

**DCAF** Geneva Centre  
for Security Sector  
Governance  
**20<sup>TH</sup> ANNIVERSARY**

# Legal Handbook on the Rights of Conscripts



**Elizaveta Chmykh  
Dr. Grazvydas Jasutis  
Rebecca Mikova  
Richard Steyne**

**2020**

PEER-REVIEWED PUBLICATION

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- Dr. Grazvydas Jasutis
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# Council of Europe Member states

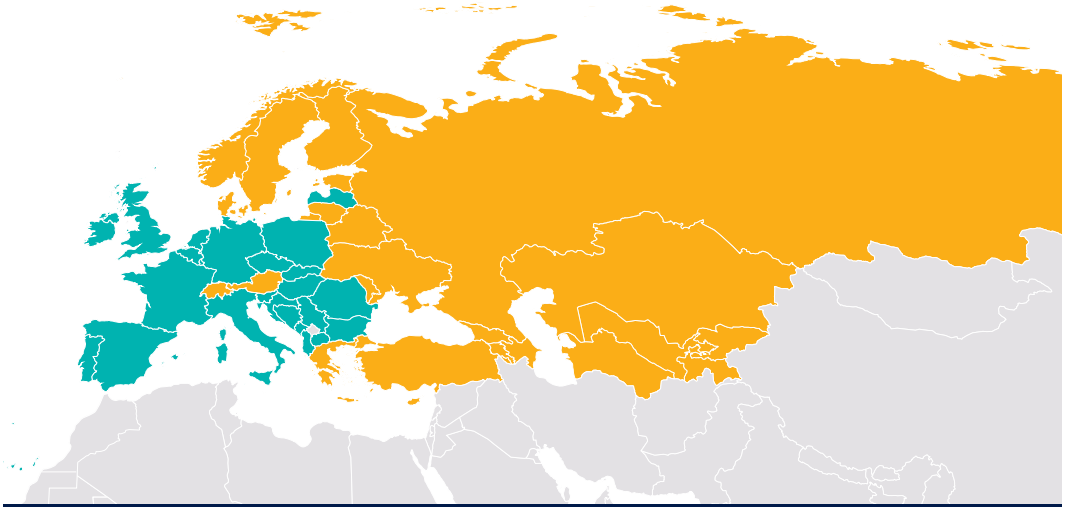


■ States that have ratified the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms as of November 2020.

In addition to these, Canada, Holy See, Japan, Mexico and the United States have the status of Observer states to the Council of Europe.

- Albania
- Andorra
- Armenia
- Austria
- Azerbaijan
- Belgium
- Bosnia and Herzegovina
- Bulgaria
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Georgia
- Germany
- Greece
- Hungary
- Iceland
- Ireland
- Italy
- Latvia
- Liechtenstein
- Lithuania
- Luxembourg
- Malta
- Republic of Moldova
- Monaco
- Montenegro
- Netherlands
- North Macedonia
- Norway
- Poland
- Portugal
- Romania
- Russian Federation
- San Marino
- Serbia
- Slovak Republic
- Slovenia
- Spain
- Sweden
- Switzerland
- Turkey
- Ukraine
- United Kingdom

# States with Compulsory Military Service in Europe and Central Asia



## ■ Countries with compulsory military service

- Austria
- Armenia
- Azerbaijan
- Belarus
- Cyprus
- Denmark
- Estonia
- Finland
- Georgia
- Greece
- Kazakhstan
- Kyrgyzstan
- Lithuania
- Moldova
- Norway
- Russia
- Sweden
- Switzerland
- Tajikistan
- Turkey
- Turkmenistan
- Ukraine
- Uzbekistan

## ■ Countries without compulsory military service

- Albania
- Andorra
- Belgium
- Bosnia and Herzegovina
- Croatia
- Czechia
- France
- Germany
- Hungary
- Iceland
- Ireland
- Italy
- Latvia
- Lichtenstein
- Luxemburg
- Malta
- Monaco
- Montenegro
- Netherlands
- North Macedonia
- Poland
- Portugal
- Romania
- San Marino
- Serbia
- Slovakia
- Slovenia
- Spain
- United Kingdom
- Vatican





# List of abbreviations

|              |  |
|--------------|--|
| <b>ACHPR</b> | African Charter on Human and Peoples' Rights                               |
| <b>ACHR</b>  | American Convention on Human Rights  |
| <b>CAT</b>   | Convention against Torture   |
| <b>CoE</b>   | Council of Europe  |
| <b>ECHR</b>  | The Convention for the Protection of Human Rights and Fundamental Freedoms |
| <b>FLC</b>   | Forced Labour Convention   |
| <b>ICCPR</b> | International Covenant on Civil and Political Rights                       |
| <b>ILO</b>   | International Labour Organization  |
| <b>ODIHR</b> | OSCE Office for Democratic Institutions and Human Rights                   |
| <b>OSCE</b>  | Organization for Security and Co-operation in Europe<br>(formerly CSCE)    |
| <b>UDHR</b>  | Universal Declaration of Human Rights                                      |



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# Foreword

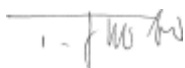
As a global center of excellence for security sector governance, DCAF – Geneva Centre for Security Sector Governance – has worked for many years to promote the protection of the human rights of military personnel. As the most vulnerable section of the military community, conscripted personnel have become a key focus of this effort in recent years. As the Director of DCAF, I am extremely proud to present this legal handbook – the first ever comprehensive analysis of international legal instruments and norms concerning the protection of the human rights and fundamental freedoms of conscripts.

This handbook pays particular attention to the rights and freedoms guaranteed under the European Convention on Human Rights, and explores cases in which such rights may be legally derogated or otherwise restricted for conscripts.

Through analyzing the relevant case law of the European Court of Human Rights and others, it demonstrates that the absence of any declarative human rights instrument for conscript rights allows states to have discretion in the way they define and protect rights. In some cases, this results in limiting the application of human rights and good governance principles to national practice and jurisprudence.

As the authors describe, the absence of any document containing best practices based on national and international jurisprudence generates inconsistency both within, and across states. Thus, this handbook contains recommendations for national authorities and the international community to ensure that legal regimes, policies, and practices fully protect the rights of conscripts.

The Handbook is aimed at all individuals who play a role in promoting, protecting, and enforcing the human rights of conscripts, including parliamentarians, government officials, policy makers, international organizations, military legal advisors, judges, professional military associations, and non-governmental organizations. DCAF hopes that this handbook will support their efforts to ensure that conscripts enjoy, to the fullest extent possible, the fundamental rights and freedoms granted to them under international law.



Thomas Guerber

Director, Geneva Centre for Security Sector Governance

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## Introductory remarks

While since the end of the Cold War, many states in Europe have done away with compulsory military service, the practice of military conscription remains widespread across Eastern Europe, the South Caucasus and Central Asia (EESCCA). This is the case in Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan, all of whom rely on a conscripts-based system. Despite this, little research has been conducted into the legal protection of military conscripts, perhaps the most vulnerable section of the military community. As the Assistant Director of DCAF – Geneva Centre for Security Sector Governance, it therefore brings me great pleasure to present this Handbook, prepared by my colleagues within Operations Europe and Central Asia.

The Handbook presents international legal instruments and norms for ensuring the protection and enforcement of the human rights and fundamental freedoms of conscripts. While the Handbook is aimed at all individuals who play a role in promoting, protecting and enforcing the human rights of conscripts, the inclusion of relevant case law from countries in EESCCA makes it particularly relevant to this region. The case law demonstrates that national legal frameworks in EESCCA differ considerably regarding the protection and enforcement of the rights of conscripts, and that further efforts are needed to align national jurisprudence with international human rights law. This is particularly the case as regard the rights and freedoms guaranteed under the European Convention on Human Rights, to which many states within EESCCA are signatories.

The Handbook demonstrates DCAF's firm commitment to advancing the protection and enforcement of the human rights and fundamental freedoms of conscripts. Ultimately, it is hoped that this handbook will support the efforts of interested parties both at the national and international level to take the necessary measures to ensure that conscripts are able to enjoy their full rights as citizens.



Darko Stančić

Assistant Director & Head of Operations Europe and Central Asia,  
Geneva Centre for Security Sector Governance

# Definitions and key concepts

## Classification of rights

While there are multiple ways to classify the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, the Convention), the following categorization reflects the variable extent to which different rights can be restricted and derogated from. The rights in the Convention can be categorized as being either:

**Absolute rights:** public authorities cannot depart from their obligations even in times of war or other national emergency, nor can they balance absolute rights against the needs of other individuals or the public interest, except in the circumstances where two absolute rights are to be balanced against one another.<sup>1</sup> Four rights in the Convention are absolute in the sense that their restriction or suspension can never be justified: the right not to be tortured or treated in an inhuman or degrading way, or punished (Article 3), the right not to be held in slavery or servitude (Article 4 (1)), the right not to be convicted for conduct which was not an offence at the time it occurred, and the right not to have a heavier penalty imposed for an offence than the one applicable at the time the offence was committed (Article 7).<sup>2</sup> Although the right to life is not absolute in the same sense, since it is subject to several wide-ranging exceptions, it remains in an analogous position and is included in Article 15(2), which provides an exhaustive list of rights from which no derogation is permissible.<sup>3</sup>

1 Crown Prosecution Service. 2019. Human Rights and Criminal Prosecutions: General Principles (Legal Guidance). Available from: <https://www.cps.gov.uk/legal-guidance/human-rights-and-criminal-prosecutions-general-principles>.

2 Jean-François Renucci. 2005. Introduction to the European Convention on Human Rights - The rights guaranteed and the protection mechanism (Council of Europe Publishing). Available from: [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-01\(2005\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-01(2005).pdf).

3 Ibid.

**Limited rights:** similar to absolute rights, limited rights cannot be balanced against the rights of other individuals or the public interest. Derogations from the application of these rights are nevertheless permissible in times of war or national emergency.<sup>4</sup> Examples of these rights include the right to liberty and security (Article 5) and the right to a fair trial (Article 6).

**Qualified rights:** public authorities can restrict qualified rights if the restriction can be justified on permissible grounds and if it is necessary and proportionate to do so. Qualified rights are those which can be restricted in order to protect the rights of another or the wider public interest. Typically, the second part of the Article in which the right is set, establishes the grounds under which public authorities can legitimately interfere with that right in order to protect the wider public interest.<sup>5</sup> Qualified rights include the right to respect for private and family life (Article 8), freedom to manifest one's religion or beliefs (Article 9(1)), freedom of expression (Article 10) and freedom of assembly and association (Article 11).

---

## Positive and negative obligations of states

The form of conduct expected from states with regard to human rights varies in relation to the type of obligations involved. To this end, there exist positive and negative obligations of states. The former requires active intervention by state authorities in order to safeguard the rights under the Convention, whereas the latter requires it to refrain from acting in a way that unjustifiably interferes with such rights.<sup>6</sup> The majority of rights under the Convention create negative obligations. While most positive obligations are not explicitly provided for in the text of the Convention, they are implied through the jurisprudence of the European Court of Human Rights (hereinafter referred to as the Court). Positive obligations in most cases have the effect of extending the requirements which states must satisfy.<sup>7</sup> For example, the prohibition of torture creates both positive and negative

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4 Crown Prosecution Service. 2019. Human Rights and Criminal Prosecutions: General Principles (Legal Guidance). Available from: <https://www.cps.gov.uk/legal-guidance/human-rights-and-criminal-prosecutions-general-principles>.

5 Ibid.

6 Jean-François Akandji-Kombe. 2007. Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights. Available from: <https://rm.coe.int/168007ff4d>.

7 Ibid., p.7.

obligations for states. The negative obligation obliges the state to refrain from torturing individuals, while the positive obligation provides for a state to adopt measures to give practical and effective safeguards for the full realization of the right. Such safeguards include the requirement of a legal system which guarantees protection from assault from other individuals and not just agents of the state, and the procedural obligations to investigate alleged instances of ill treatment (e.g. effective official investigation resulting in the identification and punishment of those responsible).<sup>8</sup>

## Restricting or interfering with rights

In general, the restriction of or interference with rights under the Convention is limited through Article 18, which provides that ‘The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.’ This Article is intended to complement the clauses which provide for rights and freedoms in the Convention.<sup>9</sup>

The following framework is used to assess whether or not an interference with a right amounts to a violation, and is generally used in relation to Articles 8 to 11 of the European Convention on Human Rights:

1. Was the interference prescribed by law? If so,
2. Did the interference pursue one of the aims set out in the relevant article? If so,
3. Was the interference necessary in a democratic society and was it proportionate? If so,
4. Was the interference discriminatory?

When deciding whether or not an interference amounts to a violation, the Court will address each of the above in turn.<sup>10</sup> If the answer to any of the first three is no, or

8 Aisling Reidy. 2002. The prohibition of torture: A guide to the implementation of Article 3 of the European Convention on Human Rights. Available from: <https://rm.coe.int/168007ff4c>.

9 European Court of Human Rights. 2018. Guide on Article 18 of the European Convention on Human Rights. Available from: [https://www.echr.coe.int/Documents/Guide\\_Art\\_18\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_18_ENG.pdf).

10 In general, the Court will not automatically address question 4 unless Article 14 has been relied on by the applicant. The Convention contains a guarantee of non-discrimination in the exercise of the rights and freedoms provided for in other articles of the Convention, and that, if question 4 is answered in the affirmative, there has been a breach of Article 14.

to the fourth yes, then the interference will be held unlawful and in violation of the Convention. The first point in this framework is also referred to as the ‘rule of law test’, the second and third as the ‘democratic necessity test’ and the fourth one relates to Article 14 (prohibition of discrimination).

The condition that the interference be ‘prescribed by law’ or done ‘in accordance with the law’ ensures that the scope of the executive to arbitrarily tamper with rights is limited by domestic legislative or judicial authority.<sup>11</sup> In order to ascertain whether an interference with a right is ‘prescribed by law’ or ‘in accordance with the law’, the Court asks the following further questions: does the domestic legal system sanction the infraction? Is the relevant legal provision accessible to the citizen? Is the legal provision sufficiently precise to enable the citizen to foresee the consequences which a given action may entail? Does the law provide adequate safeguards against arbitrary interference with the respective substantive rights?<sup>12</sup>

The question of whether or not the interference was necessary in a democratic society is the most equivocal factor in assessing the legitimacy of a restriction. Mere expediency is not sufficient; the interference must be justified by a pressing social need relating to one or more of the legitimate aims. The determination of whether such a need exists is based upon the particular facts of the case and on the circumstances prevailing in the country at the time.<sup>13</sup> It has to be determined not only that the state acted reasonably, carefully and in good faith, but also that the restriction was proportionate, and justified by relevant and sufficient reasons.<sup>14</sup> As discussed further below, necessity and proportionality are closely related, as the Court will consider whether there was an any less restrictive manner of achieving the identified aim.

The last relevant consideration of whether an interference with a qualified right is legitimate addresses whether a given interference is discriminatory. Discrimination on the grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status is prohibited under Article 14 of the Convention. This Article has no independent existence, but complements other substantive provisions of the Convention. As such it forms an

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11 Steven Greer. 1997. The exceptions to Articles 8 to 11 of the European Convention on Human Rights (Council of Europe Publishing). Available from: [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15\(1997\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15(1997).pdf), p.9.

12 European Court of Human Rights. Case of Kruslin v. France (11801/85), 24/04/1990. Available from: <http://hudoc.echr.coe.int/eng?i=001-57626>, paras. 27-36.

13 Steven Greer. 1997. The exceptions to Articles 8 to 11 of the European Convention on Human Rights (Council of Europe Publishing). Available from: [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15\(1997\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15(1997).pdf).

14 Ibid.

integral part of each of the Articles laying down rights and freedoms.<sup>15</sup> While this Article is read in conjunction with substantive provisions, it does not presuppose that there is a violation of the respective substantive right.<sup>16</sup> It follows, that a discriminatory interference with a qualified right is in violation of the rights guaranteed under the Convention.

## Proportionality

The concept of proportionality is a dominant theme throughout the Convention.<sup>17</sup> The doctrine of proportionality is central to achieving a fair balance between the sometimes conflicting rights of the community and those fundamental rights of the individual guaranteed by the Convention.<sup>18</sup> Proportionality manifests itself in multiple forms: as an ingredient of the necessity of a measure (Articles 2, and 8-11), in the context of objective and reasonable justification for difference in treatment (Article 14) or as part of the basis for finding states under a positive obligation to act.<sup>19</sup> Consequently, proportionality requires a commensurate relation between the goal pursued and the means by which the goal is intended to be achieved, as well as a balance between the interests of the applicant and those of the community.<sup>20</sup>

It follows that ‘the principle of proportionality requires there to be a “pressing social need” for the measure or interference in question and also that it is *proportionate* to the aim being pursued.’<sup>21</sup> For the assessment of proportionality of a particular measure, the following aspects are relevant: whether there is an alternative means of protecting the relevant public interest without an interference at all, or by means which are less intrusive; whether the reasons for the interference are ‘relevant’ and ‘sufficient’ to justify it; whether the decision-making process leading to the measure of interference is fair;

15 European Court of Human Rights. 2020. Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention. Available from: [https://www.echr.coe.int/Documents/Guide\\_Art\\_14\\_Art\\_1\\_Protocol\\_12\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf).

16 Ibid.

17 Karen Reid. 2015. A Practitioner’s Guide to the European Convention on Human Rights (5th Edition, Sweet and Maxwell), p. 75.

18 Crown Prosecution Service. 2019. Human Rights and Criminal Prosecutions: General Principles (Legal Guidance). Available from: <https://www.cps.gov.uk/legal-guidance/human-rights-and-criminal-prosecutions-general-principles>.

19 Karen Reid. 2015. A Practitioner’s Guide to the European Convention on Human Rights (5th Edition, Sweet and Maxwell), p. 75.

20 Ibid.

21 Phillip Leach. 2017. Taking a Case to the European Court of Human Rights (4th edition, Oxford), p. 188.



whether there exists an effective control on measures taken by the authorities.<sup>22</sup>

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## Margin of appreciation

The ‘margin of appreciation’ refers to the room for manoeuvre that the Strasbourg institutions are prepared to accord national authorities in fulfilling their obligations under the European Convention on Human Rights; the term is not found in the text of the Convention itself, nor in the travaux préparatoires, but first appeared in 1958 in the European Commission of Human Rights’ report in the case brought by Greece against the United Kingdom over alleged human rights violations in Cyprus.<sup>23</sup> ‘The doctrine, which derives from national case-law concerning judicial review of administrative action, was first adopted by the Strasbourg organs in the context of derogations from the Convention in times of emergency under Article 15 and then applied by analogy to “extraordinary” situations which fall short of the kind of crises envisaged by this provision. It has since “leaked” into every part of the Convention and now “constitutes one of the cardinal points of the Strasbourg case-law”.’<sup>24</sup> ‘In addition to its application within the concept of proportionality in Articles 8–11, the margin of appreciation is also relevant in other contexts, for example, to Article 5 (e.g. in deciding whether an individual should be detained as being of “unsound mind”, Article 6 (e.g. in considering limitations on the right of access to court), Article 14 (in assessing to what extent differences in otherwise similar situations justify a different treatment in law), Article 15 (in assessing the existence of a public emergency), Article 1 of Protocol No. 1 (e.g. in considering the extent of the right of the authorities to enforce laws so as to control the use of property), Article 2 of Protocol No. 1 (e.g. in considering the impact of the display of crucifixes in state schools on the right to education) and Article 3 of Protocol No. 1 (e.g. in assessing limitation on the right to vote and stand for election).’<sup>25</sup>

Aaron Ostrovsky states that the doctrine has no textual basis within the Convention, but was developed by the Court as an interpretative tool to deal primarily with conflicts

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22 Phillip Leach. 2017. Taking a Case to the European Court of Human Rights (4th edition, Oxford), p. 188.

23 Steven Greer. 2000. The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights (Council of Europe Publishing). Available from: [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17\(2000\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17(2000).pdf).

24 Steven Greer. 1997. The exceptions to Articles 8 to 11 of the European Convention on Human Rights (Council of Europe Publishing). Available from: [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15\(1997\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15(1997).pdf), p.15–16

25 Phillip Leach. 2017. Taking a Case to the European Court of Human Rights (4th edition, Oxford), p. 189.

of values between an individual and society; to assist the Court in delineating between what constitutes a matter which each community is able to decide at the local level versus what is so fundamental that the same requirements should be imposed on every state, regardless of variations in culture.<sup>26</sup> Nevertheless, Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, added a reference to the principle of subsidiarity and the doctrine of the margin of appreciation to the Preamble of the Convention.<sup>27</sup>

In principle, states must be given a choice as to the ways and means through which they meet their obligations. To this end, the Court's function in assessing the proportionality of an impugned decision or measure was originally limited to reviewing whether or not the particular solution adopted could be regarded as striking a fair balance.<sup>28</sup> In recent years, however, the Court has somewhat adapted its approach by also considering the possibility of alternative means to achieve the same end.<sup>29</sup> The breadth of the margin of appreciation differs in accordance with a number of factors, including the right to which it is being applied. For example, the margin of appreciation is rarely applied to Articles 2-4, which are non-derogable, but it is an important consideration when evaluating the balancing of individual rights with the public interest in the context of a proportionality assessment under Articles 8-11. Proportionality is therefore an important aspect of the margin of appreciation in so far as the Court tests whether there exists alternative means through which the applicant's rights can be impacted to a lesser degree, and if so, rules that the measures in question cannot be considered proportionate.<sup>30</sup>

Literature which has analysed the Court's jurisprudence to determine what kind of margin is granted under which circumstances has identified the following additional factors: 'whether or not the practice is common in other member states, the importance attributed to specific rights, the nature of (and grounds for) the interference, the text of the particular Convention provision, and the context--for example whether there is

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26 Aaron A. Ostrovsky. 2005. What's so Funny about Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals, *Hanse Law Review*, Vol. 1, p. 47.

27 Details of Treaty No.213, Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms. <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213>.

28 European Court of Human Rights. Case of Hatton and Others v. the United Kingdom (36022/97), 08/07/2003. Available from: <http://hudoc.echr.coe.int/eng?i=001-61188>, para. 123; European Court of Human Rights. Case of James and Others v. the United Kingdom (8793/79), 21/02/1986. Available from: <http://hudoc.echr.coe.int/eng?i=001-57507>.

29 European Court of Human Rights. Case of Sejdić and Finci v. Bosnia and Herzegovina (27996/06 and 34836/06), 22/12/2009. Available from: <http://hudoc.echr.coe.int/eng?i=001-96491>, para. 48.

30 Karen Reid. 2015. *A Practitioner's Guide to the European Convention on Human Rights* (5th Edition, Sweet and Maxwell), p. 76.

an emergency or a particular pressing and/or controversial public interest, whether the measure in question is one of a number of equally Convention-compliant alternatives, and whether or not technical expertise or detailed knowledge of local circumstances are required to make a sound judgement.<sup>31</sup>

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## Military discipline

Military discipline is the governance or the manner of leading and directing troops which consists of the rules and the ordinances in military service, mostly in the garrison or in the installation of troops in combat.<sup>32</sup> The Court's recognition of the importance of military discipline often accounts for differences in how particular provisions of the Convention are applied to conscripts and civilians. For example, in the judgment *Engel and Others v. the Netherlands*,<sup>33</sup> the Court observed that freedom of expression as secured under Article 10 applies to servicemen as well as all other persons under the jurisdiction of Contracting States. Nevertheless, 'the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline'.<sup>34</sup> The role of military discipline in the Court's analysis is considered further below.

The Court has also previously found that 'in choosing to pursue a military career the applicant was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians, States being allowed to adopt for their armies disciplinary regulations forbidding this or that type of conduct, in particular an attitude inimical to an established order reflecting the requirements of military service'.<sup>35</sup> This implies that military discipline as an inherent aspect of military service strongly underlines the application and restriction of certain rights in contrast to their usual application in the civilian context.

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31 Steven Greer. 2000. The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights (Council of Europe Publishing). Available from: [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17\(2000\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17(2000).pdf), p. 7.

32 Guillaume Le Blond. 2008. Military Discipline. Available from: <http://hdl.handle.net/2027/spo.did2222.0000.967>

33 European Court of Human Rights. Case of Engel and Others v. the Netherlands (5100/71; 5101/71; 5102/71; 5354/72; 5370/72), 08/06/1976. Available from: <http://hudoc.echr.coe.int/tur?i=001-57479>.

34 Council of Europe. 2013. National Security and European case-law. Available from: [https://www.echr.coe.int/Documents/Research\\_report\\_national\\_security\\_ENG.pdf](https://www.echr.coe.int/Documents/Research_report_national_security_ENG.pdf), p. 18, para. 52.

35 Council of Europe. 2013. National Security and European case-law. Available from: [https://www.echr.coe.int/Documents/Research\\_report\\_national\\_security\\_ENG.pdf](https://www.echr.coe.int/Documents/Research_report_national_security_ENG.pdf), p. 24, para. 70; See, for example, European Court of Human Rights. Case of Kalaç v. Turkey (20704/92), 01/07/1997. Available from: <http://hudoc.echr.coe.int/eng?i=001-58042>.

# Civil and political rights of conscripts

## Prohibition of torture, inhuman or degrading treatment or punishment and the right to life

### 1. Description and legal documents

The prohibition of torture, inhuman or degrading treatment or punishment differs from the right to life. Nevertheless, cases in which conscripts die while conducting their military service are often preceded by allegations of torture or ill treatment, and the European Court of Human Rights has applied both rights in a considerable amount of jurisprudence. Consequently, in many of the claims alleging torture, the Court examines whether or not the State has violated its positive and negative obligations with regard to the right to life.<sup>36</sup>

The Convention against Torture<sup>37</sup> (CAT) defines torture as an ‘act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination

36 See European Court of Human Rights. Case of Mosendz v. Ukraine (52013/08), 17/04/2013. Available from: <http://hudoc.echr.coe.int/fre?i=001-115887>, para. 115; European Court of Human Rights. Case of Muradyan v. Armenia (11275/07), 24/02/2017. Available from: <http://hudoc.echr.coe.int/en-g?i=001-168852>, para. 161.

37 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987).

of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>38</sup> The obligations under the CAT extend also to other acts of cruel, inhuman or degrading treatment which do not amount to torture as defined under the same Article ‘when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’.<sup>39</sup>

Prohibition of torture is provided for in a magnitude of international instruments which include the Universal Declaration of Human Rights (UDHR),<sup>40</sup> the International Covenant on Civil and Political Rights (ICCPR)<sup>41</sup> and the CAT. The binding character of the prohibition of torture is not limited to treaties, as it constitutes customary international law and has accordingly been recognized by the International Court of Justice.<sup>42</sup> Moreover, torture is argued to constitute a peremptory norm of international law (*jus cogens*)<sup>43</sup> suggesting that it is hierarchically superior to other international and national laws, from which no derogation is permitted and which is *erga omnes*, meaning all states owe this obligation to the international community.<sup>44</sup> Additionally, multiple regional human rights instruments provide for the prohibition of torture. These include the Convention,<sup>45</sup> The American Convention on Human Rights (ACHR)<sup>46</sup> and the African Charter on Human and Peoples’ Rights (the Banjul Charter).<sup>47</sup>

38 CAT, Article 1.

39 CAT, Article 16(1).

40 The Universal Declaration of Human Rights (adopted by General Assembly on 10 December 1948). Available from: [https://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf), Article 5 provides that ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’

41 International Covenant on Civil and Political Rights (adopted on 16 December 1966, entered into force 23 March 1976), Article 7 provides that ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,’ Article 10(1) provides that ‘All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.’

42 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), ICJ Judgement (Merits, 3 February 2015), para. 98; Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), ICJ Judgement (Merits, 20 July 2012), para. 99.

43 See ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, available from: [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf), Article 26 and its commentary, especially subparagraph 5; Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), ICJ Judgement (Merits, 20 July 2012), para. 99.

44 International Criminal Tribunal for the Former Yugoslavia. Prosecutor v. Anto Furundžija, 10/12/1998. Available from: <https://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>; paras. 151-154.

45 The Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953), Article 3 provides that ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’.

46 American Convention on Human Rights (signed 22 November 1969, entered into force 18 July 1978), Article 5 provides for the right to humane treatment ‘1. Every person has the right to have his physical, mental, and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person’.

47 African Charter on Human and Peoples’ Rights (adopted 1 June 1981, entered into force 21 October

The CAT, which has near-universal participation, mandates each Contracting State to take legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction:<sup>48</sup> ‘Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.’<sup>49</sup> Additionally, ‘Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.’<sup>50</sup> With regard to investigations, ‘Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.’<sup>51</sup> State Parties should also ensure ‘that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.’<sup>52</sup> This right is also extended to the right to remedy for the victim.<sup>53</sup>

The distinction between torture and inhuman and degrading treatment is understood as a difference between the intensity of the suffering inflicted, in that torture can be seen to constitute an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.<sup>54</sup> Degrading treatment is, instead, directed at the humiliation and debasing of

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1986), Article 5 provides that ‘Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited’.

48 CAT, Article 2(1).

49 CAT, Article 4.

50 CAT, Article 10.

51 CAT, Article 12.

52 CAT, Article 13.

53 CAT, Article 14.

54 European Court of Human Rights. Case of Ireland v. the United Kingdom (5310/71), 18/01/1978. Available from: <http://hudoc.echr.coe.int/eng?i=001-57506>, para. 167; United Nations General Assembly. Resolution 3452 (XXX) containing the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 09/12/1975, Article 1(2).

a person in terms of consequences by which the conduct in question adversely affects the individual's personality.<sup>55</sup> Both torture and ill treatment are not exclusive to physical acts, but can also include acts which cause mental suffering to the victim.<sup>56</sup>

The right to life is similarly encompassed in the majority of international and regional human rights instruments: Article 3 of the UDHR, Article 6 of the ICCPR, Article 2 of the European Convention on Human Rights, Article 4 of the American Convention on Human Rights, Article 4 of the African Charter and Articles 5 to 8 of the Arab Charter on Human Rights. The protection of this right invokes both negative and positive obligations on the state. The state must not only refrain from taking a life outside of the circumstances under which such a restriction is prescribed, but must also affirmatively act to protect against the loss of life. Such positive obligations include training statutory forces to use deadly force only when necessary, taking preventative measures in the face of known risk to life, implementing national legislation which helps limit loss of life (such as the regulation of hospitals and medical professionals), investigating and punishing wrongful acts resulting in death and taking responsibility for the well-being of persons in state custody.<sup>57</sup> There are three distinct positive duties to be considered in the extracts from *Rantsev v. Russia and Cyprus*.<sup>58</sup> It is clear that Article 2 enjoins the State not only to refrain from the intentional and unlawful taking of life but also to take appropriate steps to safeguard the lives of those within its jurisdiction [this is a general statement of the existence of positive obligations]. In the first place, this obligation requires the State to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions [this is the systems duty]. However, it also implies, in appropriate circumstances, a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual [this is the protective/operational duty].<sup>59</sup> The Court then goes on to the investigative duty:<sup>59</sup> As the Court has consistently held, the obligation to protect the right to life under Article

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55 European Court of Human Rights. Case of Yankov v. Bulgaria (39084/97), 11/03/2004. Available from: <http://hudoc.echr.coe.int/fre?i=001-61539>, para. 105.

56 OHCHR, CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), adopted at the 44th Session of the Human Rights Committee, on 10/03/1992, para. 5.

57 International Justice Resource Center. Right to Life: Overview [Accessed 19/05/2020]. Available from: <https://ijrcenter.org/thematic-research-guides/right-to-life/>.

58 European Court of Human Rights. Case of Rantsev v. Cyprus and Russia (25965/04), 07/01/2010. Available from: [https://www.unodc.org/res/cld/case-law/2010/case\\_of\\_rantsev\\_v\\_cyprus\\_and\\_russia\\_application\\_no\\_2596504.html/Rantsev\\_vs\\_Cyprus\\_and\\_Russia.pdf](https://www.unodc.org/res/cld/case-law/2010/case_of_rantsev_v_cyprus_and_russia_application_no_2596504.html/Rantsev_vs_Cyprus_and_Russia.pdf), paras. 218 and 232.

59 Ibid.

2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.'

The United Nations Human Rights Committee has provided in its General Comment No.6 that 'States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities'.<sup>60</sup> 'In the context of individuals undergoing compulsory military service, the Court has previously had occasion to emphasise that, as with persons in custody, conscripts are within the exclusive control of the authorities of the State, since any events in the army lie wholly, or in large part, within the exclusive knowledge of the authorities, and that the authorities are under a duty to protect them.'<sup>61</sup>

## 2. Limits of the right to life and the prohibition of torture and inhuman or degrading treatment

The limits to the right to life need to be assessed in the light of Article 2(2) of the European Convention on Human Rights which provides that 'Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: a) in defence of any person from unlawful violence; b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; and c) in action lawfully taken for the purpose of quelling a riot or insurrection.' Any death caused by an agent of the state using force beyond that which is absolutely necessary or for a reason other than that laid down in paragraph 2(2) and proportionate to the achievement of the aims set out in the sub-paragraph will amount to a violation of Article 2.<sup>62</sup> These criteria have been interpreted in a strict manner.<sup>63</sup> Additionally, Article 15(2) of the Convention provides that no derogation from

60 International Committee on the Covenant for Civil and Political Rights. Sixteenth session (1982): General comment No. 6: Article 6 (Right to Life), para. 3.

61 European Court of Human Rights. Case of Malik Babayev v. Azerbaijan (30500/11), 01/09/2017. Available from: <http://hudoc.echr.coe.int/eng?i=001-173776>, para. 66.

62 European Court of Human Rights. Case of McCann and Others v. the United Kingdom (18984/91), 27/09/1995. Available from: <http://hudoc.echr.coe.int/eng?i=001-57943>, paras. 148-149.

63 International Justice Resource Center. Right to Life: Overview. [Accessed: 19/05/2020]. Available from: <https://ijrcenter.org/thematic-research-guides/right-to-life/>.



Article 2 is permissible, except in respect of deaths resulting from lawful acts of war.

The CAT provides for the prohibition of torture and inhuman or degrading treatment as an absolute right, with no restrictions or derogations being permissible irrespective of the victim's conduct.<sup>64</sup> It states that 'No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.'<sup>65</sup> Similarly, the Convention provides for no derogation from the prohibition of torture in time of emergency.<sup>66</sup> Article 3 of the Convention constitutes its most absolute provision, it contains no second paragraph providing for permissible limitations.<sup>67</sup> Amnesties and application of national amnesty acts for perpetrators and suspected perpetrators of torture and inhuman and degrading treatment are also considered incompatible with the prohibition of torture under international law.<sup>68</sup> Consequently, the matter of restricting the prohibition of torture and inhuman or degrading treatment does not concern the identification of limitations to this obligation, but rather (firstly) a definitional problem of which conduct constitutes such an act, and (secondly) a problem as to the scope of states' obligations to prevent acts of this kind. As to the first problem, 'In order to fall within the scope of Article 3, the ill-treatment must attain a minimum level of severity, the assessment of which depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.'<sup>69</sup> Many acts which would constitute violations of Article 3 may not reach the threshold of ill treatment when they occur in the armed forces, provided that they contribute to the specific mission of the armed forces in question, for example, training for battlefield conditions.<sup>70</sup> However, 'the Court is increasingly imposing standards of treatment to which soldiers and conscripts may not be exposed. A person must perform military service in conditions compatible with respect for human

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64 European Court of Human Rights. Case of *Raninen v. Finland* (152/1996/771/972 – application no. 20972/92), 16/12/1997. Available from: <http://hudoc.echr.coe.int/eng?i=001-58123>, para. 55.

65 CAT, Article 2(2).

66 ECHR, Article 15(2).

67 European Court of Human Rights. Case of *Ireland v. the United Kingdom* (5310/71), 18/01/1978. Available from: <http://hudoc.echr.coe.int/eng?i=001-57506>, para. 163.

68 OHCHR, CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), adopted at the 44th Session of the Human Rights Committee, on 10/03/1992, para. 15.

69 European Court of Human Rights. Case of *Raninen v. Finland* (152/1996/771/972), 16/12/1997. Available from: <http://hudoc.echr.coe.int/eng?i=001-58123>, para. 55. European Court of Human Rights. Case of *Ireland v. the United Kingdom* (5310/71), 18/01/1978. Available from: <http://hudoc.echr.coe.int/eng?i=001-57506>, para. 162.

70 European Court of Human Rights. Case of *Chember v. Russia* (7188/03), 01/12/2008. Available from: <http://hudoc.echr.coe.int/eng?i=001-87354>, para. 49

dignity; the procedures and methods of military training should not impose distress or suffering of an intensity exceeding the unavoidable level of hardship inherent in military discipline; and, given the practical demands of such service, health and well-being must be adequately secured by medical assistance.<sup>71</sup> ‘In considering whether a punishment or treatment is “degrading” within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3’.<sup>72</sup> For example in *Lyalyakin v. Russia*, the Court found a violation of Article 3 because the government failed to provide a convincing explanation for why it was necessary to make the applicant strip in order to maintain discipline in the military context. Because of the lack of justification, the respective conduct reached the threshold to fall under Article 3.<sup>73</sup> With regard to the CAT, some states such as the United States have previously argued for the absence of the extraterritorial applicability of this international obligation.<sup>74</sup> The grounds for such jurisdictional limitations have nevertheless been contested and in a 2015 report the Special Rapporteur to the CAT concluded that states should establish universal criminal jurisdiction over extraterritorial acts of torture and called upon states to exercise jurisdiction over acts of torture and ill treatment, regardless of the locus where wrongfulness took place.<sup>75</sup> The positive substantive obligation commits states ‘to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment. These measures should provide effective protection, in particular, of vulnerable persons, such as military conscripts, and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.’<sup>76</sup>

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71 Karen Reid. 2015. *A Practitioner’s Guide to the European Convention on Human Rights* (5th Edition, Sweet and Maxwell), p. 364.

72 European Court of Human Rights. Case of *Raninen v. Finland* (152/1996/771/972), 16/12/1997. Available from: <http://hudoc.echr.coe.int/eng?i=001-58123>, para. 55.

73 European Court of Human Rights. Case of *Lyalyakin v. Russia* (31305/09), 14/09/2015. Available from: <http://hudoc.echr.coe.int/eng?i=001-152726>, paras. 77–78.

74 Charlie Savage. U.S. Seems Unlikely to Accept that Rights Treaty Applies to Its Actions Abroad, *The New York Times*, 6 March 2014. Available from: <https://www.nytimes.com/2014/03/07/world/us-seems-unlikely-to-accept-that-rights-treaty-applies-to-its-actions-abroad.html>; Sarah Cleveland. 2014. *The United States and the Torture Convention, Part I: Extraterritoriality*, *Just Security*. Available from: <https://www.justsecurity.org/17435/united-states-torture-convention-part-i-extraterritoriality/>.

75 Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/70/303), 2015. Para. 70. This conclusion was reiterated in the 2018 Report of the Special Rapporteur on torture and other cruel and inhuman or degrading treatment or punishment (A/HRC/37/50), para. 13.

76 European Court of Human Rights. Case of *Placi v. Italy* (48754/11), 21/04/2014. Available from: <http://hudoc.echr.coe.int/fre?i=001-140028>, para. 49; See also European Court of Human Rights. *Affaire Abdullah Yilmaz c. Turquie* (21899/02), 17/09/2008. Available from: <http://hudoc.echr.coe.int/en->

The Court nevertheless limits the scope of the positive protective obligations of states in light of the difficulties involved in policing modern societies, the unpredictability of human conduct, and the operational choices which must be made in terms of priorities and resources.<sup>77</sup> As such, this obligation ‘must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities’ and ‘not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising’.<sup>78</sup> Consequently, it has to be established that the authorities knew or ought to have known at the time, of the existence of the real and immediate risk to life and that they failed to take corrective measures which, within the scope of their powers, might have reasonably been judged to have avoided such risks.<sup>79</sup>

### 3. Relevant cases

There is a magnitude of cases from the European Court of Human Rights (ECHR) which deal with the prohibition of torture and inhuman or degrading treatment or the right to life. In some of these the Court also examines other rights such as the right to an effective remedy (Article 13), even in cases where it does not necessarily assess the merits of the alleged violation of Article 3.

***Abdullah Yilmaz v. Turkey***:<sup>80</sup> a claim was brought by a father of a 20-year-old conscript who committed suicide during his military service following injuries inflicted by a non-commissioned officer. The sergeant in question had two criminal proceedings brought against him. The first resulted in a five-month sentence which was suspended for good conduct; while the second was discontinued due to the absence of a causal link between the actions of the sergeant and the suicide. The Court noted the positive obligation of states to take requisite preventative measures to protect persons under their jurisdiction against the actions of others or themselves and concluded that such obligations apply without exception to those performing compulsory military service. This implied the

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[g?i=001-87046](http://hudoc.echr.coe.int/eng?i=001-87046), paras. 67-72.

77 European Court of Human Rights. Case of Osman v. the United Kingdom (87/1997/871/1083), 28/10/1998. Available from: <http://hudoc.echr.coe.int/eng?i=001-58257>, para. 116.

78 Ibid.; see also European Court of Human Rights. Case of Malik Babayev v. Azerbaijan (30500/11), 01/09/2017. Available from: <http://hudoc.echr.coe.int/eng?i=001-173776>, para. 66.

79 European Court of Human Rights. Case of Osman v. the United Kingdom (87/1997/871/1083), 28/10/1998. Available from: <http://hudoc.echr.coe.int/eng?i=001-58257>, para. 116.

80 European Court of Human Rights. *Affaire Abdullah Yilmaz c. Turquie* (21899/02), 17/09/2008. Available from: <http://hudoc.echr.coe.int/eng?i=001-87046>.

requirement for states to secure high professional standards among regular soldiers, whose acts and omissions particularly vis-à-vis conscripts could invoke their responsibility under Article 2. The circumstances of the case illustrated the sergeant's inability to assume the responsibilities of an army professional who was supposed to protect the physical and mental integrity of conscripts under his command. The Court ruled that this proved the deficiency of the regulatory framework and consequently, that the state authorities did not do everything in their power to protect the victim from the improper conduct of his superiors. The Court further found that the judicial proceedings did not meet the standard necessary for the protection of right to life under Article 2.

*Mosendz v. Ukraine*:<sup>81</sup> claims were brought by the mother of a conscript who died during his military service. She alleged violations of Articles 2, 3 and 13 of the Convention. The death was officially recorded as a suicide. The Court followed its judgment from a similar case, *Sergey Shevchenko v. Ukraine*,<sup>82</sup> in which it ruled that cases of suicide cannot be generally interpreted to exclude the right to life. On the contrary, the positive obligations flowing from this provision may arise in cases where the risk to a person derives from the possibility of self-harm, including the procedural obligation to carry out an effective investigation into the circumstances of what appears to be a suicide.

As regards the substantive aspects of the state's obligations, the Court noted the primary duty of a state to put in place rules commensurate with the level of risk to life or limb that may result not only from the nature of military activities and operations, but also from the human element that comes into play when a state decides to call up ordinary citizens to perform military service. Such rules must include the adoption of practical measures aimed at the effective protection of conscripts against the dangers inherent in military life and appropriate procedures for identifying shortcomings and errors likely to be committed in that regard by those in charge at different levels.<sup>83</sup> In the assessment of the domestic practice the Court referred to *dedovshchina* (or grandfatherism) as an informal system for the subjection of fresh conscripts to brutalization by more senior soldiers, which in turn facilitated a situation of impunity and permissiveness. It further pointed to the burden being on the state to exhibit solid evidence against alleged violations. When assessing the plausible explanation given by the government and the respective procedural obligations, the Court determined

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81 European Court of Human Rights. Case of *Mosendz v. Ukraine* (52013/08), 17/04/2013. Available from: <http://hudoc.echr.coe.int/fre?i=001-115887>

82 European Court of Human Rights. Case of *Sergey Shevchenko v. Ukraine* (32478/02), 04/07/2006. Available from: <http://hudoc.echr.coe.int/eng?i=001-73040>, para. 56.

83 European Court of Human Rights. *Affaire Killinç et autres c. Turquie* (40145/98), 07/09/2005. Available from: <http://hudoc.echr.coe.int/eng?i=001-69269>, para. 41.

that because no alternative explanation was considered and due to omissions and discrepancies in the investigation, state authorities cannot have been regarded as having discharged their obligation to effectively investigate and duly account for the death of the applicant's son. Since it was established that the applicant was driven to suicide by the bullying and ill treatment of his military supervisors, the state was deemed responsible for the death. Consequently, the Court found a violation of right to life on both substantive and procedural grounds. Since the complaint also overlapped with Article 3 of the Convention, it held that no separate investigation into possible violations of Article 3 was necessary. Additionally, the Court found that there had been a violation of Article 13.

*Perevedentsevy v. Russia*:<sup>84</sup> a complaint was brought by the parents of a conscript who died during his military service. The Court again referred to the domestic practice of *dedovshchina*, through which new recruits faced abuses at the hands of more senior soldiers and noted that external reports on the practice were extremely worrying. Here the Court reiterated its statements from *Mosendz v. Ukraine*, that, by their very definition, conscripts remain under the exclusive control of state authorities, and that therefore, their conditions of service remain in large part within the exclusive knowledge of the authorities. As such, state authorities are under a duty to protect them.

The Court assessed whether the authorities knew or ought to have known of a real and immediate risk to the life of the conscript and whether they did all that could have been reasonably expected of them to avoid such a risk. The Court determined that the domestic authorities were aware of the conscript's psychological difficulties but failed to recognize the seriousness of those difficulties, which were by their nature and severity capable of putting his life at risk, and further failed to take appropriate measures to prevent the risk from materializing. The Court thus found substantive violations of right to life. Concerning procedural aspects, the Court assessed that the process was impartial and independent, but did not meet the requirement of promptness due to substantial delays. It also found that the requirement of thoroughness was not met as there were discrepancies and omissions within the investigations such as, not investigating bullying practices, extortion of money, nor the existence of reported and unreported injuries suffered by the dead conscript or fellow soldiers, which he had alleged in his letters. The questioning of fellow soldiers only took place three weeks after the death of the conscript in question, by which time it was deemed likely that their physical injuries would have healed and therefore not been visible. The Court

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84 European Court of Human Rights. Case of *Perevedentsevy v. Russia* (39583/05), 13/10/2014. Available from: <http://hudoc.echr.coe.int/eng?i=001-142516>.

further found that the applicants' interests as next of kin were not fairly and adequately protected and that the investigation was not subject to the appropriate level of public scrutiny. Consequently, the Court also found a procedural violation of the right to life.

*Lyalyakin v. Russia*:<sup>85</sup> the applicant brought a claim for alleged ill treatment during his military service and the absence of any resulting investigation by competent authorities. The alleged ill treatment included the stripping of the subject's clothes, the threat of execution by placing a machine gun to his head, the dressing of the applicant in a military protection suit in hot weather and the painting of a star on his head followed by physical abuse with a belt buckle, after which he was allegedly walked on a leash and threatened with rape. With regard to the substance of Article 3, the Court stressed that the suffering and humiliation must go beyond that which could be reasonably associated with a given form of *legitimate* treatment or punishment. While mandatory military service often involves such treatment, acts that would otherwise constitute degrading or inhuman treatment may not reach the relevant threshold when they occur in the armed forces if they are proven to contribute to the specific mission in hand; for example, training to replicate battlefield conditions or interrogation techniques.

The public nature of the treatment may also be relevant or constitute an aggravating factor when assessing whether or not it is degrading within the meaning of the Article. The state has a duty to ensure that a person performs military service in conditions which are compatible with respect for his human dignity, that the procedures and methods of military training do not subject him to distress or suffering of an intensity exceeding the unavoidable level of hardship inherent in military discipline and that, given the practical demands of such service, his health and well-being are adequately secured.<sup>86</sup> The allegations must be supported by evidence which is assessed in accordance with the standard proof of 'beyond reasonable doubt' but which may nevertheless follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.

With regard to the stripping of the applicant's clothes, the Court noted that there was insufficient evidence provided in support of its necessity, and that its public nature had the effect of humiliating him, and that his young age constituted an additional aggravating circumstance. The Court thus found a violation of Article 3 with regards to undressing. This was a first case where 'the Court considered whether the fact that an

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85 European Court of Human Rights. Case of Lyalyakin v. Russia (31305/09), 14/09/2015. Available from: <http://hudoc.echr.coe.int/eng?i=001-152726>.

86 European Court of Human Rights. Case of Chember v. Russia (7188/03), 01/12/2008. Available from: <http://hudoc.echr.coe.int/eng?i=001-87354>, para. 49.

applicant had been forced to undress and to line up in front of his unit wearing only his military briefs had reached the threshold of severity to bring the case within Article 3.<sup>87</sup> With regard to the other allegations of ill treatment, the Court found no need to examine them; partially due to a lack of evidence and also to the failure to carry out an effective investigation. The Court determined that there was a violation of the procedural aspect of Article 3 since the authorities did not ensure an effective investigation into the allegations of ill treatment and equally found a violation of Article 13.

***Muradyan v. Armenia:***<sup>88</sup> the applicant was the father of a conscript who died during his military service as a result of a ruptured, deformed and enlarged spleen accompanied by an abdominal injury evidenced by recent and historic bruises. The applicant complained that his son had died as a result of ill treatment; that there had been a subsequent failure to provide him with adequate and timely medical assistance, and that the authorities had failed to carry out an effective investigation into these circumstances. The Court reaffirmed its previous jurisprudence, that conscripts are the exclusive responsibility of the State and that therefore the State is under an obligation to provide a satisfactory and convincing explanation for any injuries or deaths occurring in the course of their military service. The obligation to conduct an effective investigation is an obligation not of result but of means: the authorities must take the reasonable measures available to them to secure evidence concerning the incident at hand, including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Furthermore, the investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements. When assessing the violation of the procedural aspect of the right to life, the Court noted that the fact that appropriate steps were not taken to reduce the risk of collusion between officers amounted to a significant shortcoming in the adequacy of the investigation. The Court also highlighted the lack of focus during the investigation on examining the allegations of ill treatment; the possibility of the witnesses in question being unreliable owing to their fear of reprisal, and the lack of any related corrective measures being taken; and finally, the existence of ambiguous medical findings. Additionally, there was no investigation into multiple aspects of the case, including the origins of the bruising. The Court also stated that it could not ignore the Council of Europe Human

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87 Council of Europe – European Court of Human Rights. Overview of the Case-law of the European Court of Human Rights 2015 (Wolf Legal Publishers, 2016) available from: [https://www.echr.coe.int/Documents/Short\\_Survey\\_2015\\_ENG.pdf](https://www.echr.coe.int/Documents/Short_Survey_2015_ENG.pdf), p. 32.

88 European Court of Human Rights. Case of Muradyan v. Armenia (11275/07), 24/02/2017. Available from: <http://hudoc.echr.coe.int/eng?i=001-168852>.

Rights Commissioner's report, which contained a chapter on the human rights situation in the Armenian army, pointing to a culture of ill treatment and weak accountability. Consequently, the Court found a violation of right to life in its procedural aspect. Due to these findings, the Court did not find it necessary to examine violations of Article 3 or 13.

*Zalyan and Others v. Armenia:*<sup>89</sup> a claim was brought by two former servicemen who alleged that they had been subjected to torture and that no effective investigation had followed their allegations of ill treatment after they were detained for the suspected murder of two servicemen. The Court found that the applicants had provided insufficient evidence, particularly with respect to the medical assessments they presented, finding beyond reasonable doubt that there had been a substantive violation of Article 3. Nevertheless, as a result of what was deemed a highly flawed investigation, the Court concluded that the authorities failed to carry out an effective investigation into the applicants' allegations of ill treatment. It stated that where an individual makes a claim or a credible assertion of suffering in violation of Article 3, be it at the hands of the police or other similar agents of the state, that provision requires by implication that there be an effective and official investigation.

*Styazhkova v. Russia:*<sup>90</sup> the applicant in question was the mother of a conscript who, while on military service, was found dead with two gunshot wounds in the lateral area of his head, and bruises to his body. She brought complaints under Articles 2, 3 and 6. When assessing the substantive aspect of Article 2, the Court distinguished the circumstance of the case from those in which a conscript suffers from mental health problems (*Malik Babayev v. Azerbaijan*), or in which a conscript commits suicide as a result of a series of events which took place over such a period of time that state authorities could reasonably be expected to have identified a real and immediate risk of suicide (*Abdullah Yilmaz v. Turkey*). In circumstances under which only a short period of time elapses between alleged acts of violence committed against conscripts and their suicide, the conscripts' supervisors could not be reasonably expected to foresee the existence of a real and immediate risk of suicide. In such cases, the unpredictability of human conduct must not be ignored, and the state's positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on authorities. With respect to the case in question, as domestic authorities had no indications which would have caused them to have reasonably identified a real

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89 European Court of Human Rights. Case of *Zalyan and Others v. Armenia* (36894/04 and 3521/07), 17/06/2016. Available from: <http://hudoc.echr.coe.int/eng?i=001-161408>.

90 European Court of Human Rights. Case of *Styazhkova v. Russia* (14791/04), 14/01/2020. Available from: <http://hudoc.echr.coe.int/eng?i=001-200311>.



and immediate risk that the applicant's son would commit suicide, the Court found no substantive violation of Article 2. Regarding the procedural aspect, the Court was satisfied with the promptness, independence of the investigation and the level of public scrutiny. Nevertheless, due to the lack of alternatives to suicide being investigated; or of the officers involved in the beating of the conscript, as well as a lack of due diligence in criminal proceedings, the Court found violations of the procedural obligation under Article 2 and therefore, it did not find it necessary to examine procedural aspects of Article 3 or Article 13. Additionally, the Court noted that the application of amnesties for crimes involving ill treatment or actions which endanger life should not be permissible. Therefore, even if the Amnesty Act went into effect at the time of the investigation it would not preclude criminal investigation of the suspects for their violation of the respective right. With regard to the substantive aspect of Article 3, the Court found a violation based on the already existing observations of the government. It concluded that the conscript's punishment caused him intense physical pain and humiliation, went beyond the threshold of a minimum level of severity, and exceeded the level of unavoidable hardship of military discipline.

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## 4. Other cases

European Court of Human Rights. *Affaire Yabansu et autres c. Turquie* (43903/09), 12/02/2014. Available from: <http://hudoc.echr.coe.int/eng?i=001-128041>.

European Court of Human Rights. *Case of Chember v. Russia* (7188/03), 01/12/2008. Available from: <http://hudoc.echr.coe.int/eng?i=001-87354>.

European Court of Human Rights. *Case of Malik Babayev v. Azerbaijan*, 01/09/2017. Available from: <http://hudoc.echr.coe.int/eng?i=001-173776>.

European Court of Human Rights. *Case of Placi v. Italy* (48754/11), 21/04/2014. Available from: <http://hudoc.echr.coe.int/fre?i=001-140028>.

# Freedom of expression

## 1. Description and legal documents

John Stuart Mill stated that ‘If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind.’ He continued nevertheless to say that ‘The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.’<sup>91</sup> ‘Free speech and expression is the lifeblood of democracy, facilitating open debate, the proper consideration of diverse interests and perspectives, and the negotiation and compromise necessary for consensual policy decisions.’<sup>92</sup>

Freedom of expression is enshrined in universal and regional human rights instruments, including the UDHR, the ICCPR, the ACHR, the African Charter on Human and Peoples’ Rights (the Banjul Charter), the Declaration of Principles on Freedom of Expression, the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights, amongst others.<sup>93</sup> Article 19 of the UDHR states that ‘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.’ The United Nations Human Rights Committee states that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person; they are essential for any society, and that they constitute the foundation of every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.<sup>94</sup> The Organization for Security and Co-operation in Europe (OSCE) also emphasizes that everyone has the right to freedom of expression, including the right to communication. This right includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority

91 John Stuart Mill. 1863. *On Liberty*. Boston: Ticknor and Fields, p. 35.

92 Freedom House. *Freedom of Expression*. Available from: <https://freedomhouse.org/issues/freedom-expression>

93 See the list of documents at: <https://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Standards.aspx>.

94 Human Rights Committee 102nd session, Geneva, 11-29 July 2011. General comment No. 34. Available from: <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards.<sup>95</sup> Article 10 of the European Convention on Human Rights states that ‘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 and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.’ It further explains duties, responsibilities and possible limitations: ‘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.’<sup>96</sup> In its jurisprudence, the Court further elaborated that ‘Article 10 protects not only the substance of ideas and information, but also the form in which they are conveyed.’<sup>97</sup>

The Court has affirmed in its jurisprudence that Article 10 is fully applicable to the Internet.<sup>98</sup> Article 10 guarantees not only the right to impart information but also the right of the public to receive information. Since the Internet constitutes one of the principle means through which the public may access and disseminate information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest, it falls within the ambit of the protection afforded by Article 10.<sup>99</sup> As the Court noted, ‘[i]n the light of its accessibility and its capacity to store and communicate vast amounts of information the Internet plays an important role in enhancing the public’s access to news and facilitating the dissemination of information in general’, continuing that ‘User-generated expressive

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95 CSCE Copenhagen Document 1990. Available from: <https://www.osce.org/odihr/elections/14304?download=true>.

96 ECHR, Article 10.

97 European Court of Human Rights. Case of News Verlags GmbH & Co.KG v. Austria (31457/96), 11/04/2000. Available from: <http://hudoc.echr.coe.int/eng?i=001-58587>, para. 39.

98 Council of Europe: Steering Committee on Media and Information Society. 2014. 1197 Meeting – 5 Media ‘Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a guide to human rights for Internet users – Explanatory Memorandum’. Available from: <https://rm.coe.int/CoER-MPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804d5b31>; See also European Court of Human Rights. 2020. Factsheet – New Technologies. Available from: [https://www.echr.coe.int/Documents/FS\\_New\\_technologies\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_New_technologies_ENG.pdf).

99 European Court of Human Rights. Case of Times Newspapers Ltd (Nos. 1 and 2) v. the United Kingdom (3002/03 and 23676/03), 10/06/2009. Available from: <http://hudoc.echr.coe.int/eng?i=001-91706>, para. 27; and European Court of Human Rights. Case of Cengiz and Others v. Turkey (48226/10 and 14027/11), 01/03/2016. Available from: <http://hudoc.echr.coe.int/eng?i=001-159188>, para. 49.

activity on the Internet provides an unprecedented platform for the exercise of freedom of expression.<sup>100</sup> Internet has become an indispensable communication tool across the armed forces including for conscripts who should be entitled to use it if it does not contradict national legal regulations and security on the ground. Conscripts are entitled to hold opinions and, in certain circumstances, to receive and impart information and ideas without interference by public authority and regardless of frontiers. They should also have access to information, in some cases even to that which is held by military authorities.<sup>101</sup> The respect and full implementation of this norm is essential for the armed forces. Graziella Pavone of the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE noted that ‘because freedom of speech is about self-expression, communication and interaction, the armed forces can benefit from its promotion as it can bring about improvements to morale and increase transparency within the institution.’<sup>102</sup>

## 2. Restrictions on or interference with freedom of expression

The right to freedom of expression is not absolute and may be limited under certain conditions. According to Article 19(3) of the ICCPR, any restriction must be provided by law; undertaken to respect the right or reputations of others; protect national security, public order or public health or morals; and be necessary and proportionate to achieve a legitimate objective. As noted above, Article 10(2) of the Convention states that the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such restrictions (etc.) as are ‘prescribed by law’ and are ‘necessary in a democratic society’ in the interests of any one or more of the prescribed objectives. Notably in the context of conscription, the objective of the ‘prevention of disorder or crime’ has been found to encompass the prevention of disorder ‘within the confines of a specific social group’ and hence to include the maintenance of military discipline: *Engel v. the Netherlands*. With respect to limitations on Article 10 rights, issues can

100 European Court of Human Rights. Case of *Cengiz and Others v. Turkey* (48226/10 and 14027/11), 01/03/2016. Available from: <http://hudoc.echr.coe.int/eng?i=001-159188>, para. 52.

101 European Court of Human Rights. Case of *Társaság a Szabadságjogokért v. Hungary* (37374/05), 14/07/2009. Available from: <http://hudoc.echr.coe.int/eng?i=001-92171>, para. 35; European Court of Human Rights. Case of *Youth Initiative for Human Rights v. Serbia* (48135/06), 25/09/2013. Available from: <http://hudoc.echr.coe.int/eng?i=001-120955>, para. 20.

102 OSCE. Freedom of speech and expression in the armed forces focus of ODIHR and EUROMIL discussion in Warsaw, 17 September 2018. Available from: <https://www.osce.org/odihr/395732>.

arise as to the lawfulness of specific restrictions or prohibitions and/or of the penalties associated with breaching them.

Incitement to violence falls outside the protection afforded by Article 10 in cases where there is an intentional and direct use of wording to incite violence and where there is a real possibility that violence subsequently occurs. Hate speech directed towards minorities is not protected under Article 10.<sup>103</sup> Article 10 can also be read in conjunction with Article 17, which prohibits the abuse of rights, and provides that nothing in the Convention may be interpreted as implying that any group or person has any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth, or at their limitation, to a greater extent than is provided in the Convention. It follows that Article 10 is not applicable when the issue at stake is a gratuitous insult or ethnic abuse.<sup>104</sup> This is the case in the military context as it is in all others. For example, in *Rujak v. Croatia*<sup>105</sup> the complaints of a soldier for being disciplined due to the language he used in an argument with other soldiers fell outside of the scope of the Article.<sup>106</sup> The Court provided that ‘certain classes of speech such as lewd and obscene speech have no essential role in the expression of ideas’ where the sole intent of the offensive statement is to insult.<sup>107</sup>

Where the protection of Article 10 is engaged, the provision itself sets out a list of permissible objectives in pursuit of which the State may interfere with and restrict freedom of expression. The Court has on a number of occasions considered the lawfulness of measures restricting Article 10 rights in a military context. One relevant type of restriction concerns the ability of soldiers to access public information. While not overly sympathetic to the concerns of states regarding the need to limit access to information in the armed forces, the Court has acknowledged that the proper functioning of an army presupposes rules preventing the undermining of military discipline, and that, in certain cases, this may legitimately involve limiting access to certain information (i.e. classified information related to national security).<sup>108</sup> This reflects the broader proposition that, as

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103 Dominika Bychawska-Siniarska. 2017. Protecting the right to freedom of expression under the European Convention on Human Rights: A handbook for legal practitioners. Council of Europe. Available from: <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>.

104 Karen Reid. 2015. *A Practitioner’s Guide to the European Convention on Human Rights* (5th Edition, Sweet and Maxwell), p. 368.

105 European Court of Human Rights. First Decision in *Vladimir Rujak v. Croatia* (57942/10), 02/10/2012, Available from: <http://hudoc.echr.coe.int/eng?i=001-114145>.

106 Karen Reid. 2015. *A Practitioner’s Guide to the European Convention on Human Rights* (5th Edition, Sweet and Maxwell), p. 368.

107 European Court of Human Rights. First Decision in *Vladimir Rujak v. Croatia* (57942/10), 02/10/2012, Available from: <http://hudoc.echr.coe.int/eng?i=001-114145>, para. 29.

108 Karen Reid. 2015. *A Practitioner’s Guide to the European Convention on Human Rights* (5th Edition,

the armed forces to a certain degree represent the State, their freedom of expression may be limited due to the nature of their military service. Soldiers may be deployed in a military operation or participate in a field training exercise where the right to receive and impart information may be reasonably restricted. This proposition applies to both conscripts and professional soldiers, though their treatment may be different and unequal. In the case of *Engel*, the Court stated that the hierarchical structure inherent in armies entails differentiation according to rank. Corresponding to the various ranks are differing responsibilities which in turn justify certain inequalities of treatment in the disciplinary sphere. As such, the European Convention affords competent national authorities a considerable margin of appreciation as regards justifiable differences in treatment in relation to different categories of service people.<sup>109</sup>

The Court has also recognized that conscripts are obliged to follow military discipline, demonstrate allegiance to certain rules enshrined in codes of conduct, and fulfil various tasks linked to national security, being exposed to legal restrictions on rights such as freedom of expression in the process. Of course, the need to maintain military discipline is not of itself sufficient to justify any and all limitations on freedom of expression. In the case of *Jokšas v. Lithuania*, the Court stated that while Contracting States could legitimately impose restrictions on freedom of expression where there was a ‘real threat’ to military discipline, they could not impose such restrictions simply for the purpose of frustrating the expression of opinions, even if these were directed against the army as an institution.<sup>110</sup> The limits on the lawful pursuit of this objective are discussed further below.

Classified information and state secrets are an inseparable element of military service and constitute areas in which further restrictions on freedom of expression may be imposed on the grounds of national security. In the case of *Hadjianastassiou v. Greece*, an officer was convicted of having disclosed information classified as secret. The officer in question had revealed technical information on a given weapon, and was consequently convicted of causing considerable damage to national security. The Court decided that while the conviction was an interference of the officer’s freedom of expression, it was nevertheless justified.<sup>111</sup>

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Sweet and Maxwell), p. 366–67.

109 European Court of Human Rights. Case of *Engel and Others v. the Netherlands* (5100/71; 5101/71; 5102/71; 5354/72; 5370/72). 08/06/1976. Available from: <http://hudoc.echr.coe.int/tur?i=001-57479>.

110 Stefan Kirchner & Vanessa Maria Frese. 2014. The Freedom of Expression of Members of the Armed Forces Under the European Convention on Human Rights in *Jokšas v. Lithuania*. *Baltic Journal of Law & Politics* 7:1. p. 12–28.

111 Dominika Bychawska-Siniarska. 2017. Protecting the right to freedom of expression under the European Convention on Human Rights: A handbook for legal practitioners. Council of Europe. Available from: <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>.

Restrictions may also be justified to ensure the political neutrality of the armed forces, an objective recognized in both international human rights law and practice. Paragraph 23 of the OSCE Code of Conduct on Politico-Military Aspects of Security states that, while providing for the individual service member's civil rights, each state will ensure that its armed forces are politically neutral.<sup>112</sup> In 2011, the NATO and American commander in Afghanistan, Gen. John R. Allen dismissed Maj. Gen. Peter Fuller, the deputy commander for programmes at the NATO training mission in Afghanistan. The decision followed inappropriate public comments made by Major General Fuller, who, along with other critical remarks about Afghan politics, described President Karzai as erratic and inarticulate.<sup>113</sup> Issues regarding the political neutrality of the armed forces are also reflected in the case of *Rekvényi v. Hungary*.<sup>114</sup> The case concerned constitutional amendments pursuant to which the police and security services were prohibited from joining any political party and from engaging in any political activity. The head of the national police requested, in view of the forthcoming parliamentary elections, that police officers refrain from political activities and indicated that those who wished to pursue political activities would have to leave the police. The applicant maintained that the prohibition on engaging in 'political activities' contained in Article 40/B § 4 of the Hungarian Constitution amounted to an unjustified interference with his right to freedom of expression, in violation of Article 10 of the Convention. The Court emphasized that in the present case the obligation imposed on certain categories of public officials including police officers to refrain from political activities is intended to depoliticize the services concerned and thereby to contribute to the consolidation and maintenance of pluralistic democracy in the country. Police officers are invested with coercive powers to regulate the conduct of citizens and, in some countries, authorized to carry arms in the discharge of their duties. As such, members of the public are entitled to expect that when engaging with police, they be met by politically neutral officers who do not hold political views which might jeopardize the impartial discharging of their duties. In the Court's view, the need to ensure that the crucial role of the police in society is not compromised through the erosion of their political neutrality, and therefore in certain cases, to restrict their freedom of expression is compatible with democratic

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112 OSCE. 1994. Code of Conduct on Politico-Military Aspects of Security. Available from: <https://www.osce.org/fsc/41355?download=true>.

113 Rod Nordland, 5 November 2011. General Fired Over Karzai Remarks. New York Times. Available from: <https://www.nytimes.com/2011/11/06/world/asia/us-general-fired-over-remarks-about-karzai.html>

114 European Court of Human Rights. Case of *Rekvényi v. Hungary*, 20/05/1999. Available from: <http://hudoc.echr.coe.int/eng/?i=001-58262>.

principles.<sup>115</sup> Similar principles could be said to apply to members of the armed forces.<sup>116</sup>

In the absence of jurisprudence addressing the rights of conscripts in this area, it is unclear to what extent the requirement of political neutrality, and the restrictions that may follow, can be applied to them. On one hand, it could be thought reasonable to expect that certain restrictions also apply to conscripts. Nevertheless, their situation is arguably different from that of members of the armed forces. Conscripts did not consent to restrictions on their freedoms, and their status as members of the armed forces is by definition temporary. Additionally, their duties are generally restricted to training rather than exercising coercive powers. Consequently, in balancing their individual rights against the legitimate interests of the State, it might be seen as disproportionate to impose the same restrictions on them as are applied to other members of the armed forces. A middle-ground could potentially be found by distinguishing between the ‘active’ and ‘passive’ political participation of conscripts: thus, it might be considered lawful to require conscripts to avoid or suspend active participation in politics (for example, participation in pre-electoral campaigns; active participation in meetings or other public activities organized by political parties and political organizations; and announcements of political statements, articles, speeches or political demands), while it might be considered unlawful to prevent them from retaining their membership or affiliation with political parties in a passive form.

In general, military discipline, national security, the prevention of disorder and crime, and classified information systems are the cornerstones through which states are afforded the power to legitimately interfere with and limit the freedom of expression of conscripts. For example, in the case of *Engel*, the Court reaffirmed that freedom of expression as guaranteed by Article 10, applies to servicemen in the same manner as it does to other persons falling within the jurisdiction of Contracting States. However, the proper functioning of an army requires a legal regime through which servicemen are prevented from undermining military discipline; and the Court could not disregard the ‘specific “duties” and “responsibilities” incumbent on members of the armed forces’.<sup>117</sup> In consequence, there was no breach of Article 10 in having penalized the applicants (via committal to a disciplinary unit) for having published and distributed a paper found to

115 European Court of Human Rights. Case of *Rekvényi v. Hungary*. 20/05/1999. Available from: <http://hudoc.echr.coe.int/eng/?i=001-58262>.

116 DCAF, OSCE/ODIHR. 2008. Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel. Published by the OSCE Office for Democratic Institutions and Human Rights. Available from: <https://www.dcaf.ch/sites/default/files/publications/documents/HandbookHumanRightsArmedForces-080409.pdf>.

117 European Court of Human Rights. *Engel and Others v. the Netherlands* (5100/71; 5101/71; 5102/71; 5354/72; 5370/72). 08/06/1976. Available from: <http://hudoc.echr.coe.int/tur/?i=001-57479>.



have had this purpose and effect. The case of *Le Cour Grandmaison and Fritz v. France* gave rise to a similar issue. The applicants, who performed their military service in a French regiment in the Federal Republic of Germany, were convicted and given a suspended sentence of one year's imprisonment for the incitement of disobedience among fellow soldiers via the distribution of leaflets criticizing French military presence in the Federal Republic of Germany and petitions demanding the departure of French troops from Germany. The applicants filed a complaint alleging violations of Article 9 and 10 on account of the fact that the application of the Code of Military Justice and the Decree on the general rules of discipline in the army infringed upon their rights to freedom of thought, conscience and expression. The Court disagreed, finding that the applicants' conviction was justified on the grounds of protecting national security and preventing disorder within the armed forces.<sup>118</sup> These cases may be contrasted with *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*,<sup>119</sup> where the Court found that the State's refusal to add a particular magazine to the list of periodicals distributed by the Austrian army pursued the legitimate aim of preserving order in the armed forces, but was disproportionate to that aim because the periodical in question--while 'critical and satirical' --did not recommend disobedience or violence, but simply set out specific complaints and proposals for discussion and reform. This was considered to be within the bounds of what 'must be tolerated in the army of a democratic State just as it must be in the society that such an army serves'. Similarly, in *Grigoriades v. Greece*<sup>120</sup> the making of 'certain strong and intemperate remarks concerning the armed forces in Greece' in a letter sent by a conscripted probationary reserve officer to his commanding officer did not justify his prosecution and conviction, which were found to have violated Article 10.

It is noteworthy that the restrictions applied to the right to freedom of expression must meet certain criteria, including proportionality, necessity in a democratic society, and non-discriminatory application; and must also be clearly described in national legislation. Measures to restrict freedom of expression must also provide sufficient protection against arbitrariness and be reasonably foreseeable.<sup>121</sup> In general, the Court

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118 Anna-Lena Svensson-McCarthy. 1998. The International Law of Human Rights and States of Exception with special reference to the travaux préparatoires and case-law of the international monitoring organs. Brill. p. 179.

119 European Court of Human Rights. Case of *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria* (15153/89), 19/12/1994, Available from: <http://hudoc.echr.coe.int/eng?i=001-57908>.

120 European Court of Human Rights. Case of *Grigoriades v. Greece* (121/1996/740/939). 25/11/1997. Available from: <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-58116&file-name=001-58116.pdf>.

121 Council of Europe: Committee of Ministers. 2010. Recommendation CM/Rec(2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces and explanatory

has tended to privilege states with a wide margin of appreciation in cases involving restrictions on the rights of military service personnel, including conscripts.<sup>122</sup> This is related in part to the ambiguity of ‘national security’ and its varying interpretations. Nevertheless, if a state is unable to demonstrate that a restriction has a solid legal basis, it would be unable to apply such restrictions. It has been observed that the margin of appreciation remains opaque and the decisions of the Court can vary; as Judge Lohmus observed in a dissenting opinion, ‘The Court makes distinctions within Article 10 (art. 10) when applying its doctrine on the States’ margin of appreciation. Whereas, in some cases, the margin of appreciation applied is wide, in other cases it is more limited. However, it is difficult to ascertain what principles determine the scope of that margin of appreciation.’<sup>123</sup>

The proportionality test used by the Convention system requires consideration of the nature and extent to which a restriction on or interference with rights is justified by recourse to a legitimate objective. For example, legislation prohibiting in absolute and unconditioned terms the dissemination of all information related to national security, in the process eliminating the ability of the public to exercise oversight over the activities of intelligence services, would constitute a breach of Article 10 on the basis that, although it pursues a legitimate objective, it is not ‘necessary in a democratic society’.<sup>124</sup> Other examples are identified below. It is therefore clear that, notwithstanding the generally wide margin of appreciation, the Court’s repeated observation that ‘Article 10 does not stop at the gates of the army barracks’ (see for example, *Grigoriades v. Greece*) retains some force. Another guideline can be found in Principle 12 of the Johannesburg Principles, which states that ‘a state may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest’.<sup>125</sup> While permitting access to and the dissemination of related information, should be the default position for states in certain circumstances, limitations may be legitimately imposed. For example, documents may be classified for objective and justifiable reasons. In addition, the protection of

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memorandum. Available from: <https://policehumanrightsresources.org/content/uploads/2016/06/CoE-Guidelines-on-Human-Rights-of-members-of-the-armed-forces.pdf?x96812>, p. 51.

122 Ibid.

123 European Court of Human Rights. Case of Wingrove v. the United Kingdom (17419/90), 25/11/1996. Available from: <http://hudoc.echr.coe.int/web/services/content/pdf/001-58080>.

124 Dominika Bychawska-Siniarska. 2017. Protecting the right to freedom of expression under the European Convention on Human Rights: A handbook for legal practitioners. Council of Europe. Available from: <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>, p.51.

125 Ibid., p. 53.

national security, defence, or international relations may constitute legitimate grounds upon which access is also limited.<sup>126</sup> Nevertheless, states must clearly prescribe such exceptions in national legislation in order to define the scope of protected interests and ensure they meet the requirements of national security.

It is important to identify and distinguish between statements made by conscripts in their capacity as a public official, and those made as a private citizen. For the state, this distinction is important, as statements made while discharging official state functions are attributable to it.<sup>127</sup> While the rights of conscripts must be ensured, the protection of their freedom of expression when acting in a private capacity remains difficult to distinguish—and therefore, to protect—owing to the nature of their service.

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### 3. Relevant cases

*Jokšas v. Lithuania*:<sup>128</sup> In 2002, the applicant was employed by the Lithuanian armed forces on a five-year contract which, under specific circumstances, could be rescinded before its termination date. In 2006, a Lithuanian newspaper published an article in which the applicant criticized new legislation for inadequately protecting the rights of servicemen in disciplinary proceedings. An internal investigation was launched but eventually discontinued on the grounds that the applicant had not violated military discipline. In 2006, the applicant reached his retirement age and, in accordance with the legal provisions in force, his contract was terminated. The applicant challenged this decision before the administrative courts, alleging that he had been discriminated against on grounds of his personal opinions, and requested that the courts obtain and analyse evidence of other soldiers in his battalion who in his view should have also been dismissed on grounds of age. The applicant's complaints were dismissed in a decision that was ultimately upheld by the Supreme Administrative Court. The Court affirmed that, in principle, 'Article 10 does not stop at the gates of army barracks'; and that, while it is open to states to impose restrictions on freedom of expression 'where there is a real threat to military discipline', they are not permitted to 'rely on such rules

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126 Council of Europe: Committee of Ministers. 2010. Recommendation CM/Rec(2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces and explanatory memorandum, p. 53.

127 Stefan Kirchner & Vanessa Maria Frese. 2014. The Freedom of Expression of Members of the Armed Forces Under the European Convention on Human Rights in *Jokšas v. Lithuania*. *Baltic Journal of Law & Politics* 7:1. p. 12- 28.

128 European Court of Human Rights. Case of *Jokšas v. Lithuania* (25330/07). 12/11/2013. Available from: <http://hudoc.echr.coe.int/fre?i=001-128039>.

for the purpose of frustrating the expression of opinions, even if these are directed against the army as an institution'. On the facts, however, the Court noted that the previous internal inquiry into the applicant's actions concerning the publication of his opinion piece in a newspaper was terminated on the grounds that he had not violated any legal provisions, and that no disciplinary sanction had therefore been imposed on him. As such, in the view of the Court the applicant could not claim to be a victim of a violation of the Convention in relation to the previous inquiry, and therefore, his complaint regarding the termination of his contract was dismissed.

*Engel and Others v. the Netherlands*:<sup>129</sup> a ban on the publication and distribution by conscripts of a paper criticizing senior officers was found by the Court to be a justified interference with their freedom of expression. However, 'the Court also held that "there was no question of depriving them of their freedom of expression but only of punishing the abusive exercise of that freedom on their part".<sup>130</sup> More specifically, the Court noted that the applicants in question had actively contributed to publication and distribution of the said article at a time when the atmosphere in their military barracks was already somewhat strained. In these circumstances, the Court found that the Supreme Military Court may have had well-founded reasons for considering that the conscripts in question had attempted to undermine military discipline and that it was therefore necessary, for the prevention of disorder, to impose the penalty. Consequently, the Court found that their rights under Article 10(2) of the Convention were not violated.

*Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*:<sup>131</sup> the authorities in question prohibited the distribution to servicemen of a private periodical critical of the military administration. The Austrian government argued that the applicants' periodical threatened the country's system of defence and the effectiveness of the army. The Court did not agree with the government's submissions and held that most of the items in the periodical—which included details of complaints, proposals for reforms and mechanisms through which conscripts could institute legal complaints or appeals proceedings—did not overstep the bounds of what is permissible in the context of the free exchange of ideas, which itself must be tolerated in the army of a democratic state, just as it must be in the society which that army serves.<sup>132</sup>

129 European Court of Human Rights. *Engel and Others v. the Netherlands* (5100/71; 5101/71; 5102/71; 5354/72; 5370/72). 08/06/1976. Available from: <http://hudoc.echr.coe.int/tur?i=001-57479>.

130 Dominika Bychawska-Siniarska. 2017. Protecting the right to freedom of expression under the European Convention on Human Rights: A handbook for legal practitioners. Council of Europe. Available from: <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>, p.19.

131 European Court of Human Rights. *Case of Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria* (15153/89). 19/12/1994, Available from: <http://hudoc.echr.coe.int/eng?i=001-57908>.

132 Dominika Bychawska-Siniarska. 2017. Protecting the right to freedom of expression under the Europe-

*Observer and Guardian v. the United Kingdom*:<sup>133</sup> in 1986, two newspapers announced their intent to publish extracts from *Spycatcher*, a book written by retired intelligence agent, Peter Wright. At the time of the announcement, the book had not yet been published. Mr Wright's book included an account of alleged unlawful activities by the British intelligence service and its agents. He asserted that MI5 had used intrusive surveillance measures, including wiretapping, to gather information from diplomatic conferences held in London throughout the 1950s and 1960s, as well as the Zimbabwe independence negotiations in 1979. He also alleged that MI5 had used similar methods against diplomats from France, Germany, Greece and Indonesia, as well as in Mr Khrushchev's hotel suite during his visit to Britain in the 1950s; that MI5 had burgled and bugged Soviet consulates; had plotted to assassinate President Nasser of Egypt during the Suez crisis; had diverted its resources to investigate left-wing political groups active in Britain; as well as plotted against Harold Wilson during his premiership from 1974 to 1976. The then attorney general requested that the courts issue a permanent injunction against the newspapers in order to prevent them from publishing extracts from the book. In July 1986, the courts granted a temporary injunction to prevent the newspapers from publishing the said extracts while the judicial proceedings regarding the permanent injunction were ongoing. In July 1987, the book was published in the United States and copies of the books circulated within the United Kingdom. Despite this, the temporary injunction against the newspapers was upheld until October 1988, after which the House of Lords refused to grant the permanent injunction requested by the attorney general. The Observer and The Guardian newspapers complained to the European Court of Human Rights regarding the temporary injunctions. For their part, the British government argued that at the time when the temporary injunctions were issued, the information to which Peter Wright had access was classed as confidential. As for the period after which the book was published in the United States, the government relied on the argument for the need to assure allied states of the effective protection of information by the British intelligence service to advance their case that further injunctions were necessary.

The Court found that the temporary injunctions served the legitimate aim of protecting national security by avoiding the potential damage the *Spycatcher* material would cause to the security services. With respect to whether the resulting interference with Article 10 rights was necessary in a democratic society, the Court found that it was

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an Convention on Human Rights: A handbook for legal practitioners. Council of Europe. Available from: <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>, p.58.

133 European Court of Human Rights. Case of Observer and Guardian v. the United Kingdom (13585/88), 26/11/1991, Available from: <http://hudoc.echr.coe.int/tur?i=001-57705>.

justified prior to the publication of the book, but not after. Following its publication in the United States, the information was no longer confidential, and therefore any interest in shielding the information from the public no longer existed. Promoting the efficiency and reputation of the security services was not considered a sufficient basis for continuing to restrict the publication of this information.

*Hadjianastassiou v. Greece*:<sup>134</sup> an officer was given a five-month suspended prison sentence for having disclosed classified military information to a private company in exchange for financial gain. The information concerned a given weapon and the corresponding technical knowledge, and in the government's view, the disclosure was capable of causing considerable damage to national security.<sup>135</sup> After holding that military information is not excluded from the protection afforded by Article 10, the Court nevertheless found that the conviction was 'necessary in a democratic society' for protecting 'national security'. It concluded that the disclosure of the State's interest in a given weapon and of the corresponding technical knowledge, which may give some indication of the state of progress in its manufacture, was capable of causing considerable damage to national security, and that the evidence revealed a reasonable relationship of proportionality between the means employed and the legitimate aim pursued.<sup>136</sup> There was accordingly no violation of Article 10.

*Saszmann v. Austria*:<sup>137</sup> the applicant in question was sentenced to three months' imprisonment, suspended for a probationary period of three years, for having incited members of the armed forces, through the press, to disobedience and the violation of military laws. The Commission decided that the applicant's conviction was justified for the maintenance of order in the Austrian federal army and for the protection of national security, concluding that "the incitement to disregard military laws constituted unconstitutional pressure aiming at the abolition of laws which had been passed in a constitutional manner' and that '[s]uch unconstitutional pressure could not be tolerated in a democratic society".<sup>138</sup>

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134 European Court of Human Rights. Case of Hadjianastassiou v. Greece (12945/87), 16/12/1992. Available from: <http://hudoc.echr.coe.int/eng?i=001-57779>.

135 Dominika Bychawska-Siniarska. 2017. Protecting the right to freedom of expression under the European Convention on Human Rights: A handbook for legal practitioners. Council of Europe. Available from: <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>, p. 53

136 European Court of Human Rights. Case of Hadjianastassiou v. Greece (12945/87), 16/12/1992. Available from: <http://hudoc.echr.coe.int/eng?i=001-57779>, paras. 45-47.

137 European Court of Human Rights. Renate Saszmann v. Austria (23697/94), 27/2/1997. Available from: <http://hudoc.echr.coe.int/eng?i=001-3488>.

138 Dominika Bychawska-Siniarska. 2017. Protecting the right to freedom of expression under the European Convention on Human Rights: A handbook for legal practitioners. Council of Europe. Available from: <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>, p. 57; and European Court of

*Grigoriades v. Greece*:<sup>139</sup> the applicant was a conscripted probationary reserve officer. In the course of his military service, he claimed to have become aware of a number of abuses committed against conscripts; this led to conflict with his superiors and the initiation of criminal and disciplinary proceedings. He was acquitted of the criminal charges, but was given a disciplinary penalty as a result of which he was required to serve additional time in the armed forces. The applicant later deserted. Shortly thereafter, he sent a letter to his unit's commanding officer which contained what the Court characterized as 'strong and intemperate remarks concerning the armed forces in Greece'. The officer instituted further criminal proceedings against the applicant on the basis that the letter constituted 'an insult to the armed forces'. The applicant was convicted and sentenced to three months' imprisonment. He alleged violations of (inter alia) Articles 10 and 11 of the Convention. The Court found that the interference with the applicant's Article 10 rights constituted by his prosecution and conviction was 'prescribed by law' and pursued the legitimate aims of protecting national security and public safety, taking account of the fact that 'effective military discipline requires the maintenance of an appropriate measure of discipline in the armed forces'. However, it considered that the interference was not 'necessary in a democratic society', as the objective impact of the letter on military discipline was 'insignificant': in particular, the strong remarks made formed part of a broader context; the letter had not been disseminated to a wider audience; and it did not contain insults directed against either the recipient or any other person.

*ŞEN and Others v. Turkey*:<sup>140</sup> the applicants were Turkish nationals who, along with their families, were denied access to military premises on the grounds that their military and social security identity cards were inadmissible, as they pictured the nationals in question wearing Islamic headscarves. The applicants were further discharged on the grounds of insubordination and immoral conduct due to their adherence to the ideology of a religious 'sect' and their support for 'revolutionary Islamic' ideals. The nationals in question raised complaints under Articles 9 and 10 of the European Convention. The Court noted that in pursuing military careers, the applicants willingly accepted a system of military discipline that by its very nature implied the possibility of placing limitations on certain rights and freedoms. These limitations may include a duty for

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Human Rights. Renate Saszmann v. Austria (23697/94), 27/2/1997 Available from: <http://hudoc.echr.coe.int/eng?i=001-3488>.

139 European Court of Human Rights. Case of Grigoriades v. Greece (121/1996/740/939). 25/11/1997. Available from: <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-58116&file-name=001-58116.pdf>.

140 European Court of Human Rights. Sedat ŞEN and Others v. Turkey (45824/99), 08/07/2003. Available from: <http://hudoc.echr.coe.int/eng?i=001-23320>.

military personnel to refrain from participating in or joining prohibited organizations and movements, such as those espousing radical Islamist views. The order to discharge them was not based on their religious beliefs and opinions, nor on the manner in which they performed them, but rather on their conduct and activities, which allegedly breached military discipline and the principle of secularism. The Court consequently ruled that the discharge did not amount to interference with the right under Article 9. They applied the same conclusion to the complaint brought under Article 10.

## Prohibition of forced or compulsory labour

### 1. Description and legal documents

Article 4(1) of the European Convention on Human Rights mentions forced labour (providing specifically that ‘No one shall be required to perform forced or compulsory labour’).<sup>141</sup> The prohibition of forced labour is stipulated in many other international documents, including several fundamental conventions on forced labour (and related Recommendations), such as the International Labour Organization (ILO) Forced Labour Convention, 1930 (No. 29); the Protocol of 2014 to the Forced Labour Convention, 1930; the ILO Convention concerning the Abolition of Forced Labour, 1957; the ILO Forced Labour (Indirect Compulsion) Recommendation, 1930 (No. 35); and the ILO Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203). Other human rights instruments which contain clauses on forced labour include the Universal Declaration of Human Rights, which provides that ‘No one shall be held in slavery or servitude’.<sup>142</sup> In addition, the ICCPR provides that ‘No one shall be required to perform forced or compulsory labour’.

The Forced Labour Convention (FLC)<sup>143</sup> defines forced or compulsory labour as ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’.<sup>144</sup> Not being subject to forced

<sup>141</sup> See also ICCPR, Article 8 (3a).

<sup>142</sup> UDHR, Article 4.

<sup>143</sup> Forced Labour Convention (adopted 28 June 1930, entered into force 1 May 1932).

<sup>144</sup> FLC, Article 2.



labour is a fundamental human right: all states have to respect the principle of the elimination of forced labour regardless of ratification of the FLC or not. Military service is excluded from the definition of forced labour and activities performed during military service or conscription do not count as forced labour.

The FLC has nearly universal ratification (178 State Parties ratified), meaning that almost all countries are legally obliged to respect their provisions and regularly report on them to the ILO's standards supervisory bodies. These bodies include the Committee of Experts on the Application of Conventions and Recommendations<sup>145</sup> and the International Labour Conference's Committee on the Application of Standards.<sup>146</sup> They review reports on the application in law and practice of the FLC sent by member states, as well as the observations of various workers' organizations and employers' organizations.

The Protocol of 2014 to the Forced Labour Convention, 1930 and the supplement to the Forced Labour Convention, 1930 (No. 29) complement existing international instruments by providing specific guidance on effective measures to be taken regarding the prevention, protection and remedy of all forms of forced labour. As per Article 7, the Protocol deletes the transitional provisions of Article 1, paragraphs 2 and 3 and Articles 3 to 24 of the original Convention.<sup>147</sup> Article 2 of the original Convention, which defines forced labour, remains in force, providing that 'compulsory military service of a purely military nature is not considered forced labour'. Article 1 of the Protocol reads: 'The definition of forced or compulsory labour contained in the Convention is reaffirmed, and therefore the measures referred to in this Protocol shall include specific action against trafficking in persons for the purposes of forced or compulsory labour.'<sup>148</sup>

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145 ILO. n.d. Committee of Experts on the Application of Conventions and Recommendations. Available from: <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm>

146 ILO. n.d. Conference's Committee on the Application of Standards. Available from: <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/conference-committee-on-the-application-of-standards/lang--en/index.htm>.

147 Protocol of 2014 to the Forced Labour Convention, 1930 (adopted 11 June 2014, entered into force 9 November 2016). Available from: [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:PO29](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:PO29), Article 7; See also ILO. Forced Labour Convention, 1930 (No. 29). Available from: [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:CO29](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:CO29): 'The original text of the Forced Labour Convention, 1930 (No. 29) referred to a transitional period during which recourse to forced or compulsory labour might be had subject to specific conditions, as set out in Article 1, paragraphs 2 and 3, and Articles 3 to 24. Over the years, the Governing Body, the International Labour Conference but also the ILO supervisory bodies, such as the Committee of Experts on the Application of Conventions and Recommendations, acknowledged that these provisions, commonly known as "transitional provisions" were no longer applicable. In 2014, the International Labour Conference adopted a Protocol to Convention No.29, which expressly provided for the deletion of the transitional provisions'.

148 Protocol of 2014 to the Forced Labour Convention, 1930 (adopted 11 June 2014, entered into force 9

It is the responsibility of each member state to ensure the prohibition of forced labour. Regarding punishment for non-compliance, Article 25 of the FLC stipulates that ‘The illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced.’<sup>149</sup>

## 2. Limits on the scope of the prohibition of forced labour

Article 8 clause (3)(c) of the ICCPR provides that ‘For the purpose of this paragraph the term “forced or compulsory labour” shall not include: ... (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors.’ Similarly, Article 4(3)(b) of the Convention stipulates that forced labour does not include ‘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.’ Accordingly, the European Court of Human Rights delimits conscription from that which constitutes forced labour<sup>150</sup> and it was explicitly stated in the case of *Chitos v. Greece* (discussed below); Article 4(3)(b) is confined to situations of conscription. The result is that conscripts cannot invoke this provision in their national courts, nor the European Court of Human Rights. Therefore, they do not have a legal instrument to raise complaints about the type and scope of labour they are required to perform, assuming that it does not infringe upon other rights. It follows that certain violations of conscripts’ rights could be considered in light of Article 4, for instance, the extension of conscription terms without consent and legal justification; or the performance of tasks that are not directly linked to military service, unless the national law of a country includes non-military activities. Article 2(a) of the Forced Labour Convention contains a narrower carve-out from the definition of forced labour: ‘any work or service exacted in virtue of compulsory military service laws for work of a purely military character.’ This suggests that if the tasks in question are not of a purely military nature, they may be, under certain circumstances, considered to fall within the preview of Article 2.

November 2016), Article 1(3).

149 FLC, Article 25.

150 European Court of Human Rights. Case of Van der Musselle v. Belgium (8919/80). 23/11/1983. Available from: <http://hudoc.echr.coe.int/eng?i=001-57591>, para. 38.

Arguments of principle persist as to whether compulsory military service should be properly excluded from the definition of forced labour. In 2019, the International Fellowship of Reconciliation submitted a claim to the Office of the High Commissioner for Human Rights.<sup>151</sup> This submission raises, in summary, a number of challenges to the current protections afforded to the human rights of young people associated with military recruitment and service. It states: ‘Military service was explicitly excluded from the definition of forced labour in the 1930 ILO Convention. But there is nothing inherent in the nature of such service, when compelled, which logically supports this distinction. The exclusion would seem to have been simply a concession to the concerns of States, which at the time generally considered conscript armies the essential core of national security.’<sup>152</sup>

According to the explanatory memorandum of the Council of Europe on the human rights of members of the armed forces, members of the armed forces should not be used for forced or compulsory labour.<sup>153</sup> It further provides that ‘Military service or service exacted instead of compulsory military service should not be considered as constituting forced or compulsory labour. The nature and duration of service exacted instead of compulsory military service should not be punitive, disproportionate or unreasonable compared to that of military service.’ and that, ‘The authorities should not impose on professional members of the armed forces a length of service which would constitute an unreasonable restriction on their right to leave the armed forces and would amount to forced labour.’<sup>154</sup> The memorandum also suggests that provisions in national legislation specifying the length of conscription would be desirable in order to better conform with the standards on the prohibition of forced labour.

The Council of Europe’s memorandum also notes that ‘The fact that a person binds him/herself to following orders when entering the armed forces, whether voluntarily, or by conscription, does not mean that those in military authority can exploit their services for personal purposes. In times of national emergency or natural disaster, such as flooding, members of the armed forces may be called upon to join emergency medical teams or the civilian police force, but in principle, servicepersons, particularly

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151 International Fellowship of Reconciliation. N.d. Submission to the Study by the Office of the High Commissioner for Human Rights on human rights with regard to young people, as mandated in Human Rights Council Resolution 35/14. Available from: [https://www.ohchr.org/\\_layouts/15/WopiFrame.aspx?-sourcedoc=/Documents/Issues/Youth/IFOR.doc&action=default&DefaultItemOpen=1](https://www.ohchr.org/_layouts/15/WopiFrame.aspx?-sourcedoc=/Documents/Issues/Youth/IFOR.doc&action=default&DefaultItemOpen=1)

152 Ibid., p. 1.

153 Council of Europe: Committee of Ministers. 2010. Recommendation CM/Rec(2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces and explanatory memorandum.

154 Ibid., p. 8, paras. 14 and 16.

conscripts, should be obliged to carry out only the tasks to which they are officially assigned or the ancillary tasks associated with their rank.<sup>155</sup>

At the national level, various and sometimes ambiguous provisions exist with regard to the kind of activities that can be undertaken in times of national emergency or natural disasters by those performing military service. In some countries, it is a common practice for military servicemen to participate in activities which do not have a strictly military character. For instance, they may participate in cleaning, and assisting vulnerable groups in society.<sup>156</sup> The scope of activities should be determined by the national legislation of each country. For instance, the federal law 'About the military service' of the Russian Federation, Article 37, provides that a conscript is performing a military service when: 'he helps the organs of internal affairs, other law enforcement organs on the protection of human rights and liberties, on the provision of public security; he participates in the prevention and liquidation of consequences of natural disasters, catastrophes and accidents; or when he performs other actions that are recognized by the Court as actions completed in the interest of the society and the state.'<sup>157</sup>

These clauses suggest that, in practice, military servicemen and conscripts can be compelled to carry out tasks beyond those included in the normal scope of military service. In the absence of any international regulation or standard providing clarity on the scope or permissibility of such tasks, it remains the prerogative of each state using conscription to decide and, therefore, represents a matter of domestic law.

The conscription is a duty that should take precedence, even if it requires the fulfilment of extended periods of service. In such a case, however, the rule of proportionality should be respected, and compensation provided if appropriate. For instance, during national emergencies, conscripts might be legally obliged to serve longer periods of time or perform tasks that are not directly linked to the definition of military service.

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155 Council of Europe: Committee of Ministers. 2010. Recommendation CM/Rec(2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces and explanatory memorandum, p. 32.

156 For example, in Uzbekistan the armed forces are involved in the sanitation and protection of quarantine facilities during the Covid-19 pandemic: Хроленко, А., 2020. «Икс» Дней До Приказа: Почему Армии Узбекистана Не Страшен Коронавирус. *Sputnik Узбекистан*. Available from: <https://uz.sputniknews.ru/columnists/20200406/13865628/lks-dney-do-prikaza-pochemu-armii-Uzbekistana-ne-strashen-koronavirus.html>

157 Consultant. 2020. *Статья 37. Исполнение Обязанностей Военной Службы*. Available from: [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_18260/c133ea4f8b0bae92750182a8748f-87e45c560878/](http://www.consultant.ru/document/cons_doc_LAW_18260/c133ea4f8b0bae92750182a8748f-87e45c560878/)

### 3. Relevant cases

As compulsory military service is excluded from the definition of forced labour under the FLC,<sup>158</sup> conscripts may currently raise complaints regarding their terms and conditions of service primarily by having recourse to other rights under the European Convention, such as Article 9 (freedom of religion and belief, encompassing the right to conscientious objection to military service), or Article 14 (freedom from discrimination). For instance, and as discussed further below, in the case of *Bayatyan v. Armenia*<sup>159</sup> the Court for the first time in history recognized Article 9 as encompassing the right to conscientious objection.<sup>160</sup>

*Chitos v. Greece*:<sup>161</sup> the applicant was a medic who had joined the armed forces and studied free of charge while receiving a salary and benefits. The relevant national legislation required him, in return, to serve a specified period of time in the armed forces (or to pay certain sums to the State as nominal reimbursement). He contended that the requirement to remain in the armed forces for what he considered an extremely lengthy period or to pay an excessively large fee to the State in return for ending his engagement constituted forced or compulsory labour, since it imposed a disproportionate burden and an unnecessary restriction on his freedom of employment. The Court considered expressly whether the carve-out in Article 4(3) for ‘service of a military character’ was engaged and found that it was limited to compulsory military service and did not apply to ‘work undertaken by regular members of the armed forces’. In consequence, the Court was free to proceed to consider whether there had been a breach of Article 4(2).

The applicant asserted that he had never ‘offered himself voluntarily’ for the work in question. He accepted that he had chosen to become an army officer and therefore was compelled to abide by all requirements associated with that choice. However, having only accepted a general status, his submission could not be said to amount to explicit consent to assume obligations that were contrary to the rights enshrined in the Convention. Furthermore, the authorities of the Greek Armed Forces had failed to inform him of his supposed obligation to serve in the army for an additional five

158 FLC, Article 2(2a); See also Steven Greer. 1997. The exceptions to Articles 8 to 11 of the European Convention on Human Rights (Council of Europe Publishing). Available from: [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15\(1997\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15(1997).pdf), p. 5.

159 European Court of Human Rights. Case of Bayatyan v. Armenia (23459/03), 07/07/2011. Available from: <http://hudoc.echr.coe.int/eng?i=001-105611>.

160 European Court of Human Rights. 2020. Factsheet – Conscientious objection. Available from: [https://www.echr.coe.int/Documents/FS\\_Conscientious\\_objection\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Conscientious_objection_ENG.pdf).

161 European Court of Human Rights. Case of Chitos v. Greece (51637/12), 19/10/2015. Available from: <http://hudoc.echr.coe.int/eng?i=001-155209>.

years. The Court, however, found that the applicant had been aware of the scope of the obligations he had entered into in return for the benefits he had enjoyed.

As to whether the burden was reasonable, the Court found that the sum the State had required the applicant to pay in order to leave the armed forces imposed a ‘disproportionate burden’ on him on the limited basis that significant interest had been allowed to accrue while the applicant was pursuing his domestic appeals (although this had subsequently been rectified by the higher courts). There had accordingly been a violation of Article 4(2).

## Right to liberty and security, and right to a fair trial

### 1. Description of rights

In accordance with Article 5(1) of the Convention, on the right to liberty and security, ‘Everyone has the right to liberty and security of person’, except in cases provided for under Article 5(1) of the Convention, and in accordance with a procedure prescribed by law. In accordance with other provisions contained within Article 5 of the Convention persons who are arrested or detained shall be informed promptly, in a language which he or she understands, of the reasons for their arrest and of any charge against them. If arrested or detained in relation to a criminal offence, he or she ‘shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.’ A person deprived of their 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.’ Persons who have ‘been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation’.<sup>162</sup> Article 5 has a twofold role: it provides for conditions of lawful detention and authorized deprivation of liberty, and establishes guarantees and procedural safeguards for persons deprived of liberty.<sup>163</sup>

<sup>162</sup> ECHR, Article 5.

<sup>163</sup> European Court of Human Rights. 2020. Guide on Article 5 of the European Convention on Human Rights - Right to liberty and security. Available from: [https://www.echr.coe.int/Documents/Guide\\_Art\\_5\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf).

In accordance with Article 6(1) of the Convention, on the right to a fair trial, ‘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.’ The obligations under Article 6 of the Convention provide for the right to be presumed innocent of a criminal offence until proved guilty according to law. In accordance with paragraph 3 of the same article, a person charged with a criminal offence has the following minimum rights: ‘a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) 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; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.’<sup>164</sup>

It follows from the provisions contained within Article 6 of the European Convention, on the right to a fair trial that while in accordance with Article 5 of the Convention, the liberty of members of the armed forces *may be restricted*, and any related criminal proceedings, whether classified as disciplinary or criminal in national law, should be subject to the guarantees of a fair trial. Reflecting this, the Council of Europe (CoE) notes that ‘A clear separation between the prosecuting authorities and those handing down the court decision’ should therefore be made to ensure ‘the independence and impartiality of judicial authorities acting in criminal proceedings’<sup>165</sup>. This is exemplified in the case of *Feti Demirtaş v. Turkey*, in which the European Court of Human Rights stressed the need to ensure that military judges adjudicating criminal cases are not ‘equated to a party to the proceedings’, as this would violate their independence and impartiality.<sup>166</sup> The Court referred to the earlier case of *Cooper v. the United Kingdom*, in which the Grand Chamber—considering whether a court-martial could satisfy the requirements of Article 6—affirmed that such a tribunal was capable of being considered independent and impartial, and that relevant factors included the manner of appointment of the tribunal members and the term of their office; the existence of guarantees against outside pressures; whether the tribunal presented ‘an appearance of independence’;

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164 ECHR, Article 6.

165 European Court of Human Rights. *Affaire Feti Demirtaş c. Turquie* (5260/07), 17/04/2012. Available from: <http://hudoc.echr.coe.int/eng?i=001-108617>.

166 Ibid.

and whether it offered sufficient guarantees to exclude any legitimate doubt as to potential bias. The Court found that the presence of a civilian with a pivotal role in the proceedings constitutes one of the most significant guarantees of the independence of court-martial proceedings.<sup>167</sup>

In the case of *Georgiadis v. Greece*, the European Court of Human Rights also noted the obligation under Article 6(1) that all persons, including members of the armed forces, be granted full access to criminal case files and have the right to present their defence, ruling that ‘A procedure whereby civil rights are determined without ever hearing the parties’ submissions cannot be considered to be compatible with Article 6 para. 1.’<sup>168</sup> In the same case, the Court ruled that the applicant in question was not able to challenge the ruling of the military tribunal, noting that when found guilty of an offence, members of the armed forces should be able to appeal to a competent and independent higher authority.<sup>169</sup>

In addition to regional human rights instruments, most notably the European Convention,<sup>170</sup> the right to liberty and security, and the right to a fair trial, are provided for in a number of international instruments which represent customary international law, such as the Universal Declaration on Human Rights.<sup>171</sup>

As a part of the International Bill of Human Rights, the International Covenant on Civil and Political Rights, a multilateral treaty adopted by United Nations General Assembly Resolution 2200A (XXI) on 16 December 1966, recognizes the right to liberty and security and the right to a fair trial. Article 9 states that ‘Everyone has the right to liberty and security of person,’ and continues that ‘No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.’<sup>172</sup> Articles 14 and 16 of the ICCPR protect the right to a fair trial. Article 14(1)

167 European Court of Human Rights. Case of *Cooper v. the United Kingdom* (48843/99), 16/12/2003. Available from: <http://hudoc.echr.coe.int/eng?i=001-61549>.

168 European Court of Human Rights. Case of *Georgiadis v. Greece* (21522/93), 29/05/1997. Available from: <http://hudoc.echr.coe.int/eng?i=001-58037>, para. 40.

169 Ibid.

170 Other regional human rights instruments relevant to the protection of the right to liberty and security, and to a fair trial, include Articles 3, 4, 6 and 7 of the African Charter on Human and Peoples’ Rights. Articles 3, 4, 5, 6, 7, 8, 9 and 10 of the American Convention on Human Rights also enshrine the right to liberty and security, and to a fair trial.

171 The presumption of innocence until the accused is proven guilty is referenced in Articles 6, 7, 8 and 11 of the UDHR. Article 10 contains the key provision regarding the right to a fair trial, and states that ‘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.’ As regards the right to liberty and security of person, Article 3 of the UDHR reads ‘Everyone has the right to life, liberty and security of person.’ For more information, see United Nations. 2015. Universal Declaration of Human Rights. Available from: [https://www.un.org/en/udhrbook/pdf/udhr\\_booklet\\_en\\_web.pdf](https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf).

172 ICCPR, Article 9.



establishes the basic right to a fair trial, while Article 14(2) provides for the presumption of innocence, and Article 14(3) a list of minimum fair trial rights in criminal proceedings. Article 14(5) establishes the right of a convicted person to have a higher court review of the conviction or sentence, and Article 14(7) prohibits double jeopardy.<sup>173</sup> Article 14(1) of the ICCPR provides that 'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.' Article 16 states 'Everyone shall have the right to recognition everywhere as a person before the law.'<sup>174</sup> The ICCPR is binding in international law for those states that are party to it. The measures to implement the provisions contained within it can be found in Article 2, which includes the adoption of 'such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant'.<sup>175</sup>

Military service does not constitute a deprivation of liberty under the Convention since it is expressly sanctioned in Article 4(3)(b).<sup>176</sup> Matters related to internal discipline are unlikely to raise issues when the sanctions in question do not involve a deprivation of liberty or other punishment serious enough to warrant a criminal penalty. Whether a restriction for a soldier, as opposed to a civilian, constitutes a deprivation of liberty depends on the extent to which it deviates from normal conditions of life in the armed forces of the Contracting State in question. Factors to be considered when assessing this include the nature, duration, effects and manner of execution of the penalty or measure.<sup>177</sup> Case-law indicates that arrests which involve visiting restrictions to quarters when off duty are not sufficient, while 'strict' arrests, namely those involving confinement in a cell during the hours of night and day, and exclusion from normal duties, are.<sup>178</sup>

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173 Article 14(1) of ICCPR states 'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children'.

174 ICCPR, Article 16.

175 ICCPR, Article 2.

176 European Court of Human Rights. Case of Engel and Others v. the Netherlands (5100/71; 5101/71; 5102/71; 5354/72; 5370/72), 08/06/1976. Available from: <http://hudoc.echr.coe.int/tur?i=001-57479>, para. 59.

177 European Court of Human Rights. Case of Engel and Others v. the Netherlands (5100/71; 5101/71; 5102/71; 5354/72; 5370/72), 08/06/1976. Available from: <http://hudoc.echr.coe.int/tur?i=001-57479>, para. 59.

178 Karen Reid. 2015. A Practitioner's Guide to the European Convention on Human Rights (5th Edition,

Any detention which involves a deprivation of liberty within the meaning of Article 5 will attract its procedural guarantees which include the right to be brought promptly before an officer exercising judicial functions who has the power to order release and the right to bring proceedings challenging the lawfulness of the detention.<sup>179</sup> In *Hood v. the United Kingdom*, the commanding officer of an arrested soldier was not regarded as sufficiently independent or impartial to fulfil the role of a judicial officer in deciding on pre-trial detention under Article 5(3), due in particular to his responsibilities for internal discipline and order in his command, and his significant involvement in any subsequent prosecution.

It is important to note that while Article 5(1) of the Convention does not include the explicit right of those detained or arrested to access a lawyer, the European Court of Human Rights has found that Article 5(4) which concerns the right to challenge the lawfulness of any detention implies that a person in detention should have access to legal assistance.<sup>180</sup> Several other legal instruments refer to this, including rule 23.1 of the revised European Prison Rules of the Council of Europe, and most domestic legislation. When seeking legal counsel, Principle 18(4) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment privileges those detained or arrested, the right to converse with their legal representative in private.<sup>181</sup> As regards the European Convention, Article 6 on the right to a fair trial explicitly states ‘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.’<sup>182</sup>

In Recommendation CM/Rec (2010) 4, the Council of Europe calls on the governments of all member states to ‘ensure that the principles set out in the appendix to this recommendation are complied with in national legislation and practice relating to members of the armed

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Sweet and Maxwell), p. 362; see also European Court of Human Rights. Case of Engel and Others v. the Netherlands (5100/71; 5101/71; 5102/71; 5354/72; 5370/72), 08/06/1976. Available from: <http://hudoc.echr.coe.int/tur?i=001-57479>, paras. 59- 63; European Court of Human Rights. *Affaire Pulatlı c. Turquie* (38665/07), 26/07/2011. Available from: <http://hudoc.echr.coe.int/eng?i=001-104638>, para. 32

179 Karen Reid. 2015. *A Practitioner’s Guide to the European Convention on Human Rights* (5th Edition, Sweet and Maxwell), p. 362.

180 Council of Europe: Committee of Ministers. 2010. Recommendation CM/Rec(2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces and explanatory memorandum, p. 34; European Court of Human Rights. Case of Bouamar v. Belgium (9106/80) 29/02/1988. Available from: <http://hudoc.echr.coe.int/eng?i=001-57445>, para. 60.

181 See Principle 18(4) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Available from: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/DetentionOrImprisonment.aspx>: ‘Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official’.

182 ECHR, Article 6, para 1; See also ICCPR, Article 14(1).

forces.’ While these are recommendations, and therefore not legally binding, some reflect the core guarantees of Articles 5 and 6, and therefore are binding on states. This includes the right of members of the armed forces to be promptly informed of the reasons for their arrest or detention; any charge against them, and their procedural rights.<sup>183</sup> In the case of *Georgiadis v. Greece*, the Court underscored the importance of these, finding that the military tribunals in question had failed to provide adequate reasons for their decisions, and therefore violated Article 6(1).<sup>184</sup> A similar conclusion was made in the case of *Zalyan and Others v. Armenia*, in which the Court ruled that the defendant had been denied the right to be informed promptly of the reasons for their arrest and the right to be brought promptly before a judge, in violation of Articles 5(2) and 5(3), respectively.<sup>185</sup>

The right to liberty and security can also be connected to freedom of movement, which is enshrined in Article 2 of Protocol No. 4 to the European Convention.<sup>186</sup> This provision guarantees the freedom to leave one’s country and does not distinguish between civilians and members of the armed forces in this regard.<sup>187</sup> Rather wide limitations upon the freedom of movement of members of the armed forces are required by reason of the specific demands of military service so that the normal restrictions accompanying it do not fall within the ambit of Article 5.<sup>188</sup> Nevertheless, in its jurisprudence, the Court noted that an absolute restriction on the prohibition of international movement of ex-military personnel, regardless of purpose and duration of the journey, was not necessary in a democratic society and did not serve the interests of national security.<sup>189</sup>

Further, in its case-law the Court confirmed that interfering with an individual’s right to leave their country on the grounds that he or she was the holder of state secrets would not meet the test of necessity and proportionality.<sup>190</sup> While military personnel may in

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183 Council of Europe: Committee of Ministers. 2010. Recommendation CM/Rec(2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces and explanatory memorandum, p. 9.

184 European Court of Human Rights. Case of Grigoriades v. Greece (121/1996/740/939). 25/11/1997. Available from: <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-58116&file-name=001-58116.pdf>, para. 43.

185 European Court of Human Rights. Case of Zalyan and Others v. Armenia (36894/04 and 3521/07), 17/06/2016. Available from: <http://hudoc.echr.coe.int/eng?i=001-161408>.

186 Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto (opened for signature 16 September 1963, entered into force 2 May 1968).

187 European Court of Human Rights. Case of Soltysyak v. Russia (4663/05), 20/06/2011. Available from: <http://hudoc.echr.coe.int/eng?i=001-103354>, para. 54.

188 European Court of Human Rights. Case of Engel and Others v. the Netherlands (5100/71; 5101/71; 5102/71; 5354/72; 5370/72), 08/06/1976. Available from: <http://hudoc.echr.coe.int/tur?i=001-57479>, para. 59.

189 European Court of Human Rights. Case of Bartik v. Russia (55565/00), 21/03/2007. Available from: <http://hudoc.echr.coe.int/eng?i=001-78792>, paras. 47-52.

190 European Court of Human Rights. Case of Soltysyak v. Russia (4663/05), 20/06/2011. Available from:

certain circumstances be subject to greater restrictions regarding travel than would be permissible in the case of civilians, such restriction must in all cases be commensurate with its protective function.<sup>191</sup>

## 2. Restrictions on or interference with the right to liberty of the person

International and regional human rights instruments contain provisions for cases in which the right to liberty and security may be restricted. Article 5(1) of the European Convention contains an exhaustive list of such situations, namely:<sup>192</sup> ‘a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (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 or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; and (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.’<sup>193</sup> Any limitation in pursuit of these objectives must be ‘in accordance with a procedure prescribed by law’. Although proportionality is not expressly mentioned in Article 5(1), the Court will nonetheless assess whether a particular deprivation of liberty bears a relationship of proportionality to the ground relied on.

While it does not specify the circumstances under which the right to liberty may be restricted, Article 9 of the ICCPR notes ‘No one shall be deprived of his liberty except

<http://hudoc.echr.coe.int/eng?i=001-103354>, para. 51.

191 Ibid., para. 53.

192 European Court of Human Rights. 2020. Guide on Article 5 of the European Convention on Human Rights – Right to liberty and security. Available from: [https://www.echr.coe.int/Documents/Guide\\_Art\\_5\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf), para. 26.

193 ECHR, Article 5(1).

on such grounds and in accordance with such procedure as are established by law.<sup>194</sup> Any limitations on this right must be prescribed by national law, meaning that the circumstances in which the limitation will be imposed must be clearly delimited in an accessible law, which should not be so vague as to permit overly broad discretion and unpredictability in implementation.<sup>195</sup> Rights under Article 9(1) may be limited in a non-arbitrary manner with the incorporation of proportionality in the determination of the extent of such limits.<sup>196</sup>

As reflected in the findings of the European Court on Human Rights in the case of *Engel and Others v. the Netherlands*, ‘Military discipline ... does not fall outside the scope of Article 5 para. 1.’<sup>197</sup> This means that any deprivation of liberty in the context of military discipline must comply with the requirements of this provision. Despite this, the CoE notes that limitations upon the freedom of movement of members of the armed forces may be ‘rather wide’ and apply ‘by reason of the specific demands of military service’, and that each state is ‘competent to organise its own system of military discipline and enjoys in the matter a certain margin of appreciation.’<sup>198</sup> The CoE also notes that ‘states have made reservations to Article 5 concerning the application of the armed forces’ disciplinary measures’, and that ‘military discipline may dictate short periods of punitive detention’.<sup>199</sup>

Article 5(3) of the Convention obligates states to ensure that persons arrested or detained ‘be brought promptly before a judge or other officer authorised by law to exercise judicial power and ... be entitled to trial within a reasonable time or to release pending trial.’ As underscored in the case of *De Jong, Baljet, van den Brink v. the Netherlands*, this right applies to military personnel as it does to everyone. In its findings, the European Commission of Human Rights underlined the importance of bringing any person arrested or detained in accordance with Article 5(1)(c) of the Convention promptly before a judicial authority, as provided for by paragraph 3 of Article 5. It added that the issue of promptness must be assessed in each case according to its special features, taking into account the demands of military life and military justice.<sup>200</sup> When deprived

194 ICCPR, Article 9.

195 Sarah Joseph and Melissa Castan. 2013. *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 3rd Edition), p. 31, para. 1.83.

196 *Ibid.*, p. 31, para. 1.84.

197 European Court of Human Rights. *Case of Engel and Others v. the Netherlands* (5100/71; 5101/71; 5102/71; 5345/72; 5370/72), 08/06/1976, para. 57.

198 *Ibid.*, para 59.

199 Council of Europe: Committee of Ministers. 2010. Recommendation CM/Rec(2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces and explanatory memorandum.

200 European Commission of Human Rights. *Case of De Jong, Baljet, van den Brink against the Nether-*

of their liberty, members of the armed forces should be ‘entitled to take proceedings by which the lawfulness of the detention should be decided speedily by a court and their release ordered if the detention is not lawful.’<sup>201</sup> While such a ‘court’ may refer to a military tribunal, national court or international court, the findings of the European Court in the case of *Feti Demirtas v. Turkey* suggest that military tribunals may not in all cases be considered independent and impartial, with the Court noting that the placing of the applicant before an air force command tribunal composed exclusively of military officers could render the judges as ‘party to the proceedings’.<sup>202</sup>

The principle of the right of everyone, including conscripts, to a fair trial reflects the guarantees provided for by Article 6 of the Convention. The right of access to a court is however not absolute, and may be restricted if limitations pursue a legitimate aim and if the means employed are reasonably proportionate to the aim sought to be achieved. The findings of the Court in the case of *Golder v. the United Kingdom* nevertheless demonstrate that the right of access to a court may only be restricted in so far as it does not impair the substance of the right nor conflict with other Convention rights.<sup>203</sup> The nature of such restrictions may be thought to apply in the military as well as civilian context.

The right for a person, including conscripts, charged with a criminal offence to remain silent and not contribute to incriminating him/herself is not absolute. The findings of the Court in the case of *John Murray v. the United Kingdom* demonstrate that adverse inferences may be drawn under certain circumstances from the silence of an accused during interrogation or trial.<sup>204</sup> The nature of such restrictions may also be thought to apply in the military as well as civilian context. Nevertheless, the Court has also held that the jury should be properly directed by the trial judge when deciding whether or not to draw such inferences.<sup>205</sup>

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lands (8805/79, 8806/79, 9242/81). Available from: <http://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=001-73414&filename=DE%20JONG%2C%20BALJET%20AND%20VAN%20DEN%20BRINK%20v.%20THE%20NETHERLANDS.pdf>.

201 Council of Europe: Committee of Ministers. 2010. Recommendation CM/Rec(2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces and explanatory memorandum, p. 9-10.

202 European Court of Human Rights. *Affaire Feti Demirtaş c. Turquie* (5260/07), 17/04/2012. Available from: <http://hudoc.echr.coe.int/eng?i=001-108617>.

203 The European Court of Human Rights. *Case of Golder v. the United Kingdom* (4451/70), 21/02/1975. Available from: <http://hudoc.echr.coe.int/eng?i=001-57496>.

204 European Court of Human Rights. *Case of John Murray v. the United Kingdom* (18731/91), 08/02/96. Available from: <http://hudoc.echr.coe.int/eng?i=001-57980>.

205 European Court of Human Rights. *Case of Condon v. the United Kingdom* (35718/97), 02/05/2000. Available from: <http://hudoc.echr.coe.int/eng?i=001-58798>.

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### 3. Relevant cases

***Georgiadis v. Greece:***<sup>206</sup> claims were brought for violations of Articles 6 and 13 of the European Convention by a former conscript, who alleged that he did not have a fair hearing in the matter of compensation for his allegedly unlawful detention relating to his refusal to undertake military service, contrary to Article 6(1); and that since the decisions of the military tribunals concerning compensation could not be challenged, no effective remedy under national law for the violation of his rights under the Convention was available to him, contrary to Article 13. The Court ruled that the applicant had not waived his right to be heard on the issue of compensation, and ‘A procedure whereby civil rights are determined without ever hearing the parties’ submissions cannot be considered to be compatible with Article 6 para. 1.’<sup>207</sup>

In addition, the Court found that ‘the permanent army tribunals’ rulings *proprio motu* on the question of compensation effectively precluded the applicant from making an application himself’, and that ‘it was not open to him to challenge these rulings’. The Court also found that the military tribunals in question had failed to provide adequate reasons for their decisions, contrary to Article 6(1), as they had relied on the charge of ‘gross negligence’, which, in the view of the Court, was an imprecise concept, therefore requiring ‘that the courts give more detailed reasons, particularly since their finding was decisive for the applicant’s right to compensation’. As regards Article 13, the Court found that as the original decision of the military tribunal was in violation of Article 6, it was not necessary to examine the defendant’s claim that Article 13 had also been violated.

***Zalyan and Others v. Armenia:***<sup>208</sup> a former conscript brought claims for violation of Article 5(1), complaining that he had been illegally detained during an investigation into the murder of two conscripts. While the government of Armenia claimed the defendant had been deprived of his liberty for disciplinary purposes, the Court found that he had been deprived of his liberty for the purposes of a criminal investigation, and that this was ‘arbitrary and lacked proper legal basis’. While the Armenian government rejected the claim that this violated Article 5, on the basis that when Armenia ratified the Convention it declared that Article 5 did not apply to disciplinary measures, the Court found that ‘the

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206 European Court of Human Rights. Case of *Georgiadis v. Greece* (21522/93), 29/05/1997. Available from: <http://hudoc.echr.coe.int/eng?i=001-58037>.

207 *Ibid.*, para. 40.

208 European Court of Human Rights. Case of *Zalyan and Others v. Armenia* (36894/04 and 3521/07), 17/06/2016. Available from: <http://hudoc.echr.coe.int/eng?i=001-161408>.

disciplinary penalty was only a formal pretext and the true reason for the applicant's deprivation of liberty was the criminal investigation'. As such, and in light of the fact that in the Court's opinion 'the disciplinary penalty in question appears never even to have been executed', the Court dismissed the government's objection, and found that Article 5(1) had been violated. In addition, the Court found that contrary to provisions contained within Article 5, on the second occasion during which the defendant was placed in detention 'there were no time limits prescribed against an indefinite stay in detention, and the detention was permitted by reference to matters wholly extraneous to Article 5 § 1 such as the accused familiarising himself with the case file'.<sup>209</sup> The Court also found that the defendant had been denied the right to be informed promptly of the reasons for arrest and the right to be brought promptly before a judge, in violation of Articles 5(2) and 5(3), respectively.

***Buldu and Others v. Turkey:***<sup>210</sup> claims were brought for violations of Articles 3, 5, 7, 9, and 13 by applicants who refused to perform military service on the ground of conscience or religious beliefs, and who requested the possibility to perform alternative civilian service. One of the four applicants also alleged violation of Article 6(1), claiming that he was forced to appear before a military court on account of being accused of being a 'deserter', although he considered himself a civilian. He also alleged that his trial before the military court lacked procedural fairness. While the government contested his claim, the Court found that the government had violated Article 6(1) by compelling a civilian to stand before a military court. The Court substantiated its decision on the basis that a military court, composed exclusively of military personnel, was likely to be biased when dealing with civilian defendants, and that this likely contravened the right of everyone 'to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law', as established in Article 6(1) of the Convention.

***Pulatli v. Turkey:***<sup>211</sup> claims were brought for violations of Articles 5 and 6 by a former army sergeant who alleged that he had been deprived of his liberty based on a decision imposed on him by his military superior, and not an independent and impartial tribunal. The applicant was accused of leaving his garrison without authorization and was subsequently subjected to seven days' detention in a disciplinary cell on the decision of his military superior. The government contested the claim, arguing that his detention

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209 See also, *Baranowski v. Poland*, 28358/95, § 57, ECHR 2000-III, and *Jėčius v. Lithuania*, 34578/97, § 59, ECHR 2000-IX.

210 European Court of Human Rights. *Affaire Buldu et autres c. Turquie* (14017/08), 03/09/2014. Available from: <http://hudoc.echr.coe.int/eng?i=001-144352>.

211 European Court of Human Rights. *Affaire Pulatli c. Turquie* (38665/07), 26/07/2011. Available from: <http://hudoc.echr.coe.int/eng?i=001-104638>.



was justified on the basis of Article 171 of the Turkish Military Penal Code. The Court disagreed, concluding that, in accordance with Article 5(1) of the Convention, his detention could only be justified if it was based on a decision by a competent court. On this basis, the Court found that his rights as enshrined in Article 5(1) had been violated, and thus upheld his claim. In addition, the Court also emphasized the importance of summary trials being subject to effective judicial reviews, concluding that ‘the systemic lack of a right to judicial review for summary trials by commanding officers in Turkey breached Pulatli’s right to liberty and security.’

*Feti Demirtaş v. Turkey*:<sup>212</sup> claims were brought for violations of Articles 3, 6, and 9 on the basis that the applicant’s right to object to military service based on his religious beliefs had been violated, contrary to Article 9 of the Convention; that he had been subject to ill treatment during his detention, contrary to Article 3; and that the decision to enforce his detention was made by a military tribunal that lacked independence and impartiality, contrary to Article 6(1). In the context of the right to a fair trial, the Court found that as the applicant had been forcibly conscripted and had not accepted a military status, and was placed before an air force command tribunal composed exclusively of military officers, the judges could be ‘equated to a party to the proceedings’. As a result, the court ruled that the ‘applicant’s doubts as to the independence and impartiality of the tribunal could therefore be said to have been objectively justified’, and thus upheld the claim that Article 6(1) had been violated.

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212 European Court of Human Rights. *Affaire Feti Demirtaş c. Turquie* (5260/07), 17/04/2012. Available from: <http://hudoc.echr.coe.int/eng?i=001-108617>.

# Right to conscientious objection based on the freedom of thought, conscience and religion

## 1. Description of the right and legal documents

Conscientious objection to military service is based on the freedom of thought, conscience and religion as originally set out in Article 18 of the UDHR. Other international and regional human rights instruments also provide for this right. The European Convention on Human Rights provides for freedom of thought, conscience and religion: ‘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.’<sup>213</sup> The ICCPR,<sup>214</sup> ACHR<sup>215</sup>, African Charter on Human and Peoples’ Rights (ACHPR)<sup>216</sup> and EU Charter of Fundamental Rights<sup>217</sup> also provide for the freedom of conscience and religion.

While no international human rights documents, including the ICCPR, explicitly refer to the right of conscientious objection (to military service) the Human Rights Committee stated in 1993 that it believes that such a right can be derived from Article 18 of the Covenant since the obligation to use lethal force may seriously conflict with freedom of conscience and the right to manifest one’s religion or beliefs.<sup>218</sup> Consequently, the

<sup>213</sup> ECHR, Article 9(1).

<sup>214</sup> ICCPR, Article 18(1,2) provides that ‘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. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice’.

<sup>215</sup> ACHR, Article 12(1) provides that ‘1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one’s religion or beliefs, and freedom to profess or disseminate one’s religion or beliefs, either individually or together with others, in public or in private’.

<sup>216</sup> ACHPR, Article 8 provides that ‘Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms’.

<sup>217</sup> The Charter of Fundamental Rights of the European Union (proclaimed on 7 December 2000, entered into force 1 December 2009), Article 10.

<sup>218</sup> CCPR General Comment No. 22: Article 18 (The right to freedom of thought, conscience and religion). Adopted at the 48th session of the UN Human Rights Committee, 30 July 1993, para. 11.

right to a conscientious objection is characterized as a derivative right.<sup>219</sup> The Human Rights Committee linked the aforementioned right and the ‘obligation to use lethal force’ as being incompatible. This understanding contrasts with the notion of a total objector, who would refuse to undertake any military function whatsoever including non-combatant functions.<sup>220</sup> The restriction on the obligation to use lethal force was upheld by the Committee in its earlier decision (*Westerman v. the Netherlands*, Communication No. 682/1996).

With regard to international obligations under the ICCPR, the Human Rights Committee played a key role in establishing the right to conscientious objection based on the freedom of thought, conscience and religion. Not only did it establish that the right to conscientious objection is implied through the interpretation of Article 18 of the Covenant, but it has also addressed a number of other related issues in its concluding observation on State Parties’ reports.<sup>221</sup> These have included the basis upon which conscientious exemption from military service can be granted; the process for obtaining such exemption; the length and conditions of alternative service and the rights of those who object to alternative service; whether or not alternative service provides the same rights and social benefits as military service; and whether or not repeated punishment for failure to perform military service is permissible.<sup>222</sup> Concerns have been raised with individual states relating to the lack of independent decision-making processes,<sup>223</sup> disproportionately lengthy alternative service,<sup>224</sup> and the recognition of the right to conscientious objection in a discriminatory manner.<sup>225</sup>

The Committee has addressed conscientious objection in multiple other decisions. It first applied Article 18 of the ICCPR in *Yoon et al. v. Republic of Korea*,<sup>226</sup> where it stated that the right to conscientious objection was based on Article 18 and was applicable to

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219 UN OHCHR. 2012. Conscientious Objection to Military Service. Available from: [https://www.ohchr.org/Documents/Publications/ConscientiousObjection\\_en.pdf](https://www.ohchr.org/Documents/Publications/ConscientiousObjection_en.pdf), p. 7.

220 *Ibid.*, p. 10.

221 *Ibid.*, p. 14.

222 For example, in the annual reports of the Human Rights Committee, see its concluding observations on: Venezuela (A/48/40, para. 291); Austria, Ecuador and Belarus (A/47/40, paras. 110, 247 and 536); Spain (A/46/40, para. 172); Portugal, and Saint Vincent and the Grenadines (A/45/40, paras. 156 and 251); Norway and the Netherlands (A/44/40, paras. 83 and 219); Finland and Hungary (A/41/40, paras. 210 and 398); Iceland, Australia and Peru (A/38/40, paras. 113, 150 and 269); Norway (A/36/40, para. 358); and Canada (A/35/40, para. 169).

223 For example, in the annual report of the Human Rights Committee, its concluding observations on Israel (A/58/40, para. 85).

224 For example, in the annual reports of the Human Rights Committee, its concluding observations on Latvia (A/59/40, para. 65) and on Georgia (A/57/40, para. 78).

225 UN OHCHR. 2012. Conscientious Objection to Military Service. Available from: [https://www.ohchr.org/Documents/Publications/ConscientiousObjection\\_en.pdf](https://www.ohchr.org/Documents/Publications/ConscientiousObjection_en.pdf), p. 14.

226 Human Rights Committee. Communication Nos. 1321/2004 and 1322/2004.

all States Parties to the Covenant. In *Jung et al. v. Republic of Korea*,<sup>227</sup> the Committee confirmed its earlier position and concluded that the State was under an obligation to provide effective remedy. In *Jeong et al. v. Republic of Korea*,<sup>228</sup> the Committee reiterated its previous arguments and added that ‘The right to conscientious objection to military service inheres in the right to freedom of thought, conscience and religion. It entitles any individual to an exemption from compulsory military service if this cannot be reconciled with that individual’s religion or beliefs.’

The European Court of Human Rights, for the first time, recognized the right to conscientious objection in 2011 in *Bayatyan v. Armenia*.<sup>229</sup> In this case the Court explicitly departed from the reasoning in its earlier decisions in light of the important developments both in the domestic legal systems of Council of Europe member states and internationally.<sup>230</sup> In order to fall within the scope of the right, an individual must be ‘motivated by a serious and unsurmountable conflict between the obligation to serve in the army and a person’s conscience or his deeply and genuinely held religious or other beliefs’;<sup>231</sup> and there must be the existence of a firm, fixed and sincere objection to participation in war in any form or to the bearing of arms.<sup>232</sup> The recognition of the right to conscientious objection created the right for states to provide an alternative civilian service with a ‘genuinely civilian nature’ which is not ‘deterrent or punitive’<sup>233</sup> and the State’s obligation to make available an ‘effective and accessible procedure’ for the determination of conscientious-objector status, including decision-making by a sufficiently independent body.<sup>234</sup> In general, in its jurisprudence the Court assesses whether or not the applicant falls within the scope of conscientious objection; if there are alternatives which effectively accommodate the concerns of conscientious objectors including non-punitive alternative service; and whether or not differential treatment or punishment of conscientious objectors has a legitimate aim, reasonable

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227 Human rights Committee. Communication Nos. 1593-1603/2007.

228 Human Rights Committee. Communications Nos. 1642-1741/2007. Views adopted on 24 March 2011.

229 European Court of Human Rights. Case of Bayatyan v. Armenia (23459/03), 07/07/2011. Available from: <http://hudoc.echr.coe.int/eng?i=001-105611>.

230 Ibid., para. 101.

231 Ibid., para. 110.

232 European Court of Human Rights. *Affaire Enver Aydemir c. Turquie* (26012/11), 07/09/2016. Available from: <http://hudoc.echr.coe.int/eng?i=001-163456>.

233 European Court of Human Rights. Case of Adyan and Others v. Armenia (75604/11), 12/10/2017. Available from: <http://hudoc.echr.coe.int/eng?i=001-177429>.

234 European Court of Human Rights. *Affaire Savda c. Turquie* (42730/05), 12/09/2012. Available from: <http://hudoc.echr.coe.int/eng?i=001-111414>; European Court of Human Rights. Case of Papavasiliakis v. Greece (66899/14), 15/09/2016. Available from: <http://hudoc.echr.coe.int/eng?i=001-166850>; see also European Court of Human Rights. Case of Dyagilev v. Russia (49972/16), 07/09/2020. Available from: <http://hudoc.echr.coe.int/eng?i=001-201649>.

justification, and is proportionate and necessary in a democratic society. These are assessed based on considerations regarding whether or not applicable laws strike a fair balance between state interests and individual rights. The Court has also explored the existence of an applicable legal framework, explaining why case-law on this matter was traditionally understood in conjunction with Article 14 on non-discrimination,<sup>235</sup> and later, with Article 6(1) on the right to a fair trial.<sup>236</sup>

Where members of the armed services have been penalized or subjected to measures resulting from religious affiliations or activities, complaints have been dealt with under Article 9. These cases primarily relate to steps taken in the Greek army against proselytisers and in the Turkish army against those deemed as Islamic fundamentalists.<sup>237</sup> The importance of respecting the spiritual convictions of a person is such that the adoption of a particular religion should not in and of itself justify sanctions or dismissal.<sup>238</sup>

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## 2. Restrictions on or interference with the right to conscientious objection

‘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.’<sup>239</sup> Similar limitations are also provided for in the

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235 See European Court of Human Rights. *N. v. Sweden* (10410/83), 11/10/1984. Available from: <http://hudoc.echr.coe.int/eng?i=001-74737>; European Court of Human Rights. *Peters v. the Netherlands* (21132/93), 06/04/1994. Available from: <http://hudoc.echr.coe.int/eng?i=001-1835>; European Court of Human Rights. *Case of Thlimmenos v. Greece* (34369/97), 06/04/2000. Available from: <http://hudoc.echr.coe.int/eng?i=001-58561>.

236 European Court of Human Rights. *Affaire Feti Demirtaş c. Turquie* (5260/07), 17/04/2012. Available from: <http://hudoc.echr.coe.int/eng?i=001-108617>; European Court of Human Rights. *Affaire Savda c. Turquie* (42730/05), 12/09/2012. Available from: <http://hudoc.echr.coe.int/eng?i=001-111414>.

237 See, for example: European Court of Human Rights. *Case of Kalaç v. Turkey* (20704/92), 01/07/1997. Available from: <http://hudoc.echr.coe.int/eng?i=001-58042>; European Court of Human Rights. *Case of Larissis and others v. Greece* (140/1996/759/958-960), 24/02/1998. Available from: <http://hudoc.echr.coe.int/eng?i=001-58139>.

238 Karen Reid. 2015. *A Practitioner’s Guide to the European Convention on Human Rights* (5th Edition, Sweet and Maxwell), p. 368.

239 ECHR, Article 9(2).

ACHR<sup>240</sup> and the ICCPR.<sup>241</sup> The general circumstances under which these limitations may be applied to the manifestation of religion or beliefs in the context of military service are elaborated in further detail below. At the systemic level, the Court has made it clear that the absence of an alternative to military service for conscientious objectors can be justified only by a ‘pressing social need’,<sup>242</sup> and that it is not enough simply to point to the ‘necessity of defending the territorial integrity of the State’ as a justification for the absence of an appropriate alternative form of service.<sup>243</sup> At the individual level, the Court will treat a State’s refusal to recognize an individual as a conscientious objector an interference with his or her Article 9 rights which requires justification, but—provided that the State’s decision-making procedure was compatible with its Article 9 obligations (see above)—will accept its conclusions save in cases of ‘arbitrariness or manifest unreasonableness’ (see case of *Dyagilev v. Russia* - though a request for referral to the Grand Chamber was pending at the time of writing).

It should also be noted that restrictions can be lawfully imposed only on the right to manifest one’s beliefs alone and in private, not on the right to hold them.<sup>244</sup> The right to hold any belief and to change one’s religion or belief at any time is an absolute and unconditional right - the State may not interfere with it by forcing particular belief systems upon persons, nor through taking any coercive steps to force an individual to change pre-existing beliefs.<sup>245</sup>

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240 ACHR, Article 12(2, 3) provides that ‘2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs. 3. Freedom to manifest one’s religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others’.

241 ICCPR, Article 18(3) provides that ‘Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.’

242 European Court of Human Rights. Case of *Bayatyan v. Armenia* (23459/03), 07/07/2011. Available from: <http://hudoc.echr.coe.int/eng?i=001-105611>, para. 123.

243 European Court of Human Rights. *Affaire Mushfig Mammadov et autres c. Azerbaïdjan* (14604/08), 17/01/2020. Available from: <http://hudoc.echr.coe.int/eng?i=001-197066>, para. 97.

244 European Court of Human Rights. 2020. Guide on Article 9 of the European Convention on Human Rights: Freedom of thought, conscience and religion. Available from: [https://www.echr.coe.int/Documents/Guide\\_Art\\_9\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf), para. 25.

245 See, for example: European Court of Human Rights. Case of *Ivanova v. Bulgaria* (52435/99), 12/07/2007. Available from: <http://hudoc.echr.coe.int/eng?i=001-80075>, para. 79; European Court of Human Rights. Case of *Mockutė v. Lithuania* (66490/09), 27/05/2018. Available from: <http://hudoc.echr.coe.int/eng?i=001-181202>, para. 119.

### 3. Relevant cases

Prior to 2000, case-law of the European Court of Human Rights did not recognize the right to a conscientious objection to military service. Several complaints were found inadmissible under Article 4(3b) (see for example *G.Z. v. Austria*, no. 5591/72, 02/04/1973 or *X. v. Germany*, no. 7705/76, 05/07/1977). In later judgments, the Court only considered complaints of conscripts under Article 9 in conjunction with Article 14, which it found inadmissible due to the existing provision of alternative civil service (see *N. v. Sweden*, no. 10410/83, 11/10/1984). Developments in the recognition of the right to conscientious objection as a stand-alone right took place from 2000 onwards and in conjunction with the emergence of an almost universal consensus amongst member states on the recognition of conscientious objection as an aspect of the right to freedom of thought, conscience and religion.<sup>246</sup>

*Thlimmenos v. Greece*:<sup>247</sup> the applicant, a Jehovah's Witness, was convicted of insubordination for refusing to wear a military uniform during general mobilization. After serving half of his prison sentence, he applied to become a chartered accountant but was refused on account of his felony conviction. While a law existed through which those convicted of insubordination in the armed forces could apply for recognition as conscientious objectors, and therefore have their convictions overturned, his application was denied. He subsequently brought a complaint against the authorities, claiming that 'no distinction was made between those convicted of offences committed exclusively because of their religious beliefs and those convicted of other offences, and the facts complained of do fall within the ambit of Article 9'. The Court found a violation of Article 14 in conjunction with Article 9 due to the fact that his exclusion from the profession in question was disproportionate to the aim of ensuring appropriate punishment for those who refuse to serve, since he had already served a prison sentence. While the board examining his application to be a chartered accountant was obliged to apply the law, it was the relevant Greek legislation, which did not include appropriate exceptions, that was deemed to have violated the applicant's rights. The Court concluded that it was the State having enacted the relevant legislation which violated the applicant's right not to be discriminated against in the enjoyment of his right under Article 9 of the Convention. That State did so by failing to introduce appropriate exceptions to the rule barring

246 Karen Reid. 2015. *A Practitioner's Guide to the European Convention on Human Rights* (5th Edition, Sweet and Maxwell), p. 368.

247 European Court of Human Rights. *Case of Thlimmenos v. Greece* (34369/97), 06/04/2000. Available from: <http://hudoc.echr.coe.int/eng?i=001-58561>.

persons convicted of a serious crime from the profession of chartered accountants.

*Ülke v. Turkey*:<sup>248</sup> the applicant in question was a self-proclaimed pacifist who refused to perform military service on the basis of his convictions. As a result of his repeated refusals, he was prosecuted on a variety of grounds. The Court explicitly decided, based on its previous judgment in *Thlimmenos v. Greece*, not to consider findings under Article 9, but instead to examine a possible violation of Article 3. It ruled in favour of the applicant, finding a violation of Article 3 on account of the absence of an applicable legal framework which, in the view of the Court, would have provided appropriate means of dealing with situations arising from the refusal to perform military service on account of beliefs. The Court also found that the resulting procedures were disproportionate to the aim of ensuring that the applicant in question performed military service.

*Bayatyan v. Armenia*:<sup>249</sup> this case represented the first time the Court specifically dealt with the question of whether or not the right to conscientious objection is guaranteed under Article 9 of the European Convention.<sup>250</sup> The applicant was a Jehovah's Witness who, although refusing compulsory military service, had offered to perform alternative civil service. Despite this, at that time Armenia provided no such alternative, and so the applicant alleged a violation of Article 9. The Court held that even though the Commission had previously refused to apply Article 9 to persons refusing military service on the grounds of their belief, this restrictive interpretation was reflective of the ideas prevalent at the time and important developments had since taken place. It noted that Article 9 should not be read solely in conjunction with Article 4(3)(b): 'In this respect, the Court notes that Article 9 does not explicitly refer to a right to conscientious objection. However, it considers that opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9.'<sup>251</sup> The Court also noted that such instances should be judged on a case by case basis.<sup>252</sup> The Court further assessed that the conviction of the applicant for draft evasion amounted to interference with his

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248 European Court of Human Rights, Case of *Ülke v. Turkey* (39437/98), 24/04/2006. Available from: <http://hudoc.echr.coe.int/eng?i=001-72146>.

249 European Court of Human Rights. Case of *Bayatyan v. Armenia* (23459/03), 07/07/2011. Available from: <http://hudoc.echr.coe.int/eng?i=001-105611>.

250 UN OHCHR. 2012. Conscientious Objection to Military Service. Available from: [https://www.ohchr.org/Documents/Publications/ConscientiousObjection\\_en.pdf](https://www.ohchr.org/Documents/Publications/ConscientiousObjection_en.pdf), p.15.

251 European Court of Human Rights. Case of *Bayatyan v. Armenia* (23459/03), 07/07/2011. Available from: <http://hudoc.echr.coe.int/eng?i=001-105611>, para. 110.

252 *Ibid.*



religious beliefs. In deciding whether or not such an interference was justified, the Court considered if it: (i) was prescribed by law; (ii) pursued one or more legitimate aims set out in paragraph 2; and (iii) was necessary in a democratic society. The Court decided not to assess prescription by law but determined that there was no legitimate aim because at the time of the conviction the Armenian authorities had already pledged to introduce alternative civilian service. Additionally, when determining whether such interference was necessary in a democratic society, the Court noted that the Armenian system failed to allow any exemptions based on the grounds of conscience, and penalized those who refused to perform military service. As such, it failed to strike a fair balance between the interests of society as a whole and those of the applicant in question. Furthermore, the fact that Armenia already agreed to establish an alternative civil service was indicative of a recognition that freedom of conscience can be expressed through opposition to military service, and that it was necessary to deal with the issue by introducing alternative measures rather than penalizing conscientious objectors. As such, no pressing social need existed that could justify the interference. As a result, for the first time in its history the Court found a violation of Article 9 on the grounds of conscientious objection to military service.

*Erçep v. Turkey*:<sup>253</sup> the applicant, a Jehovah's Witness, refused to perform military service and was subsequently prosecuted for desertion in over twenty-five sets of proceedings. He brought a claim under Article 9 of the Convention. The Court found a violation of Article 9 as there was no appropriate legal framework governing the status of conscientious objectors and due to the lack of alternative forms of service, the measures which the government took against the applicant were not necessary. The Court used a similar reasoning as in the case of *Bayatyan v. Armenia*,<sup>254</sup> noting that 'The system of compulsory military service applicable in Turkey imposed obligations on citizens that were liable to have serious consequences for conscientious objectors' and that 'Such a system failed to strike a fair balance between the interests of society as a whole and those of conscientious objectors. Accordingly, the penalties imposed on the applicant, without any allowances being made for the dictates of his conscience and beliefs, could not be regarded as a measure necessary in a democratic society.' The Court subsequently mandated a change in national legislation in order to ensure its consistency with rights enshrined under the Convention.

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253 European Court of Human Rights. Case of *Erçep v. Turkey* (43965/04), 22/11/2011. Available from: <http://hudoc.echr.coe.int/eng?i=002-313>.

254 European Court of Human Rights. Case of *Bayatyan v. Armenia* (23459/03), 07/07/2011. Available from: <http://hudoc.echr.coe.int/eng?i=001-105611>.

***Feti Demirtaş v. Turkey:***<sup>255</sup> the applicant, a Jehovah's Witness, was forcibly conscripted despite refusing to perform compulsory military service on the grounds of religious beliefs. After joining his regiment, he refused to wear military uniform. Criminal proceedings were subsequently brought against him, with the air force command tribunal imposing several custodial sentences. The applicant further alleged that during custody he was ill-treated and threatened. The Chamber found violations of Article 3 and Article 9 since there was no opportunity to perform an alternative service, and the system of compulsory military service in question did not strike a fair balance between the interests of society as a whole and those of conscientious objectors. Consequently, the penalties imposed were found not to be necessary in a democratic society. The Chamber also found a violation of Article 6(1).

***Savda v. Turkey:***<sup>256</sup> the applicant, a self-declared conscientious objector and pacifist, deserted from military service. After serving a subsequent prison sentence, he was ordered to complete military service, but refused to wear uniform, and declared himself a conscientious objector. After a series of criminal proceedings and a diagnosis of anti-social personality disorder, the applicant was exempted from military service. The complaint in question concerned the right to conscientious objection under Article 9, which was not recognized in Turkey, and in respect of which no domestic legal recourse was available. The Court found violations under Articles 9, 3, and 6(1). In its reasoning the Court considered that the authorities had a positive obligation to grant the applicant an effective and accessible procedure which would have enabled him to establish whether he was entitled to conscientious-objector status, in order to protect his interests as guaranteed by Article 9. A system that did not provide that, failed to strike the proper balance between the general interest of society and that of conscientious objectors. It followed that the relevant authorities had failed to comply with their obligation under Article 9.

***Enver Aydemir v. Turkey:***<sup>257</sup> following his drafting, the applicant in question refused to perform his military service and declared himself a conscientious objector. During criminal proceedings, he cited opposition to Turkey's secular principles and his adherence to the Islamic jurisprudence of 'sharia' in defence of his decision not to 'wear military uniform belonging to the Republic of Turkey'. During his detention, he

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255 European Court of Human Rights. *Affaire Feti Demirtaş c. Turquie* (5260/07), 17/04/2012. Available from: <http://hudoc.echr.coe.int/eng?i=001-108617>.

256 European Court of Human Rights. *Affaire Savda c. Turquie* (42730/05), 12/09/2012. Available from: <http://hudoc.echr.coe.int/eng?i=001-111414>.

257 European Court of Human Rights. *Affaire Enver Aydemir c. Turquie* (26012/11), 07/09/2016. Available from: <http://hudoc.echr.coe.int/eng?i=001-163456>.

was forced to wear military uniform and was allegedly subjected to various forms of ill treatment. The Court referred to the Human Rights Committee's conceptualization of conscientious objection in relation to the obligation to use lethal force, however noting that within its own jurisprudence, conscientious objection also concerned a firm, fixed and sincere objection to participation in war in any form or to the bearing of arms. It also noted that 'the Contracting States enjoyed a certain margin of appreciation in defining the circumstances in which they recognised the right to conscientious objection and in establishing mechanisms for examining claims made on that account.' When analysing whether the applicant's beliefs formed the basis upon which he refused to perform military service, the Court noted that 'not all opinions or convictions fell within the scope of Article 9 § 1 of the Convention. The applicant's complaints did not relate to a form of manifestation of a religion or belief through worship, teaching, practice or observance within the meaning of the second sentence of Article 9 § 1. Furthermore, the term "practice" as employed in Article 9 § 1 did not cover each and every act that was motivated or influenced by a religion or belief... The evidence ... did not suggest that his stated beliefs included a firm, fixed and sincere objection to participation in war in any form or to the bearing of arms. That being so, the Court was not satisfied that the applicant's objection to performing military service had been motivated by sincere religious beliefs which were in serious and insurmountable conflict with his obligation to perform military service.'<sup>258</sup> Consequently, the Court declared the application under Article 9 inadmissible because his conscientious objection was not motivated by religious or other equivalent belief. Despite this, the Court found a violation of Article 3, both on substantive and procedural grounds.

***Papavasiliakis v. Greece:***<sup>259</sup> the complaint was brought by a Greek citizen who proclaimed to be a Jehovah's Witness (but without baptism), who objected to violence and on that basis applied for alternative civilian service. Greek law provided that the placement be the decision of the Ministry of National Defence on the basis of an opinion of a Special Board with a specified composition on the basis of documents or after a hearing. His request was denied, and he was later ordered to pay a fine for insubordination. The Court considered that 'States had a positive obligation in such matters which was not confined to ensuring that, under domestic law, there was a procedure for examining requests for conscientious-objector status; that procedure also had to be effective and accessible. One of the essential conditions for the effectiveness of the procedure was the independence

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258 European Court of Human Rights. 2016. Legal Summary *Enver Aydemir v. Turkey* (26012/11). Available from: <http://hudoc.echr.coe.int/eng?i=002-11230>.

259 European Court of Human Rights. Case of *Papavasiliakis v. Greece* (66899/14), 15/09/2016. Available from: <http://hudoc.echr.coe.int/eng?i=001-166850>.

of the individuals conducting it.<sup>260</sup> Based on its previous judgment, the Court also noted the existence of justifiable concerns in regard to compelling conscientious objectors to appear before military courts: It found that it was understandable that a conscientious objector standing trial for strictly military offences before an exclusively military court should have been apprehensive about appearing before judges belonging to the army, which could be identified as a party to the proceedings, and that the individual concerned could legitimately have feared that the Court might allow itself to be unduly influenced by partial considerations (see also *Feti Demirtaş* above). In this regard, the Court noted that had the two missing members of the Board, who were both civilians, been present, the majority of the Board would have been composed of civilians. In the Court's view, 'the applicant could thus legitimately have feared that, not being a member of a religious community, he would not succeed in conveying his ideological beliefs to career officers with senior positions in the military hierarchy.'<sup>261</sup> Consequently, the Court found that the competent authorities had failed to comply with the positive obligation under Article 9 to ensure that interviews conducted by special committees for the purpose of assessing the validity of claims brought by conscientious objectors should be conducted in a manner which guarantees procedural efficiency, and that the interview boards have equal representation between military officers and civilians.

***Adyan and Others v. Armenia:***<sup>262</sup> a claim was brought under Article 9 by a group of Jehovah's Witnesses, who, after serving part of their custodial sentence for refusing to perform both military and civilian service, claimed that the alternative civilian service offered was not of a true civilian nature, on the basis that it was supervised by military authorities. The Court noted that the mere existence of alternative service does not suffice to conclude that the authorities have discharged their obligations under Article 9. The Court considered that the right to conscientious objection guaranteed by Article 9 of the Convention would be illusory if a state were allowed to organize and implement its system of alternative service in a way that would fail to offer--whether in law or in practice--an alternative to military service of a genuinely civilian nature and one which was not a deterrent or punitive in character. While the Court confirmed that the work performed by alternative servicemen was of a civilian nature, however 'the nature of the work performed is only one of the factors to be taken into account when deciding whether alternative service is of a genuinely civilian nature. Such factors as authority, control,

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260 European Court of Human Rights. 2016. Legal Summary - Papavasiliakis v. Greece (66899/14). Available from: <http://hudoc.echr.coe.int/eng?i=002-11317>.

261 Ibid.

262 European Court of Human Rights. Case of Adyan and Others v. Armenia (75604/11), 12/01/2018. Available from: <http://hudoc.echr.coe.int/eng?i=001-177429>.

applicable rules and appearances may also be important for the determination of that question.<sup>263</sup> When assessing the character of the alternative civilian service, the Court drew two additional conclusions. First, that the alternative service in question was not sufficiently separated from the military system in terms of authority and control, in that the military were involved in the supervision and organization of the alternative service, including such aspects as spot checks, unauthorized absence, transfers, assignments; and, with regard to the application of military rules, that civilian servicemen were required to wear a military uniform. Second, the Court noted that the length of the alternative service (42 months rather than the 24 months for military service), was likely to have had a deterrent or even punitive effect. Consequently, the Court held that there was a violation of Article 9 since the authorities failed to make appropriate allowances for the exigencies of the applicants' conscience and beliefs and to guarantee a system of alternative service that struck a fair balance between the interests of society as a whole and those of the applicants (necessary in a democratic society).

***Mushfig Mammadov and Others v. Azerbaijan:***<sup>264</sup> the applicants, a group of Jehovah's Witnesses, brought a complaint under Article 9 on the basis that, after their request to perform alternative civilian service was denied by the authorities, they were prosecuted and given a custodial sentence. On the basis of its previous jurisprudence, the Court assessed whether or not the measures taken at the domestic level were justified in principle, and proportionate. The Court found a violation of Article 9 due to the absence of an alternative service system, which amounted to an interference with Article 9 rights which was not necessary in a democratic society. The Court mandated the government of Azerbaijan to amend related legislation.

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263 European Court of Human Rights. Case of Adyan and Others v. Armenia (75604/11), 12/01/2018. Available from: <http://hudoc.echr.coe.int/eng?i=001-177429>, para. 68.

264 European Court of Human Rights. Affaire Mushfig Mammadov et autres c. Azerbaïdjan (14604/08), 17/01/2020. Available from: <http://hudoc.echr.coe.int/eng?i=001-197066>.

# Freedom of assembly and association

## 1. Description and legal documents

‘In the Helsinki Final Act and numerous other CSCE/OSCE agreements, all participating States have committed to protect peaceful assembly and to respect the right of individuals to associate with others, even if in so doing they voice opinions that are critical of the government or are generally unpopular.’<sup>265</sup> The enshrinement of freedom of assembly and association in national and international legislation has a long history. Jeremy Bentham, in his 1776 work *Fragments on Government*, described freedom of association as ‘the security with which malcontents may communicate their sentiments, concert their plans, and practice every mode of opposition short of actual revolt, before the executive power can be legally justified in disturbing them.’<sup>266</sup> The concept of freedom of assembly and association has since evolved, and is now recognized in key human rights instruments. Freedom of assembly includes public or private meetings, marches, processions, demonstrations and sit-ins – the purpose of which may be political, religious or spiritual, social or otherwise. Indeed, no limit may be placed upon such purpose, other than the condition that any assembly must be peaceful. The occurrence of incidental violence does not mean an assembly forfeits its protection under the right to freedom of assembly, unless the assembly in question had a disruptive purpose.<sup>267</sup> Nevertheless, associations that engage in activities contrary to the values of the Convention cannot benefit from the protection of Article 11 by reason of Article 17 which prohibits the use of the Convention in order to destroy or excessively limit the rights guaranteed by it.<sup>268</sup> Freedom of association enshrines the right to associate with others to form bodies through which to pursue common

265 Commission on Security and Cooperation in Europe. Freedom of Association and Assembly. Available from: <https://www.csce.gov/issue/freedom-association-and-assembly>.

266 “Freedom of Assembly and Association.” Governments of the World: A Global Guide to Citizens’ Rights and Responsibilities. Encyclopedia.com. (September 30, 2020). Available from: <https://www.encyclopedia.com/international/legal-and-political-magazines/freedom-assembly-and-association>; See also, Bentham, Jeremy - Supplementary Bibliography. Available from: <https://www.encyclopedia.com/people/philosophy-and-religion/philosophy-biographies/jeremy-bentham>.

267 Council of Europe. Freedom of Assembly and Association. Available from: <https://www.coe.int/en/web/echr-toolkit/la-liberte-de-reunion-et-dassociation>.

268 European Court of Human Rights. 2020. Guide on Article 11 of the European Convention on Human Rights: Freedom of assembly and association. Available from: [https://www.echr.coe.int/Documents/Guide\\_Art\\_11\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_11_ENG.pdf), para. 109.

objectives. It specifically includes the right to form trade unions for the protection of members' interests. In addition to trade unions, two types of associations of particular importance are political parties and religious bodies.<sup>269</sup>

Article 11(1) of the Convention states that 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 or her interests.<sup>270</sup> Article 20 of the UDHR sets out that: (1) Everyone has the right to freedom of peaceful assembly and association; and (2) No one may be compelled to belong to an association. Article 21 of the ICCPR ensures that the right of peaceful assembly shall be recognized. The UN has appointed a Special Rapporteur on the rights to freedom of peaceful assembly and of association. The Special Rapporteur is mandated to gather and share information about global, regional and local trends and issues relating to peaceful assembly and association; make recommendations on how to ensure the promotion and protection of these rights; report on violations, as well as discrimination, threats or use of violence, harassment, persecution, intimidation or reprisals directed at persons exercising these rights.<sup>271</sup>

The right to freedom of peaceful assembly is closely connected to the right to freedom of thought, conscience and religion (Article 9) and freedom of expression (Article 10). Articles 10 and 11 (the freedom of assembly and association) are the cornerstones of a democratic society and should not be interpreted restrictively.<sup>272</sup> The protection of opinions and the freedom to express them is one of the key elements of Article 11.<sup>273</sup> Thus, Article 11 must be considered in the light of Article 10, where the aim of the exercise of freedom of assembly is the expression of personal opinions and the ability to secure a forum for public debate and open expression of protest.<sup>274</sup>

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269 Council of Europe. Freedom of Assembly and Association. Available from: <https://www.coe.int/en/web/echr-toolkit/la-liberte-de-reunion-et-dassociation>.

270 ECHR, Article 11(1).

271 See United Nations Human Rights Office of the High Commissioner. Available from: <https://www.ohchr.org/EN/Issues/AssemblyAssociation/Pages/SRFreedomAssemblyAssociationIndex.aspx>.

272 European Court of Human Rights. 2020. Guide on Article 11 of the European Convention on Human Rights: Freedom of assembly and association. Available from: [https://www.echr.coe.int/Documents/Guide\\_Art\\_11\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_11_ENG.pdf), para. 1.

273 Ibid., para. 3.

274 Ibid., para. 4.

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## 2. Restrictions on or interference with freedom of assembly and association

The right to freedom of assembly and association is not absolute. Under Article 4 of the ICCPR, countries may take measures derogating from certain obligations under the Covenant, including the right to freedom of assembly and association, ‘in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed’. Such measures may only be taken ‘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’.<sup>275</sup> Article 21 of the ICCPR stipulates that no restrictions may be placed on the exercise of the right to freedom of assembly 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, the protection of public health or morals, or the protection of the rights and freedoms of others. Article 22(2) makes similar provision in relation to freedom of association.

According to Article 11 of the European Convention, freedom of assembly and association includes three key elements: freedom of peaceful assembly, freedom of association with others, and the right to form and to join trade unions for the protection of one’s interests. Article 11 further provides that ‘No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, or the police, or of the administration of the State.’<sup>276</sup> This clearly identifies the scope and applicability of the norm to conscripted personnel. The jurisprudence of the Court further clarifies that while the State is bound to respect the freedom of assembly and association of its employees, Article 11 § 2 in fine allows it to impose lawful restrictions on the exercise of these rights by members of its armed forces, police or administration.<sup>277</sup> To date, the

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275 ICCPR, Article 4.

276 ECHR, Article 11(2).

277 European Court of Human Rights. 2020. Guide on Article 11 of the European Convention on Human Rights: Freedom of assembly and association. Available from: [https://www.echr.coe.int/Documents/Guide\\_Art\\_11\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_11_ENG.pdf).



case-law of the European Court has principally been concerned with restrictions on the right of public servants to freedom of association rather than freedom of assembly.<sup>278</sup>

As to whether or not an interference with Article 11 rights is ‘necessary in a democratic society’, the Court has reiterated that lawful restrictions may be imposed on the exercise of trade union rights by members of the armed forces, of the police or of the administration of the State. However, the exceptions set out in Article 11 are to be applied only in certain circumstances; namely, in cases where convincing and compelling reasons can justify restrictions on such parties’ freedom of association. In determining whether or not a necessity within the meaning of Article 11 § 2 exists, the Contracting States have a limited margin of appreciation, which goes hand in hand with rigorous supervision covering both the law and the decisions applying it, including those issued by independent courts.<sup>279</sup> The Court frequently begins its consideration of necessity in a democratic society by questioning whether or not the interference responds to a ‘pressing social need’. For example, in determining whether a restriction on the right to organize responds to a pressing social need, there must exist plausible evidence that the establishment or activities of a trade union represent a sufficiently imminent threat to the State or to a democratic society. The assessment of the existence of such a threat is primarily for national authorities, who are privileged with a wide margin of appreciation. Nevertheless, this cannot displace judicial supervision by the Court.<sup>280</sup>

The interference must also respond to an assessment of its proportionality, a consideration that—as noted above—involves balancing the right of the individual against the interest of the State and the society it represents. The reasons provided by national authorities must be relevant and sufficient, meaning that national authorities must apply standards in conformity with the principles embodied in Article 11. In addition, they must also base their decisions on an acceptable assessment of the relevant facts.<sup>281</sup>

With specific regard to the armed forces and other State employees, the Court has made it clear that restrictions lawfully imposed on members of the armed forces and other State employees under Article 11(2) must be limited to restrictions on the ‘exercise’ of Article 11 rights, meaning that the measures taken must not impair the ‘very essence of the right to organize’: *Demir v. Turkey*. Thus, for example, it would not be

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278 Ibid.

279 European Court of Human Rights. Case of Tm Haber Sen and inar v. Turkey (28602/95). 21/05/2006. Available from: <http://hudoc.echr.coe.int/eng?i=001-72521>.

280 William A. Schabas. 2015. The European Convention on Human Rights: A Commentary. Oxford University Press.

281 Ibid.

lawful to prohibit members of the armed forces from forming and being part of a union altogether: *Demir v. Turkey*; *Adefdromil v. France*; *Matelly v. France*. By contrast, it may be permissible to prevent or limit their right to strike: see *Ognevenko v. Russia* at § 72. In any case, as the exceptions are to be construed strictly, ‘convincing and compelling reasons’ will be required by way of justification: *Demir v. Turkey*. Given the role of the army in society, the Court recognizes the political neutrality of the armed forces as a legitimate aim in any democratic society, therefore allowing some restrictions on the freedom of association for conscripted personnel.<sup>282</sup> This view was reflected in the admissibility decision in the case of *Erdel v. Germany* the applicant in question was a member of a political party, the activities of which were at the time under scrutiny by the office for the protection of the constitution.<sup>283</sup> As a result, his call-up order was revoked. The Defence Area Command and the German administrative courts reasoned that the revocation was necessary in order to prevent any future criminal offences motivated by far-right extremist ideology from being committed within the German army, which was itself founded as the guarantor of the constitution and democracy. The Court noted that the political neutrality of the armed forces was a legitimate objective, and that this had a special importance in Germany due to the country’s experience during the Third Reich and the fact that the Federal Republic’s constitution was based on the principle of a ‘democracy capable of defending itself’. The revocation of the call-up order, and the resulting interference with the applicant’s Article 10 right to freedom of expression, was found to be clearly justified in pursuit of this objective given its relatively limited consequences for the applicant himself, and the relatively strong evidential basis for concerns about the political party’s loyalty to the constitution. The Court considered that the same analysis held with respect to any interference with Article 11 rights. The complaint was therefore rejected as manifestly ill-founded.

Measures aimed at preserving the order and discipline necessary in the armed forces also pursue a legitimate aim. This is reflected in the case of *Engel and Others v. the Netherlands*, discussed above in the context of freedom of expression under Article 10.<sup>284</sup> Although on the facts, the Court found that there had been no interference with Article 11 (meaning that the issue of justification did not arise), the close connection between Articles 10 and 11 means it is comparatively clear that the maintenance of military discipline would also constitute a legitimate aim for the purposes of potential restrictions on freedom of assembly and association.

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282 European Court of Human Rights. *Erdel v. Germany* (30067/04). 13/02/2007. Available from: <http://hudoc.echr.coe.int/eng?i=001-79618>.

283 Ibid.

284 European Court of Human Rights. *Case of Engel and Others v. the Netherlands* (5100/71; 5101/71; 5102/71; 5354/72; 5370/72), 08/06/1976. Available from: <http://hudoc.echr.coe.int/tur?i=001-57479>.

Aside from these general principles under the Convention, there is no agreement among states on how freedom of association (as it relates to the formation of unions or similar bodies) is to be addressed in the context of military personnel. The OSCE/ODIHR-DCAF Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel identifies three main approaches within OSCE participating States. These approaches vary from countries that prohibit such bodies entirely, to those that have officially sponsored associations, to those that allow independent military associations or unions.<sup>285</sup> In this context, uniformed military leaders have at various times voiced concerns about allowing the unionization of military forces.<sup>286</sup> While the Court has accepted that trade union activity should be adapted to take into account the specific nature of the armed forces' mission and that significant restrictions may be imposed on the forms of action and expression of an occupational association and its members, it has stressed--as noted above--that conscripts cannot lawfully be completely prevented from forming an association to protect their interests.

States must refrain from applying arbitrary measures that interfere with the rights enshrined in Article 11. Owing to the essential nature of freedom of assembly and association and its close relationship with democracy, there must exist convincing and compelling reasons to justify any interference.<sup>287</sup> Although the primary objective of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights it protects, there may in addition be positive obligations on the State to secure the effective enjoyment of such rights.<sup>288</sup>

The recommendation of the Council of Europe is that members of the armed forces should have the right to join independent organizations representing their interests and have the right to organize and to bargain collectively. Where these rights are not granted, the continued justification for such restrictions should be reviewed, and unnecessary and disproportionate restrictions on the right to assembly and association be lifted. Furthermore, no disciplinary action or any discriminatory measure should be taken against members of the armed forces due to their participation in the activities of lawfully established military

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285 OSCE/ODIHR-DCAF. 2008. Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel. Published by the OSCE Office for Democratic Institutions and Human Rights. Available from: <https://www.dcaf.ch/sites/default/files/publications/documents/HandbookHumanRightsArmedForces-080409.pdf>.

286 Jennifer Mittelstadt. 2011. "The Army is a Service, Not a Job": Unionization, Employment, and the Meaning of Military Service in the Late-Twentieth Century United States. In *International Labor and Working-Class History*. Cambridge University Press.

287 William A. Schabas. 2015. The European Convention on Human Rights: A Commentary. Oxford University Press.

288 European Court of Human Rights. 2020. Guide on Article 11 of the Convention on Human Rights - Freedom of assembly and association. Available from: [https://www.echr.coe.int/Documents/Guide\\_Art\\_11\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_11_ENG.pdf).

associations or trade unions.<sup>289</sup> While a distinction must be made between the professional members of the armed forces and conscripts as regards the formation of and participation in trade unions, the general principles of Article 11 must apply to both.

### 3. Relevant cases

While many of the below-mentioned cases relate to freedom of expression, both Article 10 and Article 11 are often applied.

*Erdel v. Germany* (admissibility decision):<sup>290</sup> the applicant was a practising lawyer and member of the political party *Die Republikaner*. The party was generally considered to be populist and right wing, and had faced scrutiny by the offices for the protection of the constitution in various German states. The party had not been declared unconstitutional by the Federal Constitutional Court; in the general elections of September 2005, *Die Republikaner* won less than one percent of the vote. The applicant held the position of lieutenant on the reserve list and was called up for service in the German army on 5 May 1997. By order of the Ministry of Defence, the Wetzlar District Recruiting Office revoked the applicant's call-up order on 6 November 1997. An appeal by the applicant was dismissed on 16 March 1998 by the Defence Area Command. It reasoned that the revocation of the call-up order released the applicant from an obligation and therefore constituted an administrative act which resulted in a benefit for the applicant. Moreover, the Command noted that while the applicant would no longer be considered for regular reserve training, he would keep his rank as reserve officer, and not be excluded from all future military exercises. Due to the occurrence of several incidents viewed as being motivated by extremist ideologies, the German army used its discretion regarding call ups so as to select command personnel for army reserve training who were not only free from any suspicion of supporting anti-constitutional movements, but who could also be expected to take immediate action against such movements. Even though it could not be presumed that every member of *Die Republikaner* opposed free democratic order, the 1996 annual report of the Federal Office for the Protection of the Constitution had concluded that certain groups and wings within the party did so. The Court, considering the alleged violation of Article 10 of the Convention, noted that this had a special importance in Germany due to the country's experience during

289 Council of Europe: Committee of Ministers. 2010. Recommendation CM/Rec(2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces and explanatory memorandum, p. 51.

290 European Court of Human Rights. *Erdel v. Germany* (30067/04). 13/02/2007. Available from: <http://hudoc.echr.coe.int/eng/?i=001-79618>.

the Third Reich and that the Federal Republic's constitution was based on the principle of a 'democracy capable of defending itself'. Given the role of the army in society, the Court recognized the political neutrality of the armed forces as a legitimate aim in any democratic society. The revocation of the call-up order, and the resulting interference with the applicant's Article 10 rights, was found to be a lawful means of pursuing this objective given the characteristics of *Die Republikaner* and the relatively limited consequences of the authorities' decision for the applicant. The same analysis held with respect to any interference with Article 11 rights. The complaint was therefore rejected as manifestly ill-founded.

*Adefdromil v. France* and *Matelly v. France*:<sup>291</sup> these judgments, handed down on the same date, concerned a challenge to French regulations which prohibited the formation of union-type organizations within the armed forces, and the membership of any such organization, on the basis that this was incompatible with military discipline. The Court underlined that no category of worker was excluded from the scope of Article 11; that the additional provisions in Article 11(2) were to be construed strictly; and that, in consequence, the limitations it permitted could only be on the 'exercise' of the right to freedom of association and not on its very essence. The State's position was found to pursue a legitimate goal--the preservation of order and discipline required in the armed forces--but was not proportionate and not therefore necessary in a democratic society, as a complete prohibition was not required in order to attain the identified aim.

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## Right to property

### 1. Description of the right

Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms enshrines the right to private property, defining it as the right of 'Every natural or legal person ... to the peaceful enjoyment of his possessions.'<sup>292</sup>

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291 European Court of Human Rights. *Adefdromil v France* (32191/09). 02/10/2014. Available from: <https://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=002-10127&filename=CEDH.pdf>; and European Court of Human Rights. *Matelly v France* (10609/10). 02/10/2014. Available from: <https://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=002-10126&filename=CEDH.pdf>

292 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 20 March 1952, entered into force 18 May 1954). Available from: [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf).

In addition to the European Convention, a number of other legal documents recognize and regulate the right to property. These include Article 17 of the Universal Declaration of Human Rights;<sup>293</sup> Article 14 of the African Charter on Human and Peoples' Rights;<sup>294</sup> Article 21 of the American Convention on Human Rights;<sup>295</sup> and Article 23 of the American Declaration of the Rights and Duties of Man.<sup>296</sup>

Other international conventions also enshrine the right to private property in the context of right to equality before the law and the rights of women. These include the UN Convention on the Elimination of All Forms of Racial Discrimination, of which Article 5 specifies that everyone has the right to equality before the law without distinction as to race, colour and national or ethnic origin, including the 'right to own property alone as well as in association with others' and 'the right to inherit';<sup>297</sup> and the UN Convention on the Elimination of All Forms of Discrimination against Women, which recognizes that women hold the same rights as men, including with regard to 'ownership, acquisition, management, administration, enjoyment and disposition of property'.<sup>298</sup>

As regards the rights of conscripted personnel, Recommendation CM/Rec (2010) 4 of the Committee of Ministers of the Council of Europe to member states on human rights of members of the armed forces, recommends that 'The property of members of the armed forces, in particular conscripts, retained upon joining the armed forces should be returned at the end of military service.'<sup>299</sup> In its 2006 resolution on human rights of members of the armed forces, the Parliamentary Assembly of the Council of Europe stipulates the minimum rights of armed forces personnel, which includes the

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293 UDHR, Article 17(1): 'Everyone has the right to own property alone as well as in association with others;' and Article 17(2): 'No one shall be arbitrarily deprived of his property.'

294 ACHPR, Article 14: 'The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.'

295 ACHR, Article 21(1): 'Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society;' Article 21(2): 'No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law;' and Article 21(3): 'Usury and any other form of exploitation of man by man shall be prohibited by law.'

296 American Declaration on the Rights and Duties of Man (adopted 2 May 1948). Available from: [https://www.oas.org/dil/access\\_to\\_information\\_human\\_right\\_American\\_Declaration\\_of\\_the\\_Rights\\_and\\_Duties\\_of\\_Man.pdf](https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf), Article 23: 'Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.'

297 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969). Available from: <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>, Article 5.

298 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981). Available from: <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>, Article 16(h).

299 Council of Europe: Committee of Ministers. 2010. Recommendation CM/Rec(2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces and explanatory memorandum.

right to respect for property.<sup>300</sup> The OSCE also makes reference to the protection of private property in its Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Conference on Security and Co-operation in Europe, *now OSCE*), in which member states are committed to ensure that ‘everyone has the right peacefully to enjoy his property either on his own or in common with others.’<sup>301</sup>

It should be noted that the aforesaid legal human rights instruments understand the right of property as related to property that is already owned or possessed, or which either will be or has been acquired through lawful means. Moreover, the European Court of Human Rights has generally interpreted ‘possessions’ to include not only tangible property, but also economic interests, contractual rights with economic value, compensation claims against the State and public law-related claims.<sup>302</sup>

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## 2. Restrictions on or interference with the right to property

While the right to property is conceived as a human right for natural persons, it is not absolute; under the relevant international legal instruments, states are privileged with the ability to apply a broad range of limits to the right. In consequence, it is viewed as one of the more flexible human rights. Permissible limitations on the right are generally centred around the pursuit of the public interest, in accordance with appropriate laws, including in the context of the payment of taxes, other contributions or penalties. For example, the Convention (by Article 1 of its Protocol, known as ‘A1P1’), the ACHPR and ACHR foresee the restriction of the right in cases where it benefits the ‘public interest’,<sup>303</sup> ‘public need’,<sup>304</sup> ‘public utility or social interest’,<sup>305</sup> other ‘general interest[s] of the community’,<sup>306</sup> or ‘to

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300 Recommendation 1742 (2006), Human rights of members of the armed forces. Council of Europe Parliamentary Assembly. Available from: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17424&lang=en>, para. 10.1.8.

301 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE. 29/06/1990. Available from: <https://www.osce.org/odihr/elections/14304?download=true>, para. 9.6.

302 Gudmundur Alfredsson and Asbjørn Eide. 1999. *The Universal Declaration of Human Rights: A common Standard of Achievement*. Martinus Nijhoff Publishers, p. 367.

303 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 20 March 1952, entered into force 18 May 1954). Available from: [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf), Article 1.

304 ACHPR, Article 14.

305 ACHR, Article 21.

306 *Ibid.*

secure the payment of taxes or other contributions or penalties'.<sup>307</sup> In the case of the Convention, any interference with the rights protected by A1P1 is subject to the usual requirements, including that it be in accordance with the law and proportionate to the legitimate aim pursued. In addition, where different groups (including those of different military ranks: *Engel v. the Netherlands*) are afforded different rights and entitlements with respect to 'possessions', those differences may also need to be justified so as to ensure compliance with the equality guarantee in Article 14.

These norms are applicable to conscripted personnel, although restrictions may be imposed on the right to possess certain items on military sites.

## Right to respect for private and family life, and correspondence

### 1. Description of the right

The right to private life provides that persons have the right to live life privately without government and media interference. It also means that personal information (including official records, photographs, letters, diaries and medical records) should be kept securely and not shared without permission, except in certain circumstances.<sup>308</sup> Courts have applied a broad interpretation to the concept of 'private life', which has included the right to determine one's sexual orientation, lifestyle, and appearance and dress; and the right to control who sees and makes physical contact with one's body. It follows that, for example, public authorities are not permitted to leave a person undressed in a busy hospital ward, nor to take a blood sample without their permission.<sup>309</sup>

The concept of private life also covers the right to develop a personal identity and to forge friendships and other relationships. This includes a right to participate in

307 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 20 March 1952, entered into force 18 May 1954). Available from: [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf), Article 1.

308 Equality and Human Rights Commission. Respect for your private and family life. Available from: <https://www.equalityhumanrights.com/en/human-rights-act/article-8-respect-your-private-and-family-life>.

309 See, for example, European Court of Human Rights. Case of Jalloh v. Germany (54810/00). 11/07/2006. Available from: <http://hudoc.echr.coe.int/eng?i=001-76307>; European Court of Human Rights. Case of M.A.K. and R.K. v. the United Kingdom (45901/05 and 40146/06). 23/06/2010. Available from: <http://hudoc.echr.coe.int/eng?i=001-97880>.



essential economic, social, cultural and leisure activities. In some circumstances, public authorities may have a positive obligation to assist individuals so they may enjoy their right to private life, including the ability to participate in society.<sup>310</sup> Finally, the right to private life (at least under the Convention) encompasses the right to physical integrity. Again, this aspect of the right may give rise to positive obligations on the State, particularly with respect to those (such as conscripts) who are under its exclusive control. Thus, in *Demir v. Turkey* the Court suggested that ‘special measures must be taken to adequately secure the health and well-being of conscripts by ... providing them with the medical assistance they require’, subject to considerations of proportionality.

The right to family life also provides persons with the right to enjoy family relationships without interference from the authorities. This includes the right to live with family and, where this is not possible, the right to regular contact. ‘Family life’ can include the relationship between an unmarried couple, an adopted child and the adoptive parent; and a foster parent and fostered child.<sup>311</sup>

Article 8 of the European Convention provides that everyone has the right to respect for his private and family life, his home and his correspondence, and that 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.

Article 12 of the UDHR provides that ‘No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.’ As regards conscripts, the enjoyment of this right is affected by military discipline, chain of command and the special characteristics of military life.

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310 Equality and Human Rights Commission. Article 8: Respect for your private and family life. Available from: <https://www.equalityhumanrights.com/en/human-rights-act/article-8-respect-your-private-and-family-life>.

311 Ibid.

## 2. Restrictions on or interference with the right to private and family life

While fulfilling duties, a conscript formally changes his status and is subject to national laws that define the role and the duties of a conscript. As a general matter, while a conscript is in a military facility and performing his duties, his private and family life can be lawfully restricted. Depending on the laws of each country, conscripts may not leave military premises, nor call family members or be visited by family members outside of specified times. At the same time, a conscript may, at any time, ask for permission to leave or make a call to the superior management. There is a debate on whether a conscript could be lawfully precluded from marrying or having children while performing compulsory service. The lawfulness of any particular restriction, or its application in a particular situation, remains to be assessed on a case-by-case basis in accordance with the general principles identified above.

Situations exist whereby state authorities may be permitted to interfere with the right to respect for private and family life, home and correspondence. However, the lawfulness of such a restriction is contingent on the authority in question demonstrating that the action is in accordance with the law, and is necessary and proportionate in order to protect national security, public safety, economy or health or morals, to prevent disorder or crime, or to protect the rights and freedoms of other people. As noted above, an action is 'proportionate' when it is appropriate and no more than necessary to address the problem concerned. States enjoy a certain margin of appreciation in respect of such restrictions.

Members of the armed forces do not waive their rights under Article 8.<sup>312</sup> Thus, for example, the Court has on multiple occasions ruled it unjustifiable to hold investigations into soldiers' private lives, including detailed interviews with soldiers and third parties, and subsequently to administratively discharge them, solely on the grounds of sexual orientation.<sup>313</sup> Such actions were considered as a disproportionate interference with the rights enshrined under Article 8.<sup>314</sup>

In the case of *P.T. v. The Republic of Moldova* the applicant raised a complaint under

312 Karen Reid. 2015. *A Practitioner's Guide to the European Convention on Human Rights* (5th Edition, Sweet and Maxwell), p. 366.

313 Ibid.

314 See, for example: European Court of Human Rights. *Case of Smith and Grady v. the United Kingdom* (33985/96 and 33986/96), 27/12/1999. Available from: <http://hudoc.echr.coe.int/eng?i=001-58408>; European Court of Human Rights. *Case of Lustig-Prean and Beckett v. the United Kingdom* (31417/96 and 32377/96), 27/12/1999. Available from: <http://hudoc.echr.coe.int/eng?i=001-58407>.

Article 8 on account of the fact that he was compelled to disclose to various public authorities a certificate exempting him from military service, which contained information about the type of illness that he suffered from.<sup>315</sup> The Court found that the inclusion of medical data on a certificate which had to be presented to third parties constituted an interference with the applicant's rights under Article 8. The Court did not consider this interference to have any legitimate basis and further noted that it also raised serious issues of proportionality. There had accordingly been a violation of Article 8.

Issues of justification may also arise where there is a difference in treatment which falls within the ambit of Article 8. For example, in *Glor v. Switzerland*, the applicant was considered unfit for compulsory military service on medical grounds (despite being entirely willing to serve) and was therefore required by national law to pay an 'exemption tax'. The Court held that the imposition of a tax based on a person's health fell within the ambit of Article 8, given the breadth of the concept of 'private life'. It accepted that the differential treatment of disabled people via the imposition of the 'exemption tax' served the legitimate objective of re-establishing 'a sort of equality' between those who were and were not able to perform military service - with the money tax substituting for the efforts and obligations that would otherwise be required. However, it found that the State had failed to strike a fair balance between the protection of the interests of the community and the rights of the applicant, in light (in particular) of the level of the tax, the applicant's willingness to serve, and the lack of provision in Swiss law for forms of service suitable for people in his position. The Court therefore found a violation of Article 14 taken with Article 8.

To take a very different example, in *Konstantin Markin v. Russia* the Court held that Article 14 (taken with Article 8) had been breached by the State's position of granting three years' parental leave to servicewomen but no equivalent right to servicemen.<sup>316</sup> Although the Court was careful not to 'lose sight of the special armed forces context' of the case, it considered that where a restriction concerned 'a most intimate part of an individual's private life' there must be 'particularly serious reasons' to justify it; in context, this required 'a real threat to the armed forces' operational effectiveness' which must be 'substantiated by specific examples'.<sup>317</sup> It found no such justification on the evidence before it; in particular, it was not enough for the State to rely on traditional gender roles or on stereotypes about the special role of women in raising children, and there was no evidence that granting servicemen some parental leave on a non-discriminatory basis

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315 European Court of Human Rights. Case of P.T. v. the Republic of Moldova (1122/12), 26/08/2020. Available from: <http://hudoc.echr.coe.int/eng?i=001-202520>.

316 European Court of Human Rights. Case of Konstantin Markin v. Russia (30078/06), 22/03/2012. Available from: <http://hudoc.echr.coe.int/eng?i=001-109868>.

317 Ibid., para. 137.

would have a negative effect on the operational effectiveness of the armed forces.<sup>318</sup>

## Right to marry and found a family

### 1. Description of the right

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights. This right is enshrined in Article 9 of the Charter of Fundamental Rights. Article 12 of the European Convention provides that ‘men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.’<sup>319</sup>

Article 16 of the UDHR provides that ‘(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution; (2) Marriage shall be entered into only with the free and full consent of the intending spouses; [and] (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.’ The ICCPR in Article 23(2) also provides that ‘the right of men and women of marriageable age to marry and to found a family shall be recognized.’

### 2. Restrictions on the right to marry and found a family

The right to marry is subject to national laws on marriage, including those that make marriage illegal between certain categories of person (for example, close relatives). Although the government may restrict the right to marry, such restrictions must not interfere with the essential principle of the right, nor be arbitrary in nature. The rights contained in Article 12 of the UDHR closely relate to Article 8 of the Convention, which secures a right to respect for one’s private and family life, his home and his correspondence. Article 12 has been used less frequently than Article 8 in the context of arguments for rights regarding family and relationships.

<sup>318</sup> Ibid., paras. 142-144.

<sup>319</sup> ECHR, Article 12.

# Economic and social rights of conscripts

Economic and social rights applicable to conscripts are regulated predominantly by two international treaties: the International Covenant on Economic, Social and Cultural Rights<sup>320</sup> and the European Social Charter (1961), the latter of which was revised in 1996. The revised version of the Charter is gradually replacing the original version. It contains all the rights guaranteed under the original version, as well as further rights (including, for example, the right to housing). Under Article 20(1.a), parties to the revised Charter undertake to treat the rights and principles in Part I as ‘a declaration of the aims which [they] will pursue by all appropriate means’; and to consider themselves bound by a specific combination of the articles in Part II (which they may add to over time). That combination must be notified by each party to the secretary general of the Council of Europe. This means that, unusually, different parties to the revised Charter may have different obligations under it at different times, depending on which articles they have agreed to be bound by.

Economic and social rights generate positive obligations on states in that they are required to utilize all available means to give effect to the rights recognized under the International Covenant for Economic, Social and Cultural Rights. ‘The Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.’<sup>321</sup> Several principles follow from the duty to give effect to the Covenant, and must be respected. These include the need for the means of implementation chosen to be adequate to ensure fulfilment of the obligations and the complementary need to ensure justiciability; the need to take account of the means which have proved to be most effective in the country concerned, in ensuring

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320 International Covenant on Economic, Social and Cultural Rights (signed 16/12/1966, entered into force 3 January 1976).

321 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 from: <https://www.refworld.org/docid/47a7079d6.html>, para. 2.

the protection of other rights, and if there is a difference in the means used in comparison to other rights, there should be a compelling justification for this difference.<sup>322</sup>

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## Right to decent and adequate housing and accommodation

### 1. Description of the right and legal documents

The right to an adequate standard of housing is protected by Article 11 of the International Covenant on Economic, Social and Cultural Rights. In a similar vein, Article 31(1) of the Revised European Social Charter commits States Parties to take measures designed ‘to promote access to housing of an adequate standard’. The Committee of Ministers has in its explanatory memorandum elaborated on what the concept of adequate housing entails, in the context of members of the armed forces, namely, that housing has adequate lighting, ventilation (including sufficient heating), is clean, is in a good state of repair, is suitably furnished and offers sufficient living space for those residing there. Additionally, it should be adequately maintained, while a military serviceperson’s personal space, even within dormitories, should be considered his/her private sphere. Hygiene and health considerations include the separation of toilet facilities from sleeping accommodation and regular cleaning. Accommodation should be separate for men and women. In situations where it is difficult to ensure adequate housing, reasonable steps should be taken by authorities to ensure as adequate a standard as possible considering the circumstances in question. While hygiene standards may be lower during training periods outside barracks or during field operations, the authorities should nevertheless ensure that an adequate level of hygiene is attained as far as reasonably expected in the given circumstances.<sup>323</sup>

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322 Ibid., para. 7.

323 Council of Europe: Committee of Ministers. 2010. Recommendation CM/Rec(2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces and explanatory memorandum, p. 57.

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## 2. Restrictions on the right to decent and adequate housing and accommodation

The right to decent and adequate housing and accommodation under the International Covenant on Economic, Social and Cultural Rights is, in contrast to civil and political rights, not subject to restrictions per se. Instead, its realization should be progressively achieved through reasonable measures to the highest possible attainable standard. It follows that, while reasonable efforts must be made to ensure that conscripts can access an adequate standard of accommodation during their period of service, the extent to which the right is required to be realized in full may be sensitive to the specific context of military training and/or operations.

As noted above, Article 31 of the Revised European Social Charter sets out a commitment to a process (the taking of measures with a particular aim) rather than a right or an outcome. In addition, rights under the Charter which are 'effectively realised' may be subject to restrictions which are prescribed by law and are necessary in a democratic society for specified purposes: Part III, Article G.

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## Right to dignity, health protection, protection from sexual harassment, and work security

### 1. Description of the right and legal documents

The rights to dignity at work, health protection, protection from sexual harassment and work security are enshrined in Articles 2 (the right to just conditions of work), 3 (the right to safe and healthy working conditions) and 11 (the right to protection of health) of the European Social Charter, and Article 26 of the Revised Charter (the right to dignity at work) which includes protection from sexual harassment. With regard to the right to dignity at work, Article 26 provides that: 'With a view to ensuring the effective exercise of the right of all workers to protection of their dignity at work, the Parties undertake, in consultation with employers' and workers' organisations: 1) to promote awareness,

information and prevention of sexual harassment in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct; 2) to promote awareness, information and prevention of recurrent reprehensible or distinctly negative and offensive actions directed against individual workers in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct.' The International Covenant on Economic, Social and Cultural Rights, in Article 7, recognizes the right to remuneration which provides all workers with a decent living; the right to safe and healthy working conditions; and the right to rest, leisure and reasonable limitation of working hours. In addition, Article 12 of the Covenant provides for the right to enjoy the highest attainable standard of physical and mental health. Several conventions of the International Labour Organization also reaffirm some of these rights, including working times, hours of work, weekly rest,<sup>324</sup> and occupational safety and health.<sup>325</sup>

In 2010, the Committee of Ministers of the Council of Europe provided specific recommendations on securing these rights in the armed forces.<sup>326</sup> With regard to sexual harassment, it noted that 'Member states should take steps to prohibit all conduct of a sexual nature, or other conduct based on sex affecting the dignity of individuals at work, including the behaviour of superiors and colleagues. There should be no tolerance of sexual harassment or violence in the military and an effective system of sanctions against those responsible for such treatment should be provided. Member states should also promote awareness, information and prevention of sexual harassment in the workplace'.<sup>327</sup> While there is no jurisprudence in this regard, in the case of *Lyalyakin v. Russia*,<sup>328</sup> the European Court of Human Rights found a violation of Article 3 (prohibition

324 Convention concerning the application of the weekly rest in industrial undertaking (No. 14) (adopted 17 November 1921, entered into force 19 June 1923); Convention concerning weekly rest in commerce and offices (No. 106) (adopted 26 June 1957, entered into force 4 March 1959); Recommendation concerning weekly rest in commerce and offices (R103) (adopted 26 June 1957); Convention concerning part-time work (No. 175) (adopted 24 June 1994, entered into force 28 February 1998); Recommendation concerning part-time work (R182) (adopted 24 June 1994); Recommendation concerning reduction of hours of work (R116) (adopted 26 June 1962).

325 Convention concerning occupational safety and health and the working environment (No. 155) (adopted 22 June 1981, entered into force 11 August 1983); Recommendation concerning occupational safety and health and the working environment (R164) (adopted 22 June 1981); Protocol of 2002 to the Occupational Safety and Health Convention (No. 155) (adopted 20 June 2002, entered into force 9 February 2005); Convention concerning occupational health services (No. 161) (adopted 25 June 1985, entered into force 17 February 1988); Recommendation concerning occupational health service (R171) (adopted 26 June 1985); Recommendation concerning the protection of the health of workers in places of employment (R97) (adopted 25 June 1953); Recommendation concerning welfare facilities for workers (R102) (adopted 26 June 1956); Recommendation concerning the list of occupational diseases and the recording and notification of occupational accidents and diseases (R194) (adopted 20 June 2002).

326 Council of Europe: Committee of Ministers. 2010. Recommendation CM/Rec(2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces and explanatory memorandum, p. 59.

327 Ibid.

328 European Court of Human Rights. Case of *Lyalyakin v. Russia* (31305/09), 14/09/2015. Available from: <http://hudoc.echr.coe.int/eng?i=001-152726>.



of torture, inhuman and degrading treatment) where a conscript was unnecessarily forced to strip, although the Court did not examine allegations of threats to rape.

Furthermore, conscripts should be entitled to periods of rest. The Committee of Ministers' recommendations noted that, while the nature of their work and the safety and health risks to which servicepersons are exposed may justify certain restrictions which would not be conceivable in a civilian context, these should be kept as short as possible, and the restrictions should not be tantamount to absolute deprivation.<sup>329</sup> Moreover, although it may not always be possible to guarantee servicepersons adequate periods of rest in exceptional circumstances, such as field training and operations, long periods without any rest at all should be kept to a minimum.<sup>330</sup>

With regard to health and work security, the recommendations provided that 'members of the armed forces should not be unduly exposed to environmental hazards which could have adverse effects on their health. During field operations and training, it may not always be possible to fully prevent exposure to diseases.' However, 'states should ensure that reasonable measures are taken to protect them.'<sup>331</sup> 'Furthermore, States should establish regulations and take appropriate measures in the fields of prevention and protection against accidents, certain and specific risks and dangers, including air pollution, nuclear hazards, risks relating to asbestos, and food safety.'<sup>332</sup> Adequate training and supervision in the use of military vehicles should also be provided to minimize the risks of accidents. Notably, these recommendations overlap to a significant degree with States' positive obligations under Articles 2, 3 and 8 of the Convention (discussed above).

Additionally, and in accordance with Article 3(1) of the Recommendation CM/REC (2010) 4 of the Committee of Ministers, authorities should periodically review policies on occupational health and safety to ensure their coherence.<sup>333</sup> Servicepersons should be entitled to healthcare, understood as meaning the prevention, treatment, and management of illness and the preservation of mental and physical health through the provision of medical services.<sup>334</sup> Once again, this overlaps with States' positive obligations under Article 8 of the Convention. For example, the Court held in *Placi v. Italy* that: 'It is generally for a State to determine the standards of health and fitness for

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329 Council of Europe: Committee of Ministers. 2010. Recommendation CM/Rec(2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces and explanatory memorandum, p. 60.

330 Ibid.

331 Ibid.

332 Ibid.

333 Ibid.

334 Ibid., p. 61.

potential conscripts, having regard to the fact that the role of the armed forces differs among states. However, conscripts should be physically and mentally equipped for challenges related to the particular characteristics of military life and for the special duties and responsibilities incumbent on members of the army. While completing military service may not in any way be overwhelming for a healthy young person, it could constitute an onerous burden on an individual lacking the requisite stamina and physical strength owing to the poor state of his health. Accordingly, given the practical demands of military service, States must introduce an effective system of medical supervision for potential conscripts to ensure that their health and well-being would not be put in danger and their human dignity would not be undermined during military service. State authorities, in particular drafting military commissions and military medical commissions, must carry out their responsibilities in such a manner that persons who are not eligible for conscript military service on health grounds are not registered and consequently admitted to serve in the army.<sup>335</sup>

## 2. Restrictions on the right to dignity, health protection, and work security

Often, States' obligations in relation to socio-economic rights focus on progressive realization. This is the case (for example) for the rights contained in the International Covenant on Economic, Social and Cultural Rights, Article 2(1), which requires States Parties to 'take steps ... to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant'. In these cases, the key limitations on the effective realization or enjoyment of a right--for example, the right to safe and healthy working conditions (Article 7(b))--often flow from limitations on states' available resources and ability to progressively realize the right. This should not, however, be taken as suggesting that states which *are* able to realize socio-economic rights are free to restrict them. For example, Article 4 of the Covenant embodies States Parties' recognition that 'in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'. Similarly, 'the rights and

335 European Court of Human Rights. Case of *Placi v. Italy* (48754/11), 21/04/2014. Available from: <http://hudoc.echr.coe.int/fre?i=001-140028>, para. 50.

principles set forth in Part I [of the European Social Charter (Revised)] when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals'.<sup>336</sup>

The effect of these constraints is clearest in relation to rights where states have an obligation to achieve a specific result. Examples include Article 2 of the revised European Social Charter (the right to just conditions of work)--which requires States, inter alia, to 'provide for reasonable daily and weekly working hours' --and Article 3 (the right to safe and healthy working conditions), which requires States, inter alia, to issue safety and health regulations and to provide for their enforcement by measures of supervision. The effective exercise of the resulting rights may only be interfered with based on the rule of law test and the democratic necessity test.

The same principles apply, though their application may be less clear-cut, where states have an obligation of conduct rather than result. Examples include Article 11 of the revised European Social Charter (the right to protection of health)--which requires states to 'take appropriate measures designed' to, inter alia, remove as far as possible the causes of ill health--and Article 26, which obliges states to promote awareness, information and prevention of sexual harassment, and recurrent negative and offensive actions to realize the right to dignity at work. Again, any interference with the effective exercise of these rights (for example, by dismantling existing measures for the removal of causes of ill health) must be lawful, necessary and proportionate.

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336 European Social Charter (Revised) (ETS No. 163) (opened for signature 3 May 1996, entered into force 1 July 1999), Article G.

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# Right to decent and sufficient nutrition

## 1. Description of the right and legal documents

The right to decent and sufficient nutrition is enshrined in Article 11 of the International Covenant on Economic, Social and Cultural Rights. Article 11 provides that all States Parties recognize the right of everyone to an adequate standard of living including adequate food, and commits them to taking appropriate steps to ensure the realization of this right. Access to sufficient nutrition is also relevant to the realization of Article 12, which provides for the right of everyone to enjoy the highest attainable standard of physical and mental health. This right is similarly enshrined in Article 25(1) of the Universal Declaration of Human Rights. The Committee of Ministers with regard to this right, recommended that military authorities take into account individual needs when providing meals to armed forces personnel, particularly as regards the dictates of different religions, health problems, pregnancy and personal ethics (e.g. vegetarianism).<sup>337</sup> While during field training and operations it is more difficult to cater for special dietary needs, they should nevertheless be met as far as reasonably practical.<sup>338</sup> Furthermore, in order to protect these rights, clean drinking water should be available at all times.<sup>339</sup>

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## 2. Restrictions on the right to decent and sufficient nutrition

Once again, states are obliged to take appropriate steps to ensure the progressive realization of this right. As a result, the fact that a state has insufficient resources to fully secure conscripts' right to decent and sufficient nutrition does not necessarily mean it is in breach of its international obligations.

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337 Council of Europe: Committee of Ministers. 2010. Recommendation CM/Rec(2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces and explanatory memorandum, p. 62.

338 Ibid.

339 Ibid.

# Recommendations

This study has examined international legal instruments and norms regarding conscript rights. On the basis of the analysis, two key conclusions can be drawn:

First, in the absence of any *declarative human rights instrument for conscript rights*, states are privileged with great discretion in the way they define and protect conscript rights; by extension, limiting the application of human rights and good governance principles to national practice and jurisprudence.

Second, in the absence of any *document containing best practices under national and international jurisprudence* in the area of conscript rights, no common standards or approaches for their protection exist. This generates inconsistency both within and across states as regards the understanding of conscript rights, and the most appropriate ways in which to protect them.

Building on the aforesaid, DCAF recommends that the following issues be explored:

- ❖ *Better understanding of the 'margin of appreciation'*: national authorities and courts are provided with a 'margin of appreciation', meaning that they enjoy significant discretion in the way they apply and interpret legal norms. While the European Court of Human Rights has identified criteria relevant in determining the breadth of the 'margin of appreciation', the absence of any clearly defined jurisprudence for conscript rights means that the limits of such a 'margin' in this context remain unclear.
- ❖ *Prescribing limits on the scope of 'legitimate aims'*: international jurisprudence provides near carte blanche for national authorities in their application and interpretation of the concept of national security. The absence of a unified and standardized approach to this concept may generate contradictory and inconsistent decisions at the national level. This results in the scope of conscript rights and their protection mechanisms varying substantially from country to country. States should consider including, in national legislation or guidance,

a clear definition of the scope of ‘legitimate aims’ for conscripted personnel, including (in particular) the concept of national security.

- ❖ Defining ‘forced labour’ in the context of military service: Article 4 of the European Convention on Human Rights stipulates that military conscripts are (in general) excluded from the prohibition on forced and compulsory labour – ‘any work or service exacted in virtue of compulsory military service laws for work of a purely military character.’ On the basis of this definition, however, the extension of conscription terms without consent and legal justification, or the performance of tasks that are not directly linked to military service (unless national legislation includes reference to non-military activities) could be considered to violate Article 4. Consequently, there remains a need to define the scope of ‘compulsory military service’, so that the tasks that conscripted personnel are required to perform, as well as any exceptional circumstances under which conscripts could be engaged in compulsory labour, are clearly elaborated.
- ❖ Establishing criteria for conscripts as ‘private citizens’: Article 10 of the European Convention on Human Rights provides an exhaustive list of legal justifications under which the State may legally interfere with and restrict freedom of expression. These justifications also apply to conscripted personnel. While the rights of conscripts must be protected, ensuring that they enjoy the right to freedom of expression while they act in a private capacity remains problematic due to the nature of their service. It is therefore important to clearly establish criteria for identifying when conscripts act as private citizens, namely, when they are not considered on duty or ‘in uniform’, and therefore, not subject to the same level of restrictions on their freedom of expression.
- ❖ Protecting the right of freedom of assembly and association for conscripts: owing to the nature of military service, states may legitimately impose limits on conscripts’ right to freedom of assembly and association. In certain cases, however, it is not clear to what extent the State may infringe upon this right. States should therefore consider establishing clear guidance on the creation and formation of conscripts’ organizations representing the interests of conscript rights, so that such limits are clearly defined in law.
- ❖ Standardizing procedures for investigating allegations of torture and other ill treatment involving conscripts: this study has demonstrated that further efforts are needed to ensure the effective prohibition of torture, inhuman or degrading treatment or punishment for conscripts. To this end, there remains a need for a

common understanding of and standardized procedures for investigating cases of torture involving conscripts (e.g. promptness, independence, due diligence, no substantial delays, discrepancies, omissions).

- ❖ *Defining the right to freedom of religion in the context of changing beliefs:* further discussions are required to ascertain whether and how the right to manifest one's religion or belief may be exercised by a conscript who, during compulsory military service, changes his or her beliefs. The specific conditions or procedures for assessing the presence and validity of such a change, and options for subsequent transfers to alternative military service, should be further examined.
- ❖ *Defining the circumstances under which military discipline may constitute a deprivation of liberty:* states should consider defining the circumstances of any deprivation of liberty of conscripted personnel in the context of the application of military discipline, and must ensure that such circumstances are prescribed by law.
- ❖ *Clarifying the permissible limits of the right of conscripts to private property:* the right of conscripts to private property is not absolute. Therefore, states enjoy a wide degree of discretion in its application. To this end, an inclusive discussion on the appropriate restrictions on this right for conscripted personnel, and what restrictions might proportionately be imposed on the grounds of 'public interest', should be held, in order that this topic be further explored.
- ❖ *Elaborating on the economic and social rights of conscripts:* the economic and social rights of conscripts should be explored, recognized and addressed, and contained in a separate framework of best practice.
- ❖ *Clarifying the rights of conscripts in the context of national emergencies:* a broader discussion and assessment of the rights of conscripts during national emergencies should be initiated to ensure that any additional restrictions on their rights have a clear legal basis, and that any additional tasks they may be required to undertake are clearly specified in law.

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