Ad hoc report

Human Rights Protection &
Disciplinary Policy in the RA Armed Forces
(Human Rights Defender of RA)

2009

This study has been conducted by the Task Force established within the framework of the Memorandum of Understanding signed between the OSCE Office in Yerevan and Human Rights Defender's Office on 6 October 2008.

The views, findings, interpretations and conclusions expressed herein do not necessarily reflect the views of the OSCE Office in Yerevan.

Contents

Introduction……4

Legal certainty as related to the content of a disciplinary offense and the choice of a penalty……...…….6

Commander's responsibility to ensure respect for human rights in the armed forces.....……...…….....….10

Disciplinary procedure and protection of fundamental human rights ……..……..…..19

Confidentiality and freedom of information ……....21

Introduction

While servicemen are endowed with a special legal status (a number of their rights and freedoms are restricted while the scope of their duties is broader) they, nevertheless, continue to enjoy State protection. Their rights, freedoms and lawful interests must be respected and, therefore, persons who breach them must be held liable for these breaches.

The Internal Service Regulations of the RA Armed Forces (hereinafter: the Regulations) have established the general obligation of the commander to make sure that military discipline is adhered to in the military unit /subdivision/ entrusted to him, that the morale among the servicemen is high, that the safety of military service, as well as its internal discipline and medical, socio-legal and logistical provision is ensured.

The commander is liable by law for each omission. Ensuring strict compliance by the commander with his duties and holding all wrongdoers to account for violations is a genuine safeguard for better protection of human rights in the armed forces.

Article 31 of the Regulations provides, *'The principle of a single-man command implies endowing the commander with full commanding power over his subordinates and bestowing individual liability on him before the State for the military unit or subdivision and for any aspect of each serviceman's life and activities.'* In certain areas, the commander delegates part of his responsibilities to his subordinates /deputies for instructions in the rules of handling the military equipment, for work with the personnel, etc/ hand in hand with delegating the responsibility for the shortcomings in these areas. All conditions under which any transfer of responsibility from the commander to his subordinate is lawful must be clearly defined, bearing in mind that Article 74 of the Regulations stipulates, "*The commander /superior/ is obliged to be fully aware of the real situation of the military unit /subdivision/ entrusted to him, always possess accurate information about its roster and actual personnel, as well as about the weapons, military equipment and other material resources".*

The commander is competent to apply disciplinary sanction with a view to fulfilling his "general responsibility". Any arbitrary use of such competence or failure to resort to it must entail the commander's liability.

The effective/lawful application of the norms prescribing disciplinary liability depends on the certainty of disciplinary offenses, as well as on the extent to which the applicable penalties are motivated and proportional vis-à-vis the committed offense.
Where disciplinary sanctions are imposed, fundamental human rights and freedoms must be respected and certain safeguards applicable in criminal law must be upheld with due regard to the European Court of Human Rights' practice of declaring certain penalties "punitive" /depriving of a furlough, demoting in one military rank, detention in a disciplinary isolator, etc/ and the requirement that all criminal procedure safeguards must be complied with regardless of

whether those penalties are regarded as criminal, administrative, civil or disciplinary by national law.[1]

In 9 months in 2008 a 70 % increase (compared with 2007) of the incidents of scuffles and bullying in military units of the RA Armed Forces was registered. Furthermore, the incidents of scuffles took place both between officers and conscripts as well as between civilians and conscripts.

Any incident of subjecting servicemen to unlawful liability, arbitrariness by and impunity of commanders has a potential to inspire a negative attitude towards military service and the fulfilment of military duties among servicemen, leading to military service evasion, low morale and negative moral and psychological atmosphere in a military unit.

In view of the increase of offenses during military service, of the wide public interest/concern about them, as well as of the need for democratic control over the armed forces in the framework of the international commitments of Armenia (the OSCE Code of Conduct on Politico-Military Aspects of Security; Armenia-NATO Individual Partnership Action Plan), including a more effective involvement/role for the Human Rights Defender in the process of civil oversight, the Defender has deemed it reasonable and necessary to undertake a special study on the progress of the enforcement of disciplinary liability in the context of human rights protection and to publish this *ad hoc* report on the results of the above study.

[1] Engel/Netherlands, 8 June 1976; Eggs/ Swetherland, 11 December 1976, etc.

Legal certainty as related to the content of a disciplinary offense and the choice of a penalty

In conformity with Article 51 of the Disciplinary Charter of the RA Armed Forces (hereinafter: the Charter), "*Every serviceman is personally liable for any breach of the military discipline or public order"*. The same act stipulates the types of applicable penalties depending on the offender's status.

The penalties include depriving the conscripts and sergeants in military service for a fixed period from their regular furlough, their isolation and detention in a disciplinary isolator, referring the soldiers and sergeants contracted to military service to the reserve prior to the established deadline, demotion in one military rank, etc. Regardless of how these measures of coercion are termed in national legislation, the European Court of Human Rights has opined that similar practices have punitive character and that the safeguards prescribed by Articles 5-7 of the European Convention of Human Rights /legal certainty, prohibition of double jeopardy, the right to a court hearing/complaint, the right to a fair trial, etc/ must be applied to them.

Legal certainty, first and foremost, implies clarity in establishing the serviceman's duties, failure to comply with which entails disciplinary liability. They must leave no room for misinterpretation. Furthermore, it is possible to clearly define the content of a disciplinary offense by law /*sensus largo*/- infer/clarify it through judicial practice or analysis of disciplinary policy implemented by commanders. In this sense, it must be noted that neither the law nor any act regulating disciplinary policy /MoD Directives etc/ defines any standards prompting commanders which penalties must be applied to certain offenses. Moreover, in certain cases the servicemen have been subjected to disciplinary liability for breaching certain rules established by the Commander with no such rules publicized or accessible in the unit, which means that the servicemen have or may have been unaware of the existence of these rules. We believe it important to remind that in conformity with the case law of the European Court of Human Rights, any law establishing liability must be available and accessible.

The principle of legal certainty also applies to the content of disciplinary penalties, the need for their application (necessity), as well as the issue of proportionality of the imposed penalty to the committed offense. There is a need for more clarity in the provisions related to the selection of the type of penalty depending on the nature of the offense. In particular, Article 92 of the Charter stipulates, "A serviceman is entitled to *some degree of forgiveness* in the selection of punishment for the first offense, to a more severe punishment for a repeated offense and to no forgiveness for any subsequent offense. The disciplinary penalty is made more stringent when the offense has been committed in a state of *alcoholic intoxication* while performing a combat duty (combat service) and other service duties or when an *essential* breach of discipline has occurred as a result of the offense". These formulations clearly contain value judgments which open scope for subjectivism/arbitrariness. It is necessary to make a differentiation between the use of alcohol and the state of alcoholic intoxication, as well as clarify the concept of the '*essential* breach of discipline' and varied manifestations of forgiveness.

It is not only the law that shall clarify those concepts. They may be interpreted also by MoD directives, acts adopted in meetings of the personnel/sergeants/non-commissioned officers/commissioned officers as well as inferred from the analysis of the disciplinary policy implemented by commanders.

The disciplinary policy in the armed forces pursues regulating/educating and preventive goals: on the one hand, it aims to ensure rigorous fulfillment by a serviceman of his duties and respect for the rules established in a military unit, on the other hand, it is an alert to all servicemen that any omission/violation will receive an adequate response.

When imposing a disciplinary penalty, the commander must bear in mind the following benchmarks laid down in the Charter:

- The main means of ensuring military discipline is persuasion /explaining the content of a legislative requirement and the nature of a made mistake, etc/. The aim of persuasion is to inculcate a determination to adhere to the internal service rules within the RA Armed Forces as well as the established discipline. A commander should resort to disciplinary penalties when the method of persuasion fails to render the desirable results. The study of disciplinary penalties has revealed that the commander does not normally justify that the method of persuasion is *in concreto* ineffective and there is a need to resort to a disciplinary penalty whereas the legislation requires, that *in case of any breach of the military discipline or public order by a serviceman, the commander (superior) may limit his actions to reminding him of his military duty, or, if necessary, impose a disciplinary penalty* /Charter, Article 51/.
- Breaches of the military discipline or public order /offenses/ by a military may, upon the commander's decision, be discussed in meetings of the personnel, sergeants, non-commission and commissioned officers, and, in case of a woman soldier, in meetings of women military ranked not lower than the soldier in question (meetings of honour). Furthermore, it is prohibited to prescribe a disciplinary penalty while deciding to discuss the offenses at the meetings of honour. The study has revealed that the above protocol (discussion at the meetings of honour) is not normally followed by commanders which has led to a complete single-man command in the army/military unit. In the meantime, the involvement of the "personnel" in the solution of the problems of military units must be combined with the principle of a single-man command.

The commander must first consider the necessity for imposing a disciplinary sanction by substantiating the ineffectiveness of the method of persuasion and then, in view of the unreasonableness to discuss the matter in meetings of honour, select a disciplinary penalty. At this stage, the commander must be guided by the following principles:

- The penalty must not be more stringent than is necessary to adapt the conduct of a particular person to the order established in the armed forces. In addition to this, there is an imperative requirement related to the manner of serving the penalties: *Any means of coercion enforced on servicemen must never serve the purpose of humiliating their human dignity*. In 2007 there was an incident of scuffle between groups of soldiers in one of the military units in Syunik marz. As a result, the commander adopted a decision on enforcing a "self-made" measure of liability against them and forced one party to wash

the clothes of the opposite party, as well as to make monetary payments both to him and to the above soldiers. Part of the demanded sum was paid, the soldiers objecting to doing the required work were exposed to ridicule and one of them was subjected to violent actions of a sexual nature. The incident was disclosed when one night the soldiers of the "injured party" decided to take their revenge on the commander and beat him up during sleep. In his statement the commander indicated that he had often resorted to the above "measure" of liability to settle the conflicts between. Article 30 of the Internal Service Regulations of the RA Armed Forces clearly states that, *"when enforcing liability, it is not allowed to insult the honour and dignity of servicemen"*. The normative act uses the expression "not allowed" which is conceptually wrong in light of the implementation of the disciplinary policy in the armed forces. We insist on the use of the term "prohibited" which complies with the international commitments undertaken by the RA, including the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

- a penalty must be fair but not excessively soft to make its imposition meaningless and falling short of its preventive function;
- a disciplinary penalty must be imposed in a timely manner.

Decisions on prescribing disciplinary penalties demonstrate that commanders fail to substantiate the need for such. Neither is there any mention of why the selected type of penalty is adequate to the weight of an offense or the level of guilt.

A person on whom the penalty is imposed must be explained the grounds and reasons for its imposition in a clear and accessible manner. The nature of the wrongful act and its deviation from the established rules must be clearly clarified. The study of the practice of application of disciplinary penalties has revealed that not always is the application of disciplinary penalties preceded or succeeded by appropriate explanatory work.

In line with the European Convention on Human Rights, Article 96 of the Regulations prescribes, "*it is prohibited to apply several disciplinary penalties for one and the same offense or join one disciplinary penalty with another or punish the whole of the subdivision's personnel instead of punishing the culprit*."

Since 1999 the distribution of servicemen's salary in the RA Ministry of Defence has been based on a bonus (incentives) system. In other words, bonuses have been added to the base salary. In case of applying a disciplinary penalty, however, depending on the gravity of offense and the severity of applied penalty, these amounts are cut down in conjunction with the primary sanction. Formally, non-payment or cutting of bonuses is not a type of penalty prescribed by the Disciplinary Charter of the RA Armed Forces. However, in terms of its substance, it fully satisfies this criterion: for one and the same offense, two penalties are imposed on a person. Since 2008, works have been underway in the RA Ministry of Defence to eliminate this practice.

The study of the practice of application of disciplinary penalties has revealed that all participants of scuffles are normally subjected to disciplinary liability without any effort to identify the level

of their participation or their guilt as well as the circumstances removing liability, which has led to the emergence of the elements of collective liability.

Although Article 93 of the Disciplinary Charter of the RA Armed Forces prescribes that a disciplinary penalty must be imposed within one day following the commission of the offense but no later than 10 days from the day the commander (superior) has become aware of the offense. There is no mention of the period of time, succeeding the commission of the offense (where the commander is not aware of the incident), in the course of which a person may be subjected to liability.

Finally, reference should be made to the disciplinary penalty prescribed by the Charter that is closest to punishment – isolation and detention in an isolator. It is applied to conscripts in military service for a period of up to 10 days, to contracted military servicemen for up to 7 days and to commissioned officers (other than commanders of regiments and subdivisions, as well as senior commissioned officers with the rank of colonel) for up to 5 days (Articles 54 and 74 of the Charter). The isolation and detention in an isolator is a specific manifestation of deprivation of liberty which was stated so by the European Commission of Human Rights as early as 1976 (Engel/Netherlands, 8 June 1976).

When ratifying the European Convention on Human Rights the RA entered a reservation by which the provision in paragraph 3, Article 5 of the Convention does not apply to the scope of the Disciplinary Charter of the RA Armed Forces.[2]

In the RA it is possible to detain a person for up to 10 days without any interference by the court. It is necessary to start a discussion with civil society on the extent to which it is reasonable to leave or lift this reservation. It should be mentioned that there are also discrepancies between the legal practice and the Constitution after the adoption of the constitutional amendments, something that has frequently been indicated by representatives of delegations arriving in the RA in the framework of the IPAP evaluation.

[2] In conformity with paragraph 3 of Article 5, *'Everyone arrested or detained in accordance with the provision of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conducted by guarantees to appear for trial.*'

Commander's responsibility to ensure respect for human rights in the armed forces

In accordance with Article 31 of the Regulations, one of the principles governing the formation, command and relations of servicemen in the RA Armed Forces is that of single-man command, which implies not only a full scope of the commander's (superior's) power vis-à-vis his subordinates but also his individual liability before the State for the military unit and subdivision as well as each and every aspect of servicemen's lives and activities.[3] Article 10 of the Regulations stipulates that in case of a failure by the commander to discharge his responsibilities in the area of exercise of the rights and lawful interests of servicemen, the guilty commander must be held liable by law.
Paragraph 2 of Article 78 of the Regulations stipulates, *"Prior to starting classes, works and any other service activity, the commander must personally make sure that safe conditions are created and secured for that, that his subordinates have mastered the safety requirements and that they have the necessary practical skills*". The analysis of these articles demonstrates that the commander is not only entrusted with the duty of the means – undertaking all the relevant activities – but with the duty of the result, in view of the fact that the commander is to make sure that the undertaken activities render the needed results – safe conditions have been ensured, that the subordinates have been trained in safety requirements, etc.

The definition of the duty of the result has a very important legal meaning: the commander is to be subjected to disciplinary liability for any omission and, in some cases, to criminal responsibility for negligent if he fails to prove that all measures have been taken within the scope of his possibilities but the consequence has not been prevented due to circumstances that were actually beyond his power.

The study of disciplinary policy demonstrates that to substantiate the commander's disciplinary liability, his superior indicates the latter's failure to comply with a particular duty, for example, a commander of a company has frequently absented himself from the field of deployment leaving his servicemen without due control; there have been violations of the regulations on careful maintenance of the military equipment, regularity of patrol checks; the servicemen of the duty detachment have been instructed but no practical lessons have been delivered, etc. Where it is impossible to indicate a breach of a specific duty, the superior, guided by the principle of the duty of the result, must subject the commander to disciplinary liability for negligence of his functional duties, failure to uphold the morale of servicemen, cases of bullying and inadequate control, etc.

The study of the disciplinary policy in the armed forces has revealed that in practice only the inferior servicemen are normally subjected to disciplinary liability. The superior (the boss) who is culpable (due to negligence or carelessness) for the incident, as a rule, gets away with it.[4] For example, in the fourth quarter of 2006, due to negligence of the persons in charge of firearms maintenance, two soldiers, in a state of alcoholic intoxication took possession of firearms, went to the open area of the military unit and at a distance of 15 meters from the building, fired shots

[3] The provisions related to the commander's liability are prescribed by Articles 73 and 78 of the Internal Service Regulations of the RA Armed Forces.
[4] In 2007-2008 only 12-14 % of measures of disciplinary liability were applied to commissioned officers.

inflicting bodily injuries on each other. As a result of the inquiry into the incident, the offenders were subjected to criminal liability. The inquiry failed to answer the question on how the soldiers had found themselves in a state of alcoholic intoxication. In addition to this, persons serving in the same military unit stated in their testimony that the above offenders had regularly been using alcohol in the course of the 3 months preceding the incident. None of the commanders was subjected to disciplinary liability for failure to prevent the above unlawful conduct.

It is true that the legislature has established a duty of the result but those implementing disciplinary policy are sometimes guided by the principle of the duty of the means. Besides, in determining the culpability of commanders the main emphasis is normally placed on whether the documents that can prove that the commander had given necessary instructions to servicemen are in place. The question of commanders' disciplinary liability (duty of the result) is therefore ignored. An immediate testimony to the aforesaid is that in accordance with the information acquired from the State agencies in the field of defence, inspite of the fact that there are documents attesting to servicemen's instructions with regard to the use of defence technology in all military units, in 2007-2008, 4 fatal accidents and 17 incidents of physical injuries resulting from violations of the rules of operations of weapons and military equipment were registered.

The study of the practice of application of disciplinary penalties has revealed a case where the principle of the duty of the result had been applied and the act had been assessed as resulting from lack of control. However, it has been indicated that it had objectively been impossible to prevent/take the relevant measures due to a short interval between the commander's appointment and the recorded offense.

On 4 August 2008 in one of the military units, a serviceman who was standing sentry at the entrance to the sentry-unit, took advantage of the disorder in the sentry-unit and opened a sub-machine gunfire in the direction of another serviceman on sentry duty entering the premises of the sentry-unit who had earlier insulted him. When he saw that as a result of the opened fire the serviceman received a fatal injury, the sentry inflicted a gunshot wound on himself. The service inquiry subsequently revealed that *the incident was a consequence of blatant violations of servicemen's interpersonal relations, weak control of the personnel by commanders, unhealthy morale in the division, negligent attitude towards their functions by platoon, company and higher commanders, low level of control, maladministration of the preparation and performance of the sentry duty, and artificial control of the sentry group by the relevant officials*. As a result, the division commander and his deputy were issued a reprimand, the commander of the artillery battery, a severe reprimand. However, the commanders of the military unit and of the headquarter were not subjected to any disciplinary penalty in view of the fact that they had been appointed to the relevant positions on 7 July 2008. In fact, it was admitted that the commander had a duty of the result, however his term of office (28 days) was not regarded sufficient to enable him to introduce the necessary changes in the unit and to strengthen control. We believe that the peculiarities of command in the armed forces were not taken into account, implying taking genuine measures to ensure law and order in a shorter period of time.

Delegation of Responsibility to Subordinates

It is necessary to consider the distribution of area responsibilities among deputies by commanders and control over their fulfillment. The study of disciplinary policy has shown that the distribution of responsibilities among deputies is normally done in the following areas:

- provision of food and control over its quality and security, as well as of the observance of the hygiene and sanitary norms;
- instruction and training regarding the regulations related to the use of military technology;
- ensuring security in a military unit (including movement in/out the unit) and the works related to the duty detachment, the rear (combat);
- works with the personnel.
- as to internal discipline, no distribution of responsibilities at the level of deputies takes place in this area. The studies conducted in a number of military units have demonstrated that their commanders normally make a note about the deputy bearing the responsibility for a particular area in the record when subjecting soldiers to disciplinary liability. For example, following a fire in a military unit both the soldier in charge of the area and the deputy commander in charge of safety were subjected to disciplinary liability. Furthermore, the least stringent penalty was imposed on the deputy commander at the time of imposition of the disciplinary penalty.

It should be noted that in some cases the distribution of responsibilities among deputies by a commander leads to the latter's unawareness of problems in that particular area of the military unit. For example, one of the commanders was unaware of the theft from the storage facility that continued for about 5 months. So, when the crime was detected, his explanation was that his deputy had been in charge of that area. No disciplinary proceeding was instituted for that case.

In conformity with the Regulations, *the commander (superior) is obliged to be fully aware of the genuine situation in the military unit (subdivision) entrusted to him, always be in possession of accurate information on the roster and actual personnel, as well as on weapons, military equipment and other material resources.*[5] The study of disciplinary policy has revealed that in case of deficiencies/inaction in specific areas, the deputy responsible for that area is held liable, i.e. is issued a severe reprimand, while the commander is merely issued a reprimand. It should be noted that any distribution of responsibilities among deputies should pursue the aim of increasing the efficiency of officers in command rather than become a means to evade or shrug off liability. Therefore, it is especially important to find out whether the commander has bestowed the relevant leverage on his deputies alongside the transfer of powers/means for regulating the relevant areas, for example transfer of the material resources or whether the competence/professionalism of a deputy has been taken into account etc.

We have registered that the studied cases failed to reveal a single example when the lawfulness of the transfer of liability had been considered. The approach is formalistic: the area deputy is

[5] The Internal Service Regulations of the RA Armed Forces, Articles 73-74.

held liable and the question, that when delegating the area, the commander has retained all the relevant leverage and has failed to take the necessary measures, is ignored.

Non-statutory Relations

Among the offenses recorded in the RA Armed Forces there are numerous cases of offenses connected with problems arising between servicemen of varied ages. Disciplinary offenses and crimes committed as a result of arguments between persons of different age groups or of one group wanting to assert itself vis-à-vis the other, have been registered over 6 months in 2008 in the military units located in the marzes of Kotayk, Gegharkounik, Tavoush. The following case that occurred in 2007 deserves special attention in this respect. 22-24-year-old servicemen forced an 18-year-old soldier to periodically wash their underwear. The inquiry revealed that the military unit commander had been aware of the practice but took no measures to eliminate it. As a result, one night the 18-year-old serviceman burned the military uniforms of the other servicemen. One of the servicemen of the military unit informed the Military Police of the MoD about the incident following which an inquiry was launched. The commander of the military unit was subsequently subjected to disciplinary liability – reprimand. In this particular situation, the imposed disciplinary penalty was not proportionate to the mentioned passive manifestation of a degrading treatment since there was ample ground to assume that the person had been subjected to degrading treatment by a private person and the commander had taken no measures to conduct proper investigation to prevent or detect the treatment. In similar cases, the UN Committee against Torture has established that this kind of state officials must be subjected to criminal liability as principal offenders or accomplices.[6] Apart from this, no measures were taken to subject the 22-24-year-old servicemen humiliating the 18-year-old serviceman to liability, which also added to the impunity and obstructed the performance of the preventive function of disciplinary liability.

The effectiveness of disciplinary policy and its preventive role must have been reflected in the indicators of offenses in the armed forces. However, their annual trend is increasing rather than decreasing. The preventive role of disciplinary liability has been constantly emphasized, in particular, in the sessions of the RA Ministry of Defence collegiums as well as in trainings for officers in command.

The role of commanders in preventing offenses and ensuring internal order is of utmost importance. The latter encompasses observance of the rules established by military charters that are related to the placement of servicemen, their daily operations, daily life and duty details. Important among the mechanisms for ensuring internal order is the profound understanding by all servicemen of the duties prescribed by law and military charters, their conscious and accurate fulfillment, consistent educational work, high demands by commanders and their care for subordinates and their health, clear definition of and adherence to the military preparation, duty details, daily routine and work time, accurate instruction in the rules of using weapons and defence technology and their observance, ensuring adequate conditions for life and hygiene requirements.

[6] Committee against Torture, General comment N2, Implementation of Art. 2 by States parties, http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.GC.2.CRP.1.Rev.4_en.pdf

The observance of charter relations in the armed forces depends on both commissioned officers and rank-and-file. In practice, there have been many cases when inaction by the commander has led to tragic consequences. The murders in the military units in Tavoush and Lori marzes in 2005-06 are vivid examples of such cases. In one of these cases, the military unit commander was unaware of the fact that "cards contests" have started among soldiers in his military unit and that the amount of money involved in the contest and the refusal to pay it caused the murder of two soldiers. In the meantime, timely interference as well as application of disciplinary penalties to the offenders would have prevented the tragedy.

Self-Mutilation

There are numerous cases of recruiting to the RA Armed Forces of persons who suffer from various health conditions and who subsequently commit grave offences including inflicting physical injuries on themselves during military service. In their statements, the responsible agencies continue to register that the incidents of self-mutilation are, among other factors, caused by the low morale in military units, low level of educational work done by non-commissioned officers, as well as lack of an individual approach to servicemen.

The following statistics is available on incidents of self-mutilation in 2008: 21 out of 115 self-mutilating servicemen were conscripted to army on the basis of medical articles 1c, 7c, 35c, 88c, 25c and 42 c, i.e. with various degrees of neuro- and mental restrictions (in medical language, these are called moderate derangement of mental and psychological functions). With a view to keeping the conscripts suffering health conditions in full view and in accordance with the order of the Head of Military Police, surveillance proceedings were drawn up by its territorial divisions. The obtained materials demonstrate that the staff of the Military Police does not always conduct proper surveillance of conscripts in the above categories.

Depending on the educational level of the subject, the picture of the offenses in the RA armed forces is as follows: 3 % of self-mutilators had higher education, 77% - secondary and 20% - an 8-year education. The picture is almost the same with the other types of offenses, including the other types of disciplinary offenses.

However, much as this and other statistical data enable to detect the factors conducive to offenses, the activities aimed at their elimination are yet to achieve significant positive changes.

Failure to Register the Offenses/Arbitrariness

One of the important things obstructing the preventive function of disciplinary liability is related to failure to register the offenses committed in the armed forces. Although the official statistics demonstrates that there is an increase in offenses on an annual basis, the existing picture does not fully reflect the actual situation.

In conformity with the assessment voiced in the course of interviews with defence sector representatives, only 35-40 % of the offenses in the armed forces are normally registered: 10-15 % of these offenses are of a disciplinary nature and the other 30 % are other types of offenses.

Furthermore, the latency indicator is quite high in registering the incidents of bullying: the interviewed persons have stated that only 15-20 % of these offenses are registered. To illustrate the aforementioned, a number of examples may be found below that clearly testify to the facts of failure to register servicemen's offenses.

In the summer of 2005 there was a spread of an epidemic among the servicemen in one of the division of the RA Armed Forces that resulted from violations of the food security regulations. This led to an almost 10-day disturbance of the activities of the military unit. The joint study conducted by the RA Ministry of Defence and the Ministry of Health Care found that this situation had resulted from the failure to adhere to the rules of hygiene and food quality control by those in charge of the military unit. However, there were no disciplinary or other proceedings in connection with the offense.

In another case in November of 2008 at 2 o'clock a.m. a company commander, in a state of alcoholic intoxication, sounded reveille and without allowing the servicemen time to dress up, forced them to go out of the barrack and run around the place. Paying no attention to the fact that the temperature outside the barrack was below 0 degree and the servicemen were sleepy, the commander continued the 'entertainment' for about an hour. As a result, several of the company servicemen caught pneumonia. No legal proceeding was initiated for the incident.

There are a number of cases when rather than register the offenses committed by commissioned officers in command liability has been imposed on the injured party. This was the case in one of the military units in Lori marz. The platoon commander beat up a soldier who hit him back twice. The commander of the military unit put the whole blame for the incident on the soldier and subjected him to disciplinary liability in the form of detention in isolator for 10 days.

There have also been cases in the armed forces when commissioned officers agreed not to impose measures of disciplinary liability against monetary or other compensation. In 2008, 4 such cases were registered in the Armavir, Kapan, Vanadzor and Shirak garrisons by the Military Police and the Military Prosecutor's Office.

Another manner of abusing the competence to subject a serviceman to disciplinary liability is the commander's practice of choosing a "weak link" from among his servicemen with a view to obtaining monetary compensation from him. The commander then keeps subjecting this "weak link" to disciplinary liability. In 2008 in a military unit of the RA Armed Forces deployed in Tavoush marz, a soldier, in violation of the rules of handling weapons, broke the device for holding the sword-bayonet of a Kalashnikov submachine gun. The commander demanded 15 000 AMD in damages. Without starting any argument about the amount, the soldier submitted a written application requesting to subject him to disciplinary liability for the inflicted damage. The commander dismissed the application (which has not been preserved: the commander did not register it but other servicemen in the military unit mentioned about it in their testimony). The soldier's application was followed by the commander's brutal demands for payment of the amount in the form of regular beatings of the soldier in the course of 20 days. The incident had a fatal end as the soldier was found hanged. An inquiry was launched into the incident which revealed a number of offenses in the above military unit. Firstly, it was found that there had been

no decision by the commander to subject the soldier to disciplinary liability for the offense that caused the incident, that the commander had administered justice at his own discretion and that he had applied the type of penalty of his own choice.

One of the causes of the negative phenomena in the RA Armed Forces is inadequate educational and professional level of the officers in command, as well as the exercise or failure to exercise their powers on other motives. This complicates the situation even further and creates an atmosphere of impunity among offenders as well as encourages them to commit new and publicly more dangerous offenses. The civil society structures and the responsible government agencies that have conducted studies and inspections in the RA Armed Forces have consistently voiced their concerns about this. Failure by commanders to discharge their responsibilities, to release the existing or emerging tension between servicemen or, in some cases, their neglect, has frequently led to fatal incidents among soldiers. If the situation is to be improved, complex and consistent steps of a continuous nature need to be taken. They must first and foremost be aimed at increasing the control over the personnel as well as be accompanied with profound work of educational and preventive nature.

Subjecting Servicemen to Torture/Degrading Treatment as a Type of Disciplinary Penalty

One of the problems in the RA Armed Forces that raises grave concerns is the treatment of servicemen in a manner that is humiliating and degrading to their dignity at the time of application of the measures of disciplinary coercion.

In 2007 there was a scuffle between groups of servicemen in a military unit in Syunik marz. The commander decided to subject the culprit to a self-made 'type' of liability: he forced one party to wash the clothes of the opposite party, as well as to pay monetary sums to him and the above servicemen. Part of the demanded sum was paid, the servicemen that objected to performing the works were exposed to ridicule and one soldier was subjected to violent actions of a sexual nature. In his statement, the commander mentioned that he had frequently resorted to the above “measure” of liability to end conflicts between servicemen. This illustrates that qualified cadres with high moral qualities need to be recruited to the command of the RA Armed Forces.

In the application of measures of disciplinary liability, treatment that is degrading to human dignity is often manifested not only in the conduct of individuals but also in the conditions of imposing certain types of disciplinary penalties. In such cases, these penalties, rather than aiming to prevent the negative conduct of offenders, may be viewed as a means of putting psychological and physical pressure on individuals. For example, the conditions in disciplinary isolators have mechanisms to humiliate a person, to subject him to suffering and to cause damage to his health. In 2007-2008 cases were registered in the RA Armed Forces when detention in an isolator caused abrupt deterioration of a soldier's health. In one of the military units located in Shirak marz a soldier was detained in a disciplinary isolator when suffering cold in the head when the temperature in the isolator was below 0 degree. As a result, in the morning the soldier was found in an unconscious state and the subsequent in-hospital treatment failed to prevent the irreparable damage to his health.

There is an urgent need to improve conditions in disciplinary isolators by ensuring that they at least cause no harm to soldiers' health when this type of disciplinary liability is imposed.

The study of the conditions in most disciplinary isolators has shown that it is impossible to remain there in a natural standing position. Therefore, it is even redundant to speak about the rest of the conditions. Surely, any detention in a disciplinary isolator implies certain difficulties for the soldier inherent in the fact of isolation. However, they must not be transformed into a means of inflicting suffering on him or threaten his health.

In some cases the commander, by his own conduct, contributes to transforming this type of disciplinary penalty into a veritable suffering for the serviceman. For example, in one of the military units, a soldier was subjected to detention in a disciplinary isolator after receiving in-hospital treatment of pneumonia. In view of his health condition, the serviceman requested the commander to replace that type of penalty with another. However, the request was not granted. When being given food in the isolator, the soldier requested to pass to his superiors that his health condition was deteriorating. This circumstance was again ignored. As a result, his health condition deteriorated even further and he was transferred to hospital where his treatment lasted for over 3 months.

We are drawing everybody's attention to the fact that not always are commander held liable for subjecting servicemen to degrading treatment (there are no materials on commanders' liability for such incidents). It is necessary to make sure that the officers in command are properly instructed in and informed about issues related to the application of disciplinary liability. At the same time, there should be consistency in giving the most severe legal answers to offenses in the light of the fact that the above incidents give ample grounds to assume that there are cases of torture in the armed forces.

Lack of Clear Delineation between Penal and Disciplinary Policy Fields

In a separate chapter, the Internal Service Regulations of the RA Armed Forces regulates the issues of servicemen's liability and prescribes that all servicemen, regardless of their rank and position, are equal before law and are liable in the manner prescribed for the RA nationals.[7] Two types of liability can be described: criminal and disciplinary.

Article 30 of the Regulations prescribes that servicemen are normally subjected to one type of liability for a committed offense. Furthermore, the servicemen who have been imposed a disciplinary penalty are not exempt from criminal liability for this offense.

The study of the practice of application of measures of disciplinary liability in the RA Armed Forces has revealed the following trend: many acts that must be qualified as crimes and, naturally, entail criminal liability either do not receive any legal assessment or are assessed as disciplinary offenses with the entailing liability limited to one of the types of disciplinary penalties.

[7] The Internal Service Regulations of the RA Armed Forces, Article 23.

During 9 months in 2008 a large number of incidents registered in the RA Armed Forces encompassed scuffles and bullying – 171; 38 or 22,2 % of which related to incidents of beatings of conscripts by commissioned officers. In the meantime, there is no such number of criminal proceedings against commissioned officers in the records of the RA Defence Ministry. In a number of cases, measures of disciplinary liability were imposed on commissioned officers for acts comprising elements of the articles of the Special Part of the RA Criminal Code. 5 or 2,9 % of the cases concerned the incidents of beatings of commissioned or non-commissioned officers by conscripts and 97 cases or 56,7 % - to scuffles between conscripts. To illustrate the aforesaid, in 2006 the tension among a number of servicemen in a military unit in Lori resulted in a commission of an offense by one of them for which the commander imposed a disciplinary penalty in the form of a 10-day detention in a disciplinary isolator. When choosing this measure of disciplinary liability, the commander also forced the serviceman to clean the lavatories of the military unit which the soldier refused to do. The commander then subjected him to a cruel beating. It is obvious that in this case we are dealing with an incident of subjecting a serviceman to a degrading and inhuman treatment and a criminal violation of his rights. In fact, this situation comprises elements of the crime stipulated in paragraph 1 of Article 375 of the RA Criminal Code, which deals with abuse of official power or office by a superior or an official, excess of power or of the boundaries of the official powers, as well as with inaction by the authorities when these acts are committed for personal profit, or to promote personal or group interests. In this case, the commander, out of his personal interests exceeded his power for which he must have been subjected to criminal liability. However, an official inquiry was launched into the incident as a result of which the act was assessed as a violation of the rules/bullying and a disciplinary penalty was imposed on the commander – demotion in one military rank.

In another incident registered by the Military Police in 2007, there was an argument between soldiers in one of the military units on the grounds of personal hostility. One of the soldiers asked the commander to transfer him to another military unit. The commander left the soldier's request without notice for about a month in the course of which the incident ended with one soldier stabbing the other with a knife. The incident was not registered and, upon the commander's assignment, the soldier's wound was treated in the military unit. However, lack of professionalism at the time of showing medical assistance led to abrupt deterioration of the soldier's condition in a week's time. The serviceman was subsequently transferred to hospital and the commander was issued a severe reprimand. It is obvious that the failure to subject the stabbing soldier to legal liability and issuing only a severe reprimand to the commander cannot have a preventative impact.

The relationship between two types of liability – criminal and disciplinary – is not understood in the right manner in the armed forces which leads to arbitrary imposition of one or the other, impunity of criminals and/or double jeopardy.

Disciplinary procedure and protection of fundamental human rights

Article 10 of the Disciplinary Charter of the RA Armed Forces stipulates that only immediate supervisors and supervisors mentioned in the section on "Applying a Disciplinary Penalty in Special Cases" may apply incentives and disciplinary penalties. There is no clear regulation of who has a right to impose a disciplinary penalty on a serviceman if the latter has been seconded to a foreign country (for example, Iraq) and undergoes his military service in a division composed of servicemen from different countries. In a similar vein, there is no clarity whether a serviceman may be subjected to a disciplinary penalty by a 'superior' who holds a civilian rather than military position in the RA Armed Forces. In this sense, there is a need for clarification of the issue of the actors entitled to impose a disciplinary penalty.

Article 91 of the Disciplinary Charter of the RA Armed Forces stipulates that any decision by a commander (superior) to subject his subordinate to a disciplinary penalty must be preceded by an inquiry launched with a view to detecting the culprits and the causes and conditions conducive to the commission of the offense. It is clearly stated that during the inquiry the commander (superior) finds out whether the offense has been committed, when, where, under what circumstances and what offense has been committed, the issue of *mens rea* in a particular person's actions or inaction, the degree of each person's guilt when the offense has been committed by several persons, its consequences, the circumstances extenuating and aggravating liability, as well as the causes and conditions of the commission of the offense.

It has been consistently stated in the course of our interviews with the defence sector staff that no official inquiry is normally conducted. And in those rare cases when such an inquiry is however launched the questions that need clarification are not always examined in an exhaustive manner or reflected in the order to impose a particular penalty.

It has already been mentioned that the main means to ensure military discipline is persuasion. The commander must resort to disciplinary penalties when the method of persuasion fails to yield the desirable results. In fact the commander enjoys a wide margin of appreciation. We suggest that the application of any measure of impact, including persuasion is recorded. This will enable, in case of a necessity, to ensure more effective control and transparency in this area.

The practice of replacing the criminal investigations prescribed by the RA Criminal Procedure Code with in disciplinary inquiries on torture reports is impermissible. Many decisions of the prosecutor dismissing the initiation of a criminal case or discontinuing the criminal proceedings state that the disciplinary inquiry failed to prove the fact of torture. Those conclusions arising from disciplinary inquiries acquires the force of irrefutable evidence which, in fact, is not disproved or compared with or examined against other evidence. There is a misunderstanding of the relationship between disciplinary and criminal fields/proceedings.

The first part of this report includes a detailed analysis of the problem of legal certainty in the choice of a penalty. It is important to add that the prepositional phrase 'up to' in the period of detention in a disciplinary isolator prescribed by the Disciplinary Charter of the RA Armed

Forces opens a certain scope for arbitrariness by commanders. Although this approach has been conditioned by the desire to individualize the liability of the offending servicemen, it would, however, be right to clarify in more precise terms the time period (in days) for which a person may be detained in a disciplinary isolator for a particular type of offense.

Complaints Against Disciplinary Penalties

Article 32 of the Internal Service Regulations of the RA Armed Forces prescribes that the subordinate is obliged to unconditionally obey the superior's orders. Alongside obeying the superior's order, he has a right to complain if he believes that he has not been treated in the right manner.

The serviceman is also entitled to complain against the imposed disciplinary penalty within a 10-day period,[8] which, however, does not release him from performing the superior's orders and his official duties.[9] There are some difficulties in this area with regard to the disciplinary penalty involving isolation and detention in a disciplinary isolator. If a disciplinary penalty of a 10-day detention in a disciplinary isolator is imposed on a serviceman, he is in fact deprived of the real opportunity to complain against this penalty. It is true that theoretically he has a right, through an authorized person, to complain against any unlawful act of his commander (superior) and any restrictions to his rights and privileges prescribed by law.[10] However, this opportunity seems unrealistic in practice. A vivid proof of this is the fact that in accordance with the information received from the RA Ministry of Defence only two cases of complaints against disciplinary penalties had been registered.

No complaints against disciplinary penalties by conscripts have been registered which, does not imply that they have admitted to their guilt for the committed offense or that there have been no violations at the time of the application of disciplinary penalties. It is necessary to stress that there is no effective mechanism for complaints against disciplinary sanctions and that the creation of such is an expedient matter.

In the context of human rights protection, it is necessary to eliminate the absolute power of commanders to subject servicemen to disciplinary liability. For example, in the Netherlands, the final decision in disciplinary proceedings is adopted by special military judicial collegia where persons who are both judges and military are involved. A clear mechanism for appealing against their decisions is also envisaged. It is necessary to create a structure which will adopt the final decision on matters of disciplinary liability with a clear differentiation of functions in terms of procedure /launching disciplinary inquiry and adoption of final decision/.

[8] The Disciplinary Charter of the RA Armed Forces, Article 93.
[9] The Disciplinary Charter of the RA Armed Forces, Article 118.
[10] The Disciplinary Charter of the RA Armed Forces, Article 116.

Confidentiality and Freedom of Information

Directly connected with the issues of effective disciplinary policy in the armed forces, prevention of legal violations as well as effective democratic oversight over the armed forces is correlation between access to information and confidentiality/state secret.
These problems are especially important in the RA Armed Forces in view of the fact that the responsible persons refuse to provide information related to violations under the pretext of military secrecy. This approach is an outright departure from Article 10 of the RA Law on State and Official Secrets adopted on 3 December 1996, which prescribes that any information related to violations and restrictions for the human rights and fundamental freedoms of citizens can not be regarded as state and official secrets.

While there is no denying that in some cases the wording of Article 9 of the 1996 Law on State and Official Secrets is related to value judgments and may open room for broad interpretation (for example, it is not clear which are the activities of defence and economic significance found in this Article), more often failure to provide the information related to the armed forces, and especially to offenses, is a direct result of unnecessary secrecy by competent persons, lack of awareness of the law or other manifestations of arbitrariness by them.

It is necessary to instruct the servicemen of the armed forces and the staff of the RA Ministry of Defence with a view to clarifying the real scope of information that constitutes military secrets to them which will make sure that they no longer obstruct the exercise of the right to freedom of information.

It is necessary to develop a practice whereby any information related to offenses committed in the armed forces as well as to disciplinary measures applied against wrongdoers will be collected in a scrupulous manner (for example, frequency of offenses committed by one and the same person or frequency of the applied measures of disciplinary liability against one and the same person, their types, etc). This kind of a statistical database will enable the study of the genuine causes of offenses, conditions conducive to these offenses over many years and take effective measures to eliminate these factors.

From the viewpoint of transparency, it is of utmost importance to train officers in military units who will take charge of the public relations. This has been recognized as one of the priorities in the Public Awareness Concept Paper of the RA Ministry of Defence[11]. At present, citizens and the mass media have no other channel to obtain information about the incidents taking place in military units than the Ministry of Defence. When they apply to a military unit, the competent persons, relying on military discipline or absence of the relevant order, demand that the citizen or the mass media first obtains permission from the Ministry, thereby restricting the right of the public to obtain information in a timely manner.

We welcome the fact that each military unit is going to appoint a public relations officer. To prevent this officer's inclusion in the military hierarchy and to maximally ensure his independent and unobstructed work, we recommend that this position is occupied by a civilian rather than military, also in view of the fact that his work will mainly imply contacts with citizens.

[11] The public informing conception of the MoD of the Republic of Armenia, Nov. 2007, http://www.mil.am/eng/index.php?page=111