THE SOLDIER AS A CITIZEN IN UNIFORM: A REAPPRAISAL

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The term 'a citizen in uniform' is an old one. It has also received a new lease of life in the Council of Europe and in the Organisation for Co-operation and Security in Europe (the OSCE).[1] Understanding of it is likely to vary amongst States in the same way as their armed forces will differ in terms of their history, traditions and types of deployment. It may also vary depending on whether one is thinking of pre-modern, modern, late modern or postmodern armed forces.[2] The armed forces of many States have evolved naturally through this process, but not all. In some this evolution process has included participation in armed conflict, but not for all.

Along the spectrum stretching from the position where soldiers have identical rights and duties to those of civilians[3] (civilian soldiers) to one in which the armed forces are kept quite separate from civilian society (militarised soldiers) most States will be somewhere in the middle ground.

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[1] It is used by the Parliamentary Assembly of the Council of Europe as a goal to which States should steer. See, for example, OSCE, Resolution 1166 (1998), para 1; OSCE Recommendation 1380 (1998), para 1, both of which refer only to conscripts. OSCE Recommendation 1742 (2006) and OSCE Doc 10861 (24 March 2006) take a wider remit to consider all members of armed forces and refer to the citizen in uniform concept (both at their respective para 2). The Committee of Ministers of the Council of Europe agreed on 28 March 2007 to remit the issues raised in Recommendation 1742 to a committee to prepare a recommendation to member States. It is also used by European Organisation of Military Associations (EUROMIL) which indicates that "all the member associations of EUROMIL consider themselves committed to the principle of the Citizen in Uniform": EUROMIL , 'About Us', online <http://www.euromil.org/aboutus.asp> (last accessed on 1 September 2007). See also the OSCE *Code of Conduct on Politico-Military Aspects of Security* (1994), para 32. The position of Germany's principle of Innere Fuhrung (discussed below) may also be explained on this basis.

[2] These terms are used in C Moskos, J Williams and D Segal (eds), *The Postmodern Military: Armed Forces after the Cold War* (Oxford University Press, 2002), 1-2. Moskos takes the view that "a postmodern military ultimately derives from the decline of the level of threat to the nation": 27.

[3] I will assume that whilst the soldier is a citizen he is to be compared with the civilian. This will avoid the need to consider whether the rights and duties of a 'citizen' are different from non-citizens within the State to whose armed forces the soldier belongs.

They will, for instance, recognise that if the civilian soldier position is taken they will need to put in place different arrangements during peace from those applicable in war and if they are to act in coalition with other armed forces abroad their peacetime arrangements may not work well in collaboration with others. The militarised soldier position brings with it a danger of the imposition, or threat, of martial law or of a military coup and the rejection of any real control by civilian government or by national law over the armed forces.

It may be instructive to consider the phrase 'citizen in uniform' and whether it has any significance today in terms of the rights of members of the armed forces. It may not be too radical a view to argue that it is a pre-modern military concept linked to the importance of the protection of the nation State.[4] In the postmodern armed forces world it even becomes possible to think that citizens do not need to become soldiers at all and that States can hire them, as civilians, to undertake certain roles previously performed by soldiers.[5] Some of these civilians may be nationals of the State but those who do the actual fighting could be recruited from abroad. As long as they become members of the armed forces of the State they will not be mercenaries. In theory, there is great attraction to this idea.[6] If accepted it would no longer be necessary to have to treat one group of citizens (members of the armed forces) differently from another group (civilians).

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[4] See Moskos *et al*, above n 2, 1, who refer to the development of the idea of the *levee en masse*. This is retained in modern law. See *Third Geneva Convention Relative to the Treatment of Prisoners of War,* opened for signature 27 July 1929, last revised 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) ("Geneva Convention III"), art 4(6). In this model citizenship and defending the State can easily be linked.

[5] The rise of civilian 'contractors' in military operations is a factor of this postmodern military. See generally 'Private Military Companies' (2006) 88 *International Review of the Red Cross* 443, particularly, K Fallah, 'Corporate actors; the legal status of mercenaries in armed conflict' (2006) 88 *International Review of the Red Cross* 599. In the United Kingdom a Minister informed the House of Lords that the "Ministry of Defence does not employ private security contractors in Iraq": *Hansard*, House of Lords, vol 672, col.WA104 (13 June 2005).

[6] F W Maitland, *The Constitutional History of England* (Cambridge University Press, 1963), 275-6, comments that Henry II's "object [in accepting payment in place of military service in 1159] was to spare the lives of his subjects and get his wars fought for him by mercenaries". Compare N Machiavelli, *The Art of War* (Dover Publications, 2006) whose work was first published in 1674 and who commented that "no one ever established any Republic or Kingdom who did not think that it should be defended by those who lived there with arms": 21.

In this respect, however, postmodern military thinking is unlikely to render completely redundant the theory of the soldier as, to some extent at least, a citizen in uniform. At first sight it is a strange notion that one group of citizens (soldiers) should attract such an epithet. It is not used in respect of other citizens who wear uniform (except possibly, the police) even if they are employed by the State or by public bodies.

It is relatively easy to be drawn to the mantra that a soldier is a 'citizen in uniform' where he has been conscripted. This is because it appears to suggest that his previous status as a civilian somehow continues whilst he is in military service in a 'citizen army'.[7] It also suggests that his rights and duties as a citizen (civilian) are somehow preserved whilst a soldier.[8] In this context the phrase provides no more than words of comfort. It fails to take into account that the soldier will be subject to the particular requirements of military life[9] and to military law and this, by itself, may well make substantial inroads into his rights as a civilian. He will, for instance, find that he has no right to quit military service as easily as he could civilian employment and he will be subject to military justice to ensure the maintenance of military discipline.[10] As a result, he may receive

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[7] This is a common term to describe compulsory military service during the wars of the 19th and 20th centuries. For the background to 'national service' in England, see D Hayes, *Conscription Conflict* (Sheppard Press, 1949). See also G Nolte and H Krieger, 'Military Law in Germany' in G Nolte (ed), *European Military Law Systems* (De Gruyter Recht, 2003) 343, who refer to the post World War II policy in Germany which was to "to create a military that [is] firmly integrated with society (*inter alia* by relying on a conscript army)". C Kelleher, 'Mass Armies in the 1970s: The Debate in Western Europe' (1978-79) 5 *Armed Forces & Society* 3, 8, who comments that "it is an almost religious principle that, as a 'citizen in uniform', a conscript's allegiance, politically and socially, remains in the civilian sector". The increasing acceptance by States of conscientious objection to military service also lends some support to the notion of the citizen army since civilians who do wish to serve may be offered some form of alternative service. It can also be understood as referring to reserve forces. See C Moskos, 'Reviving the Citizen-Soldier' (2002) 147 *Public Interest* 76; C Moskos, 'A New Concept of the Citizen-Soldier' [2005] *Orbis* 663, 669 referring to the 'Abrams Doctrine'; J Griffith, 'Will Citizens be Soldiers? Examining Retention of Reserve Component Soldiers' (2005) 31 *Armed Forces & Society* 353.

[8] Transition between military and civilian life may not, however, be easy. There may be some difficulty for servicemen returning to civilian life and obtaining employment "in their areas of specialisation": *Smith and Grady v United Kingdom* (2000) 29 EHRR 493, para 92.

[9] He may be employed in the army, for instance as a clerk but "a soldier is first and foremost a soldier, and if a state of war exists, he must be able to perform the duties of a soldier for which he was trained": *Rivard v Canadian Armed Forces* 1990 Can LII 685 (CHRT); *Irvine v Canada (Canadian Armed Forces)* 2004 CHRT 9, para 35.

[10] F W Maitland, above n 6, wrote that "this, I think, has been the verdict of long experience, that an army cannot be kept together if its discipline is left to the ordinary

severe penalties imposed by a court system wholly different in structure from that established to try civilians. Moreover, during time of an international armed conflict the soldier will need to show he is not a civilian.

The term 'citizen in uniform' cannot, however, refer solely to the conscript soldier. Whilst the conscript has become a soldier simply because he is a citizen the volunteer has agreed to change his status from that of civilian to soldier. But the term 'citizen in uniform' must also apply to him (if it is to apply at all) since the State is unlikely to accept that the rights and duties of both classes of soldier should differ so fundamentally.[11]

Why did the phrase develop in constitutional thinking? One theory was that it would ground the army within society so as to prevent it from being seen as a tool to be used by the sovereign or the government to oppress the civilian population or indeed, to acts as "a hedge against military interventionism".[12] If the army sees itself, it is argued, as being composed merely of civilians in uniform it would be unlikely to take such action against fellow citizens. There is not much evidence to support such a theory. It assumes that the civilian population is homogenous and that soldiers themselves will see all citizens as equally worthy of such protection.[13] It also assumes that the army will not be used to act as a

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common law"; N Machiavelli, above n 6, placed in the mouth of Fabrizio the following comment: "discipline drives away fear from men, lack of discipline makes the bold act foolishly… for a courageous army is not so because the men in it are courageous, but because the ranks are well disciplined": 45, 48. See generally, G Rubin, *Murder, Mutiny and the Military*: *British Court Martial Cases 1940-1966* (Francis Boutle Publishers, 2005). A number of the court-martial cases involved servicemen charged with mutiny: *Report of the Army and Air Force Court-Martial Committee* (the Lewis Committee) Cmnd 7608 (1949), para 11; J Griffith, 'Report of the Army and Air Force Courts-Martial Committee, 1946 (Cmd. 7608)' (1949) 12 Modern Law Review 223.

[11] See P Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge University Press, 2006), 13.

[12] See C Kelleher, above n 7, 7; A Scobell, 'Why the People's Army Fired on the People: The Chinese Military and Tiananmen (1992-93) 18 *Armed Forces & Society* 193, 201: "soldiers were told by civilians that they were the people's army and they should not move against the people".

[13] For modern examples see *Nachova v Bulgaria* [2006] 42 EHRR 43, para 168 (treatment of Roma); and Parliamentary Assembly of the Council of Europe, *Human Rights Violations in the Chechen Republic*, Doc 10774 (21 December 2005) Appendix C; *Bazorkina v Russia* (Application No 69481/01), Judgment, 27 July 2006; the treatment of some members of the Kurdish population in Turkey by Turkish security forces as outlined in, for instance, judgments given by the ECtHR.

substitute police force in quelling disorder. Where it is it may be satisfying superficially to argue that the soldier's powers in acting for this purpose are no greater than those of a civilian and, indeed less than those of a police officer.[14] Although rules of engagement (however they are described) will be drawn up on this basis the reality is often quite different. The State will frequently provide soldiers with weapons designed for 'war fighting' to try and maintain order.[15] Whilst citizens may have a limited duty to preserve the peace the soldier deployed for this purpose is required to put his duties as a soldier above those he is required to accept as a civilian.

A further argument to support the principle of the soldier as a citizen in uniform is that if there is adequate control by the civilian government over the armed forces this will mitigate any likelihood of the army being used for unlawful purposes.[16] The argument might run that in a democracy

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[14] See S Skinner, 'Citizens in Uniform: Public Defence, Reasonableness and Human Rights' [2000] *Public Law* 266, who draws attention to the fact that at common law there is an "absence of separate legal regimes for state and citizens". A police officer has also been described as a "citizen in uniform": C Burrows, 'UK Policing: Less Lethal Technologies-an Operational, Legal and Medical Perspective' (2006) 74 *Medic-Legal Journal* 83. Indeed, "in some States State security forces may have the status of police": *Aslan v Turkey,* Application No 22497/93, Admissibility Decision, 20 February 1995.

[15] See the comment of Lord Diplock in *AG for Northern Ireland's Reference (No.1)* [1977] AC 105, 137; *R v Clegg* [1995] 1 AC 482 and compare the truncation of this quotation given by Elias J in *Bici v Ministry of Defence* [2004] EWHC 786 (QBD) at para 104. For an earlier view see J C Wakerley [1975] *Criminal Law Review* 186 (letter).

[16] This idea takes in the UK what many States will consider to be an extreme position, namely, the constitutional position, since 1689, that the armed forces may exist only so long as Parliament continues the relevant legislation on an annual basis. This was, historically, not the position in respect of the Royal Navy since its opportunity to oppress the people was much less than that of the Army. See Maitland, above n 6, 280. It is an essential element in the concept, within the UK, of Parliamentary control over the armed forces. For the position in the USA see Earl Warren, 'The Bill of Rights and the Military' (1962) 37 *New York University Law Review* 181, 184. The constitutional arrangements of other States may impose some limitations on the use to which armed forces may be put within the State. For New Zealand see the Defence Act 1990, ss 5 and 9. Professor S E Finer comments that "no reason is adduced for showing that civilian control of the armed forces is, in fact, 'natural'": *The Man on Horseback: The Role of the Military in Politics* (Penguin, 2nd ed, 1976), 4. Compare the OSCE *Code of Conduct on Politico-Military Aspects of Security* (1994) para 29. Civilian control can embrace not only the policy relating to the armed forces but also the accountability of its members to the law for their unlawful actions. See generally, A Croissant, 'Riding the Tiger: Civilian Control and the Military in Democratizing Korea' (2004) 20 *Armed Forces & Society* 357, 359, who also draws attention to indirect influence of retired members of the armed forces. The issue is not merely civilian control but "democratic civilian control": E Coughlin, 'Democratizing

the government (which of necessity must be a civilian government) is answerable to the electorate (and to the law) for the conduct of its public services whether it involves nurses or soldiers and that the legal status of each group, *mutatis mutandis*, should be similar.

Taking a different angle the principle is said to protect the soldier himself from oppression by the armed forces of which he is a member. His rights as a civilian are not to be curtailed since he remains a citizen although in uniform. Sir James Mansfield CJ in *Burdett v Abbott* (1812) appears to have exaggerated the legal status of the soldier when he commented that he wanted to "correct a strange mistaken notion which has got abroad, that because men are soldiers they cease to be citizens; *a soldier is gifted with all the rights of other citizens*, and is bound to all the other duties of other citizens".[17] In his judgment Mansfield CJ was dealing with the issue of whether soldiers had a duty to prevent a breach of the peace or a felony. If citizens in general had such a duty soldiers could not be distinguished from them. He was not addressing the *rights* of soldiers but merely their duties.

Civilian Control: The Polish Case' (1997-98) 24 *Armed Forces & Society* 519, 530. For an analysis of the effect of membership of the European Union on one State (Greece) compared with non-membership (Turkey) and of the differences between civilian control of the armed forces and 'mere' demilitarisation, see O Duman and D Tsarouhas, '"Civilianization" in Greece versus "Demilitarization" in Turkey: A Comparative Study of Civil-Military Relations and the Impact of the European Union' (2006) 32 *Armed Forces & Society* 405.

[17] *Burdett v Abbott* (1812) 4 Taunt 401, 449 (emphasis added). A similar point is made in the *Manual of Military Law* (War Office, 1914) 213; *Manual of Military Law Part II* (HMSO, 1989) 2-1. The Lewis Committee, above n 10, para 138, was more guarded. It concluded that "in the matter of legal safeguards, citizens should be no worse off when they are in the Forces than in civil life unless considerations of discipline or other circumstances make such a disadvantage inevitable". See also Lord Bingham in *R v Spear et al* [2002] UKHL 31 at para 4, although his Lordship did recognise that the soldier "remains subject to *almost* every law, including the criminal law, which binds other citizens and continues to enjoy *almost* all of the same rights" (emphasis added); Lord Lyell, *Hansard*, House of Lords, Vol 685, col.293 (11 October 2006). This relationship between the soldier and the armed forces may be spoken of as a 'Military Covenant'. For its use in the British Army, see: *A review of the circumstances surrounding the deaths of four soldiers at Princess Barracks, Deepcut Between 1995 and 2002,* Report by Nicholas Blake, QC, HC 795, 2005-06, para 4.2. This quotes the Covenant as stating that "in putting the needs of the nation and the Army before their own, *they forgo* some of the rights enjoyed by those outside the Armed Forces" (emphasis added). He may, however, have privileges not available to civilians. See generally, *Manual of Military Law Part II* (HMSO, 1989) 2-2-II.

A literal interpretation of Mansfield CJ's view of the soldier's rights could never have been an accurate assessment of the legal status of the soldier since, as argued above, the armed forces of any State must be a disciplined body and the disciplinary code involved will impose much greater obligations on the soldier than would any comparable employment disciplinary code on the civilian. The position in Germany is stated to be that a "soldier's fundamental and statutory rights should only be restricted insofar as this [is] strictly necessary to perform the mission of the armed forces".[18] Indeed, by the principle of "*Innere Fuhrung* (internal leadership) …soldiers are encouraged to act as 'citizens in uniform'".[19] Some other States will take a similar view although there is likely to be considerable variation as to how much restriction of the soldier's rights are indeed necessary to enable the armed forces "to perform [their] mission".[20] In this matter the often dead hand of 'tradition' may prevent senior military leaders from seeing that restrictions on the personal lives of soldiers may not, in reality, be necessary to enable the armed forces to perform the functions entrusted by the State to them.

It has also been suggested that if the soldier is protected by this principle all non-citizens with whom he comes into contact on military operations will also benefit. The point was forcefully made in the Parliamentary Assembly of the Council of Europe when it commented that:[21]

> we cannot expect the armed forces to respect humanitarian law and the human rights of the civilian population and other combatants in conflicts and external operations on the ground unless respect for human rights is guaranteed within the army ranks.

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[18] G Nolte and H Krieger, above n 7, 343.

[19] "Although expected to follow orders (as long as they are not obviously illegal), they are expected to reflect upon the actual working of the military, to safeguard their rights, and to contribute to the well-functioning of the armed forces by their independent thinking. Superiors are trained to lead by example and persuasion, and to respect soldiers as responsible contributors to the military mission": ibid. The German Parliamentary Commissioner for the Armed Forces sees his role as to "ensure that… the concept of soldiers as citizens in uniform and the principles of Innere Fuhrung will remain decisive criteria governing all action taken": Deutscher Bundestag, online: <http://www.bundestag.de/htdocs_e/parliament/03organs/06armforce/armfor.html> (last accessed on 5 September 2007).

[20] In *Smith and Grady v UK* (2000) 29 EHRR 493, the ECtHR stated that "each State is competent to organise its own system of military discipline and enjoys a certain margin of appreciation in this respect": para 89.

[21] Parliamentary Assembly of the Council of Europe, Doc 10861 (24 March 2006) para 12.

The concept of the soldier as a 'citizen in uniform' may therefore only be partially accurate. It does not tell us what restrictions on the rights and freedoms of a civilian are justified or necessary for a soldier. Neither does it tell us against which type of citizen the soldier's rights and duties are being compared. In terms of duties and powers those of a police officer differ from those of a bus driver. In some circumstances the powers and duties of a soldier may be more similar to the police officer than to the bus driver. In others the bus driver and the soldier have much in common. It also assumes that the equality provisions which apply in civilian society should also apply in the armed forces.[22] Women, for instance, are given equal employment rights in some States as civilians but not whilst they are in the armed forces. Moreover, the phrase treats all soldiers as a homogenous group without any differences in rank.[23]

Whilst the term 'rights' of the soldier is a term wider than that of his human rights and will vary amongst different States[24] I will consider the latter and use it to refer to rights under a human rights instrument. [25] Given that the European Court of Human Rights (ECtHR) has now issued a number of decisions relating to armed forces I will concentrate on that instrument, although the position under the International Covenant on Civil and Political Rights 1966 is unlikely to be much different. The Convention assumes that the State of which the soldier is a citizen is a democracy[26] and that the model of the militarised soldier is not in existence. In considering soldiers' rights and freedoms the ECtHR is not

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[22] See C Dandeker and D Mason, 'Diversifying the Uniform? The Participation of Minority Ethnic Personnel in the British Armed Forces' (2003) 29 *Armed Forces & Society* 481, 499 who see the issue being one of "claims to legitimacy in relation to civil society as a whole".

[23] Compare Y Groll-Ya'ari, 'Toward a Normative Code for the Military' (1994) 20 *Armed Forces & Society* 457, 459 who argues that, in this context, there is no difference between officers and soldiers and that the latter are "equal citizens of the same state".

[24] In most military codes a soldier is given a number of 'rights', frequently in the form of creating a disciplinary offence by others. An example is the military offence of ill-treatment of subordinates: the *Armed Forces Discipline Act 1971* (New Zealand) s 41; the *Armed Forces Act 2006* (United Kingdom) s 22.

[25] It is often used to refer to bullying or harassment which acts may not map well onto the European Convention on Human Rights, although it may do so in other States. See, for instance the jurisprudence of the Canadian Human Rights Tribunal.

[26] This is the position also under the *International Covenant on Civil and Political Rights,* opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ("ICCPR"). The link between a democracy and individual rights seems clear; see W Allison, *Military Justice in Vietnam: The Rule of Law in an American War* (University Press of Kansas, 2007), 7.

comparing them merely against civilians within the respondent State but against the standards applicable to all civilians within Council of Europe States.

I. The Approach of the European Convention on Human Rights

The Convention (ECHR) requires States "to secure to *everyone* within their jurisdiction the rights and freedoms" set out in it and not merely to citizens only.[27] No doubt most people within the jurisdiction of a State will be citizens but others will not be. Even in the armed forces some soldiers may not be citizens of the State but may have been recruited from abroad.[28] The linkage between citizens and soldiers is not an inexorable one.

The rights and freedoms referred to under the Convention are owed without discrimination[29] so there can be no argument that they do not apply to members of the armed forces as a group, although the fact that an applicant may be a member of the armed forces is a relevant factor in assessing his rights. Indeed, the drafters of the ECHR envisaged it applying to the armed forces of States party since there are a number of articles within it which reflect the fact that States possess armed forces.[30]

The fact that a State party to the ECHR owes these rights and obligations to everyone within its jurisdiction would appear to suggest that there is no room to argue that the rights of members of the armed forces are less than those of civilians. The ECtHR has, however, taken the view that the rights and freedoms owed by States under the Convention must be

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[27] *European Convention on Human Rights*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) ("ECHR"), art 1.

[28] Certain non- nationals are permitted to join the UK (see *Armed Forces Act 2006* (UK) s 340) and French armed forces respectively. Examples are the recruitment of Gurkha soldiers, who are nationals of Nepal into the UK Army and non-French citizens into the French Foreign Legion. Foreign soldiers will not be mercenaries if captured during an international armed conflict if they are actually members of the armed forces of a State: *Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* ("Protocol I"), opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978), art 47.

[29] ECHR, above n 27, art 14; and see also the ICCPR, above n 26, art 2. Discrimination can be made between civilians on the one hand and "all Netherlands citizens serving in the Netherlands armed forces" on the other: *M.J.G v The Netherlands*, Communication No 267/1987, UN Doc.CCPR/C/OP/2, at 74 (1990), para 3.2.

[30] See arts 4(b), 11(2) and 15. For States party to the ICCPR ibid, arts 8(3)(c)(ii) and 22(2). For the position of those States which have entered reservations to either of these instruments in respect of their armed forces see below.

considered within the context of military life. The Court confirmed this in *Akbulut v Turkey* (2003) where it concluded that:[31]

> it is well established that the Convention applies in principle to members of the armed forces and not only to civilians. However, when interpreting and applying the rules of the Convention in cases such as the present one, 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.

The ECtHR recognises that within this context the position of the soldier is not the same as that of the civilian. Thus, members of the armed forces may be tried by military courts for crimes against the ordinary criminal law (in some States) or for offences contrary to the military code of discipline.[32] Punishments may be considered more severe than under a disciplinary code for civilian occupations.[33] In relation to a charge under the criminal law brought before a military court the effect may be that the soldier is sentenced to imprisonment by a court quite different in form and structure from that which would try a civilian for the same criminal offence. On the other hand, like a civilian, a soldier who is deprived of his liberty within the military base must be brought promptly before a judge (and not merely a military officer).[34]

Compared with a civilian a soldier's freedom of expression may be more restricted in order to secure the proper functioning of the armed

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[31] ECtHR, Application No 45624/99, Admissibility Decision, 6 February 2003. One of the earliest statements made by the ECtHR on the standing of members of the armed forces was in *Engel v The Netherlands* (1976) 1 EHRR 647, para 54.

[32] He is entitled to the benefit of a tribunal which, in an appropriate case, complies with art 6 of the Convention. See *Findlay v UK* (1997) 24 EHRR 221; *Morris v UK* (2002) 34 EHRR 52; *Cooper v UK* (Grand Chamber, 16 December 2003; *Grieves v UK* (2004) 39 EHRR 2. For a range of charges see *11 Applications v UK* (Application no 45689/99 *et al*), Admissibility Decision 25 May 2004. These included the purely military offences of desertion and absence without leave. For summary trial before a soldier's commanding officer see *Thompson v UK* (Application No 36256/97), judgment, 15 September 2004; *Bell v United Kingdom* (Application No 41534/98), Judgment 16 January 2007, para 53. See also *Forum of Conscience v Sierra Leone*, African Commission on Human and Peoples' Rights, Comm No 223/98 (2000), para 17.

[33] Although some States may adopt an administrative procedure for dealing with shortcomings in performance in addition to disciplinary processes.

[34] ECHR, above n 27, art 5(3); *Duinhoff v The Netherlands* (1984) 13 EHRR 478; *Hood v UK* (2000) 29 EHRR 365. There may be some degree of uncertainty within the military context of what would amount to a 'deprivation of liberty' although this is likely to be more clear-cut in relation to a civilian.

forces[35] as may his ability to proselytise his religious belief.[36] These cases may be seen generally as instances where military discipline is actually likely to be affected adversely by the soldier's actions or where subordinates within a hierarchical structure may be unduly influenced by a superior officer rather than merely limitations on the freedom of expression or of freedom of thought, conscience and religion because the context is one involving the armed forces.[37]

It is much easier to justify all or some of these differences between the civilian and the soldier where the latter is a volunteer. The ECtHR had the fact that the applicant had volunteered to join the armed forces very much in mind in *Akbulut v Turkey* (2003). It concluded that:[38]

> in choosing to pursue a military career the applicant was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations which could not be imposed on civilians... States may adopt for their armies disciplinary regulations forbidding this or that kind of conduct, in particular an attitude inimical to an established order reflecting the requirements of military service.

Certainly, the fact that the applicants in *Smith and Grady v UK*[39] were aware before they joined the armed forces that those armed forces would

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[35] See *E S v Germany*, (Application No 23576/94) Admissibility Decision, 29 November 1995; *Engel v Netherlands* (1976) 1 EHRR 647 ("the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline, for example, by writings": para 100); *Hadjianastassiou v Greece* (1993) 16 EHRR 219; *Vereinigung Demokratischer Soldaten Osterreich and Gubi v Austria* (12 December 1994); *Grigoriades v Greece* (1997) 27 EHRR 464 ("Article 10 does not stop at the gate of army barracks": para 45, but see the powerful dissent, note 54 below); *Larissis v Greece* (1999) 27 EHRR 329; *Erdel v Germany*, Application No 30067/04, Admissibility Decision 13 February 2007 ("the Court recognises that it is a legitimate aim in any democratic society to have a politically neutral army").

[36] *Larissis v Greece* (1999) 27 EHRR 329. Restrictions imposed on the applicants were justifiable in so far as they concerned subordinate military personnel but not civilians: para 59.

[37] See for example, *Sert v Turkey* (Application No 47491/99) Admissibility Decision, 5 December 2000; *Sen v Turkey* (Application No 45824/99) Admissibility Decision, 8 July 2003.

[38] See above n 31, para 64. See also the difficulties in a soldier purporting to waive his right to an independent and impartial tribunal: *Thompson v United Kingdom,* above n 32, para 44; *Bell v United Kingdom*, Application No 41534/98, Judgment, 16 January 2007.

[39] *Smith and Grady v UK* (2002) 29 EHRR 493; *Lustig- Prean and Beckett v United Kingdom* , Application No 31417/96, Judgment, 27 September 1999. Compare the earlier view of the Commission in *B v UK*, Application No 9237/81, Admissibility Decision, 12

dismiss any serving member who was found to be homosexual did not justify the State's action in so doing. It is, however, difficult to accept that different considerations would apply had the applicants in all these cases been conscripts.

It should not be thought that the ECtHR has set out all the boundaries between how the Convention rights are to be applied within a civilian and within a military context.[40] Other issues which may come before the Court might include the limitations on the private lives of members of the armed forces such as the censorship of personal communications, sexual relationships between different ranks,[41] the desire not to receive inoculations or particular prescribed medical treatment, the wearing of jewellery, hair length, the provision of certain foods for religious reasons, not to be separated from family responsibilities, not to be required to provide a sample for drug testing[42] and to refuse a particular military assignment for religious/conscience reasons.[43] Here the key issue will be the balancing of the perceived need for military efficiency in relation to the tasks which the armed forces might be required to undertake (operational effectiveness) against the claimed rights of the soldiers themselves. Different views on this may be taken depending on whether the armed forces are operating within their own State, where they are deployed abroad as a contingent to a multi-national force or during an armed conflict.

In practical terms these issues may not arise, although theoretically possible, where soldiers are volunteers pursuing a military career and are progressing well within it. In addition, the availability within the armed forces of an efficient complaints mechanism (such as that which exists where there is a parliamentary armed forces ombudsman, as in Germany,

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October 1983, para 2, although a relevant factor in this was that the applicant was superior in rank to his sexual partner, who was also under the age of 21: para 3.

[40] The ECtHR may not accept the State's arguments justifying a particular restriction as being within its national security interests: see *Smith and Grady v UK,* above n 8.

[41] See *B v UK,* above n 38, para 3. In addition, the applicant's sexual partner was under the age of 21 (a criminal offence at the time).

[42] See House of Lords and House of Commons Joint Committee on Human Rights, *22nd Report*, 2005-06 (UK) para 1.112.

[43] For example see *Khan v RAF Summary Appeal Court* [2004] EWHC 2230 (Admin); the case of Flt Lt Kendall-Smith in 'RAF doctor jailed over Iraq refusal' (Press Release, The Guardian Unlimited, 13 April 2006), online: <http://www.guardian.co.uk/Iraq/Story/0,,1753241,00.html> (last accessed on 1 September 2007).

Canada, Ireland, Australia) may head off any challenge in human rights terms.[44] The position may, however, be entirely different where soldiers have been dismissed by their armed forces. In this case further challenges in terms of alleged breaches of the ECHR may surface.

A State party to the ECHR is, of course, free to impose fewer restrictions on the rights and freedoms enjoyed by its soldiers than would be permitted by the Convention and thus equate as nearly as possible its soldiers to civilians. This is sometimes spoken of as 'civilianisation of the military'. The trend, certainly in western European States in recent times, has been to move towards this concept but individual States are at different places within the whole spectrum.[45] This should be contrasted with the idea that many postmodern armed forces are less like a closed structure into which civilians cannot peer than their predecessors. Inquests[46] before a coroner's court in England and court proceedings involving those killed

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[44] For a recommendation in England, see Report by Nicholas Blake QC, above n 17, recommendation 26; Joint Committee on Human Rights, Twenty-Second Report, HL 233/HC 1547 (2005-06), para 1.119. Compare House of Lords Select Committee on the Constitution, Thirteenth Report (2005-06), para 3; House of Commons Select Committee on the Armed Forces Bill (2005-06), para 125 and the *Armed Forces Act 2006* (United Kingdom), ss 338-9. See also recommendation 1742 (2006) of the Parliamentary Assembly Council of Europe, *Human Rights of Members of the Armed Forces*, 11 April 2006 and Doc 10861, 24 March 2006, both at para 9.2, online: <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc06/EDOC10861.htm>.

[45] This is frequently seen in modernisation of military justice systems which involve applying, as far as possible, civilian criminal justice procedures and in civilian court oversight of military justice, particularly a civilian court to hear appeals from military courts. It is also reflected in the desire of some governments to ensure that the composition of their armed forces reflects that of the civilian population. The position of women members of the armed forces, for instance, shows differences in the armed forces of various States particularly on the issue of their deployment to combat roles. See, for example, the view taken in New Zealand by the *Human Rights (Women in Armed Forces) Bill 2006* (NZ) and the speech of the UK government minister, Ms Pillay, MP, *Hansard*, 6 September 2006. Compare *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: New Zealand,* 1214/94, UN Doc A/49/38, para 611. See also, G Rubin, 'United Kingdom Military Law: Autonomy, Civilianisation, Juridification' (2002) 65 *Military Law Reporter* 36, 44-47 particularly. For the USA see W Allison, above n 26, 185.

[46] See, in relation to UK armed forces' deaths in Iraq and Afghanistan: *Hansard*, House of Lords, Vol 685, WS 56 (12 October 2006).

on active service show that deaths caused during combat operations can be the subject of judicial proceedings[47] held outside the military legal system. On the other hand, some States have entered a reservation to the Convention in respect of their armed forces, generally permitting discipline issues to be governed solely by national law.[48] Where this has occurred divergence between the rights of the soldier and those of the civilian can develop where each is subject to the same criminal law. Not all States, however, recognise this possibility since in some criminal jurisdiction can be exercised only by the civilian courts. In this latter group of States the position of the soldier and that of the civilian in respect of the enforcement of the criminal law will be identical. This may not be the case where criminal jurisdiction is concurrent. The position is even more divergent when the State permits a civilian to be tried by its military courts. In this case the civilian is treated as a soldier in civilian clothes.[49] Whilst the ECtHR has not set its face wholly against such a practice it will require "compelling reasons justifying such a situation".[50]

II. CONCLUSION

As a means of understanding the status of armed forces personnel in postmodern armed forces the concept of the 'soldier as a citizen in uniform' is a shibboleth which may have some political merit[51] but which, on its face, is not entirely an accurate legal term, at least in a number of States. It tells us little more than that a soldier (who will normally be a citizen), like a police officer, nurse or a museum attendant, is subject to the

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[47] See *R (on the Application of Gentle and another) v Prime Minister and others* [2006] EWCA Civ 1690.

[48] Some ten States have done so. The pattern varies with some States entering a reservation solely to parts of art 5, some to arts 5 and 6 and one State to art 11. The Parliamentary Assembly of the Council of Europe has recommended member States to withdraw their reservations to the Convention, see *State of Human Rights and Democracy in Europe*, Doc 11202, 28 March 2007, para 15.

[49] The position in the UK is now set out in the *Armed Forces Act 2006* (UK) s 370 and Schedule 15. There is an element of consent in relation to those employed as civilians, although only indirectly by their dependants. Compare the situation where martial law is imposed: *Alfatli et al v Turkey*, Application No 32984/96, Judgment, 30 October 2003, para 45.

[50] *Ergin v Turkey (No 6)*, Application No 47533/99, Judgment, 4 May 2006; *Martin v United Kingdom*, Application No 40426/98, Judgment, 24 October 2006.

[51] Above n 1.

criminal law and that this law takes precedence over civilian or military orders.[52]

In a democracy the soldier's right and obligations are determined by the national law or those parts of international law applicable within the State. His individual rights or obligations may be similar to, or depart from, those of a person who is not a member of the armed forces (a civilian). Any differences will have to be judged against the needs of military discipline within a particular State and those for the successful recruitment of volunteer armed forces. Greater opportunity to sharpen differences between the rights and obligations of a civilian and those of a soldier become possible if the armed forces are recruited (partly) on a conscript basis, since the attractiveness of the career as a soldier is not a significant factor in relation to conscripts. In theory, the absence by the conscript of any acceptance voluntarily of the life of a soldier should argue against any significant differences from the regime which applies to volunteers. In practice, however, their status - often confined to that of the recruit in training - may display marked differences.

The maintenance of discipline at all times within the armed forces is generally considered to be more important than in all other (civilian) occupations, simply because it is not realistically possible to provide for different systems during peacetime and in combat situations. It is for this reason that the role of the civilian and the soldier cannot be equated and why the ECtHR has decided that it must consider Convention rights within 'the characteristics of military life'. It does not do this in respect of any other occupational group.[53]

In future cases before the ECtHR, however, that Court will want to satisfy itself that there are acceptable reasons "substantiated by specific examples" behind national law for treating a civilian and a soldier

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[52] This was the view of A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan & Co, 1961), 307 (whose view was the same in his 1926 edition, 303). For more modern instances see, for example, *K-H W v Germany* (Application No 37201/97), Judgment, 22 March 2001, para 75; G Humphreys & C Craven, *Military Law in Ireland* (Round Hall Sweet & Maxwell, 1997), 22. Rules of engagement are normally drawn up on this basis.

[53] The need to preserve order within a civilian prison may share certain characteristics with military discipline but the legitimate aim of any restriction on human rights is quite different. The maintenance of discipline with a police force, fire services or other disciplined body, whilst important, does not share with the armed forces the essential requirement of a very high level of discipline when engaged in armed conflict or where weapons are used.

differently.[54] The issues will revolve around, in practice, whether the restriction is proportionate to the need to protect military order and discipline.[55] It will be the Court and not merely the armed forces which will ultimately decide this issue.

Different considerations may, however, apply during time of armed conflict. We have seen that the soldier's rights under the ECHR need to be considered within the particular circumstances of military life and those rights given by articles 8-11 are subject to such limitations as are "necessary in a democratic society in the interests of national security". These are variable concepts. Both the military context and the 'interests of national security' will alter during armed conflict to which the State is a party. By these devices any similarity with the rights of a citizen may be varied and the rights of the soldier are likely, in consequence, to look very different from those of the civilian.

Earl Warren, Chief Justice of the United States, wrote in 1962 that "our citizens in uniform may not be stripped of their *basic* rights simply because they have doffed their civilian clothes".[56] In this passage the Chief Justice clearly recognised that, providing the basic rights of a soldier were left untouched, some limitations could be imposed on soldiers in such a way that they would be distinguished from civilians. The position in Europe is very similar if we assume that 'basic' rights are those contained in the Convention on Human Rights but as interpreted by the Court to

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[54] *Smith and Grady v UK*, above n 8, para 89, and for the Court's unwillingness to accept that there were reasons of operational effectiveness which would justify a ban on homosexuals serving in the armed forces, paras 99 and 105. Thus the Court will have to consider whether the restriction is (a) prescribed by law and (b) pursues a legitimate aim (for example military order and discipline). In cases falling within arts 8-11 the further requirement of "necessary in a democratic society" will need to be satisfied (in practice this will depend upon whether the restriction "answers a pressing social need" to maintain military order and discipline). See, for example, the dissent of five judges in *Grigoriades v Greece*, above n 35, where the applicant had been charged with 'insulting the army') who took the view that "military justice is by itself necessary in a democratic society, otherwise anarchy or anti-democratic subversion ensues, contrary to the aims of the Convention": para 5. They considered that the "primary purpose of military discipline is to ensure that in all circumstances... lawful orders from a superior in rank are unquestioningly and immediately carried out by the serviceman to whom they are addressed": para 4.

[55] For the application of this principle to the freedom of expression see *Vogt v Germany*, Application No 17851/91, Judgment, 2 September 1995, para 52 which required any restriction to be "proportionate to the legitimate aim pursued".

[56] See Earl Warren, above n 16, 188 (emphasis added). His view has also been adopted judicially in *Chappell v Wallace* (1983) 462 US 296; *US v Connell* (1995) 42 MJ 462.

reflect the realities of military service.[57] Where the ECtHR has taken into account the particular characteristics of military life in order to protect military discipline it has done so in relation to those rights upon which the Convention recognises that limitations may be imposed within a democratic society or where it has interpreted the Convention in order to recognise the "normal conditions of life within the armed forces".[58] Whilst it has recognised that military courts play a necessary part (at least in some States) in the maintenance of discipline, the Court has insisted that such courts guarantee to the soldier (as the civilian) an 'independent and impartial tribunal' for the determination of charges, although characterised as breaches of military discipline, which are of the same nature and effect as criminal charges.

In so far, therefore, as a civilian and a soldier must, in a democratic State, share *basic* rights, the maxim that 'a soldier is a citizen in uniform' is an accurate one.[59] However, the soldier on the one hand, the police officer, the nurse and museum attendant on the other are all citizens in uniform but their legal status is clearly not identical.

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[57] For the position of a number of European States see Nolte, above n 7, 74.

[58] *Engel v Netherlands*, above n 31, para 59, where the Court was interpreting the term "deprivation of liberty" in art 5. Compare the right to life (art 2) where a soldier, like a civilian, is entitled to an independent and impartial investigation should he die in suspicious circumstances: see *Shevchenko v Ukraine,* Application No 32478/02, Judgement, 4 April 2006.

[59] Whether a citizen is a soldier or a civilian, if he is detained as a prisoner of war or as an internee during an international armed conflict his 'rights' under Geneva Convention III and IV respectively are similar.