

# Military Unions and Associations, Chapter 9 of the Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel, OSCE/ODIHR, DCAF

Some countries have long-standing arrangements for members of the armed forces to join associations representing their interests. Several other states have granted this right in recent years. In a number of countries, however, the unionization of military personnel has been viewed as conflicting with the unique nature of the military and its role in maintaining national security and public order. Moreover, a distinction should be made between different models of association, e.g., professional associations, trade unions, and other informal mechanisms of consultation. The advantages and disadvantages of each are discussed below. There appears to be no internationally agreed definition of a trade union. The International Labour Organization Convention on Freedom of Association and Protection of the Right to Organise of 1948 refers instead to “workers’ organisations”, i.e., “any organisation of workers ... for furthering and defending the interests of workers”. The central question in the debate on military unions or associations is not what the body representing the interests of members of the armed forces is called but rather how to respect the rights of military personnel to the freedom of association and assembly while at the same time meeting the needs and legitimate concerns of the military, given its unique function.

## **1. Issues at Stake**

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

The focus of this chapter, however, is a series of questions concerned with the recognition of military associations and unions. Collective bodies can play a valuable role in representing their members’ interests, including protecting their human rights. Military associations or unions may promote the welfare of individual members by pursuing grievances on their behalf, represent their interests at different levels from that of the unit upwards, and consult or negotiate on collective conditions of service in the armed forces. They may also play a valuable role as intermediaries between the Ministry of Defence and armed forces personnel when issues such as restructuring the military are discussed. Where these associations exist, they vary in nature from country to country. Some major variations concern the extent to which they are autonomous, their links with external professional or union federations, and whether they are legally permitted to engage in industrial action. In countries such as Sweden or Germany, independent military associations exist that are financed by members’ fees and that employ their own advisory staff. In other countries, such as Bulgaria, finance comes from the Ministry of Defence. It is more common for associations to define themselves as bodies representing professional servicemen and -women rather than as military unions, although this is partly a consequence of the legal culture in specific countries. For professional associations, links with external confederations of trade unions are not normal, although they do exist, e.g., in Sweden and the Netherlands. In other cases, military associations have joined umbrella associations representing professionals or public servants. In addition, many military associations or unions are members of international associations promoting the interests of servicemen and -women. The largest by far is the European Organisation of Military Associations (EUROMIL), with more than 30 associations (both professional associations and trade unions) from over 20 countries, but a number of others exist on a regional basis. Most OSCE participating States prohibit industrial action by members of the armed forces.

It is common in many countries for the freedom of association of public servants, including members of the armed forces, to be limited. This difference in treatment in comparison with other workers may be justified because of the public interest in ensuring that essential public services are not disrupted. It can be argued that members of the armed forces are not workers in a conventional sense in that, when enlisting, they subject themselves to a comprehensive system of restrictions under a system of military discipline that is far more extensive than the usual control of an employer over an employee. Nevertheless, it is notable that some legal bodies have treated members of the armed services as “workers”. Membership by servicemen and -women of trade unions or other collective representative bodies poses two distinct problems. The first is the question of military discipline and possible interference with the esprit de corps. The raising of collective grievances on the part of members of the armed forces has traditionally been seen as equivalent to insubordination or even the serious military offence of mutiny. It is argued that the disciplined nature of the armed forces requires that orders should not be questioned. Moreover, industrial action could disrupt vital operations in a way that threatens national security. Whether this interest also forbids any discussion of the conditions of service in general is more debatable, however. There is also cause for scepticism about the

general argument, based on surveys of countries that have permitted military associations (see surveys by the French Senate and prepared for the Joint Services Command and Staff College in the UK). The second issue is related to allegiance and outside influence. Membership of trade unions is seen as undesirable because members of a union may act collectively on the instruction of union officials (for example, in taking industrial action), and this can be seen as a rival source of authority and allegiance to the chain of command within the armed forces. The objection is all the greater if the union in question is a civilian one. In order to address these problems to some extent, collective representative bodies — in countries where they are permitted — commonly work under two constraints. The first is that the representative body may be limited to members of the armed forces (so countering the objection of outside influence) and not linked to other trade unions. Second, legal barriers may be imposed that forbid strikes or other forms of industrial action that could disrupt operations or threaten security.

The changing context in which military forces now operate prompts a re-evaluation of restrictions on association, for two distinct reasons. The first is that the nature of the tasks that armed forces personnel are now given and the setting in which the military is deployed are often non-traditional. Members of the armed forces are now more likely to be part of a multinational force or engaged in peacekeeping operations than in conventional conflict.

These types of missions lead naturally to comparisons between the conditions of service of different national forces working alongside each other. Soldiers from a state where rights of association are restricted may quite reasonably question the operational necessity of this when they work alongside service personnel from a state that takes a more relaxed view. Unfavourable comparisons of conditions of service may produce discontent and a loss of morale (and, in turn, of operational efficiency). The second cause for re-evaluation is the increasing professionalization of armed forces, which means that the military needs to compete effectively in the labour market in order to attract high-quality personnel. Any conditions of service that make the armed forces less attractive as a career will be scrutinized by potential entrants. It is advisable therefore for the armed services themselves to reappraise whether restrictions on freedom of association remain strictly necessary.

#### *International human rights commitments*

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

### **Box 9.1**

#### **Freedom of Association in Human Rights Law<sup>85</sup>**

Art. 20 UDHR (1) Everyone has the **right to freedom of peaceful assembly and association**. (2) No one may be compelled to belong to an association. Art. 21 ICCPR The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. Art. 11 ECHR Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. Art. 8 ICESCR 1. The States Parties to the present Covenant undertake to ensure:

- (a) The right of everyone **to form trade unions and join the trade union of his choice**, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
- (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- (d) The **right to strike**, provided that it is exercised in conformity with the laws of the particular country.

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

3. Nothing in this article shall authorize States Parties to the International Labour Organisation

Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

In addition to these, Art. 12 of the EU's Charter of Fundamental Rights provides that everyone has the right to freedom of association at all levels, in particular in political, trade-union, and civic matters. This implies the right of everyone to form and to join trade unions for the protection of their interests. The Charter is notable because the right is not qualified in the case of members of the armed services. However, it does not have the status of a directly enforceable legal norm. Since the Madrid Conference of 1983, the OSCE has recognized the right of workers to "establish and join trade unions", within the law of the respective state. At the Copenhagen Conference in 1990, the OSCE added the right of individuals to form political parties and

political organizations, along with the corollary right to peaceful assembly and demonstration. Any restrictions of these rights should be prescribed by law. The Copenhagen Conference also recognized the right of trade unions to determine their own membership. Alongside these rights are the more general provisions relating to freedom of expression, respect for others, and minority cultural differences.<sup>91</sup> None of the OSCE documents contain any specific commitments in relation to unions in the armed forces.

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

*Box 9.1 (cont.)*

Art. 5 ESC With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the

application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.

Art. 6 ESC With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:

1 to promote joint consultation between workers and employers;

2 to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;

3 to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise:

4 the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

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

The extent to which the guarantees provided for in this convention shall apply to the armed forces and the police shall be determined by national laws or regulations. Similar wording appears in the other conventions (Art. 5 of the 1949 Convention and Art. 1.2 of the 1981 Convention). In complaints to the Freedom of Association Committee of the International Labour Organization about the propriety of such restrictions, the Committee has found that provisions dealing with exceptions should be interpreted restrictively (and should not apply, for example, to civilians working for the armed forces in manufacturing establishments or in a country's army bank<sup>93</sup>). The committee has stated that, in cases of doubt, workers should be treated as civilians. An equally restrictive approach is evident from the text of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Art. 11.2 states:

This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state. Similar restrictions appear in Art. 22 of the International Covenant on Civil and Political Rights.

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

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

Some commentators have questioned whether a restriction under Art. 11.2 can operate to take away the right of association altogether. In the *Rekvenyi* case, the Court preferred to leave open the related issue of whether Art. 11.2 was subject to a proportionality test when it applied to the police, members of the administration of the state, and the armed forces.

The issue is best regarded as undecided. It could certainly be argued that the state's interest could be adequately protected by restrictions on the taking of industrial action rather than on membership of unions

per se.

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

#### *Different approaches*

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

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

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

The second approach is to make *non-autonomous arrangements*. Here, the state provides the legal machinery for representation of the interests of members of the armed forces, e.g., in bargaining over pay or negotiating changes to conditions of service, pensions, and so on.

The formal position of these arrangements may be buttressed by a legal requirement that they be used before changes are made.

A developed example of these arrangements is that of France, where the General Statute of the Military of 24 March 2005 prohibits members of the armed forces from joining professional associations, but the Higher Military Council (Conseil Supérieur de la Fonction Militaire, or CSFM) provides for participation in discussions concerning conditions of service.<sup>101</sup> Created in 1990, the CSFM gives advice on questions related to the conditions of service and must be consulted if legislation or regulations are proposed that are related to these conditions. It is composed of members elected by the armed forces councils. The CSFM may deal with various topics, e.g., career development, transition to civilian life, welfare in the armed forces, pension reform, housing, and the conditions of international operations. An item may be put on the CSFM’s agenda by a majority of the members. Seven councils have been created at forces level covering: the army, the air force, the navy, the military constabulary, the medical corps, the procurement agency, and the energy agency.

The members of the councils are picked randomly from among those members of relevant forces who stand for office. The councils have two functions: to study any question related to the conditions of service or to the organization of work in the forces; and to represent the viewpoint of forces personnel on the topics submitted to the CSFM. A similar approach is followed in Italy.

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

## **Box 9.2**

### **Military Associations in Selected Countries**

### **Swedish Association of Military Officers (SAMO)**

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

The third approach is for there to be an authorized but autonomous *military association*.

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

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

Notwithstanding freedom of association, members of the armed forces may be legally prohibited from engaging in certain forms of industrial action, especially strikes. It should be mentioned, however, that even where a military association itself is prohibited from or voluntarily forswears industrial action, this may not prohibit secondary industrial action by another union in support of its cause.

### **Box 9.2 (cont.)**

#### **Poland**

Ministry of Defence decisions from 1994 allow for meetings of officers at all levels and for the election of commissioners to act as advocates for soldiers' interests (Decisions No. 81 and 82 of 22 August 1994). In 2000, the Constitutional Tribunal ruled that a ban on membership of trade unions in the military was constitutional *provided* there were alternative means of exercising the right to freedom of association (decision of 7 March 2000).

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

#### **Hungary**

Following a 1989 amendment to the Constitution granting the right of freedom of association to servicemen, the

Association for Protection of the Interests of Military Personnel was established with 56 individual members and seven local associations in 1991.

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

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

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

#### **Bulgaria**

The Rakowski Bulgarian Officers League is an independent professional organization of active servicemen, reserve servicemen, and their families. Formed in 1991, it now has 10,000 members in the Ministry of Defence and the Ministry of Interior. Its main objectives are defence of the professional and social interests of its members and the professionalization of the armed forces. The League has been especially active in lobbying for legislative reform leading to the civilianization of the armed forces, and has actively supported Bulgaria's membership of NATO and of the EU.

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

Finally, and more rarely, in a few countries (for example, the Netherlands), a trade union for members of the armed forces may exist that is associated with other trade unions through a federation. Although there could clearly be risks of external influence and of industrial militancy in such arrangements, it is worth noting that

the experience in the Netherlands has been one of self-restraint: strike action, for example, has never been taken.

## **2. Best Practices and Recommendations**

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

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

### **Recommendations**

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