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**POSITION PAPER**

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THERE FOLLOWS THE POSITION ADOPTED BY THE CONFERENCE OF EUROPEAN CHURCHES (CEC) ON THE MEETING REPORT OF THE MEETING OF THE DH-DEV GROUP ON HUMAN RIGHTS OF MEMBERS OF THE ARMED FORCES - COMMITTEE OF EXPERTS FOR THE DEVELOPMENT OF HUMAN RIGHTS (DH-DEV) ON 3<sup>RD</sup> AND 4<sup>TH</sup> DECEMBER 2007, AND ON THE PAPERS PRESENTED AT THAT MEETING (PRELIMINARY ELEMENTS FOR A CM RECOMMENDATION AND OVERVIEW OF RELEVANT CASE-LAW FROM THE EUROPEAN COURT OF HUMAN RIGHTS ON MEMBERS OF THE ARMED FORCES).

First of all the Conference of European Churches expresses its gratitude at having been given the opportunity to attend the Meetings of the DH-DEV Group on Human Rights of members of the Armed Forces as an observer, and to be able to take position on the results of the meeting in writing. The Conference of European Churches rates highly this work done by the Council of Europe and the working parties it has set up on further developing human rights and basic freedoms including fundamental social rights, and also welcomes the fact that they are tackling human rights issues specifically relating to members of the armed forces – a group that should not be underestimated.

The Conference of European Churches ventures to add the following comments to the results of the meeting of the DH-DEV Group on Human Rights of Members of the Armed Forces held on 3-4 December 2007 – and more especially on the Revised Preliminary elements for a Recommendation to the Committee of Ministers of Member States on human rights of members of the armed forces (Appendix III of the Meeting Report).

1. In the European Convention protecting Human Rights and basic freedoms (ECHR) and its additional protocols, the armed forces are only mentioned as such in article 4

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para 3 lit.b and article 11 para 2 ECHR and on the point of restriction or possibly admissible encroachment on fundamental rights, or else in the definition that forced labour and compulsory duties do not constitute military service as such. Other than that there are no indications in the ECHR and its additional protocols which suggest any special limitations or possible circumstances for encroachments in matters of fundamental and human rights for members of the armed forces. Human Rights and fundamental freedoms – including basic social rights – are therefore applicable to members of the Armed Forces.

That having been said, there is article 15 of the ECHR which provides a waiver of the obligations for member states under the ECHR and therefore waiver of the Fundamental and Human Rights under the particular circumstances mentioned there – and this is strongly linked to the armed forces and their family members – however such a waiver of the ECHR and its additional protocols is only possible in the case of war or another public state of emergency which threatens the very life of the nation. In such cases as these, the armed forces are always actively involved – likewise in cases of major catastrophes to provide emergency relief. Whilst in the instance of some other public state of emergency, we have a judgement of the European Court of Human Rights – partly in relation to the quasi-civil war situation in Northern Ireland – (cf the cases of *Lawless – Ireland* 1.7.1961, *Ireland vs United Kingdom* 18.1.1978, *Brannigan and McBride vs United Kingdom* 25.5.1993, but also relative to Turkey – *Demir i.a. vs Turkey* 23.10.1998, *Askey vs Turkey* 18.12.1996), there is no case law precedent in the European Convention of Human Rights relative to the concept of war. This latter phenomenon is not without importance for members of the armed forces and the possibilities cited in relation to Article 15 ECHR for member states, but according to the wording of Article 15 ECHR in cases of waiver for fundamental rights – apart from those cited in the Article 15 para 2 ECHR – it would be technically justifiable to differentiate between members of the armed forces and the general population in times of war.

Thus it would also be justified – at least in the context of the present recommendations – to pick up this line of thought as well. Ultimately the concept of “war” in common law terminology remained uncontested right to the end of World War II – a war being understood as a quarrel between two or more states leading in the minds of those involved to a state of war. This classical definition was however widened in the four so-called Geneva Conventions of 1949 (the Geneva Convention for treatment of prisoners of war, Geneva Convention for protection of civil population in times of war, and so on) when the previously cited common law concept of “war” was extended to cover a de facto state of war, when besides the war as declared the four previously mentioned Geneva Conventions of 1949 also concede there is a further armed conflict or “case in point” insofar as armed conflicts can also to some extent be considered as war situations even if one of the partners in the conflict does not admit to being in a state of war. In the meantime national wars of liberation have also been extended in a protocol to fall into the field of application of war and humanitarian rights under the broad heading of war within international law. The doctrine of International Law also recognises the application of War and Humanitarian Rights under international law for peace-making operations under the mandate of the Security Council of the United Nations – but not in the cases of so-called peace-keeping operations where aggressive intervention by international troops is not on the cards as a matter of principle.

These illustrations show that while international law after World War II – and more especially after 1950 – was in the process of modifying the concept of war – and the so-called four Geneva Conventions of 1949 mentioned earlier were essentially signed even before the

execution of the ECHR in 1950, only later did it become effective in terms of law and ratified as such. So if one refers back to International Law to clarify the concept of war in the sense of Article 15 of the ECHR – which is right in principle given the status of the ECHR in International Law – one could posit a considerably wider margin for potentially waiving provisions of the ECHR and its additional protocol under today's broad definition of what concretely constitutes a war than what was conceivable in 1950 when the ECHR was concluded. It would therefore seem appropriate to reflect on this question of the definition of what is a war. One could point out for example after all that there was talk in some countries after the terrorist attacks of 11<sup>th</sup> September 2001 in some states of a “war against terror” – and here the concept of what constitutes a war is being extended in a totally different direction in the way states are talking (comparison can also be made here in this respect with the suspension of the United Kingdom of Great Britain and Northern Ireland declared, and subsequently retracted, from Article 15 ECHR on 16 March 2005). It would therefore be pertinent to draw the member states' attention when making recommendations to the Member States that the concept of war in the sense meant in Article 15 of the ECHR is to be understood at its most limiting and narrow, in a classical sense, as was the case right up to the end of World War II particularly as the other element in point of “another public state of emergency” also exists.

Quite apart from these considerations however the Conference of European Churches also believes that an entirely different direction should be considered and reflected on in relation to Article 15 of the ECHR namely whether Article 15 of the ECHR should be completely altered by addition of a new protocol. In article 52 of the Charta of Fundamental Rights of the European Union it is in fact laid down that any restriction on exercising the rights and freedoms recognised in the EU Charta of Fundamental Rights must be covered by law and must respect the essential context those rights and freedoms enshrine. Within the basic principle of proportionality limitations can only be undertaken if they are necessary and genuinely meet purposes that serve the common good as recognised by the Union or what is required for protecting the rights and freedoms of others. Article 54 of the EU Charta of Fundamental Rights also includes a clause relative to abuse. The EU Charta of Fundamental Rights therefore only provides for general limitations and possible encroachments of fundamental rights (including basic social rights) – this under a general clause which can doubtless be further widened in cases of national emergency and war according to the underlying principle of relative moderation and the requirements to protect the rights and freedoms and others and the goals of the European Union. It would therefore be pertinent to think along these lines. In passing, one might also mention that a number of agreements in international law list fundamental rights occurring under states of emergency in much greater number than those under article 15 para 2 of the ECHR. In this respect reference can be made to article 4, para 2 of the International Pact on citizens' and political rights of 16 December 1996 (UN Human Rights Pact II).

2. Human Rights and Basic Freedoms in the sense of both the ECHR and the European Social Charta – and fortunately as clearly retained in the prospective recommendations of the Committee of Ministers to the Member States – apply to all members of the armed forces although encroachments into fundamental and human rights are possible where the Fundamental and Human Rights of members of the armed forces are subject to restrictions. Apart from the special case of article 15 of the ECHR, special regulations for members of the armed forces occur only in article 4 and article 11 of the ECHR. The general recommendations the Committee of Ministers is contemplating making to the member states of the Council of Europe

concerning the actual application of the Fundamental Rights of the ECHR and the Social Charta for members of the armed forces in the member states can really only centre on also laying down what conditions could arise where encroachments or even restrictions of fundamental rights might occur or what form these could possibly take in the particular case of members of the armed forces given special military requirements (military hierarchy, deployment etc). In this respect the view of the Conference of European Churches would however plea for particular distinctions to be drawn among members of the armed forces:

In a good number of member states of the Council of Europe, national service is compulsory (eg Bulgaria, Denmark, Germany, Estonia, Finland, Austria, Russia, Switzerland); other member states of the Council of Europe only have professional armies (eg Belgium, France, Italy, Ireland, the Netherlands, the United Kingdom of Great Britain and Northern Ireland). When considering the question as to whether it is admissible to waive fundamental and human rights on the basis of the ECHR and the Social Charta in accordance with the provisions set in either, it makes a difference in the view of the Conference of European Churches in normal times (meaning not in the case of a war or any other interventions during armed struggles such as disaster relief), whether the citizen concerned is discharging ordinary military service or has chosen of his or her own free will to become a soldier. If someone voluntarily chooses a career as a soldier, he or she is consciously accepting the possibility that there may be all kinds of limitations to his or her rights for so-called military reasons – especially in cases of armed intervention but also in other military operations, exercises etc, simply by the fact of having joined an army, and he or she is compensated accordingly moreover. It is a different matter for those citizens who have to perform general national service, who have not opted to join the armed forces and have a totally different civil career in view thereafter, and so who cannot just without more ado, in normal circumstances, be subjected to limitations of their fundamental and Human Rights of whatever degree, in the course of this type of service for the collectivity. On this score it must also not be overlooked that people performing their national service where this is obligatory, should not normally be any less well treated from the standpoint of their fundamental or Human Rights than people who are doing alternative or civil service in place of military service (the latter are not for example mentioned in Article 11 para 2 ECHR). In this respect therefore the Conference of European Churches takes the view that for a wide variety of Fundamental and Human Rights at all events, further thought should be given to whether special recommendations might not be made to the member states in a number of areas for members of the armed forces who are performing standard national service and in other instances for members of professional armies.

### 3. Re- Article 5 ECHR (recommendations):

Against margin note 30 on the recommendations in respect of the Meeting Report of 3-4 December 2007 reference is felicitously made to the fundamental decision of the European Court for Human Rights on 8 July 1976 in the affair of Engel et al vs the Netherlands – this being in relation to the issue of deprivation of freedom as a punishment in the context of military disciplinary measures. In this case of Engel et al vs the Netherlands it is basically a question of lenient, moderate and close confinement – whereby for the European Court of Human Rights in the case of this decision the lenient and moderate states of confinement do not fall under the cover of protection afforded by article 5 ECHR – contrary to the Commission of Human Rights at the time. Close confinement – being locked in a cell during the full period of the disciplinary measure – was deemed to constitute deprivation of freedom in the sense of Article 5 of the ECHR.

In this connection however it should be pointed out that in this case of Engel et al vs the Netherlands, the three types of confinement mentioned as being generally used in most armies (where there is compulsory military service) could be supplemented by a fourth type which at least from the point of view of the Conference of European Churches could be rated as a deprivation of freedom in the sense of Article 5 of the ECHR:

In many member states a disciplinary measure in the form of confinement is meted out in such a manner as a disciplinary punishment that the soldier has to discharge his service as usual (this applies particularly with general national service) but immediately after this time of service is confined – not locked up in a cell as in the case of close confinement – but simply required to remain in a specific but not locked place that he cannot leave in the short-term. This type of confinement – which is different again from close confinement – constitutes in the view of the Conference of European Churches a deprivation of freedom in the sense of Article 5 of the ECHR and thus the procedural guarantees of Article 5 of the ECHR should apply in this case.

In the armed forces there are – or have been – combinations of circumstances which constitute marginal cases where relative levels of deprivation of freedom are concerned under article 5 of the ECHR:

Quite apart from special circumstances such as military exercises, manoeuvres or moments of armed intervention it has happened and happens time and again that soldiers (in the case of normal military service – but also in professional armies) have or had to endure weeks and weeks when they could not leave their barracks after service hours (however long those were) and so had very limited possibilities of movement within the barracks even at weekends, despite the fact that military imperatives – such as crisis situations or even inside a barracks in a peace-keeping operation outside a member state – in no way necessitated this. A measure of this kind ultimately means that for weeks on end members of the armed forces are cut off from the outside world, usually only have telephone contact with their relatives, and are also unable to attend religious worship in public and with their families. Even in countries where there are military chaplains for the armed forces, members of minority churches do not always find there is a chaplain available to conduct a service every Sunday. The Conference of European Churches feels this represents a certain deprivation or at least limitation of freedom. Whereas in the case of soldiers joining a professional army one can assume that career soldiers have basically given their consent in such circumstances and that this limitation or deprivation of freedom is more or less something they have agreed to and so from the point of view of article 5 of the ECHR is admissible, this is definitely not the case for soldiers who are performing military service in the context of general national service. Should therefore such a situation persist for more than a month in the absence of any kind of offensive or particular military exercises, members of the armed forces who are performing general national service are being subjected to a deprivation of freedom in the sense of article 5 of the ECHR which cannot be justified. Hence recommendations should also be made to the member states that army personnel who are performing general national service should not be subjected to periods of deprivation of freedom outside their hours of service without justification such as continuous sojourns in barracks for over a month – in accordance with rights contained in article 5 of the ECHR. In such cases of deprivation of freedom for over a month members of the armed forces in the context of normal national service can not only vindicate their rights under article 5 of the ECHR but also in other fundamental rights including article 9 of the ECHR.

#### 4. Re- article 6 ECHR (recommendations)

Turning to the recommendations to the Member States in marginal note 42 ff in respect of military courts, the Conference of European Churches feels the Member States of the Council of Europe should be recommended to set up military courts on disciplinary matters (especially when potentially leading to confinement) only in order to guarantee that the procedures under article 5 of ECHR be respected. For acts punishable in the courts, civil matters and others, normal (- civil) - national justice should prevail also for members of the armed forces even though measures of punishment peculiar to the military are quite permissible also. If however acts potentially punishable in court or even specific acts punishable according to military rules are not put to the normal national (civil) courts but come before an instance of specifically military justice (which the Conference of European Churches is against as such) the precaution needs to be taken that a civil, independent judge partakes not only in the proceedings of the military courts but also the final instance of justice is in any case a normal (civil) national court, preferably the national civil High Court for punitive action. This would go in the sense of article 2 of protocol 7 in the Convention to protect Fundamental and Human Rights and Fundamental freedoms. In cases such as this, even if the instance of justice is a military one sitting on disciplinary matters competent to mete out punitive action, it should be ensured that the ECHR guarantees and additional protocols be respected for members of the armed forces.

#### 5. Re- Article 9 ECHR (recommendations)

The Conference of European Churches points out that article 9 of the ECHR – on freedom of thought, conscience and religion – does not feature among the essential rights under article 15 para 2 ECHR, which the Conference of European Churches regrets as such and an amendment is being requested in this respect. However the Conference of European Churches takes the liberty of pointing out that in article 4 para 2 of the International Pact on citizens' and political rights of 16<sup>th</sup> December 1966 (UN Human Rights Pact II), article 18 on the freedom of thought, conscience and religion counts among the essential fundamental rights. This means therefore in relation to article 15 para 1 (last half-sentence) of the ECHR, that those member states of the Council of Europe who have ratified the aforementioned International Pact on citizens' and political rights cannot overlook the right to freedom of thought, conscience and religion ultimately even within the scope of the last half-sentence of article 15 para 1 of the ECHR – and this even in cases of war or another state of public emergency. The Conference of European Churches would set great importance by specifically pointing this out to the member states of the Council of Europe in the particular recommendations as this is crucial for members of the armed forces.

Freedom of thought, conscience and religion is not entirely protected in the ECHR, only within the scope of article 9 para 2 of the ECHR – apart that is from the case of article 15 of the ECHR. Article 9 para 2 of the ECHR however is generally felt in its wording actually to limit the right to practice one's religious or secular conviction, whereas one's inner religious freedom and freedom of conscience are always guaranteed. Behind this stands the aim in any nation state where there is a variety of religious affiliations, to guarantee for everybody the right to religious freedom as such and the right to change religion unconditionally, as the European Court for Human Rights upheld in its judgement of 25<sup>th</sup> May 1993 in the affair of Kokkinakis vs Greece. This too should be reiterated explicitly in the recommendations for the member states, as this is not unimportant for members of the armed forces in relation to the required adaptation of soldiers to military structures.

Margin note 55 relative to the judgement of the European Court for Human Rights in the case of 1<sup>st</sup> July 1999 of Kalac against Turkey and the subsequent conclusion drawn concerning limitations on protections of fundamental rights according to article 9 of the ECHR upon joining the army, and the acceptance of military discipline in the process, can surely only be applicable to career soldiers (see also judgement of 19<sup>th</sup> October 2005 in the case of Roche vs the United Kingdom of Great Britain and Northern Ireland). For members of the armed forces who are in the armed forces because they are performing standard national service this is not such a logical conclusion to draw as the national serviceman or woman is not joining the army of his or her own free will and so not voluntarily accepting military discipline as such but rather has to accept it because of the law. This means in any case that any encroachments on the fundamental right to religious freedom – also freedom of thought and conscience – where soldiers performing standard military service are concerned can only be permitted in more stringent circumstances than those prevailing for members of a professional army. Soldiers serving in the armed forces as part of their general national service are fulfilling national duty and have not chosen to be soldiers for their career – no matter what their terms of remuneration.

In this vein therefore the Conference of European Churches is of the view that margin number 55 needs to be enlarged upon.

The Conference of European Churches however also draws attention to the fact that, irrespective of the explanations to article 5 of the ECHR in this position paper – soldiers who are carrying out their military service in the context of general national service should be enabled to practice their faith at appropriate intervals together with members of their Church or faith community. This imposes as a condition that throughout the duration of a normal period of national service it should not happen that persons whose presence is mandatory be constantly barracked in places where it is impossible to practice their faith alongside members of their church or religious community. This requires consideration of the fact that in every member state there exist minority churches and minority religions. It must therefore be possible – except during very particular interventions or special military exercises – for soldiers to have the option of attending church service in their church or religious community outside the military installation on Sundays and holy days even if at more than weekly intervals, within the period when undertaking their general national service. This applies insofar as Church attendance is not facilitated at appropriately regular intervals through military chaplains in person within the framework of the armed forces themselves. The Conference of European Churches would deem it an infringement of article 9 of the ECHR if soldiers performing normal national service were not specifically enabled to attend church services in their own church or religious community once in any two-month period. Obviously soldiers serving in a professional army cannot claim any such rights although it must also be possible for these to attend services of worship of their Church or religious community except during active offensives or periods of that kind – plus certain of the rights along the lines of article 8 of the ECHR, such as contacts with other members.

Following the recommendations made on article 9 of the ECHR the conclusions following on from the judgement of the European Court of Human Rights on 24<sup>th</sup> February 1998 in the case of Larissis vs Greece should also – in the view of the Conference of European Churches – be taken up again. Here discussions on religious issues held by military superiors with people under their command should be considered as an encroachment

upon the latter's freedom to practice their religion on account of the pressure being exerted on those subordinates. Thus a recommendation should be made to the Member States in this vein that appropriate legal arrangements be made in the military rules of procedure.

6. Re- Article 10 of the ECHR (recommendations)

In this respect likewise the Conference of European Churches esteems that nuances should be made here or there, according to whether someone is a member of a professional army or members of armed forces that are carrying out ordinary national service. Concerning the right to express one's opinion freely, soldiers doing duty service in the context of general national service should simply be granted the reservation that they have the right to express their opinions openly like any other citizen but that should be done outside duty hours and only in civilian dress, and in any case the commitment to secrecy and expression of opinions on the armed forces themselves should be subject to tighter limitations.

7. Re- Article 7 of the ECHR (recommendations)

Article 11 para 2 of the ECHR envisages certain encroachments on this fundamental right (freedom of assembly and association) in the case of members of the armed forces. These are taken into consideration in the recommendations to the Member States without their actually being alluded to as such. However the Conference of European Churches feels that in this particular case such potential encroachment by the State in article 11 of the ECHR be applied very restrictively in the case of members of the armed forces that are performing ordinary national service. It should be made quite clear that there is no doubt but that even soldiers performing national service are free to participate in demonstrations of any kind whatsoever – even if these are directed against the government, thought not in uniform. Over and above this there could be some limitation on participation in demonstrations and gatherings that are purely general and public in nature, so not limited to members of the armed forces, but solely directed against the armed forces. Recommendations should also be made to the member states along these lines.

8. In the survey of the relevant decisions of the European Court for Human Rights relating to members of the armed forces, the decision of the European Court of Human Rights of 24<sup>th</sup> February 19978 in the case of Larissis vs Greece, RJD 1998 1, line 39, should also be taken up and alluded to (see earlier comments).

This then is the brunt of the position taken by the Conference of European Churches in relation to the Meeting Report on the meeting of the DH-DEV Group on Human Rights of Members of the Armed Forces held on 3<sup>rd</sup> and 4<sup>th</sup> December 2007; the Group is requested to deliberate further on these considerations at its next working party meeting on 9<sup>th</sup> to 11<sup>th</sup> April in Strasbourg.