibility lies with a senior official: the deputy under secretary of defense for equal opportunity.

The Defense Department maintains the Defense Equal Opportunity Management Institute, which trains equal-opportunity personnel, advises the Department on equal-opportunity policy, and conducts related research.

The Department requires each service to maintain and review affirmative-action plans and to complete an annual "Military Equal Opportunity Assessment". This assessment reports whether various equal-opportunity objectives have been met and identifies problems such as harassment and discrimination.

The assessment includes both data and narrative assessments of progress in 10 areas. One of these is recruitment and accessions (i.e., commissioning of officers). Other areas include officer and enlisted promotion results, completion of officer and enlisted professional military education (e.g., the war colleges and non-commissioned officer academies), augmentation of officers into the regular component, assignment to billets that are service-defined as career-enhancing and to billets for commanding officers and deputy commanding officers, and over- and under-representation of minorities or women in any military occupational category.

Specific programmes have been created for outreach to certain historically disfavoured groups:

- American Indian/Alaskan Native Employment Program
- Asian American/Pacific Islander Employment Program
- Black Employment Program
- Hispanic Employment Program

Similarly, in the UK, concerns about the under-representation of ethnic-minority groups in the armed forces, racial discrimination and bullying, and low retention rates have led to the devising and implementation of a series of proactive policies. A partnership agreement was concluded between the Ministry of Defence and the statutory anti-discrimination body, the Commission for Racial Equality (CRE), in 1998. This covers measures to achieve racial equality, including achievement of ethnic-minority recruitment targets, removal of barriers to ethnic-minority recruitment and promotion, increased numbers of ethnic-minority officers at higher ranks, effective action to prevent racist abuse and making equal-opportunity performance part of annual appraisals. In 2001, the CRE reported to the Armed Forces Select Committee of the House of Commons that substantial progress had been

209 Department of Defense, <http://www.dod.mil/prhome/eotenent.html>; Department of Defense Directive 1350.2, 18 August 1995, <http://www.dtic.mil/whs/directives/corres/rtf/d13502x.rtf>; Defense Equal Opportunity Management Institute, <http://www.deomi.org/deomi.htm>.

made. In 2000, an official policy "for equal representation" was launched to correct the under-representation of national minorities in the armed forces.[210]

Special personnel policies

Affirmative-action policies tend to be controversial and may even be unconstitutional or unlawful especially if they involve reverse discrimination. They could also potentially breach the international agreements described above. Specific and time-limited derogations from the EU Directive for the purpose of redressing previous discrimination are an option. However, targets or quotas of under-represented groups to specify the desired levels of minority participation in certain army ranks and structures, and policies designed to meet those quotas, can be effective.

In Canada in the 1960s, one of the issues dividing the Anglophone majority and Francophone minority — roughly three-quarters to one-quarter of the population, respectively — was the under-representation of the latter group in the armed forces and particularly in the officer corps. Affirmative-action quotas, special training programmes, and changes in language requirements for officers were introduced with the expectation that this would increase Francophone representation. It seems that the creation of French-speaking units in all three services and in every military discipline has had a more important impact on increasing the number of French-speaking officers.[211]

A further method for facilitating the recruitment of under-represented groups short of quotas is by easing the requirements for the acceptance of minorities into military schools (a policy of this kind was introduced in Bulgaria in 2003, with the help of the NATO Information Centre and with financing by the EU delegation in Bulgaria).

Training measures

Policies of this kind may include special training courses to raise awareness of ethnicity issues. For example, in the mid-1990s, the members of the newly formed South African National Defence Force, which had to incorporate seven different armed forces belonging to different racial and ethnic backgrounds, went through a number of training programmes designed to nurture greater tolerance and respect for diversity.

To go further, completion of equal-opportunities training may be a pre-condition for promotion; conversely, evidence of non-compliance with these policies may be treated as a bar to career advancement.

Nationality questions

Restrictions preventing non-nationals from entering a country's armed forces are common among OSCE participating States, but they are not universal. On their face, such restrictions are a form of discrimination (sometimes indirect racial discrimination), but this may be easily justifiable.

For example, the UN Convention on the Elimination of All Forms of Racial Discrimination does not apply to "distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens".[212] Although citizens of EU states are generally free to take up employment in another EU state under the right of free

210 Ministry of Defence, "The Chief of General Staff's Equality and Diversity Directive for the Army", <http://www.army.mod.uk/linkedfiles/servingsoldier/usefulinfo/equality/ss_hrpers_eq_w/cgs_equality_and_diversity_directive.pdf>.

211 "Multiethnic Armed Forces", Geneva Centre for Democratic Control of Armed Forces, 2005, <http://www.dcaf.ch/publications/bg_multiethnic_armed_forces.cfm?nav1=4&nav2=1>.

212 Art. 2.

movement of persons, there are exceptions in the case of public service, and the relevant case law of the Court of Justice and a statement of the European Commission include the armed forces in this excluded category.[213]

Despite this, some countries do recruit non-nationals into their armed forces or into specific units, e.g., the French Foreign Legion recruits non-nationals,[214] and the Gurkhas in the British Army are Nepalese citizens.

Box 12.7
The Gurkha Brigade[215]

For nearly two centuries, since the 1815 peace treaty that ended the Anglo-Nepalese war of 1814-1815, Gurkhas have served the Crown, initially as soldiers in the (British) Indian Army, and following Indian Independence in 1947 in the British Army.

In a normal year, some 28,000 potential recruits compete for the 230 places that are available in the 3,500-strong Brigade of Gurkhas. The Brigade is unique. It is not an operational brigade in the conventional sense. Rather, it is an administrative entity, an umbrella organization that ensures that formed Gurkha units, into which all Gurkha soldiers are recruited and serve, mainly as infantry, but also as engineers and in signals and logistics units, are able to be integrated into, and form part of, other operational brigades in the British Army.

Gurkhas are recruited in Nepal. They are Nepalese citizens and continue to be so during their period of service to the Crown. On retirement, they return to Nepal and resume their place in Nepalese society. These special arrangements are required to enable Gurkhas to serve in the British Army while at the same time maintaining their distinct Nepalese identity and safeguarding their cultural, religious, and ethnic heritage.

The conditions of service are governed by the Tripartite Agreement (originally a memorandum of agreement signed in 1947 between the Governments of the UK, India, and Nepal, in which the Government of Nepal agreed to the employment of Gurkha troops in the armies of the UK and India).

As explained above, restrictions on non-nationals serving in the armed forces will often be defensible. However, where non-nationals *are* permitted to serve, differences in the conditions of service will be harder to defend.[216] Two court cases involving alleged discrimination against Gurkhas in the UK demonstrate these principles in operation. In the first, the issue was whether the terms and conditions of service of members of the Brigade of Gurkhas were compatible with Art. 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[217] Gurkhas were less favourably treated in the amount of pension that they received, as compared with other British army soldiers, but more favourably treated as to when it was payable (immediately after 15 years, whereas a British soldier was entitled to a deferred pension payable at the age of 60). The Court also took into account the very different living conditions in the societies to which Gurkhas and other British soldiers would retire. Although it found that there was no breach of Art. 14, nevertheless the litigation led to a fundamental review of conditions of service.[218] In the second, the discrimination concerned the difference in compensation payments to Gurkha and British soldiers who were held as prisoners of war by the Japanese during World War

213 See the European Parliament factsheet "Free movement for workers", <http://www.europarl.europa.eu/facts/3_2_2_en.htm>.

214 See <http://www.legion-recrute.com/en>.

215 Judgment of J. Sullivan (Administrative Court) in *R (Purja) v. Ministry of Defence, England and Wales High Court*, 2003, p. 445; <http://www.army.mod.uk/brigade_of_gurkhas/index.htm>.

216 Restrictions against citizens of non-member states are not covered by EU Directive 2000/43. See Art. 3.2.

217 *R (Purja and others) v. Ministry of Defence,* Court of Appeal, 9 October 2003, *Weekly Law Reports,* Vol. 1, 2004, p. 289.

218 House of Lords, Debate, Publications & Records Section, British Parliament website, 11 January 2005, <http://www.publications.parliament.uk/pa/ld200405/ldhansrd/vo050111/text/50111-47.htm>.

II. The court held the lower payments to the Gurkhas to be irrational. This conclusion led to compensation payments of £10,000 to each of the Gurkhas affected.

Approaches to linguistic minorities

Language may form a barrier to full participation in armed forces for members of some minority groups who speak a language other than the official language. Box 12.8 below shows the various approaches to this issue taken in several OSCE participating States.

Box 12.8

Approaches to Minority Languages in Selected Countries[219]

Austria	Servicemen can freely communicate in their own language. With respect to the conscription procedure and testing for the ability to fulfil military service, linguistic minorities are allowed to use their own (recognized minority) language. All other communication within the armed forces has to be in the official language, which, according to Austrian constitutional law, is German.
Canada	Conversations with peers are in the language of choice. However, in military units designated as unilingual, mainly located in unilingual regions, as defined by the Treasury Board Secretariat (both French- and English-language units are earmarked within the Canadian Forces), the language of work is mandated. In units designated as bilingual (mainly in bilingual regions), either language can be used freely.
Czech Republic	The official language for dealing with administrative authorities in the Czech Republic, including superiors in the armed forces, is Czech; Slovak is not considered equivalent. It is not permissible to use other languages for communication in the armed forces.
Finland	The command language is Finnish (one unit is Swedish-speaking). In civilian affairs, people are free to choose their language.
Latvia	According to the Official Language Law, only the official language of Latvia, Latvian, shall be used within the units of the National Armed Forces. However, this restriction is applicable only during the performance of official duties.
Lithuania	The official language must be spoken during duty hours.
Slovakia	According to Art. 6, para. 1, of the Constitution, Slovak is the official language of Slovakia. According to Art. 3.2 of Act No. 270/1995 of the Collection of Laws of the Slovak Republic, members of the Armed Forces must use the official language in official communication.
Ukraine	Only the state language may be used in official business.

Where there are numerically significant language differences within a state, the creation of distinct units recognizing minority differences can be an effective solution to the under-representation of minority language groups. For example, the armed forces in Switzerland have a multi-tier structure, with units organized along cantonal and linguistic lines as far as possible. Specialized troops, however, may form multilingual units. Multilingualism is compulsory for Ministry of Defence staff and the officer corps (see Box 12.9).

Belgium and Canada have established a dual military structure in response to the Belgian Flemish and Canadian Francophone preferences to be commanded in their own language. In Canada, the introduction of such units has had several effects:

- Francophone officers are advantaged in such units because of their better communication skills in their native language;
- Francophone officers in French-language units are more attuned to the cultural peculiarities of their Francophone soldiers and therefore are more successful leaders, and are promoted as rapidly as (if not more so than) their Anglophone colleagues in English-speaking units;
- The creation of French-speaking units throughout the armed forces results in a requirement for colonels, generals, and staff officers to be bilingual, regardless of promotion quotas.[220]

219 ODIHR-DCAF questionnaire, questions 78 and 79.

220 "Multiethnic Armed Forces", *op. cit.*, note 211.

Box 12.9

Multilingualism and the Swiss Armed Forces[221]

Switzerland is a state with four official languages: French, German, Italian, and Retro-Roman. In spite of the fact that the Swiss Armed Forces have never officially formulated a policy of multilingualism, they have developed three policies for addressing the multi-language character of the Swiss state.

1. The principle of language territoriality

The equitable representation of the linguistic groups in the Armed Forces is guaranteed by the territorial structure of the Armed Forces, which goes back to the historical cantonal military organization. Given the fact that most units are recruited from citizens of the same canton, and since 22 out of 26 Swiss cantons are monolingual entities, most units of the Swiss Armed Forces use one language for internal communication purposes.

2. The principle of proportionality

In addition to territoriality, the question of multilingualism is addressed by the proportional representation of the linguistic communities in the Swiss Armed Forces. The composition of Armed Forces personnel is supposed to reflect the actual proportion of the language communities in Switzerland. This policy of representation relies mostly on informal and customary rules, and legal prescriptions are rare.

3. The language competences of the officer corps

Officers need to have excellent communication skills. In this respect, the Swiss Armed Forces take advantage of the relatively good language competence of its officers, which they acquired during pre-military and civil education. Only recently has language education been given more attention in officer training: not in one of the four official languages, but in English.

4. Best Practices and Recommendations

- There should be effective means for members of the armed forces to raise allegations of racial discrimination (including indirect discrimination and harassment on racial grounds) within the armed forces;
- Members of the armed forces should have access to civilian courts or tribunals in order to pursue allegations of racial discrimination (including indirect discrimination and harassment on racial grounds). Where it is a precondition that they use internal means first, the civilian authority should be able to proceed notwithstanding in the event of undue delay or an inadequate internal investigation;
- All armed forces should have a transparent recruitment process that includes a hiring code based on principles that include fair and equitable representation of all ethnic groups;
- Where an ethnic or linguistic minority is significantly under-represented in the armed forces in comparison with the population as a whole, active steps should be taken to encourage and facilitate applications from that group;
- Ministries of defence should co-operate with independent anti-discrimination bodies in monitoring and implementing these policies;
- Tolerance of ethnic and linguistic minorities should form an essential part of training for all members of armed forces, backed by appropriate disciplinary sanctions where individuals are responsible for discriminatory conduct or harassment;
- Superior officers have a special responsibility, and a detailed understanding of these issues should be a prerequisite for promotion. Equally, it should be understood that any

221 Bernhard Altermatt, "Der Umgang der Schweizer Armee mit der Mehrsprachigkeit: Proportionalität und Territorialität: Ein historischer Uberblick mit Standortbestimmung", Federal Military Library and Historical Service, Report No. 15, Bern, 2004, pp. 71-73.

finding of discrimination will be a bar to promotion and/or will lead to a reduction in rank;

- Restrictions on non-nationals working within the armed forces should be reviewed to establish that they serve a necessary objective and are proportionate to it. Where non-nationals are permitted, any difference in treatment to the conditions of service of nationals should be similarly reviewed;
- In the case of significant linguistic minorities, consideration should be given to facilitating the minority language through specific arrangements, such as dual military structures;
- Military training courses should be provided in minority languages, where appropriate.

Chapter 13
Women in the Armed Forces

This chapter explores different models and good practices regarding women's participation in the armed forces, as well as the impact of the increased integration of women into a traditionally male domain. It underlines the main barriers still facing female soldiers at all stages of their military career, while highlighting mechanisms for the protection and enforcement of women's human rights. It also deals with harassment and violence and with mechanisms and policies for promoting equality of all military personnel.

This chapter looks at the issue of women in the armed forces as one of diversity management, i.e., recruiting and retaining employees from different demographic backgrounds and, in particular, about using their qualities in an optimal way.[222] Special attention is paid to women's capacity to contribute positively to security, particularly in light of the many new roles that modern armed forces have, varying from monitoring missions and delivering humanitarian aid, to peacekeeping and peace-building missions. (As child care is a parental responsibility, this issue is addressed in Chapter 17, "Working Conditions".)

1. Relevance

The proper role for women in the armed forces is an ongoing debate in most democracies. Although women's military opportunities have expanded over the past thirty years in the OSCE region, even militaries with the highest participation of women among their ranks, e.g., the United States, count only up to 15 per cent female military personnel.[223] Until recently, women were generally confined to combat support, logistics, administration, and nursing and related medical positions. Women can currently participate in the armed forces in most OSCE participating States, and there appears to be a general acceptance of women in a wider spectrum of military roles. Nevertheless, servicewomen are still frequently exposed to discriminatory policies and actions. For example, in many countries women are excluded from combat positions. Furthermore, women face discrimination in their careers, being promoted only to command positions on an exceptional basis. In this respect, differences in the treatment of women exist not only between states, but also between the navy, air force, and army within one state.[224]

2. Issues at Stake

Women's full participation as citizens

Women's participation in the armed forces is foremost a human rights issue, which concerns women's right to have access to the military profession. Taking part in the nation's defence and armed forces is an integral part of the rights and duties associated with citizenship. If women are excluded from participation in such an important national institution as the armed forces, they are in an unequal position vis-à-vis male citizens. It could be

222 Jan van der Meulen and Joseph Soeters, "Introduction: the Diversity of Diversity", in Joseph Soeters and Jan van der Meulen (eds.), *Managing Diversity in the Armed Forces: Experiences from Nine Countries* (Tilburg: Tilburg University Press, 1999).

223 ODIHR-DCAF questionnaire, question 75.

224 Gerhard Kümmel, "When Boy Meets Girl: The 'Feminization' of the Military", *Current Sociology*, Vol. 50, No. 5, 2002, pp. 615-639; Donna Winslow and Jason Dunn, "Women in the Canadian Forces: Between Legal and Social Integration", *Current Sociology*, Vol. 50, No. 5, 2002, pp. 641-667.

argued that women might gain from being excluded from the armed forces, and that it might be desirable for a society as a whole that women constitute a "peaceful" sector in society. However, this argument ignores that women and men should be treated alike in terms of citizenship and equal opportunities. Without the experience of participation in the military, women will be less able to raise their voices in security discourse.[225]

Women's participation in the military is a key part of their participation in the management and resolution of conflict. Security Council Resolution 1325 on Women, Peace and Security (2000) reaffirms:

> the important role of women in the prevention and resolution of conflicts and in peace-building. [It urges states] to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict.

Equal representation

Women's access to the military is also an important aspect of the democratization of the armed forces in terms of the adequate representation of all groups constituting society. This was a central aspect regarding, for example, the integration of African Americans in the United States or Catholics in Germany, where, in the 1970s, the Federal Armed Forces made efforts to increase the number of Catholic officers in order to build a more democratic leadership in the army and to include important groups from the civilian sector. As these examples show, armed forces not only mirror society, but they can also be a progressive force in the struggle of excluded groups for equal rights (such as in the case of African Americans in the United States), or they can retard these processes (as is often still the case with regard to women).

A further aspect of democratization refers to what may be called the "inner life" of the army. Studies have shown that — contrary to what many believe — male bonding has little to do with military efficiency; military groups can find different, more inclusive ways of bonding and developing camaraderie. The production of a more inclusive, i.e., also gender-inclusive, army makes for a more democratic army and society.

Non-discrimination issues

Women's participation in the military is a question of non-discrimination, i.e., equivalent career opportunities for men and women, equal access to different functions, equal wages, and elimination of abuses against female service personnel. It is also a question of positive acceptance and integration of women in the military environment and in military tradition.

Gender and operational effectiveness

The benefits of including women in the armed forces and their contribution to peace and security should not be overlooked. Participation of women in the military can be particularly important in peacekeeping, the core function of most military forces. Peacekeeping differs in many ways from traditional military functions in that it emphasizes protection of the civilian population and involves characteristics related to conflict resolution and reconstruction. The presence of women in peacekeeping forces has been recognized as improving the force's relationship with the host community, and the force's capacity to engage with and protect women and children.[226]

225 Uta Klein, "The Gender Perspective of Civil-Military Relations in Israeli Society", *Current Sociology*, Vol. 50, No. 5, 2002, pp. 669-686.

226 See UN Security Council Resolution 1325 (2000) on Women, Peace and Security, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N00/720/18/PDF/N0072018.pdf?OpenElement>.

3. International Human Rights Commitments

Several international instruments prohibit discrimination on grounds of gender and promote *de jure* integration.

Art. 15.1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly, states that all states parties "shall accord to women equality with men before the law".[227] CEDAW requires states parties to take action both on a normative level, i.e., by incorporating the principle of equality in their national legislation and by abolishing all discriminatory laws, and on a procedural level, by requiring them to establish effective mechanisms to ensure the protection of women against any form of discrimination. In particular, the Convention contains specific provisions concerning discrimination against women in employment matters and requires states parties to take specific action in this field. Art. 7 prescribes that states parties take "all appropriate measures to eliminate discrimination against women in the political and public life of the country". Art. 8 stipulates that:

> States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

The CEDAW Committee has adopted a comment on Arts. 7 and 8 of the Convention that looks specifically at participation of women in the military (see Box 13.1).[228]

Box 13.1

Women in the Military: The CEDAW Committee's Comment on Participation of Women in the Military[229]

28. The accessibility of the military service to women has rarely been reported on by the States parties to the Convention. Some countries, however, have made reservations to various provisions of the Convention, including its articles 7 and 8, with regard to the participation of women in the military service … .

29. The military is important to women in their role as citizens. However, many men and women think it is "men's business". The historical reservation of military roles to men is largely the result of social construction. It has been argued that military service is built into male rites, maintaining the separation between men's and women's roles and stereotypes as "the protectors" and the "protected". …

30. Since the military constitutes an important element of State order, decision-making and governance, all citizens should be concerned about the kind of military they have. By being outside the military, women cannot be involved in the decisions related to the use of military forces, changes in the military institutions and overall control over its performance. …

227 Available at <http://www.un.org/womenwatch/daw/cedaw>. In Art. 1, the Convention defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".

228 "Implementation of Article 21 of the Convention on the Elimination of All Forms of Discrimination against Women: Analysis of articles 7 and 8 of the Convention", CEDAW/C/1994/1, <http://www.un.org/documents/ga/cedaw/13/cedawc1994-4.htm>.

229 See <http://www.un.org/documents/ga/cedaw/13/cedawc1994-4.htm>.

Box 13.1 (cont.)

33. The issue of the participation of women in the military takes on a particular meaning in peace-keeping, the main purpose of which is to avoid or to defuse conflict in order to permit a peaceful solution. The absence of women among military personnel in United Nations peace-keeping forces reflects the absence of women in the military of those countries which provide troops to the peace-keeping operations. Women, however, have been active participants of those operations at the civilian level. In December 1992, two of the United Nations peace-keeping operations (Angola and South Africa) were headed by women from the United Nations Secretariat, and a relatively high percentage of civilian monitors, administrators and other personnel seconded from the Professional category were women.

34. As peace-keeping increases in importance, the question will need to be raised whether the exclusion of women from many peace-keeping tasks is acceptable. Given the fact that peace-keeping differs in many ways from the traditional military and involves characteristics related to conflict resolution, an increased presence of women could make some difference.

The principle of non-discrimination against women in employment matters has been affirmed by several other international instruments, including Recommendation 1700 (2005) of the Parliamentary Assembly of the Council of Europe on discrimination against women in the workforce and the workplace[230] and the European Council Directive 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.[231] Some instruments refer to the military sector in particular: examples are the motion for a resolution on women in the armed forces presented at the Parliamentary Assembly of the Council of Europe in 2005[232] and Council of Europe Recommendation 1742 (2006) on human rights of members of the armed forces.[233] In the latter Recommendation, the Assembly recommends that the Council of Europe:

> pay greater attention to the issue of the status of women in the armed forces. A great many female soldiers are subjected to sexual harassment. The issues of access to military duties and to specific posts in the armed forces, career structures and equal rights are all relevant to discrimination against women, a matter requiring in-depth consideration in itself.

The OSCE has affirmed on several occasions its commitment to end any kind of discrimination on the basis of gender and has also promoted initiatives to foster equality in OSCE participating States, such as the OSCE Action Plan for the Promotion of Gender Equality. ODIHR, in particular, assists OSCE participating States in complying with international instruments for the promotion of gender equality and women's rights, and in reviewing legislation to ensure appropriate legal guarantees for the promotion of gender equality in accordance with OSCE and other commitments (see Box 13.2). ODIHR recently established a new programme on women and security that places the thematic area of women's human rights in the context of the OSCE's comprehensive approach to security. Its objectives are to promote women's rights and consideration of a gender perspective in relation to

230 Available at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta05/erec1700.htm>.

231 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, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31976L0207:EN:HTML>.

232 "Women in the armed forces", Parliamentary Assembly of the Council of Europe, Doc. 10609, 21 June 2005, Strasbourg, available at <http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc05/edoc10609.htm>.

233 Available at <http://www.assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/EREC1742.htm>.

security-related areas of concern, such as conflict prevention/early warning, post-conflict reconstruction, maintenance of security, security-sector reform, and promotion of human security.[234]

Box 13.2

OSCE Commitments on Women and Sexual Discrimination: Selected Examples[235]

41. Participating States … have committed themselves to making equality between women and men an integral part of policies both at State level and within the Organization … .

42. Participating States are therefore recommended to:

- … Adhere to and fully implement the international standards and commitments they have undertaken concerning equality, non-discrimination and women's and girls' rights; …
- Draw on the experience of the OSCE to develop cross-dimensional gender equality policies and strategies …

44. Priorities

…

(b) Ensuring non-discriminatory legal and policy frameworks

- The ODIHR … will assist OSCE participating States in complying with international instruments for the promotion of gender equality and women's rights, and in reviewing legislation to ensure appropriate legal guarantees for the promotion of gender equality in accordance with OSCE and other commitments;
- The ODIHR will assist in the development and implementation of specific programmes and activities to promote women's rights, to increase the role of women at all levels of decision-making, and to promote equality between women and men throughout the OSCE area, particularly through education in gender awareness;
- The ODIHR will assist in the implementation and assessment of national strategies and action plans on measures to promote gender equality and gender mainstreaming; …
- The ODIHR and the OSCE field operations will assist, as appropriate, in building up local capacities and expertise on gender issues as well as networks linking community leaders and politicians; …

(g) Building national mechanisms for the advancement of women

- The ODIHR will continue to provide know-how and support for the building-up of democratic institutions for advancing gender equality, such as Ombudsman's offices at local and national levels, as appropriate; … .

4. Developments and Factors Contributing to Greater Participation of Women in Armed Forces

Despite the fact that women have played an important role in armed forces since time immemorial,[236] it has only been during the last thirty years that women have started to play a greater role in modern armed forces. However, despite great advances in removing restrictions to women's participation in the armed forces in many OSCE participating States, female soldiers still face barriers at all stages of their military careers. Although armed forces are generally conservative organizations that have resisted including women,

234 "OSCE Action Plan for the Promotion of Gender Equality: ODIHR contribution for the Annual Evaluation Report on Gender Issues in the OSCE", ODIHR, May 2006, p. 12, <http://www.osce.org/documents/odihr/2006/05/19268_en.pdf>.

235 Annex to Decision No. 14/04 on the 2004 OSCE Action Plan for the Promotion of Gender Equality, Sofia 2004.

236 For an excellent discussion of gender and the military, see Helena Careiras, *Gender and the Military: Women in the Armed Forces of Western Democracies* (London: Routledge, 2006).

over the last twenty years women have expanded their military roles, thereby challenging the perception that armed forces are a male domain. Several factors explain the increased participation of women in the military.

Need for women's recruitment

The most significant inroads have been made in times of emergency and in times of war. Under these circumstances, the state needs to mobilize as many citizens as possible to respond to crises, and women's participation therefore becomes a necessity. Typically, women initially fill military roles related to their gender roles in society, such as that of nurses, which was the first role to be performed specifically by women in Western military institutions. Though times of war have resulted in increases in the number of women in the armed forces, this has not been sustained after those wars, when most women return (not always voluntarily) to their traditional roles.

Transition to an all-volunteer force

The transition to professional military systems plays a role in increasing women's participation in the armed forces. As opposed to conscription, which is usually only obligatory for men, voluntary (or professional) military systems normally include women.

Sometimes countries make a partial transition to professional armed forces, using volunteers to fill vacancies created by a lack of conscripts. In Russia, for example, the conscript system has, for various reasons, failed to bring a sufficient number of young men into the armed forces. Thus, contract service was introduced in the late 1980s as a volunteer, or professional, element to bring additional personnel to the armed forces. Since its introduction, women have made up a considerable portion of the volunteers: up to 50 per cent at the end of the 1990s. Albeit mostly in lower-ranking positions, the overall participation of women in the Russian armed forces increased from 3 per cent at the beginning of the 1990s to 10 per cent in the same decade.[237]

Changing cultural values

Arguably the most important factor that has propelled the expansion of the role of women in the military has been changing cultural values about women's roles. This has by no means been a natural process. Women, individually and collectively, have fought for equal rights in both the private and public spheres, and have demanded their inclusion in all professions through political and legal action. Women's emancipation is closely linked with a general increase in women's participation in the workforce. These broad social changes have altered women's and men's opinions about whether or not military roles should be open to women, and they have sped up the process of women's integration in the military.

Rise of non-combat jobs

In the 20th century, the stereotype of soldiers as warriors has been eroded by the bureaucratization and computerization of armed forces.[238] These developments have led to a great rise in non-combat jobs in administrative, logistical, medical, and other sectors of the armed forces. The rise of non-combat jobs is one of the factors contributing to the increased participation of women in the armed forces.

5. Levels of Participation

In recent years, women have come to play an increasingly important part in Western armed forces, and most countries have granted women the legal right to serve in the armed forces.

237 Jennifer Mathers, "Women in the Russian Armed Forces: A Marriage of Convenience?", *Minerva: Quarterly Report on Women and the Military*, Fall-Winter 2000.

238 Kümmel, *op. cit.*, note 224.

Even so, the absolute number of women in the military continues to be small, and women continue to be under-represented in armed forces in comparison with their relative number in society. The number of women serving in the armed forces varies considerably from country to country (see Box 13.3).

Box 13.3

Representation of Women in Selected OSCE Participating States' Armed Forces[239]

State	All Ranks (%)	Officers (%)
Belarus	5	NA
Belgium	8.3	6.3 (1% of whom are senior officers)
Canada	15	General Flag Officers: 4 Brigadier General: 7 Colonel/Captain: 4
Croatia	9	6
Czech Republic	12	Lieutenant Colonel: 1 Major: 4
Denmark	5	2
Estonia	15	-
Finland	4	First female officer appointed in 2006
France	13	Senior officers: 4 General officers: 1
Germany	7	4
Georgia	8	NA
Ireland	5	none
Latvia	15	NA
Lithuania	12	Lieutenant Colonel: 3 Major: 6
Luxembourg	1	0.02
Norway	7	NA
Poland	1	NA
Portugal	1	NA
Slovakia	8	34
Slovenia	11	NA
Spain	14	NA
Sweden	4	NA
Switzerland	5	1
Turkey	0.2	NA
United States	15	5

Leaving aside countries where women are not allowed to serve, the table shows that rates vary from 0.2 per cent in Turkey to 15 per cent in the United States. Different career opportunities for men and women may also explain why women are distributed over the ranks so unevenly. Box 13.3 shows that women are even more under-represented in the higher ranks. In some OSCE participating States, there are no women at all in the highest ranks (e.g., Latvia, Poland, Spain, Ukraine). The significance of having women in higher ranks goes beyond mere statistics. Women who are generals or high commanding officers symbolize that women can reach the top. This can strengthen the conviction that women can have a successful career in the armed forces, which will probably attract more women to pursue military careers. While there may not be formal barriers to the advancement of women in

239 ODIHR-DCAF questionnaire, questions 75 and 76.

the military, the under-representation of women in the higher ranks indicates that a glass ceiling does exist, i.e., women cannot reach the top ranks due to cultural barriers.[240]

6. Approaches to Women's Participation in the Armed Forces

In the process of opening up the military to women, the main issue that states consider is which jobs to make available to women. Four approaches to integration can be identified:

- Women may serve only in specific units (e.g., special women's units);
- Women are excluded from specific positions;
- All functions are open to women on the same basis as men;
- Women are entirely excluded from participation in the armed forces. Based on our survey among OSCE participating states, this model does not occur within the OSCE area, though it was only recently abandoned, for example, by Italy in 1999 and Hungary in 1996.[241]

Special women's units

Special women's units were common in the past. In the United States, for example, the Women's Army Corps (WAC), a special unit of the US Army during World War II, was abolished in 1978.[242] Other branches of the US military had similar women's units, including the Navy WAVES, the Women's Auxiliary Air Force, the SPARS of the Coast Guard and the Women Airforce Service Pilots. The integration of women into regular armed forces was gradually prompted by legislative action and considerable political pressure. In particular, since the adoption of the Women's Armed Services Integration Act in 1948, the number and kinds of positions open to women have progressively increased.[243] The Women's Royal Army Corps existed in the United Kingdom until 1990.[244] Similarly, there were women's corps in the Netherlands beginning in 1944, such as the Women Assistance Corps and, later, organizations such as MARVA (Navy), MILVA (Army), and LUVA (Air Force). The women in these corps did not work in combat functions; instead, they worked, for example, in medical units, service units, transport units, and air-traffic-control units. In the Netherlands, in 1982, the separate women's corps were dismantled, and from that moment female military service personnel were supposed to have the same rights, duties, and opportunities as their male colleagues.[245]

Women are excluded from specific positions

In some OSCE participating States, women are excluded from specific positions. The first roles that were opened to women in the armed forces were that of military nurse, which was traditionally considered the typical female role, and positions in the administrative sector, where tasks were mainly bureaucratic. Women were later allowed to serve in technical roles in logistics services, and subsequently in combat-support technical roles.

240 "The conundrum of the glass ceiling", *The Economist,* 21 July 2005, available at <http://www.economist.com/displaystory.cfm?story_id=4197626>.

241 Office on Women in the NATO Forces, <http://www.nato.int/issues/women_nato/perc_fem_soldiers_2001_2006.pdf>. Since this model is no longer used in the OSCE region, it will not be further discussed in this handbook.

242 More information can be found at <http://www.army.mil/cmh-pg/brochures/wac/wac.htm>.

243 M. Harrel and L. Miller, *New Opportunities for Military Women. Effects Upon Readiness, Cohesion and Morale* (Santa Monica, California: Rand, 1997), available at <http://www.rand.org/pubs/monograph_reports/MR896>. This report provides a detailed description of the various steps of women's integration in the US Armed Forces.

244 See <www.wracassociation.co.uk>.

245 Katia Sorin (ed.), *Des femmes militaires en Occident, quels enseignements pour la France ?* (Paris: Centre d'études en sciences sociales de la défense, 2005), pp. 94-118, available at: <http://www.c2sd.sga.defense.gouv.fr/IMG/pdf/SORIN_femmes_militaires_occident_premiersemestre2005.pdf>.

Box 13.4

Are Women Allowed to Fulfil Combat Positions? Practices in OSCE Participating States[246]

Women are allowed to fulfil combat positions in:

Austria, Belarus, Belgium, Bosnia and Herzegovina, Canada, Croatia, the Czech Republic, Denmark, Estonia, Finland, Georgia, Germany, Ireland, Latvia, Lithuania, Luxembourg, Norway, Poland, the Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, and Turkey.

Women are not allowed to fulfil combat positions in:

Azerbaijan, France, Portugal, Ukraine, the United Kingdom, and the United States.

In some states (see Box 13.4 above), women are often not granted access to combat roles. The main official reason given for excluding women from combat functions are gender differences linked to physical strength, which are believed to render female service personnel unable to attain minimum performance standards. Women are excluded from specific positions in several states, including Belarus, France, Ukraine, and the United States. In the Netherlands, women are excluded from the Marine Corps and the Submarine Fleet.[247] In the United Kingdom, women serve in all specializations except those where the primary duty is "to close with and kill the enemy". Women are therefore excluded from the Royal Marines General Service (as Royal Marine Commandos), the Household Cavalry and Royal Armoured Corps, the Infantry, and the Royal Air Force Regiment. This exclusion does not, however, prevent them from serving as part of such units in administrative and support roles. According to official Royal Navy publications, women are precluded from serving aboard submarines or as mine-clearance divers for health reasons relating to breathable air mixtures.[248] The exclusion of women from combat roles has recently been a subject of discussion in the United Kingdom on the grounds that positions should be open to all on the basis of ability. Following rising criticism, the British Defence Ministry undertook a study on combat effectiveness and gender, the results of which were published in 2002. On the basis of this, the secretary of defence announced that direct combat roles in the British Armed Forces would remain closed to women on the grounds of combat effectiveness, not because women would not be fit for combat roles, but because of concerns for "the impact of gender mixing on the combat team in close combat conditions".[249]

All military functions, combat roles included, are open to women

In some countries, all military functions, combat roles included, are open to women, depending on their actual capabilities. Individuals cannot be rejected or employed solely on the basis of gender. This approach can be found in, for example, Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, Latvia, Lithuania, Luxembourg, Norway, Poland, Serbia, Spain, Sweden, Switzerland, and Turkey. This is a relatively new approach: for example, Norway, a country with a comparatively high level of women's integration in the armed forces, became, in 1985, the first NATO state to open all positions to women, including service on board submarines. Canadian servicewomen have also been able to serve in

246 ODIHR-DCAF questionnaire, question 73.

247 Sorin, *op. cit.*, note 245.

248 Defence Factsheet, "Women in the Armed Forces", available at <http://www.mod.uk/DefenceInternet/FactSheets/WomenInTheArmedForces.htm>.

249 "Women in the Armed Forces", Ministry of Defence of the United Kingdom, 22 May 2002, <http://www.mod.uk/NR/rdonlyres/10B34976-75F9-47E0-B376-AED4B09FB3B3/0/women_af_summary.pdf>. For more information, see R. Woodward and P. Winter, "Discourses of Gender in the Contemporary British Army", *Armed Forces & Society*, Vol. 30, No. 2, Winter 2004, p. 289.

almost all functions and environments since 1989, the only exception being service on board submarines, and even that restriction was lifted in 2001.[250]

However, one has to take into account that the formal opening of all positions does not necessarily imply that women are working in every position. In Denmark and Norway, for example, all functions are open to women, but no woman has as yet served as a para-ranger, a marine commando, or a fighter pilot.[251]

In some cases, women have gained full access to all positions only after a court ruling. This is the case, for example, in Germany. Tanja Kreil, who had been trained in electronics, applied in 1996 to serve in the Federal Armed Forces as a volunteer, requesting a role in electronic maintenance of weapons, a combat support role. Even so, her application was rejected by the Federal Armed Forces recruitment centre on the grounds that women could serve in medical and musical services only, and not in positions involving the use of arms.[252] Having exhausted judicial avenues within Germany, she appealed to the European Court of Justice, which ruled that gender could not be a reason to categorically deny women access to any position within the armed forces.[253] Box 13.5 sums up the main points of the ruling. It is important that the Court declared that the EU Council directive on equal opportunities for men and women was applicable to the armed forces, thereby adding a European dimension to the participation of women in armed forces.

Box 13.5

Landmark Case: European Court of Justice Rules Out the Total Exclusion of Women from Jobs Involving Firearms[254]

- EU Council Directive 76/207/EEC of 1976 on equal job opportunities for men and women applies to employment in armed forces;
- The Directive cannot justify greater protection for women against risks to which men and women are equally exposed;
- Though national authorities have a certain amount of discretion in derogating from the principle of the individual right to equal treatment of men and women for the sake of protecting public security, the total exclusion of women from all military posts involving the use of arms cannot be justified;
- With respect to the nature of armed forces, the fact that persons serving those forces might be called upon to use arms could not, in itself, justify the exclusion of women from access to military posts.

After this ruling, the German Government opened up combat units to women.[255] Since January 2001, women have been eligible to enter all classifications, provided they meet the criteria for the position they are applying for.[256] In another case concerning a British servicewoman, however, the European Court of Justice ruled that women can be ex-

250 Vicki Nielsen, "Women in uniform", NATO Review, Vol. 49, No. 2, Summer 2001, available at <http://www.nato.int/docu/review/2001/0102-09.htm>.

251 *Ibid*.

252 Article 3a of the Regulation on Soldiers' Careers.

253 *Kreil v. Bundesrepublik Deutschland*, European Court of Justice, Case C-285/98, 11 January 2000, available on the Court's website at <http://curia.europa.eu>.

254 *Ibid*.

255 According to German experts present at the ODIHR-DCAF expert review meeting in Warsaw in December 2006, not all posts in the Federal Armed Forces are open to women, e.g., women are not allowed to serve in special intervention units.

256 G. Kümmel, "Complete Access: Women in the Bundeswehr and Male Ambivalence", *Armed Forces & Society*, Vol. 28, No. 4, Summer 2002, pp. 555-573.

cluded from the special forces, i.e., the Royal Marines.[257] The Court stated that the special conditions for deployment of assault units, as well as the requirement of interoperability, allow for derogation of the right to equal treatment.

7. Harassment and Other Forms of Gender-Specific Discrimination

In spite of the fact that women are *de jure* allowed to serve in armed forces in most countries, they still face *de facto* discrimination on the basis of gender. Though men and women are formally equal in most states, women do not enjoy the same status as men in the armed forces as a result of cultural and structural forms of inequality. Much of the resistance to integration is embedded in the prevailing male-dominated culture, which conceives the military as essentially a male institution. Gender discrimination also affects military recruitment and employment policies. Discriminatory practices range from biased recruitment and performance evaluation systems, and the absence of separate facilities for women, to the lack of legislation on maternity leave and exclusion from combat functions. Different career opportunities for men and women also explain why women are distributed over the ranks so unevenly.

Moreover, double selection standards for men and women are often presumed to undermine women's credibility and generate hostility from male colleagues. As a consequence, servicewomen feel that they must work twice as hard to receive the same respect as men. Furthermore, women who are seen as competent soldiers may have their sexuality questioned.[258] Therefore, more open policies are needed at the level of recruitment, e.g., the adoption of gender-free physical selection standards (e.g., UK[259]).

Sexual harassment and sexual violence

Sexual harassment is a form of sexual discrimination that has been defined as:

> unwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct of a sexual nature ... when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.[260]

The above definition identifies two types of sexual harassment. The first is **quid pro quo** harassment, in which decisions on hiring, termination, promotion, or pay are made based on an employee's response to sexual advances. The second type of sexual harassment involves the creation of a **hostile work environment**, in which female service personnel are targeted by their male peers simply because they are women, by, for example, being touched unnecessarily, being addressed with offensive language, or being subjected to pressure for sexual activity. Sexual harassment causes damage to the emotional or psychological well-being of the victims; it may also influence the quality of female personnel's work performance

257 *Sirdar v. The Army Board, Secretary of State for Defence*, European Court of Justice, 29 October 1999, Case C-273/97, available on the Court's website at <http://curia.europa.eu>. For comments, see G. Harries-Jenkins, "Women in Extended Roles in the Military: Legal Issues", *Current Sociology*, Vol. 50, No. 5, September 2002, pp. 745-769.

258 L Miller, "Women in the Armed Forces", in J. Callaghan and F. Kernic (eds.), *Armed Forces and International Security: Global Trends and Issues* (Münster: Lit Verlag, 2003), p. 222.

259 Woodward and Winter, *op. cit.*, note 249, p. 286.

260 "Report of the Special Rapporteur on Violence against Women, its causes and consequences", United Nations Commission on Human Rights, E/CN.4/1997/47, 12 February 1997.

and may make it difficult for them to achieve their career goals. Any person in a command position using or condoning explicit or implicit sexual behaviour aimed at influencing the career, pay, or performance of a military member is engaging in harassment.

Sexual violence

Sexual assaults and sexual violence against female military personnel is also a widespread problem. In the United Kingdom, for example, according to a public survey recently conducted by the Ministry of Defence and the Equal Opportunities Commission, nearly all servicewomen, while showing high tolerance for such behaviour, had heard sexual jokes and stories and had been exposed to sexual language and material in the workplace. Fifteen per cent had "particularly upsetting" experiences, and 4 per cent said they had been sexually assaulted.[261] In the United States, the Department of Defense acknowledged 2,374 reported cases of sexual assault in 2005. This represents an increase of 40 per cent over the number of reported cases in 2004 (1,700). The data for 2004 represents a 25 per cent increase over the 2003 figure (1,012). The data for 2003 represents a 41 per cent increase over data collected for 2002. Among women veterans seeking disability benefits, 69 per cent of combat veterans and 86 per cent of non-combat veterans reported in-service or post-service sexual assault. The US Department of Defense's study concluded that the prevalence of sexual assault was three to ten times higher for females serving in the armed forces than for females in the general population.[262]

Sexual harassment and sexual violence not only damages the emotional or psychological well-being of the victims, it also harms the work performance of female personnel, as well as the public image of the armed forces. Preventing sexual harassment in the military is therefore essential for ensuring a non-discriminatory and safe environment for all its members. However, many abuses remain unpunished; indeed, few women use the military's formal or informal grievance process because of a lack of confidence in the military system for redress. Many women do not tell anyone if they have been a victim of abuse and handle the situation by themselves because they fear that their complaint could have a negative effect on their career and because they feel they would not be believed. Some of them even decide to leave the service.

8. Policies and Mechanisms against Harassment

In most OSCE participating States, sexual harassment is codified as a disciplinary or criminal offence, depending on the gravity of the act. Often, special complaints procedures are not provided for. Therefore, women victims of discriminatory practices may initiate the regular informal procedure by reporting the case to their superior, who may investigate the complaint or refer it to the commanding officer. If this inquiry is unsatisfactory for the victims, they may ask for a review of the claim by a civil court (e.g., France, Sweden) or by the military prosecutor's office (e.g., Ukraine). However, given its gravity, it would be preferable to consider sexual assault a crime according to criminal law and for the criminal courts of the state in question to initiate prosecution from the start instead of leaving it to the military justice system.

261 S. Rutherford, R. Schneider, A. Walmsley, "Ministry of Defence/Equal Opportunities Commission Agreement on Preventing & Dealing Effectively with Sexual Harassment: Quantitative & Qualitative Research into Sexual Harassment in the Armed Forces", March 2006, available at <http://www.mod.uk/NR/rdonlyres/538E55EE-9CA4-4177-9A0B-6853A431B283/0/20060522SRReport.pdf>; "MOD and EOC agree action to tackle sexual harassment in the Armed Forces", available at <http://www.mod.uk/DefenceInternet/DefenceNews/DefencePolicyAndBusiness/ModAndEocAgreeActionToTackleSexualHarassmentInTheArmedForces.htm>.

262 Statement of Christine Hansen, Executive Director, The Miles Foundation, Hearing on Sexual Assault and Violence Against Women in the Military and at the Academies, testimony presented to the Honorable Christopher Shays, Chairman, Subcommittee on National Security, Emerging Threats and International Relations of the Government Reform Committee within the United States House of Representatives, 27 June 2006.

Some states, after extensive research into the nature and the extent of sexual harassment in the armed forces, have decided to take special actions in order to deal more effectively with the problem. This is the case in Denmark, for example, where in 2003, following the survey report of Psychologists at the Defence College, the Danish Defence Command adopted various initiatives to prevent and combat harassment, such as the establishment of a hotline for psychological counselling and the establishment of an organization of local counsellors. The role of the counsellors has now been widely accepted locally, and both peers and management have started using them actively in handling conflicts. Furthermore, in January 2006, the Danish Armed Forces instituted special rules and regulations that make certain actions sanctionable (see Box 13.6).

Overall, these initiatives have resulted in a significant decrease in the number of incidents of sexual harassment in the Danish Armed Forces. Since the first evaluation in 2003, the number of incidents has been reduced by 80 per cent.

Box 13.6

Denmark: Initiatives against Harassment[263]

Personal counselling:

The Danish Defence Command has established an organization that consists of 50 locally based employees of both sexes who offer anonymous counselling as needed. The counselling offer is open to employees who experience sexual harassment and to employees who experience a bad working environment. Such employees can meet in confidence with a neutral person, who can provide advice and support. When requested, counsellors can assist by referring problems to a commanding officer or by arranging mediation. The counsellors work with different types of offences, including sexual harassment, bullying, and discrimination.

Information brochures on handling sexual harassment:

The Danish Defence Command has published special information brochures for employees and management on how to handle cases of sexual harassment. The brochures have been supplemented by several articles in defence magazines.

Various local initiatives (at unit level), including:

- Dialogue about sexual harassment with a view to creating more awareness in the organization;
- Local surveys among employees;
- Gender mainstreaming in local personnel policy;
- Local action plans for handling sexual harassment;
- Dialogue among women about sexual harassment;
- Sexual harassment as a fixed item on the agenda of the Works Council (a consultation body consisting of representatives of management and personnel);
- Discussions on sexual harassment in the local safety council;
- Sexual harassment as part of annual personnel assessments;
- Integration of sexual-harassment issues into educational programmes for sergeants and officers;
- Heightened attention of commanders to sexual harassment in order to ensure prompt intervention;
- Attention for sexual harassment at introduction courses;
- Banning of offensive materials in print and electronic media.

263 ODIHR-DCAF questionnaire, question 53.

Often, political and military leaders are aware that sexual harassment in the armed forces has to stop for reasons that go beyond the well-being of the individuals concerned. Harassment weakens trust among, and interdependence of, armed forces personnel, and it erodes effectiveness in the field, as well as the attractiveness of the armed forces as an employer.

9. Policies for Promoting Equality

Managing diversity and gender mainstreaming

As mentioned before, the issue of women in the armed forces has to be seen as part of the wider issue of managing diversity, i.e., recruiting and retaining employees from different demographic backgrounds and using their qualities in an optimal way. Based on research in business and military settings, the generally accepted idea today is that diversity in groups or organizational units can be both advantageous and disadvantageous, depending on institutional measures within the armed forces, as well as variables at unit level (e.g., leadership, tasks, and group composition). In this context, gender is not an issue that can be consigned to a gender officer or a watchdog in a single office because no single office or officer can be involved in all phases and activities of all units in the armed forces. This is the essence of mainstreaming gender, i.e., "ensuring that gender perspectives and attention to the goal of gender equality are central to all activities - policy development, research, advocacy/ dialogue, legislation, resource allocation, and planning, implementation and monitoring of programmes and projects".[264]

Box 13.7

Belgian Charter for the Promotion of Equal Opportunities for Men and Women in the Armed Forces and for the Implementation of the Principles of UN Security Council Resolution 1325[265]

Since women first entered the Belgian Armed Forces in 1975, there has been impressive progress in terms of providing equal opportunities for men and women. On 8 March 2007, the Belgian minister of defence and the chief of defence signed a charter with representatives of women's organizations in Belgium, with the aim of promoting a structural equal-opportunities policy, as well as gender mainstreaming in the armed forces. In particular, the Belgian Armed Forces will take into account UN Security Council Resolution 1325 for gender mainstreaming in its peacekeeping operations.

The Charter lists 10 obligations and commitments for the Belgian Armed Forces, including formulation of a specific strategy (Art. 2), formulation of specific action plans (Art. 4), creation of budgets for gender mainstreaming (Art. 5), adoption of specific measures and maintenance of relevant databases (Art. 7), observance of UN Resolution 1325 and conduct of peacekeeping operations (Art. 9), as well as the conduct of "permanent and democratic evaluations" of achieved progress and results within the context of the charter (Art. 10).

In this context, the following policies and positive actions contribute to women's integration in armed forces.

Women's networks

Organizations of female service personnel, such as the Defense Department Advisory Committee on Women in the Services (DACOWITS) in the United States or the Defence Women's Network in the Netherlands, play an important role in this regard (see Box 13.8). These mechanisms exert pressure on the defence leadership to improve women's conditions in the armed forces, inform women of their rights, and offer women help in case of

264 United Nations Office of the Special Advisor on Gender Issues and the Advancement of Women, see <http://www.un.org/womenwatch/osagi>.

265 The Charter is available (in French and Dutch) at <www.mil.be>.

mistreatment. In this regard, the introduction of special advisors/counsellors for women should be taken into consideration (see the example of Danish counsellors, Box 13.6).

Box 13.8

The Dutch Defence Women's Network[266]

Since 1992, the Defence Women's Network has been trying to influence policy makers and to promote the interests of women in the Dutch Armed Forces. The network has two goals:

- To inspire, stimulate, inform, and motivate women who are employed in the Dutch Ministry of Defence;
- To strengthen the position of women and to stimulate their advancement to higher positions within the armed forces.

The Defence Women's Network consists of active female service personnel. Meetings, discussions, and a newsletter organized by the network facilitate contacts between members of the network. It is an informal "old girls" network for the benefit of both the armed forces and women working in the armed forces. The network is a source of knowledge and expertise that is often consulted by defence policy makers.

Awareness-raising and training

Because officers are the custodians and shapers of organizational culture, gender training is essential for military officers in order to eradicate the prevailing male-dominated culture and to enhance awareness of the problem among male peers. Training could also reinforce the role of the chain of command in preventing and punishing cases of discrimination and mistreatment. Training alone, however, is insufficient. It is only helpful if it is part and parcel of a comprehensive culture of learning, and if participants integrate the lessons learned into their work.

Affirmative action

Some countries have launched affirmative action within the military, especially for women in higher ranks. In Germany, for example, the armed forces have had to apply quasi-preferential treatment for women soldiers since January 2005. If a male and a female applicant for a position in the Federal Armed Forces have the same performance, the position will be given to the female soldier.[267]

National and international monitoring

Both national and international monitoring (for comparing best practices) are important. It is important that data be produced frequently (as part of the yearly defence budget, for example) on recruitment, promotion, and retention of women in the armed forces. If women leave the armed forces, their responsible manager/commander or personnel officer should conduct exit interviews in order to assess why they are leaving.

International monitoring, such as by the UN Committee of the Convention on the Elimination of Discrimination against Women, is also relevant for fostering women's integration in society and, consequently, in the military. The Committee monitors measures adopted by states parties to promote women's equality with men before the law. The Committee comprises 18 experts "of high moral standing and competence", selected by states parties. States parties are required to submit a report to the Secretary-General, for consideration by the Committee, on the various measures adopted in order to meet the objectives of the Convention. Any disputes between two or more states parties that cannot be settled by negotiation should be resolved by arbitration (Art. 29).

266 See <www.defensievrouwennetwerk.nl>.

267 See <www.bundeswehr.de/portal/a/bwde>.

Box 13.9

Czech Republic: Policy on the Equal Treatment of Men and Women[268]

In 2001, the Government of the Czech Republic adopted a paper on the government's priorities and procedures for promoting equality between men and women. In 2002 and 2003, the minister of defence issued further orders and guidelines about promoting equal opportunities for men and women working in the Czech armed forces. Relevant policy priorities and procedures are updated on an annual basis. The Defence Ministry's Personnel Division is responsible for implementing the policy. The policy has four objectives:

1. Establishing legal conditions for equal opportunities for men and women;
2. Increasing legal awareness;
3. Ensuring equal opportunities for men and women in their access to a professional career;
4. Monitoring and evaluating the efficiency of the implementation of the principle of equality of men and women.

A series of lectures dealing with equal opportunities for men and women for senior staff is held once a year. Principles of equal opportunities constitute a part of all educational programmes in military schools and are also a part of standard preparation for commanders at all levels.

10. Best Practices and Recommendations

- Based on managing diversity and gender mainstreaming, legislation on equal opportunities should be implemented in the military sector;
- Armed forces personnel should be recruited and selected for positions in the armed forces on the basis of actual, not presumed, capabilities;
- Officers should be provided with adequate training, including on culture, gender, and complaints procedures;
- Commanders should use their position to prevent and punish cases of mistreatment;
- Commanders should promote a culture of mutual trust and respect;
- There should be no tolerance of sexual harassment or sexual violence in the military. An effective system of sanctions should be provided for in case of harassment or violence;
- In training, armed forces personnel should be made aware of what behaviour constitutes harassment;
- Complaints mechanisms should be available for women service personnel who have been subject to harassment or violence;
- Special advisors for women should be established in the armed forces;
- A better understanding of the benefits women bring to the military should be promoted;
- Armed forces should use positive advertising to recruit women;
- States should improve and enhance the military's ability to recruit, retain, and advance women.

268 Supplementary information for the ODIHR-DCAF questionnaire provided by the Czech Republic.

Chapter 14

Gays and Lesbians in the Armed Forces

Along with the gradual development of more tolerant attitudes towards homosexuality in society in general, the degree of acceptance of lesbians and gays in the military has stirred public debate in many OSCE participating States recently. The decriminalization of homosexuality[269] has led to the recognition in many states of equal rights through the extension of broader social rights (e.g., civil unions, social benefits) to gays and lesbians, as well as to the introduction of specific bans in national legislation on discrimination against gays and lesbians.

The issue of gays and lesbians in the armed forces reflects the issue of gaining equal rights and the struggle against discrimination in society in general. Gays and lesbians have always served in the armed forces, even though they have been obliged to hide their sexual orientation and have frequently been exposed to discriminatory policies and actions. As a result of this wider societal trend, various OSCE participating states have adopted a policy to stop discrimination and to promote equal opportunities within the armed forces. This can be illustrated by an example from Belgium (see Box 14.1), where a new law on non-discrimination forms the basis for a policy on diversity, non-discrimination, and equal opportunities in the Belgian armed forces.

Box 14.1

Managing Diversity, Non-discrimination and Equal Opportunities in the Belgian Armed Forces: 'Good-bye Discrimination, Hello Diversity'[270]

Based on the Anti-Discrimination Law of 25 February 2003, the Belgian armed forces have an official policy on diversity, non-discrimination, and equal opportunities. The armed forces recognize the diversity of their personnel. In accordance with this policy, every expression of discrimination is unlawful and will not be tolerated. The policy and personnel of Belgium's armed forces are guided by these principles in both internal and external relations. The diversity policy is based on a general directive (DGHR-APG-DIVMGT-001) of 17 October 2005. The policy deals with ethnic, linguistic, religious, sexual-orientation, and gender diversity. A strategic diversity plan offers a framework for the implementation of this policy. The plan foresees the adoption of specific measures in four domains: recruitment; training and education; leadership and organizational structures, and communication. The policy has been disseminated via briefings, news outlets, and information papers. An information strategy has been devised to reach out to all personnel, including through the use of a DVD called "Good-bye Discrimination, Hello Diversity".

The participation of openly gay and lesbian personnel in the military is a relatively recent phenomenon in the OSCE region, however, as many states began lifting the ban on homosexuals in the military only in the 1970s, starting with the Netherlands in 1974. Box 14.3 provides an overview of OSCE participating States that allow gays and lesbians to serve in

269 Homosexual acts were decriminalized, for example, in the Russian Federation in 1993, in Albania in 1995, in Poland in 1932, and in the United Kingdom in 1967. According to the World Legal Survey 2006 of the International Lesbian and Gay Association (available at <www.ilga.org>), consensual same-sex acts are still penalized in Uzbekistan.

270 ODIHR-DCAF questionnaire, questions 68-69; see the website of the Belgian armed forces: <www.mil.be>.

their armed forces.[271] While most OSCE participating States entitle gays and lesbians to serve openly in the armed forces, several others still ban gays and lesbians from serving in the military on grounds such as unit cohesion and privacy. There are other countries that neither ban nor support gay and lesbian service members. In these countries, sexuality is considered a personal aspect of one's identity that should not be subject to public scrutiny.

This chapter explores different policies and attitudes towards gay and lesbian personnel in the armed forces. It underlines the main barriers facing homosexual service personnel in their military careers while proposing best practices for the integration of gays and lesbians in the military. It also deals with harassment, as well as with mechanisms and policies for promoting equality of all military personnel. Finally, this chapter addresses military culture in the armed forces as both a barrier and a solution to the problem of discrimination against gays and lesbians in the armed forces. In particular, it explains how training and awareness-raising among military commanders can contribute to promoting equal opportunities.

1. Issues at Stake

As mentioned in the introduction to this chapter, OSCE participating States take different approaches to accepting gays and lesbians as members of the armed forces.

The central issue

The central issue is that excluding gays and lesbians from military service violates the principle of equality both in terms of employment opportunities and in terms of citizenship. Because military service has historically been associated with citizenship, excluding lesbians and gays from the armed forces prevents them from fully enjoying their rights and duties as citizens.

There are two standard arguments against admitting gays and lesbians to work in the armed forces, both of which are based on cultural beliefs instead of scientific proof or objective evidence: (1) homosexuality is a personality disorder; and (2) homosexuality is a threat to the operational effectiveness of the armed forces.

First, those against admitting gays and lesbians to the armed forces argue that gays and lesbians suffer from a psychological disorder and, therefore, are not fit to work in the armed forces. However, according to an official statement of the American Psychiatric Association of as early as 1973, there is no medical or scientific proof for classifying homosexuality as a mental disorder or defect.[272]

The second major argument is that the presence of gays and lesbians in the armed forces would interfere with combat readiness and effectiveness by reducing troop cohesion, discipline, and morale. However, there have been no reports from the countries that have lifted their ban that the presence of lesbian and gay personnel in military units has compromised

271 The data collected by the ODIHR-DCAF questionnaire shows that gays and lesbians are allowed to serve in Belarus and Russia, whereas data collected by the International Lesbian and Gay Association shows that gays and lesbians are not allowed to serve in Belarus or in Russia. These discrepancies necessitate further research. See <www.ilga-europe.org>.

272 American Psychiatric Association, "Position Statement on Homosexuality and Civil Rights", *American Journal of Psychiatry,* Vol. 131, No. 4, 1973, p. 497. For more information, see the website of the American Psychiatric Association at <http://www.psych.org/index.cfm>. Furthermore, see "Military Document suggests that Homosexuality is a Defect", Michael D. Palm Centre, University of California, Santa Barbara, press release, 17 November 2006, available at <http://www.palmcenter.org/press/dadt/releases/military_document_suggests_that_homosexuality_is_a_defect>.

military performance in any way.[273] Since Canada lifted its ban, for example, no evidence has been found that the presence of gays and lesbians has had any appreciable effect on any aspect of military life or performance (see Box 14.2).

Box 14.2

The Lifting of the Ban on Gays in Canadian Military Has No Impact on Unit Cohesion[274]

Canadian Defence officials knew to date of no instances of people acknowledging or talking about their homosexual relationships, no fights or violent incidents, no resignations (despite previous threats to quit), no problems with recruitment, and no diminution of cohesion, morale, or organizational effectiveness.

Cultural attitudes as a core issue of non-acceptance of gays and lesbians

The main arguments against admitting gays and lesbians to the armed forces are not based on scientific proof or objective evidence but on cultural grounds and prejudices. Concerns do exist that a homophobic mentality prevails in the armed forces, whereby anyone who is different or does not fit in may face hurdles.[275] Cultural barriers are a problem not only in countries where gays and lesbians are still prohibited from serving, but also in countries where the ban has been lifted. In the latter countries, gays and lesbians still encounter significant resistance from within the military even when the top military leadership speaks out against homophobic practices at work. Thus, some OSCE participating States have taken measures to guarantee not only *de jure* equality but also to promote *de facto* equality (see Section 4 of this chapter, "Policies and Mechanisms for Promoting Equality").

Harassment and discrimination

Even though the legal position of gays and lesbians has improved in recent years, gay and lesbian personnel still face various forms of discrimination. Typical forms of discrimination include unofficial policies or practices that may impact on future career advancement.[276] Other forms of discrimination include unequal treatment as far as housing and other domestic benefits to same-sex partners are concerned.

Furthermore, gay and lesbian service members are often obliged to work in a hostile environment and are sometimes subject to abuse and harassment due to their sexual orientation. Such harassment ranges from offensive speech, jokes, and name-calling, to sexual violence and violent assaults. A study recently conducted in the United States indicates that nearly 39 per cent of 71,455 military respondents reported being aware of incidents of harassment based on perceptions of an individual's sexual orientation during the preceding 12 months. Of those claiming awareness, the largest proportion reported awareness of only one incident (14.6 per cent), while 1.6 per cent reported being aware of more than one incident.[277]

273 A. Belkin, "Don't Ask, Don't Tell: Is the Gay Ban Based on Military Necessity?", *Parameters*, Summer 2003, pp. 108-119, available at <http://www.gaymilitary.ucsb.edu/Publications/2003_BelkinInParameters.pdf>.

274 Bernard Rostker *et al.*, *Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment* (Santa Monica, California: RAND Corporation, 1993), pp. 74-79.

275 Finding based on opinions of experts, ODIHR-DCAF Human Rights of Armed Forces Review Workshop, Warsaw, December 2006.

276 M. Wechsler Segal, "Sexuality and the Military, Armed Forces and International Security: Global Trends and Issues", in Jean Callaghan and Franz Kernic (eds.), *Armed Forces and International Security: Global Trends and Issues* (Piscataway, New Jersey: Transaction Publishers, 2003), pp. 217-220.

277 K. Bowling, J. Firestone, R. Harris, "Analyzing Questions That Cannot Be Asked of Respondents Who Cannot Respond", *Armed Forces & Society*, Vol. 31, No. 3, Spring 2005, p. 432, available at <http://afs.sagepub.com/cgi/reprint/31/3/411>.

2. International Human Rights Commitments

Sexual orientation is a deeply rooted aspect of each individual's personality. Rules that make distinctions based on sexual orientation constitute a challenge not only to the principle of non-discrimination but also to the right to privacy.

Prohibition of discrimination

Art. 26 of the International Covenant on Civil and Political Rights affirms that:

> the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

As the UN Human Rights Committee has concluded, Art. 26 "prohibits discrimination in law or in fact in any field regulated and protected by the public authorities", whether or not the legislation covers a right guaranteed in the covenant.[278]

Though Art. 26 of the ICCPR does not make explicit reference to discrimination based on sexual orientation, the Human Rights Committee has interpreted the ICCPR's prohibition on discrimination based on sex to include discrimination on the basis of sexual orientation.[279]

The principle of non-discrimination is reaffirmed in Art. 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and in Art. 13 of the Treaty establishing the European Union, which mandates the Council to take appropriate action to combat discrimination based, among other things, on sexual orientation.

On the basis of this article, the Council of the European Union adopted an EU employment directive that establishes a general framework for equal treatment in employment and occupation matters and adequate means of legal protection in cases of discrimination.[280] The directive stipulates that discrimination based on, *inter alia*, sexual orientation, is forbidden. Art. 3, which defines the scope of the directive, states that the directive applies to the entire public and private sector, and there appears to be no exception for national security. According to the same article, armed forces of EU member states are only allowed to discriminate on the basis of age or disability in order to safeguard combat effectiveness.[281] This implies that sexual orientation cannot be a justification for banning gays and lesbians from working in the armed forces.[282]

The prohibition of discrimination does not mean that no distinctions are permissible. The directive recognizes that, in very limited circumstances, a difference of treatment may be justified where a characteristic related to "religion or belief, disability, age or sexual

278 United Nations, Office of the High Commissioner for Human Rights, Human Rights Committee, "General Comment 18: Non discrimination", para. 12, 37th session, 1989, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.1, p. 26, 1994.

279 *Nicholas Toonen v. Australia,* United Nations Human Rights Committee, 4 April 1994, *International Human Rights Reports*, Vol. 1, 1994, p. 97.

280 Art. 3.4: "Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces." See <http://ec.europa.eu/employment_social/news/2001/jul/directive78ec_en.pdf>.

281 *Ibid*., Arts. 1, 3.1, and 3.4.

282 Bearing in mind the now sceptical attitude of international judges to claims that the presence of gays and lesbians in the armed forces affects efficiency or morale, such a claim is very unlikely to succeed. See *Lustig-Prean and Beckett v. the United Kingdom*, *op. cit*., note 4, p. 548.

orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate".[283]

Right to privacy

The prohibition on gays and lesbians serving in the armed forces may also be in contravention of the right to private life, which is protected by both the ICCPR (Art. 17) and the ECHR. Art. 8 of the ECHR states:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[284]

On the basis of this provision, the European Court of Human Rights ruled that the United Kingdom's policy prohibiting homosexuals from serving in the armed forces violated the principle of respect for private life (see Section 3 of this chapter, "Different Approaches to the Participation of Lesbians and Gays in the Armed Forces").

The OSCE has not explicitly affirmed its commitment to end discrimination on the basis of sexual orientation. Only in the 1995 Ottawa Declaration did the OSCE Parliamentary Assembly call upon:

> participating States to ensure that all persons belonging to different segments of their populations be accorded equal respect and consideration in their constitutions, legislation and administration and that there be no subordination, explicit or implied, on the basis of ethnicity, race, colour, language, religion, sex, sexual orientation, national or social origin or belonging to a minority … .[285]

Discrimination on the basis of sexual orientation is understood by many participating States and OSCE institutions to be banned under provisions banning discrimination "on any ground".[286]

3. Different Approaches to the Participation of Lesbians and Gays in the Armed Forces

Policies and practices regarding lesbians and gays serving in the armed forces vary widely from country to country. There have also been changes within countries, with many nations relaxing or entirely lifting the ban on gays and lesbians in the armed forces because of the application of a human rights and equal-opportunities approach to the armed forces in OSCE participating States.

Three broad policies concerning the presence of gays and lesbians within the military can be identified:

- Systems in which gays and lesbians are excluded by law and, if found to be serving, can be legally removed from the service;

283 *Ibid*., para. 23.

284 The prohibition of discrimination and the right to respect for private and family life specifically within the military context are reaffirmed in Council of Europe Parliamentary Assembly Recommendation on Human Rights of Members of the Armed Forces 1742 (2006), paras. 10.1.5 and 10.2.3, available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/EREC1742.htm>.

285 Ottawa Declaration of the OSCE Parliamentary Assembly, 8 July 1995, <http://www.osce.org/documents/pa/1995/07/171_en.pdf>.

286 See, for example, Copenhagen 1990, para. 5.9.

- Systems in which gays and lesbians fully participate in the armed forces, in line with international non-discrimination standards;
- "Don't ask, don't tell" systems, which represent a third way of dealing with homosexuality in the armed forces by allowing gays and lesbians to serve as long as they do not declare and/or manifest their sexual orientation.

Box 14.3 gives a more comprehensive overview of the policies of selected OSCE participating States (i.e., states that replied to the ODIHR-DCAF questionnaire on the human rights of armed forces personnel).

Box 14.3

Are Lesbians and Gays Entitled to Serve in the Armed Forces of OSCE Participating States?[287]

State	Entitled to serve?
Austria	yes
Azerbaijan	no
Belarus	yes
Belgium	yes
Bulgaria	yes
Canada	yes
Croatia	yes
Czech Republic	yes
Denmark	yes
Estonia	yes
Finland	yes
France	yes
Greece	no
Georgia	yes
Germany	yes
Ireland	yes
Latvia	yes
Lithuania	yes

State	Entitled to serve?
Luxembourg	yes
Malta	yes
Netherlands	yes
Norway	yes
Poland	yes
Portugal	yes
Russian Federation	yes
Serbia	no
Slovakia	yes
Slovenia	yes
Spain	yes
Sweden	yes
Switzerland	yes
Turkey	no
Ukraine	yes
United Kingdom	yes
United States	yes

Explicit bans on gays in the military

A small group of OSCE countries have an explicit ban on gays and lesbians in the military. As Box 14.3 shows, this is the case, for example, in Greece and Turkey.

The Greek army bars gays from its ranks in accordance with a 2002 presidential decree that excludes from military service all persons suffering from psycho-sexual or sexual-identity disorders, excluding both those serving under its compulsory conscription system and those enlisting voluntarily. In February 2006, the Greek State Committee on Human Rights, which advises the prime minister, demanded that steps be taken to end anti-gay discrimination in the country. No such measures have been taken.[288]

Lesbians and gays fully participate in the armed forces

Many other OSCE participating States entitle gays and lesbians to serve in their armed forces (see Box 14.3). Under this approach, the necessity of guaranteeing military readiness does not imply the exclusion of homosexual personnel. The military evaluates performance

287 ODIHR-DCAF questionnaire, question 81.

288 "Greece does not want gays in its armed forces", Political Gateway, 28 March 2006, quoted in *ILGA Europe Euro-letter*, No. 130, April 2006, available at <http://www.steff.suite.dk/eurolet/eur_130.pdf>.

against professional criteria regardless of sexual orientation. In these countries, abuse and harassment are completely prohibited, not just violations related to an individual's sexual orientation. Military regulations therefore provide for the same standards for military personnel regardless of sexual orientation.

The armed forces of the United Kingdom provide an example of this approach. In 2000, the United Kingdom lifted its ban on gays and lesbians in the military following two rulings of the European Court of Human Rights.[289] All four applicants were members of the armed forces of the United Kingdom and had been subject to investigations by the military police into their sexual orientation. The applicants were administratively discharged between July 1993 and January 1995, in accordance with the Ministry of Defence policy at that time, after having "revealed" their homosexuality. Until the Court ruling, about 60 homosexual servicemen had been forced to leave the service every year.[290] The applicants argued before the Court that the investigations concerning their sexual orientation and their subsequent discharges constituted a violation of their right to private life, as guaranteed by Art. 8 of the ECHR (see Box 14.4).

Box 14.4

Right to Privacy and Sexual Orientation: The *Smith and Grady v. United Kingdom* Case at the ECHR[291]

"… the Court finds that the perceived problems [of homosexual relations] which were identified in the Homosexual Policy Assessment Team (HPAT) report as a threat to the fighting power and operational effectiveness of the armed forces were founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation.

"To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants' rights outlined above any more than similar negative attitudes towards those of a different race, origin or colour.

"Accordingly, the Court concludes that convincing and weighty reasons have not been offered by the Government to justify the policy against homosexuals in the armed forces or, therefore, the consequent discharge of the applicants from those forces.

"In sum, the Court finds that neither the investigations conducted into the applicants' sexual orientation, nor their discharge on the grounds of their homosexuality in pursuance of the Ministry of Defence policy, were justified under Article 8 § 2 of the Convention. … Accordingly, there has been a violation of Article 8 of the Convention."

The Court also noted that a strict code of conduct for all members of the armed forces could be a rather effective anti-sexual-harassment policy.

As a result of these rulings, the Ministry of Defence announced a new policy on sexual conduct in the Armed Forces Code of Social Conduct. The policy is founded on the need to maintain combat effectiveness, based on the principles of group cohesion and discipline,

289 *Smith and Grady v. the United Kingdom*, European Court of Human Rights, 27 September 1999, *European Human Rights Reports*, Vol. 29, 1999, p. 493, and *Lustig-Prean and Beckett v. the United Kingdom*, *op. cit.*, note 4, p. 548.

290 "Gays win military legal battle", BBC News website, 27 September 1999, available at <http://news.bbc.co.uk/1/hi/uk/458714.stm>.

291 *Smith and Grady v. the United Kingdom, op. cit.*, note 289, p. 493 *et seq.*, paras. 96, 97, 105, 110,111,112.

which are, in turn, underpinned by factors such as mutual trust and respect, and a requirement to avoid conduct that offends others.[292]

After 2000, the operational effectiveness of the armed forces did not collapse or decrease as was feared by UK defence policy makers. On the contrary, an internal government report that appraised the British change in policy characterized it as a solid achievement with fewer problems than might have been expected.[293] Furthermore, the Royal Navy recently started a campaign to hire gay service members and to promote fair treatment of gay, lesbian, and bisexual recruits.[294]

'Don't ask, don't tell' policy

As evidenced by the US practice, the third approach to homosexuality and military service is based on a differentiation between sexual orientation and sexual behaviour. The law permits gays and lesbians to serve in the armed forces as long as they do not declare and/or manifest their sexual orientation by engaging in homosexual acts. Therefore, while a person's sexual orientation is considered a private matter, homosexual conduct, even by simply making a statement, provides justification for barring entry to, or continued service in, the armed forces.

Along with restrictions on the speech and conduct of gay and lesbian service members, there are restrictions on official inquiries into their sexual orientation and private lives and a prohibition on hostile treatment. According to a Defense Department directive, "Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, whether a member is a heterosexual, a homosexual, or a bisexual."[295]

The "don't ask, don't tell" policy has met severe criticism from human rights groups within the United States. According to Human Rights Watch, '"Gay and lesbian service members are discharged without regard to their skills, training, commitment or courage — victims of the irrational fears and stereotypes some heterosexuals have about them."[296]

As part of its oversight responsibilities, the Congress of the United States regularly publishes reports on the current state of affairs concerning gays and lesbians in the armed forces. For example, in 2005 it published a Congressional research report that covered issues such as legal challenges brought forward by gay and lesbian service personnel, harassment and even murder of gay and lesbian personnel in the services, recruitment policies, homosexual marriages, and foreign military experiences.[297]

292 UK Ministry of Defence, "Homosexuality and the Armed Forces", Ministry of Defence website, Equality and Diversity Section, available at <http://www.mod.uk/DefenceInternet/AboutDefence/WhatWeDo/Personnel/EqualityAndDiversity/HomosexualityAndTheArmedForces.htm>.

293 Belkin, *op. cit.*, note 273.

294 "Navy's new message: your country needs you, especially if you are gay", *The Guardian*, 21 February 2005, available at <http://www.guardian.co.uk/gayrights/story/0,,1418932,00.html>.

295 "Guidelines for Fact-Finding Inquiries into Homosexual Conduct", Department of Defense Directive No. 1332.4, Enclosure E4, 21 December 1993, available at <http://www.dtic.mil/whs/directives/corres/pdf/133214p.pdf>.

296 "U.S. Military's 'Don't Ask, Don't Tell' Policy Panders to Prejudice: Anti-Gay Harassment Flourishes", Human Rights Watch, 23 January 2003, available at <http://www.hrw.org/press/2003/01/us012303.htm>.

297 David F. Burrelli and Charles Dale, "Homosexuals and U.S. Military Policy: Current Issues", CRS Report for Congress, Washington, DC, 27 May 2005. For a comment on this report, see N. Frank, "Research Note Assessing 'Homosexuals and U.S. Military Policy: Current Issues'", The Michael D. Palm Center, University of California, Santa Barbara, July 2005, available at <http://www.palmcenter.org/publications/dadt/research_note_assessing_homosexuals_and_u_s_military_policy_current_issues>.

The replies of OSCE participating States to the ODIHR-DCAF questionnaire on human rights of armed forces personnel indicate that only three states (of those that replied) ask about the sexual orientation of those who apply for jobs in the armed forces: Poland, Serbia, and Ukraine, with Poland and Ukraine allowing gays and lesbians to serve.[298]

Though the "don't ask, don't tell" policy is official policy in the United States, it cannot be excluded that some other countries follow that policy in practice while officially allowing gays and lesbians to serve openly in the armed forces. For example, Russia lifted its ban in 2003 and allowed gays and lesbians to serve openly in its armed forces. However, Russian military health authorities have publicly stated that they: "would not advise such persons to publicize their sexual orientation. In the army they are not liked and will probably be beaten."[299]

4. Policies and Mechanisms for Promoting Equality

In those states where the ban on gays and lesbians in the military has been lifted, thus ending official institutional discrimination, the issue is how to translate *de jure* non-discrimination into *de facto* equal opportunities regardless of the sexual orientation of service personnel, including combating harassment of gays and lesbians.

Several OSCE participating States have taken action to protect the rights of homosexuals in the armed forces and to render the armed forces a more attractive employer to all. These actions range from putting an adequate policy framework in place and establishing standards for social conduct, to training and awareness-raising, as well as establishing complaints procedures.

Policy framework

Following extensive research into the nature and the extent of sexual harassment in the armed forces, some states have taken special action in order to deal more effectively with harassment. For example, in the United Kingdom in 2006, the minister of defence and the Equal Opportunities Commission agreed on a three-phase action plan to prevent and deal with sexual harassment in the armed forces.[300] Special policies aimed at integrating gays and lesbians in the armed forces have also been introduced in the Netherlands (see Box 14.5).

Standards for social conduct

Some OSCE countries have adopted a code of conduct regulating the behaviour of all armed forces personnel, regardless of their sexual orientation. These codes of conduct are regarded as necessary for safeguarding operational effectiveness and as an effective means to reduce discrimination and abuse in the military.

298 ODIHR-DCAF questionnaire, question 80.

299 "Army Welcomes Gays", *The Moscow Times*, 8 November 2003, p. 4.

300 Rutherford *et al.*, *op. cit.*, note 261; "MOD and EOC agree action to tackle sexual harassment in the Armed Forces", US Federal News Service, 25 May 2006.

Box 14.5

The Netherlands: Policies for Accepting and Integrating Gays and Lesbians in the Armed Forces[301]

According to a recent opinion poll, 90 per cent of Dutch armed forces personnel accept gays as colleagues. Current official policy aims at acceptance of homosexuality within the armed forces and at protection against discrimination and harassment. The policy makes use of information, education, support, and legal procedures to achieve its aims.

1. Information Policy

The information policy aims at increasing the acceptance of homosexuality within the armed forces. Information brochures, the officer corps, and an independent foundation for homosexuality and the armed forces play an important role in the information campaign. In particular, commanding officers are expected to play an exemplary role in terms of values and norms towards acceptance and non-discrimination of homosexuals. The information policy reaches out to both military personnel and society at large.

2. Education

Education on acceptance and protection against discrimination of homosexuals is a second pillar of armed forces policy. Attention is paid to policy and regulation, as well as values and norms within the initial training of all recruits, career courses for non-commissioned officers and officers, and courses for specialists within the armed forces.

3. Support and Counselling

Support is a third element of policy. Homosexual armed forces personnel can turn to counsellors on the level of the unit or to special counsellors within the Office of the Inspector-General. These counsellors receive training from external institutions for acquiring information and skills for dealing with complaints. In addition, a special telephone number has been created for complaints, and social workers are also available to deal with complaints. Victims of discrimination and harassment can ask for help through these procedures.

4. Legal Framework

The entire policy is based on a legal framework that includes a ministerial decree on the complaints procedure for harassment and discrimination, a ministerial decree on submitting complaints about (general) demeaning and unfair treatment by military superiors, and a code of conduct of the armed forces.

In the United Kingdom, for example, an Armed Forces Code of Social Conduct was recently adopted that puts emphasis on conduct and equal standards for all personnel, regardless of sexual orientation. A workable standard would emphasize that each individual is to be judged on the basis of their performance relevant to military goals (i.e., that everyone should be judged on their own merits); that all personnel must respect each other's privacy; that interpersonal harassment — whether verbal, sexual, or physical — will not be tolerated, regardless of the genders of people involved; and that no service member will be permitted to engage in conduct that undermines unit cohesion (see Box 14.6).

301 Anna Adolfsen and Saskia Keuzenkamp, *Uniform uit de kast: Homosexualiteit binnen de krijgsmacht* [Coming Out in Uniform: Homosexuality within the Armed Forces] (The Hague: Social-Cultural Planning Office, 2006), <http://www.scp.nl/publicaties/boeken/9037702554.shtml>.

Box 14.6
The UK Armed Forces' Code of Social Conduct[302]

- The Code of Social Conduct explains the Armed Forces' policy on personal relationships involving Service personnel. It applies to all members of the Armed Forces regardless of their gender, sexual orientation, rank or status.
- In the area of personal relationships, the overriding operational imperative imposes a need for standards of social behaviour which are more demanding than those required by society at large. Such demands are equally necessary during peacetime and on operations.
- Examples of behaviour which can undermine operational effectiveness include: unwelcome sexual attention in the form of physical or verbal conduct; … displays of affection which might cause offence to others; … and taking sexual advantage of subordinates.
- Unacceptable social conduct requires prompt and positive action to prevent damage.
- When considering possible cases of social misconduct, and in determining whether the Service has a duty to intervene in the personal lives of its personnel, Commanding Officers at every level must consider each case against the following Service Test: "Have the actions or behaviour of an individual adversely impacted or are they likely to impact on the efficiency or operational effectiveness of the Service?"

Training/awareness-raising

Training of senior military officers is essential to eradicate any prevailing anti-homosexual attitudes and to enhance awareness of the problem among heterosexual peers. Training also reinforces the role of the chain of command in preventing and punishing cases of discrimination and mistreatment. Leaders play a critical role in enforcing proper conduct in the workplace. If lower-level leaders are convinced that active monitoring and support for non-discriminatory behaviour will be noticed and rewarded, they will be more supportive of an environment free from abuse. A non-discriminatory policy will create opportunities for all and will allow for excellent performance regardless of the sexual orientation of service personnel.[303]

In Sweden, a documentary film called "Ignorance, Diversity and Love" was made within the framework of the EU-sponsored project Norm-giving Diversity. The film follows an officer, Krister Fahlstedt, both at work and in his everyday life. It was conceived mainly for training and information purposes after the introduction of the Swedish 1999: 133 Act prohibiting discrimination and harassment of people at work on the basis of their sexual orientation (see Box 14.7)

302 "Armed Forces Code of Social Conduct: Policy Statement", Ministry of Defence, London, 2000, available at <http://www.mod.uk/DefenceInternet/AboutDefence/WhatWeDo/Personnel/EqualityAndDiversity/ArmedForcesCodeOfSocialConductPolicyStatement.htm>.

303 G. Herek and A. Belkin, "Sexual Orientation and Military Service: Prospects for Organizational and Individual Change in the United States", in T.W. Snider, A.B. Adler, and C.A. Castro (eds.), *Military Life: The Psychology of Serving in Peace* (Westport, Connecticut: Praeger, 2005), p. 26.

Box 14.7

The Swedish Project Norm-Giving Diversity: 'Ignorance, Diversity and Love'[304]

- The project focuses on the armed forces as one of the institutions that clearly sets standards in society;
- Its main idea is to provide a forum for employers, trade unions, and ideological organizations to work together in the battle against discrimination based on sexual orientation;
- The basic concept is that an open and generous working environment benefits everyone;
- It aims to create a climate in which no one has to hide their sexual orientation from their colleagues against their will;
- It aims to change the prevailing masculine culture through education;
- It provides information on homosexuality;
- It offers awareness-raising for employees, employers, interest groups, and unions;
- It underlines the importance of networks for homosexuals in order for their voices to be heard.

Partners of gays and lesbians

While some states do not provide any benefits to the partners of gays and lesbians, others provide housing and other benefits. In the United Kingdom, for example, the partners of gays and lesbians have equal pension rights to heterosexual couples. Since 2005, the British armed forces have entitled the partners of gays and lesbians to stay in family quarters, provided their relationship is registered under the Civil Partnership Act of 2004.[305] In Denmark, the partners of gays and lesbians receive the same social benefits in case of death or disability as the partners of heterosexual service members. Canada provides gay and lesbian service members with medical and other benefits for their partners.[306] In Spain, according to Law 29/1999 on Measures for the Geographic Mobility of Soldiers, housing is granted for stable partnerships, even if the soldier's partner is of the same sex (Art. 6).[307]

Complaints procedures and counselling

In most countries, there are no special complaints procedures in cases of harassment based on sexual orientation. Complaints mechanisms for gays and lesbians are often incorporated into general complaints mechanisms so as to avoid identification where an individual wishes to remain anonymous. Therefore, gay and lesbian military personnel who are victims of discriminatory practices may initiate regular informal procedures by reporting the case to their superior, who may investigate the complaint or refer it to the commanding officer. If this inquiry is unsatisfactory for the victims, they may ask for review of the claim by a civil court (e.g., France, Sweden) or by the military prosecutor's office (e.g., Ukraine). Complaints mechanisms should include effective witness protection, confidentiality provisions, and the possibility of a temporary transfer to another unit while an investigation is ongoing.

304 See the website of the publicly funded Swedish programme Norm-giving Diversity, 16 October 2002, available at <http://www.normgivande.nu/ArticlePages/200210/16/20021016204747_Normgivande351/20021016204747_Normgivande351.dbp.asp>.

305 Simon Evans, "Armed forces allow gay couples family quarters", *The Scotsman*, 21 February 2005, available at <http://news.scotsman.com/uk.cfm?id=194672005>.

306 Wechsler Segal, *op. cit.*, note 276, p. 218.

307 Nolte, *op. cit.*, note 6. The armed forces were the first public institution in Spain to confer legal rights to stable partnerships of the same sex.

Some states have introduced specific advisers on lesbian and gay rights. In the Netherlands, for example, a special counsellor has been instituted at the Inspector-General's Office. Furthermore, in the Netherlands, the Foundation on Homosexuality and the Armed Forces has been established, which receives financial and organizational support from the Ministry of Defence.[308]

While these counselling services are useful in order to inform gay and lesbian armed forces personnel about their rights and the procedures available in case of harassment, it has to be underlined that this issue is the responsibility of all within the chain of command.

5. Best Practices and Recommendations

- A state's approach to the participation of gays and lesbians in the armed forces should be in line with its international human rights obligations, in particular those on anti-discrimination and the right to privacy;
- Anti-discrimination and equal-opportunities legislation should be (made) applicable to the military;
- Standards of social conduct should be adopted within the armed forces that aim at safeguarding operational effectiveness while reducing discrimination and abuse in the military;
- Standards of social conduct should regulate behaviour of all armed forces personnel regardless of their sexual orientation;
- The minister of defence should undertake special measures so as to ensure that no gap exists between *de jure* and *de facto* policy. Such measures include an information policy, education and awareness training, and complaints and sanctions procedures for harassment and discrimination.

308 For more information, see <www.shk.nl>.

Section V

Chapter 15

Children Associated with Armed Forces

In recent years, the international community has been progressively moving towards a position where the forced or compulsory recruitment, or use in hostilities, of persons under the age of 18 (girls and boys) by armed forces or armed groups is being considered illegal and one of the worst forms of child labour. In addition, the enlisting or use in hostilities of children under the age of 15 has been defined as a war crime. This shift has been supported by the development of a set of international legal instruments, including the Optional Protocol to the Convention on the Rights of the Child and the Rome Statute establishing the International Criminal Court, and has been reinforced by a series of United Nations Security Council resolutions on children and armed conflict.

In referring to "children associated with armed forces", the aim of this chapter is to provide an overview of practices, mechanisms, and procedures for ensuring the protection and enforcement of children's human rights in OSCE participating States. In particular, this chapter considers three issues. First, it addresses those persons below the age of 18 who have been legally recruited into the armed forces on a voluntary basis. Second, it focuses on the children of armed forces personnel. The rationale for including this particular group is that the protection and well-being of children forms an integral part of the right to family life for all military personnel.[309] Third, this chapter deals with children coming into contact with military thinking and personnel via cadet programmes. Cadet programmes in many states are aimed at young children (e.g., starting at 12 years of age) and form a grey area, as they are (mostly) not formally part of armed forces structures, but their programme includes military elements.

1. Issues at Stake

The voluntary recruitment of children under 18 years of age into the armed forces raises a number of sensitive issues: the early exposure of children to the harsh conditions and hazardous activities typical of the military environment may seriously harm their psychological, physical, and social development.

In many situations, it is extremely difficult to draw a clear dividing line between voluntary recruitment and potentially forced or coerced recruitment. The decision to join the armed forces can be truly voluntary, based on a balanced analysis of all the options available. In other cases, however, economic and cultural factors, coupled with aggressive or invasive recruitment policies by the military, such as active recruitment in educational institutions, could impinge on children's freedom of choice as to whether to join the armed forces. Children may be encouraged to enlist voluntarily in armed forces for a variety of reasons. Economic and social factors such as poverty and unemployment make a military career one of the few opportunities available for children living in underdeveloped areas.

309 Art 23.1 of the International Covenant on Civil and Political Rights states: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." See <http://www.hrweb.org/legal/cpr.html>. Art. 5 of the UN Convention on the Rights of the Child says: "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention." See <http://www.unhchr.ch/html/menu3/b/k2crc.htm>.

For those children, joining the armed forces could represent the only means for obtaining a home, an education, money, or status. At times, cultural and ideological reasons, such as value systems that glorify military life or peer pressure may push children to join the military. The decision to join the armed forces can also be the result of an intimidating atmosphere towards children's families, which in turn may press children to join the army "voluntarily".[310]

In order to protect the rights and well-being of children associated with armed forces, it is necessary to invest in prevention, norm-setting, and enforcement. **Prevention** focuses on addressing the factors that lead to the recruitment and the use of children. Efforts must be made **to develop norms and standards** aimed at ensuring that children associated with armed forces live in a safe environment. Finally, **enforcement mechanisms** should be in place to prevent and/or punish violations.[311]

2. International Human Rights Commitments

The United Nations Convention on the Rights of the Child, adopted in 1989, is a comprehensive code of rights, offering the highest standards of protection for children of any international instrument. The Convention sets out these rights in 54 articles and two Optional Protocols, spelling out the basic human rights of children, including the right: to survival; to develop to the fullest; to protection from harmful influences, abuse, and exploitation; and to participate fully in family, cultural, and social life. The near universal acceptance of the Convention establishes it as a set of international norms that are the basic minimum rights that all children are entitled to. Art. 1 states: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

The **Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict** is among the most important international instruments addressing the recruitment or use of children in armed forces.[312] The Optional Protocol sets 18 as the minimum age for compulsory recruitment by governments.[313] Forced recruitment is forbidden by all parties and under all circumstances. The same prohibition is affirmed by the **International Labour Organization (ILO) Convention 182 concerning the Prohibition and Immediate Action for Elimination of the Worst Forms of Child Labour,** which defines the forced or compulsory recruitment of any person under 18 for use in armed conflict as one of the worst forms of child labour.[314]

The Optional Protocol sets 16 as the minimum age for voluntary recruitment in government forces, with the stipulation that no person under 18 is to take direct part in hostilities. States that accept volunteers aged 16 and 17 are required to make a binding declaration

310 "Child Soldiers", background material produced by the Geneva Centre for the Democratic Control of Armed Forces, October 2006, available at <http://www.dcaf.ch/publications/kms/details.cfm?lng=en&id=26088&nav1=4>.

311 *Ibid*.

312 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted and opened for signature, ratification, and accession by General Assembly Resolution A/RES/54/263 of 25 May 2000, entered into force on 12 February 2002, available at <http://www.unhchr.ch/html/menu2/6/protocolchild.htm>. Also see the Convention on the Rights of the Child, setting 15 as the minimum age for recruitment and for direct participation in hostilities; this standard is drawn from the two Additional Protocols to the four Geneva Conventions of 1949.

313 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Arts. 1 and 2.

314 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, Convention 182, 1999, Art. 3.a. Among OSCE participating States that are also ILO members, only Turkmenistan and Uzbekistan have not ratified this convention.

at the time of ratification or accession that specifies their minimum voluntary age and outlines appropriate safeguards to ensure that such recruitment is not forced or coerced (See Box 15.1).[315] The international community, however, is progressively moving towards accepting 18 as the minimum age also for voluntary recruitment in armed forces (see Table 1).

Box 15.1

Voluntary Recruitment under 18 Years of Age: Safeguards[316]

States parties that permit voluntary recruitment into their national armed forces under the age of 18 years shall maintain safeguards to ensure, as a minimum, that:

(a) Such recruitment is genuinely voluntary;

(b) Such recruitment is carried out with the informed consent of the person's parents or legal guardians;

(c) Such persons are fully informed of the duties involved in such military service;

(d) Such persons provide reliable proof of age prior to acceptance into national military service.

Table 1

Status of OSCE Participating States in Relation to the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict[317]

	Minimum age for voluntary recruitment		Minimum age for voluntary recruitment		Minimum age for voluntary recruitment
Albania****	n/a	Germany	17	Moldova	18
Andorra	18	Greece	18	Romania	18
Armenia	18	Hungary***	n/a	Russian Federation***	18
Austria	17	Holy See	19	San Marino***	n/a
Azerbaijan	17	Iceland	n/a	Serbia	18
Belarus	18*	Ireland	17**	Slovakia	18
Belgium	18	Italy	17	Slovenia	18
Bosnia and Herzegovina	18	Kazakhstan	19	Spain	18
Bulgaria	18	Kyrgyzstan	18	Sweden	18
Canada	16	Latvia	18	Switzerland	18
Croatia	18	Lithuania	18	Tajikistan	18
Cyprus****	n/a	Luxembourg	17	Former Yugoslav Republic of Macedonia	18
Czech Republic	18	Malta	17½	Turkey	18
Denmark	18	Monaco	21	Turkmenistan	n/a
Estonia***	18	Norway	18	Ukraine	18
Finland	18	Netherlands***	n/a	United Kingdom	16
France	17	Poland	18	United States of America	17
Georgia****	18	Portugal	18	Uzbekistan****	n/a

*Exception: admission to military academy at 17 years
**Exception: enlistment to Air Corps apprenticeships at 16 years
*** Signed but not ratified the Optional Protocol
****Has not signed the Optional Protocol

315 *Ibid*., Art.3.2.

316 Art. 3.3 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

317 "Ratifications and Reservations" on the website of the Office of the UN High Commissioner for Human Rights, at <http://www.ohchr.org/english/countries/ratification/11_b.htm>, last update 6 December 2006; ODIHR-DCAF questionnaire, question 26.

The **Rome Statute of the International Criminal Court** (as of 1 January 2006, 40 OSCE participating States had ratified the ICC statute) defines "Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities" as a war crime, both in the course of international conflict and in the case of armed conflict of a non-international character.[318] The ICC statute focuses particularly on prosecution and punishment of those responsible for the recruitment and use of children. The statute also acknowledges the importance of including in the court's composition judges with specific legal expertise on children's issues when dealing with cases involving children.

In addition to the above-mentioned instruments, the **UN Security Council** passed several resolutions strongly condemning the recruitment of children and their use in armed conflict as a violation of international law, among them Resolution 1612 (2005), which established a comprehensive monitoring and reporting mechanism on children affected by conflict. The violations to be monitored include, among others, recruiting or using child soldiers.[319]

A key document that informed many of the developments in international norms and standards was the "Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa", a set of recommendations for governments and communities adopted at an international symposium in 1997. In 2005, UNICEF initiated a global review of the Cape Town Principles that resulted in a document called "Guidelines to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups" (the "Paris Guidelines"), providing more detailed guidance for those implementing programmes in the area. These guidelines were launched at a ministerial conference held in Paris in February 2007 that gathered states to endorse a final declaration entitled the "Paris Commitments". The Paris Guidelines do not refer solely to children who are taking (or have taken) a direct part in hostilities. In the Guidelines, "a child associated with an armed force or group" refers to any person below 18 years of age who is, or who has been, recruited or used by an armed force or group in any capacity, including but not limited to children used as fighters, cooks, porters, messengers, spies, or for sexual purposes.

At the regional level, in December 2003 the European Union adopted "Guidelines on Children and Armed Conflict",[320] which aim to ensure that the EU takes effective measures to protect children and influence third parties and non-state actors to implement international human rights standards, humanitarian law, and regional human rights instruments, including those concerning the recruitment and use of children for military purposes. The Guidelines propose that EU representatives and EU military commanders in conflict zones should increase their monitoring and reporting of human rights abuses against children.[321] The Guidelines also require that, in countries where the EU is engaged in crisis manage-

318 Rome Statute of the International Criminal Court, 1998, Art. 8.2.b.xxvi and Art. 8.2.e.vii, respectively.

319 UN Security Council Resolutions 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003), 1539 (2004), and 1612 (2005) on children and armed conflict, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/439/59/PDF/N0543959.pdf?OpenElement>.

320 Council of the European Union, "EU Guidelines on Children and Armed Conflict", 2003, 15634/03, available at <http://ue.eu.int/uedocs/cmsUpload/GuidelinesChildren.pdf>.

321 Such reports should particularly address violations and abuses against children, recruitment and deployment of children by armies and armed groups, killing and maiming of children, attacks against schools and hospitals, blockage of humanitarian access, sexual and gender-based violence against children, and the abduction of children.

ment, the specific needs of children be taken into account in operational planning, especially when dealing with the reintegration of children.[322]

The OSCE has, on several occasions, expressed its commitment to the recognition, promotion, and protection of children's rights, including their right to special protection against all forms of violence and exploitation (see Box 15.2).

Box 15.2

OSCE Commitments to End Child Recruitment and Use in Armed Forces[323]

- We will undertake measures to … end violence against … children as well as sexual exploitation … . We will look at ways of preventing forced or compulsory recruitment for use in armed conflict of persons under 18 years of age.
- Each participating State will ensure that the recruitment or call-up of personnel for service in its military, paramilitary and security forces is consistent with its obligations and commitments in respect of human rights and fundamental freedoms.

International monitoring mechanisms

The **Committee on the Rights of the Child** is a UN treaty body of independent experts that monitors implementation of the Convention on the Rights of the Child by its states parties.[324] All states parties are required to submit regular reports to the Committee on how the Convention is being implemented. States must report initially two years after acceding to the Convention and then every five years thereafter. The Committee examines each report and addresses its concerns and recommendations to the state party in the form of concluding observations. It also monitors implementation of two optional protocols to the Convention, namely on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography.

Furthermore, UN Security Council Resolution 1612 established a monitoring and reporting mechanism that collects and provides timely, objective, accurate, and reliable information on the recruitment and use of child soldiers in violation of applicable international law and on other violations and abuses committed against children affected by armed conflict. This is a formal, structured mechanism co-ordinated by UNICEF in co-operation with the Office of the Special Representative of the UN Secretary General for Children and Armed Conflict.[325] The work is conducted at the country level, and the related findings are then reported back to the Security Council working group.[326]

322 Lilian Peters, "War is no Child's Play: Child Soldiers from Battlefield to Playground", Geneva Centre for the Democratic Control of Armed Forces, Occasional Paper No. 8, July 2005, p. 36.

323 Istanbul 1999 (Charter for European Security: III. Our Common Response), para. 24; Budapest 1994 (Decisions: IV. Code of Conduct on Politico-Military Aspects of Security), para. 27.

324 The OSCE countries that have submitted reports to the Committee on the Rights of the Child are: Andorra, Belgium, Canada, Italy, Kazakhstan, Kyrgyzstan, Lithuania, Malta, Monaco, Norway, and Switzerland. Reports are available at <http://www.ohchr.org/english/bodies/crc>.

325 UN Security Council Resolution 1612 (2005), available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N05/439/59/PDF/N0543959.pdf?OpenElement>.

326 The working group was established by Resolution 1612 and is mandated to review the data submitted through the monitoring and reporting mechanism and to make recommendations for action against parties that continue to violate children's security and rights. It reviews progress in the development and implementation of action plans called for in para. 5.a of Security Council Resolution 1539 (2004), which called on the parties concerned, as annexed to the Secretary-General's report of 10 November 2003, to prepare time-bound action plans to halt the recruitment and use of children in violation of international obligations.

3. Children Legally Recruited into Armed Forces

Children may join the armed forces on a voluntary basis in a number of OSCE participating States. National legislation, reflecting international commitments, establishes the minimum age for voluntary service. As shown in Table 1, in the majority of countries, recruits should have attained a minimum age of 18, although in a number of countries persons younger than 18 can still legally enlist in the armed forces.

The **Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict** requires states parties to raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in the Convention on the Rights of the Child (15 years),[327] and to recognize that, under the Convention on the Rights of the Child, persons under the age of 18 are entitled to special protection.

As shown in Table 1, there are a number of OSCE countries that still have not ratified the Optional Protocol, thus potentially allowing for not only voluntary recruitment below the age of 18 but also conscription. National legislation should set the minimum age for conscription and recruitment procedures (see Chapter 10, "Conscientious Objection to Military Conscription and Service").

For example, close to 5,000 children under the age of 18 were enlisted to serve in the UK armed forces as of April 2006.[328] Children could sign up with an option to leave after four years from the age of 18. On ratifying the Optional Protocol in June 2003, the UK Government declared that the recruitment age reflected the minimum school-leaving age, "that is the age at which young persons may first be permitted to cease full-time education and enter the full-time employment market". It also stated that safeguards were maintained by informing the potential recruit about the nature of military duties, ensuring that the decision to enlist was voluntary, and obtaining free and informed parental consent.[329]

In all countries, recruitment is followed by a period of training, which focuses on discipline, teamwork, and self-reliance, and includes elements such as general service knowledge, drills, physical education, and field skills such as first aid and weapons handling.[330] In some states, volunteers are also trained in human rights and, more specifically, on the rights of the child. In Sweden, for example, training comprises, among other things, information about human rights and international humanitarian law, including the Convention on the Rights of the Child and the Optional Protocols to the Convention.[331]

327 Art. 38, para. 3, of the Convention on the Rights of the Child.

328 The statistics are available on the website of the UK Defence Analytical Services Agency, **Table 1 - UK Regular Forces by Age and Sex**, available at <http://www.dasa.mod.uk/natstats/tsp8/tsp8tab1.html>.

329 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, New York, 25 May 2000, United Kingdom of Great Britain and Northern Ireland: Ratifications, 24 June 2003, Reference C.N. 694.2003 TREATIES-10 (Depositary Notifications), available at <http://untreaty.un.org/English/CNs/2003/601_700/694E.doc>.

330 United Kingdom, House of Commons, Defence Select Committee, "Duty of Care", Third Report, Session 2004-05, London, 3 March 2005, available at <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmdfence/63/63.pdf>.

331 Committee on the Rights of the Child, initial report of states parties under article 8(1) of the Optional Protocol to the Convention on the Rights on the Involvement of Children in Armed Conflict, Sweden, Report No. CRC/C_OPAC/SWE/1, 22 February 2006, para. 51, available at <http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/efb7737b24f83ea2c12571cc0049aadb/$FILE/G0640721.pdf>. Also see the report presented by Switzerland, Report No. CRC/C/OPAC/CHE/1, available at <http://daccessdds.un.org/doc/UNDOC/GEN/G05/427/48/PDF/G0542748.pdf?OpenElement>: "Every soldier acquires a basic grounding in international humanitarian law and children's rights during training provided at the various stages of Swiss military service (officer training, recruit training school, etc)" (para. 51).

Safeguards for children under 18 in the armed forces

According to the Optional Protocol, states that accept 16- and 17-year-old volunteers should outline appropriate substantive and procedural **safeguards** in their national legislation. The first aim of these safeguards is to ensure that children are not forced or coerced to enlist. In some cases, children may be compelled to join the armed forces by external circumstances. Poverty, lack of education, and lack of alternative employment could be critical factors contributing to the recruitment of children.

Potential recruits and their parents should therefore be given a clear and precise explanation of the nature of duties involved in military service, as well as of the demands of military life, in order for consent to be as genuine as possible. Moreover, in some instances, recruits under 18 may withdraw their enlistment by requesting a release (e.g., Norway) or because of withdrawal of parental consent (e.g., Ireland).

Box 15.3 contains some examples of safeguards provided for by states upon signature or ratification of the Optional Protocol on the involvement of children in armed conflict.

Box 15.3

Canada and Croatia: Special Safeguards for Recruits under 18 in the Armed Forces[332]

Canada

"Pursuant to article 3, paragraph 2, of the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts, Canada hereby declares:

"1. The Canadian Armed Forces permit voluntary recruitment at the minimum age of 16 years.

"2. The Canadian Armed Forces have adopted the following safeguards to ensure that recruitment of personnel under the age of 18 years is not forced or coerced:

"(a) all recruitment of personnel in the Canadian Forces is voluntary. Canada does not practice conscription or any form of forced or obligatory service. In this regard, recruitment campaigns of the Canadian Forces are informational in nature. If an individual wishes to enter the Canadian Forces, he or she fills in an application. If the Canadian Forces offer a particular position to the candidate, the latter is not obliged to accept the position;

"(b) recruitment of personnel under the age of 18 is done with the informed and written consent of the person's parents or legal guardians. Article 20, paragraph 3, of the National Defence Act states that 'a person under the age of eighteen years shall not be enrolled without the consent of one of the parents or the guardian of that person';

"(c) personnel under the age of 18 are fully informed of the duties involved in military service. The Canadian Forces provide, among other things, a series of informational brochures and films on the duties involved in military service to those who wish to enter the Canadian Forces; and

"(d) personnel under the age of 18 must provide reliable proof of age prior to acceptance into national military service. An applicant must provide a legally recognized document, that is an original or a certified copy of their birth certificate or baptismal certificate, to prove his or her age."

Furthermore, special safeguards should ensure that volunteers under the age of 18 do not take a direct part in hostilities.

The UK, on signing and ratifying the Optional Protocol in September 2000, declared that it "will take all feasible measures to ensure that members of its armed forces who have not

332 "Ratifications and Reservations" on the website of the Office of the UN High Commissioner for Human Rights, at <http://www.ohchr.org/english/countries/ratification/11_b.htm>, last update 6 December 2006.

Box 15.3 (cont.)

Croatia

"The Republic of Croatia makes the following declaration in relation to Article 3, paragraph 2, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts:

"Related to Article 3, paragraph 2 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, the Republic of Croatia states that Croatian legislation prevents persons under 18 from joining the Armed Forces of the Republic of Croatia.

"In order to ensure that persons under 18 do not join its Armed Forces, the Republic of Croatia has made the following provisions:

"- It has been stipulated by law that military service consists of duty to register as a recruit, to enter military service (conscription), and to serve in the reserves in the Armed Forces of the Republic of Croatia;

"- The duty to register as a recruit arises in the calendar year in which a person turns 18, and remains until the person enters military service (conscription) or service in civilian life i.e. until the person is transferred to the reserves or until military service ceases pursuant to the provisions of the Defence Act. The process of recruitment includes registration in the military records, medical and other examinations, psychological tests and recruitment itself. It is a preliminary procedure required in order to determine whether a person is eligible for military service. The status of the recruit remains valid until entering military service (conscription) to which, according to the law, a recruit may not be sent before reaching the age of 18;

"- Eligible recruits are sent to do their military service (conscription) after they come of age (turn 18), normally in the calendar year in which they turn 19, thereby becoming conscripts. Recruits are not part of the Armed Forces of the Republic of Croatia; conscripts make one component of the Armed Forces of the Republic of Croatia."

attained the age of 18 years do not take a direct part in hostilities".[333] However, it reserved the right to deploy personnel under 18 in certain circumstances:

> The United Kingdom understands that article 1 of the Optional Protocol would not exclude the deployment of members of its armed forces under the age of 18 to take a direct part in hostilities where:
> a) there is a genuine military need to deploy their unit or ship to an area in which hostilities are taking place; and
> b) by reason of the nature and urgency of the situation:
> i) it is not practicable to withdraw such persons before deployment; or
> ii) to do so would undermine the operational effectiveness of their ship or unit, and thereby put at risk the successful completion of the military mission and/or the safety of other personnel.

Similarly, the United States has made a reservation concerning the implementation of the obligation not to permit children to take direct part in hostilities:

> The United States understands that, with respect to Article 1 of the Protocol -
> (A) the term "feasible measures" means those measures that are practical or practically possible, taking into account all the circumstances ruling at the time, including humanitarian and military considerations;
> (B) the phrase "direct part in hostilities";

333 See the chapter "Europe and Eurasia" in *Child Soldiers Global Report 2004* (London, Coalition to Stop the Use of Child Soldiers, 2004), <http://www.child-soldiers.org/document_get.php?id=884>: "One 17-year-old girl was on board a British ship sent to the theatre of conflict during the Afghanistan war, but there were no other known deployments of personnel under 18 to Afghanistan or Iraq during the US-led interventions in 2001 and 2003."

(i) means immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy; and
(ii) does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions, or other supplies, or forward deployment.

4. Abuses and Duty of Care of Recruits under 18

In armed forces, new recruits are liable to suffer abusive treatment whether from their superiors in the form of punishment or from fellow recruits in the form of bullying. In most countries, abuse often takes place in a broader context of denying young soldiers adequate food and access to medical care.

This phenomenon has reached worrying dimensions in some OSCE participating States, where there has been grave concern about the number of alleged suicides or other unexplained deaths of recruits (see Chapter 16 "Proper Treatment of Armed Forces Personnel"). In the UK, an independent report was published in 2004 to review the deaths of four soldiers at the Princess Royal Barracks at Deepcut in Surrey between 1995 and 2002. Two of the soldiers were 17 at the time of death, and a third, a female recruit, had just turned

Box 15.4

The Deepcut Review Report 2006: Preventing Abuses and Duty of Care Related to Recruits under 18 (Selected Recommendations)

(1) Young people … should continue to be able to enlist at 16 … so long as their training takes place in a suitable environment dedicated to the needs of such young people, and particular care is taken for their welfare.

(2) Those under 17 should be trained in establishments exclusive to this age group.

(3) The Army should plan to eliminate the need for soldiers to join their units in the field army on completion of Phase 1 and 2 training until they reach the age of 18. …

(7) Recruits who joined the Army as minors [and who are] unhappy with pursuing a military career before they reach the end of their Phase 2 training … should be able to discharge as of right.

(8) ATRA [Army Training and Recruiting Agency] should maintain a regular audit of its training estate. …

(10) ATRA should require all its training segments to identify the supervisory ratios it needs to train future generations of trainees in accordance with the effective duty of care principles …

(12) Instructors should be vetted for their suitability to work with young people, applying standards that are no less rigorous than those applied to civilian establishments educating or training people under 18.

(13) A single booklet should be issued … [explaining] (i) what is meant by bullying and harassment; (ii) example of the type of conduct that is considered inappropriate or unacceptable; … (iv) that blanket punishments imposed on a group for the failings of an individual are unacceptable; (v) what a soldier should do if he or she witnesses a breach of these principles.

(14) Cancellation of weekend leave by an NCO … [and] the allocation of guard duty should never be used as a punishment …

(15) The standards set by the ATRA Code of Practice for Instructors should be enforced by formal disciplinary sanctions. …

(18) Failure to report any sign of abuse of power should itself be a matter for disciplinary sanction; …

(26) There should be established a commissioner of Military Complaints (the Armed Forces Ombudsman) who should be a person independent of the three services …

18. The report presented a number of recommendations (see Box 15.4) and highlighted shortcomings, particularly in the armed forces' training regime.

It is worth noting that the UK Defence Analytical Services Agency published figures in 2004 on suicide and open-verdict deaths in the UK regular armed forces, examining suicide methods, and drawing comparisons with the equivalent UK general population.[334] While the figures showed that, overall each service had fewer deaths from suicide than expected compared with the UK general population, young males in the army, under 20 years of age, were 1.5 times more likely to commit suicide than the UK general population.

A key discussion point to emerge from the Deepcut Review Report was the issue of duty of care. Recommendation 10, referring to supervisory ratios in training regiments, identified the need "to train future generations of trainees in accordance with the effective duty of care principles". The House of Commons Defence Select Committee discussed this issue at length, observing that consideration for moral duty of care should be as important as the legal considerations, and focused their attention on the "welfare and psychological aspects of the duty of care owed to recruits and trainees".[335]

As part of its follow-up to the report, the Ministry of Defence appointed the Adult Learning Inspectorate to conduct an independent inspection and oversight of initial training in the armed forces, as well as the provision of care and welfare to trainees. The agreement included an annual rolling inspection programme. A particular point of note was the identified need for a broader investigation into how independent oversight might help the army in defining and maintaining appropriate standards of care.[336]

5. Providing Support to Recruits

One of the most important aspects of the duty-of-care philosophy is ensuring that recruits are fully informed and aware of the nature of military life. The parents or legal guardians of recruits under 18 should be equally informed and wherever possible fully involved throughout the recruitment process. Those closest to the young recruits may be the best placed to identify early signs of developing problems.

Information available to recruits should also include clear guidance on where to go to obtain support if they face problems such as harassment, bullying, or intimidation. Points of contact will often be identified from within the recruits' unit, possibly including a padre or senior officer, but, obviously depending on the nature of the abuse and perpetrator, other alternatives may be required.

In Kazakhstan, for example, a free hotline is available for recruits to seek support, and most armed services will have dedicated social workers and health visitor services available to service personnel.

Complaints procedures in the military

Several OSCE countries have established military ombudspersons[337] (e.g., Canada, Germany), who, among other things, help ensure respect for the rule of law in the armed forces, promote transparency and accountability in defence structures, and focus attention on

334 Vicky R. Ward and Nicola T. Fear, "Suicide and Open Verdict Deaths among Males in the UK Regular Armed Forces, 1984-2002: Methods Used to Commit Suicide", Defence Analytical Services Agency, 28 July 2004, available at <http://www.dasa.mod.uk/publications/pdfs/suicide/suicidemethodrep.pdf>.

335 "Duty of Care", *op. cit.*, note 330.

336 See <http://docs.ali.gov.uk/mod_files/scope_of_the_survey.htm>.

337 See ODIHR-DCAF questionnaire, questions 4-5.

problems in military practice requiring corrective action.[338] Ombudspersons deal with human rights issues in general and therefore have no specific mandate to deal with children as separate legal entities (see Chapter 22, "Ombudsmen"). Countries without a military ombudsman (e.g., Slovakia, Spain, the United Kingdom) do have complaints and investigation mechanisms that are part of the chain of command (see Chapter 20, "The Responsibility of Commanders and Individual Accountability" and Chapter 21, "Discipline and Military Justice") or otherwise have national authorities competent to deal with relevant complaints.

In Kazakhstan, for example, children, as well as parents and guardians, have the same channels for directing complaints. Complaints should be submitted to the Ministry of Education or to public reception facilities set up for people who have suffered abuse. Moreover, a human rights ombudsman has been established, and there are proposals to introduce a special ombudsman for the rights of the child in the near future.[339]

6. Children of Military Personnel

This section focuses on the children of military personnel, not on children drafted into the armed forces. This is an important issue, as stipulated by Art. 5 of the Convention of the Rights of the Child:

> States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.[340]

Indeed, fathers and mothers serving in armed forces face significant challenges created by distance and the amount of time spent away from their families. During deployments, their children pass through significant stages of development physically, intellectually, and socially, marked by events that cannot be recaptured upon return from assignment.

Military families face very specific social challenges (living in the barracks, single-parent families) and stress associated with their type of work and their living conditions. Shifting work schedules and long hours, as well as the ever-present possibility of being deployed anywhere in the world on a moment's notice, can affect the lives of the children of these families.

Children are particularly vulnerable when separated from their family during deployment. While children's individual responses may depend on a variety of factors such as age, maturity, gender, and their relationship with their parents, their unique developmental viewpoint and limited life experience put them at an increased risk of emotional stress during the deployment period. As a result, children have many deployment-related educational, social, and emotional needs/issues.

338 "Military Ombudsmen", background material produced by the Geneva Centre for the Democratic Control of Armed Forces, March 2006, available at <http://www.dcaf.ch/publications/bg_military_ombusdsman.cfm?nav1=4&nav2=1>.

339 "State Party Examination of Kazakhstan's initial Report on the Optional Protocol on Children in Armed Conflicts", NGO Group for the Convention on the Rights of the Child, available at <http://www.crin.org/docs/CRC43_Kazakhstan_OPAC.doc>.

340 Art. 5 of the UN Convention on the Rights of the Child, available at <http://www.unhchr.ch/html/menu3/b/k2crc.htm>.

Some countries have developed specific programmes to support families of armed forces personnel. These programmes work with military command, military law enforcement personnel, medical staff, family centre personnel, as well as with civilian organizations and agencies, to provide a co-ordinated response to service members' families in need of support. In Canada, for example, the Kingston Military Family Resource Centre (KMFRC) organizes local and regional programmes targeted mainly at military families. The Canadian example is particularly interesting since the KMFRC is a non-profit organization that is not part of the military (see Box 15.5).

Box 15.5

Canada: Kingston Military Family Resource Centre[341]

The Kingston Military Family Resource Centre (KMFRC) provides professional, confidential services that enhance the social and emotional well-being of local military families;

The KMFRC is an incorporated, non-profit agency, governed by the community it serves through an elected volunteer board of directors, comprised of military members and their spouses;

The services and programmes of the KMFRC are available to regular, reserve, and retired members and their families who live both on and off base. Bilingual service is readily available.

- Programmes and services:
- Children's programmes;
- Youth programmes/teen centre;
- Deployment support and community programming;
- Emergency child-care services;
- Employment assistance services;
- Volunteer services and training;
- Resource library;
- Community information and referral services;
- Welcome packages;
- KMFRC Family Health Centre.

Furthermore, a number of countries have adopted legislation regarding the protection of children of military personnel, such as the United States (see Box 15.6).

Box 15.6

United States: Overview of the Military Child Care Act of 1989[342]

The goal of this act is to improve the availability, management, quality, and safety of child care provided on military installations. Its major components include:

- An increase in the military's mandated contribution to the operation of Child Development;
- The development of training materials and training requirements for child-care staff;
- A pay increase for child-care employees directly involved in providing care;
- Employment preference for military spouses;
- The addition of child-care positions;
- Uniform parent fees based on family income;
- Expanded child-abuse prevention and safety;
- Report on five-year demand for child care;
- Subsidies for family home day care;
- Early childhood education demonstration programmes.

341 See <http://www.rmc.ca/external/kmfrc/index.htm>.

342 Gail L. Zellman, Anne Johansen, Jeannette Van Winkle, *Examining the Effects of Accreditation on Military Child Development Center Operations and Outcomes* (Santa Monica, California: RAND Corporation, 1994), pp. 43-44.

In the UK, local authorities have statutory responsibility for the protection of children of service families based in the UK. As such, the armed forces co-operate with these and other authorities for assisting in the protection of children, and, particularly in areas with a concentration of service personnel, participate on Area Child Protection Committees. When service families are based overseas, the responsibility for the protection of children is vested in the Ministry of Defence.

Education

The children of military families move frequently during their education. Academic standards, courses, access to programmes, promotion and graduation requirements, programmes for children with special needs, and transfer and acceptance of records vary greatly from country to country and even from school to school. Frequent moves and continuous changes in schooling systems are stressful for children. In addition to losing friends, children may develop problems with relationships and adapting to new environments.[343]

7. Cadet Programmes

In several countries, young people, even those under 16 years of age, are involved in cadet programmes, often through their schools, thereby receiving early exposure to military life and a military environment. The status of cadet programmes can at times appear ambiguous, since they are often organized by regular schools, considered civilian educational establishments, but funded or sponsored by the armed forces, where children receive military training courses parallel to their regular academic studies.

Compulsory military training for children violates international human rights standards in various ways. First, parents should have the right to choose the form of their children's education.[344] The state has to respect the rights of parents to ensure that the education of their children is in conformity with their own religious and philosophical convictions.[345] Furthermore, as elaborated elsewhere in this handbook, everyone has the right to freedom of conscience, and "no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice".[346] In addition, compulsory military training at schools might violate the right to hold pacifist beliefs or to manifest them.[347] Therefore, it follows that international law allows for military training at schools as long as it is voluntary or if provisions are made for parents who object for their children to opt out.

Concerning cadet programmes, states follow different models in the OSCE region. While some countries have mandatory programmes, others offer them on a voluntary basis. In other countries, no basic military education is offered in general or vocational schools, while others offer basic military education for young people as part of civil defence courses.

The Swedish armed forces arrange courses for young people that provide information about Sweden's "total defence", in particular about the tasks of the Swedish armed forces in

343 "Services pupils 'need more help'", BBC news website, 6 September 2006, <http://news.bbc.co.uk/1/hi/education/5316688.stm>.

344 Art. 26 of the Universal Declaration of Human Rights states: "Parents have a prior right to choose the kind of education that shall be given to their children." Available at <http://www.un.org/Overview/rights.html>.

345 Art. 2 of Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms: "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." Available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>.

346 Art. 18.2 of the International Covenant on Civil and Political Rights, available at <http://www.cirp.org/library/ethics/UN-covenant>.

347 Art. 14 of the UN Convention on the Rights of the Child.

general, but also career information and information about compulsory service and voluntary defence activities. Children may also be trained, under specific conditions, in the use of firearms. Military training courses are conducted on a voluntary basis, and the aim is to promote interest in the operations of the armed forces and to facilitate future recruitment of career officers (see Box 15.7).

Box 15.7

Youth Activities with the Swedish Armed Forces[348]

- Courses are open to young people between the ages of 15 and 20;
- Those who have not yet reached 18 at the time of application may not be accepted without the consent of their parents or legal guardians;
- Firearms training may be undertaken only by those who have reached the age of 15, and firearms training with automatic weapons may only be undertaken by those who have reached the age of 17;
- Firearms training is only conducted in relation to fixed targets, and weapons may never be released to young people for private storage or private use;
- Combat training may only be conducted by persons who have reached the age of 18, and is not included in youth operations.

Similar programmes are run also in the United States, where courses are held by retired military personnel. Alternatively, high-school students can participate in the Summer Leaders Seminar, which is led and supervised by West Point cadets. However, a point of note is the enactment by the US Congress of the No Child Left Behind Act of 2001, a law that requires secondary schools to provide military recruiters with the names, addresses, and telephone numbers of all juniors and seniors. Schools that fail to comply with this programme risk losing federal funds.[349]

In other countries, like in the Russian Federation[350] and Georgia, boys attend military lessons in ordinary secondary schools. In Georgia, such lessons are not compulsory, although they were during Soviet times. Individual schools decide whether to have military lessons or not, and the programme is approved by the director of the school. Military lessons are held only in the 11th form (for students aged 16-17) and include such issues as first aid, topography, military legislation, etc.[351] In Russia, however, military education is mandatory for all students in general and vocational schools. Furthermore, basic military training has to be provided to all young men, whether they attend school or not. According to a 2003 joint order of the Ministry of Defence and Ministry of Education, basic military training in schools must include shooting, patriotic education, and drills, such as 3-5-kilometre marches while wearing gas masks.[352]

348 "Initial report of States parties under article 8(1) of the Optional Protocol", Sweden, Report No. CRC/C_OPAC/SWE/1, 22 February 2006, para.21, available at <http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/efb7737b24f83ea2c12571cc0049aadb/$FILE/G0640721.pdf>.

349 *Child Soldiers Global Report 2004*, *op. cit.*, note 333.

350 Arts. 12 and 13 of the Russian Federation Law on Military Duty and Military Service. Children have to follow military courses in their final two years of schooling.

351 Information provided by Mr. Irakli Sesiashvili, Director of the Justice and Liberty association, former deputy ombudsman on military issues, Warsaw, 11 December 2006.

352 Federal Law No. 100-FZ of 21 July 2005 on Amendments to the Federal Law on Military Duty and Military Service and Article 14 of the Law of the Russian Federation on Education. See Center for the Development of Democracy and Human Rights, "Legislative Process in the State Duma: Human Rights Analysis", No. 90, 26 October 2005, <http://www.demokratia.ru/en>.

During negotiations on the Optional Protocol on the involvement of children in armed conflict, Norway supported the introduction of a lower age limit than 18 for voluntary recruitment to national armed forces (Art. 3). In this respect, Norway had to consider whether its home guard youth organization, the Home Guard Youth, was an obstacle to declaring a binding age limit of 18 for voluntary recruitment to the Norwegian armed forces. The question is relevant, as the Home Guard Act still allows for persons to be admitted as volunteers to the Home Guard Youth from the age of 16. Upon ratification of the Convention, the Norwegian Government commented as follows:

> The Home Guard Youth is formally attached to the Norwegian armed forces. However, the Home Guard Youth cannot be considered to be recruited to the Norwegian armed forces within the meaning of the Protocol because it is presumed that a person is not considered to have been recruited before he or she has formally or de facto become a member of the armed forces with the rights and obligations that this entails. Members of the Home Guard Youth are not to receive any practical training in or take part in any other way in war-related activities, and they are to be exempt from service in situations where the armed forces could be involved in hostilities. Furthermore the Home Guard Youth are not subject to military disciplinary authority or to the Military Penal Code.[353]

It is important to ensure that cadet programmes adopt appropriate policies, such as codes of conduct, in order to ensure that children live in a safe environment that takes into account their specific needs.[354]

Numerous countries have special mechanisms for the protection of cadets. In the United States, for example, the Civil Air Patrol (CAP) has a zero-tolerance policy for all forms of child abuse and drug abuse within their programme (see Box 15.8).

In the UK, cadet programmes include the Combined Cadet Force, the Sea Cadet Corps, the Army Cadet Force, and the Air Training Corps. Cadets generally enter the programme between the ages of 12 and 14, but once they reach 18 they become subject to similar rules to those applying to be adult instructors.

The welfare of cadets is covered by child protection legislation, and similar arrangements apply as in other youth organizations. For example, the Air Cadet Organisation vets all adults through the Criminal Records Bureau, gives formal training to uniformed adults, and draws attention to duty-of-care responsibilities.

In its review of the Deepcut Report, the UK Defence Select Committee observed that, because cadet organizations were subject to child protection legislation, they had a more comprehensive approach to their duty-of-care responsibilities than did the armed forces. They recommended that the Ministry of Defence consider whether aspects of the cadet organizations' duty-of-care arrangements might be appropriate in caring for the youngest recruits to the armed services.[355]

353 "Implementation of the Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict", Norway's first periodic report, January 2006, p. 2, available at <http://www.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.OPAC.NOR.1.pdf>.

354 Coalition to Stop the Use of Child Soldiers, "Submission to the UN Study on Violence against Children, with specific reference to children in military schools and to children in peacetime government forces", March 2005.

355 "Duty of Care", *op. cit.*, note 333.

Box 15.8

US Civil Air Patrol: Cadet Protection Policy and Programme for Parents and Leaders[356]

Screening: All CAP senior members undergo an FBI criminal history record check to determine eligibility for CAP membership;

Training: Prior to working with cadets, senior members must complete CAP's Cadet Protection Training Program;

Leadership: All cadet activities must be supervised properly. Commanders must exercise care in selecting senior members and cadets to conduct and supervise cadet activities. Generally, this means that a minimum of two senior members will be present when appropriate and feasible. This requirement also protects senior members from false allegations of abuse;

Sexual Abuse: Cadets will not be subjected to sexual molestation, touching, contact, exposure, suggestions, or other incidents of a sexually oriented nature;

Physical Abuse: Cadets will not be physically struck or assaulted in any way. Also, cadets will not be hazed or forced to do excessive exercises;

Reporting Requirements: Senior members, cadets, cadet parents/guardians should report suspected abuse to the unit commander or the commander at the next higher level of command. The unit commander reports the allegation to his or her wing commander; the wing commander then contacts the wing legal officer and National Headquarters CAP corporate legal counsel or executive director. CAP views allegations of abuse as serious and will fulfil its statutory obligation to contact appropriate child protection and law enforcement agencies for investigation and prosecution of child abuse allegations.

8. Best Practices and Recommendations

- Each state's international legal obligations should be integrated into national legislation, with recruiters and other military officials accountable for ensuring their effective implementation, in particular the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict;
- Parents, or legal guardians, should be actively involved to the maximum extent possible in the selection and recruitment process;
- Prior to giving final consent, potential recruits and their parents or legal guardians should be provided with full and detailed information about all aspects of the recruitment and induction process, including the specific nature of the commitment involved in enlisting into the armed forces;
- Recruits who join the armed forces under 18 years of age and who are unhappy with pursuing a military career before they reach the end of their training should be able to discharge as of right;
- In-service procedures and practices should reflect the duty-of-care notion by providing special protection for persons under 18 years of age, with ultimate responsibility for guaranteeing implementation resting with commanding officers;
- Preventive measures should ensure that children are not put at risk of being abused by those in positions of power, such as strict background checks in the recruitment of training officers or supervisors;
- A comprehensive training programme for all instructors should reflect the responsibilities involved in educating and working with young recruits;
- All armed services personnel are, and should be held, accountable for reporting abuse at the first instance of any sign of mistreatment;

356 See <http://level2.cap.gov/documents/CPPT_Student_Guide_DRAFT.pdf>.

- Any complaint of mistreatment, bullying, or harassment should trigger an investigation, independent of the unit implicated, with appropriate disciplinary and/or administrative action taken as required. In particular, measures to protect the complainant should be put in place, if deemed necessary, and the complainant should be kept informed of the outcome of the investigation;
- The families of service personnel must have access to a full range of support services, including education, health, and social welfare;
- Clear procedures and guidance are required on action to be taken when it is suspected that a child of armed services personnel has been subjected to abuse, violence, or neglect, including where necessary the involvement of external agencies;
- Military structures supporting cadet programmes should ensure that appropriate protection policies are in place to safeguard children;
- Mandatory military training at general and vocational schools for all students needs to be avoided and outlawed, as it violates international human rights standards.

Chapter 16

Preventing Mistreatment of Armed Forces Personnel

Armed forces personnel, whether conscripted or volunteers, are part of a chain of command in which the interests of the individual are subordinated to the requirements of military duty. Yet they remain citizens in uniform, and must be granted the same rights as civilians, without prejudice to military discipline.[357] The growing recognition of servicemen and -women as citizens with equal rights to the rest of the population has been a gradual process in which the European Court of Human Rights has played a critical role by contributing to the development of the concept of "citizens in uniform". According to this notion, respect for the rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms does not stop at the gates to the barracks. While the operational effectiveness of the armed forces entails the restriction of certain rights, non-derogable human rights should be granted to all members of the armed forces, whatever their status, in an absolute manner and without restriction. No derogation is possible from the right to life; the prohibition of inhuman or degrading treatment; or the prohibition of slavery, servitude, and forced or compulsory labour.[358]

The military profession can maintain its dignity and professionalism only if the human rights of soldiers are respected. Brutality, institutionalized bullying, violence, ill-treatment, and torture constitute grave violations of the rights of servicemen and -women that cannot be justified under any circumstances or by any tradition. According to the Parliamentary Assembly of the Council of Europe:

> Ill-treatment, bullying, brutality, torture, malnutrition, illness, over-exploitation, sometimes causing physical ill-effects or even resulting in death … too many young conscripts in Europe suffer such fates during their military service.[359]

This chapter explores good practices concerning protection of the rights of service members *vis-à-vis* improper treatment and particularly relating to bullying and hazing (initiation ordeals), practices that remain common in the armed forces of a number of countries.

It is evident that the issue of mistreatment is closely connected with other issues discussed in other chapters of this handbook, notably Chapter 12, "Ethnic and Linguistic Minorities in the Armed Forces" (ethnic and linguistic minorities may be at a greater risk of harassment or bullying on racial grounds); Chapter 13, "Women in the Armed Forces" (the prevalence of sexual harassment and sexual violence towards women in the armed forces); Chapter 14, "Gays and Lesbians in the Armed Forces" (gays and lesbians are sometimes subject to abuse and harassment due to their sexual orientation); Chapter 15, "Children Associated with Armed Forces" (young recruits are frequently subjected to mistreatment); Chapter 17, "Working Conditions" (poor working conditions often contribute to the occurrence of mistreatment); Chapter 20, "The Responsibility of Commanders and Individual

357 Parliamentary Assembly of the Council of Europe, "Human rights of members of the armed forces", Doc. 10861, 24 March 2006, para. 53, available at <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc06/EDOC10861.htm>.

358 *Ibid*., para. 54.

359 *Ibid*., para. 19.

Accountability" (competent leadership is the first line of defence against mistreatment); and Chapters 21 and 22 dealing with military justice and ombudsmen, respectively.

1. Issues at Stake

Armed forces play an essential role in protecting society against various threats. As such, they must be prepared to protect and uphold the constitution, state institutions, and the central values of the society at all times. Indeed, military institutions should not be considered as autonomous realms isolated from society; instead, they should be firmly integrated within society. Human rights standards as part of the society's central values apply to the armed forces as well. Subject to limitations related to military duty, all human rights apply to members of the armed forces, regardless of rank, whether professionally contracted or conscripted, and they are thus to be considered citizens in uniform.[360] Yet psychological and physical violence against members of the armed forces remain one of the main issues facing the armed forces of many countries. Recent publicized cases of mistreatment of armed forces personnel in the OSCE region and especially those affecting young recruits, who are the most vulnerable group within the military, have brought renewed attention to this phenomenon. It is all too often the case that young conscripts are subjected to ill-treatment, bullying, brutality, torture, malnutrition, and illnesses that sometimes cause physical and psychological ill-effects or may even result in death.[361] The custom of subjecting recruits to various (often informal) initiation ordeals, a practice that is still followed in some OSCE participating States, is of particular concern.

Initiation practices can vary greatly from regiment to regiment and may differ from one country to another in terms of whether the treatment inflicted is considered acceptable or not. Inhuman treatment covers "at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable" and treatment that "was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering".[362] Moreover, "the suffering and humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment".[363]

Factors causing mistreatment

The following situations or conditions increase the chance of bullying and other forms of mistreatment in the armed forces.

1. Rituals of unit initiations play an important and legitimate role in fostering unit cohesion and morale. Initiation rituals are ceremonies organized during, or at the end of, the recruits' initial basic training in which the recruit is physically and mentally tested, at times reaching the limits of what is bearable. Initiation rituals test and mark the recruit's transition from civilian to military life, a process that is sometimes called "mortification" because the recruit's civilian identity is replaced by a military identity through a process

360 "Memorandum of Deepcut and Beyond", House of Commons Select Committee on the Armed Forces Bill, 14 February 2006, London, available at <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmarmed/828/828we13.htm>.

361 "Human rights of members of the armed forces", *op. cit.*, note 357, para. 19.

362 This is based on the case law of the now defunct European Commission on Human Rights, *Kudla v. Poland,* European Court of Human Rights, 26 October 2000, *European Human Rights Reports*, Vol. 35, 2002, p. 198, para. 92; and European Commission of Human Rights, *Greek* Case, Report of 5 November 1969, *Yearbook of the European Convention of Human Rights* (Strasbourg: Council of Europe, 1969), Vol. 12, p. 186.

363 *Kudla v. Poland*, *ibid.*, para. 92. When applied to military recruits, treatment should go beyond suffering and humiliation ordinarily connected with military service in order for it to be considered degrading.

of hardships and initiation rituals.[364] The majority of initiation rituals are organized by peers and take place in absolute isolation, often without the supervision of military leaders. The likelihood of mistreatment exists because the transition from civilian life (where everything is familiar) to military life (where new rules apply) means that recruits become vulnerable to pressures exerted by their peers. Although it is widely acknowledged that initiation rituals can fulfil a positive symbolic function, they may also result in excesses that may in turn lead to physical or mental harm. A distinction should therefore be made between positive rituals and outright bullying as a perverse manifestation of power. In its report on the mistreatment of soldiers in the Russian Federation,[365] Human Rights Watch put forward a test to distinguish between activities that enhance *esprit de corps* and those that constitute illegal degrading treatment. Certain activities that do not in themselves qualify as inhuman or degrading treatment may, if excessive, carried out over a protracted period, or involving a threat of violence, cross the threshold and become inhuman or degrading treatment. For example, food or sleep deprivation as part of an initiation ritual does not necessarily constitute degrading treatment, but depriving a recruit of a significant part of his food or sleep over an extended period of time would be considered degrading or inhuman.[366]

2. Furthermore, the need to maintain discipline, if pushed to extremes, may often lead to violations. Strict rules of subordination and the requirement of unconditional obedience to orders issued by commanders often affect relations between soldiers and commanders. The prevailing approach is that discipline must be introduced among soldiers as early and as promptly as possible so that radical and immediate measures can be taken. Overstepping the authority attributed to commanders, e.g., through verbal or physical punishment, is therefore often perceived as necessary for disciplining subordinates. The condition of subordination of soldiers may further limit them in openly expressing their claims. An extreme interpretation of military values, e.g., total subordination, may thus contribute to an environment in which mistreatment is more likely to occur.

3. Beyond the imperative of maintaining discipline, military training for preparing soldiers for war and conflict may also result in violations of human rights. Training in peacetime tries to simulate battle conditions; hence, extreme feelings and hardships are an essential part of military training. Soldiers are supposed to "train as you fight" and have to undergo many hardships in order to achieve combat readiness. The dualism between peacetime training and wartime practice may create difficulties in distinguishing legitimate methods of training from harassment.

4. Poor working conditions, inadequate facilities, and malnutrition may also be contributing factors leading to mistreatment. Armed forces personnel in general and conscripts in particular may be employed for non-military purposes. In some states, for example, the commanders or officers in charge of military units may "lease" conscripts to private businesses to carry out various types of work or require them to construct their own dwellings. This practice complies with the connotation of forced labour. Military personnel may also

364 Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (New York: Doubleday, 1961).

365 Human Rights Watch, "The Wrongs of Passage: Inhuman and Degrading Treatment of New Recruits in the Russian Armed Forces", October 2004, available at <http://hrw.org/reports/2004/russia1004>.

366 *Ibid*., pp. 27-28. Using extreme physical exercise as a form of punishment in the context of initiation practices is not in and of itself degrading or inhuman, but forced physical exercise to the point of collapse under threat of violence would constitute degrading treatment or punishment. Making new recruits perform chores as part of an initiation does not in and of itself constitute degrading treatment, but forcing a recruit to live in servitude for extended periods of time, under threat of violence, reaches this threshold.

be subject to extortion, e.g., when parents send money or food to recruits who are then forbidden from keeping it, but are instead forced to give it to their superiors or peers.[367]

5. The lack of transparent and effective supervision and other monitoring mechanisms, in addition to the absence of witness-protection programmes, contributes to the persistence of bullying within the military. In many cases, investigations of alleged cases of mistreatment remain in the hands of commanding officers, who may in fact themselves be the source of grievance in the first place or who might have an interest in covering up cases of mistreatment. To counter mistreatment among armed forces personnel, it is imperative that military personnel be informed of their rights and that commanding officers receive clear guidelines and adequate training enabling them to exert their authority while at the same time respecting the rights of their subordinates. Furthermore, effective external and internal monitoring mechanisms should punish and thereby deter abuses within the armed forces. Indeed, the reputation and effectiveness of armed forces are conditional on the elimination of impunity for such offences.

The urgent need to address mistreatment

Any mistreatment needs to be addressed for at least three reasons. First, the prohibition of cruel, inhuman, or degrading treatment is a fundamental human right. Under international law, qualifying this basic human right, even under reference to requirements of military duty (see below), is not permitted. Second, mistreatment creates fear and mistrust among military personnel. Terror and suspicion can hardly be good instruments for forging cohesive military units, which is a necessary condition for successful engagement in war, conflict, and peacekeeping operations. Third, the parents of mistreated conscripts and society at large will abhor a state institution that destroys its sons and daughters. Systematic mistreatment will lead to societies that disrespect the military, as well as to draft evasions and a rise in the number of military drop-outs. This is not a record that any state institution can be proud of or aim for.

2. International Human Rights Commitments

As citizens in uniform, members of the armed forces must be granted the same rights as civilians. While the protection and promotion of certain civil and political rights, such as freedom of expression and the freedom of thought, conscience, and religion or belief, may be qualified in light of military duties, all members of the armed forces, whatever their status, must enjoy certain inalienable fundamental freedoms and rights, in an absolute manner and without restriction. In particular, no derogation is possible from **the right to life,** bearing in mind, however, the inherent dangers of the military profession (Art. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Art. 6 of the International Covenant on Civil and Political Rights). Members of the armed forces have **the right to protection against inhuman or degrading treatment** (Art. 3 of the ECHR and Art. 7 of the ICCPR). This means that servicemen and -women must not suffer humiliating or degrading treatment, for instance during particularly harsh or rigorous training, nor may they be subjected to torture, ill-treatment, brutality, or other practices that may be deemed to be inhuman or degrading treatment or punishment. **The prohibition of slavery, servitude, and forced or compulsory labour** (Art. 4 of the ECHR), according to which conscripts must not be required to perform tasks that are incompatible with their assignment, nor be required to undertake forced or compulsory labour, is of relevance to this chapter. These rights are also reaffirmed in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[368] as

367 *Ibid.*

368 Available at <http://www.ohchr.org/english/law/cat.htm>.

well as in the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[369] The above-mentioned universal human rights cannot be restricted, even by military requirements.

Investigating mistreatment: the right to a fair trial

When violations occur, members of the armed forces have the right to **legal protection** (Art. 5 of the ECHR) and the **right to a fair trial** by an independent and impartial tribunal (Art. 6 of the ECHR and Arts. 14 and 15 of the ICCPR). The procedures for lodging an official complaint before military courts should take into account that the conditions of arrest and detention must be lawful and should comply fully with the relevant articles of the ECHR and ICCPR (existence of appropriate remedies, fairness of proceedings, impartiality and independence of the court, lawfulness of any arrest or detention of conscripts). However, several OSCE participating States have made reservations to these articles (see Chapter 21, "Discipline and Military Justice").[370]

Council of Europe

One valuable source of guidance is the case law of the European Court of Human Rights, the significance of which goes beyond the member states of the Council of Europe. According to the interpretation of the Court, the Convention treats members of the armed forces as "citizens in uniform", i.e., service personnel retain their civil and political rights, but they are modified so as to be appropriate to the military context.

The "citizen in uniform" approach is taken by many international organizations, which have adopted recommendations condemning the widespread violations of soldiers' rights and which require member states to take action in order to end rights violations and to fully implement the concept of citizens in uniform. The Parliamentary Assembly of the Council of Europe, for example, has consistently shown its interest in this issue. In 1998, it adopted Resolution 1166 and Recommendation 1380 on the human rights of conscripts, where it posited the principle that conscripts, like all members of the armed forces, should be regarded as "citizens in uniform", and should therefore "enjoy the same rights and fundamental freedoms, in particular those conferred by the European Convention on Human Rights, and enjoy the same legal protection as ordinary citizens". The Parliamentary Assembly also recently adopted Recommendation 1742 (2006) on the Human Rights of Members of the Armed Forces more generally, in which special attention is given to mistreatment of armed forces personnel, and in particular conscripts, as the most vulnerable group within the armed forces.[371]

OSCE commitments

The OSCE has also expressed its commitment to strive for the elimination of any form of torture and other cruel and inhuman or degrading treatment. On several occasions, OSCE participating States have committed themselves to inquire into all alleged cases of torture and to prosecute offenders. They have also committed themselves to include specific provisions aimed at eradicating torture in their educational and training programmes for

369 Available at <http://www.cpt.coe.int/EN/documents/ecpt.htm>.

370 Azerbaijan, the Czech Republic, France, and Slovakia, for example, made a reservation to Arts. 5 and 6 of the ECHR; Armenia, Lithuania, Moldova, Portugal, Russia, and Ukraine made reservations to Art. 5 of the ECHR. For a full list of reservations to the ICCPR, see <http://www.ohchr.org/english/countries/ratification/4_1.htm#N18>.

371 Parliamentary Assembly of the Council of Europe Recommendation 1742 (2006). Also see "Human rights of members of the armed forces", *op. cit.*, note 357. The Parliamentary Assembly of the Council of Europe has also paid attention to certain specific points, looking at the subject of professional servicemen's right of association and the right of conscientious objection to military service, regarded as a fundamental component of the right to freedom of thought, conscience, and religion or belief.

law enforcement, military, and police forces.[372] **The OSCE Code of Conduct on Politico-Military Aspects of Security** is particularly relevant for armed forces personnel, as it commits participating States to ensure that military, paramilitary, and security service personnel are able to enjoy and exercise their human rights and fundamental freedoms (see Box 16.1).

Box 16.1
The OSCE Code of Conduct on Politico-Military Aspects of Security[373]

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

33. Each participating State will provide appropriate legal and administrative procedures to protect the rights of all its forces personnel.

3. Preventing Bullying

Several measures may be taken in order to prevent mistreatment and abuses within the armed forces and to fight against a cultural environment that tolerates these practices. These measures include: (1) banning illegal initiation rituals; (2) instructing and training new recruits and commanders; (3) ensuring that there is competent leadership at the level of officers and non-commissioned officers; and (4) improving working conditions.

Ban on illegal initiation rituals (hazing)

A clear ban on unauthorized initiation ceremonies is important to provide a clear basis for the prosecution and punishment of illegal practices. In the 1980s, for example, the British Defence Ministry launched a series of measures to tackle bullying, the most important of which was the introduction of an explicit ban on unauthorized initiation practices[374] (see Box 16.2).

Box 16.2
The Queen's Regulations for the Army: The Ban on Unauthorized Initiation Ceremonies in the United Kingdom[375]

"The essential ingredients of discipline and military efficiency owe nothing to any unauthorized initiation or other rites aimed at terrifying or inflicting physical or mental degradation upon any individual. Such conduct would be directly contrary to the requirements of training morale and good leadership … . Allegations of unauthorized activities are to be referred to the Special Investigation Branch for investigation with a view to the taking of disciplinary action under the Army Act 1955 against the instigators and other participants. The contents of this paragraph are to be repeated at least annually in all formation, unit and sub unit orders."

Training

Training is important so that military personnel are informed about their rights. Training courses should also promote the values of camaraderie and loyalty among armed forces

372 Budapest 1994, Decisions: VIII. The Human Dimension, para. 20.

373 The OSCE Code of Conduct on Politico-Military Aspects of Security, 1994.

374 James K. Wither, "Battling Bullying in the British Army 1987 – 2004", *The Journal of Power Institutions in Post-Soviet Societies,* No. 1, 2004, available at <http://www.pipss.org/document46.html>.

375 The Queen's Regulations for the Army, revised edition, March 1996, IAC 13206, London, Her Majesty's Stationery Office, Part 6, para. 5.201A.

personnel; a climate of mutual trust and respect is undeniably conducive to strengthening the cohesion and therefore the operational ability of a unit. Awareness-raising efforts and practical courses on addressing bullying should be part of the curriculum at officers schools. In a number of OSCE participating States, e.g., Austria, Belarus, France, Georgia, Norway, Russia, Turkey, and Ukraine, officers are trained in dealing with bullying and receive training in spotting and preventing illegal bullying practices. Ireland is another example, as all new entrants into the defence forces receive instruction on what constitutes inappropriate behaviour and more importantly on how to seek redress or to make a complaint against someone who treats them inappropriately. This instruction is given by the officer commanding the training unit responsible for induction training regardless of whether the induction training is for general service or for officer cadets. The lecture also outlines the role that the commanding officer plays in resolving complaints. All new entrants into the defence forces are given a *Defence Forces New Entrants Information Handbook*[376] (see Box 16.3).

Box 16.3

Ireland: *Defence Forces New Entrants Information Handbook*[377]

The aim of this handbook is to provide information for those enlisting in the defence forces on:

- Their responsibilities and obligations;
- Details of conditions of employment;
- Entitlements and rights as a member of the defence forces;
- Health and safety policies;
- Interpersonal relationships;
- Unacceptable behaviour, harassment and bullying;
- How to prevent unacceptable behaviour; and,
- How to seek redress and make a complaint.

Competent leadership

In addition to training, competent leaders play an essential role in forging personnel into cohesive fighting units. Leaders provide purpose, direction, and motivation. Leaders promote a climate of cohesion by inculcating discipline and a sense of duty within their units; commanders also play an important role in taking measures against bullying. In Canada, the Czech Republic, Germany, Georgia, Latvia, Lithuania, Norway, Poland, Portugal, the United Kingdom, the United States, and Ukraine, officers organize routine and surprise checks to spot and prevent illegal initiation practices. Furthermore, in many OSCE participating States, e.g., Austria, Azerbaijan, Belgium, Denmark, Luxembourg, and Switzerland, officers are instructed to investigate any form of abusive practice and to strictly and consistently apply disciplinary punishments (zero-tolerance policy). In this context, commanding officers are not only responsible for the safety and welfare of all assigned personnel, they also have the duty to report offences against military law and military codes to the appropriate authorities for investigation, consideration, adjudication, and legal action (see below).

Improving working conditions

Another important measure for preventing and reducing human rights violations in the armed forces is improving the working and living conditions of armed forces personnel.

376 ODIHR-DCAF questionnaire, question 47b.

377 *Defence Forces New Entrants Information Handbook*, Defence Forces Headquarters, Ireland, November 2006.

Poor working conditions, inadequate facilities, malnutrition, and low salaries may contribute to mistreatment in so far as armed forces personnel, and conscripts in particular, may be obliged to carry out work for private, non-military purposes, e.g., working in fields or factories.

4. External Monitoring Organizations Addressing Mistreatment in Armed Forces

In addition to the policy measures that can be taken within the armed forces, external supervision of the armed forces by non-military bodies plays a fundamental role in ensuring respect for human rights within the barracks and in preventing bullying.

Parliaments, civil society organizations, and other kinds of independent institutions and media are often allowed to conduct investigations into the human rights situation within the armed forces; the information gathered is usually published in thematic or yearly reports. This oversight function is very important in order to spread information and raise awareness of the issue among civil society and military personnel. Furthermore, civil society organizations may help parliaments in exercising oversight over the military. Many OSCE participating States allow, in varying fashions, a certain degree of external supervision over the military (see Box 16.4).

Box 16.4

Azerbaijan, Luxembourg, Poland, Sweden, Russian Federation: External Supervision over the Armed Forces[378]

Azerbaijan

According to Art. 49 of the Law on Mass Media Outlets of the Republic of Azerbaijan, regular staff correspondents of media outlets are entitled to compile, prepare, edit, and publish information. They are granted the status of journalist while performing their duties.

Luxembourg

Military unions or religious representatives are often informal points of contact for complaints of military personnel.

Poland

Members of parliament, especially members of the Parliament's Defence Commission, are allowed to conduct investigations into the situation in the armed forces.

Sweden

Every citizen has the right to receive information and documents of interest from the armed forces, and this right is only limited if the requested document is secret. In that sense, anyone can conduct investigations regarding the human rights situation in the armed forces. There are also different ombudsmen who can conduct investigations after complaints have been made regarding breaches of human rights.

Russian Federation

The ombudsman of the Russian Federation and several public organizations may carry out monitoring of, and research into, the armed forces, including with regard to respect for the human rights of current and former members of the armed forces.

Another example is the independent research of Vladimir Lukin, the human rights representative of the Russian Federation. In July 2005, he published a special report on abuse in the Russian armed forces and recommended the adoption of various measures, ranging

378 ODIHR-DCAF questionnaire, question 7.

from improved training to adequate remuneration for members of the armed forces (see Box 16.5).

Box 16.5

Observing the Rights of Citizens during Military Service as Conscripts: Special Report of the Representative on Human Rights of the Russian Federation[379]

Right to dignity

- The state and society should acknowledge that non-statutory relations represent a major problem not only with regard to protecting the rights of armed forces personnel but also ensuring military readiness and building the morale of the troops;
- Measures must be taken in order to train junior commanders and armed forces personnel in general … [and] a sergeant's rank should be conferred on those who are contract soldiers, [who] have completed a sufficiently lengthy (in any case, longer than five months) training course, and [who] have leadership and management qualities; they should receive adequate remuneration;
- The armed forces should have a military police organization mandated to conduct investigations, as well as to carry out patrols and duty service, to escort detainees, and to escort and inspect military cargoes. It is crucial that military police entities be formed not based on army garrisons or military zones but according to the territorial principle. Further, they should not report to military commanders and should be funded through a separate item of the budget.
- Prevention of non-statutory relations, including bullying, is assumed to require non-traditional approaches to army recruiting. For example, it seems sensible to consider the formation of training units manned by conscripts from the same draft. They could serve in such units for most (most likely half) of their statutory term.
- It is worth considering, by way of an experiment, manning military units with conscripts mainly originating from the same area (town, district, region, and territory) and to confer upon such units corresponding honorary titles along with establishing councils of army veterans composed of grandfathers, fathers, and elder brothers of the conscripts.
- The idea of returning to the practice of the formation of special units on an ethnic basis … is also worthy of consideration. The practice of recruitment based on ethnic origin proved to be successful in the armed forces of the Russian Empire. Nowadays, this principle is being successfully applied in the armed forces of several countries.

Engaging armed forces personnel in assignments not related to performance of military duties

- Engaging armed forces personnel in work that is not related to the performance of military duties should, with good reason, be recognized as forced labour and is therefore unlawful.

Right of conscripted armed forces personnel to adequate remuneration

- Conscripts should be granted a substantial increase in pay.

Another example of an independent investigator dealing with bullying and abuse within the armed forces is the 2004 Deepcut Review of Nicholas Blake.[380] Blake, who reviewed the four deaths at a British army training centre, found that, despite the abuse, there was no evidence that any of the soldiers had taken their lives because of being bullied or sexually harassed. The fatal gunshot wounds suffered by four teenage soldiers at the Deepcut

379 "O soblyudenii prav grazhdan v svyazi s prokhozhdeniem voennoi sluzhby po prizyvu" [Observing the rights of citizens during military service as conscripts], special report of the Representative on Human Rights of the Russian Federation, Moscow, 2005.

380 Nicholas Blake QC, *The Deepcut Review. A review of the circumstances surrounding the deaths of four soldiers at Princess Royal Barracks, Deepcut between 1995 and 2002* (London: The Stationery Office, 2006). The full report is available at <http://www.official-documents.gov.uk/document/hc0506/hc07/0795/0795.pdf>.

barracks between 1995 and 2002 all appear to have been "self-inflicted".[381] Blake also found that there had been no culture of bullying at Deepcut that was authorized or approved by senior officers. During his 14-month inquiry, however, Blake uncovered bullying and sexual harassment that had gone unpunished and apparently unnoticed by commanding officers.[382] The report highlighted several factors that may have contributed to the deaths of the four soldiers: the poor quality of the accommodation blocks, and particularly the sanitary and washing facilities in the barracks; the limited range of recreational activities provided on-site; the soldiers' virtual inability to leave the barracks when off duty; the possibility of having unsupervised access to weapons; the lack of adequate supervision; and the imposition of informal sanctions, like extra guard duties.[383] The Deepcut Review, while highlighting these shortcomings, particularly in the armed forces' training regime, presented a number of recommendations (see Box 16.6).

Box 16.6
The Deepcut Report: Selected Recommendations[384]

- The Army should routinely seek confirmation from others of self-declared medical and social histories, including access to medical or other confidential records. Such data is necessary to make a full assessment of the applicant's suitability and enable training centres to be aware of any particular vulnerability that may need addressing;
- Instructors should be vetted and properly trained before being allowed to work with young people;
- Every officer, non-commissioned officer, civilian instructor and trainee should be alert to any sign of abuse and be obliged to report it through the chain of command, so that prompt and effective action can be taken. Failure to report any sign of abuse of power should itself be a matter for disciplinary sanction;
- Complaints of mistreatment, harassment or bullying should be promptly assigned to the Royal Military Police;
- A Commissioner of Military Complaints, or Armed Forces Ombudsman, should be appointed;
- Armed guard duty by any trainee should be directly supervised by an NCO or experienced adult soldier;
- The minimum age for trained soldiers to conduct unsupervised armed guard duty should be 18.

5. Complaints Procedures in Case of Mistreatment

In cases of mistreatment, military personnel have the option of trying to redress the situation primarily through the chain of command and the military justice system.

Military commanders are responsible for the safety and welfare of all assigned personnel; commanders coming across evidence of abusive practices are obliged to investigate and to inform their superiors (e.g., in Estonia). If these practices do indeed constitute a criminal offence, the disciplinary superior is obliged to inform the appropriate investigating authorities, e.g., the public prosecutor in the case of Germany or the military police in the case of the Czech Republic, who may bring the case before the appropriate court. Military

381 *Ibid*., 12.2.

382 M. Evans, "Bullying rejected as the cause of Deepcut deaths", *The Times*, 30 March 2006. "Mr Blake said he was amazed that the Army Prosecuting Authority had not charged a Deepcut instructor, identified as Sergeant BB, who had abused trainees with physical and verbal violence. The sergeant, who has left the Army, hit one female recruit in the face 'for no reason' and rode a bicycle over 'fat' soldiers, ordered to lie prostrate on the parade ground. The prosecuting authority ruled that a conviction was unlikely and prosecution was 'not in the public, including the service, interest'. Sergeant BB was one of about ten Deepcut staff who received letters from Mr Blake, warning them that their conduct would be highlighted in the report and that it might be possible to identify them."

383 Blake, *op. cit*., note 380.

384 *Ibid*.

personnel can be held responsible if they bully or harass their subordinates or peers, or if they allow bullying to occur. In some countries, depending on the gravity of the offence, perpetrators may be held criminally liable (e.g., Belarus, France). In the United States, for example, the Uniform Code of Military Justice includes a specific punitive article, Art. 93, "Cruelty and Maltreatment". Commanders may be forced to have counselling, or may be punished with reprimands, loss of pay, refused possibility of promotion, failure to re-enlist, or discharge from service and court-martialling for serious cases that involve assault, aggravated assault, or mistreatment of subordinates (see Chapter 21, "Discipline and Military Justice"). Box 16.7 gives an indication of how perpetrators and officers who endorse mistreatment can be held accountable.

Box 16.7

Holding Accountable Perpetrators of Bullying and Supervising Officers for Allowing Bullying to Occur[385]

Belgium

Disciplinary regulations impose responsibility on superiors for the acts of their subordinates if these acts are due to the superior's negligence, or if the superiors were, or could have been, aware of an infraction of their subordinates and did not take all possible measures to prevent the subordinate from executing an illegal action. Belgian law provides punishment for employers that do not end bullying when there has been a complaint and a decision to that regard.

Denmark

Military personnel can be held responsible according to the military disciplinary code if they bully or harass their subordinates or their peers. The same rules apply to superiors who allow their subordinates to bully or harass others. The sanctions vary according to the gravity of the offence from a reprimand to a fine. In more severe cases, they can also be held responsible under the Military Criminal Code.

France

Bullying is a penal offence. Perpetrators and officers who allow it to happen will be judged in the appropriate court, which may be a civilian court (depending on seriousness of the offence).

Switzerland

Perpetrators of bullying may face punishment of up to three years' imprisonment. However, the person suffering damages must file a complaint.

Furthermore, several OSCE participating States have established **ombudsman offices** that help the military chain of command and the military justice system to ensure that the rule of law is respected in the armed forces and to promote transparency and accountability in defence structures and focus attention on problems in military practice requiring corrective action[386] (see Chapter 22, "Ombudsmen").

6. Best Practices and Recommendations

- In training, military personnel, and especially commanders, should be vetted and properly informed about their rights and about what constitutes bullying;
- Officers should be provided with adequate training on complaints procedures;
- Appropriate guiding principles should be elaborated for leaders on how to treat their soldiers;

385 ODIHR-DCAF questionnaire, question 52.

386 "Military Ombudsmen", *op. cit.*, note 338.

- Every officer and non-commissioned officer should pay attention to any sign of abuse and be obliged to report it through the chain of command, so prompt and effective action can be taken;
- Commanders should use their position of leadership to prevent and punish cases of mistreatment;
- Commanders should promote a culture of mutual trust and respect instead of fear and punishment;
- Complaint mechanisms should be available for service personnel who have been subject to harassment or violence;
- Complaints of mistreatment, harassment, or bullying should be investigated and punished;
- There should be no tolerance of bullying in the military;
- An explicit ban on unauthorized initiation practices should be provided for in legislation;
- The state should constantly investigate reasons for human rights violations in the army and react in an appropriate manner;
- Ministries of defence should co-operate with NGOs and media and "open the doors" of their military units to enhance transparency;
- External institutions, e.g., ombudsmen, human rights commissioners, NGOs, or special commissions of inquiry, should be allowed to monitor how human rights are being upheld in the armed forces and adopt recommendations for changing patterns and trends leading to mistreatment.

Chapter 17
Working Conditions

This chapter explores good practices concerning the working conditions of armed forces personnel in the context of social and economic rights of service members in OSCE participating States. It is important to stress that social and economic rights differ from civil and political rights in that social and economic rights are "programmatic" rights or "positive" rights that oblige states to take measures and implement programmes to promote the realization of these rights.[387]

After elaborating the problems and issues at stake, as well as the relevant human rights involved, this chapter discusses various approaches to working conditions of armed forces personnel in OSCE participating States. Particular attention is paid to working time, remuneration, safety and health at work, and family life. The chapter concludes with some best practices and recommendations. As the handbook focuses on peacetime situations, deployments of troops abroad in peacekeeping or other operations are not covered. The chapter takes a generic approach to the armed forces, while acknowledging that in any given country differences in working conditions may exist between the navy, army, and air force.

1. Issues at Stake

The "enjoyment of just and favourable conditions of work" forms a part of a broad set of social and economic rights that include issues such as the right to work, to form or join unions, to an adequate standard of living, and to the highest attainable standards of physical and mental health.[388] It also includes the issue of equal opportunities, which is addressed in other chapters of this handbook (see Chapters 12-14).

As mentioned above, just and favourable working conditions should not to be perceived as a legal minimum standard; rather, states should introduce programmes or policy objectives that aim to ensure that such conditions are provided. For example, the International Covenant on Economic, Social and Cultural Rights (ICESCR), by requiring states to give effect to the rights "by all appropriate means", takes a broad and flexible approach that takes into account the specific characteristics of the legal and administrative systems of states that are party to the Covenant.[389]

All OSCE participating States grant certain social and economic rights to armed forces personnel, which, in certain countries, differ from those rights granted to other civil servants or to civilians.[390] This is due to the fact that the military profession is subject to specific risks and demands that have an impact on the health and safety of servicemen. While at home in peacetime, a great number of military personnel perform jobs (e.g., guards, doctors, canteen personnel, engineers, computer specialists, etc.) that are subject to health and

387 UN Committee on Economic, Social and Cultural Rights, "General comment No. 9: The domestic application of the Covenant", E/C.12/1998/24, 3 December 1998, available at <http://www.hri.ca/fortherecordCanada/documentation/tbodies/e-c12-1998-24.htm>.

388 International Covenant on Economic, Social and Cultural Rights, available at <http://www.ohchr.org/english>.

389 "General comment No. 9", *op. cit.*, note 387.

390 Nolte, *op. cit.*, note 6, p. 97.

safety risks similar to jobs in the private sector. A minority of military jobs, e.g., combat personnel, minesweepers, and intelligence personnel, are subject to specific military health and safety risks. These risks are partly linked to the stress inherent in the military profession, partly to exposure to physical, chemical, and biological agents (e.g., contaminated exercise locations/deployment areas, radiation, noise, etc.).[391]

Just and favourable conditions of work are relevant for the armed forces and their personnel for a variety of reasons. First, adequate working conditions such as effective safety and health policies contribute to the prevention of accidents, sickness, and casualties in the workplace. In the private and public sectors of the European Union, for example, about 4.8 million work-related accidents take place every year, and 14 per cent of all workers suffer more than one accident per year; on average, nearly 5,200 workers lose their life as a result of a work-related accident, and about 158 million days' work are lost in the EU on an annual basis.[392] Box 17.1 provides an overview of frequent health and safety problems encountered in the military sector.

Box 17.1
Frequent Health and Safety Problems in the Military Sector[393]

A. Psycho-social problems

Stress

Changes in the structure of the military organization (restructuring, demands on mobility and flexibility), handling complex technological equipment, non-standard working times (especially during exercises and guard duties) are factors that may lead to stress.

Post-Deployment Stress Syndrome (PDSS)

PDSS has become a common phenomenon among armed forces personnel who have been deployed in military missions abroad. The exact cause of the syndrome is hard to identify. It is generally assumed that it is caused by a combination of factors: stress (different cultural and religious environments, violent environments, family stress, uncertainty, high degree of alertness, etc.), vaccinations, exposure to dangerous radiological and chemical substances, working environment and living circumstances, irregular working hours and performance during postings, etc. All these factors affect the immune system of soldiers deployed during humanitarian and foreign missions.

B. Occupational illnesses and accidents

Contaminated exercise locations/deployment areas

Problems with asbestos, depleted uranium, etc.

Radiation

For example, serious health problems with soldiers working with radar.

Physical agents like noise, moisture, etc.

A lack of ear protection can cause permanent hearing loss. This especially affects pilots and soldiers working at air bases.

Working time

Increased risk for accidents following long working hours during exercises and missions or because of monotonous night shifts (guard duty).

391 EUROMIL, "Final Report on the 6th International Seminar: Health and Safety for Military Personnel in European Forces: The Importance of Social Dialogue", 8-10 November 2002, Vaerlose/Copenhagen, available at <http://www.euromil.org/documents/reports/Report%20on%20the%206th%20International%20Seminar.pdf>.

392 Commission of the European Communities, 2004, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the practical implementation of the provision of the Health and Safety at Work Directives 89/391 (Framework), 89/654 (Workplaces), 89/655 (Work Equipment), 89/656 (Personal Protective Equipment), 90/269 (Manual Handling of Loads) and 90/270 (Display Screen Equipment), Brussels, 5 February 2004, available at <http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0062en01.pdf>.

393 See <www.euromil.org>.

Second, based on the ratification of the ICESCR, OSCE participating States have a legal obligation to implement just and favourable work conditions "by all appropriate means". Third, just and favourable conditions of work have a positive impact on work and life in the barracks. They reduce conditions such as poverty and poor living standards and reduce the chance of mistreatment. Fourth, good working conditions help to improve team cohesiveness and operational effectiveness. Finally, ensuring that soldiers enjoy a broad range of social rights can foster a positive public image of armed forces in society. An improved public image of the military as a responsible employer will also help ease recruitment of new personnel.

Military unions and representative associations often play an important role in realizing just and favourable working conditions. They are essential for developing a strategy to improve working conditions within the military. Military unions and representative associations play a role in both the adoption and implementation of legislation. Furthermore, they act on behalf of soldiers to identify and raise awareness of existing problems[394] (see Chapter 9, "Military Unions and Associations").

2. International Human Rights Commitments

The following covenants and treaties are relevant: the International Covenant on Economic, Social and Cultural Rights, various conventions of the International Labour Organization, the European Social Charter of the Council of Europe, relevant directives of the Council of the European Union, as well as OSCE commitments.

The ICESCR covers a whole range of rights relevant to this chapter,[395] including the right to:

- Remuneration that provides workers – at a minimum – with fair wages and equal remuneration, as well as a decent living for themselves and their families; safe and healthy working conditions; equal opportunities for everyone; rest, leisure, and a reasonable limitation of working hours, as well as holidays (Art. 7);
- Social security, including social insurance (Art. 9);
- Protection and assistance to families, the provision of child care, and taking special measures to protect and assist children and young people (on the last issue, see Chapter 15, "Children Associated with Armed Forces") (Art. 10);
- An adequate standard of living for everyone and their family, including adequate food, clothing, and housing (Art. 11);
- The highest attainable standard of physical and mental health (Art. 12);
- Education (Art. 13).

Except for the right to join or form a union (Art. 8), the ICECSR does not limit the enjoyment of the aforementioned rights in the interest of national security or for members of armed forces in particular.

The European Social Charter also includes many relevant social and economic rights discussed in this chapter, including the right to: just conditions of work (Art. 1); safe and healthy working conditions (Art. 3); fair remuneration (Art. 4); protection of employed women in particular in the case of maternity (Art. 8); vocational guidance and training (Arts. 9 and 10); protection of health (Art. 11); social security (Art. 12); social and medical assistance (Art. 13); and the right to benefit from social-welfare services (Art. 14). The European Social Charter stipulates that these rights can be limited provided that limitations

394 *Ibid.*

395 International Covenant on Economic, Social and Cultural Rights, available at <http://www.unhchr.ch/html/menu3/b/a_cescr.htm>.

are prescribed by law, necessary in a democratic society, and are in the interest of, *inter alia*, the protection of national security (Art. G on restrictions).[396]

The above-mentioned rights have also been reaffirmed in several ILO conventions. These conventions cover a broad range of issues, including equality of opportunity and treatment;[397] employment security;[398] wages;[399] working time, hours of work, weekly rest, and paid leave;[400] occupational safety and health.[401]

While the aforementioned treaties and covenants are general in nature, the European Union has adopted a range of directives that establish specific working conditions. Prevention is the guiding policy for EU occupational health and safety regulation. In order to avoid accidents and occupational illnesses, EU-wide minimum requirements for health and safety at the workplace have been adopted, as have requirements on working time. These include Directives 89/391 (Framework),[402] 89/654 (Workplaces),[403] 89/655 (Work Equipment),[404] 89/656 (Personal Protective Equipment),[405] 90/269 (Manual Handling of

396 The European Social Charter of the Council of Europe is available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm>.

397 Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (No. 100), 1951; Recommendation concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (No. 90), 1951; Convention concerning Discrimination in Respect of Employment and Occupation (No. 111), 1958; Recommendation concerning Discrimination in Respect of Employment and Occupation (No. 111), 1958, available at <http://www.ilo.org/ilolex/english/index.htm>.

398 Convention concerning Termination of Employment at the Initiative of the Employer (No. 158), 1982; Recommendation concerning Termination of Employment at the Initiative of the Employer (No. 166), 1982; Recommendation concerning Termination of Employment at the Initiative of the Employer (No. 119), 1963, available at <http://www.ilo.org/ilolex/english/index.htm>.

399 Convention concerning Labour Clauses in Public Contracts (No. 94), 1949; Recommendation concerning Labour Clauses in Public Contracts (No. 84), 1949; Convention concerning the Protection of Wages (No. 95), 1949; Recommendation concerning the Protection of Wages (No. 85), 1949; Convention concerning Minimum Wage Fixing, with Special Reference to Developing Countries (No. 131), 1970; Convention concerning the Protection of Workers' Claims in the event of the Insolvency of their Employer (No. 173), 1992; Recommendation concerning the Protection of Workers' Claims in the Event of the Insolvency of their Employer (No. 180), 1992, available at <http://www.ilo.org/ilolex/english/index.htm>.

400 Convention concerning the Application of the Weekly Rest in Industrial Undertakings (No. 14), 1921; Convention concerning Weekly Rest in Commerce and Offices (No. 106), 1957; Recommendation concerning Weekly Rest in Commerce and Offices (No. 103), 1957; Convention concerning Part-Time Work (No. 175), 1994; Recommendation concerning Part-Time Work (No. 182), 1994; Recommendation concerning Reduction of Hours of Work (No. 116), 1962, available at <http://www.ilo.org/ilolex/english/index.htm>.

401 Convention concerning Occupational Safety and Health and the Working Environment (No. 155), 1981; Recommendation concerning Occupational Safety and Health and the Working Environment (No. 164), 1981; Protocol of 2002 to the Occupational Safety and Health Convention (No. 155), 1981; Convention concerning Occupational Health Services (No. 161), 1985; Recommendation concerning occupational and health service (No. 171), 1985; Recommendation concerning the Protection of the Health of workers in Places of Employment (No. 97), 1953; Recommendation concerning Welfare Facilities for Workers (No. 102), 1956; Recommendation concerning the List of Occupational Diseases and the Recording and Notification of Occupational Accidents and Diseases (No. 194), 2002, available at <http://www.ilo.org/ilolex/english/index.htm>. There are also conventions for the protection of workers against specific risks.

402 Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, available at <http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31989L0391&model=guichett>.

403 Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace (first individual directive within the meaning of Article 16 (1) of Directive 89/391/EEC), available at <http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31989L0654&model=guichett>.

404 Council Directive 89/655/EEC of 30 November 1989 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), available at <http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31989L0655&model=guichett>.

405 Council Directive 89/656/EEC of 30 November 1989 on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace (third individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989L0656:EN:HTML>.

Loads)[406] and 90/270 (Display Screen Equipment),[407] as well as European Working Time Directive 93/104.[408] Both the Framework Directive and the European Working Time Directive make exceptions that are relevant for the armed forces. Art. 2.2 of the Framework Directive states that:

> This directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it. In that event, the safety and health of workers must be ensured as far as possible in the light of the objectives of this Directive.[409]

OSCE participating States have also expressed their commitment to strive for the achievement of acceptable working conditions and to ensure that their citizens enjoy employment rights (see Box 17.2). Particularly relevant in this regard is the OSCE Code of Conduct on Politico-Military Aspects of Security, which commits participating States to ensure that military, paramilitary, and security service personnel will be able to enjoy and exercise their human rights and fundamental freedoms, including economic and social rights. Para. 32 of the Code requires participating States to "ensure that military, paramilitary and security forces personnel will be able to enjoy and exercise their human rights and fundamental freedoms as reflected in [O]SCE documents and international law, in conformity with relevant constitutional and legal provisions and with the requirements of service".

Economic, social, and cultural rights are of a different nature than civil and political rights. Civil and political rights are negative rights and generally require governments to refrain from action. Economic, social, and cultural rights, however, constitute positive obligations for governments. In this sense, the negative protection of civil and political rights is much more straightforward, and the question arises as to which legal standard has been violated when economic, social, and cultural rights are infringed. This does not imply that economic, social, and cultural rights are deemed to be non-enforceable. It means, rather, that "many states and many human rights systems have chosen not to enforce them through the judicial process, but to enforce them through other means".[410]

406 Council Directive 90/269/EEC of 29 May 1990 on the minimum and safety requirements for the manual handling of loads where there is a risk particularly of back injury to workers (fourth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), available at <http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31990L0269&model=guichett>.

407 Council Directive 90/270/EEC of 29 May 1990 on the minimum safety and health requirements for work with display screen equipment (fifth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), available at <http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31990L0270&model=guichett>.

408 Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, available at <http://www.incomesdata.co.uk/information/worktimedirective.htm>.

409 Art. 2.2. of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, available at <http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31989L0391&model=guichett>. The European Working Time Directive follows this approach. In Art. 1.3 "Purpose and Scope", it refers to the Framework Directive by stipulating that: "This Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC, without prejudice to Article 17 of this Directive, with the exception of air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training." Available at <http://www.incomesdata.co.uk/information/worktimedirective.htm>.

410 E. Nii Ashie Kotey, "Some Fallacies About Rights: of Indivisibility, Priorities and Justiciability", in *Report of a Regional Seminar on Economic, Social and Cultural Rights* (Geneva: International Commission of Jurists, 1998).

Box 17.2

OSCE Commitments in the Sphere of Economic and Social Rights[411]

(12) [The participating States] recognize that … economic, social … and other rights and freedoms are all of paramount importance and must be fully realized by all appropriate means.

(13) In this context they will

(13.1) develop their laws, regulations and policies in the field of … economic, social … and other human rights and fundamental freedoms and put them into practice in order to guarantee the effective exercise of these rights and freedoms;

(13.2) consider acceding to the … International Covenant on Economic, Social and Cultural Rights … and other relevant international instruments, if they have not yet done so; …

(14) The participating States recognize that the promotion of economic [and] social … rights … is of paramount importance for human dignity and for the attainment of the legitimate aspirations of every individual. They will therefore continue their efforts with a view to achieving progressively the full realization of economic [and] social … rights by all appropriate means, including in particular by the adoption of legislative measures. In this context they will pay special attention to problems in the areas of employment, housing, social security [and] health … . They will promote constant progress in the realization of all rights and freedoms within their countries, as well as in the development of relations among themselves and with other States, so that everyone actually enjoys to the full his economic [and] social … rights … .

…

(21) The participating States will ensure that the exercise of the above mentioned rights will not be subject to any restrictions except those which are provided by law and are consistent with their obligations under international law, in particular the International Covenant on Civil and Political Rights, and with their international commitments, in particular the Universal Declaration of Human Rights. These restrictions have the character of exceptions. The participating States will ensure that these restrictions are not abused and are not applied in an arbitrary manner, but in such a way that the effective exercise of these rights is ensured.

3. Policy and Approaches

Working time and compensation for overtime

Traditionally, many countries have based their approach to the rules on working time in the armed forces on the concept of the permanent availability of military personnel. However, the extent to which they adhere to this concept varies. Earlier research carried out by Georg Nolte and Heike Krieger shows that, in Europe, the average period of working time for armed forces personnel is between 36 and 50 hours per week.[412] According to the same research, some countries take an approach comparable to that of the civil service. In Belgium, armed forces personnel generally work 38 hours per week, like civil servants. In Denmark, working hours follow those of other civil servants with modification for the effectiveness of the armed forces. For instance, it is normally required in Denmark to grant employees 11 hours of free time within each 24-hour period. Since military exercises sometimes last for several days and it is therefore not possible to comply with this provision, compensation is granted.[413] In Italy, the regular working time is 36 hours per week. Overtime compensation can be provided in money or in time.[414] However, practical problems

411 Vienna 1989 (Questions relating to Security in Europe, paras. 12, 13, 13.1, 13.2, 14 and 21).

412 Nolte, *op. cit.*, note 6, pp. 101-103.

413 *Ibid.*, p. 101.

414 F. Piotet, V. Porteret, K. Sorin, and C. Famechon-Koudjil, "Les conditions de vie des militaires en Europe : convergences et divergences (Allemagne, Belgique, Espagne, France, Pays-Bas, Italie et Royaume-Uni)", Centre d'études en sciences sociales de la défense, March 2003, p. 96.

and budgetary constraints may lead to delays in the provision of compensation or even non-payment.

In other countries, on the other hand, the organization of working time is still based on the principle of the permanent availability of soldiers. This is the case in France, for example, where Art. 12 of the General Statute on Military Personnel establishes that a soldier can be requested to be on duty at all times. The proliferation of international and national missions (e.g., Vigipirate, created in 1995 and reinforced after the attacks of 11 September) has confirmed this idea. Recently, however, following the reduction in the working time of civilian defence personnel in 2002), the French Ministry of Defence adopted a system of compensation for overtime for armed forces personnel. On the basis of this regulation, armed forces personnel were granted 15 extra days of annual leave, to a total of 60 days. If armed forces personnel are not able to take their leave days for reason of service, they may be given monetary compensation, up to a maximum equivalent of eight days per year, which, in financial terms, amounts to 680 euros.[415]

In the majority of OSCE states, armed forces personnel are entitled to periodic holidays. For example, they enjoy six weeks per annum of holidays in Denmark; one month in Spain; 23 or 24 days depending on rank in the Netherlands, with additional days depending on age. Some states also grant post-mission leave, such as Germany, Poland, and the United Kingdom.[416]

Remuneration

The regulations concerning salary and pensions for armed forces personnel vary from country to country. Here, the focus is on the authority that decides on remuneration, special incentives and allowances, safeguards for the timely payment of remuneration, dispute/complaint mechanisms, and comparisons of the salary level of armed forces personnel with their equivalents in the private and public sectors.

Differences exist as to the authority that decides rules on salary, allowances, and pensions.[417] In some countries, this power is vested in the government alone, e.g., in Croatia, while in other countries the parliament is involved. In yet other countries, the rules of remuneration are a result of collective-bargaining agreements with military unions, e.g., in Finland and in Sweden (see Box 17.3).

In some countries, in addition to a regular salary, armed forces personnel are eligible for special incentives and pay that recognize arduous, hazardous, and specific duties, upon the decision of a commander or political authority. In the Czech Republic, for example, commanders are entitled to decide about the variable part of salary only, which may not exceed one-third of the total salary. Upon the decision of a commander, soldiers may also receive one-off bonuses that are paid according to the funds available. In the Russian Federation, in accordance with Art. 13.9 of the Federal Law on the Status of Armed Forces Personnel, the president or the Government of the Russian Federation, in particular the minister of defence, may establish bonuses and other additional payments for armed forces personnel within the limits of the allocated funds.[418]

415 *Ibid.*, p. 95.

416 Nolte, *op. cit.*, note 6, p. 104.

417 EUROMIL's position on Military Pensions, as adopted by the EUROMIL Board on 16 September 2004, available at <http://www.euromil.org/documents/policies/positionpapermilitarypensions_16092004finweb.pdf>.

418 *Ibid.*

Box 17.3

Who Has the Authority to Decide on Rules for Remuneration in Selected OSCE Participating States?[419]

Azerbaijan
The president and the Cabinet of Ministers

Bosnia and Herzegovina
The Council of Ministers upon the proposal of the minister of defence in co-operation with the General Staff

Finland
The defence forces are vested with the relevant authority, as prescribed by law and collective-bargaining agreements

Latvia
The Cabinet of Ministers

Lithuania
Parliament and Government

Slovenia
The Ministry of Defence in co-operation with the Ministry of Labour, Family and Social Affairs

Sweden
The armed forces as a result of negotiations with unions

Ukraine
The Parliament, president, and Cabinet of Ministers

Usually, specific measures are in place in order to ensure that salary, allowances, and pensions are paid on time, such as the provision of efficient procedures in the area of management and administration of wages and pensions (e.g., Denmark). Legislative statutes (e.g., Slovenia) or service instructions (e.g., the United States) may require prompt payment of salary and other monetary benefits. Moreover, a reliable IT-based salary/pensions system, through which all payments are made by direct electronic deposit to the payee's bank account, ensures correct and timely payments to armed forces personnel. Nowadays, IT-based systems are in place in most OSCE participating States.[420]

Box 17.4

Appeals in Salary Disputes in Selected OSCE Participating States[421]

Azerbaijan
Military personnel are entitled to lodge a complaint with a court dealing with labour disputes.

Belarus
Military personnel have the right to appeal to a court.

Bosnia and Herzegovina
Individuals should first appeal to their superior in the chain of command; later, they can turn to the minister of defence and then to an authorized court.

Denmark
If a dispute, as an exception, is not amicably settled inside the defence organization, an individual can bring their case to the Ministry of Defence or to a court.

France
Appeals can be made to the administration of the Ministry of Defence or to the State Council.

Ireland
Appeals are made to the Labour Relations Court.

Poland
Appeals are made to superiors in the chain of command, an administrative court, an employment and social-security tribunal, or the minister of defence.

Spain
Appeals may either be administrative, ending in a ministerial resolution, or they can be lodged in civilian courts.

In case of disputes concerning salary (see Box 17.4), there exist different procedures for seeking redress. In some states, an individual can attempt to resolve a dispute by report-

419 ODIHR-DCAF questionnaire, question 62.
420 ODIHR-DCAF questionnaire, question 64.
421 *Ibid.*

ing the case to their superior in the chain of command before addressing the Ministry of Defence (e.g., Latvia, Bosnia and Herzegovina). In other states, an individual may bring a case to a labour court (e.g., Ireland), to an ordinary administrative court (e.g., Slovakia) or to a civilian court (e.g., Norway). In other states, the individual should first bring the case to employees' representatives, and then, if the problem persists, to an administrative court, as, for example, in Finland.[422]

With respect to the relationship between the level of salary/pensions of military personnel and the general salary/pension level in civilian professions (considering similar occupations, skills, and experience), the picture varies from state to state in the OSCE region. Box 17.5 provides an overview of the level of salaries of armed forces personnel compared with their equivalent in the public and private sectors in selected OSCE participating States.

Box 17.5

Salary Level of Armed Forces Personnel Compared with Personnel in Other Sectors in Selected OSCE Participating States[423]

France
Military personnel have a special legal status but they are similar to civilian administrative personnel with respect to financial issues.

Germany
The pay, pensions, and benefits armed forces personnel receive are comparable to those in the civilian sector.

Latvia
In the majority of cases, the level of salary, and especially pensions, of military personnel are higher in comparison with civilian professions.

Poland
Military personnel receive salaries that are, on average, 50 per cent higher than those of civilian personnel in similar posts. Military personnel receive pensions that are 50 per cent higher than those of civilian employees, calculated for the same period of employment.

Serbia
The salary of military personnel is lower than that of civilian employees in similar positions with similar qualifications.

United States
Regular military compensation for both officers and enlisted personnel is at the 70th percentile of that of civilian personnel with comparable education and experience. Pensions for retired military personnel exceed the average pension for civilians.

Health

In most OSCE participating States, armed forces personnel are entitled to full health care. In this regard, there exist two main approaches. On one hand, some states have a specific health-care system for military personnel. This is the case in Canada, for example, where Canadian Forces personnel are entitled to comprehensive health care through the Canadian Forces Health Services. In other states, there is no separate system for the health care of military personnel, and, therefore, civilian health-care systems also cover military personnel. This is the case in Norway, for example, where health care is provided for free to all citizens, service personnel included. The same happens in Denmark, where Danish citizens

422 ODIHR-DCAF questionnaire, question 64 (b).
423 ODIHR-DCAF questionnaire, question 67.

are normally covered by public health insurance, which is financed through taxation. Thus, all members of the armed forces are included in the general national health service.

Armed forces are responsible for providing for the treatment of armed forces personnel deployed in international missions. As soon as sick and/or wounded personnel are repatriated, the military or public health-care system offers the necessary treatment. Regardless of the prevailing health-care system, armed forces have the duty to provide medical care to service personnel in the barracks and during military exercises through military medical facilities. Box 17.6 shows a great variety of the availability of medical doctors in military service among the selected OSCE participating States, varying from 50 military medical doctors in Belarus per 1,000 armed forces personnel to two in Canada. The differences can be explained in three ways. First, this shows the extent to which military medical care is a priority in the country concerned. Second, the results can be explained by the fact that some countries might have a co-operation agreement between the military and private/state medical personnel. In Canada, for example, it might be possible that military personnel rely on civilian medical personnel. Third, the differences can be explained in the organization and efficiency of the medical service in the militaries of the countries concerned.

Box 17.6

Intensity of Medical Care: Availability of Military Medical Doctors for Armed Forces Personnel in Selected OSCE Participating States[424]

	Number of military medical doctors per 1,000 armed forces personnel
Belarus	50
Canada	2
Estonia	10
Georgia	6
Germany	3
Ireland	3
Latvia	33
Lithuania	5
Luxembourg	4
Norway	5
Poland	12
Slovakia	3

It is possible that, in one country, medical services are centralized and are supported by a large number of administrative and medical assistants, leading to efficiency advantages. For these reasons, the data presented in Box 17.6 has to be carefully interpreted. [424]

Diverging rules exist in OSCE states about whether spouses, children, and other family members may enjoy the same entitlements as armed forces personnel themselves. Families of armed forces personnel are entitled to full free medical care in, for example, Finland, France, Poland, and Spain. In the United Kingdom, where the National Health Service is in place, families are entitled to medical support only if they are accompanying soldiers abroad. In other states, families of armed forces personnel are not entitled to free health

424 ODIHR-DCAF questionnaire, question 60.

Box 17.7

Policies for Dealing with Injuries and Death while on Duty: Selected Examples[425]

Azerbaijan
According to Article 5.a of the Law on Compulsory State Insurance for Military Servicemen, 100 per cent compensation will be paid if the insured is killed or injured while on duty.

Belarus
Compensation is paid out by an insurance company in case of ascertained disability or death, in which case the family of the deceased is granted benefits.

Denmark
The injury must be reported within a year to the Insurance and Indemnification Office under the Defence Command Denmark. If personnel in the Danish Armed Forces suffer from an occupational illness, a report about the illness must be sent from the infirmary or a private doctor or, in case the medical report is sent to the Insurance and Indemnification Office, it will be forwarded to the Danish Social Board of Industrial Injuries.

Estonia
If armed forces personnel are killed while on duty, the state shall pay their children, parents, widow or widower, and other dependents, pursuant to the Family Law Act, a single allowance equal to 10 years' salary of the deceased. Funerals are organized by the state and the expenses are also borne by the state. Within six months from the death of the service member, an application along with a death certificate and documents proving that the dependent is entitled to the benefit must be submitted to the commander. If an individual is injured, the state will pay a single allowance. The amount will depend on the severity of the injury.

Germany
If armed forces personnel die as a result of a deployment-related accident, their families receive compensation, as well as damages in certain cases, in addition to pensions. Moreover, armed forces personnel have the opportunity to cover themselves against such risks by contracting appropriate personal insurance (life insurance, accident insurance with accidental-death coverage).

Poland
The legal basis is an act of 11 April 2003 on compensation, which is applicable in case of accidents and illness during military service. In case of death, a lump sum and a family allowance are paid, the costs of the funeral are refunded, and financial aid is provided. In case of injury or other illness, a surcharge or extra contribution for the costs of medical treatment is paid, a holiday bonus is provided, the costs of hospitalization are refunded (entirely or partly), and financial aid is provided.

Russia
If a serviceman is killed or wounded, an investigation into the circumstances is carried out. Based on the results of the investigation, a decision is made regarding the initiation of criminal proceedings or the refusal to initiate criminal proceedings. At the same time, commanding officers make a decision concerning insurance payments to the victim or his relatives.

Spain
In case of death, the closest relatives will receive monetary compensation: the widow or widower will receive an allowance for life or until he or she remarries. Children will receive an allowance until they are 21 years old or 24 years old if they are unemployed. The parents will receive an allowance in case the deceased had no wife or children and the parents were supported by him or her.

Turkey
In case of injury, armed forces personnel receive medical treatment and health care without any charge, and they continue to receive their salary and other allowances. If they do not have any physical disability that will prevent them from working, they can keep their position. If their health does not allow them to maintain their position, they receive their pension. In case of the death of a member of the armed forces, their legal family members receive compensation and a pension.

425 ODIHR-DCAF questionnaire, question 56 and 66.

care. Dependents of Canadian Forces personnel, for example, do not have their health care provided by the Canadian Forces; rather, they are entitled to comprehensive health care through their provincial Ministries of Health similar to all Canadian citizens. Families of members of the Canadian Armed Forces also have the option to participate in extended family medical/dental coverage through the Public Service Health Care Plan. In case of international deployments, there are exceptions to allow Canadian Forces medical coverage of dependants who accompany deployed members of the armed forces. Many other OSCE participating States follow the same approach, e.g., Ireland, Latvia, Lithuania, and Switzerland.

In case armed forces personnel are injured or killed during duty, specific policies are in place in almost all OSCE participating States. Box 17.7 illustrates the procedures for dealing with the matter in selected countries.

As far as can be established, in case of death, disability, or injury, financial benefits, disability compensation or pension, pension rights, and payment of damages also apply to family members and relatives of deceased, injured, or incapacitated armed forces personnel.

Safety at work

In general, each country has specific laws on safe and healthy working conditions for military personnel. In the majority of states, national laws and regulations for working conditions in civilian environments also apply to military personnel. In Germany, for example, the Federal Law on Occupational Safety and Health includes soldiers within the classification of "working people". Thus, the armed forces have to guarantee the same level of occupational/environmental safety and health for their military personnel and their other employees as is prescribed for civilians working in the public and private sectors. For this purpose, the Federal Armed Forces have their own occupational safety and occupational health organizations, as well as their own authorities to exercise supervision, similar to civilian supervisory authorities (occupational safety and health inspectors). The same approach is taken, for example, in Slovakia, where these conditions are established in the Labour Code.

In another group of countries, there are specific military regulations for occupational/environmental safety and health on regular duty, which mainly follow the general national civilian laws and regulations on these issues. In Canada, for example, the Queen's Regulations and Orders for the Canadian Forces are derived from the National Defence Act.[426] They assign responsibility to commanding officers for the safety of their subordinates and make provisions for disciplinary sanctions against those who neglect their duties. Part 1 of Canada's Labour Code prescribes occupational health and safety requirements for workplaces under federal jurisdiction.[427] The Canadian Forces are legally exempt from the Labour Code and its regulations, but the content of the Labour Code is reflected in Department of National Defence General Safety Standards, which are applied to the Canadian Forces.

Family life

The specific nature of military life, e.g., the nature of the job, life on military bases, international deployments, and frequent moving, have an impact on the family members of armed forces personnel and, therefore, on the latter's private life. Military institutions in many OSCE participating States increasingly recognize the importance of achieving a good bal-

426 Available at <http://laws.justice.gc.cdenln-51>.

427 Available at <http://laws.justice.gc.ca/en/ShowTdm/cs/L-2>.

Box 17.8

Safe and Healthy Working Conditions for the Armed Forces: Specific Military Regulations Versus Civilian-Based Regulations in Selected OSCE Participating States[428]

Specific Military Regulations

Azerbaijan

Internal service regulations of the armed forces cover safe and healthy working conditions.

Turkey

Regulations and directives have been developed in accordance with national legislation in order for military personnel to serve in a secure and healthy environment and with safe and healthy working conditions. These regulations and directives are as follows: Turkish Armed Forces Environmental Directive (MD 433-1); Turkish Armed Forces Directive on the Control of Solid Waste (MY 433-2); Turkish Armed Forces Directive on the Control of Air and Water Pollution, as well as Noise and Waste (MY 433-3); Turkish Armed Forces Directive on the Control of Medical Waste (MY 433-1A); Turkish Armed Forces Directive on Forestation (MY 433-49); Turkish Armed Forces Directive on Combating Infectious Diseases (MY 33-14); Turkish Armed Forces Directive on Food Control (MY 33-13A).

Civilian Safety and Health Regulations Applicable to the Armed Forces

Luxembourg

General laws on safe and healthy working conditions apply.

Portugal

General legislation applies.

Slovakia

Safe and healthy working conditions are established in general, not specifically for military personnel.

Mixed System of Military-Specific and Civilian Regulations

France

In so far as the work of armed forces personnel resembles the work of civilian personnel of the Ministry of Defence, civilian rules and regulations apply (e.g., the Labour Code); otherwise, military rules and regulations apply (Art. 16, Defence Ministry Decree 85-755 of 19 July 1985 on Hygiene, Security at Work and Prevention).

ance between private and military life for service members, acknowledging the influence of private life on military performance.

In this context, the vast majority of OSCE participating States have introduced legislation on maternity/paternity leave and on child care in the military sector. In some states, only female service members may benefit from maternity leave and the right to child care, e.g., the Russian Federation, Switzerland, and Turkey. In other states, both men and women are entitled to parental leave, e.g., the Czech Republic, Germany, and Latvia. The length and the conditions of the leave vary from state to state. Box 17.9 provides examples of states following one of these two approaches.

In some countries, the armed forces have nurseries for use by armed forces personnel. In Belgium, for example, several nurseries for babies and young children of armed forces personnel are administered by the Central Office for Social and Cultural Activities, under the supervision of the Ministry of Defence. In France, there are nursery schools and child-care facilities for babies and young children of armed forces personnel.[429]

428 ODIHR-DCAF questionnaire, question 57.

429 Piotet *et al.*, *op. cit.*, note 414, p. 128-129.

Box 17.9

Latvia, Norway, Switzerland, and Turkey: Maternity and/or Paternity Leave in the Armed Forces[430]

Paternity and Maternity Leave

Latvia

Maternity and paternity leave applies to all members of the armed forces. If a soldier wishes, he or she shall be granted leave to take care of a child without retaining service remuneration until the child reaches the age of 1 1/2 years.

Norway

Fathers are, at a minimum, entitled to five weeks' leave with full pay for taking care of a newborn child. In such cases, their salary is paid by national social services. For personnel employed by the government, an additional 10 days are offered in connection with the birth of a child. This is paid by the employer. *Mothers* are given three weeks of leave before expected childbirth and a minimum of six weeks of leave after childbirth. Full regular salary is paid by national social services. In addition to the above-mentioned, *mothers or fathers* are given 38 weeks of leave with full pay from national social services to take care of a child during the first 12 months after the child is born. The parents decide whether the mother or the father will make use of this benefit. The Ministry of Children and Equal Rights seeks to motivate fathers to share this period with the mother in order to encourage shared responsibility for raising children.

Only Maternity Leave

Switzerland

Maternity/paternity leave is not granted except for female members of the armed forces who give birth: they may quit the armed forces after the birth of a child.

Turkey

Maternity leave is permitted for the purposes of child-bearing and child care. The Turkish armed forces do not permit paternity leave. Female military personnel benefit from maternity leave and the right to child care.

Furthermore, armed forces recognize the importance of supporting the family of their personnel in order to help them accept the constraints inherent in military life. To this end, the military organizes family unification programmes and programmes for assisting families in case of deployments abroad; they often consist of preparation before a mission and in a reintegration and support programme after the mission is over. In Denmark, for example, there are special programmes to offer support to personnel and relatives who are threatened by, or suffer from, the psychological after-effects of traumatic incidents they experienced in the service, and which essentially influence their everyday life. The target group includes both discharged and serving personnel.

In some countries, specific institutions inside the military deal with the social and family problems of service members. In France, for example, an organization called Army Social Welfare organizes social events to help military personnel with problems and to improve their quality of life. It can also grant financial aid to armed forces personnel in need. Furthermore, it manages the Ministry of Defence budget for holiday houses and apartments in mountain and sea resorts.[431]

430 ODIHR-DCAF questionnaire, question 61.

431 *Ibid.*, p.128.

4. Best Practices and Recommendations

- In line with the OSCE Code of Conduct on Politico-Military Aspects of Security (in particular para. 32), OSCE participating States have the obligation to ensure that armed forces personnel will be able to enjoy and exercise their human rights and fundamental freedoms. According to the Vienna 1989 commitments, OSCE participating States are obliged to ensure that the exercise and enjoyment of economic and social rights are not restricted, with the exception of those that are provided by law and are consistent with international commitments;
- Restrictions on the exercise and enjoyment of social and economic rights by armed forces personnel need to be specific. General restrictions need to be avoided;
- Working conditions are not only a matter of laws and regulations, but also of implementation. Armed forces should have all necessary measures in place in order to ensure that working conditions are implemented in accordance with national law and international obligations;
- Special attention is needed for administrative measures to ensure that salaries, pensions, and allowances are paid on time. Furthermore, training in health and safety issues is important;
- As part of social dialogue on working conditions, parliaments and representative associations of armed forces personnel should be involved in determining working conditions, including issues such as salaries, allowances, and pensions; working time; health; safety at work; and issues related to achieving a balance between private/family life and working life;
- In case of a disagreement between armed forces personnel and the ministry of defence concerning issues related to working conditions, armed forces personnel should have the possibility to turn to independent arbiters (courts, tribunals, ombudsmen, committees, commissioners, etc.). These independent arbiters should have full powers to investigate or mediate cases, including access to military premises, opportunities to question armed forces personnel, and access to classified information, and they should have the authority to make recommendations wherever necessary (also see Chapter 22, "Ombudsmen");
- Ministries of defence should take all possible measures to ensure that provisions related to working conditions are implemented in accordance with national law and international obligations;
- Ministries of defence should provide medical care to armed forces personnel in the barracks and during military operations and exercises;
- In case of injury or death during military duty, the ministry of defence should provide for adequate care (health, allowances, etc.) to armed forces personnel and their partners/families;
- In support of family life and in the interest of both parents and children, armed forces should have an active programme in place for supporting parents of young children, e.g., parental leave, nursery schools, and other child-care benefits;
- Recognizing the importance of supporting the private/family life of armed forces personnel, armed forces should organize programmes for assisting families/partners in case of deployments abroad. The programmes should take place before, during, and after deployments.

Chapter 18
Veterans

Whereas nearly all chapters in this handbook deal with the human rights of personnel when they are serving in the armed forces, this chapter focuses on personnel who have left the armed forces. In particular, it addresses the rights of veterans as a sub-group of former servicemen and -women (while acknowledging that in some states veterans can still be in service). Depending on their historic and cultural backgrounds, various OSCE participating States define veterans differently, which has consequences in terms of the number of veterans who are entitled to benefit packages, as well as the type of benefits they may receive.

The key question of this chapter is: who is a veteran? To answer this question, two points need to be considered: (a) whether personnel served on active duty or as reserve forces; (b) whether armed forces personnel have conflict experience or not. These are important distinctions because the amount and type of benefits for veterans depends on the definition of veterans. Generally speaking, the more exclusive the definition of veterans, the more generous the benefits that veterans enjoy. Veterans with conflict experience enjoy more benefits than veterans without such experience (if the latter receive any benefits at all).[432]

This chapter first deals with the relevance of veterans for OSCE participating States. Relevant rights are discussed, in particular the social, cultural, and economic rights that apply to veterans and that OSCE participating States have committed to uphold. Examples are provided of national approaches to defining veterans. The chapter also discusses the major elements of veterans policies by answering the following questions: Who receives support? Who delivers support? What type of support? How can the transition from military to civilian life be facilitated? The chapter concludes with policy recommendations.

1. Issues at Stake

An important feature of civilian-military relations is how states recognize the sacrifices that armed forces personnel have made for their country and how states provide care and support to armed forces personnel and their families once they have left the military.[433] State support for, and societal recognition of, veterans are evidence of national solidarity, as well as of the values that a society stands for. They also show an intergenerational bond with those who have made sacrifices for future generations.

While states have at least a moral obligation to establish policies for veterans because of the sacrifices they have made, there are also other pressing reasons for doing so.

Duty of care

As a responsible employer, the armed forces have the duty of care for their current and former employees. While on duty, particularly in war or war-like circumstances, armed forces personnel are often subjected to dangerous and life-threatening situations. Many veterans often suffer the consequences of their service even after they have left the armed

432 Christopher Dandeker, Simon Wessely, Amy Iversen, and John Ross, "What's in a Name? Defining and Caring for 'Veterans': The United Kingdom in International Perspective", *Armed Forces & Society,* Vol. 32, No. 2, January 2006, pp. 161-177.

433 *Ibid.*

forces, experiencing, for example, post-traumatic stress disorder (PTSD), physical health problems, and disabilities. States have a moral duty, if not a legal obligation, to take care of veterans.

A proper veterans policy supports recruitment and retention

It is in the interest of the armed forces as an employer to take care of veterans, as improved services for veterans can be seen as a recruitment incentive as well. In addition, providing improved benefits for veterans signals to current and future armed forces personnel that the armed forces is a responsible employer. On the other hand, negative publicity about the poor treatment of veterans could deter potential future recruits from signing up for the armed forces. It could also lead to dissatisfaction among those serving in the armed forces, especially those who are about to return to civilian life, as well as among those who have already left the armed forces.[434]

Care for veterans supports a broader social agenda

It can be argued that specific military social policies serve broader social objectives. Helping veterans, especially those who are vulnerable or homeless, also contributes to a broader agenda of tackling social exclusion.

Transition from military to civilian life

As is the case with other (non-veteran) former servicemen and -women, it is in the interest of society in general, the armed forces, and the individuals concerned that special measures be taken so that (especially young) veterans are in a position to have a successful career as civilians. This is important not only to individual servicemen or -women, but also to the armed forces as an employer. If job seekers see that armed forces have an active policy in place for former servicemen and -women, they may be more interested in working for the armed forces. In the same way, such a policy also reassures current armed forces personnel.

Veterans in post-conflict situations

The concept of *veteran* has a special meaning in post-conflict states. Unfortunately, some OSCE participating States have experienced war, e.g., the countries of the western Balkans. Since the end of the wars in the former Yugoslavia, all western Balkan states have entered a phase of downsizing and restructuring their armed forces. In the countries involved, each warring party brought many men to arms who became redundant after peace agreements were reached. Though each country faces different challenges, they have all laid off armed forces personnel. Not all veterans have the needed expertise and qualifications to succeed in civilian life. Without a proper demobilization programme, the armed forces of the parties involved become financially unsustainable. Without proper veterans programmes, many former soldiers will be poorly reintegrated into society, if at all.

2. International Human Rights Commitments

Like other citizens, veterans are entitled to social and economic rights. In this respect, all OSCE participating States have made commitments that apply to veterans. For example, states have committed themselves "to promote and encourage the effective exercise of … economic [and] social … rights".[435] To this effect, states are obliged to "develop their laws, regulations and policies in the field of economic, social and other human rights and fundamental freedoms and put them into practice in order to guarantee the effective exercise of

434 *Ibid*., pp. 167 and 169.

435 Helsinki 1975, Principle VII, para. 2.

these rights and freedoms".[436] In this context, states "will pay special attention to problems in the areas of employment, housing, social security [and] health".[437] OSCE participating States have also promised that the exercise of these rights "will be not subject to any restriction except those which are provided for by law and are consistent with their international obligations under international law".[438] Last but not least, participating States have also committed themselves to "ensure that these restrictions are not abused and are not applied in an arbitrary manner".[439]

How do these rights apply to veterans? Like other citizens, veterans have the right to proper health treatment, housing, employment, and social security. Of course, it has to be underlined that these social and economic rights differ to a certain extent from political and civil rights in that the former are an end to be achieved and aspired to. Civil and political rights, on the other hand, have to be applied immediately and fully. Another difference is that social and economic rights require policies and measures for their implementation on the national level, whereas political and civil rights require legal action at the national level. For this reason, an OSCE commitment in the sphere of social and economic rights does not automatically constitute a right at the national level unless a state has adopted such a right in national legislation. In addition, a general prohibition of discrimination applies to veterans policies in terms of their enjoyment of social and economic rights. A state cannot exclude or favour one group of veterans over another group of veterans on the basis of gender, ethnicity, language, social origin, association with a national minority, or political or other opinion.

Another important right that applies equally to veterans is the right to a fair trial. If veterans have disputes with their government over their treatment, they should have access to the justice system.

3. Who Is a Veteran? – Different National Approaches

There is no definitive answer to the question "Who is a veteran?" Depending on whether a country has been involved in war with another country, in civil war, or in peacekeeping operations, countries may opt for a different definition of a veteran. It is also a matter of a country's tradition of commemorating previous involvement in wars and conflicts. Box 18.1 gives an overview of approaches to veterans in selected OSCE participating States.

436 Vienna 1989, para. 13.1.

437 *Ibid.*, para. 14.

438 *Ibid.*, para. 21.

439 *Ibid.*

Box 18.1
Different Approaches to Veterans in Selected OSCE Participating States[440]

	Germany	Former Yugoslav Republic of Macedonia	Spain	Bosnia and Herzegovina	Bulgaria	Romania	Serbia	Albania
Who is a veteran?	No legal status	WW II combatants and those who participated in the Democratic Army of Greece between 1945 and 1949	Anyone who has served in the Spanish armed forces or the Civil Guard	WW I and WW II combatants and combatants in other wars in the region	Any military person directly involved in combat during war waged by Bulgaria in protection of national interests and territorial integrity	WWI and WWII combatants, including those forced to serve in German military units, provided they have Romanian citizenship; military personnel involved in peacekeeping and anti-terrorism missions	WW I and WW II combatants; those who have taken part in armed activities since August 1990	WW II combatants
How many?	Formally, there are no veterans	Approximately 17,000	40,000 in the Association of Veterans, plus those who belong to specific military units	No data available	29,000-30,000	Approximately 300	Approximately 400,000	Approximately 20,000
Is there a national veterans day?	No	11 October	Yes, but there is no specific date; usually held in October	4 July, Day of Veterans of WW II	6 May, Valour and Army Day	9 May, Victory Day	No	29 November, Liberation Day
Are there governmental and non-governmental organizations for veterans?	Associations	Responsibility of the Ministry of Labour and Social Policy	Non-governmental: Association of Veterans of the Armed Forces	Ministerial department for veterans	No specialized ministry for veterans; shared competencies among numerous ministries	Associations; department within the Ministry of Defence	Ministry of Labour, Employment and Social Policy	Specific section of the Defence Ministry
Are there special services for veterans?	None	War invalidity allowance, family invalidity allowance, invalidity allowance, material allowance, care allowance, orthopaedic allowance, health protection	Mutual support for members and some funding for volunteer activities	Pensions, subvention for invalids and additional subventions for specific categories	Medical supplies (75% of the cost paid by national budget); free public transportation in the region where they live; preferential use of social patronage services and accommodation in homes for senior citizens; use of public and military canteens; preferential rate for medical treatment	Free transportation, housing support, exemption from paying taxes, free medical care	Special social protection in accordance with the law	War veteran award, special health services, free public transportation

440 Information was received from the Parliament of Albania, the Parliament of Bosnia and Herzegovina, the Parliament of Bulgaria, the former Yugoslav Republic of Macedonia (in co-operation with the Association of Veterans of Macedonia), the Danish Military Personnel Department, the German Defence Ministry, the Parliament of Romania, the Parliament of Serbia, and Spain's Association of Veterans of the Armed Forces (*Hermandad de veteranos de las Fuerzas Armadas*).

All former servicemen and -women are veterans

There is a group of OSCE participating States that take a broad approach by defining a veteran as anyone who has served in the armed forces, regardless of whether they were deployed in conflict zones. In the United Kingdom, for example, veterans are all persons who have served for more than a day, as well as their dependants. It has been estimated that the United Kingdom has approximately 10 million former servicemen and -women, widows and widowers, and other dependants; they constitute 16 per cent of the British population.[441] Implementation of the United Kingdom's veterans policy is administered by the Veterans Agency, whose core functions are to administer the war disablement pension scheme and the armed forces compensation scheme (for compensating any service-related injury, ill health, or death), as well as to provide guidance, advice, and practical help.[442] In addition, veterans may visit battlefields and war cemeteries all over the world at the expense of the state.

Another example is the United States, where all former servicemen and -women are considered to be veterans, provided that they served for at least 90 days and were honourably discharged. In addition, those servicemen who have served in war circumstances, even if only for one day, are recognized as veterans with wartime service. War veterans are eligible for various special benefits. Wartime service can only be gained in a war declared by Congress. In addition, Congress can define a conflict as warlike circumstances, in which case the start and end of the conflict, as well as the geographical area, are precisely defined in legislation enacted by Congress.[443]

In Canada, a veteran is any former member of the Canadian Forces who has been honourably discharged and who has met all the professional military occupational requirements of the Department of National Defence.

What these three countries have in common is that they have a rather broad definition of veterans: everyone who has served is a veteran. However, a veteran has to meet specific criteria in order to benefit from special policies, e.g., disability, illness, or having served in war or warlike circumstances.

Former servicemen with active service deployment

A second group consists of states where only those former armed forces personnel who have served in wars or in warlike circumstances (e.g., peace operations) are qualified as veterans. This approach has been followed by the Netherlands since 1990, where those soldiers who fought in World War II, Indonesia (1945-1950), New Guinea (1945-1962), and peace operations (starting with the UN peace operation in Korea 1950-1953) up to Afghanistan in 2006 have been classified as such.[444] Belgium also belongs to this second group of states, where all former servicemen and -women are counted as veterans if they have been deployed in wars, such as World Wars I and II, the Korean War, or hostilities in Congo, as well as in peace operations.[445]

441 According to the official estimates of the War Veterans Agency of the United Kingdom, available at <http://www.veteransagency.mod.uk>; Dandeker *et al.*, *op. cit.*, note 432, estimate that the United Kingdom has 13 million veterans, including their dependants, constituting 20 per cent of the British population, p. 165.

442 The core functions of the United Kingdom's Service Personnel and Veterans Agency are described at <http://www.veteransagency.mod.uk/about_us/about_us.html>.

443 J.M.P Weerts, "Het Nederlands veteranenbeleid in internationaal perspectief", *Militaire Spectator*, Vol. 169, No. 5, 2000, pp. 245-253.

444 The Dutch Defence Ministry published policy guidelines in 2000 on the provision of care for veterans. The original document is entitled "Zorg voor veteranen in samenhang: Hoofdlijnen van het veteranenbeleid", The Hague, 2000.

445 See the webpage of the Belgian National Institute for Invalids of War, Veterans and Victims of War at <http://www.niooo.be/PAGES/wie.html>.

The Russian Federation also belongs to this group, as evidenced by its definition of veterans in its 1995 Law on Veterans.[446] The legal definition of veterans currently includes around 1 million participants and disabled persons of World War II (known in Russia as the Great Patriotic War); 9.5 million "toilers in the rear during the war years" (who worked on the home front during World War II); more than 200,000 survivors of the siege of Leningrad; 19.4 million labour veterans; more than 1.4 million veterans of battles; 300,000 veterans of the armed forces; and 22,000 veterans of high-risk situations.[447] This system of groups of veterans signifies the importance of war veterans in Russian society. The significance of veterans is further underlined by the existence of a parliamentary committee for veterans affairs.[448] In fact, this list constitutes a hierarchy of veterans, and different groups of veterans are entitled to different forms of benefits and commemoration.[449] The group entitled to the most benefits are the soldiers who served in the Great Patriotic War. Their benefits include employment and education guarantees, as well as benefits in health care, housing, tax relief, and transportation.[450]

The number of living veterans of the two World Wars has decreased over the years, whereas the number of those participating in military missions abroad is growing. States have increasingly started to recognize that this group of new veterans and their families also need to be addressed. In Romania, for example, since October 2006 personnel who have participated in military missions abroad or in anti-terrorism missions in Romania for at least four months, whether continuously or in total, including air patrols and naval interventions, will be granted the honorary title of military veteran, whereas civilian personnel meeting the same criteria will be given the title of veteran. If an individual is disabled, the title of military or civilian veteran is granted regardless of the duration of participation in a particular mission. Disabled military or civilian veterans have the right to continue their employment in the Ministry of Defence.[451]

Only World War I and World War II soldiers

A third group refers to countries where only those soldiers who served in World War I and II are recognized as veterans. This is the case in, for example, the former Yugoslav Republic of Macedonia (which also includes those who fought in the Democratic Army of Greece between 1945 and 1949), Albania, and Bulgaria.

Formally no veterans exist

A fourth group consists of states where veterans formally do not exist. Examples include Denmark and Germany, where there is no legal status of veteran for former soldiers. With regard to Germany, it is official policy to not continue the traditions of the German armed forces that existed before 1945. This does not imply that those who served in both World Wars or in peacekeeping operations do not receive any care. General laws or private foundations provide care. For example, participants in World War II had to be taken care of before the German armed forces (*Bundeswehr*) came into existence in 1955. Between 1945 and 1955, there was no military to assume responsibility for them. One of the first German

446 The 1995 Law on Veterans is available, in Russian, at <http://www.consultant.ru/popular/veteran/31_1.html#p30>.

447 See the report (available in Russian only) of the State Duma Committee for Veterans Affairs for 2005, available at <http://www.duma.gov.ru/veteran/otshet/2005.htm>.

448 The State Duma Committee for Veterans Affairs was created in July 2003, see <http://www.duma.gov.ru/veteran>.

449 Communication with Dr. Nataliya Danilova, Senior Lecturer at St. Petersburg University and Research Fellow at Bristol University (UK).

450 Nataliya Danilova, "Social policy for veterans: conceptualisation and the case study of Russia", research proposal, University of Bristol, 2006.

451 This information is outlined in Government Ordinance No. 82 of 25 October 2006 on recognition of the merits of army personnel participating in military missions.

social policies after World War II dealt with caring for victims, including civilians, soldiers, and their families. Concerning medical treatment, former German servicemen and -women do not receive any treatment from the military health system. They are treated like any other former civil servant: the state pays 70 per cent of the costs of medical treatment; 30 per cent is paid by the former serviceman or -woman or by a private health-insurance provider. The interests of disabled veterans are taken care of by private associations or by private, mostly regional, foundations (e.g., the German Social Association). This policy has been in place since the foundation of the Federal Republic of Germany in 1949.[452]

Veterans: post-conflict states

OSCE participating States in the western Balkans were confronted with conflict and civil war in the 1990s that affected the status of veterans (in addition to veterans of World War I and World War II). In Bosnia and Herzegovina, for example, every military formation of the three entities that took part in the civil war has veterans. Each of them has its own rules regarding the status of veterans. Bosnia and Herzegovina does not have a ministry for veterans affairs, but each entity has associations for veterans.[453] In Serbia, the rights of veterans are constitutionally guaranteed rights. The policy to protect these rights is financed by the state budget and regulated by several laws: the Law of the Federal Republic of Yugoslavia on the Basic Rights of Veterans, Disabled Veterans and Families of Fallen Veterans (still in force), and the 1998 Law on the Rights of Veterans, Disabled Veterans and Families of Fallen Veterans. Serbia is currently harmonizing these laws into a single law on veteran and invalidity protection (tabled at the National Assembly). According to the aforementioned 1998 Law, a veteran is any citizen of Yugoslavia who was involved in World War I or World War II (as part of the anti-fascist movement), as well as anyone involved in hostilities after 1990. Estimates suggest that some 400,000 veterans fall into the latter category. The 1998 law also stipulates that military personnel disabled during hostilities or during peacetime (including current armed forces personnel) enjoy special protection. According to the Law on Peacekeeping Operations, in case of injury, illness, or death of personnel, compensation will be paid according to the regulations of the international organizations leading the operation in question.[454]

4. Policies

Who receives support?

States have developed different approaches to determining the benefits that veterans are entitled to. In many OSCE participating States, different categories of veterans receive different kinds of support, depending on, *inter alia*, the type of conflict (e.g., World War II veterans versus veterans of recent conflicts) and whether or not they were disabled during their service.

For example, Canada has developed a needs-based approach. Depending on veterans' specific needs, and if certain conditions are met, a veteran might be eligible for a variety of services, including rehabilitation, financial benefits, job placement, and disability allowances.[455]

In Romania and Russia, on the other hand, World War II veterans receive different benefits from veterans of recent conflicts. In Romania, World War II veterans and their families are entitled to certain free domestic train travel, free travel on municipal public transportation,

452 Communication with representatives of the German armed forces, November 2006.

453 Communication with staff of the parliamentary defence committee of Bosnia and Herzegovina.

454 Communication with staff members of the parliamentary defence committee of Serbia.

455 "The New Veterans Charter: For CF Veterans and their Families", Veterans Affairs Canada, Ottawa, 2006, available at <http://www.vac-acc.gc.ca/clients/sub.cfm?source=Forces/nvc>.

tax exemption, housing support (priority in obtaining rental houses), and free medical care, including free tickets for medical treatment in health spas.[456] The main entitlement of Romania's recent veterans is the right to continue employment within the armed forces in case of injury or disability.

Homeless persons form a special vulnerable group of veterans who need more care. Both systematic research and newspaper reports show that veterans are generally overrepresented in the population of homeless persons. For example, the United States Department of Veteran Affairs estimates that 2 million veterans (both male and female) are homeless on any given night and perhaps twice as many experience homelessness during the course of any given year. Many other veterans are considered near homeless or at risk because of their poverty, lack of support from family and friends, and dismal living conditions in cheap hotels or in overcrowded or substandard housing.[457] Box 18.2 provides an example of how the problems of homeless veterans are tackled in the United States.

Box 18.2

United States: Reaching Out to Homeless Veterans[458]

The Department of Veterans Affairs (VA) "offers a wide array of special programs and initiatives specifically designed to help homeless veterans live as self-sufficiently and independently as possible. In fact, VA is the only Federal agency that provides substantial hands-on assistance directly to homeless persons. Although limited to veterans and their dependents, VA's major homeless-specific programs constitute the largest integrated network of homeless treatment and assistance services in the country.

- "VA's specialized homeless veterans' treatment programs have grown and developed since they were first authorized in 1987. The programs strive to offer a continuum of services that include:
- "aggressive outreach to those veterans living on streets and in shelters who otherwise would not seek assistance;
- "clinical assessment and referral to needed medical treatment for physical and psychiatric disorders, including substance abuse;
- "long-term sheltered transitional assistance, case management, and rehabilitation;
- "employment assistance and linkage with available income supports; and
- "supported permanent housing."

Who provides care and benefits to veterans?

Concerning the provision of care to veterans, states have developed a variety of models and strategies to reach out to veterans.[459]

First, some states, in particular those that suffered a high number of casualties during World Wars I and II, have special ministries that deal with veterans, such as Veterans Affairs Canada or the US Department of Veterans Affairs (VA).[460] The VA is the second-biggest department in the US government, with some 250,000 employees and a budget of approximately $86.7 billion for the fiscal year 2008.[461] The VA focuses on three policy areas:

456 Communication with staff members of the parliamentary defence committees of Romania and Russia.

457 Richard Tessler, Robert Rosenheck, and Gail Gamache, "Homeless Veterans of the All-Volunteer Force: A Social Selection Perspective", *Armed Forces & Society*, Vol. 29, No. 4, Summer 2003, pp. 509-524; "Homeless Veterans", US Department of Veterans Affairs, <http://www1.va.gov/homeless>; Dandeker *et al.*, *op. cit.*, note 432, pp. 166-167.

458 US Department of Veterans Affairs, 2006; Tessler *et al.*, *ibid.*

459 Weerts, *op. cit.*, note 443.

460 For Veterans Affairs Canada, see <http://www.vac-acc.gc.ca/general>; for the US Department of Veterans Affairs, see <http://www.va.gov>.

461 See <www.va.gov/budget/summary/index.htm>.

Veterans Benefits Administration, the Veterans Health Administration, and the National Cemetery Administration.

In a second group of states, the provision of care to veterans is a shared responsibility between the ministry of defence and other ministries, while special institutes, foundations, or agencies implement the veterans policy. This is the case, for example, in the United Kingdom and the Netherlands. A special Veterans Institute – an organization through which the Defence Ministry co-operates with one of the major veterans associations – has existed in the Netherlands since 2000. The Institute's aim is to promote social recognition of, and care for, Dutch veterans and their families. In addition to medical and legal advice, the Institute also offers assistance by professional social workers and various forms of aftercare programmes for specific target groups. In the United Kingdom, the Ministry of Defence created the Service Personnel and Veterans Agency, which aims to improve "personnel, pensions, welfare, and support services to members of the armed forces and veterans". In the case of the United Kingdom, the personnel administration agency has been merged with the veterans agency, leading to the provision of an integrated "life cycle" personnel policy for current and former armed forces personnel.[462]

France is another interesting example. Within the Ministry of Defence and under the responsibility of the deputy minister for veterans, two institutions are currently dealing with veterans policy in France. First, the deputy minister is the chair of the governing board of the National Office for Veterans (ONAC). The ONAC is an independent public body under the auspices of the minister of defence, responsible for protecting the material and moral interests of veterans and war victims. The ONAC's central office is complemented by 100 decentralized services for each French county (*department*). These services are tasked with issuing veterans' cards and entitlements, providing special social services for veterans, providing the wider public with historical information about veterans, providing other specific services to veterans, as well as with maintaining relations between veterans and local administrative agencies. Furthermore, the ONAC maintains retirement homes and training institutes that deal with reintegrating veterans into society.[463] Though the ONAC falls under the responsibility of the minister of defence, it has a separate budget. Second, the 1990-91 Gulf War underlined the need for medical care for so-called new veterans (active personnel who serve in operations other than wars, e.g., UN peacekeeping operations). In this context, France created an agency for monitoring the health of veterans (see Box 18.3).

Box 18.3

France: Monitoring Agency for the Health of Veterans[464]

The French Monitoring Agency for the Health of Veterans (OSV) is in charge of co-ordinating actions and policies aimed at improving medical care for current and former armed forces personnel. It is part of the Directorate for Statutes, Pensions and Social Reintegration under the Secretary General for Administration of the Ministry of Defence.

The OSV has four missions: (1) mapping the occupational risks for armed forces personnel with a view to clarifying possible patterns; (2) supporting the collection of information about the careers of armed forces personnel, as well as participating in the co-ordination of the network of civilian and military institutions providing care; (3) ensuring that health care is provided, notably in the field of emerging pathologies, and initiating relevant epidemiological surveys; (4) providing relevant scientific advice, without substituting the responsibilities of departmental directorates dealing with veterans and military disability pensions.

462 For more information, see the website of the Service Personnel and Veterans Agency, <http://www.veterans-uk.info/about_us/about_us.html>.

463 See <http://onac62.chez-alice.fr/onac/onac.htm>.

464 Decree No. 2004/524 of 10 June 2004 on the establishment of a body to monitor veterans' health (Observatoire de la santé des veterans), available at <http://www.admi.net/jo/20040612/DEFD0400560D.html>.

In a third group of states, e.g., Norway and Finland, care for veterans is entirely the responsibility of a general (not military) ministry dealing with social affairs and health. In these countries, there is no special or exclusive care for veterans, but their interests and needs are addressed by general health- and social-care systems. In this group of states, there is often a special veterans association that represents the interests of veterans, e.g., the Association of Veterans of the Armed Forces (*Hermandad de veteranos de las Fuerzas Armadas*) in Spain, which provides members with support and some financial assistance for volunteer activities.

Veterans associations and not-for-profit private organizations exist in states across the OSCE region. The World Veterans Federation (WVF), an international non-governmental organization, includes 164 veterans associations in 84 countries all over the world. The WVF brings together war veterans and victims of war from different conflicts that have occurred since World War II, including veterans of peacekeeping operations.[465] At its 24th General Assembly in Johannesburg, South Africa, in December 2003, the WVF adopted a Declaration on Rights of War Veterans and Victims of War (see Box 18.4).

Box 18.4

Art. 6 of the Declaration on Rights of War Veterans and Victims of War[466]

The World Veterans Federation,

…

6. Calls upon the United Nations Member States to undertake urgent measures providing for:
   - improvement and updating of legislation concerning war veterans and victims of war;
   - social security, medical care and other relevant benefits;
   - alleviation of hardships of psycho-social consequences of war and integration of war veterans and victims of war into society;
   - adequate care for former personnel of peace-keeping and similar operations, before, during and after the mission.

An interesting example of networking care for veterans is given by the Danish practice. Denmark has developed what it calls the partner model, where the government, military associations, and veterans organizations work closely together in providing support and care to veterans. According to the partner model, the three aforementioned actors are represented in a steering group, chaired by the director of the Personnel Service of the Ministry of Defence. Furthermore, the military and veterans associations appoint their representatives to the steering group. The steering group co-ordinates the activities of these three actors, which include, among others, family support and a hotline provided by veterans organizations, medical and social support provided by the government, and specific support activities for current and former armed forces personnel provided by military associations. In fact, EUROMIL has recommended the partner model for all of its member countries.[467]

What type of benefits?

Three types of benefits and support activities can be distinguished. First, benefits consist of material or financial support for veterans, e.g., disability pensions, free or partially

465 See the World Veterans Federation website, <http://perso.orange.fr/fmac/english/default.htm>.

466 Declaration on Rights of War Veterans and Victims of War, available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/4db255c28ac256fec1256e660035174a?Opendocument>.

467 "Social Protection and Problems related to Veterans ('New Veterans') from International Peace Support Missions", EUROMIL report, 29 October 2005, available at <http://www.afmp.nl/documenten/euromil/addon-newveterans.pdf>.

subsidized use of public transportation, health care, etc. A second group of benefits addresses the non-material problems of veterans. This can include psychological help, social work, and counselling. This is a very important area, as many veterans are exposed to the risk of post-traumatic stress disorder (PTSD) during their deployment in zones of conflict. PTSD is a stress-induced illness with various symptoms, such as alcoholism, drug abuse, and depression. PTSD is not a new illness; it has been diagnosed among veterans of armies involved in conflict or war for a long time. PTSD requires care not only immediately after deployment; it also needs to be addressed before and during deployment. Box 18.5 provides an overview of the recommendations for systematic treatment of PTSD drawn up by the National Defence and Canadian Forces Ombudsman.[468]

Box 18.5

Systematic Treatment of Armed Forces Personnel with PTSD: Recommendations of the National Defence and Canadian Forces Ombudsman[469]

Responding to a complaint by a member of the Canadian Forces with PTSD, the Canadian Ombudsman initiated thorough research into how systematic treatment of PTSD can be improved in the Canadian Forces. To this extent, the Ombudsman drafted 31 recommendations. Some of them are listed below and can be useful for states developing or reviewing their approach to PTSD among current and former armed forces personnel.

The Ombudsman recommended that:

1. The Canadian Forces develop a database that accurately reflects the number of Canadian Forces personnel, including members of both the Regular and Reserve Forces, who are affected by stress-related injuries.
2. The Canadian Forces develop a database on suicides among members and former members.
3. The Canadian Forces conduct an independent and confidential mental health survey that includes former members, as well as Regular and Reserve Components. …
7. Specific and detailed education and training objectives dealing with PTSD be included in curricula of all Canadian Forces education and training establishments … .
8. Canadian Forces units be mandated to provide ongoing continuation training about PTSD to all members at regular intervals, in addition to any deployment-related training. …
11. The Canadian Forces include members or former members who have experience of PTSD in all education and training initiatives relating to PTSD. …
19. The Canadian Forces audit and assess the effectiveness and procedures designed to assist Reserve Force members and augmentees pre- and post deployment. …
27. The Canadian Forces take steps to deal with the issue of stress and burnout created by lack of resources and high case-loads among Canadian Forces caregivers.
28. The Canadian Forces take steps to improve support programmes designed for the families of members diagnosed with PTSD, at all elements and locations. …
30. The Canadian Forces initiate an end-to-end review of the rules dealing with confidentiality of medical information. In the short term, breaches of confidentiality must be dealt with quickly and visibly to re-establish confidence in the Canadian Forces' commitment to protect personal information.
31. The Canadian Forces create the position of PTSD coordinator, reporting directly to the Chief of Defence Staff and responsible for coordinating issues related to PTSD across the Canadian Forces.

468 Report to the Minister of National Defence by André Marin, National Defence and Canadian Forces Ombudsman, "Special Report: Systematic Treatment of CF Members with PTSD", Ottawa, 2001, available at <http://www.ombudsman.forces.gc.ca/rep-rap/sr-rs/pts-ssp/doc/pts-ssp-eng.pdf>.

469 *Ibid.*

A third type of activity involves supporting the commemoration and societal acknowledgment of sacrifices made by veterans, including activities such as maintaining cemeteries and organizing/supporting national veterans days. Special veterans memorial days, public events, and monuments are especially important for fostering respect within society at large for the sacrifices made by veterans. National veterans days are organized in, for example, the former Yugoslav Republic of Macedonia (11 October), Bosnia and Herzegovina (4 July), Bulgaria (6 May), Romania (9 May), the Netherlands (29 June), and Albania (29 November).

Transition from military to civilian life

A last type of benefit involves activities to facilitate the transition from military to civilian life, including providing support for education and training. As mentioned before, an effective transition from military to civilian life is important for society as a whole (as it reduces unemployment), the armed forces (as part of being an attractive employer), and, of course, for former servicemen and -women themselves. Therefore, most, if not all, OSCE states have a policy in place to support the transition from military to civilian life.

Belgium offers an interesting example. In order to enhance the flexibility of the personnel-management policy and to lower the average age of its military personnel, the Belgian armed forces have introduced the concept of mixed careers.

Box 18.6

Promoting the Transition from Military to Civilian Life: The Concept of Mixed Careers in the Belgian Armed Forces[470]

The Belgian armed forces have started to change their policy towards military careers and have introduced the concept of mixed careers. The goal of this new policy is to make personnel more flexible and to create new opportunities for military personnel to make a transition to civilian life. The main elements are:

(1) The concept applies to all military personnel who start working in the armed forces;

(2) Military personnel are recruited for a fixed period of time and start their career in an operational unit. After the end of this initial period, servicemen and -women have the choice to: (a) continue to work in military operational functions; (b) start working as a civilian within the Ministry of Defence; or (c) start working as a civilian outside the Ministry of Defence, e.g., in the government or in the private sector;

(3) The qualification "military" means that only personnel working in operational units and functions can be qualified as military personnel. Each serviceman and -woman will be continuously evaluated as to whether they qualify to continue to perform military functions;

(4) Those working in civilian jobs in the armed forces will work in support functions;

(5) The armed forces will coach those who prefer to start working outside the armed forces.

The concept of mixed careers was introduced in 2005. In order to implement the concept, the armed forces have started negotiations with military and civilian unions, as well as with representatives of other government services and the private sector.

These policies do not always need to be conducted by the government or the armed forces; private initiatives can be very effective as well, as Box 18.7 shows.

470 ODIHR-DCAF questionnaire, question 87.

Box 18.7

Support for Retraining and Self-Employment of Former Public and Military Service Personnel: The Case of the Open Society Institute-Georgia[471]

In 2006, the Open Society Institute, in close co-operation with the Public Administration Program, implemented a joint pilot project called Support for Retraining and Self-Employment of Former Public Servants, including military personnel.

Through the programme, 100 people who had lost their jobs after the Georgian government downsized the public service were selected, including public servants, police, security services personnel, and military staff. Fifty of these were trained by the Georgian training institution, the European School of Management, in how to start their own business. After the training, they were given an opportunity to prepare their own business plans. In total, 10 business plans were submitted to the Open Society Institute, which selected the best four projects, which were subsequently financed by partner banks.

The other 50 people participated in a four-month training programme on non-governmental organizations (NGOs) and on how to set up NGOs. This group was trained by the Center for Training and Consultancy. The course covered the following issues: the establishment and management of NGOs, project planning and design, management, and monitoring. Afterwards, the Open Society Institute announced a closed competition for the training participants. Of the 16 projects submitted, four were provided with funding grants.

Thirty per cent of the participants were former military servicemen or former policemen. Most of them found new jobs in business or the NGO sector following their training.

Twelve former employees of law enforcement bodies took part in the closed competition, including three from the Ministry of Defence. Two of the participants in the projects receiving funding were former employees of law enforcement bodies, one from the Ministry of Defence and the other from the Interior Ministry.

Reintegration of armed forces personnel into society is particularly important in states that have been involved in war or civil conflict. Successful integration of former servicemen and -women helps to stabilize post-conflict situations, where great numbers of soldiers become redundant. For example, the former Yugoslav countries that took part in the civil war in the 1990s have, with the help of international organizations, started special demobilization and retraining programmes, e.g., the Project for Resettlement and Retraining (PRISMA), which was carried out in what was then Serbia and Montenegro,[472] or the World Bank and the International Organization for Migration (IOM) programmes in Bosnia and Herzegovina. In co-operation with DCAF, the Bonn International Center for Conversion drafted guidelines for proper demobilization and retraining of war veterans, based on lessons learned from post-conflict programmes in Bosnia and Herzegovina (see Box 18.8).[473]

471 The Open Society Institute Georgia, January 2007.

472 Tobias Pietz with Marc Remillard, "Demobilization and Retraining for the Future: The Armed Forces in Serbia and Montenegro", Bonn International Center for Conversion and Geneva Centre for the Democratic Control of Armed Forces, Brief No. 31, Bonn/Geneva, 2005, available at <http://www.bicc.de/publications/briefs/brief31/brief31.pdf>.

473 Andreas Heinemann-Grüder and Tobias Pietz with Shay Duffy, "Turning Soldiers into a Work Force: Demobilization and Reintegration in Post-Dayton Bosnia and Herzegovina", Bonn International Center for Conversion and Geneva Centre for the Democratic Control of Armed Forces, Brief No. 27, Bonn/Geneva, 2003, available at <http://www.bicc.de/publications/briefs/brief27/brief27.pdf>.

Box 18.8

Recommendations for Reintegration of War Veterans: Lessons Learned from the Case of Bosnia and Herzegovina[474]

The World Bank and the IOM have supported three major reintegration projects for those soldiers who were involved in the civil war in Bosnia and Herzegovina in the 1990s. Supported by DCAF, the Bonn International Center for Conversion developed recommendations for the reintegration of war veterans based on the experiences with these reintegration programmes.

- Security-sector reform: Military downsizing is unlikely to succeed unless it is accompanied by a coherent armed forces restructuring policy, underpinned by wider socio-economic programmes;
- Timing: The early and radical discharge of soldiers following the cessation of hostilities is preferable to protracted downsizing; otherwise, risks to society persist, and soldiers may be perceived as a threat by other countries and parties;
- Information: Prior to discharge, soldiers should receive reliable information about their benefit package, as well as about retraining, business opportunities, and job placement services;
- Comprehensive cost accounting: Instead of focusing on the immediate costs of post-military benefit packages, assessments of war veteran policies should take into account the wider socio-economic costs;
- Demand-driven approach: Particular attention should be paid to the most vulnerable war veteran groups: the disabled, female soldiers, as well as dependants. It is vital to deal with mental illnesses caused by war, e.g., post-traumatic stress disorder;
- Sustainability: The overarching goal of international aid and projects must be to create sustainable national structures that can provide employment for former soldiers.

5. Best Practices and Recommendations

- The framework for a veterans policy should be regulated by law in accordance with international obligations, notably OSCE commitments made during the Helsinki 1975 and Vienna 1989 summits;
- Veterans policies need to be based on: (1) societal and official recognition of veterans; (2) effective communication between veterans and care-providing agencies; and (3) effective care meeting the demands and needs of veterans;
- Veterans policies and/or care providers should not discriminate against veterans on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
- All former servicemen and -women who have been involved in war or warlike circumstances should be included within the definition of *veteran*;
- Veterans should have the opportunity to communicate their wishes, demands, and questions with one point of contact in order to avoid miscommunication and duplications;
- Veterans belonging to vulnerable groups in society, e.g., homeless people and prisoners, need to receive special attention. Special attention is also needed with regard to domestic violence and with regard to the risk of suicide;
- Benefits packages for veterans could include rehabilitation programmes; financial benefits; health care/insurance; job placement (including priority job appointment in civil service); disability awards, as well as other benefits in case of death; a clothing allowance, and financial advice;
- Defence agencies should co-ordinate their veterans policy with, first of all, veterans organizations/associations, as well as with other ministries and local government agencies. Co-ordination should cover the development, implementation, and evaluation of veterans policies.

474 *Ibid.*, pp. 5 and 36.

Section VI

Chapter 19

Human Rights Education

This chapter discusses various methods used to educate armed forces personnel about their human rights and fundamental freedoms and about respecting those of their colleagues. 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. At a basic level, human rights training may identify practices that should be avoided, but it may also do more by enhancing the civic education of members of the armed forces. Training is valuable both for new recruits and for those at later stages of their military career. Indeed, officers have a particular responsibility for creating an ethos in which human rights are upheld. Apart from formal inclusion of human rights in the curriculum for recruits and officers, this chapter also discusses other means of communicating the importance of human rights, such as through professional codes of conduct, as well as the role of military colleges in this important task.

1. The Importance of Human Rights Training

Training is an important part of the induction and development of armed forces personnel. In addition to imparting technical information and enhancing military skills, it provides an opportunity to inculcate shared values, a common vision, and collective pride.

Training can be used to introduce personnel to each of the human rights described in the earlier chapters of this handbook, and it can also reinforce the need to respect these rights. As explained earlier, by internalizing the values of human rights within the armed forces themselves, service members will be more likely to be able to put human rights to practice in their work.

In countries where the armed forces have been involved in inter-communal conflict or repressive practices, appropriate training presents an opportunity to take a new approach based on respect for human rights, democratic values, and international legal commitments. In more established democracies, it is a means of reinforcing democratic values and educating members of the armed forces about the role and ethos of the military services. This is all the more important in view of the changing context in which today's armed forces operate, especially in peacekeeping and multilateral forces.

Also bearing in mind the duties to combat bullying and mistreatment of new recruits, if training in human rights begins at a sufficiently early point, it may help to change a poor ethos. One example concerns initiation rituals. Instead of providing occasions for bonding over shared mistreatment and humiliation of new recruits, rituals may instead be channelled into more positive directions, for example by raising recruits' civic awareness.

Officers can also undergo training in order to familiarize themselves with the special needs of minority groups within the armed forces, such as the customs of ethnic minorities (Chapter 12, "Ethnic and Linguistic Minorities in the Armed Forces") or the observances of religious groups (Chapter 11, "Religion in the Armed Forces"). Training of this kind can equip officers to be aware of the particular concerns and needs of these groups and to recognize situations that put the rights of these groups at risk.

International organizations also recognize the importance of education and training in promoting respect for human rights. Education and training are a central state obligation to combat sexual stereotypes under the Convention on the Elimination of All Forms of Discrimination against Women. The same is true under Art. 7 of the International Convention on the Elimination of All Forms of Racial Discrimination (see Box 19.1 below).

Box 19.1

UN Convention on the Elimination of All Forms of Racial Discrimination

Art. 7

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

The OSCE has resolved that "effective human rights education contributes to combating intolerance, religious, racial and ethnic prejudice and hatred, including against Roma, xenophobia and anti-Semitism" (Moscow 1991). In this regard, participating States are encouraged to provide education programmes in human rights to students at all levels, with particular emphasis on "students of law, administration and social sciences as well as those attending military, police and public service schools". International organizations and educational establishments should work together in order to meet the specified aims.

2. Approaches to Human Rights Training

Various procedures can be used to reinforce the importance of human rights. This section describes the inclusion of human rights in training curricula, the place of human rights in military oaths and codes of professional ethics, and the role of military colleges.

First, it is important that human rights have a formal place in armed forces' training curriculum. Training is a means of ensuring that members of the armed forces are aware of their legal rights and obligations, including rights arising under international conventions such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Geneva and Hague Conventions, and the OSCE Code of Conduct on Politico-Military Aspects of Security (see Chapter 4, "OSCE Commitments"). An understanding of these obligations is central to any military training on human rights. In Germany, for example, the Legal Status of Military Personnel Act (Section 33) stipulates that armed forces personnel have to be instructed about their rights and duties under international law in peacetime and war. The instruction on international humanitarian law and other international rules, conventions, and commitments relating to armed conflicts envisaged in this Act is an integral part of the basic training programme for all military personnel in the German armed forces. In Azerbaijan, according to the schedule endorsed by the minister of defence, personnel of military units receive weekly instruction in human rights and fundamental freedoms.

There may be advantages to allowing training by civilians — where they have relevant expertise that cannot be matched in the armed forces — and this may help to strengthen the link between the military and civil society. The International Committee of the Red Cross, for example, has a training programme on humanitarian and human rights law that has been used in the Norwegian armed forces.

One way to stress the importance of human rights is if the subject forms part of core training, e.g., in leading up to or explaining the nature of the oath of service taken by members of the armed forces. An oath of this kind (swearing allegiance to the constitution and state institutions) signifies that the armed forces do not owe allegiance to a specific leader but rather to a higher order, which includes respect for constitutional governance, the rule of law, and human rights.

Apart from student contact hours devoted to these issues, human rights concerns should also be included in relevant regulations and training manuals.

In addition, human rights training is also relevant in officer training courses or when forces are deployed on special missions. Officer training is of particular importance in combating bullying (also see Chapter 17, "Working Conditions"). For example, both commissioned and non-commissioned officers may be trained as part of the curriculum at officers schools on preventing abusive initiation practices, on how to spot illegal practices, on the need to investigate any form of abusive practice, and on how to strictly and consistently apply disciplinary punishment in all cases where such punishment is warranted.

3. Professional Codes of Ethics or Conduct

Although legal measures are an important guarantee for human rights, professional codes of conduct can also play an important part in achieving respect for human rights by integrating respect for human rights into the professional ethos of the armed services. By incorporating respect for human rights into training and induction, a positive commitment in favour of constitutional values and human rights can come to pervade the armed forces.

One of the best-known examples of a system of professional ethics of this kind is the German one of *Innere Führung* (moral leadership and civic education), which was consciously instilled in the armed forces as part of Germany's post-war reconstruction. The principles of *Innere Führung* provide basic guidelines for the internal organization of the armed forces on the one hand, and for their integration into state and society on the other. They serve to reduce to a tolerable level any tensions or conflicts arising between the individual rights and freedoms of service personnel as citizens on the one hand, and the demands of their military duties on the other. A key aspect is that the leadership behaviour of superior officers must be imbued with respect for human dignity.

Box 19.2

Leadership and Civic Education in the German Armed Forces: The Principles of *Innere Führung*[475]

The objectives of *Innere Führung* are:

- To make service personnel fully aware of the political and legal bases of the armed forces, as well as of the purpose and meaning of their military mission;
- To promote the integration of the armed forces and their service personnel into state and society and to create greater public awareness and understanding of their mission;
- To enhance the willingness of service personnel to carry out their duties conscientiously, and to maintain discipline and cohesion within the armed forces;
- To ensure that the internal structure of the armed forces is organized on the basis of respect for human dignity and for the performance of the armed forces' mission.

The actual substance and objectives of *Innere Führung* in everyday military life are laid down in a series of laws, orders, and service regulations.

475 See the website of the German Federal Parliament: <www.bundestag.de>.

A short and easily understandable summary of professional military values — such as a code of conduct — can be used for training purposes. It may also form a reference point, for example, in the investigation of alleged misconduct. Extracts from three such codes are given in Box 19.3: the Code of the French Soldier, the Code of Conduct for Armed Forces Personnel of the Netherlands, and the Code of Conduct of the Canadian Forces Personnel. Tolerance, equality, and neutrality are key virtues stressed by the codes. Some countries have developed codes of conduct for specific groups within the military, e.g., for the military police and for military cadets in Canada.[476]

Box 19.3
Codes of Conduct and Human Rights: Selected Countries (Extracts)[477]

Code of Conduct for Armed Forces Personnel of the Netherlands	6. I respect human rights and adhere to the rules laid down in the law of war. I treat everyone equally and with respect, and wherever possible offer aid to fellow humans in need. 7. I carry out my assigned tasks professionally, even in difficult circumstances or in the event of danger to my own life. 8. I never abuse the power entrusted to me. I shall use force if ordered to, but never more than is necessary for completing my tasks. Anyone, certainly my opponent, may be sure that I am resolute and persistent.
Code of the French Soldier	1) Soldiers are dedicated to service to France, at all times and in all that they do; 3) Soldiers control the use of force, respect their adversary, and endeavour not to harm civilian populations; 4) Soldiers obey orders, consistent with the law, customs and conventions of war; … 8) Soldiers are attentive to the needs of others and to overcoming obstacles [difficulties] in order to support the cohesion and capacity of their unit; 9) Soldiers are open to the world, other societies and respect diversity; 10) Soldiers are careful in expressing philosophical, political or religious views, not to compromise the neutrality of the army; 11) Soldiers, proud of their mission are ambassadors for their regiment, for the territorial army and for France.
Code of Conduct of the Canadian Forces Personnel	Engage only opposing forces and military objectives; In accomplishing your mission, use only the necessary force that causes the least amount of collateral civilian damage; … Treat all civilians humanely and respect civilian property; Do not attack those who surrender. Disarm and detain them; Treat all detained persons humanely in accordance with the standard set by the Third Geneva Convention. Any form of abuse, including torture, is prohibited; … 9. Respect all cultural objects (museums, monuments, etc.) and places of worship; … 11. Report and take appropriate steps to stop breaches of the [Law of Armed Conflict] and these rules. Disobedience of the Law of Armed Conflict is a crime.

4. Military Colleges: Implementation of Human Rights Training

There are various ways in which human rights can be mainstreamed in training in military colleges. Some steps might include:

- Revising the formal curriculum at military colleges to increase attention to human rights in terms of classroom hours and assessment;

476 See <http://lois.justice.gc.ca/en/N-5/SOR-2000-14/index.html> and <http://www.central.cadets.forces.gc.ca/rgsc/JI-cadets.pdf>.

477 Letter of the Deputy Minister of Defence to the Netherlands' Parliament, 7 November 1996 (unofficial translation); Code of the French Soldier: see the website of the French Ministry of Defence at <http://www.defense.gouv.fr/terre/layout/set/popup/content/download/46406/461207/file/code_du_soldat_code_du_soldat.pdf>; Code of Conduct of the Canadian Forces Personnel, Office of the Judge Advocate General, Report B-GG-005-027/AF-023.

- Assessing knowledge of human rights as a core educational outcome in military training. No member of armed services should be permitted to pass initial training without demonstrating a basic awareness of human rights;
- Including appropriate human rights aspects in all subsequent training for officer ranks;
- Appointing human rights specialists to the faculty of military colleges and encouraging the secondment of existing staff to other specialist international human rights bodies;
- Establishing public lectures, scholarships, and prizes in human rights as applied to the armed forces.

It may also help to create a centre of excellence in human rights at one military college so that innovations and developments can be disseminated to other colleges. In Ireland, for example, the United Nations Training School Ireland has been designated by the chief of staff as a Leadership and Human Rights Centre of Excellence. The OSCE Code of Conduct is taught to participating students in human rights and leadership courses at the school. In Germany, the Internal Leadership Centre offers various courses and seminars on international law, particularly international humanitarian law, for legal advisers, teachers of law, and staff officers. The purpose of these courses is to deepen and enhance knowledge of international humanitarian law in armed conflicts and to promote awareness of the importance of the law as an integral component of military operations.

5. Best Practices and Recommendations

- Education in human rights should form a core part of initial military training. Members of the armed forces should be unable to pass training without demonstrating familiarity with these principles;
- Appropriate human rights training should be incorporated into officer courses, especially in order to combat mistreatment and bullying and to recognize the special needs of ethnic and religious minorities within the armed forces;
- Armed forces should draw on the expertise of civilian experts and civil society organizations in providing training in human rights;
- Where codes of conduct do not already exist, consideration should be given to adopting and promoting codes that outline the responsibilities of members of the armed forces in terms of respecting each other's rights;
- Human rights should be given greater prominence in the staffing and work of military colleges;
- Centres of excellence should be established to promote awareness of human rights in the armed forces.

Chapter 20

The Responsibility of Commanders and Individual Accountability

In all military systems, the power to command and the duty to obey are of central importance. This chapter explores the importance of a responsible command structure and of individual accountability for protecting the human rights of armed forces personnel during peacetime. As is the case in other chapters, peacekeeping operations and other military deployments abroad fall outside the scope of this chapter. Please note that most members of the armed forces are at the same time both commander and subordinate, except for those in the highest or the lowest ranks.

Commanders play a crucial role in all military, social, and moral aspects of their unit. As one authority puts it, "The overriding operational imperative of the armed forces is to sustain team cohesion and to maintain trust and loyalty between commanders and those they command. This imposes a need for values and standards which are more demanding than those required by society at large."[478] As part of their responsibility for ensuring operational effectiveness, commanders build up effective team relationships within their units, thus fostering team spirit and a climate of mutual trust and respect. If armed forces want to serve their society effectively, there is no place for bullying, social misbehaviour, breaking the law, discrimination, harassment and other forms of unacceptable behaviour, or human rights violations. Commanders — both officers and non-commissioned officers (NCOs) — can be considered to be the first line of defence against violations within the barracks. Their leadership is crucial for respect for human rights within the barracks. In this context, commanders have a responsibility to play an assertive and proactive role in creating a climate of trust and mutual respect among soldiers, and they have an obligation to take all measures necessary to prevent subordinates from committing unlawful acts.

Individual accountability means that armed forces personnel committing an illegal act are fully responsible for their deeds even if they are acting on the basis of orders received from a superior. Such an approach to accountability is important in terms of avoiding impunity. It makes it impossible for soldiers, NCOs, and officers alike to escape responsibility by hiding behind their unit or orders given by superiors. This ensures that personnel executing unlawful orders or acting illegally on their own initiative are held individually accountable for offences or crimes committed.

1. Issues at Stake

In order to ensure that the human rights of armed forces personnel are respected in the barracks, it is crucial that laws and regulations protecting human rights be in force and that effective remedies be available to deal with any violations that may occur. The presence of an appropriate regulatory framework, however, is not enough to ensure respect for these rights in day-to-day military life.

Individuals can take recourse to military or civilian courts to ensure that their human rights are respected, especially in the case of serious crimes. Recourse to military or civilian

478 British Army, "Values and Standards of the British Army", March 2000, available at <http://www.army.mod.uk/servingsoldier/usefulinfo/valuesgeneral/values/ss_hrpers_values_comd_w.html>.

justice does, however, represent the last resort; in the majority of the cases, commanders play a prominent role in ensuring respect for human rights among troops. They contribute to discipline in the barracks by fostering an atmosphere of interdependence among the troops, for example by delegating responsibilities to their subordinates. Moreover, when offences specific to military life occur, commanders have the primary responsibility to deal with them and are allowed to adopt sanctions.[479] Box 20.1 shows the wide scope of the responsibilities of commanders in the Russian army. This example underlines that commanders' concern for the human rights of their subordinates must be understood in the wider context of their duties.

Box 20.1

Russian Federation: The Scope of Responsibilities of Military Commanders[480]

Commanders … in peacetime and wartime are solely responsible for constant combat and mobilization readiness; the successful fulfilment of combat tasks; education; military discipline; law and order; the moral and psychological condition of military personnel; the safety of military service; the condition and safety of military equipment and military stocks; pecuniary, technical, financial, and everyday maintenance; and medical service.

In light of the prominent role of commanders in ensuring that human rights are respected among the troops, it is crucial that the officer and NCO corps be provided with adequate training. To this end, a clear framework for the responsibility and individual accountability of commanders should be defined. Officers and NCOs need to be trained not only in the exercise of leadership, but also in military law, human rights, and international humanitarian law. As a result of this training, officers and NCOs are expected to acquire a thorough knowledge of their duties, to develop a sense of justice, and to learn how to be a model for their subordinates.

In addition to adequate training, an effective chain of command should be in place. The proper delegation of responsibilities by commanders to their subordinates contributes to the creation of an atmosphere of interdependence and, as a consequence, to a reduction in instances of abuse within the armed forces.

Peacetime versus wartime

The principle that commanders are responsible for the acts of their subordinates in peacetime and for the maintenance of discipline within the ranks should be distinguished from the so-called doctrine of command responsibility.[481] The latter is applicable in times of war in relation to violations of the law of war committed by armed forces personnel against civilians and enemy soldiers. According to this doctrine, commanders can be held responsible for the deeds of their subordinates if they knew or should have known that their subordinates were engaging in impermissible conduct and if they failed to prevent or punish such conduct.

479 The type of sanction (disciplinary or criminal) depends on national legislation and therefore differs from state to state.

480 Art. 27.2 of Federal Law No. 76-FZ of 27 May 1998 on the Status of Military Personnel.

481 The doctrine of command responsibility was established by the Hague Conventions IV (1907) and X (1907) and applied for the first time by the German Supreme Court in Leipzig after World War I in the trial of Emil Muller. Furthermore, the doctrine was invoked by the international military tribunals after World War II and developed further through international and domestic jurisprudence, in particular in the Yamashita case after World War II, available online at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=327&invol=1>. By 1977, the doctrine of command responsibility was accepted as customary international law and was codified in Additional Protocol I to the Geneva Conventions. Its status as customary law was confirmed with the explicit inclusion of command responsibility in Art. 7.3 of the Statute of the International Criminal Tribunal for the former Yugoslavia and Art. 6.3 of the Statute of the International Criminal Tribunal for Rwanda, as well as Art. 28 of the Rome Statute of the International Criminal Court.

The primary goal of the armed forces is to achieve operational effectiveness. To realize this goal, armed forces apply the "train as you fight" principle, meaning that soldiers are trained in circumstances similar to combat and crisis situations. Commanders have to prepare their units for war and conflict, and armed forces personnel have to undergo many hardships in order to achieve combat readiness. *In extremo*, soldiers may sacrifice their lives for a superior collective interest. Training in extreme warlike situations may lead to violations of the human rights of armed forces personnel, which makes it necessary to distinguish between legitimate and illegitimate methods of training.

In addition to an effective command structure, the principle of individual accountability plays a crucial role with regard to respect for human rights by promoting responsible individual behaviour. Indeed, it obliges each member of the armed forces to behave in conformity with human rights standards, regardless of orders. It also favours a balanced distribution of responsibilities between commanders and subordinates in case of violations. It is not easy to resist an illegal order because superiors are vested with more powers than their subordinates. Because commanders have the power of their rank, it is imaginable that superiors or even peers could force subordinates/colleagues to execute an illegal order. Therefore, the concept of individual accountability implies individual courage among armed forces personnel.

2. Commanders' Responsibilities

Transmitting and maintaining values and standards of proper behaviour among subordinates is a core responsibility of commanders. Typical military values include honour, integrity, courage, loyalty, and discipline (see Box 20.2). Commanders have both a moral and legal role in preventing offences that could potentially be committed by subordinates. Commanders' responsibilities encompass, among other things, ensuring that orders given, and the execution thereof, are in full compliance with the law; ensuring a working and living environment free from harassment, unlawful discrimination, and intimidation; preventing and punishing bullying and other forms of mistreatment of armed forces personnel; ensuring adequate working and living conditions, as well as stopping and reprimanding misbehaviour, including alcohol and drug abuse. In all of these matters, commanders bear responsibility for the orders they give. They are also responsible for offences committed by their subordinates, even if they do not order or directly participate in the commission of unlawful acts, if they knew, or should have known, about these unlawful acts and failed to take steps to prevent them from occurring.

Box 20.2

United Kingdom: The Role of Commanders in Upholding Values and Standards of Proper Behaviour[482]

"32. Inculcating and maintaining the values and standards of the Army is a core responsibility of commanders at all levels. It will require more than a single period of instruction on first issue, but repeated training … . It will also require commanders to include in their annual training programmes, and give priority to, the further instruction in moral understanding that complements and underpins these values and standards … .

"34. Individuals who fail to uphold the standards of conduct that are explained in this paper may be subject to disciplinary or administrative action. … In assessing whether to take action, Commanding Officers will consider a series of key criteria set out in Army General and Administrative Instructions. This will establish the seriousness of the misconduct and its impact on operational effectiveness and thus the appropriate and proportionate level of sanction. … If the misconduct is particularly serious, it may be appropriate to proceed directly to formal administrative or to disciplinary action. Such action may constitute a formal warning, official censure, the posting of one or more of the parties involved or disciplinary action. In particularly serious cases, or where an individual persists with, or has a history of acts of misconduct, formal disciplinary or administrative action may be taken, which might lead to termination of service. …"

482 "Values and Standards of the British Army: Commanders' Edition", March 2000, available online at: <http://www.army.mod.uk/servingsoldier/usefulinfo/valuesgeneral/values/ss_hrpers_values_comd_w.html>.

The role of commanders in ensuring respect for human rights in the barracks depends on the leadership style of the commander. Generally speaking, one can distinguish between a leadership style based on fear and mistrust and a leadership style that emphasizes the role of commanders in creating an environment of mutual trust and respect.

According to the first approach, the main task of commanders is to make their subordinates respect their leadership by closely supervising their activities and imposing severe sanctions whenever the rules are infringed or when disciplinary offences occur. Following this approach, leadership is based on fear and the threat of punishment.

The second approach underlines the role of the moral leadership of commanders as a more effective means of maintaining discipline in the barracks and of creating an environment based on mutual trust. According to this approach, the attitude of officers and NCOs towards their subordinates is crucial for ensuring respect for human rights among the troops. Day-to-day training and minor disciplinary sanctions are considered far more effective than harsh methods in instilling discipline and in reducing human rights violations. Military leadership based on mutual trust and respect, contrary to that based on threats and fear, is the foundation for a well-functioning army and for respect for human rights.

An important example of this approach can be found in the concept of *Innere Führung* in Germany. Following this approach, the behaviour of both commanders and subordinates should be guided by respect for human rights (see Chapter 19, "Human Rights Education").

The duties of superiors are partly included in general laws on the status of armed forces personnel; these duties are further elaborated in military disciplinary codes and penal laws.

Box 20.3

Italy: Duty of Superiors[483]

1. Superiors are responsible for ensuring that their subordinates respect laws, regulations, and military orders. They should serve as a good example of discipline and of how regulations should be respected.
2. Superiors are responsible for maintaining discipline among their subordinates, and they should aim to achieve the maximum degree of efficiency in their unit. They should, in particular:
   a) Respect, in relations with their subordinates, the equal dignity of all soldiers and shall base their evaluations on objective and fair criteria;
   b) Generally speaking, avoid publicly reprimanding a soldier who has misbehaved. The superior should speak with him privately;
   c) Establish in-depth relationships with their subordinates, evaluating their personal qualities and trying to improve their skills;
   d) Take care of the military education of their subordinates and adopt measures for improving proper relations among, civic education, and professional skills;
   e) Ensure that personnel have good working and living conditions;
   f) Ensure that security norms are respected in order to preserve their subordinates' physical integrity;
   g) Grant any meetings that are requested (including to discuss personal or family issues), under the conditions established by law, and provide a prompt evaluation of the petitions presented in the manners prescribed by law;
   h) Show exemplary behaviour in all circumstances and act firmly and impartially;
   i) Ensure the best conditions possible for their subordinates to execute the orders they receive.

483 Art. 21 of Decree of the President of the Republic No. 545/1986.

The commanding officer is responsible for the education, security, discipline, health, well-being, morale, and general operational ability of his subordinates. The following specific duties are included in the majority of military systems (see Box 20.3): the duty to set a good example for one's subordinates, the duty to care for one's subordinates, and the responsibility for the discipline of subordinates.

Illegal and improper orders

Commanders are responsible for the orders they issue and for their implementation; they are also responsible for not mistreating or abusing their subordinates. In particular, commanders have a duty not to issue improper or illegal orders and not to impose illegal punishment.

Commanders give improper orders when they ask their subordinates to perform activities that fall outside their specific mandate or that do not serve a military purpose at all. For example, when the working conditions of armed forces personnel are deplorable and military wages very low, it is possible that members of the armed forces will find themselves performing non-military services (e.g., harvesting) or being rented out to private businesses in order to supplement their low salaries and improve their living conditions in the barracks.

Many countries provide for sanctions should the command function be abused in this way. In this case, a distinction is usually made between minor abuses that give rise to disciplinary liability, and major abuses that give rise to criminal responsibility (e.g., in Switzerland). In some cases, both minor and major abuses are subject to disciplinary proceedings (e.g., in Austria).

Box 20.4

Approaches to an Illegal Order: Selected Examples from National Legislation[484]

Belarus
An illegal order is one that is inconsistent with legislation.

Belgium
An order is illegal when it is not in accordance with one of the characteristics of an order: (1) an order is given by a superior; an order must concern military duty; (2) an order cannot be executed when the execution appears to cause a crime or criminal act; (3) an order must be clear to the subordinate, so he understands what is expected; (4) an order must be clear and precise and not a general measure in order to avoid claims by subordonates that the order constituted advice or a request that could be fulfilled as he or she pleased.

Estonia
Issuing a command that conflicts with the law is prohibited, as are those that exceed the authority accorded to the person issuing the command, those that require the execution of acts that the recipient of the command does not have the right to perform, those that would result in unjustified moral or material damage, and those that are unduly dangerous to the life and/or health of a person.

Lithuania
Illegal orders are orders that force military personnel to contravene the military oath; that violate national laws, principles, and norms of international law; or that force military personnel to serve other persons or group of persons beyond official military duties.

Luxembourg
An illegal order is an order prohibited by law.

Poland
An order is illegal if it requires the execution of any forbidden act or punishable offence as defined by Arts. 318, 343, and 344 of the Penal Code.

Illegal orders violate national law and therefore constitute a crime. Examples include the order to kill another soldier without a reason or to use military force for non-military tasks (see Box 20.4).[485]

484 ODIHR-DCAF questionnaire, question 22.a.

485 It is important to acknowledge that the issue of illegal orders may be seen in a broader context. Orders that contravene public international law, e.g., an order that violates Art. 2.4 of the United Nations Charter, are also illegal. Art. 2.4 of the UN Charter states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." As this handbook covers peacetime only, our primary interest here concerns acts that might lead to individual responsibility. Whether a military deployment abroad contravenes public international law remains outside the scope of this handbook.

Illegal orders include those that contravene the values and norms provided for in the constitution of a country, e.g., becoming involved in activities that endanger the political order (see Box 20.5).

Box 20.5

Slovakia: Unconstitutional Order[486]

Art. 117.3 of Act No. 346/2006

No military order may be issued in contravention of the Constitution of the Slovak Republic, constitutional laws, other laws, generally binding regulations, service regulations, the military oath, or the Ethical Code of Professional Soldiers.

Illegal orders also include illegal punishment, e.g., collective punishment. Collective punishment is inflicted on a whole group for the misbehaviour of a single member. Commanders have the obligation to refrain from imposing illegal punishment.

Commanders' responsibility for subordinates' behaviour

An important issue is the scope of a commander's responsibility for the behaviour of his or her subordinates. To what extent is a commander responsible for the misdeeds or illegal actions of his or her subordinates?

Commanders are responsible for acts of their subordinates if they were, or ought to have been, aware of them and failed to take steps to prevent or punish them. Commanders have a positive obligation to prevent the commission of offences and crimes by subordinates. Commanders may be charged under criminal law or under military disciplinary law depending in the first instance on the type of offence committed, but also on the circumstances of the case and, in particular, on whether they could have reasonably foreseen the risk of the offence or crime committed by their subordinates.

If the commander's involvement takes the form of an omission or acquiescence rather than of a positive act, it is more difficult to prove the culpability of commanders in cases of human rights violations. Therefore, in such instances, it is unlikely that serious charges would be pressed against senior officers under criminal or disciplinary law. In most cases, commanders are punished with administrative sanctions for the misdeeds of their subordinates. They could, for example, be relieved of their duties as a commander, be demoted, or even be discharged.

3. Individual Accountability

In all military systems, members of the armed forces have a general duty to obey superiors' orders. In case of execution of an illegal command, moral and legal responsibility is borne both by those issuing and by those actually executing the illegal order. Therefore, armed forces personnel executing unlawful orders or acting illegally on their own initiative are, in general, held individually accountable for offences or crimes committed.

Armed forces personnel executing an illegal order are subject to disciplinary measures or to criminal sanctions, depending on national legislation and on the gravity of the violation. Disciplinary measures against those commanding and executing an illegal order are taken by their superior commanders; criminal sanctions are normally applied by special military or civilian courts (see Chapter 21, "Discipline and Military Justice").

486 *Ibid.*

Duty to disobey illegal orders

There are significant differences between countries with respect to the nature of the obligation to obey orders issued by a superior. In this regard, the central questions are: what are the circumstances under which a soldier must obey an illegal order, and is an illegal order binding? There are three main approaches to this issue:

1. One possibility is the presumption that the duty of armed forces personnel to obey extends only to lawful orders. Therefore, a soldier has no duty whatsoever to obey an illegal command. This approach is applied, for example, in the United Kingdom and Belgium, where an illegal order is considered not to be binding from the start (see Box 20.6);
2. Another possibility is that illegal orders are always binding; consequently, armed forces personnel are obliged to obey the command notwithstanding its illegality;[487]
3. The third option is that the binding force of the order depends on how wrong the ordered act is or on how obviously illegal it is. In Italy, for example (see Box 20.6), any order is presumed to be lawful unless it is manifestly illegal. In Denmark, armed forces personnel must immediately obey lawful and unlawful orders; they must immediately inform their superior officer/NCO that they intend to lodge a complaint if the superior officer/NCO upholds an unlawful order. Only if an unlawful order jeopardizes security and its execution could put people at risk is a soldier not under a duty to obey. He must, however, promptly contact his superior and make a statement.[488]

Box 20.6
Models for the Duty to Obey[489]

Belgium

An order that involves illegal acts is not a legal order and cannot be executed.

United Kingdom

Section 12

Disobedience to lawful commands

(1) A person subject to service law commits an offence if:

(a) he disobeys a lawful command; and

(b) he intends to disobey or is reckless as to whether he disobeys the command.

Italy

Art. 25.2: A soldier who receives an order contrary to the legislation in force should inform his superior of it …. If the superior confirms the order, the soldier is obliged to execute it. In the case of an order manifestly against the institutions of the state or whose execution manifestly constitutes a crime, the soldier has the duty not to follow the order and to promptly inform his superiors.

Personal judgments versus unconditional obedience

Recognizing that armed forces personnel have the right to refuse to execute an illegal command is of fundamental importance. It implies that the obligation to execute orders does not require unconditional obedience; in specific circumstances, individual soldiers should be allowed to evaluate the consequences of carrying out an order. On the other hand, this

487 Nolte, *op. cit.*, note 6, p. 93.

488 Replies to questionnaire "Euromil Programme for a Common European Military Law", questions IX.1 and IX.2. Replies were provided to the authors of this handbook by the Danish Association CS on 21 June 2006.

489 ODIHR-DCAF questionnaire, question 22.e, Belgium; UK Armed Forces Bill, 2005; Decree of the President of the Republic of Italy No. 545/1986, Regulation on Military Discipline.

approach represents a rather high-risk strategy in so far as it requires a personal judgment on the part of the service member facing an order whose binding force is uncertain. In the case of poor judgement, the subordinate bears responsibility for not obeying an order.

Several mechanisms can be devised in order to address this problem. The first is for the soldier in question to take into consideration whether an order contravenes the country's constitution or is otherwise inconsistent with the country's legislation and to use this as a benchmark to evaluate whether the order must or must not be obeyed. Another possibility is to allow armed forces personnel who believe they have been given an illegal order to have recourse to complaint mechanisms in order to protest against the execution of the order (see Box 20.7). Members of the armed forces reporting any illegal behaviour are generally protected by law against possible reprisals.

Box 20.7

Complaint Procedures against Illegal Orders: Selected Examples[490]

Belgium

Every serviceman has the right to demand to be heard by a superior in order to raise an objection. In addition, the service of the Inspector-General is responsible for investigating complaints concerning the functioning of the armed forces. This service includes a network of local mediators.

Czech Republic

In accordance with Section 48 of Act. No. 221/1999, soldiers are obliged to refuse to perform [an illegal] order and to inform either their superior or the military police directly.

Malta

Soldiers who believe that they have received an illegal order have the possibility to complain via the chain of command.

Norway

There are several possible ways to follow up an illegal order. Soldiers having been given such an order could address the person who has given the order, or file a report with a superior or the military police (with regard to orders in breach of international humanitarian law/human rights law, soldiers are in fact under an obligation to report illegal orders to superiors). The soldier also has the option of writing a complaint to the ombudsman.

Slovakia

According to Art. 117.4 of Act No. 346/2005, if a professional soldier thinks that a military command, directive, order, or instruction from his staff manager or commander is inconsistent with generally binding legal regulations, he is obliged to alert the staff manager or the commander to this. If the staff manager or commander insists on the fulfilment of the command, directive, order, or instruction, this must be confirmed to the professional soldier in writing, and the professional soldier is obliged to ensure that it is carried out.

According to Art. 117.5 of Act. No. 346/2005, a professional soldier is obliged to refuse the fulfilment of a military command, directive, order, or instruction of his staff manager or commander if, by its fulfilment, he would commit a criminal act; he shall immediately bring this fact to the attention of his immediate superior or the commanding officer who issued the military command, directive, order, or instruction.

Turkey

In case of an illegal order, armed forces personnel should not obey the order and should report the case to their superior. According to the Internal Service Act, complaints can be made through ranking commanders.

Another solution is to allow armed forces personnel, under certain conditions, to invoke a plea of compliance with orders as a defence for illegal actions (e.g., the Russian Federa-

490 ODIHR-DCAF questionnaire, question 22.c.

tion). Justification based on orders given by superiors as a defence for illegal actions is not regulated in the same manner in all countries. In Germany, for example, Section 5 of the Military Criminal Code states that a subordinate who commits a crime pursuant to an order will be responsible only if he knew, or should have known, that he would be committing a criminal offence by executing the order.[491] In other countries, a plea of compliance with orders is considered merely as a mitigating factor, i.e., as grounds to reduce punishment (e.g., Switzerland and Poland). Finally, in a few states (e.g. Estonia), orders issued by a superior are not recognized as a defence under military or civil law. Box 20.8 provides examples of the different models.

Box 20.8

Plea of Compliance with Orders as a Defence for Illegal Actions in Selected OSCE States[492]

Estonia

A person executing an illegal order will always be responsible for the consequence(s) of his or her actions.

Malta

An order cannot be used as a defence for illegal actions.

Poland

Art. 30 of the Penal Code:

Whoever commits a prohibited act while being justifiably unaware of its unlawfulness shall not commit an offence; if the mistake committed by the perpetrator is unjustifiable, the court may take this into account as a mitigating circumstance when imposing a penalty.

Russian Federation

In line with Art. 42 of the Criminal Code, the infliction of harm on legally protected interests shall not be qualified as a crime provided it was caused by a person acting in the execution of a binding order or instruction; the criminal responsibility for infliction of such harm shall be borne by whoever gave the illegal order or instruction. However, anyone who commits an intentional offence in the execution of an order or instruction known to be illegal shall be liable under the usual terms; failure to execute an order or instruction known to be illegal shall preclude criminal liability.

Switzerland

A person carrying out an illegal order is responsible for his or her actions. However, punishment may be reduced if it is proven that an illegal order was given.

Turkey

An order cannot be used as a defence for illegal actions.

491 This standard is in conformity with what is provided for in Art. 33 of the Statute of the International Criminal Court: "8.1 The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful. 8.2 For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful."

The United Kingdom has not incorporated this article into its legal system; instead, a stricter rule applies. Regardless of whether an order is manifestly illegal or not, it can never serve as an excuse for carrying out an illegal order.

492 ODIHR-DCAF questionnaire, question 22.e.

4. Best Practices and Recommendations

- The framework for commanders' responsibility and individual accountability should be clearly defined in legislation;
- Officers and NCOs should be provided with adequate training, not only in the exercise of leadership but also on military law and human rights law;
- Commanders should use their position of leadership to build effective working relationships among their troops, thus fostering a climate of mutual trust and respect;
- An effective system of sanctions should be provided for in case of abuse of the command function;
- In training, commanders should be made aware of their duty not to issue illegal orders or to impose illegal punishment;
- Illegal punishment should be outlawed, in particular collective punishment and punishment resulting in demeaning treatment, humiliation, or torture;
- In training, armed forces personnel should be made aware of the duty to disobey illegal orders;
- Complaint mechanisms should be available for armed forces personnel who have been given an illegal order.

Chapter 21

Discipline and Military Justice

This chapter discusses the role of military justice systems in the protection of the human rights of armed forces personnel. As citizens in uniform, members of the armed forces are subject to criminal law in the same way as civilians; in addition, they have specific duties under military law that are designed to maintain a disciplined environment. While the purpose of military justice may be the enforcement of discipline, with the administration of justice as a secondary consideration,[493] the challenge that military justice systems pose for the protection of human rights is in determining how to enforce disciplinary obligations in a way that is consistent with the rights to a fair trial and due process. Military justice raises concerns both about the comparability of the rights of members of the armed forces and of defendants in ordinary criminal courts and of the independence of military courts and those who work within them, whether as judges or lawyers.

In this chapter, the rationale of military justice is first discussed, together with international treaty obligations protecting the right to a fair trial. Next, the ways that different countries deal with the relationship between criminal offences and military discipline and the division of jurisdiction between civilian and military courts are discussed. Questions of independence are addressed through treatment of the composition and appointment of courts, prosecutors, and defence counsel, and the composition of appellate courts.

1. Issues at Stake

There are a number of aspects of life in the armed forces that necessitate a military justice system. Members of armed forces serve within a system of discipline that regulates their lives more pervasively than most other professions. This follows from the fact that they frequently live on military bases and, when on active service, most of their time and efforts are devoted to military tasks under the command of a superior. In situations involving potential conflict, the urgent and over-riding importance of the military task and the risk to life justify the need for consistent obedience. The division that exists in other professions between work and private life virtually disappears under these circumstances, and it is not surprising that military discipline extends to many areas of the lives of members of the armed forces above and beyond the criminal law applicable to citizens generally. The constant need to train servicemen to be ready for active military deployment means that discipline must also be maintained under peacetime conditions, although it can be argued that a more nuanced approach to discipline should be taken, bearing in mind actual circumstances.

Moreover, the international legal regime presupposes the existence of systems of military discipline. Thus, it is a requirement of international humanitarian law that, in order for captured troops to be treated as prisoners of war, they should be subject to a disciplinary code.[494] This distinguishes the armed forces of a state from mercenaries and ensures that

493 For a discussion of the United States' position, see David A. Schlueter, *Military Criminal Justice: Practice and Procedure* (Charlottesville, Virginia: LexisNexis, 2004), 6th edition, pp. 5-7.

494 Annex to Hague Convention IV of 1907, Art. 1; Third Geneva Convention of 1949, Art. 4.2; Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol 1), Art. 43.

they are subject to the discipline of a superior officer for any contraventions of the laws of war.[495]

The need for consistency also supports the existence of military justice systems. A system of military justice can help ensure that members of the armed forces are subject to common legal standards, whether they are deployed at home or abroad. The applicability of military law may mean that there is less need to enforce local laws in their case (subject to the agreement of the state where they are deployed to relinquish jurisdiction over offences). In the case of countries that do not deploy their armed forces abroad, however, the argument for a unified military justice system that includes regular criminal offences committed by members of the armed forces (as well as disciplinary offences) is weaker. This important difference explains a number of variations that can be found in different countries' military justice systems. A single system of military discipline can also be a unifying factor between different units, regiments, and branches of the armed forces.[496] This is an increasingly important consideration, as the changing nature of threats to security requires more flexible military responses.

Enforcement of discipline is a task closely linked to the chain of command. Most armed forces provide for minor disciplinary matters to be dealt with speedily and relatively informally by a superior officer. Concern with military efficiency, discipline, and morale has in many countries given rise to military courts and tribunals that are distinct from the civilian court system. The Supreme Court of Canada has summarized the concerns that apply in countries with separate military courts, as shown in Box 21.1.

Box 21.1

The Purpose of Military Courts (Supreme Court of Canada)[497]

The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. … There is thus a need for separate tribunals to enforce special disciplinary standards in the military.

Such courts may deal with issues that fall under the normal criminal law *and* those that are offences only under the disciplinary code. Alternatively — and increasingly commonly — civilian courts may have jurisdiction over normal criminal offences committed by members of the armed forces, at least when they are in their home countries. A number of variations exist — these are discussed further below — in terms of personnel, process, appeals, and sentencing powers.

Despite these variations two major concerns arise in relation to military justice systems: independence and equal treatment.

The issue of independence is related to the chain of command. As already explained, the pervasive nature of military discipline gives superior officers a very high degree of control

495 P. Rowe, *op. cit.*, note 4, p. 67.

496 This was a significant factor influencing the adoption of a unified system in the United Kingdom. See the Armed Forces Act of 2006.

497 *R. v. Généreux,* Canadian Supreme Court, 13 February 1992, *Canada Supreme Court Reports*, Vol. 1, 1992, p. 259; also see <http://scc.lexum.umontreal.ca/en/1992/1992rcs1-259/1992rcs1-259.html>.

over the life of individual servicemen, with the potential for far-reaching decisions that could, for example, affect an individual's safety, health, and family life. Disciplinary matters may need to be dealt with under extreme conditions of service, where full procedural safeguards are not attainable and where there is an urgent and paramount need to restore discipline if the effectiveness of a mission is not to be compromised. Equally, however, a miscarriage of justice may lead to the imposition of severe punishments that have far-reaching consequences.

In order to have credibility and legitimacy in the eyes of both the armed forces and the public, military justice must be detached from the immediate chain of command; otherwise, there will be a conflict of interest between the position of military superiors in initiating a complaint regarding a disciplinary offence and judging the merits of the complaint. For this reason, it is common to find a right to review or appeal the summary disciplinary decisions of a commanding officer. In the case of the jurisdiction of military courts over more serious matters, issues of independence include the process of appointing judges or other members of the court,[498] the origin of court members (whether they are from the same unit or a different one, or whether they are military or civilian), access to legal representation, and the choice of prosecuting and defence counsel. If any court members are directly under the influence or control of the superior officers of the person charged, this can raise concerns about their independence.

Concerns about equal treatment focus on the extent to which members of the armed forces who are subject to military justice enjoy comparable rights to the due-process guarantees applicable to civilians. This is of greatest concern in military justice systems that assume responsibility for trying offences that, if allegedly committed by a civilian, would be dealt with in civilian courts. In these instances, the issue is whether rights — e.g., to remain silent, to the presumption of innocence, to have access to a lawyer, not to be detained except on specified grounds, to bail, to know the prosecution's case, and to examine witnesses on equal terms with the prosecution — apply to defendants before military tribunals. To explore each of these issues fully would require extensive discussion of the constitutional arrangements and criminal procedure in the participating States (issues that vary significantly and that are beyond the scope of this chapter). There is also a significant distinction between those countries from the common-law world where the judge in a criminal trial acts as an umpire between the prosecution and defence lawyers, and civil-law systems that use the investigating-judge model. The important point, however, is that any variations in procedure should be fully justified by military exigencies and within the grounds for restricting procedural trial rights contained in relevant human rights conventions. In some instances, military justice systems may depart from civilian procedures, but the question is whether they then provide equivalent protections for the defendant.

A number of countries that formerly tried all cases where members of the armed forces were accused of criminal offences in military courts have moved in recent years to the position where civilian courts have jurisdiction over regular criminal offences because of concerns about independence and equal treatment,[499] although sometimes civilian courts operate in a specialized division or according to specific procedural rules. Even where this has not occurred, the incorporation of constitutional or human rights guarantees into the military justice system has led to significant reforms in a number of countries, with the

498 In a UK court-martial, for example, the presiding judge (the judge advocate) is a legally qualified civilian, but the other members of the court are military officers who are assigned to the individual case and are usually not legal professionals.

499 See, for example, the Proceedings of the International Society for Military Law and Law of War Seminar at Rhodes, 10-14 October 2001, published as *Seminar on Military Jurisdiction* (Brussels: International Society for Military Law and Law of War, 2001).

consequence that trials in the military justice system are beginning to resemble those of their civilian counterparts.

2. International Human Rights Commitments

International human rights treaties contain rights (e.g., to a fair trial and to be free from arbitrary arrest and detention) that apply to military justice systems. These set international standards for assessing the fairness of a trial.

Box 21.2
International Human Rights Concerning Detention and Criminal Trial

Art. 9 ICCPR	1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
Art. 10 UDHR	Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.
Art. 11.1 UDHR	Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
Art. 5 ECHR	Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: • the lawful detention of a person after conviction by a competent court; … • (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence. … • Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him. • Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial. • Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. • Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.
Art. 6 ECHR	1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

Challenges to military courts have been a fruitful source of jurisprudence under the ECHR, leading to substantial reforms in some countries, such as the United Kingdom, Belgium, and Ireland. Although Art. 6 of the ECHR refers to a "criminal charge", it is clear from the jurisprudence of the European Court of Human Rights that, in determining what constitutes a criminal charge, it is not sufficient only to look at whether national law defines something as such. The concept of a criminal charge may extend beyond the national legal definition to include disciplinary measures in some cases, based on the nature of the punishment, in particular whether the member of the armed forces who is facing trial for a disciplinary offence may be detained if convicted.[500] The European Court of Human Rights has found that it is incompatible with the right to a fair trial by an independent and impartial tribunal if the superior officer of the defendant in a military trial appoints the judges

500 *Engel v. Netherlands, op. cit.*, note 29, paras. 80-82.

to try the case, appoints the prosecuting and/or defence counsel, or prepares the evidence against the accused.[501] The power of a superior officer to quash or change a military court's decision has also been considered to be incompatible with Art. 6.[502] Subjecting civilians to the jurisdiction of military courts or civilian courts that include military judges for offences against the military may also breach Art. 6.[503]

A number of Council of Europe states have made reservations to Arts. 5 or 6 of the ECHR for their military justice systems: the Czech Republic, France, Lithuania, Moldova, Portugal, Russia, Slovakia, Spain, Turkey, and Ukraine. This means that Arts. 5 and 6 cannot be invoked for members of the armed forces in these countries (for more on reservations, see Chapter 5, "International Human Rights Law"). Although these states represent nearly a quarter of the Council of Europe, the remaining 37 countries in which these articles *do apply* to military justice nevertheless constitute nearly two-thirds of OSCE participating States.

OSCE participating States have, on a number of occasions, affirmed the fundamental importance of minimum fair-trial standards for all persons (i.e., including members of armed forces). These commitments emphasize the need to ensure that detained persons have certain rights before trial[504] and that they are tried by an independent and impartial

501 *Findlay v. the United Kingdom,* European Court of Human Rights, 25 February 1997, *European Human Rights Reports*, Vol. 24, 1997, p. 221; also see *Grieves v. the United Kingdom,* European Court of Human Rights, 16 December 2003*, European Human Rights Reports*, Vol. 39, 2004, p. 7, concerning the lack of independence of a naval judge advocate who was a serving naval officer. Revisions to the UK procedures introduced by the Armed Forces Act of 1996 have been found to satisfy Art. 6: *Cooper v. the United Kingdom,* 16 December 2003, European Court of Human Rights, *European Human Rights Reports*, Vol. 39, 2004, p. 171.

502 *Findlay v. the United Kingdom*, *ibid.*; *Morris v. the United Kingdom,* European Court of Human Rights, 26 February 2002*, European Human Rights Reports*, Vol. 34, p. 1253.

503 *Öcalan v. Turkey,* European Court of Human Rights, 12 May 2005*, European Human Rights Reports*, Vol. 41, 2005, p. 985; *Martin v. the United Kingdom,* European Court of Human Rights, 24 October 2006, Application No. 40426/98 (unpublished, retrievable through the website of the Court at <www.echr.coe.int>), para. 44: "While it cannot be contended that the Convention absolutely excludes the jurisdiction of military courts to try cases in which civilians are implicated, the existence of such jurisdiction should be subjected to particularly careful scrutiny, since only in very exceptional circumstances could the determination of criminal charges against civilians in such courts be compatible with Article 6."

504 Moscow 1991:
"(23.1) The participating States will ensure that (i) no one will be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law;
"(ii) anyone who is arrested will be informed promptly in a language which he understands of the reason for his arrest, and will be informed of any charges against him;
"(iii) any person who has been deprived of his liberty will be promptly informed about his rights according to domestic law;
"(iv) any person arrested or detained will have the right to be brought promptly before a judge or other officer authorized by law to determine the lawfulness of his arrest or detention, and will be released without delay if it is unlawful;
"(vi) any person arrested or detained will have the right, without undue delay, to notify or to require the competent authority to notify appropriate persons of his choice of his arrest, detention, imprisonment and whereabouts; any restriction in the exercise of this right will be prescribed by law and in accordance with international standards;
"(vii) effective measures will be adopted, if this has not already been done, to provide that law enforcement bodies do not take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, or otherwise to incriminate himself, or to force him to testify against any other person;
"(viii) the duration of any interrogation and the intervals between them will be recorded and certified, consistent with domestic law;
"(ix) a detained person or his counsel will have the right to make a request or complaint regarding his treatment, in particular when torture or other cruel, inhuman or degrading treatment has been applied, to the authorities responsible for the administration of the place of detention and to higher authorities, and when necessary, to appropriate authorities vested with reviewing or remedial power;
"(x) such request or complaint will be promptly dealt with and replied to without undue delay; if the request or complaint is rejected or in case of inordinate delay, the complainant will be entitled to bring it before a judicial or other authority; neither the detained or imprisoned person nor any complainant will suffer prejudice for making a request or complaint;
"(xi) anyone who has been the victim of an unlawful arrest or detention will have a legally enforceable right to seek compensation."

tribunal.[505] The latter aspect, which is of most relevance to this chapter, was elaborated in some detail at the Copenhagen Conference in 1990 (see Box 21.3).

Box 21.3
OSCE Commitments on Fair Trials (Extracts)[506]

(5) [The participating States] solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following: …

(5.12) the independence of judges and the impartial operation of the public judicial service will be ensured;

(5.13) the independence of legal practitioners will be recognized and protected, in particular as regards conditions for recruitment and practice;

(5.14) the rules relating to criminal procedure will contain a clear definition of powers in relation to prosecution and the measures preceding and accompanying prosecution;

(5.15) any person arrested or detained on a criminal charge will have the right, so that the lawfulness of his arrest or detention can be decided, to be brought promptly before a judge or other officer authorized by law to exercise this function;

(5.16) in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone will be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law;

(5.17) any person prosecuted will have the right to defend himself in person or through prompt legal assistance of his own choosing or, if he does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

3. Approaches

Military justice is a complex field in which a great variety of national systems operate, raising a host of technical issues, only some of which are explored here, in view of the distinctive focus of this handbook on the human rights of members of the armed forces.[507] For this reason, the handbook does not discuss the issue of the jurisdiction of military courts over *civilians*, as can occur in some countries where a wrong is allegedly committed against a member of the armed forces or for events on military premises. We deal here with: the relationship between criminal offences and military discipline; the type of court dealing with military offences; the choice of military or civilian judges; the position of prosecutors and defence lawyers; and the need for independent appeals.

The relationship between criminal offences and military discipline

A distinction should be drawn between criminal offences and disciplinary offences that are generally not criminal offences. For example, theft or assault would amount to a criminal offence, whereas failing to report for duty would be a disciplinary offence that is not a criminal offence. While civilian courts can usually only deal with criminal offences, military

505 Vienna 1989 (Questions Relating to Security in Europe: Principles):
"[The participating States] … will … ensure that effective remedies as well as full information about them are available to those who claim that their human rights and fundamental freedoms have been violated; they will, *inter alia*, effectively apply the following remedies:
"• the right of the individual to appeal to executive, legislative, judicial or administrative organs;
"• the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal, including the right to present legal arguments and to be represented by legal counsel of one's choice;
"• the right to be promptly and officially informed of the decision taken on any appeal, including the legal grounds on which this decision was based. This information will be provided as a rule in writing and, in any event, in a way that will enable the individual to make effective use of further available remedies."

506 Copenhagen 1990.

507 Nolte, *op. cit.*, note 6, pp. 130-175.

courts may (depending on the state concerned) deal with criminal offences and disciplinary offences or disciplinary offences only.

The relationship between criminal offences and military discipline raises two specific issues for human rights protection: whether members of armed forces on trial for criminal matters receive the same procedural protections applicable to civilians and whether they stand to be punished more than once under different systems for the same act.

Essentially two different approaches can be taken. The more common approach is to treat disciplinary matters and criminal offences separately. The advantage of this approach is that, for criminal matters, the same procedures applicable to civilians may be used in a straightforward manner (although there is a separate practical question of the type of court in which the trial will take place). Spain and Norway draw a clear distinction between disciplinary offences, which are dealt with by military courts, and general criminal offences, which are dealt with by civilian courts. This approach ensures that members of the armed forces are dealt with on an equal basis to civilian defendants but that military expertise is brought to bear on offences of a distinctly military character. The disadvantage, however, is the risk that the individual soldier may suffer successive penalties for the same action, i.e., both a criminal sanction and a disciplinary sanction and a possible professional sanction (such as reduction in rank). Moreover, when added together, these punishments may be disproportionate to the offence, particularly when compared with how a civilian would be treated in comparable circumstances.

The second approach (of which the United Kingdom is a clear example) is to permit military courts to deal with criminal charges and disciplinary offences by incorporating all criminal offences into its armed forces legislation (the Armed Forces Act of 2006) along with disciplinary offences. This eliminates the potential problem of double punishment. This approach may, however, highlight the discrepancies in the procedures of those courts when compared to regular criminal courts. A variation on this model, as in Canada, is to permit military courts to try soldiers for criminal offences but to reserve certain serious offences (such as murder and manslaughter) for civilian courts.[508]

As explained above, countries that differentiate disciplinary and criminal matters have to deal with the question of double punishment, which is something that contravenes both the rule of law and international human rights commitments.[509] It is true that disciplinary procedures and criminal law can be regarded as serving different functions that are not mutually exclusive. Accordingly, the objective of disciplinary action – ensuring the effectiveness of the armed forces – may not be fully realized by criminal penalties that focus on the circumstances and the severity of the offence committed and take these as setting the parameters for punishment. (So far as double punishment is concerned, disciplinary action may, depending on the circumstances, be comparable to the action of an employer following a criminal conviction of an employee that demonstrates that the employee is unfit.) There are, however, convincing counter-arguments against drawing too sharp a distinction between the purposes of the two systems. In Germany and Spain, for example, successive criminal and disciplinary punishments may be imposed. Nevertheless, within the disciplinary system, some sanctions only arise if the relevant code is violated, and rehabilitation of the offender is a frequently cited objective of sentencing in criminal courts. Moreover, from the perspective of the serviceman or -woman in question, the loss of liberty, or financial or other sanctions, may be more obvious and significant than any subtle distinction in

508 National Defence Act (*Revised Statutes of Canada*, 1985, c N-5), Pt. III.

509 Art. 14.7 ICCPR: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

the rationale for the punishment. The Netherlands, Belgium, and the United Kingdom[510] are examples of states that prevent double punishment. If a serviceman is convicted in a criminal court, he or she cannot face disciplinary action for the same act in a military court.

As explained in Section 2 above, one of the main human rights issues concerning military discipline is the question of ensuring the independence of the court vis-à-vis the chain of command. This problem has several dimensions: whether the ordinary courts or military courts have jurisdiction, whether military courts include civilian judges, how the judges of military courts are appointed, the role of the prosecution and defence lawyers, and how appeals are handled. These are discussed below in turn.

The type of court dealing with military offences

Countries use a variety of systems for dealing with alleged violations of criminal law (see Box 21.4).

Box 21.4

Dealing with Breaches of Criminal Law

Model	Examples
Ordinary civilian courts have exclusive jurisdiction over all criminal matters	Denmark, Germany, Sweden
Special civilian courts have jurisdiction over all criminal matters	Italy, the Netherlands
Overlapping jurisdiction of civilian and military courts	France, Belgium, the United Kingdom, the United States
Military courts have exclusive jurisdiction over criminal and disciplinary offences	Azerbaijan, Belarus, Luxembourg, Poland, Switzerland, Turkey, Ukraine

First, ordinary civilian courts may deal with all criminal allegations against members of the armed services, as happens, for example, in Denmark, Germany, and Sweden. This approach adheres to strict equality of treatment and independence. There may be potential disadvantages, however, in so far as some offences arising in a military context may be handled by judges unfamiliar with military conditions and culture. It is also possible that the intervention of the civilian court system may itself have a negative impact upon military effectiveness and requirements, for example, if a trial is subject to lengthy delays.

A second approach, designed particularly to overcome these potential difficulties, is that of a specialized division or procedure within the civilian courts. In the Netherlands, special chambers exist for trying military personnel for military offences, while criminal offences are tried within the civilian court system. These courts include a judge who is a member of the armed forces. The cases are dealt with initially at the canton section of a district court (for minor offences) or by the district court in Arnhem for other offences, with appeals to the military chamber of the Appeals Court in Arnhem.[511] In Italy, military courts were integrated into the civilian court system through the abolition in 1981 of the Supreme Military Court, bringing them under the jurisdiction of the Court of Cassation.

Third, civilian and military courts may have overlapping jurisdiction. In these instances, business may be divided between the courts according to various factors: such as the seriousness of the offence, where it was committed, the identity of the victim, and whether it was committed in peacetime or wartime. In the United Kingdom, criminal offences

510 UK Armed Forces Act of 2006, Section 66.

511 Nolte, *op. cit.,* note 6, p. 630.

committed by members of the armed forces against civilians would normally be dealt with in the civilian courts, whereas criminal offences committed by one soldier against another would normally be heard in military courts (courts-martial). This is plainly intended to ensure independence and to enhance public confidence in the handling of the most serious cases. In Belgium, civilian courts try cases where there is a civilian co-defendant, which ensures that all defendants are treated equally. In France, civilian courts try military personnel for offences committed on French soil, and military courts are responsible for offences committed by soldiers abroad (the considerations here are practical).

Finally, there are countries where military courts are solely responsible for handling all aspects of criminal offences involving members of the armed forces. The advantages of this approach are that the courts are familiar with military life, and any interference with military effectiveness from the process may be minimal. These arrangements are, however, less concerned with the public's perception of the independence of the courts and equality of the treatment of military defendants in relation to civilians.

The composition of military courts

As Box 21.5 shows, there are a variety of arrangements for the composition of military courts. It is a common practice to include a civilian element. Although a civilian judge may be less familiar — in comparison with a judge with a military background — with the context in which disciplinary decisions are taken, the advantage is that a civilian element enhances the appearance of independence and, thus, public confidence in military justice. The civilian members of the court act as a guarantee against the influence of commanders on the military members. The same effect can be achieved if an appeal lies from a court comprising military personnel to one containing civilians. In this way, military courts may be integrated within the legal system as a whole.

Box 21.5

Personnel Serving on Military Courts[512]

Military Only	Civilian Only	Both
Belarus, Croatia, Ireland, Slovakia, Spain, Switzerland, Turkey, Ukraine, the United States	Azerbaijan, Latvia	Canada, Finland, France, Luxembourg, the United Kingdom

Appointment of members of military courts

In many countries, members of military courts are appointed in the same way as members of civilian courts, often by the head of state (e.g., the Czech Republic, Estonia, and Finland), or the Ministry of Justice (Denmark), or an appointments council (Norway). Other countries, however, may involve the Ministry of Defence (Croatia or Germany), the members of the military justice system (Ireland), or differentiate between peacetime and wartime (France). Where the Ministry of Defence is involved, the appearance of independence is enhanced if appeal lies to a higher court that is not appointed by the Ministry of Defence, as with the German arrangements for the Federal Administrative Court.

512 ODIHR-DCAF questionnaire, question 9.

Box 21.6

Appointment of the Members of Military Courts (Selected States)[513]

Germany	The civilian judges on military disciplinary and complaints courts (courts of first instance) are appointed by the Federal Ministry of Defence. The civilian judges in the military affairs divisions of the Federal Administrative Court (appeal authority) are nominated by the Federal Ministry of Justice together with the judicial selection board and are appointed by the federal president.
France	In peacetime, judges are appointed by the chancellor, and only civilian judges sit on the courts. In peacetime, there is no exception for military personnel, who are tried like civilians. In wartime, judges are appointed by the Ministry of Defence, and judges sitting on the courts are both civilians and military personnel.
Ireland	In the case of military tribunals, military judges are appointed by the judge advocate general, a civilian lawyer is appointed by the president of Ireland. Civilian judges are appointed by the president on the advice of the government.

Prosecution and defence lawyers

Whether or not a country has a separate military prosecutor is likely to be influenced by whether cases are tried by civilian courts or by military courts. In France, Germany, and the Netherlands, for example, prosecution of military personnel is undertaken by ordinary prosecutors. A number of other countries have distinct military prosecutors or military prosecution services. As in the case of judges, these prosecutors will be specialists in military law and will thus be familiar with the military context. Bearing in mind that some legal systems grant prosecutors broad powers in terms of determining charges, when to discontinue prosecution, the examination of evidence, and the possible cross-examination of defendants and other witnesses, their independence is an important consideration. As Box 21.7 shows, the safeguards for independence may be constitutional, legislative, or administrative in nature.

Box 21.7

Guarantees for the Independence of Military Prosecutors (Selected States)[514]

Country	Safeguard
Estonia	Prosecutors are civilians answering to the Ministry of Justice.
Ireland	Prosecutors for courts-martial are appointed from a panel by the director of military prosecutions. They will not be from the same formation or unit as the accused.
Russian Federation	Prosecution bodies exercise their authority independent of the federal bodies of state administration, public authorities of the subjects of the Russian Federation, local governance structures, and public associations, and in strict compliance with the laws applicable on the territory of the Russian Federation. Any form of influence is contrary to the law (Arts. 4 and 5 of Federal Law 2202-1 of 17 January 1992 on the Prosecutor's Office of the Russian Federation).
Turkey	The independence of prosecutors is governed by Arts. 9, 138, 139, 140, 145 of the Constitution.

It is important that armed forces personnel accused of a serious offence under criminal law or of a serious disciplinary violation have access to independent legal advice and representation. As noted in Section 2 above, Art. 6 of the ECHR requires that a person facing a criminal charge have the right "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require". Providing representation by a military defence lawyer against the defendant's wishes would therefore be contrary to the Convention.

513 ODIHR-DCAF questionnaire, question 10.

514 ODIHR-DCAF questionnaire, question 11.b.

However, this applies to criminal cases or those disciplinary offences that have similar consequences (and therefore not to all disciplinary offences) and only, of course, to states that have signed up to the Convention.

Another safeguard for the independence of defence lawyers in these circumstances is the professional duties of a lawyer representing his or her client under the relevant bar code. Attorney-client privilege may also act as a safeguard against command influence in cases where the defence lawyer is a member of the armed services.

Appeals from military courts

As explained earlier, an appeal from a military court to a civilian court is an important safeguard. It helps to ensure that the lower court is correctly applying the general law (whether in the constitution or the criminal code). It can also help to correct procedural defects, including any that might arise from command influence. In these respects, the integration of military courts into the civilian legal system acts as an important safeguard to correct possible miscarriages of justice and can help instil public confidence in the military justice system. Just as the military should ultimately be under civilian control, so, it can be argued, should military courts be subject to the civilian court system.[515] Moreover, in the case of criminal charges, the right of appeal against conviction or sentence is recognized by major human rights treaties, although they do not stipulate the type of court.[516] Where less serious disciplinary matters are punished by a superior officer, an appeal may be the first opportunity for a formal hearing with procedural safeguards.

In practice, countries provide for appeals in a variety of ways.[517] In a small number of participating States, appeal lies only to a higher military court. Most, however, provide for final appeal to the country's Supreme Court,[518] although sometimes on restricted grounds (for example, interpretation of constitutional provisions). In some countries (for example, the United States and Canada), there is an intermediate appeal to a military court, which has the function of ensuring consistency between different branches of the services.

4. Best Practices and Recommendations

- In instances where civilian and military courts have overlapping jurisdictions, the choice of assuming jurisdiction over a case should lie with the civilian court;
- Safeguards should be incorporated to prevent members of the armed services from being doubly punished for the same act in successive criminal and disciplinary proceedings;
- Military judges and prosecutors should be drawn from independent services not under command of the unit concerned in any trial and, preferably, appointed by civilian ministries of justice or prosecutor's offices. Military judges appointed to standing courts should enjoy security of tenure;
- Judges and prosecution lawyers should be allocated to individual military trials by a process insulated from intervention by the chain of command;
- Defendants in military trials should have access to legal advice and representation of their choice and if unable to pay should be granted legal aid on conditions no less favourable than those applicable to normal criminal trials in the country concerned;
- Where offences are tried before military courts rather than civilian courts, the military courts should include a civilian judge at first instance or appeal should lie to a civilian court. In every case, the final appeal should lie to the civilian court system.

515 Rowe, *op. cit.*, note 4, p. 87.

516 Art. 14.5 ICCPR; Art. 2 of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

517 ODIHR-DCAF questionnaire, question 14.

518 Poland has a military chamber within the Supreme Court.

Chapter 22
Ombudsmen

An ombudsman is an institution that exercises oversight over the public administration and helps to ensure that the latter observes the principles and practices of good governance by dealing with complaints from the public regarding decisions, actions, or omissions of the public administration.

This chapter deals in particular with military ombudsmen. It explores the importance of this institution in protecting the human rights of armed forces personnel in peacetime and its contribution to a more efficient and accountable structure of the armed forces. To this end, the chapter presents different approaches to the ombudsman's function, highlighting the advantages and shortcomings of each of them.[519]

1. Relevance

Why have an ombudsman? In spite of existing complaints procedures within the military, various countries around the world have an ombudsman for addressing complaints about improper and abusive behaviour in the military, shortcomings in military policy, as well as systemic problems in the military. After investigating these complaints and shortcomings, the ombudsman formulates recommendations for corrective action. In this context, the value of an ombudsman can be seen in several areas:

1. Its independent oversight increases trust in the military sector by creating greater transparency in the administrative process, without undermining the authority of the military chain of command;
2. As an independent watchdog, it contributes to the democratic and civilian control of the armed forces. It reinforces the principles of good governance, civilian control, the rule of law, and human rights within the barracks;
3. The ombudsman provides essential protection to individual armed forces personnel against violations of their rights, abuses of power or unfair decisions;
4. The ombudsman can help military commanders to achieve internal changes and to improve the internal functioning of the armed forces;
5. As a result, the ombudsman can have a positive impact on the quality of life of servicemen, on their morale, on the *esprit de corps,* which can also help retain soldiers at a time of critical staff shortages.[520]

2. International Human Rights Commitments

While not referring specifically to the military context, the OSCE has, on several occasions, affirmed the fundamental importance of an ombudsman institution for the protection of human rights, in particular emphasizing its role for dealing, among other things, with minority[521] and gender[522] issues (see Box 22.1).

519 Although acknowledging the fundamental importance of the issue, this chapter does not deal with the activities of the ombudsman and its respective competencies in war or peacekeeping operations.

520 A. Marin, "Overhauling Oversight: Ombudsman White Paper", 30 March 2005, available at <http://www.ombudsman.forces.gc.ca/rep-rap/sr-rs/wp-lb/index-eng.asp>.

521 Annex to Decision No. 3/03: Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area, Maastricht 2003.

522 Annex to Decision No. 14/04: 2004 OSCE Action Plan for the Promotion of Gender Equality, Sofia 2004.

Box 22.1

OSCE Commitments on Ombudsmen: Selected Examples

Annex to Decision No. 3/03: Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area (Maastricht 2003)

Recommended action by OSCE institutions and structures:

20. The ODIHR and, where appropriate, other OSCE institutions and structures, including OSCE field operations, will assist participating States, at their request, in developing anti-discrimination legislation, as well as in establishing anti-discrimination bodies. …

22. Upon request, the ODIHR will provide advice on how a participating State's existing mechanisms, such as ombudsman offices, commissions for combating discrimination, police disciplinary commissions, and other relevant bodies can alleviate tensions between Roma and Sinti and non-Roma communities.

Annex to Decision No. 14/04: 2004 OSCE Action Plan for the Promotion of Gender Equality (Sofia 2004)

44 (g) Building national mechanisms for the advancement of women: The ODIHR will continue to provide know-how and support for the building-up of democratic institutions for advancing gender equality, such as Ombudsman's offices at local and national levels, as appropriate.

3. Different Approaches to the Ombudsman Function

As far as the structure and the competences of ombudsmen are concerned, there are four main models:

- Countries without a military ombudsman (e.g., Slovakia and Spain);
- Countries where the ombudsman is integrated in the military itself, under the name of inspector-general (e.g., the Netherlands and Belgium);
- Countries where the civilian ombudsman's responsibility also includes the military (e.g., Sweden, Denmark, Poland);
- Countries that have an independent military ombudsman (e.g., Germany, Canada, Ireland).

Countries without a military ombudsman

The majority of countries do not have a military ombudsman**.** This approach has the advantage of relying principally on the command structure for the administration of discipline within the military ranks. However, there is a risk that abuses and mistreatment of military personnel will go unpunished due to the lack of confidence in internal disciplinary procedures and due to the fear of retaliation by military commanders; therefore, the protection of human rights of servicemen may be at risk. The absence of a military ombudsman is often due to strong resistance to the introduction of such independent complaints mechanisms on the part of the chain of command. In the United Kingdom, for example, especially after the death of the four recruits at the Deepcut army barracks, there was an intense debate on the merits of establishing an alternative means of exercising external and independent oversight over the armed forces. The introduction of a military ombudsman with full investigative powers with respect to complaints and authority to make binding adjudications on them was recommended both by the House of Commons Defence Committee[523] and also by the recent Deepcut Review Report.[524] However, the Ministry of Defence did not accept this recommendation, "mainly on the grounds that the Services already [had]

523 "Duty of Care – Third Report of Session 2004-05", House of Commons Defence Select Committee, 3 March 2005, recommendation 112, available at <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmdfence/63/6302.htm>.

524 Blake, *op. cit.*, note 380, chapter 12, pp. 400-403.

procedures for dealing with the redress".[525] Also, the proposal of extending the terms of reference of the parliamentary commissioner for administration to permit him to deal with complaints from service personnel about administrative matters has been refused so far.[526] Instead, legislation in 2006 introduced the service complaints commissioner. Appointed by the defence minister, the role of the service complaints commissioner is to supervise the investigation of complaints by the military and to report to the defence minister annually on the operation of these redress procedures.[527]

Countries where the ombudsman is integrated into the military

The military chain of command tends to favour an oversight mechanism integrated into the military, as it appears to be more receptive to command and control issues and attentive to the need to protect the operational effectiveness of the military; furthermore, it has the advantage of a specialist knowledge of military life and issues. However, integrated mechanisms may lack independence, as they are under the control of the military hierarchy. This may in turn reduce the legitimacy of the complaints mechanism in the eyes of the complainants.

An inspector-general, as this mechanism is most often called, is usually involved in operational issues, and the incumbent is invariably a serving member of the military. This is the case in the Netherlands, where the inspector-general of the armed forces has both an advisory and a mediation function; he also exercises the function of inspector for veterans (see Box 22.2). The main drawback of this approach is that the military performs the oversight function on itself. This can create a potential conflict of interest and undermine confidence in the recommendations of the oversight body.

Box 22.2

The Inspector-General of the Netherlands Armed Forces (IGK)[528]

Position of the IGK

The IGK comes directly under the minister of defence, which means that he holds an independent position within the defence organization. To be able to carry out his tasks, the IGK has access to all elements of the defence organization, while he is also authorized to inspect documents and attend meetings.

What does the IGK do?

One of the IGK's tasks is to mediate in individual cases concerning (former) personnel of the Netherlands armed forces that have been submitted to him by, or on behalf of, the individual concerned or his or her relatives.

In what matters is the IGK authorized to mediate?

The IGK mediates in individual cases that are related to the defence organization. The IGK can also be contacted concerning cases of misconduct or disrespectful behaviour towards colleagues. In principle, he will not address matters in which legal procedures have been started or where a verdict has been given.

The period in which an appeal may be made against a verdict is not affected by the fact that the IGK has been asked to mediate. The IGK does not make decisions in cases involving offences. Where appropriate, he will refer such cases to the Royal Military Police.

525 "The Government's response to the House of Commons Defence Committee's third report of session 2004-5, on Duty of Care", Ministry of Defence of the United Kingdom, June 2006, available at <http://www.mod.uk/NR/rdonlyres/25DDEF96-F9E8-4C70-8B63-8EE8B3CD5496/0/GovtResponsetotheDeepcutReview.pdf>.

526 Blake, *op. cit.*, note 380, para. 8.

527 Armed Forces Act, sections 338 and 339, <http://www.opsi.gov.uk/acts/acts2006/ukpga_20060052_en_21>.

528 See the website of the Netherlands ombudsman for defence: <http://www.mindef.nl/ministerie/igk/english>.

In Belgium, the inspector-general mediator heads the General Inspection Service of the Ministry of Defence. Its competences are described in Box 22.3.

Box 22.3

The Inspector-General Mediator (IGM) of the Belgian Armed Forces[529]

Position of the IGM

The IGM reports directly to the minister of defence, which means that he holds an independent position within the defence organization. If relevant, he also reports to the chief of defence. The IGM heads the General Inspection Service.

Authority

- To investigate any complaint of military or civil servants of the armed forces in relation to the functioning of all services of the Ministry of Defence, discrimination, the independence necessary to exercise certain functions;
- To mediate between plaintiffs and the Ministry of Defence;
- To receive and transmit formal complaints about violence and psychological or sexual harassment at work to the prevention advisor when mediation is refused by the complainant;
- To handle every request for study, examination, or advice tasked by the minister of defence;
- To initiate special or regular inspections and investigations;
- To report to the minister of defence and to the chief of defence, the latter only if it will not endanger current or future investigations.

Investigation versus mediation

On the basis of complaints received, the IGM has the opportunity to investigate a complaint or to mediate between the complainant and the services of the Ministry of Defence. These two activities are very different and can never occur simultaneously. In case mediation fails, the IGM shall mandate a commission to investigate the matter. This commission of investigation has no right to receive information about the mediation activities.

Yearly reports

The yearly reports of the IGM are submitted to the minister of defence. The IGM's reports do not contain any reference that might reveal the identity of complainants.

Network of local mediators

The functioning of the IGM is supported by a network of local mediators. These are members of the armed forces who mediate between complainants and the service within their area. The local mediators have the official status of a counsellor.

Countries where the civilian ombudsman's responsibility includes the military

In some countries, the military oversight function is part of a civilian oversight mechanism, as, for example, in Sweden and in Poland. A civilian ombudsman has the advantage of having a strong appearance of independence and of ensuring equal treatment of military personnel and civilians alike. On the other hand, a civilian ombudsman may lack specific knowledge and credibility within the military. Furthermore, an excessive workload may cause significant delays in the resolution of cases. A solution to these problems could be to introduce specializations within the ombudsman's office, e.g., appointing a deputy ombudsman dealing specifically with military affairs.

529 ODIHR-DCAF questionnaire, question 4; annual report of the General Inspection Service, 2004, available at <www.mil.be>.

This is the case, for example, in Sweden, where the ombudsman's work is subdivided into several areas of responsibility, including the armed forces, non-combatant national service, and other cases relating to the Ministry of Defence.[530]

Sweden was the first country to establish the office of ombudsman for military affairs, in 1915. Later, however, in the 1980s, in the framework of general reform of the Swedish military, the responsibilities of the military ombudsman were incorporated into the responsibilities of the parliamentary ombudsman (see Box 22.4).

Box 22.4
Sweden: Civilian Ombudsman Overseeing the Military[531]

Members of the Swedish armed forces may submit grievances or complaints to the parliamentary ombudsman only after exhausting the military grievance system. Conscripts whose complaints are not settled at the local level through direct appeal to unit officers up to the commanding officer may make complaints with the national conscript board and, if still unsatisfied, with the parliamentary ombudsman. An officer can make a complaint through the chain of command to the supreme commander if necessary. If still not resolved, it is referred to the parliamentary ombudsman.

The parliamentary ombudsman can visit units of the armed forces at any time to investigate complaints or just to talk to conscripts, officers, and civilian employees. Lately, only about 10 cases per year have reached the parliamentary ombudsman.

In Denmark, an advisory system has been established to provide assistance and advice to soldiers and officers who feel that they have been subjected to discrimination or have been accused of discrimination. The system consists of advisers outside the military chain of command who perform this advisory function alongside their normal assignments. When exercising their advisory function, they report to a chief adviser in the Army's Personnel Command. The advisers provide guidance or, if necessary, assistance in formulating a complaint through the chain of command. The system does not constitute an external/independent complaint process in itself.

This system has the advantage of ensuring that soldiers' rights are not unduly differentiated from those of the population as a whole. The concentration of the ombudsman function in one office can also be less costly than having several specialized offices. At the same time, a civilian oversight mechanism may lack the necessary expertise for dealing with the defence sector and may fail, due to the wide range of its mandate, to focus attention on the particular problems facing military personnel.

Countries that have an independent military ombudsman

As a separate institution, the laws of several countries provide for an independent ombudsman for the military, such as the parliamentary ombudsman for the Norwegian armed forces, the parliamentary commissioner for the armed forces in Germany, the ombudsman for national defence and Canadian Forces, or the ombudsman for the defence forces of Ireland.

In addition to having specialist knowledge of military matters, the main advantage of an independent military ombudsman is its credibility in the eyes of complainants, parliament, and the public. The main disadvantage is that its establishment may be costly.

530 See the website of Sweden's parliamentary ombudsman, <http://www.jo.se/Page.aspx?MenuId=38&Mainmenu Id=12&ObjectClass=DynamX_Persons&Language=en>.

531 See the website of Sweden's parliamentary ombudsman: <http://www.jo.se>.

The **parliamentary ombudsman for the Norwegian armed forces** was established in 1952, making it the world's first parliamentary military ombudsman. The ombudsman is head of the Ombudsman's Committee, which comprises seven members. The ombudsman and the Ombudsman's Committee are organs of the Norwegian Parliament. They are elected and report to the Parliament. The ombudsman is impartial and independent of the Ministry of Defence and the military authorities. The ombudsman safeguards the rights of all members and former members of the armed forces.[532] Box 22.5 sums up the ombudsman's main functions.

Box 22.5
The Parliamentary Ombudsman for the Norwegian Armed Forces[533]

- The ombudsman may start an investigation upon a request and upon his own initiative in any matter that comes to his attention;
- All sorts of issues and circumstances arising from military service can be brought to the attention of the ombudsman at any time;
- The ombudsman is empowered to deal with cases involving all authorities;
- The ombudsman has access to all documents and information and may hear witnesses and experts;
- The Ombudsman's Committee inspects military units at home and abroad;
- The ombudsman submits inspection protocols with proper recommendations to the Ministry of Defence, chief of defence, and military authorities involved;
- The ombudsman may at any time report a matter to the Parliament;
- The ombudsman acts as an adviser to the Parliament and Ministry of Defence on matters within his or her sphere of competence;
- The Ombudsman's Committee submits annual reports to the Parliament.

The **German Parliamentary Commissioner's Office** was established in 1959 after a decision was taken to recreate the German armed forces.[534] The German ombudsman is an organ of the German Parliament. He or she is elected by, and reports to, the Parliament. The parliamentary commissioner — who is not a member of parliament — may take action upon instructions of the Parliament or of its Defence Committee or upon his own initiative when circumstances come to his attention that suggest a violation of the basic rights of a member of the armed forces or of the principles of *Innere Führung*.[535] Furthermore, armed forces personnel may present a petition directly to the parliamentary commissioner without going through other bodies of the military grievance system. In carrying out his or her mandate, the parliamentary commissioner has the power to demand access to information and to hear witnesses and experts, as well as the right to visit military premises without prior notice. At the end of any investigation, the parliamentary commissioner makes recommendations and monitors their implementation. The parliamentary commissioner submits an annual report to the Parliament, which includes negative situations and incidents in the armed forces and which may form the basis for further discussion of, and decisions on, the internal development of the armed forces.

532 See the website site of the Norwegian parliamentary ombudsman for the Armed Forces: <http://www.ombudsmann.no/mil/english.asp>.

533 *Ibid*.

534 Art. 45.b of the Basic Law.

535 The parliamentary commissioner's mandate is defined in Section 1, paras. 2 and 3 of the Law on the Parliamentary Commissioner for the Armed Forces.

The Office of the National Defence and Canadian Forces Ombudsman was set up in 1998 following a public inquiry into the involvement of a Canadian airborne regiment in beating up, torturing, and killing Somali youngsters during a peacekeeping mission in Somalia in 1992.[536] One of the recommendations of the public inquiry was to strengthen accountability of the Canadian Forces by setting up an independent review body.[537] The Canadian military ombudsman is a fully independent institution that is appointed by the cabinet and reports to the Ministry of Defence. It deals with individual complaints initiated by military members, their families, the Ministry of Defence, or upon its own initiative. Unlike in Germany, a complainant must, except in compelling circumstances, have attempted to resolve the complaint by referring it to the chain of command or the military grievance system before having recourse to the military ombudsman. The ombudsman may also conduct investigations into systemic issues, as, for example, in the framework of the Post Traumatic Stress Disorder Initiative (PTSD).[538] The ombudsman publishes an annual report that is tabled in Parliament by the defence minister and debated by the relevant parliamentary committees, as well as special reports on specific investigations, when this is judged to be in the public interest.

An independent military oversight mechanism has the advantage of being able to devote its attention exclusively to military matters, thus developing a specialized knowledge in the field. Its ability to issue public reports strengthens Parliament's oversight capacity and ensures greater transparency and accountability of the military.

These are among the most significant examples of independent mechanisms for military oversight and have often been used as models by other countries, such as, for example, Ireland. The **Irish ombudsman for the defence forces** is appointed by the president of Ireland on the recommendation of the government and reports to the minister of defence.[539] The ombudsman investigates complaints by members and former members of the defence forces. The ombudsman's task is to ensure that members and former members of the permanent defence forces and reserve defence forces have a rigorous, independent, and fair appeal for complaints they believe have not been adequately addressed by the internal military complaints process.[540] The ombudsman is impartial and is independent of the minister of defence, the Department of Defence, and the military authorities. Like in Canada, members of the armed forces must make a complaint through internal structures before submitting a case to the ombudsman.[541] Upon conclusion of an investigation, the ombudsman may make recommendations to the minister of defence, setting out measures that should be taken to rectify the situation. If the minister's response to the ombudsman's recommendations is unsatisfactory, then the ombudsman may issue a special report on the case.[542]

536 For more information on the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, see <http://www.forces.gc.ca/site/Reports/somalia/vol0/index_e.asp>.

537 Commission of Inquiry into the Development of Canadian Forces to Somalia, *Dishonored Legacy: The Lessons of the Somalia Affair* (Ottawa: Canadian Government Publishing Centre, 1997), Executive Summary and Chapter 16.

538 André Marin, "Systemic treatment of CF members with PTSD", National Defence and Canadian Forces Ombudsman, February 2002, available at <http://www.ombudsman.forces.gc.ca/rep-rap/sr-rs/pts-ssp/doc/pts-ssp-eng.pdf>.

539 The ombudsman for the defence forces was established by law through the Ombudsman (Defence Forces) Act 2004, available at <http://www.oireachtas.ie/documents/bills28/acts/2004/a3604.pdf>. See the ombudsman's website at <http://www.odf.ie>.

540 Section 4.1 of the Ombudsman (Defence Forces) Act 2004.

541 The ombudsman for the defence forces is excluded from investigating actions that concern security or military operations; organization, structure, and deployment of the defence forces; terms and conditions of employment; and administration of military prisons.

542 The information in this paragraph was taken from the website of the Irish ombudsman for the defence forces, <http://www.odf.ie>. Special reports are included in the ombudsman's annual report.

The following table highlights the main features of various approaches to a military ombudsman (Box 22.6).

Box 22.6

The Ombudsman Function: A Comparison of Different Approaches (Canada, the Netherlands, and Sweden)

	Independent	Specialist knowledge	Inside the chain of command	Credibility for the complainant
Canada	yes	yes	no	yes
The Netherlands	no	yes	yes	no
Sweden	no	no	no	no

4. The Functioning of the Ombudsman: Questions and Answers

What conditions ensure that an ombudsman functions properly?

Regardless of the approach chosen, three conditions should be met in order to ensure the proper functioning of the ombudsman's institution:

1. Effectiveness (i.e., that the ombudsman's recommendations are followed by the relevant organs);
2. Fairness (i.e., transparency of procedures); and
3. Independence.

The independence of the ombudsman office is crucial for ensuring robust and credible accountability of the military. In order to be independent, the ombudsman should be granted statutory authority, operational independence, and an adequate staff.[543] This means, first of all, that an appropriate legal status should be granted to the ombudsman office, either by the constitution (e.g., Azerbaijan) or by a legislative act (e.g., Finland) or by both instruments (e.g., Denmark). Second, the ombudsman should be provided with its own autonomous investigative capacity. Third, the ombudsman should be provided with sufficient and qualified expert staff.

The military ombudsman's independence also depends on its institutional embedding in the political system, which varies from country to country. In some countries, defence ombudsmen are appointed by, and accountable to, the Parliament (e.g., Poland, Norway, the Czech Republic); in others, ombudsmen are appointed by the Ministry of Defence and accountable to the Ministry of Defence and to the Parliament (e.g., Canada). Ombudsmen may also be appointed by, and report to, the commander of the armed forces (e.g., Estonia). The independence of the ombudsman is one of its main strengths and a source of trust; therefore, the ombudsman should never serve as an adviser to ministers or to the Parliament (see Box 22.7).

543 "Military Ombudsmen", *op. cit.*, note 338.

Box 22.7

Independence of Ombudsmen: Selected National Provisions[544]

Poland

Art. 210 of the Constitution

The commissioner for civil/citizens' rights shall be independent in his activities, independent of other state organs, and shall be accountable only to the Sejm in accordance with the principles specified by a statute.

Azerbaijan

Art. 5. Safeguards for the Independence of the Commissioner

5.1 The Commissioner shall be independent and obey only the Constitution and laws of the Republic of Azerbaijan.

5.2 The independence of the Commissioner shall be ensured by the following:

5.2.1 He or she shall not be replaced while in office;

5.2.2 He or she shall enjoy immunities;

5.2.3 Interference in his of her activities by any governmental or municipal body or official shall not be permitted;

5.2.4 He or she shall be provided with financial and social guarantees.

5.3 Declaration of a state of emergency or martial law shall not cease or restrict the activities of commissioner.

Who can complain?

Members of the armed forces, former members, reserve members, applicants, or their partners/families who allege that they have been subjected to wrong or unfair treatment can ask the ombudsman in most countries to start an inquiry. In addition, the ombudsman often has the power to conduct an investigation upon instruction of the Parliament. In general, members of the general public cannot bring a complaint to the ombudsman.

In certain countries, ombudsmen may also start an investigation on their own initiative in matters that suggest that there has been a violation of the basic rights of a member of the armed forces (e.g., Germany, Canada, Finland, Georgia, Ireland) (see Box 22.8). Such investigations are an important tool if an ombudsman wishes to look at broader systemic issues affecting all servicemen.

Box 22.8

Canada: Who Can Make a Complaint to the Military Ombudsman?[545]

- A current or former member of the Canadian Forces;
- A current or former member of the Cadets;
- A current or former employee of the Department of National Defence;
- A current or former employee of a non-public fund;
- A person applying to become a member of the armed forces;
- A member of the immediate family of any of the above-mentioned;
- An individual on an exchange or secondment with the Canadian Forces.

544 ODIHR-DCAF questionnaire, question 4.d, and the Constitutional Law on the Human Rights Commissioner (Ombudsman) of the Republic of Azerbaijan, adopted on 28 December 2001, <http://www.transparency-az.org/files/n5.doc>.

545 Ministerial Directives on the National Defence and Canadian Forces Ombudsman, Directive 12, <www.ombudsman.forces.gc.ca>.

Types of complaints

Complaints may refer to a broad spectrum of official, personal, and social problems that service personnel may encounter in their everyday military routine, ranging from cases of maladministration to violations of fundamental rights. Complaints may relate to working conditions in general; exemption from, and postponement of, obligatory military service; and entitlement to benefits in case of disability suffered during operations or of death. Complaints may also deal with discrimination in the working environment and harassment (see Box 22.9).

Box 22.9

Germany: Types of Cases That Can Be Brought before the Ombudsman[546]

- Rights and duties of service personnel;
- Leadership style and behaviour;
- Modalities of military training;
- Application of disciplinary regulations;
- Working hours and pay regulations;
- Location and type of assignment;
- Regulations regarding the representation of service personnel;
- Complaints about living conditions (housing, clothing, etc.);
- Access to medical treatment and services;
- Questions related to promotions, assessment of performance, and transfers.

Ombudsmen may deal with individual wrongs, as well as with systemic issues concerning broader policy questions. Sometimes an investigation into an individual complaint may shed light on systemic problems.

What are the ombudsman's powers of investigation and to access classified information?

In some countries, an ombudsman can deal with a case only after appeals through internal military complaint mechanisms (the chain of command and the military justice system) have been exhausted (see Chapter 20, "The Responsibility of Commanders and Individual Accountability", and Chapter 21, "Discipline and Military Justice"). In Ireland, the chain of command and the military justice system are given 28 days to deal with a case. Following this period, a complaint may be filed with the ombudsman. This rule has greatly speeded up internal complaints mechanisms.[547]

In Germany, on the contrary, servicemen may bring complaints directly to the attention of the parliamentary commissioner without going through official channels and without having to observe specific time limits.[548] In order to protect the rights of servicemen, the ombudsman has the power to conduct investigations. As part of his or her investigative

546 See the website of the German Parliament, <http://www.bundestag.de/htdocs_e/orga/03organs/06armforce/index.html>.

547 Ms. Paulyn Marrinan Quinn, SC, Ombudsman for the Irish Defence Forces, ODIHR-DCAF expert review workshop, Warsaw, 11 December 2006.

548 K. Gleumes, *Der Wehrbeauftragte: parlamentarische Kontrolle über die Streitkräfte; Petitionsinstanz für Soldaten der Bundeswehr* [The Parliamentary Commissioner for the Armed Forces: parliamentary control over the armed forces, institute for petitions for soldiers of the Federal Armed Forces] (Berlin: German Bundestag Publications, 2001).

powers, the ombudsman has the right to demand information, to interview witnesses, and to have access to records.

Given the nature of the security sector, some information cannot be disclosed to the public for reasons of national security. Generally speaking, even when rules of top confidentiality apply, the ombudsman is allowed to have access to all relevant documents for any specific case (e.g., Lithuania). However, the ombudsman cannot disclose classified information or the findings of the investigation to the general public[549] (see Box 22.10).

Box 22.10

The Secrecy Act: Special Provisions Regarding Secrecy within the Offices of the Parliamentary Ombudsmen (Sweden)[550]

Chapter 11, Art. 4

"… Secrecy shall in no case apply to an adjudication by the parliamentary ombudsmen by which a matter is terminated. If a parliamentary ombudsman … receives information from another public authority, where the information is secret, the secrecy shall apply also within the Ombudsman's Office or the Office of the Chancellor of Justice. However, if the information is contained in a document that has been produced on account of the relevant activity, secrecy shall apply within the Ombudsman's Office only if it can be assumed that a public or private interest would suffer extensive damage or considerable harm should the information be disclosed. …"

Does the ombudsman visit the barracks?

Many countries (e.g., Germany, Georgia) have granted their ombudsman the right to visit the premises of any unit at any time and without prior notice (see Box 22.11). Field visits enable the ombudsman to meet and talk to service personnel of all ranks, thereby gaining a direct impression of the conditions within the military. During such visits, service personnel may bring to the ombudsman's attention any problem they encounter in performing their everyday military duties, as well as their personal concerns, which often are not expressed in petitions. Thanks to onsite visits, the ombudsman also has the possibility to take preventive actions and to submit specific problematic situations to the attention of the relevant authorities.

549 Hans Born, Philip Fluri, and Anders Johnsson (eds.), *Handbook on Parliamentary Oversight of the Security Sector: Principles, mechanisms and practices* (Geneva: Geneva Centre for the Democratic Control of Armed Forces, Inter-Parliamentary Union, 2003), p. 92.

550 See <http://www.jo.se/Page.aspx?MenuId=37&MainMenuId=12&Language=en&ObjectClass=DynamX_Document&Id=576>.

Box 22.11

The Ombudsman's Powers of Inspection in the Czech Republic, Georgia, and Lithuania[551]

Czech Republic

According to Act No. 349/1999, the ombudsman is entitled to carry out his or her own inquiry and to propose remedial measures to the relevant state bodies; in case of non-acceptance of a proposal, the ombudsman is entitled to make the case public and to request that measures be taken by a superior or the government. The chief inspector of human rights is entitled to perform all types of inspections inside the armed forces and to propose remedial measures.

Georgia

Art. 18 of the Law on the Public Defender of Georgia

While carrying out an investigation, the public defender shall enjoy the following rights:

- *To have access* to any public authorities, national or local, enterprise, organization, or institution, *including military units* … without impediment;
- To demand and receive from public authorities, national or local, public and private enterprises, organizations, or institutions, as well as from public officials and legal persons, any information, document, or other material required for investigation;
- To obtain an explanation on the issue from any public official;
- To carry out expert examinations and to make findings through state and/or non-state organizations; to invite experts to conduct examinations and render advisory services.

Lithuania

The ombudsman has the power to request information necessary for any investigation, to enter institutions (including military premises) and companies to conduct onsite inspections and to request explanations.

What is the outcome of an investigation by an ombudsman?

Once an investigation has been completed, the ombudsman has the power to make recommendations to eliminate improper conduct, including demanding a change in policy or the adoption of certain measures to ensure that there is no recurrence. He or she may also refer a matter to the authority responsible for initiating criminal or disciplinary proceedings (see Chapter 20, "The Responsibility of Commanders and Individual Accountability", and Chapter 21, "Discipline and Military Justice"). In most states, ombudsman institutions do not have binding adjudicative powers; instead, they rely on persuasion. Their recommendations are not binding and may not overturn decisions of the military or civil justice systems; however, ombudsmen's recommendations carry significant political weight and moral authority (see Box 22.12).

What elements are contained in an ombudsman's annual report?

In addition to recommendations, an ombudsman has the power to issue **public annual reports**. In each report, addressed either to the Parliament (e.g., Finland, Lithuania, Poland) or to the government (e.g., Canada), the ombudsman describes the problems faced by servicemen and the status of the relations between the ombudsman's office and the chain of command. Box 22.12 describes the elements often included in an ombudsman's annual report.

551 ODIHR-DCAF questionnaire, question 4.d; Law on the Public Defender of Georgia, <http://www.ombudsman.ge/eng/laws/1.html>.

Box 22.12[552]

An ombudsman's annual report should:

- Be published as soon as possible after the end of the year;
- Be independent (no censorship by political authorities);
- Contain descriptions of the complaints filed throughout the year;
- Provide an account of all major investigations conducted during the year;
- Identify systemic problems;
- Motivate and argue any decision taken by the ombudsman's office;
- Specify whether recommendations were followed up.

An annual report is a tool both for accountability and for effectiveness; if a recommendation is not followed up or an investigation is blocked, this can be mentioned in the report. As such, these public reports represent a powerful means for an ombudsman to involve the judiciary and political authorities in military matters and to bring any deficiencies they detect to the attention of the government or the Parliament, as well as of the public at large.

In some countries, e.g., Ireland and Canada, the ombudsman can voluntarily issue **special reports** outside the mandatory annual report if there are problems with follow-up to recommendations or specific systemic issues to be dealt with.[553]

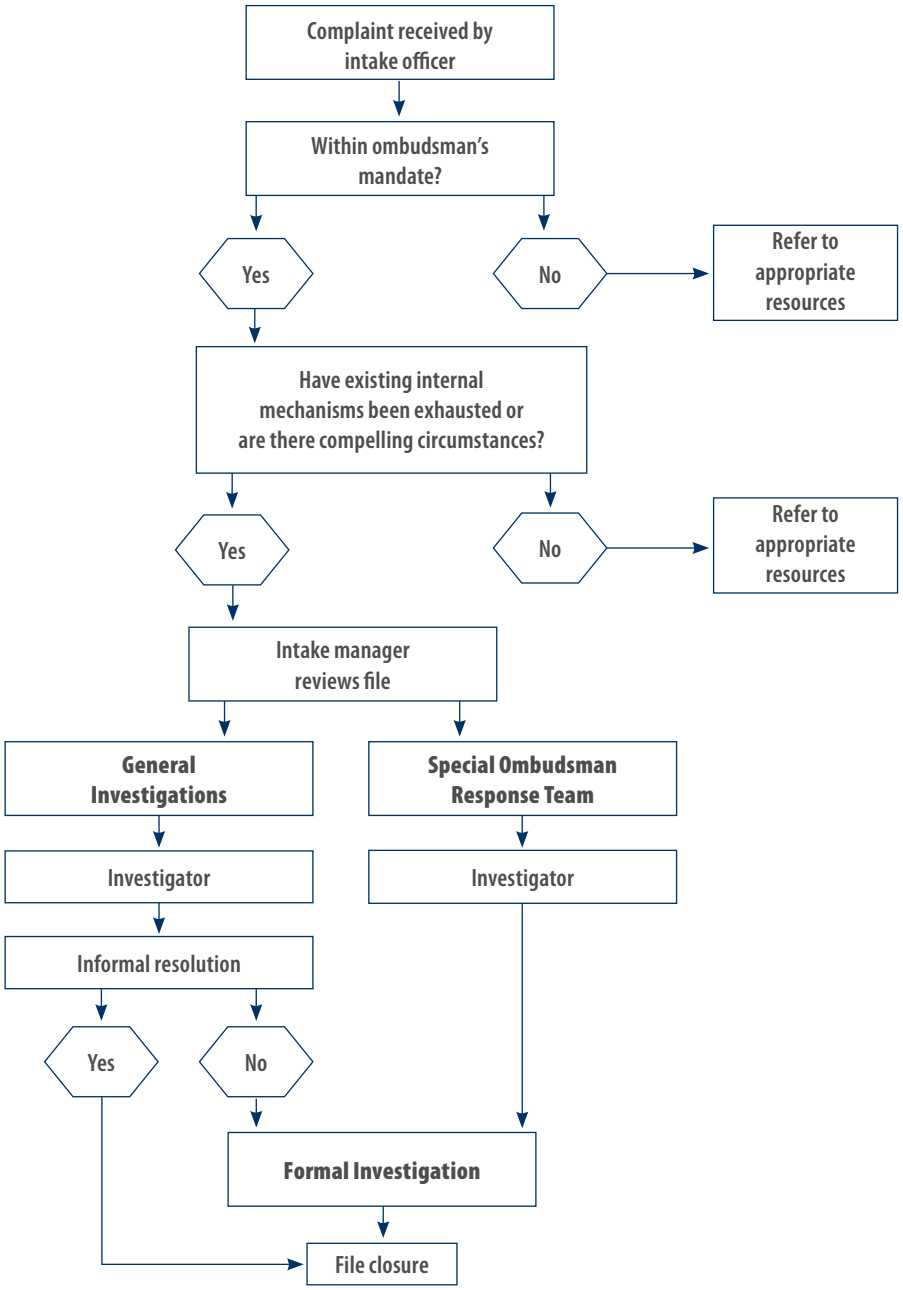
Regardless of an ombudsman's power to issue recommendations and an annual report, the very existence of such an independent institution can have a positive effect on the behaviour of many superiors.

552 Ms. Paulyn Marrinan Quinn, Ombudsman for the Irish Defence Forces, Warsaw, ODIHR-DCAF Workshop, 11 December 2006.

553 Special reports of the National Defence and Canadian Forces Ombudsman are available at <http://www.ombudsman.forces.gc.ca/rep-rap/sr-rs/index-eng.asp>.

Box 22.13

Canada: How a Case Is Handled by the Ombudsman[554]



554 *2005-2006 Annual Report* (Ottawa: National Defence and Canadian Forces Ombudsman, 2006), p. 18, available at: <http://www.ombudsman.forces.gc.ca/rep-rap/ar-ra/2005-2006/doc/2005-2006-eng.pdf>.

5. Best Practices and Recommendations

- An independent ombudsman — outside the military chain of command — with competence to deal with military matters is an effective way of dealing with complaints, errors, and systemic problems in the armed forces;
- An ombudsman should be granted statutory authority, operational independence, and adequate staff;
- Appropriate legal status should be granted to the ombudsman's office by the constitution and/or statutory law. The law should include provisions about the mandate of the ombudsman, who can complain to the ombudsman, which types of cases/complaints can be handled by the ombudsman, access to classified information, access to premises of the armed forces, whether internal military complaint channels should be exhausted before turning to the ombudsman, the investigative powers of the ombudsman, the procedure for appointing and dismissing the ombudsman, safeguards for ensuring the independence of the ombudsman's office, the procedure for approving the ombudsman's budget, the status of recommendations made by the ombudsman, and reporting requirements (annual reports, special reports);
- An ombudsman should have the power to start his or her own investigations as an important tool to address wider systemic issues in the armed forces;
- Countries with a defence ombudsman, or intending to set up such an institution, should obtain information on lessons learned from the experience of other countries that have set up such an institution;
- Countries with a defence ombudsman should request a review of its terms of reference; functions; general procedures, including reporting to Parliament; impact; resources; and budget as compared to the corresponding institutions in other countries with comparable security situations.

Annex 1. Selected OSCE Commitments

RIGHT	OSCE COMMITMENT
Right to life	"In participating States where capital punishment has not been abolished, sentences of death may only be imposed for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to international commitments." (Vienna 1989)
Prohibition of torture	"The participating States strongly condemn all forms of torture as one of the most flagrant violations of human rights and human dignity. They commit themselves to strive for its elimination." (Budapest 1994)
Right to liberty and security	"No one will be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." (Moscow 1991) "Any person arrested or detained on a criminal charge will have the right, so that the lawfulness of his arrest or detention can be decided, to be brought promptly before a judge or other officer authorized by law to exercise this function." (Copenhagen 1990)
Right to a fair trial	"The participating States will … effectively apply … the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal." (Vienna 1989)
No punishment without law	"No one will be charged with, tried for or convicted of any criminal offence unless the offence is provided for by a law which defines the elements of the offence with clarity and precision." (Copenhagen 1990)
Right to respect for private and family life	"The participating States reconfirm the right to the protection of private and family life, domicile, correspondence and electronic communications. In order to avoid any improper or arbitrary intrusion by the State in the realm of the individual, which would be harmful to any democratic society, the exercise of this right will be subject only to such restrictions as are prescribed by law and are consistent with internationally recognized human rights standards. In particular, the participating States will ensure that searches and seizures of persons and private premises and property will take place only in accordance with standards that are judicially enforceable." (Moscow 1991)
Freedom of thought, conscience, religion or belief	"The participating States … agree to take the action necessary to ensure the freedom of the individual to profess and practise, alone or in community with others, religion or belief acting in accordance with the dictates of his own conscience." (Madrid 1983)
Conscientious objection and alternative service	"The participating States … agree to consider introducing, where this has not yet been done, various forms of alternative service, which are compatible with the reasons for conscientious objection, such forms of alternative service being in principle of a non-combatant or civilian nature, in the public interest and of a non-punitive nature; … will make available to the public information on this issue; … will keep under consideration, within the framework of the Conference on the Human Dimension, the relevant questions related to the exemption from compulsory military service, where it exists, of individuals on the basis of conscientious objections to armed service, and will exchange information on these questions." (Copenhagen 1990) "The participating States will reflect in their laws or other relevant documents the rights and duties of armed forces personnel. They will consider introducing exemptions from or alternatives to military service." (Budapest 1994)

Freedom of expression	"The participating States will ensure ... that everyone will have the right to freedom of expression including the right to communication. This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." (Copenhagen 1990)
Freedom of assembly and association	"[The participating States] affirm that, without discrimination, every individual has the right to … freedom of association and peaceful assembly." (Paris 1990)
Right to effective remedies	"[The participating States will] ensure that effective remedies as well as full information about them are available to those who claim that their human rights and fundamental freedoms have been violated." (Vienna 1989) "The participating States will consider acceding to a regional or global international convention concerning the protection of human rights, such as the European Convention on Human Rights or the Optional Protocol to the International Covenant on Civil and Political Rights, which provide for procedures of individual recourse to international bodies." (Copenhagen 1990)
Prohibition of discrimination	"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law will prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground." (Copenhagen 1990)
Equality on grounds of sex	"[The participating States undertake to] eliminate all forms of discrimination against women, and to end violence against women and children as well as sexual exploitation and all forms of trafficking in human beings." (Istanbul 1999)
Right to property	"Everyone has the right peacefully to enjoy his property either on his own or in common with others. No one may be deprived of his property except in the public interest and subject to the conditions provided for by law and consistent with international commitments and obligations." (Copenhagen 1990)
Right to education	"[The participating States] will ensure access by all to the various types and levels of education without discrimination as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." (Vienna 1989)
Human rights education	"Human rights education is fundamental and it is therefore essential that [participating States'] citizens are educated on human rights and fundamental freedoms." (Moscow 1991)
Right to free elections	"[To ensure that the will of the people serves as the basis of the authority of government, the participating States will] guarantee universal and equal suffrage to adult citizens; … respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination; … respect the right of individuals and groups to establish, in full freedom, their own political parties or other political organizations and provide such political parties and organizations with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities." (Copenhagen 1990)
Freedom of movement	"The participating States will respect fully the right of everyone to freedom of movement and residence within the borders of each State, and […] to leave any country, including his own, and to return to his country." (Vienna 1989)
Right to nationality	"We reaffirm our recognition that everyone has the right to a nationality and that no one should be deprived of his or her nationality arbitrarily. We commit ourselves to continue our efforts to ensure that everyone can exercise this right. We also commit ourselves to further the international protection of stateless persons." (Istanbul 1999)

National, cultural, and linguistic identities	"The participating States will protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of national minorities on their territory." (Vienna 1989)
Economic and social rights	"[The participating States] recognize that … economic, social, cultural and other rights and freedoms are all of paramount importance and must be fully realized by all appropriate means. [In this context, they will] develop their laws, regulations and policies in the field of … economic, social, cultural and other human rights and fundamental freedoms and put them into practice in order to guarantee the effective exercise of these rights and freedoms." (Vienna 1989) "The participating States reaffirm that the right of association will be guaranteed. The right to form and – subject to the general right of a trade union to determine its own membership – freely to join a trade union will be guaranteed. These rights will exclude any prior control. Freedom of association for workers, including the freedom to strike, will be guaranteed, subject to limitations prescribed by law and consistent with international standards." (Copenhagen 1990)

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Selected Internet Resources

Geneva Centre for the Democratic Control of the Armed Forces
www.dcaf.ch

European Organisation of Military Associations
www.euromil.org

OSCE's Office for Democratic Institutions and Human Rights
www.osce.org/odihr

Council of Europe
www.coe.int

European Court of Human Rights
www.echr.coe.int

European Committee for the Prevention of Torture
www.cpt.coe.int

National Human Rights Institutions Forum
www.nhri.net

International Labour Organization
www.ilo.org

United Nations Committee against Torture
http://www2.ohchr.org/english/bodies/cat/

Parliamentary Assembly of the Council of Europe
www.assembly.coe.int

Office of the United Nations High Commissioner for Human Rights
www.ohchr.org

International Committee of the Red Cross
www.icrc.org

About ODIHR

The Office for Democratic Institutions and Human Rights (ODIHR) is the OSCE's principal institution to assist participating States "to ensure full respect for human rights and fundamental freedoms, to abide by the rule of law, to promote principles of democracy and (…) to build, strengthen and protect democratic institutions, as well as promote tolerance throughout society" (1992 Helsinki Document).

ODIHR, based in Warsaw, Poland, was created as the Office for Free Elections at the 1990 Paris Summit and started operating in May 1991. One year later, the name of the Office was changed to reflect an expanded mandate to include human rights and democratization. Today, it employs more than 120 staff.

ODIHR is the leading agency in Europe in the field of **election observation**. It co-ordinates and organizes the deployment of several observation missions with thousands of observers every year to assess whether elections in the OSCE area are in line with national legislation and international standards. Its unique methodology provides an in-depth insight into all elements of an electoral process. Through assistance projects, ODIHR helps participating States to improve their electoral framework.

The Office's **democratization** activities include the following thematic areas: rule of law, civil society and democratic governance, freedom of movement, gender equality, and legislative support. ODIHR implements more than 100 targeted assistance programmes every year, seeking both to facilitate and enhance state compliance with OSCE commitments and to develop democratic structures.

ODIHR promotes the protection of **human rights** through technical-assistance projects and training on human dimension issues. It conducts research and prepares reports on different human rights topics. In addition, the Office organizes several meetings every year to review the implementation of OSCE human dimension commitments by participating States. In its anti-terrorism activities, ODIHR works to build awareness of human dimension issues and carries out projects that address factors engendering terrorism. ODIHR is also at the forefront of international efforts to prevent trafficking in human beings and to ensure a co-ordinated response that puts the rights of victims first.

ODIHR's **tolerance and non-discrimination** programme provides support to participating States in implementing their OSCE commitments and in strengthening their efforts to respond to, and combat, hate crimes and violent manifestations of intolerance. The programme also aims to strengthen civil society's capacity to respond to hate-motivated crimes and incidents.

ODIHR provides advice to participating States on their policies on **Roma and Sinti.** It promotes capacity-building and networking among Roma and Sinti communities and encourages the participation of Roma and Sinti representatives in policy-making bodies. The Office also acts as a clearing house for the exchange of information on Roma and Sinti issues among national and international actors.

All ODIHR activities are carried out in close co-ordination and co-operation with OSCE institutions and field operations, as well as with other international organizations.

More information is available on the ODIHR website (www.osce.org/odihr).

About DCAF

The Geneva Centre for the Democratic Control of Armed Forces (DCAF) is an international foundation whose mission is to assist the international community in pursuing good governance and reform of the security sector. To this end, the Centre develops and promotes appropriate norms at the international and national levels, determines good practices and relevant policy recommendations for effective governance of the security sector, and provides in-country advisory support and practical assistance programmes to all interested actors.

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