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RESTRICTION OF HUMAN RIGHTS IN THE MILITARY:  
THE STANDARD OF LEGITIMACY

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other government agency.

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RESTRICTION OF HUMAN RIGHTS IN THE MILITARY:  
THE STANDARD OF LEGITIMACY

Laszlo Kelemen

**ABSTRACT:** In democratic countries common standards available from international and domestic law, court decisions, scholarly works and other sources have formed on the the contents of individual human rights. There are no common standards, however, on the application of human rights norms in the special military context. This thesis, referring to cases judged by the European Court of Human Rights, the Hungarian Constitutional Court and the U.S. Supreme Court, reviews the mainstream European and the American standards as well as the major theories on the treatment of human rights in the military. Based upon that, in order to find some common standards applicable in a modern democracy, the thesis sets legitimate national security aims and examines whether certain human rights restrictions in the military are a rational means to attain those aims.

## Table of contents

I. INTRODUCTION .....	1
1. Human rights in general .....	1
2. Scope .....	5
II. APPLICABILITY OF HUMAN RIGHTS REGULATIONS ON THE MILITARY- -TWO STANDARDS .....	8
1. Applicability in general .....	8
2. The European standard .....	11
3. The American standard .....	14
III. THEORIES RELEVANT TO HUMAN RIGHTS RESTRICTIONS .....	26
1. Justification for restrictions .....	26
2. Justification for the full application of human rights norms .....	33
IV. BALANCING AIMS AND MEANS .....	49
1. Overview .....	49
2. Endurance of combat fatigues .....	52
3. Maintaining readiness and availability during peacetime .....	56
4. Unconditional obedience to command .....	58
5. Maintaining discipline .....	70
6. Human factors, motivation .....	81
7. Social support .....	89
8. Conclusion .....	94

## I. INTRODUCTION

### 1. Human rights in general

Human rights first appeared as a political and legal theory in the 17th and 18th centuries in the works of philosophers, and later, as a result of the victorious bourgeois revolutions, they became part of constitutions and legal systems. The essence of the theory is that everyone is born free and equal, and no one including the state can deprive the individual of his freedom. The key elements of the innate rights are: liberty, security, property, and the right to resist oppression. The present system of human rights prescribed by international law documents as well as national constitutions and laws also rests on this fundament. Human rights, as understood now, include among others the following: the right to life, the right to liberty (i.e. freedom from slavery, and forced labor), freedom of movement and residence, freedom of marriage, the right to security of person (due process guarantees in criminal procedures such as judicial approval of detention, the presumption of innocence, the right to counsel etc.), the right of privacy (including protection of family, home, correspondence, telephone conversations, and personal data etc.), the freedom of thought, conscience, and religion, the freedom of expression, the freedom of the press, the right to assembly, the right to association, and the right to property. Suffrage is a special category of rights. Once

these rights have been violated, independent courts are supposed to provide effective legal protection for the individual.

In another development, the concept of social, economic and cultural rights emerged in the 19th century labor movement. Beginning with Marx socialists contended that equality in a bourgeois society is one of form, not substance; in order to facilitate real equality the state must provide rights securing decent living and working conditions especially for the working class and the poor. These rights include, among others, the following: the right to form trade unions, the right to work, the right to strike, the right to just and favorable conditions of work, the right to an adequate standard of living, the right to social security, assistance and welfare, the right to health, the right to housing, and the right to education. The legal character of social, economic and cultural rights differs from that of human rights. While the latter primarily requires abstention on the part of the state, the former necessitates extensive state intervention, and state measures. Further, the realization of most economic, social and cultural rights, by virtue of their nature, depends on the economic conditions of a country rather than on legal safeguards; thus they usually can not be enforced through legal procedures. If they are enacted at all, they can only be regarded as the aspirations of the

state. These rights gained recognition in international law,<sup>1</sup> and they, or at least some of their elements appear in many countries' constitutions, and in practically every country's legal system. However, the international community appears to deem economic, social and cultural rights somewhat less than universal, and belonging primarily to domestic political issues. This paper will address only human rights as defined in the first paragraph.

Historically, due to legislative, judicial and scholarly works, the scope of human rights has expanded. New rights have been added to the list permanently. Informational rights (the right to the protection of personal data, and to the access to public data) is a good example of this recent development. At the same time, the contents of extant rights keep evolving as well; we do not mean the same thing by the same right as they did 100 years ago. The freedom of expression, for instance, unlike earlier eras, now involves the most open criticism of public officials. Besides interpreting individual rights increasingly broadly, the application of the concept of human dignity is another technique for extending the scope of human rights protection. Under this concept widely applied in Europe, human dignity is the general human right, i.e. the right to

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<sup>1</sup> See, for example, Articles 22-27 of the Universal Declaration of Human Rights or the International Covenant on Economic, Social and Cultural Rights.

individual self-determination. Self-determination means that the individual is free to determine how to live, what to do, and what not to do as he wishes. Unless there is a more specific right available in the traditional catalogue, where a court finds that the individual is to be protected in the given situation, it may grant protection under the right of human dignity.

Looking at another aspect of the expansion of human rights, we can see that human rights' protection has become applicable to more and more strata of society; former peripheral groups have become part of the center. When equality, and human rights first emerged in legislation --although it was a great progress compared to the conditions of feudalism-- they did not create a real democracy in the original Greek sense of the word (i.e. the rule of the people). Instead, the newly gained rights protected fully only adult, rich, and healthy men belonging to the majority. The mentioned peripheral groups used to involve, and indeed may still involve, among others, women, children or youngsters, racial, national, religious or other minorities, the insane, the incarcerated, and members of the armed forces. Except for women and minorities, these groups necessarily may not be entitled to the whole range of human rights even in a highly democratic society. The determination of their rights, and a reasonable level of necessary restriction require a delicate balancing of interests, which is often a current issue

for law-making bodies as well as courts.

Legislation, and the realization of human rights are primarily the business of individual states. On the other hand, human rights occupy a paramount place in international relations, and international law too. In order to promote the realization of the common values shared by them, states expressed their commitment to the cause of human rights in international treaties, of which the Universal Declaration of Human Rights is the most well-known. In addition, regional treaties were born as well. The European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>2</sup> is more detailed than the Universal Declaration, and is the only international agreement allowing individuals to lodge complaints with an international forum against a state for an alleged violation of human rights. The procedures involving the European Commission of Human Rights, and the European Court of Human Rights<sup>3</sup> provide, as will be demonstrated, a most effective extra protection after domestic remedies have been exhausted.

## 2. Scope

Since the issue of human rights is highly

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<sup>2</sup> Signed in Rome on 4 November 1950, hereinafter European Convention.

<sup>3</sup> hereinafter European Court

internationalized, standards concerning the common contents of these rights have formed. From international treaties, court decisions, comparison of law, scholarly works, and other sources, some fundamental notions exist on what is meant, for example, by the freedom of expression in a modern democracy. However, there are apparently no commonly accepted international standards on what is meant by freedom of expression or any other human right in the military of a modern democracy.

As mentioned earlier, soldiers traditionally belonged to the periphery of human rights. The law of the military was the law of obedience. The bitter experiences of World War II started a process of reevaluation of the role of the military, and the rights of its members, in Germany and other countries as well. As a result, some "democratization" followed and is still underway, but the developments are sometimes quite different in individual countries. The difficulties in this area arise from the circumstance that two fundamental and equally important constitutional interests often clash, namely, the interest of guaranteeing human rights, and the one related to national defense and military effectiveness. Although this conflict may, in many cases, be only apparent, it is a very complicated and responsible task to weigh correctly the totally different interests against each other. This may be a reason why there is not as much common ground here as in other areas of human rights. However, it is accepted in every democracy that

soldiers, per se, are not excluded from the protection of human rights, while some, but very different level of restrictions also seems to be allowed. This paper is an attempt to find some generally applicable common standards and principles.

Chapter II examines two existing standards on the human rights of soldiers: the one used by the European Court, which is the general rule<sup>4</sup> in most European countries, and the other used by the American Supreme Court. Chapter III analyzes the factors potentially justifying human rights restrictions in the military on the one hand, and the factors potentially justifying the full application of these rights on the other hand. Basically accepting the European approach, and challenging the American one, Chapter IV attempts to find a rational balance among the factors in order to satisfy a high level of legitimacy in a democratic

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<sup>4</sup> THERE ARE MAJOR DEVIATIONS, HOWEVER. UNDER ARTICLE 64 OF THE EUROPEAN CONVENTION, "ANY STATE MAY . . . MAKE RESERVATION IN RESPECT OF ANY PARTICULAR PROVISION OF THE CONVENTION." ACCORDINGLY, FRANCE, PORTUGAL AND SPAIN MADE RESERVATIONS TO ARTICLES 5 AND 6, TAKING THEIR MILITARY DISCIPLINARY SYSTEMS OUT OF THE EUROPEAN COURT'S JURISDICTION. IN ADDITION, MAJOR ELEMENTS OF THE LEGAL SYSTEMS OF SOME CENTRAL AND EASTERN EUROPEAN COUNTRIES WHICH JOINED THE CONVENTION RECENTLY SUPPOSEDLY ARE NOT IN A FULL COMPLIANCE WITH THE CONVENTION AND THE PRACTICE OF THE COURT INTERPRETING IT.

society.<sup>5</sup>

## II. APPLICABILITY OF HUMAN RIGHTS REGULATIONS IN THE MILITARY-- TWO STANDARDS

### 1. Applicability in general

An examination of the applicability of the human rights provisions of international treaties, national constitutions, or other relevant domestic legislation to military members must first answer the question whether a soldier is a human being. The answer to be gleaned from the various sources is, of course, yes. Enumerating the rights, the Universal Declaration of Human Rights uses the subjects "everyone" or "no one", making no mention of any groups or classes excluded from its application. The same subjects are used by the European Convention, which prescribes, "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in . . . this convention."<sup>6</sup> This approach recurs in a still more forceful form when the Convention forbids

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<sup>5</sup> THE PAPER FOCUSES ON FINDING GENERAL STANDARDS APPLICABLE IN ANY MODERN DEMOCRACY RATHER THAN ANALYZING ANY INDIVIDUAL COUNTRY'S LEGAL SYSTEM. AS ILLUSTRATIONS, HOWEVER, IT WILL REFER TO THE DECISIONS OF THE EUROPEAN COURT, THE U.S. SUPREME COURT, THE HUNGARIAN CONSTITUTIONAL COURT, AS WELL TO AS AMERICAN AND HUNGARIAN LEGAL NORMS.

<sup>6</sup> ARTICLE 1

discrimination.<sup>7</sup> The convention mentions the military specifically when stipulating that the term "forced or compulsory labor" shall not include military service, and when allowing the imposition of special restrictions on the rights of assembly and association of the members of the armed forces.<sup>8</sup> Though it was not disputed by either party, the European Court found it necessary to refer to these Articles in Engel and Others v The Netherlands<sup>9</sup> to prove the applicability of the European Convention to military members.

An examination of the constitutions of democratic countries results in similar conclusions. No express regulation of the Hungarian Constitution provides that the human rights Articles do not apply to the members of the armed forces. The Constitution, however, specifically forbids party membership, and political activities for professional soldiers. The American Bill of Rights (Amendments I-X to the Constitution) does not have any provision excluding military members generally out of its protection either; it only contains one specific

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<sup>7</sup> UNDER ARTICLE 14, "THE ENJOYMENT OF THE RIGHTS AND FREEDOMS SET FORTH IN THIS CONVENTION SHALL BE SECURED WITHOUT DISCRIMINATION ON ANY GROUND SUCH AS SEX, RACE, COLOUR, LANGUAGE, RELIGION, POLITICAL OR OTHER OPINION, NATIONAL OR SOCIAL ORIGIN, ASSOCIATION WITH NATIONAL MINORITY, PROPERTY, BIRTH OR OTHER STATUS."

<sup>8</sup> ART. 4(3)(B), ART. 11(2)

<sup>9</sup> (No 1) (A/22): (1979-80) 1 EHRR 647, PARA 54.

exemption: persons involved in "cases arising in the land or naval forces" are not entitled to a Grand Jury.<sup>10</sup> From these provisions it is easy to conclude that if specific exemptions are mentioned then the general rule must apply.

While the formal applicability of human rights to the military seems to be obvious, real applicability is a much more intriguing question. Human rights are not absolute even in the most democratic countries. The protection of the rights of other individuals as well as some compelling community interests, such as public order, public safety, public health, morals or national security, may well demand the imposition of restrictions on the exercise of human rights. It is up to law-making authorities and courts to weigh the often contradictory interests against each other, and to strike a balance among them. During this process, they must strictly see to it that restrictions are imposed only if absolutely necessary and inevitable. Founded in 1989, the Hungarian Constitutional Court has developed the following test: a fundamental human right can only be restricted in a certain situation if the restriction a) serves a legitimate aim; b) is necessary, inevitable, and out of a compelling cause, that is there is no other way to attain the aim; and c) is not disproportionate to the aim sought to be achieved. This test has been derived from the practice of the European Court, and national courts in Europe. Although the

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<sup>10</sup> AMENDMENT V

wording may vary, the test of legitimacy is similar in other countries as well, i.e. a high level of necessity and reasonableness is required. This is called the test of "strict scrutiny" in the U.S.

## 2. The European standard

Bearing in mind that restrictions are acceptable, but under some strictly determined conditions only, the question is whether the test used in human rights cases generally is applicable to military cases as well. The European Court has always used the same standard; the level of scrutiny has never been reduced just because the case has been military-related. This attitude is clearly ascertainable from the case Vereinigung Demokratischer Soldaten Österreichs and Gubi v Austria<sup>11</sup>. Here the main question was whether military authorities can legitimately forbid the distribution of a newspaper whose approach was often critical to military matters in the barracks. (The paper was published by the one applicant, and actually distributed by the other.) First the Court declared, "Freedom of expression applies to servicemen just as it does to other persons within the jurisdiction of the Contracting States."<sup>12</sup> Then, it began its traditional analysis with a methodology that did not differ at all from that used in other cases: the Court

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<sup>11</sup> (A/302): (1995) 20 EHRR 55

<sup>12</sup> *Id.* PARA. 27.

examined legality, legitimacy, necessity, and the needs of a democratic society.<sup>13</sup> At the same time, the Court recognized the special military circumstances in its analysis as well. For example, it stated, "the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline, for example by writings."<sup>14</sup> Finally, weighing all the circumstances, the Court ruled that the restriction was unnecessary in this case, and Austria violated the applicants' freedom of expression.<sup>15</sup> In Engel, the Court made it clear in general that it was ready to consider fully the uniqueness of the military: "when interpreting and applying the rules of the Convention ... the court must bear in mind the particular characteristics of military life and its effects on the situation of individual members of the armed forces."<sup>16</sup> This special consideration does not mean an automatic deference, however. The Court applies the same test, or the same methodology of analysis, and the results may be but are not necessarily different in the military context.

The approach of the Hungarian Constitutional Court is akin

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<sup>13</sup> THESE CRITERIA ARE OBSERVED AND FURTHER DISCUSSED BY MERILLE DELMOS-MARTY ED., THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS 322-330 (1992).

<sup>14</sup> VEREINIGUNG, SUPRA NOTE 11 PARA. 36.

<sup>15</sup> ARTICLE 10 OF THE EUROPEAN CONVENTION

<sup>16</sup> ENGEL, SUPRA NOTE 9 PARA. 54.

to that of the European Court. It has always applied its usual standard to military cases, and has never shown any special deference. On the contrary, the Court has not been deterred even from decisions bringing radical changes to traditional military life. For example, in 1991, on the petition of some members of a professional soldiers' movement, it annulled the provisions<sup>17</sup> of the Service Regulations<sup>18</sup> forbidding the formation of "social organizations" in the barracks.<sup>19</sup> As a result, the way was opened to the legitimate formation of military trade unions<sup>20</sup>. The Hungarian Parliament has adopted the high standards of the Constitutional Court: in 1993 when Parliament passed the National Defense Act,<sup>21</sup> an introductory provision of the Act repeats practically verbatim the phrase used in a number of earlier Constitutional Court resolutions: "Members of the armed forces are usually entitled to the same human rights and freedoms as other citizens are. These rights can only be

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<sup>17</sup> 10 A) -E) PONT

<sup>18</sup> 6/1987 (IX.15.) HM R. DEFENSE MINISTER'S DECREE ON THE SERVICE REGULATIONS OF THE HUNGARIAN DEFENSE FORCES.

<sup>19</sup> 51/1991 (X.19) AB HAT.

<sup>20</sup> THIS PROCESS IS ONLY FINISHING NOW, AS PARLIAMENT IS DEBATING A BILL DETERMINING, AMONG OTHERS, THE RIGHTS OF MILITARY UNIONS. THREE RESPECTIVE BILLS ARE BEING DEBATED ON THE LEGAL STATUS OF CONSCRIPTS, CADETS AND PROFESSIONAL SOLDIERS. THEY ARE SCHEDULED TO BE ADOPTED ON MARCH 26, 1996. THESE BILLS WILL BE MENTIONED LATER IN THIS PAPER AS WELL.

<sup>21</sup> 1993. EVI CX. TV.

restricted with respect to the specialities of the military service on condition that the restriction is necessary, inevitable, and out of a compelling cause."<sup>22</sup>

### 3. The American standard

The U.S. Supreme Court's approach is visibly different. It may well be summarized by two quotations from the decisions of the Court: "With these very significant differences between military law and civilian law and between the military community and the civilian community in mind, we turn to appellee's challenges..."<sup>23</sup> "The rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and civilian courts are not the agencies which must determine the precise balance to be struck in this adjustment."<sup>24</sup>

Although strongly emphasizing the uniqueness of the military, the Supreme Court has admitted the applicability of the Bill of Rights, at least in theory. It expressly stated, for example, in Brown v Glines that, "members of the military service are entitled to the protection of the First Amendment

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<sup>22</sup> 1. PARA. (4)

<sup>23</sup> PARKER V. LEVY, 417 U.S. 733, 752 (1974).

<sup>24</sup> BURNS V. WILSON, 346 U.S. 137, 140 (1953); QUOTED LATER IN SOLORIO V. U.S., 483 U.S. 435, 440 (1987).

..."<sup>25</sup> More generally, in Chappell v. Wallace the Court quoted Chief Justice Warren with approval, "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."<sup>26</sup> Further, the Court added, "This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service."<sup>27</sup>

The Court's practice, and sometimes confusing statements,<sup>28</sup> however, give cause for both lower courts as well as commentators to question whether the Bill of Rights applies to

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<sup>25</sup> 444 U.S. 348, 354 (1980).

<sup>26</sup> 462 U.S. 296, 304 (1983).

<sup>27</sup> *Id.*

<sup>28</sup> SEE, E.G. MIDDENDORF V. HENRY 425 U.S. 25, 33 (1976) IN WHICH THE SUPREME COURT SAID, "THE QUESTION OF WHETHER AN ACCUSED IN A COURT-MARTIAL HAS A CONSTITUTIONAL RIGHT TO COUNSEL HAS BEEN MUCH DEBATED AND NEVER SQUARELY RESOLVED." THE COURT DID NOT FIND IT NECESSARY TO ANSWER THIS QUESTION EITHER IN MIDDENDORF OR ANY CASE SINCE, SUGGESTING IN THIS WAY THAT THE BILL OF RIGHTS OR AT LEAST THE FOURTH AMENDMENT MAY NOT APPLY TO THE MILITARY AT ALL.

the military at all, and if so, to what extent.<sup>29</sup> Apart from its sporadic theoretical hints, the Supreme Court has not provided much constitutional protection for servicemembers in practice. Instead, it has focused on explaining why they are not entitled to protection in various cases. A review of the cases related to the human rights of servicemembers demonstrates that the Supreme Court has routinely rejected most appeals.<sup>30</sup>

In its reasoning the Supreme Court stresses its incompetence in military matters. It usually invokes Art. I, para. 8 cls. 12-14 of the Constitution: "[The Congress shall have power] To raise and support Armies, . . . To provide and maintain a Navy; To make rules for the Government and Regulation of the land and naval Forces." These provisions are interpreted by the Court as "an explicit grant of plenary authority to Congress."<sup>31</sup> Since plenary denotes full, entire, complete or absolute, it might logically follow from this interpretation that there is no room for any judicial review, and Congress may

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<sup>29</sup> THE INDICATED CONFUSION IS WELL DEMONSTRATED BY AN ARTICLE WHOSE FINAL CONCLUSION IS, "IT IS INCREDIBLE THAT IN THE LATE TWENTIETH CENTURY IT IS NOT ABSOLUTELY KNOWN WHETHER THE FOURTH AMENDMENT APPLIES TO THOSE SWORN TO DEFEND IT." LEDERER AND BORCH, DOES THE FOURTH AMENDMENT APPLY TO THE ARMED FORCES? 144 MIL. L. REV. 110, 123 (1994).

<sup>30</sup> EVERY U.S. SUPREME COURT CASE MENTIONED IN THIS PAPER ENDED IN REJECTION, BUT SEE SUPRA NOTE 32 FOR AN EXEPTION.

<sup>31</sup> CHAPPELL, SUPRA NOTE 26 AT 305.

disregard the whole Bill of Rights when regulating the military. The Court has not, however, gone as far as that. It has declared, at least in theory, the applicability of the Bill of Rights, thus it preserved the right to intervene, but only in exceptional cases.<sup>32</sup> It is clear that judicial deference towards Congressional decisions is the rule, while on-the-merits review is the exception, but the Court has not provided any test or more detailed delineation to clarify its standard of deference.

In Goldman v. Weinberger<sup>33</sup> the Supreme Court extended the application of its deferential approach from statutes to the service regulations. Examining the constitutionality of an Air Force regulation, which led to banning the appellee, an Orthodox Jew and an ordained rabbi, from wearing his yarmulke<sup>34</sup> when in uniform, the Supreme Court stated, "courts must give great defe-

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<sup>32</sup> EQUAL PROTECTION CASES NOT DISCUSSED IN THIS PAPER, OR AT LEAST A CERTAIN CIRCLE OF THEM APPEAR TO BE THE ONLY EXCEPTION. IN THESE CASES THE SUPREME COURT, INSTEAD OF THE USUAL PRINCIPLE OF DEFERENCE, APPLIES A STRICT SCRUTINY TEST EVEN IN THE MILITARY CONTEXT: "WE CAN ONLY CONCLUDE THAT CLASSIFICATION BASED UPON SEX, LIKE CLASSIFICATION BASED UPON RACE, ALIENAGE, OR NATIONAL ORIGIN ARE INHERENTLY SUSPECT, AND MUST THEREFORE BE SUBJECTED TO STRICT JUDICIAL SCRUTINY." FRONTIERO V. RICHARDSON, 411 U.S. 677, 688 (1973).

<sup>33</sup> 475 U.S. 503 (1986)

<sup>34</sup> YARMULKE IS A SKULLCAP REQUIRED TO BE WORN BY THE APPELLEE'S RELIGION. HE WORE IT EITHER EXPOSED OR UNDER HIS SERVICE CAP.

rence to the professional judgement of military authorities concerning the relative importance of a particular military interest."<sup>35</sup> Doing so, the Court stressed the vital importance of uniformity, obedience, and discipline in the military, and it failed to make even the slightest effort to examine any evidence on whether the regulation was necessary to attain these or any other legitimate aims.<sup>36</sup> Instead, the Court made it clear that it did not require evidence, and in contradiction with its express adherence to the applicability of the Bill of Rights, it gave a free hand to military authorities to exercise their jurisdiction without any constitutional limitations: "But whether or not expert witnesses may feel that religious exceptions to AFR 35-10 are desirable is quite beside the point. The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment."<sup>37</sup>

Explaining its enormous deference, the Supreme Court also has referred to its lack of expertise in military matters. In Chappell the Court declared, "the courts are ill-equipped to determine the impact upon discipline that any particular

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<sup>35</sup> SUPRA NOTE 33 AT 507.

<sup>36</sup> SEE JUSTICE O'CONNOR'S DISSENTING OPINION, SUPRA NOTE 33 AT 528.

<sup>37</sup> SUPRA NOTE 33 AT 509.

intrusion upon military authority might have."<sup>38</sup> This statement is quoted later in Solorio v United States,<sup>39</sup> in which the Court overruled its earlier decision made in O'Callahan v Parker.<sup>40</sup> In O'Callahan the Court held that a military tribunal may not try a serviceman charged with a crime that has no service connection. In Solorio the Court recognized that that decision unnecessarily caused serious practical difficulties, and attributed this former "mistake" to its lack of expertise. Under the Solorio rule, court martial jurisdiction "depends solely on the accused's status as a member of the Armed Forces" again.

Competence issues aside, the Supreme Court has always paid a special attention to the uniqueness of the military: "The military constitutes a specialized community governed by a separate discipline ..."<sup>41</sup> "Discrimination is unavoidable in the Army."<sup>42</sup> "[T]he military is, by necessity, a specialized society separate from civilian society."<sup>43</sup> "Its law is that of

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<sup>38</sup> SUPRA NOTE 26 AT 305.

<sup>39</sup> 483 U.S. 435 (1987).

<sup>40</sup> 395 U.S. 258 (1969).

<sup>41</sup> ORLOFF V. WILLOUGHBY, 345 U.S. 83, 94 (1953). QUOTED MOST RECENTLY IN CHAPPELL, SUPRA NOTE 26 AT 301.

<sup>42</sup> ORLOFF, ID.

<sup>43</sup> PARKER, SUPRA NOTE 15 AT 743.

obedience."<sup>44</sup> "[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arises."<sup>45</sup> "[U]nlike the civilian situation the Government is often employer, landlord, provisioner, and lawgiver rolled into one."<sup>46</sup> "The inescapable demands of military discipline and obedience can not be taught on the battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection."<sup>47</sup> "The essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.'<sup>48</sup> Having made these, and other similar observations, the Court labels a case as a military one, and then in granting "deference" fails to examine whether a restriction is necessary in the given context.

Instead of focusing on the concrete issue, the Supreme Court has usually looked at the military norm system as a whole, and tried to find some sort of balance in this way. For

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<sup>44</sup> IN RE GRIMLEY 137 U.S. 147, 153 (1890). LATER QUOTED IN PARKER, SUPRA NOTE 23 AT 744.

<sup>45</sup> UNITED STATES EX REL. TOTH V. QUARLES, 350 U.S. 11, 17 (1955). LATER QUOTED IN TWO MORE CASES, RECENTLY IN GREER V. SPOCK, 424 U.S. 828, 838 (1976).

<sup>46</sup> PARKER, SUPRA NOTE 23 AT 751.

<sup>47</sup> CHAPPELL, SUPRA NOTE 26 AT 300.

<sup>48</sup> GOLDMAN, SUPRA NOTE 33 AT 507.

example, in United States v. Johnson<sup>49</sup> when reinforcing and expanding its decision made in Feres v. United States<sup>50</sup> to bar servicemembers from suing military authorities for damages under the Federal Tort Claims Act, the Court referred to the Veterans' Benefits Act, and "numerous other benefits" available for servicemembers as compensation. However, the real issue in this case was whether a judicial remedy is available in damages cases. Military administrative procedures and judicial procedures do not have the same qualities; an independent judicial system obviously can provide a higher level of due process guarantees. It is also questionable whether the other benefits, such as educational benefits, extensive health care, home-buying loan benefits, or advantageous retirement conditions are really relevant to the case.

The Constitution of the United States does not mandate any special judicial deference in military-related human rights cases. While the earlier mentioned provisions<sup>51</sup> grant Congress regulatory powers over the military, they do not diminish the power of courts, and do not authorize Congress to disregard other provisions of the Constitution, including the Bill of Rights. When exercising its regulatory power, Congress must see to it that the law it enacts is in harmony with the whole body

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<sup>49</sup> 107 S. Ct. 2063 (1987).

<sup>50</sup> 340 U.S. 135 (1950).

<sup>51</sup> ART. I, PARA. 8 CLS. 12-14

of the Constitution, and, should it fail to do so, courts should repair the mistake.<sup>52</sup>

While some level of judicial deference may in general be necessary, the level of deference should not be different between military and civilian human rights cases. In Orloff the Supreme Court declared, "judges are not given the task of running the Army."<sup>53</sup> Nor are they given the task of, for example, running education, health care, or economic affairs. Federal or state legislatures, or the respective executives are given this task, and judges must always be aware of this fact. But they must also be aware of their own duties, and responsibilities, among which the preeminent one is the protection of the constitutional rights of the individual. Government officials have great freedom in determining the direction of a country, but judges are to apply strict scrutiny to government actions to assure that no unjustified infringement on individual rights occur in any segment of society. Carrying out this task, the judiciary, of course, should consider the special circumstances of the case, including the military context. With respect to these special circumstances, however, it should not abandon or debase its normal standards. Nor do military-related human rights cases entail any special judicial

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<sup>52</sup> SIMILARLY, THE EXECUTIVE BRANCH INCLUDING THE ARMED SERVICES ARE NOT ENTITLED TO ANY PREFERENTIAL TREATMENT UNDER THE CONSTITUTION.

<sup>53</sup> SUPRA NOTE 31 AT 93.

expertise. Judges are usually not experts in other areas such as medicine or technical sciences, but are supposed to be experts on human rights, and they, as practice shows, routinely cope with their own lack of special knowledge.

Another question is whether the Supreme Court's perception of the military is correct or not.<sup>54</sup> Since the Court has always considered that it has no practical jurisdiction over a given military human rights case, it has never entered into an on-the-merits examination, and has never tried to form a logical connection between its observations of the military and its final decisions. Therefore, the correctness of the Court's observations is practically insignificant; even if the Court had made different observations, it would have necessarily reached the same result in a given case in light of its deferential approach.

The result of the Supreme Court's approach is a "de facto non-justiciability."<sup>55</sup> "If the political branches of the Government may enact any regulations that are deemed necessary to promote perceived military objectives without regard for independent constitutional limitations, then the inexorable

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<sup>54</sup> SEE PAGE 67.

<sup>55</sup> ROBERT S. MARX, WHEN THE FIRST AMENDMENT IS NOT PREFERRED: THE MILITARY AND OTHER SPECIAL CONTEXTS, 56 U. CIN. L. REV. 779, 841 (1988).

conclusion must be that servicemembers have no constitutional rights, and the judiciary, by necessity, has no role to play."<sup>56</sup> Supreme Court decisions, "virtually immunize the military from judicial review."<sup>57</sup> In United States v Stanley,<sup>58</sup> as a case with "potentially devastating effects,"<sup>59</sup> "the Court denied recovery to a soldier who had been used as an unknowing subject in LSD experiments, and suffered lasting harm as a result."<sup>60</sup>

Most commentators concur in vehemently criticizing the Supreme Court's approach, and they are joined by the justices authoring dissenting opinions. They, however, have not had any tangible influence on the majority decisions of the Court. As a regularly dissenting justice, Justice Stewart wrote in his dissent to Parker v Levy in connection with the upheld Articles 133<sup>61</sup> and 134<sup>62</sup> of the Uniform Code of Military Justice:<sup>63</sup> "I find

<sup>56</sup> BARNEY F. BILELLO, JUDICIAL REVIEW AND SOLDIERS' RIGHTS: IS THE PRINCIPLE OF DEFERENCE A STANDARD OF REVIEW? 17 HOUSTON L. REV. 465, 491 (1989).

<sup>57</sup> LINDA SUGIN, FIRST AMENDMENT RIGHTS OF MILITARY PERSONNEL: DENYING RIGHTS TO THOSE WHO DEFEND THEM. 62 N.Y.U.L. REV. 855, 855 (1987).

<sup>58</sup> 107 S.Ct. 3054 (1987).

<sup>59</sup> *SUPRA* NOTE 57.

<sup>60</sup> *SUPRA* NOTE 57.

<sup>61</sup> "ANY COMMISSIONED OFFICER, CADET OR MIDSHIPMAN WHO IS CONVICTED OF CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN SHALL BE PUNISHED AS A COURT-MARTIAL MAY DIRECT."

it hard to imagine criminal statutes more patently unconstitutional than these vague and uncertain general articles."<sup>64</sup> His opinion is remarkable in that he argues for applying the same method of analysis usual in parallel civilian cases, and which is the mainstream European standard as well. He contends that the recognition of the uniqueness of the military, "only begins the inquiry."<sup>65</sup> Concerning the so called general articles, "the issue is whether the vagueness . . . is required to serve a genuine military objective."<sup>66</sup>

The U.S. Supreme Court's de facto abduction of true judicial review is unjustified. As demonstrated by the standards applied by the European Court and the Hungarian Constitutional Court, appropriate judicial review is possible. Working on this premise, in order to find an objective and well

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<sup>62</sup> "THOUGH NOT SPECIFICALLY MENTIONED IN THIS CHAPTER, ALL DISORDERS AND NEGLECTS TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE IN THE ARMED FORCES, ALL CONDUCT OF A NATURE TO BRING DISCREDIT UPON THE ARMED FORCES, AND CRIMES AND OFFENSES NOT CAPITAL, OF WHICH PERSONS SUBJECT TO THIS CHAPTER MAY BE GUILTY, SHALL BE TAKEN COGNIZANCE OF BY A GENERAL, SPECIAL OR SUMMARY COURT-MARTIAL, ACCORDING TO THE NATURE AND DEGREE OF THE OFFENSE, AND SHALL BE PUNISHED AT THE DISCRETION OF THAT COURT."

<sup>63</sup> 10 U.S.C. 946 (1988) [HEREINAFTER UCMJ]

<sup>64</sup> SUPRA NOTE 23 AT 774.

<sup>65</sup> SUPRA NOTE 23 AT 787.

<sup>66</sup> SUPRA NOTE 23 AT 787.

considered balance, the following chapter reviews the major theories arguing against and for the application of human rights in the military.

### III. THEORIES RELEVANT TO HUMAN RIGHTS RESTRICTIONS

#### 1. Justification for restrictions

The special mission of the military is the most often invoked justification for human rights restrictions in the military. Although soldiers in most countries fortunately usually act in peaceful circumstances, and most of them are never engaged in combat activities, we can not disregard the fact that they are ultimately destined for fighting wars, sacrificing their lives without hesitation if the need arises. In combat there is no room for individual concerns, protests, or reflections; everyone must follow the command with an instinctive obedience. Therefore, the argument goes, human rights can only have a very limited role. Soldiers must be conditioned for wartime circumstances during peacetime. It logically follows that peacetime regulations should not essentially differ from wartime norms, i.e. human rights need to be substantially restricted even in peacetime. Any wrong assessment here may ultimately undermine a nation's defense capability and security. Basically, this is the U.S. Supreme Court's perception.

A second justification for restrictions is that the military is a dangerous institution in peacetime as well as in wartime. Soldiers deal with, or at least have a relatively easy access to, weapons and dangerous materials. Even one undisciplined soldier can cause huge damage to fellow soldiers and society, but the damage which potentially may be caused by an army made up of undisciplined soldiers is incalculable. It is easy to see that discipline must be maintained at any price, even at the price of some human rights restrictions. The U.S. Supreme Court does not fail to stress the importance of discipline in any military-related case. Restrictions related to maintaining discipline are likely to affect soldiers' privacy, and some due process rights.

Third, the military's special mission necessitates a special, hierarchical organizational structure. Soldiers, who are supposed to follow their superiors' commands unconditionally, can not be allowed to question their superiors's decisions, authority, or personality, or they can only do so in a much more limited way than can civilians. Otherwise, the hierarchical structure would be undermined, and it would affect military effectiveness. The interests related to the special protection of hierarchy may bring about restrictions on soldiers' self-expression, and access to judicial review.

Maintaining military effectiveness and readiness may

reasonably require soldiers to be available on a short notice at any time. This necessity may result in restrictions on freedom of movement and on the freedom to choose residence. It is also generally accepted that, in the interests of the service, the military has the right to transfer its members to new assignments even without consent, which may entail a mandatory changes of residence.

Additionally, the system of conscription involves major human rights restrictions by definition. Conscripts' personal liberty, and freedom of movement must be restricted in order to operate the system, and other kinds of restrictions are to be imposed as well. Involuntary service in the military may also infringe on the freedom of conscience of many of conscripts. This infringement on freedom of conscience may be accomodated by maintaining other, alternative services such as non-armed military service or civilian service for conscientious objectors, but there is no obligation under international law to establish these alternatives. For example, the European Convention states that compulsory military service is not forced labor. Nor would be alternative service, the Convention adds, referring to the countries where conscientious objection is "recognized."<sup>67</sup> From this wording it is clear that the provision of alternative service is not mandatory.

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<sup>67</sup> ARTICLE 4 (1) (B)

A less discussed justification for human rights restrictions on the military is the perception of the military by soldiers and commanders. The military is an innately conservative institution, and members of the military establishment tend to think in a conservative way. Even where restrictions may not in fact serve any real military objective, commanders and senior officers may well insist on them if only because of customs, traditions or beliefs. Although civilian authority has the right in a democracy to impose rules on its military, it would make a mistake should it try to act in a vacuum. Going too far in liberalization may result in a backlash in the military itself, potentially causing identity crises for military members, which could weaken a nation's defense capabilities. Although the military should not and can not be immune to social changes, it is not the place for avant-garde solutions or social experiments.

The perception of the civilian population may justify human rights restrictions on the military as well. Civilians in every country have a picture of a soldier. Unless most servicemembers fit in with that image, the military as a whole may lose trust and public support or will become the subject of suspicion to the public, and this is likely to create an environment in which carrying out its mission will be harder for the military. Since the image of the military is largely determined by professional soldiers, restrictions to satisfy public perception are likely

to affect them more than conscripts. The public image of a soldier usually involves some elements of positive behavior, or at least the avoidance of behavior considered excessive, abusive or immoral by most people. Soldiers may reasonably be banned from this kind of behavior, such as drunkenness or drug consumption which may well be legal for civilians.

In a democracy the military as an institution must remain politically neutral. It must carry out the laws and directives coming from a legitimate civilian authority without reservation. The military can not favor or disfavor any party or political movement; it can not try to change or oppose the government in any form. The question is whether individual soldiers in a private capacity can do so. The answer to this question largely depends on the public perception of the act. Senior level commanders can nowhere publicly oppose the government. The remainder may or may not be given more freedom depending on whether the public is able to differentiate between individuals' acts and those of the institution. This consideration may justify restrictions on soldiers' public or political activities, and human rights related to them. Unless the necessary restrictions are applied here the public belief in the civilian control over the military may be shaken.

To justify restrictions on military installations, the theory of private property rights is occasionally advanced.

Under this justification, the government, as any other (private) property owner, has the right to tell what can be and what can not be done on the premises. The U.S. Supreme Court considered the Government to be a landlord in Parker.<sup>68</sup> The Austrian Government used, among others, this argument in Verinigung Demokratischer Soldaten Osterreichs.<sup>69</sup> It contended that freedom of expression does not apply to private estates; instead, owners are entitled to exercise their private property rights. Using this logic, the Austrian Government, as the owner of the barracks in the country, could, as any other property owner, ban the distribution of some publications on its premises without violating any human rights regulations.

Human rights are sometimes regarded as unnecessary burdens or disturbances which, as such, may be sacrificed in some circumstances for the sake of military expediency. The U.S. Supreme Court, referring to "the relative insignificance of the offenses being tried" called the right to counsel in a summary court-martial "a particular burden to the Armed Forces," and concluded that the involved soldiers' "time may be better spent than in possibly protracted disputes over the imposition of discipline."<sup>70</sup>

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<sup>68</sup> *SUPRA* NOTE 23.

<sup>69</sup> *SUPRA* NOTE 11 PARA. 43.

<sup>70</sup> MIDDENDORF V. HENLEY, 425 U.S. 25, 46 (1976).

The theory of waiver is often invoked in connection with professional soldiers. Many, perhaps all countries' legal systems recognize waiver of rights, with some exceptions for offenses such as murder, torture, or causing serious bodily harm. Soldiers, when entering voluntarily into the profession, are reasonably supposed to have accepted the basic premises of the military, including the fact that some restrictions are imposed on them and that they must face other, special hardships as well. In most countries, disadvantages of military service are offset by higher pay, and better benefits such as health care and pension. As a result, professional soldiers may be better rewarded than other state employees of similar age and education. Having knowingly waived some of their rights and accepting the benefits in return, professional soldiers, according to this theory, should have no legal or moral ground to complain.

Finally, the theory of the "waiver of rights" is related to, but not identical with a theory which might be called the "totality of circumstances." Military life, and military norm system as a whole are examined and applied on a case by case basis. Some restrictions, which may seem unjustified in and of themselves, may well become acceptable under this totality view. The U.S. Supreme Court appears especially to favor this

approach.<sup>71</sup>

2. Justification for the full application of human rights norms

The major opposite argument holds that human rights are not gifts provided by the state but reflect rather the most fundamental values of democracy. The primary purpose and task of the state is to assure the exercise of human rights without any discrimination through law-making and law-enforcement. Although human rights are not quite absolute, there must be certain concrete, well considered, and very serious other interests to justify any restrictions. The logic of this approach works in the same way in the military. Soldiers are human beings first of all, who happen to wear uniforms. Their special circumstances may entail special restrictions, but not unconditional ones. Abstract references to military specialities and military needs are not sufficient explanation for denying or curtailing the rights of those who are supposed to defend them. The interests relevant to human rights and the interests relevant to the military and national security should carry the same weight in a democracy. Therefore, not even real and concrete military interests automatically outweigh human rights

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<sup>71</sup> ALMOST ANY MILITARY-RELATED HUMAN RIGHTS CASE OF THE COURT CAN DEMONSTRATE IT. THIS PAPER DISCUSSES JOHNSON AND WEISS FROM THIS POINT OF VIEW. SEE PAGE 16, AND TEXT ACCOMPANYING NOTE 137.

protection interests. The competing interests must be balanced carefully against each other in a process which pays equal attention to both. The result will be a high and ever increasing level of human rights protection in the military. This is the basic approach of the European Court and the Hungarian Constitutional Court.

The theories of private property rights, expediency, waiver of rights and the totality of circumstances impliedly wish to negate any balancing of military interests with human rights. Although they sound logical, in reality they only serve as explanations for irrational human rights restrictions. Using those theories as justifications, the state can rid itself of any obligation to find rational justification at all. Instead, it can say to soldiers, for example: "I have taken away your rights because I am the property owner." Or "by virtue of the act of joining the military voluntarily, you waived all your rights, thus you can only have as much freedom as I give you." It would be dangerous for democracy itself if democratic rights could be denied on the basis of some artificially created fictions, or because they might cause unnecessary costs, nuisances or inconveniences to the state or state officials. The European and the Hungarian court practice gives sufficient support to rebut these theories.

The "private property rights" theory, for example, was

rejected by the European Commission of Human Rights, and the European Court. Citing Article 1 of the European Convention, which requirese states to secure human rights to everyone under their jurisdiction the Commission stated, "[t]his undertaking extends to all persons under their actual authority and responsibility."<sup>72</sup> Thus the state can not deny human rights on the basis that someone happens to stay on state premises. In another case,<sup>73</sup> the European Court similarly rejected a reasoning based on "expediency". "The applicant was arrested by the Dutch military authorities while completing his compulsory national service. He complained that the failure to bring him before a military court until five days after his arrest violated Article 5(3)<sup>74</sup> of the Convention."<sup>75</sup> As the Dutch Government explained the delay, the applicant's detention began on a Wednesday afternoon, during a week when military judges were not available due to a military exercise, and then due to the upcoming weekend. The Court pointed out that these kinds of circumstances

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<sup>72</sup> VERINIGUNG, SUPRA NOTE 11 PARA. 44.

<sup>73</sup> KOSTER v NETHERLANDS (A/221): (1992) 14 EHRR 396

<sup>74</sup> "EVERYONE ARRESTED OR DETAINED IN ACCORDANCE WITH THE PROVISIONS OF PARAGRAPH 1 (c) OF THIS ARTICLE SHALL BE BROUGHT PROMPTLY TBRFORE A JUDGE OR ANOTHER OFFICER AUTHORISED BY LAW TO EXERCISE JUDICIAL POWER AND SHALL BE ENTITLED TO TRIAL WITHIN A REASONABLE TIME OR TO RELEASE PENDING TRIAL. . .

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<sup>75</sup> HEADNOTE TO KOSTER, SUPRA NOTE 73. (LEXIS, EUROPE LIBRARY, CASES FILE) .

can not justify failure to honor the obligations prescribed by the Convention.<sup>76</sup>

As far as the waiver of rights, and the totality of circumstances theories are concerned, although neither the European Court nor the Hungarian Constitutional Court has addressed them directly, certain conclusions can be drawn from court practices. These courts have always limited the scope of their examinations to the concrete human rights issues before them, trying to determine whether the challenged rule or decision is necessary in a democratic society. They have never found any deficiencies that can be saved just because of the fact that professional soldiers are entitled to certain "employment" advantages or because they joined the military voluntarily. The courts consider human rights to be basic values, not only as a whole, but with each deserving to be cherished in itself. Rights are not interchangeable, and can not be substituted one for another. It is incumbent on the state to protect human rights in all circumstances and to impose only the inevitable restrictions. Human rights are not items of merchandise and soldiers can not bargain them away.

Some theories try to secure more human rights by differentiating among groups of soldiers, or certain situations. They admit that restrictions may be inevitable or at least acceptable

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<sup>76</sup> KOSTER, SUPRA NOTE 73 PARA. 24-25.

in some circumstances, but contend that the restrictions should be limited to these special groups or situations only, without unnecessarily involving the whole group of servicemembers. An example is the Hungarian Constitutional Court's position that professional soldiers' human rights may be burdened more than conscripts' rights. The Court received two petitions challenging the constitutionality of a regulation barring soldiers (both professionals and conscripts) from turning to courts to challenge their commanders' decisions in damages cases. The Court examined the first petition from the point of view of professional soldiers, and it ruled that, as a result of their profession, they must endure more stringent regulations, and are not necessarily entitled to judicial recourse.<sup>77</sup> This decision, however, was overruled a few weeks later, when the Court examined the same regulation on the petition of conscripts. With respect to conscripts, it concluded that they can not be constitutionally barred from judicial review. Since the regulation applied to all soldiers without distinction, the Court finally annulled it and opened the way to judicial review for professional soldiers as well as conscripts.<sup>78</sup> The Court, however, did not give any detailed explanation on how it might differentiate between conscripts and professionals in other cases.

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<sup>77</sup> UNPUBLISHED RESOLUTION OF THE COURT DELIVERED TO THE INTERESTED PARTIES ONLY.

<sup>78</sup> 57/1993 (X.28.) AB HAT.

Differentiation is possible not just between professional soldiers and conscripts, but also based on duty assignments as well. The character of the military profession has dramatically changed in our age. Support and service elements, with functions that hardly differ from parallel civilian jobs, now far outnumber classic combat elements in the military. While combat elements must maintain some distance from civilian society, service elements should emulate it, and the elements providing direct combat support should stand in between. This function-based differentiation suggests that the legal status of soldiers, including their human rights, varies in these three groups, and major restrictions should be limited to the combat elements.<sup>79</sup>

While a function-based continuum is theoretical, the differentiation between wartime or combat situations and peacetime is now well established in most countries' legal systems and in international law. For example, the European Convention provides, "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with

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<sup>79</sup> THIS NOTION IS OUTLINED BY SAM C. SARKESIAN ET AL., SOLDIERS, SOCIETY, AND NATIONAL SECURITY, 160-162 (1995).

its other obligations under international law."<sup>80</sup> Derogations shall not be made<sup>81</sup>, however, from the right to life, "expect in respect deaths resulting from lawful acts of war", the ban on torture, or inhuman or degrading treatment or punishment, the ban on slavery or servitude, and the principles of "nullum crimen sine lege," and "nulla poena sine lege."<sup>82</sup> This regulation applies to civilians as well as soldiers. The Hungarian Constitution contains provisions similar to the European Convention's ones, but it extends the circle of fixed rights to religious freedom.<sup>83</sup>

Given this legal framework, the question is whether this kind of differentiation between wartime and peacetime is necessary to soldiers' human rights. Although soldiers prepare for war even in peacetime, the reality is that they usually

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<sup>80</sup> ARTICLE 15(1)

<sup>81</sup> UNDER ARTICLE 15(2)

<sup>82</sup> "NO CRIME WITHOUT THE LAW," AND "NO PUNISHMENT WITHOUT THE LAW" AS WORDED BY ARTICLE 7(1) OF THE EUROPEAN CONVENTION: "NO ONE SHALL BE HELD GUILTY OF ANY CRIMINAL OFFENCE ON ACCOUNT OF ANY ACT OR OMISSION WHICH DID NOT CONSTITUTE A CRIMINAL OFFENCE UNDER NATIONAL OR INTERNATIONAL LAW AT THE TIME WHEN WAS COMMITTED. NOR SHALL A HEAVIER PENALTY IMPOSED THAN THE ONE THAT WAS APPLICABLE AT THE TIME THE CRIMINAL OFFENCE WAS COMMITTED."

<sup>83</sup> ALKOTMANY, 8. PARA. (2).

operate in peaceful circumstances. It would be absurd to pretend as if our troops were fighting World War III right now, and to draw conclusions from this presumption. Doing so we would establish or maintain a norm system definitely unacceptable for most soldiers and incompatible with reality. Some differentiation is unavoidable, although the concrete measures may be disputable.

Unreasonable human rights restrictions may vitiate military effectiveness in many ways. First of all, soldiers come to the military from the outside world, where they were socialized to democratic values. If they can see that the military denies these values, they may find hard to accept or to identify themselves with values alien to a democratic society. This may cause internal tensions, as well as disciplinary and other problems. Tensions of this kind may become more serious in a conscript army, but can also exist in a professional armed force. Although persons who choose military service voluntarily may reasonably be supposed to show more understanding and acceptance of traditional military values and restrictions on their "civilian" rights, it would be naive to believe that they can completely eradicate their own preferences and will become eager to sacrifice all their human rights when they join the

service.<sup>84</sup> Individuals, even if they basically accept institutional purposes and interests, will never cease pursuing their own goals. If the military completely oppresses or disregards individual aspirations, it will cause frustration and soldiers will lose their motivation to carry out the military's mission. Instead, the military, as any other institution, should try to integrate individual interests into its purposes as much as possible; in order to do that, it must provide a high level of individual rights.

Human rights related to the broadly interpreted self-expression (mostly the First Amendment rights in the U.S. Constitution) may serve in the military as "safety valves."<sup>85</sup> If soldiers, by exercising their human rights, are (relatively) free to express their grievances, complaints, criticisms,

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<sup>84</sup> THIS IS THE PREMISE OF THE U.S. SUPREME COURT, HOWEVER, (SEE TEXT ACCOMPANYING NOTE 48) AND IS ALSO SUGGESTED BY SAM NUNN, CHAIRMAN OF THE SENATE ARMED SERVICES COMMITTEE: "ONCE AN INDIVIDUAL HAS CHANGED HIS OR HER STATUS FROM CIVILIAN TO MILITARY, THAT PERSON'S DUTIES, ASSIGNMENTS, LIVING CONDITIONS, PRIVACY, AND GROOMING STANDARDS ARE ALL GOVERNED BY MILITARY NECESSITY, NOT PERSONAL CHOICE." THE FUNDAMENTAL PRINCIPLES OF THE SUPREME COURT'S JURISDICTION IN MILITARY CASES, 29 WAKE FOREST L. REV. 557, 559 (1994).

<sup>85</sup> SEE RICHARD W. ALDRICH, ARTICLE 88 OF THE UNIFORM CODE OF MILITARY JUSTICE: A MILITARY MUZZLE OR JUST A RESTRAINT ON MILITARY MUSCLE? 33 UCLA L. REV. 1189, 1197 (1986).

recommendations, or requests, then their concerns become part of the official system, giving military and civilian superiors an opportunity to deal with the problem. Otherwise, these problems would continue, and soldiers could become frustrated, distrustful, discontented, or even disobedient, which could potentially undermine the whole system.

Besides preventing potential discipline problems, human rights provide an indispensable contribution to military effectiveness. It is wrong to assume that every free speech in the military is necessarily subversive or harmful. On the contrary, soldiers very often have positive suggestions, even if worded in a critical form. Superiors at every level actually need this input, which may contain valuable ideas, and provide useful feedback.<sup>86</sup> Experience shows that these ideas, even if not always well received at first, are often accepted over time. Of course, some sort of speech may eventually be dangerous, but it would be a mistake to eliminate free speech entirely out of the fear of this often only abstract danger. Instead, the boundaries of free speech must be clearly designated, and if it

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<sup>86</sup> IN HUNGARY, GOVERNMENT-SPONSORED AND INDEPENDENT MILITARY RESEARCH INSTITUTES PROVIDE AN ESPECIALLY VALUABLE CONTRIBUTION. A NUMBER OF RESEARCHERS ARE PROFESSIONAL SOLDIERS. THEY OFTEN PUT FORWARD HIGHLY CRITICAL OPINIONS, OCCASIONALLY TO THE ORDERS OF THE MINISTRY OF DEFENSE, OR THE COMMAND OF THE DEFENSE FORCES. THESE OPINIONS ARE USED FOR FORMING POLICIES, OR DRAFTING NEW REGULATIONS.

has been properly done, there will only be a small number of easily resolved violations.

This approach appears in the case law of the European Court. In connection with the magazine *Der Igel*, the Court concluded that freedom of expression for soldiers includes the right to distribute publications criticizing a wide range of issues, but not questioning vital military interests: "These articles were written in a critical or even satirical style and were quick to make demands or put forward proposals for reform, yet they did not call into question the duty of obedience or the purpose of service in the armed forces. Accordingly the magazine could scarcely be seen as a serious threat to military discipline."<sup>87</sup> The Court so decided knowing that the publications, "led to a large number of complaints from conscripts,"<sup>88</sup> but also recognizing that "the Government was gradually implementing most of the reforms proposed by the magazine."<sup>89</sup>

While the system of conscription is unthinkable without human rights restrictions, the restrictions must be inevitable, reasonable, and proportionate. The fact that conscription is legally compatible with the requirements of democracy does not

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<sup>87</sup> VEREINIGUNG, SUPRA NOTE 11 PARA. 49.

<sup>88</sup> VERINIGUNG, SUPRA NOTE 11 PARA. 39.

<sup>89</sup> VEREINIGUNG, SUPRA NOTE 11 PARA. 33.

automatically justify every restriction. For example, the freedom of movement must be restricted, but only to some extent; this necessity should not lead to treating conscripts like prisoners. Regulations should allow them to leave the barracks unless there is a clearly-defined reasonable purpose (daily training, exercises, duty) for keeping them back. The whole system of conscription must be designed in a democratic country in a way which burdens individuals no more than is absolutely necessary.

Although current international law does allow conscription and does not require alternative forms of service for conscientious objectors, conscription is waning and conscientious objection is recognized in most democratic countries. Most recently, for example conscription was abolished in Holland and Belgium, and France is considering a similar step.<sup>90</sup> Conscription, even in its most liberal form, seriously burdens human rights, and not only for those who have strong conscientious reservations towards the armed forces and military service; therefore replacing the draft with an all-

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<sup>90</sup> THIS WAS REPORTED IN SASKIA SISSONS, DUTCH CONSCRIPT ARMY STANDS DOWN, THE EUROPEAN (PARIS), 8-14 FEBRUARY 1996 AT 3.

voluntary system is a welcome advance.<sup>91</sup>

The principle of civilian control over the military requires that final decisions on military issues be made by civilian authorities. While soldiers' opinions and expertise are not to be neglected, they are not to be accepted automatically either. Law-makers and courts should be especially cautious in human rights matters. Commentators point out that the military establishment can not be an authentic expert when its own interests are at stake.<sup>92</sup> Even without any intention to mislead, military commanders may tend to present the interests related to their personal power, prestige, and comfort as vital national security ones. Politicians, officials, and judges should be able to differentiate properly in this delicate area giving adequate consideration to human rights interests.

The military can never be completely absorbed in civilian

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<sup>91</sup> THIS IS TRUE EVEN THOUGH HUMAN RIGHTS CONSIDERATIONS ARE NOT THE PRIMARY ONES ON DECIDING THE FUTURE OF THE CONSCRIPTION SYSTEM. RATHER, BROADER MILITARY, SOCIAL AND ECONOMIC FACTORS MATTER. THESE FACTORS ALSO SHOW, HOWEVER, THAT A PROFESSIONAL ARMY IS MUCH MORE EFFECTIVE, BETTER GEARED TO CARRY OUT MILITARY MISSIONS AND, ALL-IN-ALL, IS NOT MORE COSTLY THAN A DRAFTED ARMY IS.

<sup>92</sup> SEE FOR A MORE DETAILED ANALYSIS JAMES M. HIRSCHHORN, THE SEPARATE COMMUNITY: MILITARY UNIQUENESS AND SERVICEMEN'S CONSTITUTIONAL RIGHTS, 62 N.C.L. REV. 177, 240-248 (1984).

society. In order to preserve public credit and respect, it must be distinct. Too large a distinctness or distance from society is dangerous, however, because it could insulate the military, and alienate it from civilian society. If the military's values and norms are diametrically opposed to the values of society, the military would become an object of suspicion and a mysterious institution, and would lose public support or at least public interest. As a direct result, it could lose political support and funding. The military may become relatively free in determining its own norms but, for lack of resources, will be less capable of carrying out its fundamental mission.<sup>93</sup>

Applying this analysis to human rights matters results in the conclusion that while the public may accept some level of restrictions, a totally different norm system is unacceptable and it would be harmful even to the military itself. Instead of defending traditional restrictive positions, military leaders should seek ways of applying the norm system of civilian society, including the human rights system, to the military as

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<sup>93</sup> IN LIGHT OF THE POST-COLD WAR UNCERTAINTIES IN THE U.S. ARMY, "MOST SERIOUSLY, THERE IS A POTENTIAL FOR DIMINISHED SUPPORT FOR THE MILITARY PROFESSION, WITH A LOSS OF PRESTIGE AND ESTEEM TO ACCOMPANY THE EXPECTED DIMINUTION OF RESOURCES. MILITARY ISOLATION IN THE BARRACKS ... WOULD ACCELERATE THIS TENDENCY AND MUST BE AVOIDED." SARKESIAN, *SUPRA* NOTE 79 AT 140-141.

much as possible.

Excessive restrictions may cause recruitment problems as well. They may deter a large portion of society, especially most highly intelligent people, from choosing a military career. This would be a great loss, especially considering that today's armed forces increasingly need persons at every level who are capable of making decisions on their own and assuming heavy responsibilities in complex situations.

In a modern democracy civilian involvement with the military is not restricted to politicians and public officials. Others, such as the media, participate in discussing a wide range of military-related issues. If soldiers are altogether or substantially banned from contributing with their own opinions and views to public discussions, then the public will lack basic information necessary to any meaningful participation. For this reason, soldiers must enjoy a high level of freedom of expression, even though certain restrictions concerning primarily military secrets and political questions may well be justified.

Finally, history gives an additional and powerful argument against human rights restrictions in the military. Although the military establishment usually resists proposed changes for a while, many reforms are realized from time to time, and they

have proven not to harm military effectiveness. For example, in the U.S., most senior naval officers opposed the abolition of flogging in the 19th century.<sup>94</sup> Similarly, the introduction of the Uniform Code of Military Justice with a number of legal guarantees known before only in the civilian justice system was received with reservations after World War II.<sup>95</sup> Further, while both the Air Force and the Supreme Court found it vital that orthodox Jews should not wear a yarmulke when in uniform in 1986,<sup>96</sup> Congress enacted the right to wear religious apparel in 1988.<sup>97</sup>

Social changes and the expansion of human rights must necessarily affect the military. Resistance to them can cause unnecessary internal tensions, and isolation from society. Further, as history shows, isolation efforts are usually futile because they can not prevent but can only delay changes. Although the importance of tradition is often invoked as an argument for restrictions, tradition can not be decisive guidance in our rapidly changing world.

#### IV. BALANCING AIMS AND MEANS

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<sup>94</sup> THIS IS NOTED BY JAMES M. HIRSCHHORN. *SUPRA* NOTE 93 AT 243.

<sup>95</sup> HIRSCHHORN, *SUPRA* NOTE 93 AT 243.

<sup>96</sup> GOLDMAN, *SUPRA* NOTE 33.

<sup>97</sup> 10 U.S.C. 774 (1988).

## 1. Overview

Conflicting theories on human rights restrictions in the military can be confusing. Almost every theory sounds logical in itself, yet the suggested results are just the opposite. Determining the scope of necessary and reasonable restrictions, this Chapter will weigh the conflicting views against each other and draw logical conclusions. In order to do that, first, one must clarify the aims to be attained, and then match the means to the aims. One must examine what means are unconditionally necessary, what means are unnecessary, and, even if appearing useful, what means are counterproductive or definitely detrimental.

Generally, the primary business of the military is defending the homeland against any foreign attack. In peacetime the military must prepare and be ready to carry out this mission at any time. The military may also be used for international peace-keeping operations, for quelling domestic riots, or insurrections (unless the force of the police is sufficient), and for providing assistance to civilians during large-scale natural or industrial catastrophes. Defending the territorial integrity, the political independence, and the democratic system of a country, and protecting the lives and assets of its people are undoubtedly vital national interests and belong to the legitimate aims of any government. Of course, assuring human

rights to everyone must also be a primary aim in any democracy. When these two objectives clash the existence of a nation or its democratic system (including human rights protection) may outweigh assuring human rights to everyone and in every situation. If some human rights restrictions are the inevitable price for securing these rights and other vital national interests against a severe attack, this price must be paid, but only when really necessary. National defense interests should not be used as pretexts for curtailing democratic rights. Restrictions on the human rights of military members may well be regarded as necessary elements for assuring military effectiveness, and as such, relevant to the vital national security interests. Restrictions are legitimate provided that they assure or promote the effectiveness of the military and contribute to the realization of some more general national purposes thereby.

While human rights restrictions may be a means of assuring military effectiveness and national security, they are not the only or most important ones. For example, effectiveness depends on the level of military training and education, the availability of high quality arms, equipment, and financial resources in general, the motivation of soldiers, even on the character of a nation, and a range of other factors. The law is one of these factors. The fundamental role of the law in the context of military effectiveness is to create clear, rational,

and predictable relations acceptable for most, through well-considered law-making, and consistent law-enforcement. Human rights are part of this equation.

Although general determination of aims is necessary, it seems worthwhile to analyze more concrete aims in the context of human rights restrictions. A discussion of five potentially human-rights-related factors of military effectiveness follows: (1) endurance of combat fatigues; (2) maintaining readiness and availability in peacetime; (3) unconditional obedience to command; (4) maintenance of discipline in general; (5) human factors and motivation in the military; (6) social responsiveness and support.

## 2. Endurance of combat fatigues

One of the characteristics of military service is that soldiers are potentially exposed to the harsh circumstances of combat. They must be able to perform amid extreme weather and terrain conditions, exhausted and frustrated in their physiological and mental needs, separated from their homes and families, and ultimately in permanent lethal danger. Both conscripts and professional soldiers must be conditioned to endure these fatigues in peacetime through training and exercises simulating combat. Human rights, except for a narrow circle of protection, can not be the tool for saving soldiers from these fatigues

because, if they were not prepared for them, their own lives would be in a much greater danger in a real battle, and they could not carry out the task of defending the nation as they are expected to do.

In peaceful conditions the protection of life, health, bodily integrity, and human dignity mark the boundaries of the rights not to be restricted. The law must guarantee that training and exercises do not impose a direct danger on soldiers' life, health, and bodily integrity. Beyond these boundaries, however, there is a large room for exposing them to serious fatigues which would be unheard of in civilian life. Besides life and health, human dignity must also be respected. While soldiers are not to be prevented from training tasks found unpleasant or difficult, training tasks must always serve real training purposes. They can not be imposed as informal punishments, acts of personal vengeance, or any other form of abuse. Although in the circumstances of the military it is sometimes hard to differentiate among various intentions, and abusive intentions may be hard to prove, the law, and especially disciplinary and criminal law need to protect against this kind of violation of human dignity.

In a combat situation or when otherwise carrying out an armed mission, soldiers may legitimately be expected to sacrifice their lives if the need arises. They can not refuse

even high risk missions which carry a direct danger to their lives or bodily integrity. They can not, however, be given any task that is certainly known to cause death or serious injury. To that limited extent life is to be protected even in combat circumstances. This proposition is in harmony with the Hungarian Constitutional Court's stance. The Court noted in its resolution declaring the death penalty unconstitutional<sup>98</sup> that the right to life can not be restricted. In another resolution,<sup>99</sup> however, it ruled that increased risk-taking in certain situations in the military can not be regarded as a restriction of the right to life. It follows, according to the Court, that while even a highly increased level of danger may still be constitutional, missions that carry certain death are not.

Major elements of human rights, such as due process rights, the right of privacy or the right of self-expression, are not to be automatically restricted even in wartime. An effective combat performance in itself does not necessarily require restrictions beyond those discussed on the rights to life and bodily integrity. On the other hand, in the interest of preventing panic or disorder among the troops, the concrete exigent circumstances such as a widening of the war or elevated intensity may well entail severe restrictions of any human

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<sup>98</sup> 23/1990 (X.31.) AB HAT.

<sup>99</sup> 46/1994 (X.21) AB HAT.

right. So might circumstances such as lowered morale, a grave economic or political situation or the behavior of the enemy. The limitation of these restrictions is prescribed by international law, as well as the Constitution or other laws of the country. Possible wartime restrictions may, of course, affect the civilian population as well, but are likely to be different and more stringent in the military.

Should soldiers be conditioned for these potential extreme wartime restrictions already in peacetime? Should their rights be curtailed to prepare them for the unlikely possibilities of a worst-case scenario war? It seems just as absurd to prepare soldiers for human rights restrictions potentially necessary in a war by applying them in peace-time as it would be to do so to civilians. The differentiation between war and peace conditions from the point of view of human rights restrictions is necessary and inevitable.

Defending the Supreme Court's special deference to military matters, the argument is made that everything necessary to accomplish victory in a war is lawful in the United States. Nor is international law seen to be a barrier: "Once the political authorities have explicitly acted contrary to international law, as by an inconsistent statute or by denunciation of a treaty, the courts must apply the rule of decision resulting from that act even though the action may be regarded by other states as

contrary to international law."<sup>100</sup> Besides the lack of international law limits, there are no constitutional limits either, according to this proposition: "With respect to means, the Framers explicitly rejected the idea of constitutional limit."<sup>101</sup> Since anything goes in a war, "the court has no exterior standard against which to measure the balance of interests Congress has struck,"<sup>102</sup> and the political leadership is totally free to regulate the military, including human rights matters. Consequently, the role of the reviewing court is minimal: "the courts should not find military departures from civilian standards of individual rights within the armed forces unconstitutional unless manifestly irrational in terms of successful military performance."<sup>103</sup> Even if the theory of unlimited means be correct, and thus unlimited human rights restrictions could be imposed in a total war, it does not follow that the same restrictions could be legitimate in peacetime, and that "manifest irrationality" would be the only possible test available for the courts.

### 3. Maintaining readiness and availability during peacetime

A common military premise holds that war can break out at

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<sup>100</sup> HIRSCHHORN, SUPRA NOTE 92 AT 209.

<sup>101</sup> HIRSCHHORN, SUPRA NOTE 92 AT 211.

<sup>102</sup> HIRSCHHORN, SUPRA NOTE 92 AT 249.

<sup>103</sup> HIRSCHHORN, SUPRA NOTE 92 AT 246.

any moment. Consequently, both soldiers, whether conscripts or professionals, must be available on a very short notice to carry out combat missions. For this reason, professional soldiers must live where they may easily be reached, and conscripts, or a certain percentage of them, must permanently reside in barracks. Soldiers may be obliged to report their whereabouts and their travel plans, and foreign travel especially may be subject to approval. These regulations affect the freedom of choice of home and freedom of movement. Their reasonableness, with respect to the diminishing role of war as a solution to international conflicts in our age, is increasingly questionable in most countries.

Conscripts' mandatory stay in barracks is a significant burden on their freedom of movement. Under the current Hungarian Service Regulations, Hungarian conscripts as a rule are entitled to leave the barracks for one weekend every other month, and for a 5 days holiday during a 6 month training period. A bill submitted to Parliament on the Service of Conscripts contains substantial liberalization, but also still maintains some unnecessarily rigid regulations. There are also unpublished regulations fixing the percentage of soldiers required to stay in barracks at a certain time for maintaining "combat readiness." These rules are treated flexibly in most barracks and conscripts are allowed to stay away much more than the legal minimum. This arrangement, however, gives an

extraordinary opportunity for abuse in the form of informal punishment, unjustified personal preferences, and prejudice. In a number of Western European countries conscripts are entitled to remain from their duty station except during normal weekday service hours unless they have some other extra service task. Maintaining combat readiness by requiring a number of conscripts to remain in barracks permanently is unreasonable in peacetime unless there is a real danger of an armed attack.

The obligation imposed on professional soldiers to live within a certain distance of their place of duty is not a disproportionate burden if the military provides the necessary financial or material assistance for moving and housing. Reporting travel arrangements is also acceptable and, besides advancing readiness, it may serve discipline reasons as well especially in the case of conscripts. Requiring approval for foreign travel may be justified in the case of professional soldiers having access to secrets so long as they have been informed of this possibility in advance. Conscripts, on the other hand, should be allowed to travel abroad without permission in peacetime, but, if disciplinary problems have regularly occurred or are reasonably expected to occur as a result of foreign travel, travel may be subject to prior approval. Even here some sorts of emergency travel must still be allowed. Visiting certain foreign countries may be forbidden for both conscripts and professional soldiers for national

security reasons.

#### 4. Unconditional obedience to command

Every work organization requires subordinates to follow the instructions of their superiors. Depending on the position of the person and the general conditions of the workplace, employees may be given relatively more freedom and independence in determining a number of factors related to their work. Although their suggestions and input may be welcome and even implemented from time to time, in the end, except for some extreme situations, they are obligated to execute the instructions they are given unconditionally and have no right to refuse. The most serious consequence of disobedience in labor law is the loss of employment.

The military, as a work organization, follows a similar pattern: there are superiors and subordinates, and the latter are supposed to follow instructions. The most decisive difference is that the possible consequences of disobedience in the military are much more serious than they are in most civilian workplaces. As a result of disobedience, soldiers may directly endanger the lives of other soldiers and civilians, or even in an extreme situation the existence of the democratic system of government itself. Unconditional obedience to command is a vital element of success, even mere survival, in any combat

situation. These circumstances justify more serious legal consequences to disobedience than mere discharge.<sup>104</sup> In addition, most countries' legal systems try to prevent potential disobedience by applying other means, such as human rights restrictions.

The more serious legal consequences flow from disciplinary and criminal law.<sup>105</sup> Disobedient soldiers, depending on the circumstances, may well face a term of confinement, or in the countries where it is allowed, even death penalty, which would be unheard of in civilian life. Generally, this more severe treatment seems to be justified even if we know that most acts of disobedience in themselves, especially in peacetime, do not bring about devastating consequences. There are, however, or may be situations, both in peacetime and wartime, when unconditional obedience is indispensable to saving lives, maintaining democracy, or defending the nation. Since these are unquestionably vitally important objectives, the state may legitimately want to condition soldiers to unmistakably,

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<sup>104</sup> DISCHARGE IS, OF COURSE, OUT OF THE QUESTION IN CASE OF CONSCRIPTS.

<sup>105</sup> AS OPPOSED TO THE UCMJ, MOST COUNTRIES' LEGAL SYSTEMS DIFFERENTIATE BETWEEN DISCIPLINARY OFFENSES AND CRIMINAL ONES IN THE MILITARY. ONLY MORE SERIOUS OFFENSES QUALIFY AS CRIMES AND ARE JUDGED BY COURTS. THE REMAINDER IS DISCIPLINARY OFFENSE JUDGED BY MILITARY COMMANDERS. DISCIPLINARY PUNISHMENTS USUALLY DO NOT INCLUDE DEPRIVATION OF LIBERTY AND MAY BE SUBJECT TO JUDICIAL REVIEW.

instinctive obedience and to deter potential violations forcefully. More severe sanctions are not a disproportionate means compared to these objectives.

A distinction should nevertheless be made for peacetime first offenders on equitable grounds. For some young conscripts and even volunteers, it may be unusual and extremely hard to follow orders unconditionally, and to adapt to military life in general. Due to difficulties in adaptation or lack of experience, they may commit acts of minor disobedience without realizing the potentially serious consequences. It would be a mistake to stigmatize them as criminals. In most cases the process of investigation in itself is enough to deter further violations. Appropriate law-making and law enforcement techniques are available to treat this issue, for example, administering a reprimand or using disciplinary procedures instead of criminal ones, or criminal procedures not having unfavorable consequences in civilian life, or other light, or symbolic punishments.

Besides carrying more severe sanction for infractions, unconditional obedience to command is traditionally reinforced by human rights restrictions aimed at providing special protection to the military hierarchy. These restrictions affect or may even annihilate soldiers' self-expression rights including aspects of the right of assembly and association, and

the right to judicial review. The questionable rationale behind this restrictive approach is that criticizing the persons or the decisions of commanders necessarily undermines respect; if they lose respect, their ability to command will also be diminished. As a result, more disobedience will occur, and this chain reaction will ultimately vitiate the effectiveness of the whole system. This logic suggests that either every kind of criticism is dangerous, or even if not, then the potential danger is great enough to justify severe restrictions as a preventive measure.

While the special interests at stake may justify some special measures, freedom of expression is the central value of democracy. It enables various ideas and opinions to appear and clash in public life, promoting development in a very effective way. It contributes to military effectiveness as well in several ways. Democracy means the rule of law, and the military can not be an exception. Commanders must understand that their power over subordinates is not infinite, but prevails only in a scope strictly defined by the law. If they fail to obey the law themselves, they can not be immune to legal review, including judicial review. Undermining morale and integrity, lawlessness or command arbitrariness are just as devastating for military effectiveness as disobedience is. In sum, the question is not whether legal disputes and critical opinions are admissible in the military at all, but rather what the rational limitations of these rights should be.

Legal disputes of an administrative or civil law character should not have any special limitations in peacetime. Military authorities should be the first avenue for redress of grievances. Because of the hierarchical structure of the military it seems reasonable that soldiers have to lodge complaints with higher military authorities. After exhausting the military appellate hierarchy they should be allowed to go to court just as civilians can. Soldiers deployed abroad should be allowed to submit their actions after returning home. Contrary to traditional views, as Hungarian experience shows, judicial review does not affect discipline and obedience at all. Soldiers who sued the military are to obey the command as anyone else, and are bound by all military regulations. Should they violate regulations in connection with their pending lawsuits, they can be sanctioned for that violation.

For the protection of the persons of commanders, criminal and administrative proscriptions of libel and slander generally applied in the civilian sphere seem to be adequate provided that more severe punishments are available. Criticizing the command or acts of the commander should be allowed on condition that the criticism must be limited to concrete individual acts or neglects instead of being aimed at general policies or principles. Criticism questioning the commanders' fitness, calling for their replacement or advocating insubordination or mutiny must also be forbidden. This arrangement strikes a

proper balance between the interests of a democratic society in free expression and the necessities stemming from the unique nature of the military: Although there is a wide range for fair and objective criticism, direct pressurizing is not allowed. Nor does criticism exempt anyone from unconditional obedience to the command. Soldiers are expected to obey but they may subsequently express their criticisms. This kind of criticism does not sanction or cause disobedience; therefore it does not impair military effectiveness.<sup>106</sup>

As a result of recent law-making efforts as well as the Constitutional Court's rulings, Hungarian law either now provides or will soon provide unlimited judicial remedy both for conscripts and professional soldiers similar to labor disputes in the civilian sphere. Meanwhile, American soldiers remain barred from lodging tort claims with courts against the military.<sup>107</sup>

As for free expression, neither American nor Hungarian regulations satisfy the standard delineated here. Both the UCMJ and the Hungarian Criminal Code<sup>108</sup> contain provisions which could

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<sup>106</sup> AS DISCUSSED IN POINT 7, ADDITIONAL RESTRICTIONS MAY REASONABLY BE IMPOSED ON SOLDIERS' RIGHTS OF POLITICAL SELF-EXPRESSION. SELF-EXPRESSION RIGHTS MAY BE FURTHER RESTRICTED IN DIFFICULT WAR SITUATIONS.

<sup>107</sup> SEE PAGE 16.

<sup>108</sup> 1978. EVI IV. TV.

suppress free expression unreasonably. The UCMJ penalizes "disrespect toward a superior commissioned officer."<sup>109</sup> According to the Manual for Courts-Martial,<sup>110</sup> "[d]isrespectful behavior is that which detracts from the respect due to the authority and person of a superior commissioned officer."<sup>111</sup> This proscription could be interpreted to allow no room for any criticism, especially when "truth is no defense."<sup>112</sup> The Hungarian Criminal Code penalizes those "who raise discontent among soldiers against superiors, the command, or military order and discipline"<sup>113</sup>. The purpose is immaterial. Almost any critical expression communicated to other soldiers could be interpreted as an act of raising discontent. Further, the Service Regulations categorically forbid any criticism of the command,<sup>114</sup> although other regulations allow legal disputes questioning command decisions,<sup>115</sup> and a new Bill is going to give wide opportunities

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<sup>109</sup> ARTICLE 89

<sup>110</sup> EXEC. ORDER No. 12,960,60 FED. REG. 26,647 (1995), REPRINTED IN MANUAL FOR COURT-MARTIAL, UNITED STATES, APP. 25, AT A25-26 (1995 ED.) [HEREINAFTER MCM].

<sup>111</sup> PARA.13 (c) (3)

<sup>112</sup> *Id.*

<sup>113</sup> 357. PARA.

<sup>114</sup> *SUPRA* NOTE 18, 28. PONT.

<sup>115</sup> SEE 4/1993 (IV.25) HM R. DEFENSE MINISTER'S DECREE ON THE APPLICATION OF CERTAIN PROVISIONS OF THE LABOR CODE ON THE SERVICE RELATIONS OF PROFESSIONAL SOLDIERS. THIS DECREE WILL SOON BE REPLACED BY A STATUTE.

of criticism to military unions. Despite the existing restrictions, in practice in Hungary, criticism is not totally suppressed. On the contrary, soldiers' overtly critical opinions often appear publicly, including in the weekly of the Ministry of Defense, without incurring any adversary disciplinary or criminal action.

The military establishments of many countries traditionally have had a strong aversion toward collective human rights. These rights involve collective complaints and the rights of assembly and association as a means of military-related protests; they are often associated with disobedience and mutiny in the minds of many. Just as the distinction can be drawn between individual criticism and disobedience, the distinction should be drawn between collective rights and mutiny. Collective rights must be limited to self-expression that do not pressure or threaten and thus no way can obstruct military commanders' actions. Within that limit, however, collective rights should not be denied.

Lodging collective complaints with military authorities is forbidden both in the Hungarian and the American military.<sup>116</sup> This prohibition is unjustified in peacetime. It is a natural

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<sup>116</sup> FOR HUNGARY SEE THE SERVICE REGULATIONS, *SUPRA* NOTE 18, 841-842 PONT, FOR THE U.S. SEE ARTICLE 138. OF THE UCMJ, AND RESPECTIVE SERVICE REGULATIONS.

occurrence whatever the rules say that people with similar grievances talk about them and discuss possible solutions. If they decide to protest collectively, and their protest does not contain elements of insubordination or threat, their complaint does not create any more danger to the military than individual complaints do. On the contrary, collective complaints can be useful to commanders because they can get a real picture of the magnitude and seriousness of the problem. The Hungarian Constitutional Court ruled that the right to collective complaint in the military is not a constitutional requirement.<sup>117</sup> In the same resolution the Court also ruled that soldiers are entitled to the collective protection of their rights, i.e. entitled to form unions. The minority justices noted that the Court created a logical contradiction. In practice, the contradiction has been resolved by accepting collective complaints only from soldiers' spokesmen and unions.

Public demonstrations organized and primarily attended by soldiers to promote their demands may raise serious concerns. On the one hand, mass demonstrations have such a huge power or potential that they might reasonably be interpreted by military leaders as an unacceptable pressure on them. On the other hand, civilians may also be frightened by the mere fact of military demonstrations even if they are not specifically aimed at

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<sup>117</sup> *SUPRA* NOTE 19.

interfering in civilian politics.<sup>118</sup> Hungarian law is not clear on this issue. There is no definite ban on servicemembers' demonstrations, but a vague rule in the Service Regulations may be so interpreted.<sup>119</sup> Under that rule, soldiers can not attend demonstrations aimed at "the respect of superiors, military order, and discipline, or comrade spirit." Otherwise, they are free to attend demonstrations but only in plain clothes. Demonstrations on military premises can only be held with the prior approval of the commander of the installation.

The right of association encompasses military unions. In the United States there is a definite ban on every kind of union activity by soldiers.<sup>120</sup> In Hungary, however, as mentioned, the Constitutional Court opened the way in theory for the legitimate operation of unions in 1991, but it did not outline the legal framework for their activities or possible restrictions. The legislature has also failed to do so. A bill settling this issue is being debated by Parliament now. The bill strikes an adequate balance between competing demands. It vests military unions with classic union rights to initiate negotiations, submit petitions, perform individual and collective representation, and obtain information (except for military

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<sup>118</sup> DESPITE THE MENTIONED CONCERNS MILITARY DEMONSTRATIONS MAY WELL BE  
LAWFUL IN A STABLE DEMOCRACY, SUCH AS HOLLAND.

<sup>119</sup> SUPRA NOTE 18, 10. PONT.

<sup>120</sup> SEE THE MILITARY UNIONS ACT, 10 U.S.C. 976 (1995).

secrets), but it does not provide any right to obstruct or endanger a commander's ability to act. Consequently, the right to strike and suspensive veto<sup>121</sup> are not available. Legal disputes between unions and the military are decided by courts, as in any other case.

Learning the opinions and grievances of subordinates in a legally channeled form is an elementary interest of commanders, as well as the whole military and civilian leadership. Recognizing this, regulations create official channels of collective representation in the military in a number of European countries even where no unions exist or are allowed. If unions do exist, they can work parallel with the official collective complaint system and union activists may be spokesmen in that system if they are so elected. The rights of elected spokesmen are similar to the rights of unions as described by the Hungarian Bill. The spokesmen's system is especially useful for conscripts because they are unlikely to be able to form unions in most countries. The Hungarian Bill establishes this system only for conscripts because professional soldiers are expected to form their own unions.

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<sup>121</sup> HUNGARIAN LABOR LAWS AUTHORIZE TRADE UNIONS TO VETO CERTAIN SUPPOSEDLY UNLAWFUL MEASURES OF EMPLOYERS PROVIDED THAT THEY ARE TO AFFECT A NUMBER OF EMPLOYEES FIXED BY LAW. IN CASE OF VETO THE MEASURE CAN NOT BE EXECUTED UNTIL THE INTERESTED PARTIES HAVE SETTLED OR A COURT HAS DECIDED THE DISPUTE.

Assuring unconditional obedience to command is an eminent interest. Since disobedience may entail catastrophic consequences, soldiers must be conditioned to instinctive obedience throughout their service with a delicate system of punishments and rewards. Applying disciplinary and criminal punishments for disobedience is a rational method. Human rights restrictions, on the other hand, should not be primary means of assuring obedience. They may only serve as preventive measures and as such, should be applied cautiously. Individual and collective rights should be restricted only when they obviously and directly interfere with a commander's freedom to act. They do not need to be, however, and legitimately can not be totally denied in the interest of obedience because a delicate balancing can afford room for these rights without impairing military effectiveness.

#### 5. Maintaining discipline

Although very important, unconditional obedience is only one element of discipline. Besides obedience to command, soldiers must comply with the rules in general, and must not commit any disciplinary or criminal offenses. Military commanders are ultimately responsible for maintaining discipline in their units. They potentially have three functions in the enforcement of discipline: preventing offenses, discovering offenses, and punishing offenders. Focusing on issues related

to these functions, the following passages will discuss whether due process and privacy rights of soldiers should be curtailed, and if so to what extent, in the interest of maintaining discipline.

Alcohol, drugs, weapons or similar materials may be forbidden to soldiers on military installations for disciplinary reasons. To enforce these rules, searching the belongings of soldiers entering the installation, or searching incoming packages in the presence of the addressee are allowable. Belongings, and packages leaving the installation may also be searched in the presence of the owner in order to prevent larceny, and especially smuggling out weapons or dangerous substances.<sup>122</sup> Searching soldiers' dwelling places or their private closets on a military installation without probable cause, in order to prevent or disclose potential offenses, is a more intricate question. "Whether soldiers' expectation of privacy is 'reasonable' depends at least in part on whether society recognizes it as reasonable."<sup>123</sup> It would seem apparent that a reasonable expectation of privacy does not exist in barracks rooms where a number of conscripts or privates live together, while it does exist in a house on the military installation where a soldier lives alone or with his family. Where soldiers

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<sup>122</sup> THE CURRENT HUNGARIAN REGULATIONS CONTAIN THESE PROVISIONS, AND PROSPECTIVE LEGISLATION IS GOING TO MAINTAIN THEM.

<sup>123</sup> U.S. v. MCCARTHY, 38 MJ 398, 402 (C.M.A. 1993).

do not have a reasonable expectation of privacy, searches conducted for legitimate purposes do not impose a disproportionate burden on their privacy rights. The law must, however, provide that searches can not lead to unjustified harassment or violation of human dignity. In these circumstances, soldiers should be given proper legal protection.

Military commanders, duty officers or the military police may reasonably be given the right to confine soldiers temporarily in order to enforce good order and discipline or prevent breaches of the law in a military installation. Confinement may be necessary when a soldier commits a serious disciplinary or criminal offense the character of which demands the offender's immediate separation. For example, the confinement of a drunk or dazed soldier whose condition disturbs the order or imposes danger on his own or another's bodily integrity may be justified. As an extra guarantee, the consent of a doctor may be required in this case. The legitimate purpose of these kinds of confinement is to prevent direct danger or to bring the soldier to a legal authority competent to direct detention. Since, as discussed later, military commanders are not the appropriate legal authorities to direct a lengthy deprivation of liberty, or to impose such punishment, they can only be allowed to detain soldiers temporarily, for a period fixed in hours rather than in days.

Civilian lack of expertise on military matters, the commanders' special responsibility for maintaining discipline, and the urgent need to act in a timely and efficient manner are the usual justifications for vesting the military, either commanders themselves or special units under their influence, with the right to administration of justice including deprivation of liberty as a punishment. Due process rights and guarantees are regarded as obstructing factors according to this notion. Many of these guarantees, however, have been inserted gradually into the military disciplinary and justice systems of most countries, and the practice created by the European Court and the countries following it shows that they may be completely applied in the military.

The leading case on the deprivation of liberty in the military was Engel.<sup>124</sup> From Engel and subsequent cases including some non-military-related ones, it is clear that the European Court deems any case involving deprivation of liberty<sup>125</sup> as a

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<sup>124</sup> SUPRA NOTE 9.

<sup>125</sup> THE MEANING OF "DEPRIVATION OF LIBERTY" IN THE MILITARY CONTEXT WAS INTERPRETED IN ENGEL. THE TEST OF THE COURT WAS WHETHER THE FORM OF RESTRICTION APPLIED "CLEARLY DEVIATE[S] FROM THE NORMAL CONDITIONS OF LIFE WITHIN THE ARMED FORCES OF THE CONTRACTING STATE. IN ORDER TO ESTABLISH WHETHER THIS IS SO, ACCOUNT SHOULD BE TAKEN OF A WHOLE RANGE OF FACTORS SUCH AS THE NATURE, DURATION, EFFECTS AND MANNER OF EXECUTION OF THE PENALTY

punishment for an offense to be a criminal charge for which the person, "is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."<sup>126</sup> This applies to military as well as to any civilian proceedings. Although the word "tribunal" suggests any decision-making panel, the adjectives "independent" and "impartial" imply a judicial body, an interpretation confirmed by the Court's practice. When defining "criminal charge," the Court applies a substantive test; the name given the procedures does not matter. Disciplinary or administrative proceedings may qualify as "criminal charges". Even though the interpretation of an "independent and impartial tribunal" needs further explanation,<sup>127</sup> it is obvious that military commanders do not qualify as such tribunals, thus they do not have the right to impose deprivation of liberty as a punishment, or at least not

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OR MEASURE IN QUESTION." (SUPRA NOTE 9 PARA. 59.) THE COURT RULED, BASED ON THIS TEST, THAT WHEN A CONSCRIPT WAS FORBIDDEN TO LEAVE THE BARRACKS AS A PUNISHMENT IT DID NOT CONSTITUTE A DEPRIVATION OF LIBERTY, WHILE WHEN HE WAS PUT UNDER ARMED GUARD, IT DID. IT FOLLOWS THAT INsofar AS PROFESSIONAL SOLDIERS NORMALLY CAN LEAVE THEIR WORKPLACE WITHOUT PERMISSION, IN THEIR CASE A BAN ON LEAVING AFTER NORMAL DUTY HOURS AS A FORM OF PUNISHMENT WOULD CONSTITUTE A DEPRIVATION OF LIBERTY IN ITSELF. THIS MAY EVEN BE THE CASE WHEN CONSCRIPTS ARE CONCERNED TODAY BECAUSE THEY CAN LEAVE THE BARRACKS AS A RULE AFTER DUTY HOURS, FOR EXAMPLE IN HOLLAND.

<sup>126</sup> ARTICLE 6 OF THE EUROPEAN CONVENTION

<sup>127</sup> SEE PAGE 63.

without providing the right for the offender to appeal with suspensive effect<sup>128</sup> to an independent tribunal. Commanders, may at most, apply short temporary confinement, and only for the reasons strictly defined by Article 5(1) (b) (c) and (e) of the European Convention.<sup>129</sup> The law in Hungary completely follows this standard<sup>130</sup>.

The American UCMJ fails to meet the European standards. Under Art. 15., commanders, under certain circumstances, in the form of "non-judicial punishment," may impose "correctional

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<sup>128</sup> A SUSPENSIVE APPEAL MEANS THAT THE PUNISHMENT CAN NOT BE EXECUTED UNTIL IT HAVE BEEN FINALLY APPROVED BY AN INDEPENDENT TRIBUNAL.

<sup>129</sup> " (B) THE LAWFUL ARREST OR DETENTION OF A PERSON FOR NON-COMPLIANCE WITH THE LAWFUL ORDER OF A COURT 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; "

" (E) THE LAWFUL DETENTION OF PERSONS FOR THE PREVENTION OF THE SPREADING OF INFECTIOUS DISEASES, PERSONS OF UNSOUND MIND, ALCOHOLICS OR DRUG ADDICTS OR VAGRANTS. "

<sup>130</sup> COMMANDERS CAN IMPOSE DISCIPLINARY CONFINEMENT UP TO 21 DAYS ON CONSCRIPTS ONLY, BUT AS A RESULT OF A LAW ADOPTED IN 1994, IN CASE OF AN APPEAL, THE CONFINEMENT CAN NOT BE EXECUTED UNTIL THE COMPETENT COURT HAS UPHELD IT (FULLY OR PARTLY) .

custody" for not more than 30 consecutive days. "However, except in the case of a member attached to or embarked in a vessel, punishment may not be imposed upon any member of the armed forces . . . if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment." In other words, the servicember either resigns his right to trial and appeal to a supposedly independent tribunal before knowing whether the sentence includes confinement, or he must subject himself to court-martial procedures, as a result of which, if he is convicted, his punishment may be more severe. A similar option is given when the accused is tried by a summary court-martial consisting of one commissioned officer. The summary court-martial may impose confinement again, although it is not an independent tribunal either, and the right to counsel is not provided in its proceedings. The accused may refuse a summary court-martial and risk trial by a special or a general court-martial, which provides more due process but subjects him to potentially more severe punishment. The possible result of these provisions is that servicemembers may be sentenced to confinement without adequate due process. In contrast to decisions of the European Court, referring to the uniqueness of the military, the US Supreme Court ruled in Middendorf<sup>131</sup> that summary court-martial is not a criminal trial, and not an adversary proceeding. The Court also noted non-judicial punishment with approval. The shortcomings of these proceedings

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<sup>131</sup> SUPRA NOTE 70.

are completely offset, according to the Court, by the opportunity to choose a trial by special or general court-martial.

Finally, it is also questionable whether the American special, and general courts-martial qualify as an independent and impartial tribunal in the European sense. In Hungary military judges, similarly to any other judge, are appointed for this position by the President, and can only be removed under exceptional circumstances for misconduct described by law. They have no contact with military officials, their pay is fixed by law, and they work within the civilian court system. The only link to the military is that military judges are promoted by the Commander in Chief of the Defense Forces. Since promotion is automatic and does not influence pay, this link is purely formal.<sup>132</sup> Appeals against military tribunals' sentences are judged by the Supreme Court, which consists of civilian judges entirely. American military judges, on the other hand, are more military officers than judges. They are not appointed as judges; instead, they are assigned to this position, as with any other one, by the Judge Advocate General<sup>133</sup> of their service. They do not have either a life-tenure or a fixed term but may be instead removed at any time. They are evaluated by subordinates

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<sup>132</sup> FOR THE LEGAL STATUS OF HUNGARIAN MILITARY JUDGES SEE 1972. EVI IV. TV. (STATUTE No 4, 1972 ON THE COURTS.)

<sup>133</sup> HEREINAFTER TJAG

of TJAG, and their career depends on those evaluations. Then, too, courts-martial are convened by commanders and the members of the court are selected by them. Commanders, as persons responsible for the discipline in their unit, in many cases are directly interested in the outcome of the trial. Although the UCMJ forbids and penalizes any command influence on military judges and court members,<sup>134</sup> the mere fact that court members are usually subordinates of the convening commander is enough to raise serious concerns about the entire system.

The European Court has not yet examined a military justice system similar to the American one. Recently, however, a number challenges have been lodged to the British military justice system,<sup>135</sup> which is very similar to the American one. The European Court has extensive case law interpreting the concept of an independent and impartial tribunal. The Court applies a case by case approach, but common elements of a test may be

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<sup>134</sup> ARTS. 37 AND 98.

<sup>135</sup> "A DOSSIER OF 10 TEST CASES" CHALLENGING THE FAIRNESS OF THE BRITISH COURT-MARTIAL SYSTEM WAS SUBMITTED TO THE EUROPEAN COMMISSION OF HUMAN RIGHTS ACCORDING TO THE GUARDIAN (JANUARY 17, 1995). THE REUTER NEWS SERVICE REPORTED THAT THE COMMISSION WOULD HEAR A COMPLAINT OF A BRITISH SOLDIER WHO THREATENED TO KILL COLLEAGUES WHILE ON DUTY. ACCORDING TO HIM, "THOSE WHO SENTENCED HIM WERE NEITHER INDEPENDENT NOR IMPARTIAL." (FEBRUARY 23, 1995) [LEXIS, EUROPE LIBRARY, UK FILE]

discerned. Using the case Sramek v Austria<sup>136</sup> as a model, an independent and impartial tribunal must: a) have limited possibilities for the removal of members; b) contain no member who is subordinate in duties or service organization to a party in the case; and c) appear just and fair to an independent observer. The British-American military justice system would appear to fail this test, even if the U.S. Supreme Court found the American system perfectly constitutional. Although the U.S. Supreme Court admitted that "a fixed-term of office is a traditional component of the Anglo-American civilian judicial system"<sup>137</sup> it found this rule does not apply in the military context. Using its totality approach, the Court invoked arts. 37 and 98 of the UCMJ, posited that TJAG is not interested in the outcome of a particular court-martial and noted that "[t]he entire system, finally, is overseen by the Court of Military Appeals, which is composed entirely of civilian judges who serve for fixed terms of 15 years."<sup>138</sup> While the Supreme Court might theoretically be correct that oversight by a civilian appellate court could assure adequate protection to the accused in the American military system, that protection would be sufficient only if in case of an appeal a military sentence could not be executed until it had been affirmed by the civilian court. Short of that a military accused is deprived of liberty without full

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<sup>136</sup> (A/84): (1985) 7 EHRR 351.

<sup>137</sup> WEISS V. UNITED STATES, 114 S. Ct. 752, 761 (1994).

<sup>138</sup> *Id* AT 762.

constitutional due process.

The proper role of military commanders in maintaining discipline is to prevent and discover crimes rather than to punish them: administration of justice belongs to independent judges in a modern democracy. The accused must have access to the judiciary at least before the execution of a sentence depriving him of his liberty. Within these limits, there are a variety of appropriate legal techniques and justice systems capable of assuring full due process rights in the military without diminishing military effectiveness. Some marginal exceptions can not be ruled out, however.<sup>139</sup>

#### 6. Human factors, motivation

Wars are fought by men rather than by guns, equipment, or machinery. The decisive importance of the human factor has been long recognized by military leaders. Soldiers must be strongly motivated in order to be effective combatants. Motivation emanates from various sources, which can include the following three elements: a) identification with the nation, with the

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<sup>139</sup> WHERE CIRCUMSTANCES DICTATE A DIFFERENT BALANCE TO ASSURE MILITARY EFFECTIVENESS SPECIAL EXCEPTIONS COULD BE RECOGNIZED. ON BOARD SHIP, FOR EXAMPLE, A CAPTAIN MAY REASONABLY HAVE EXTRA RIGHTS OF CONFINEMENT INFLICTED WITHOUT PROMPT JUDICIAL REVIEW. FURTHER RESTRICTIONS COULD BE POSSIBLE DURING WARTIME.

government as the nation's representative, and with the democratic political system; b) identification with the institution of the military; c) identification with commanders and fellow soldiers<sup>140</sup>.

Identification with the nation, its fundamental institutions, and values is the most general motivating factor. While it may not, in itself, be enough to motivate, it is an indispensable element. This sort of identification means that soldiers believe in the basic values of independence, freedom and democracy and think these values worth being defended, even at the cost of serious personal risk. Ideally, the soldier should identify with the cause of the mission in which he is engaged, but if the ideal is not possible, he must at least believe in the general political decision-making process of his country. A democratic political structure in and of itself can produce some level of this sort of motivation.

Identification with the institution depends on the purposes, values, methods, and everyday practices of the military, and on the extent to which the individual can reconcile institutional purposes with his own aims, ideas and

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<sup>140</sup> "IDENTIFICATION" REFERS TO A THEORETICAL OBJECTIVE RATHER THAN THE ACTUAL SITUATION. WHILE INDIVIDUALS MAY NOT ACTUALLY "IDENTIFY THEMSELVES" IN THE NARROW DEFINITIONAL SENSE WITH CAUSES, INSTITUTIONS, OR OTHER PEOPLE, A HIGH LEVEL OF ACCEPTANCE IS NECESSARY TO PROVIDE SUFFICIENT MOTIVATION.

aspirations. Human rights are a major element of this equation. Finally, a soldier meets not the military, as such, but individual persons, commanders, and fellows soldiers every day. He judges the whole institution largely by them. Ideally, these persons should be congenial, but they must at least be acceptable to the individual soldier. This acceptability is crucial in light of the fact that soldiers often make sacrifices in a combat situation primarily for the sake of people around them, rather than for abstract notions of patriotism.

For professional soldiers, financial incentives and other advantages may be a crucial motivation in joining the military. Since the military profession is in many ways more demanding than civilian professions, it is logical and perhaps necessary to offset extra hardships by extra incentives. Otherwise, the military could face recruitment problems in both quality and quantity. The extra advantages should, however, be proportionate to extra disadvantages; professional soldiers should not be given privileges that appear unjustified to civilians. Human rights restrictions may be one of the extra disadvantages but human rights can not be restricted just because professional soldiers have some other kinds of advantages.

Providing individual freedom helps to create inspiring and motivating human relations in every workplace, including the

military. Freedom in a workplace involves but is not limited to respect for human rights; it also means that subordinates are given a certain level of individual decision-making competence, the potential to contribute to the decision-making processes in the organization and the opportunity to realize their own goals and aspirations. In this way, ideally, both organizational and individual goals will be substantially realized and motivated individuals will substantially identify with the organization. Within some natural limitations, this same pattern works in the military as well.

Providing individual freedom is not only necessary but also possible in the military of a modern democracy where citizens, including soldiers, are well aware of the basic notions of democracy. With social and military-technical developments, soldiers' service and life are quite different now when compared to the turn of the century, for example.<sup>141</sup> Soldiers today usually live together with civilians, have many social contacts

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<sup>141</sup> ZILLMANN AND IMWINKELRIED WRITE, "THE 'SOCIETY APART' WAS A VALID DESCRIPTION OF THE SMALL, 19TH CENTURY REGULAR ARMY FIGHTING WITH INDIANS ON THE FRONTIER. THE DESCRIPTION WAS STILL LARGELY VALID WHEN FORCES STOOD GARRISON OR SHIPBOARD DUTY IN THE 1930'S. BUT BY 1974 THE MILITARY HAD BECOME A MULTIMILLION-PERSON EMPLOYER INVOLVED IN ALMOST EVERY ASPECT OF AMERICAN LIFE." CONSTITUTIONAL RIGHTS AND MILITARY NECESSITY: REFLECTIONS ON THE SOCIETY APART, 51 NOTRE DAME LAW 396, 400 (1976).

and a way of life similar to that of civilians. Many are highly educated and an increasing number have civilian higher or graduate education as well. With their military or civilian education, many professional soldiers have knowledge or skill marketable in the civilian community. Thus, serving in the military is not necessarily a life time commitment.<sup>142</sup> Accordingly, the U.S. Supreme Court's "separate society" concept and observations<sup>143</sup> leading to it do not reflect the realities of today's American armed services and are unfit for drawing appropriate conclusions. Reality suggests that soldiers generally are to be treated similarly to civilian employees, that is, they are to be motivated rather than subjugated. On the other hand, of course, military specialities may dictate deviation from this general rule, and even motivation itself entails human rights restrictions in the interest of creating necessary uniformity.

Uniformity creates and reinforces cohesion among soldiers, and, as such, it is a major motivating factor. Uniformity means first of all wearing uniforms. It is not an accident that armed services all over the world have uniforms. When wearing a uniform, a servicemember distinguishes himself from society to some extent and identifies himself with his service. This

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<sup>142</sup> FOR A DETAILED ANALYSIS OF MILITARY PROFESSIONALISM AT PRESENT SEE SARKESIAN, *SUPRA* NOTE 79.

<sup>143</sup> SEE SOME TYPICAL OBSERVATIONS ON PAGES 15-16.

simple act in itself helps him behave in a way expected of a member of an armed service. Since the purpose of wearing uniforms is the expression of necessary uniformity, no substantial individual deviation should be allowed. Besides uniform regulations, most militaries have other grooming standards on hair, beard, and moustache. While these restrictions may not be unconditionally necessary, they do serve as an expression of uniformity and are certainly appropriate for professional soldiers<sup>144</sup>.

After uniformity of appearance, uniformity of thinking and behavior appears to be the next logical step. One analysts of the practice of the European Court's freedom of thought and conscience cases divides this right into an internal and an external element.<sup>145</sup> Thoughts, ideas, opinions, and beliefs of the individual belong to the internal element, while acts and behaviors emanating from them belong to the external element.

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<sup>144</sup> EXPERIENCE SHOWS THAT GROOMING REGULATIONS CAUSE MORE TENSIONS THAN POSITIVE RESULTS IN THE CASE OF CONSCRIPTS. SINCE THEY SERVE INVOLUNTARILY, ONLY A LOWER LEVEL OF IDENTIFICATION CAN BE REASONABLY EXPECTED OF THEM, WHICH MAY LEAD TO THE CONCLUSION THAT CHANGING THEIR HAIR, BEARD OR MOUSTACHE NEED NOT BE REQUIRED. THIS REQUIREMENT WOULD BE TOTALLY UNJUSTIFIED IN THE CASE OF CONSCRIPT RESERVISTS CALLED IN FOR A LIMITED PERIOD OF TIME AFTER THE PERFORMANCE OF THEIR BASIC SERVICE.

<sup>145</sup> VIKTOR MAVI, AZ EUROPA TANACS ES AZ EMBERI JOGOK, 196-197 (1993) [IN HUNGARIAN].

The internal element of conscientious freedom can not be restricted; the state can not attempt to learn, to influence, or to change the thoughts and beliefs of the individual, even if they be destructive or clearly unacceptable to the majority of society. The military should not impose any official value system or ideology on soldiers and can not apply any sort of indoctrination. It can, however, demand conduct which may not be required by law in civilian life and which may go against individual values and beliefs.<sup>146</sup> The legitimacy of these requirements should be tested by the standard to be applied to human rights restrictions: necessity and reasonableness.

American military criminal law allows military authorities to impose extensive behavioral requirements. UCMJ provisions on sodomy, or conduct unbecoming of an officer and a gentleman, and the general article,<sup>147</sup> as well as MCM provisions based on the general article, such as adultery, wrongful cohabitation, disloyal statements, disorderly conduct and drunkenness, fraternization, indecent language, indecent acts with another<sup>148</sup> can be mentioned as examples. In Hungary, although the Service

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<sup>146</sup> SINCE MOST REQUIREMENTS CONCERNING PRIVATE BEHAVIOR RATIONALLY CAN ONLY BE PROSCRIBED FOR PROFESSIONAL SOLDIERS, ONLY THIS CIRCLE IS EXAMINED HERE.

<sup>147</sup> ARTICLES 125, 133 AND 134; SEE ARTICLES 133 AND 134, SUPRA NOTES 48, 49.

<sup>148</sup> PARAS. 62, 69, 72, 73, 83, 89 AND 90.

Regulations contain a number of usually vaguely worded behavioral or moral requirements,<sup>149</sup> the Criminal Code does not attach criminal consequences to them. The Code usually penalizes wrongful consequences rather than wrongful behaviors. Alcoholism and drug addiction, depending on the circumstances, may qualify as disciplinary offenses or may be regarded as medical problems only. Homosexual behavior, unless the soldier harasses others, is exclusively a medical issue, and likely to lead to a separation for medical reasons. Other elements of family life or sexual behavior are deemed exclusively private, and do not incur any adversarial legal action.

The test for the legitimacy of conduct requirements or restrictions should be whether the conduct in question obstructs the soldier in the performance of his duties or in his cooperation with others in the military. Using this test, alcoholism and drug addiction qualify as legitimate prohibitions. They may be treated as medical, disciplinary, or criminal matters depending on the circumstances and the legal system. Even though perhaps lawful in most democratic countries, homosexual behavior is usually not acceptable to the majority of society in many places. While civilians, contrary to their reservations or prejudices towards homosexuals, may well be required to work together with them, in the military, overt homosexual behavior may reasonably be deemed a major disturbing factor, since the

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<sup>149</sup> SUPRA NOTE 18, 50-53 PONT.

military differs from other workplaces.

Soldiers even in peaceful situations, but especially during deployments are, or may be required to live in close proximity, and may be separated from their relatives and civilians for even a long time. Insofar as most soldiers are likely to feel uncomfortable in the presence of homosexuals in certain circumstances this behavior could obstruct unit cohesion, or cause it to deteriorate. Limitations on it in the interest of maintaining effectiveness, protecting other individuals' privacy and preventing the lowering of morals are thus legitimate, at least as long as most military members strongly oppose homosexuality. If society accepts and tolerates homosexual behavior, this restriction may become unnecessary and thus lose its legitimacy.<sup>150</sup> As for the other elements of questionable sexual or moral behavior, such as adultery or "wrongful" cohabitation, although a number of people may find them reprehensible, in light of modern society's more tolerant attitude, they are unlikely to affect unit cohesion.

#### 7. Social support

Military and civilian society are inseparably intertwined. While the military provides the essential service of national

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<sup>150</sup> IN HOLLAND, FOR EXAMPLE, PERSONS WITH OVERT HOMOSEXUAL BEHAVIOR ARE ALLOWED TO JOIN THE MILITARY.

defense for society and carries out a number of other useful social functions<sup>151</sup> even in peace-time, it can not dispense with constant social support for any element of its operation. In order to gain or preserve this support the military must be distinct from society to some extent, but must not be isolated with a special norm system alien to a democracy. The military must follow a democratic value and norm-system, which means affording human rights as a rule with restrictions imposed as an exception only when it is necessary. While the social perception of the military may also necessitate some restrictions in the interests of maintaining credibility and social support, the degree of the necessary restrictions will depend on the traditions, political culture, and other circumstances of a country. Some general principles should, however, apply.

First, just as some conduct requirements may be prescribed so that soldiers can believe that they belong together and can trust each other, some conduct standards may be necessary for the public as well to believe that soldiers are capable of defending the nation and ready to sacrifice themselves if the occasion arises. While there is no guarantee that well-behaved, regulation-abiding soldiers will perform perfectly in the

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<sup>151</sup> USEFUL FUNCTIONS INVOLVE, FOR EXAMPLE, CREATING JOBS, ADVANCING SCIENCE AND TECHNOLOGY, AND PROVIDING SUPPORT TO CIVILIAN SOCIETY IN A RANGE OF EXIGENT SITUATIONS OR FOR VARIOUS COMMUNITY EVENTS.

battlefield, the idea of requiring soldiers to abide by some standards of conduct is not irrational. Appearances often can not be separated from reality, and even if some elements of conduct may turn out to be mere appearances, having powerful social impact, they still may be necessary to public support. Conduct not tolerated, or at least not well received by the public in a professional soldier is similar to the behaviors discussed in the context of motivation and cohesion of soldiers. Alcoholism, drug addiction, scandalous behavior, homosexuality, and an immoral way of life may be conduct disfavoured by society. It is to be noted, however, that the legitimacy of some conduct requirements of this kind is waning in many countries as society is becoming increasingly open and tolerant. Variations among individual countries can reasonably be large in this area.

Another possible conduct restriction affects the political activities of soldiers and the self-expression rights related to them. While the degree of restriction may vary from country to country, in order to maintain the public belief in civilian control, certain blanket restrictions seem rational: Professional soldiers<sup>152</sup> can not in public a) question the

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<sup>152</sup> FURTHER DIFFERENTIATION IS POSSIBLE EVEN WITHIN THIS GROUP BASED ON RANK, STATUS OR POSITION. THUS, SOME RESTRICTIONS MAY BE LIMITED TO COMMISSIONED OFFICERS OR CERTAIN SENIOR COMMANDERS ONLY SINCE THEIR INFLUENCE WITHIN AND OUTSIDE THE MILITARY IS MORE SIGNIFICANT THAN THAT OF OTHERS.

fundamental principles of the democratic political structure; b) criticize the general policy of the legislative and the executive; c) initiate the replacement of the executive or any civilian directing body or authority. These restrictions should apply to any public or official speech, any public or official writing, and to the right of assembly such that soldiers can not organize public demonstrations with the prohibited agenda. They should, however, be allowed to attend even these kinds of demonstrations in plain clothes. While these restrictions might also be applied to the right of association to the effect that professional soldiers can not form or join organizations whose purpose or activities involve the prohibited issues, that would mean that they can not be members of political parties, which is unnecessarily restrictive. It is enough to forbid the occupying of a certain level of positions in a party and making public statements or issuing propaganda on behalf of a party. This arrangement strikes a proper balance between two basic interests: it maintains the appearance of the loyalty of professional soldiers towards the civilian leadership by keeping them out of direct political issues on the one hand, but allows them to take part in public life contributing with their knowledge and expertise to the public discussion of military issues.

Rules fall behind this ideal picture both in Hungary and the United States. In Hungary, a Constitutional amendment in

1993<sup>153</sup> prohibited professional soldiers from being members of a political party and pursuing political activities in general. The term "political activity" could involve extensive human rights denying professional soldiers the rights of assembly and association, freedom of expression, and even of the suffrage. Since laws and regulations have not changed as a result of the constitutional amendment, it is unclear now, at least in theory, what is meant by the prohibition of political activities. In practice, nothing has changed. Although the meaning of the prohibition of party membership is clear, this prohibition can not be enforced unless the soldier admits being a member. A strictly protected personal data under law, party affiliation can not be revealed by parties to the inquiry of military authorities, thus, admission by the soldier is the only way to prove his membership.<sup>154</sup> In America penalizing the use of contemptuous words against civilian officials is of major

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<sup>153</sup> 1993. EVI CVII. TV.

<sup>154</sup> A NEW CONSTITUTION IS BEING PREPARED NOW IN HUNGARY. WHILE THE PROHIBITION ON PARTY MEMBERSHIP IS BEING WIDELY DISPUTED, A CONSENSUS SEEMS TO HAVE FORMED AMONG EXPERTS THAT THE PROHIBITION OF POLITICAL ACTIVITIES WOULD BE UNNECESSARY IN THE NEW CONSTITUTION.

concern.<sup>155</sup>

## 8. Conclusion

The purpose of this paper has been to give an analytical framework for the treatment of human rights in the military of a modern democracy, with particular attention to the degree of possible restriction. Although not all elements of this subject have been addressed, expanding on this framework, additional military-related human rights issues could be analyzed with the same methodology. Logic demonstrates that when weighing the arguments for and against the application of human rights to the military the scale tips in favour of pro-human rights views. Although a reasonable distinction from the civilian standard is inevitable and entails some restrictions, the rule should be full application of human rights with restrictions imposed as

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<sup>155</sup> UNDER ARTICLE 88 OF THE UCMJ, "ANY COMMISSIONED OFFICER WHO USES CONTEMPTUOUS WORDS AGAINST THE PRESIDENT, THE VICE PRESIDENT, CONGRESS, THE SECRETARY OF DEFENSE, THE SECRETARY OF A MILITARY DEPARTMENT, THE SECRETARY OF TRANSPORTATION, OR THE GOVERNOR OR LEGISLATURE OF ANY STATE, TERRITORY, COMMONWEALTH, OR POSSESSION IN WHICH HE IS ON DUTY OR PRESENT SHALL BE PUNISHED AS A COURT-MARTIAL MAY DIRECT." ACCORDING TO RICHARD W. ALDRICH, "WHILE THERE MAY BE JUSTIFICATION FOR CURTAILING THE RIGHTS OF MILITARY MEMBERS IN SOME AREAS, THE EXTENT TO WHICH FREE SPEECH RIGHTS ARE IMPINGED UPON BY ARTICLE 88 IS UNWARRANTED." SUPRA NOTE 85 AT 1219.

exceptions and only after a careful consideration. While the military should not be a place for social experimentation with unusual ideas and practices, it would be equally dangerous for the military to experiment to see how much deviation from the democratic value system of society, and, consequently, how much isolation is possible, and for how long time.