

EUROPEAN INSTITUTIONS AND MECHANISMS FOR PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF MILITARY PERSONNEL

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Abstract: *Through international treaties, human rights have reached the pinnacle of their legitimacy, being ratified by most countries. Respecting the human rights is the legal foundation for a democratic society in which the military has a defining role. In the comprehensive approach of the European institutions, protecting and promoting the human rights of military personnel are preconditions for regional unity, stability and security. The European documents provide an integrated understanding of the concept of rights and freedoms in relation to the special status of military personnel in society, representing regulated standards of conduct. Promoting the culture of respect for the fundamental values of human rights, both in the process of military education and training, as well as in exercising their specific tasks, represents an instrument for maintaining the order, discipline and morale of the military, ensuring the effectiveness of military actions and an overwhelming factor supporting the achievement of strategic objectives.*

Keywords: *human rights; freedoms; restrictions; military; European institutions; armed forces.*

Introduction

Human rights are adopted globally through international conventions and treaties and implemented at national level in constitution provisions and laws that express the fundamental social values aimed to meet fundamental needs or personal aspirations in a social and state context. According to international norms, fundamental human rights are based on the principles of dignity and freedom of the individual, therefore these human rights and freedoms are promoted and protected not only within a state, but also at international level through the public international law. The human being is regarded as an individual person, not a citizen of a state, who possesses civil, political, economic, social and cultural rights¹ that are protected by instruments going beyond national borders.

The international legal framework regarding human rights consists of documents adopted and applied by the United Nations (UN): the UN Charter, the Universal Declaration of Human Rights and the two UN Covenants from 1966². This framework proved its validity over time, remaining permanently relevant, as confirmed by the UN Secretary General Kofi Annan: *“human rights are the foundation of human existence and coexistence; that human rights are universal, indivisible and interdependent; and that human rights lie at the heart of all that the United Nations aspires to achieve in peace and development.”* (United Nations 1997).

At the European level, the establishment of the Council of Europe actually enshrined the idea of unity between member states for promoting and defending the human rights. The collective guarantee that European states undertake to respect the fundamental principles of democracy based on the protection of fundamental rights was the signing of the European Convention on Human Rights (ECHR) – a European instrument which reflects the interdependence between the international security and the protection of human rights.

All societies have created institutionalized instruments for protecting the values and principles laid down in fundamental laws, as well as for maintaining and developing the capacity to defend the territorial integrity, unity and sovereignty of the state. We can say that *“social*

¹ The idea of creating a mechanism for the protection of human rights emerged with the *Declaration of human and citizen rights* of the French National Assembly of 26 August 1789 in which it was stated that: *“the purpose of any political association is the preservation of natural and imprescriptible human rights”*.

² *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*.

democracy, at the normative level, has its benchmarks in fundamental values and rights. With regard to regulatory claims and the question of whether they could really be implemented, they are the crucial points of any political compass.” (GOMBERT 2012). In other words, the constituent power and stability of the society, including the fundamental rights and freedoms, are protected by the state’s elements of power in which the military function is instrumental.

The way in which a state decides to legislate the fundamental rights of military personnel depends on the position of the armed forces in society. Addressing such a theme is a current issue because, “in a democratic society, the army fulfils functions that are necessary not only to defence and social cohesion but also to human rights protection: security is a fundamental right since it is a requisite for enjoying freedoms and narrowing gaps resulting from inequality.” (Council of Europe 2002).

Some European institutions and organisations, in which Romania has a member status, have adopted sets of rules regarding fundamental rights and freedoms applicable to military personnel, in order to establish a common area in which concerns regarding the protection of the military are highlighted as part of the global transformation process towards a *unified Europe* based on commonly recognised values.

The Council of Europe

The Council of Europe, by virtue of its primary objective of achieving a greater unity among its members through the adoption of common rules, pointed out in its *Recommendation CM/Rec(2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces* (Council of Europe 2010) the undeniable importance of guaranteeing respect for the fundamental rights of military personnel, given the particular characteristics of military life and its effects on the individual situation of members of the armed forces. A number of other documents regarding the personnel of the armed forces preceded the adoption of this recommendation: the *Committee of Ministers' Recommendation regarding conscientious objection to compulsory military service*³, as well as the Parliamentary Assembly's Recommendations on human rights of members of the armed forces, the abolition of restrictions on the right to vote, the right to association for members of the professional staff of the armed forces, the exercise of the right of conscientious objection to military service and on human rights of conscripts.⁴

The Council’s *Recommendation* provides a set of measures and principles for member states which should be implemented into national law but, in particular, respected in practice. To the extent that the state is a party to international conventions and treaties on human rights and freedoms, military personnel must, in the context of their professional lives, benefit from the exercise of those rights. In certain exceptional circumstances, such as the outbreak of a war or the existence of emergencies affecting national security, states may decide to derogate from some obligations in compliance with the principle of proportionality in relation to the requirements of the situation. These derogations may not concern: the right to life, excepting the deaths resulting from military conflicts, the interdiction of torture and inhuman or humiliating treatment or punishment, the prohibition of slavery. Moreover, it is clearly emphasized that no punishment can be applied without a law and the right not to be tried or punished twice.

The right to life is an inviolable right for any individual, including the military personnel. They must not be exposed to life-threatening situations excepting for legitimate military purpose. The threat to life must be taken into account in actions involving the military

³ *Committee of Ministers' Recommendation No. R (87) 8 regarding conscientious objection to compulsory military service.*

⁴ Parliamentary Assembly's Recommendations No. 1742 (2006) on “*Human rights of members of the armed forces*”, No. 1714 (2005) on the “*Abolition of restrictions on the right to vote*”, No. 1572 (2002) on the “*Right to association for members of the professional staff of the armed forces*”, No. 1518 (2001) on the “*Exercise of the right of conscientious objection to military service in Council of Europe member states*” and No. 1380 (1998) on “*Human rights of conscripts*”.

and any suspicious death must be investigated. The *Recommendation* states that the military personnel should never be sentenced to death or executed. Moreover, torture or inhuman or degrading treatment cannot also be applied to members of the armed forces and more vulnerable groups should receive special attention.

The document protects the military from the obligation to perform forced or compulsory labour or they cannot perform tasks incompatible with their duties, with the exception of emergency and civil assistance. However, the provision excludes military service from the category of forced labour.⁵ The *Recommendation* also states 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.*” (Council of Europe 2010).

As far as *military discipline* is concerned, the European document recognizes the right of states to organise their own system of discipline and to use a margin of discretion in this regard. Collective punishment should be forbidden and the state must ensure a fair appeal in front of a higher and independent body.

It is ruled unambiguously that military personnel enjoy the *right to liberty and security*. Even when a military person is arrested or detained, it is necessary to be promptly informed about any charges and procedural rights. States should establish procedural safeguards for military personnel who should have guaranteed access to a process within a reasonable time in both criminal and civil matters.

Respect for private and family life, home and correspondence for military personnel is specifically provided in the Council’s *Recommendation*. The restriction of this fundamental right can only be done when there is a real national security issue. Investigations that interfere with the privacy are only authorised if there are reasonable suspicions of the occurrence of a crime or it is required for the purposes of highest-level security clearance.

Military members must benefit from the exercise of *freedom of thought, conscience and religion*. The specificity of military life may lead to limitations of this right proportional with the aim pursued but only with the application of the principle of non-discrimination. The *Recommendation* defines the status of *conscientious objector* to recruits who refuse to perform compulsory military service and who should be offered alternative civil service. Furthermore, professional soldiers should be given the effective opportunity to leave the armed forces for reasons of conscience.

Issues relating to one of the most controversial rights: *the freedom of expression* of military personnel (which also includes the freedom to have opinions, to receive and transmit information and ideas) are integrated into this *Recommendation*. The text refers to the provisions of ECHR which provides that the right to freedom of expression may be restricted, in compliance with the principle of proportionality, in order to protect national security, territorial integrity and public safety, public health, reputation or the rights of other persons. The special rule in the text of the regulation refers also to the possibility of restricting free expression to protect military discipline if there is an existing threat of undermining it.

Similarly, from the national security perspective, restrictions regarding the *right to peaceful assembly and to freedom of association with others* for military personnel may be put in place. It is expressly provided that military personnel should be granted the right to be part to professional organisation protecting their rights and interests. Moreover, where restrictions on this right exist, “*the continued justification for such restrictions should be reviewed and unnecessary and disproportionate restrictions on the right to assembly and association should be lifted.*” (Council of Europe 2010).

⁵ Article 42 paragraph (2) (a) of the Romanian Constitution provides that: “*it does not constitute forced labour activities for the performance of military duties, as well as those carried out, according to the law, in lieu, for religious or conscientious reasons*”.

Other important provisions cover political rights so that military personnel can exercise them, with certain legitimate restrictions. In addition, the social and economic rights of the military personnel include: the right to marry, the right to protect their property, the right to receive fair remuneration and a retirement pension, the right to decent and sufficient nutrition. Furthermore, states must ensure that this category of personnel enjoy the right to dignity (including the right not to be subject to sexual harassment), health protection (granting rest time and including them in the process of military training and planning of operations, healthcare and treatment, disability compensation) and workplace safety measures to prevent accidents and occupational diseases. States should take appropriate measures to protect health where armed forces personnel have been exposed to epidemics or other diseases.

The document clearly requires that member states should “ensure, by appropriate means and action, including, where appropriate, translation, a wide dissemination of this recommendation among competent civil and military authorities and members of the armed forces, with a view to raising awareness of the human rights and fundamental freedoms of members of the armed forces, and to providing training aimed at increasing their knowledge of human rights.” (Council of Europe 2010).

Organisation for Security and Cooperation in Europe (OSCE)

The protection of human rights, which are considered a key component of a democratic civil society, has been one of the directions of strategic interest for OSCE, the largest regional security organisation. Through the *Office for Democratic Institutions and Human Rights (ODIHR)*, OSCE has stepped forward to “clearly state those democratic, constitutional, basic and legal principles that guarantee the exercise by all state institutions of state authority, in accordance with the laws adopted by the people, through its democratically elected representatives.” (PURDĂ 2016, 148).

Adopted at the Forum for Security Co-operation in Budapest, the *Code of Conduct on Political-Military Aspects of Security*,⁶ is a reference document that underlines the central role of the armed forces in a democratic society, outlining principles on state control of the armed forces, their civilian and parliamentary oversight and the rights of military personnel.

The *Code of Conduct* expressly states that “each participating State will ensure that military, paramilitary and security forces personnel will be able to enjoy and exercise their human rights and fundamental freedoms as reflected in OSCE documents and international law, in compliance with relevant constitutional and legal provisions and with the requirements of service.” (OSCE 1994). The document also stresses the importance of ensuring that member states guarantee fundamental rights and freedoms for military personnel by reflecting these rights in relevant legislation or other documents. Furthermore, each state will establish legal and administrative procedures to ensure the exercise and control of how the human rights are respected within the armed forces. The military personnel must be trained in the field of humanitarian law, on international treaties and provisions related to armed conflicts and on its fundamental rights and freedoms.

For the implementation of the *Code of Conduct*, the Security Cooperation Forum and the Centre for Conflict Prevention carry out a number of activities. Member states are required to provide information on their progress in implementing the provisions agreed in the document adopted in Budapest, aimed at building trust and adopting the best standards of conduct resulting from practice.

Published by the OSCE – ODIHR and the Centre for Democratic Control of the Armed Forces (DCAF) in 2008, the *Handbook on Human Rights and Fundamental Freedoms of Armed*

⁶ This document was adopted at the 91st Plenary Meeting of the Special Committee of the CSCE Forum for Security Co-operation in Budapest on 3 December 1994. It came into effect as a politically binding document on 1 January 1995.

Forces Personnel is a true guide in the military field, integrating practical aspects with relevant jurisdiction. The *Handbook* provides an overview of legal regulations, policies and instruments to ensure the framework under which armed forces personnel enjoy the exercise of their human rights. Moreover, the *Handbook* is also addressed to those who have a role in the mechanism of promoting and protecting human rights: policy makers, judges, military personnel, professional military associations and non-governmental organisations, as well as theorists and practitioners in the field of law or military science.

For collecting information on practices and policies, ODIHR and DCAF, together with the governments of the OSCE member states, organized two conferences: *Citizen in Uniform: Implementing Human Rights in the Armed Forces* (held in Berlin in September 2006) (OSCE 2006) and *Military Unions and Associations* (Bucharest, October 2006) (OSCE 2006). Both events aimed to identify different ways to ensure the protection of human rights in the armed forces of OSCE member states and to further allow for adopting adequate common standards.

The OSCE *Handbook* stresses the importance of respecting the principles of proportionality and non-discrimination in the hierarchical relations between military personnel, bringing into question vulnerable groups in this regard (women, sexual or ethnic minorities). Furthermore, the *Handbook* promotes the cult of respect for military personnel, suggesting to states the adoption, in the process of learning and training, of programmes to raise awareness of tolerance and embrace diversity. Accordingly, training is seen as a mean of disseminating fundamental rights and freedoms for military personnel, both internally adopted or arising from international conventions and OSCE commitments. Particularly, commanders should be aware of the importance and necessity of protecting the rights of subordinate personnel, therefore being necessary to raise awareness about the problems that may lead to inequities. The establishment of independent supervisory bodies is also essential.

Restrictions on the exercising of fundamental rights and freedoms by the military may be imposed to protect matters of national importance. Under international treaties, fundamental rights such as freedom of expression or association may suffer certain limitations under the imperative of including these provisions in relevant laws. These restrictions must be legitimate and directly proportionate with the pursued security purpose.

Within the mechanism for the protection of the fundamental rights of military personnel, the main responsibility lies with the individual state through its institutions (Parliament, Government, Ministry of Defense) as well as the military leadership of the armed forces. The *Handbook* recommends the adoption of laws providing rules in this regard and codes of professional conduct for widely informing and explaining in practical terms the rights. Certain representation bodies (military associations or trade unions) may ensure that the interests of its members are observed. *The ombudsman*⁷ in various states resolves complaints on inadequate conduct or misbehaviour in the military as well as systemic problems of the military domain, making recommendations for corrective actions.⁸

OSCE continues to advocate the important role of implementing international standards and good practices concerning the human rights of armed forces personnel. For example, the organisation co-hosted a round-table discussion in Riga on 7 June 2016, partnering with the European Organization of Military Associations (EUROMIL), regarding military personnel freedom of association. The event was part of the ODIHR's programme on human rights, gender and security, which supports OSCE member states in making their security sectors human rights compliant and gender responsive. (OSCE 2016)

Judicial Control on Respecting the Human Rights of Military Personnel

Courts have extensive powers of control against violations of military rights by states including but not limited to: inequity, discrimination, abuse of power, lack of information or

⁷ *State authority aimed to defend the rights and freedoms of persons in their rapport with public authorities*, (CĂLIN 2013, 576).

⁸ The Romanian Constitution uses the term *ombudsman*, an institution with general competence whose activity is regulated by Law No. 35/1997.

refusal to provide information, unlawful proceedings. We can state that “*international case-law is an important source for the protection of human rights, with bodies created by international treaties on human rights establishing a practice in the field, which in many cases makes a common body with the interpreted text.*” (PARASCHIV 2014, 57). This created the sound institutional framework for the application of international rules recognising all persons, including military personnel, providing the “*international procedural capacity by ensuring the right to refer directly to international courts: the Human Rights Committee, the Committee for the Elimination of All Forms of Racial Discrimination, the Committee against Torture, the European Court of Human Rights, the European Court of Justice, etc.*”. (SELEJAN-GUȚAN, Protecția europeană a drepturilor omului 2018, 4)

The courts, in accordance with their fundamental purpose of ensuring the application of laws, shall ensure the manner in which the exercise of human rights and fundamental freedoms is respected, representing the most effective contemporary system of their protection. The case-law of the European Court of Human Rights or the European Court of Justice has shown that the military personnel have the same rights as any other citizen, subject to certain restrictions inherent in the military field, in accordance with international rules (European Human Rights Reports, Vol 29 2000, 548). In resolving relevant cases for the matter, courts have decided that fundamental rights, such as life, freedom, equal opportunities, the right to a fair trial and appeal, the right not to be subject to torture, cruel, inhuman or degrading treatment or punishment, must be respected for the personnel of the armed forces of a country. However, the decision of the European court “*is not an end in itself, but a promise of future change, the starting point of a process which should allow the effectiveness of rights and freedoms.*” (TULKENS 2006).

Conclusions

Respecting the human rights for all citizens, including the members of the armed forces, is an obligation for states under international rules. The military field, seen as a closed system, needs imperative and coercive rules to protect military personnel from possible abuses both from inside and outside the organization.

The application of fundamental principles of human rights must take precedence in the treatment of military personnel and discriminations of any kind are prohibited⁹. International mechanisms for promoting and protecting the human rights are based both on conceptual and regulatory work in the field, and on dissemination actions in order to make people aware of the fundamental values they enjoy. Consequently, the general and special natures of human rights and international humanitarian law should be integrated into the educational and training processes in order to be known by the military and to educate them in the spirit of compliance with established standards.

Documents adopted at international level are guarantees that the European institutions actively ensure the implementation of fundamental human rights in the military field. Having political moral value, these instruments claim for the need to strengthen the effective protection of the rights of military personnel in the domestic and European legal systems.

The importance of respecting the fundamental rights and freedoms of military personnel in the current context of real instability contributes to the strengthening of a homogeneous military force governed by the principles of humanity and respect for human dignity. The practical application of these European rules and the respect for rules on fundamental human rights in the military field lead to an increase in the morale component of combat power and would generate a uniformity in the approach, especially in the context of multinational operations.

⁹ According to Article 16 paragraph 1 of the *Romanian Constitution*, citizens are equal before the law and authorities, without privileges and without discrimination.

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