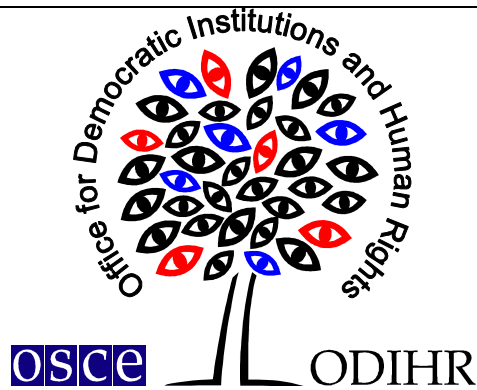


Warsaw, 23 September 2010

Opinion-Nr.: CRIM – ARM/163/2010
(AT)

www.legislationline.org



NOTE

ON THE APPLICATION OF SANCTIONS AND ENFORCEMENT MEASURES TOWARDS MEMBERS OF THE ARMED FORCES IN ARMENIA

**Based on an unofficial English translation of relevant legislation and documents
provided by the OSCE Office in Yerevan**

TABLE OF CONTENTS

- 1. INTRODUCTION**
- 2. SCOPE OF REVIEW**
- 3. EXECUTIVE SUMMARY**
- 4. ANALYSIS AND RECOMMENDATIONS**
 - 4.1. International Human Rights of Armed Forces Personnel Applied to the Armenian Context**
 - 4.2. The Practice of Other OSCE participating States**
 - 4.3. Recommendations for the Republic of Armenia**

Annex 1: Letter of the Deputy Minister of Foreign Affairs of the Republic of Armenia to the Head of the OSCE Office in Yerevan of 18 June 2010

Annex 2: Letter of the Military Prosecutor and Deputy Prosecutor-General of the Republic of Armenia to the Deputy Minister of Foreign Affairs of 13 April 2010

1. INTRODUCTION

1. *On 18 June 2010, the Deputy Minister of Foreign Affairs of the Republic of Armenia sent a letter to the head of the OSCE Office in Yerevan enclosing a letter addressed to him by a Military Prosecutor and Deputy Prosecutor General of the Republic of Armenia (First Rank State Advisor of Justice) (hereinafter “the Military Prosecutor”), in which the latter asked for OSCE support. In particular, the request focused on information on international standards concerning the procedure of application of punishment/sanctions and other enforcement measures towards servicemen of the armed forces of the Republic of Armenia. The Military Prosecutor was also interested in the procedure applied in other OSCE participating States, in particular whether in such cases, servicemen of armed forces were kept in specialized places of detention, or whether they were detained in facilities together with civilians who had committed crimes of a general nature. He was interested to know whether international standards would be breached if servicemen were detained, as a preventive measure, in facilities controlled by the Ministry of Defence.*
2. *The OSCE Office in Yerevan forwarded this request to the ODIHR and the current Note is prepared in response thereto.*

2. SCOPE OF REVIEW

3. The scope of this Note covers only the question posed by the Military Prosecutor related to international standards related to imposing sanctions and other enforcement measures towards members of the armed forces, in particular detention and imprisonment. Thus limited, the Note does not constitute a full and comprehensive review of the current and draft legislation governing such matters in Armenia.
4. The Note raises key issues and provides indications of areas of concern. The ensuing recommendations are based on international human rights standards and best practices, as found in relevant international agreements and commitments ratified and entered into by the Republic of Armenia.
5. This Note is based on an unofficial translation of the Deputy Minister of Foreign Affairs’ letter of 18 June 2010 and the Military Prosecutor’s enclosed letter of 13 April 2010, which have been attached to this document as Annexes 1 and 2 respectively. Errors from translation may result.
6. In view of the above, the OSCE ODIHR would like to make mention that this Note is without prejudice to any written or oral recommendations and comments to criminal legislation or legislation on armed forces of the Republic of Armenia that the OSCE ODIHR may make in the future.

3. EXECUTIVE SUMMARY

7. The OSCE ODIHR notes that, in order to ensure the full compliance of future legislation on detention and imprisonment of military personnel with international standards, it is recommended that:

A. All detention and prison facilities, regardless of whether they are run by the Ministry of Justice or the Ministry of Defence, should provide for conditions which are in compliance with international standards and guarantee the exercise of prisoners' or detainees' rights to fair trial, an effective remedy and the right to freedom from torture and inhuman or degrading treatment; [pars 44-46] and

B. All prisoners and detainees in all prison and detention facilities should be treated equally and in accordance with international law – no such facility should positively or negatively discriminate against prisoners or detainees. [pars 47-48]

4. ANALYSIS AND RECOMMENDATIONS

4.1. International Human Rights of Armed Forces Personnel Applied to the Armenian Context

8. While many States have separate legislation for rights and responsibilities of members of the armed forces, international human rights legislation entitles them to, as far as possible, the same human rights as civilians.¹ Main human rights instruments such as the International Covenant on Civil and Political Rights² (hereinafter “the ICCPR”) and the European Convention on Human Rights and Fundamental Freedoms³ (hereinafter “the ECHR”) expressly cover “everyone” within the jurisdiction of state courts.⁴ Nevertheless, the particular characteristics of military life and its influence on individual members of the armed forces will always need to be taken into account.⁵ Both of the above principles were once again reiterated in a recommendation on human rights of

¹ According to the Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel of the OSCE and the Geneva Centre for the Democratic Control of Armed Forces (DCAF), this is based on the recognition that members of the armed forces are “citizens in uniform”, which are entitled to the same human rights protection as all other citizens.

² The United Nations International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) on 16 December 1966 and acceded by the Republic of Armenia on 23 June 1993.

³ The Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950, entered into force on 3 September 1953. The Republic of Armenia ratified the Convention on 26 April 2002.

⁴ While the ECHR applies to everyone within the jurisdiction of the Contracting Parties, the ICCPR specifies that it shall apply to everyone within the territory and jurisdiction of the States party to the Covenant.

⁵ In this context, see the ECtHR judgment in the case of *Engels v. the Netherlands* of 8 August 1976, application nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, in which the Court specified that “the Convention applies in principle to members of the armed forces and not only to civilians”.

***OSCE ODIHR Note on the Application of Sanctions and Enforcement Measures
Towards Members of the Armed Forces***

- members of the armed forces recently passed by the Council of Europe's Committee of Ministers.⁶
9. The OSCE Code of Conduct on Politico-Military Aspects of Security⁷ clarifies that OSCE human dimension commitments also apply to armed forces personnel and contains a number of specific safeguards in this respect.⁸
 10. Among the human rights granted to members of armed forces are the right to liberty and the right to a fair trial,⁹ guaranteed by Articles 9 and 14 of the ICCPR and Articles 5 and 6 of the ECHR. Both instruments also provide to any person whose Covenant/Convention rights and freedoms have been violated the right to an effective remedy (Article 2 par 3 of the ICCPR and Article 13 of the ECHR). When members of the armed forces are detained or imprisoned, the conditions in the detention/prison facilities and treatment of the detained/prisoners should correspond to the standards set by various human rights instruments, notably the European Convention on Human Rights (Article 3), the European Convention on the Prevention of Torture and Inhuman and Degrading Treatment and Punishment¹⁰ and other international human rights treaties to which Armenia is a party, as well as OSCE commitments.
 11. However, it ought to be noted that certain countries, such as the Republic of Armenia, have invoked reservations with regard to the applicability of the right to liberty under Article 5 of the ECHR to disciplinary penalties for members of the armed forces.¹¹ In the OSCE region, members of the armed forces are usually subjected to specific duties under military law that are designed to maintain a disciplined environment, but are subject to criminal law

⁶ Recommendation CM/Rec(2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces, adopted on 24 February 2010 at the 1077th meeting of the Ministers' Deputies.

⁷ The OSCE Code of Conduct on Politico-Military Aspects of Security of 3 December 1994, adopted at the 91st Plenary Meeting of the Special Committee of the CSCE Forum for Security Co-operation in Budapest.

⁸ More specifically, par. 32 of the Code of Conduct specifies that "Each participating State will ensure that military, paramilitary and security forces personnel will be able to enjoy and exercise their human rights and fundamental freedoms as reflected in CSCE documents and international law, in conformity with relevant constitutional and legal provisions and with the requirements of service". See also the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow, 3 October 1991, par. 23.1.

⁹ Different aspects of the right to a fair trial are, inter alia, guaranteed to the defendant, but also to other persons participating in criminal proceedings, in Articles 9, 15-17, 19-22 of the Criminal Procedure Code of the Republic of Armenia. The applicability of these rights to members of the armed forces is once more stressed in pars E and F of Recommendation CM/Rec(2010)4 of the Council of Europe's Committee of Ministers.

¹⁰ European Convention on the Prevention of Torture and Inhuman and Degrading Treatment and Punishment, passed by the Council of Europe on 26 November 1987, ETS No. 126. The ratification of this Convention by the Republic of Armenia entered into force on 1 October 2002.

¹¹ In its reservations to the application of Article 5, the Republic of Armenia stated that this provision shall not affect the operation of the Disciplinary Regulation of the Armed Forces of the Republic of Armenia approved by Decree No. 247 of 12 August 1996 of the Government of the Republic of Armenia, under which arrest and isolation as disciplinary penalties may be imposed on soldiers, sergeants, ensigns and officers. In this context, see also par D in the Recommendation CM/Rec(2010)4 of the Council of Europe's Council of Ministers, which requires fairness and procedural guarantees in military disciplinary procedures.

***OSCE ODIHR Note on the Application of Sanctions and Enforcement Measures
Towards Members of the Armed Forces***

in the same way as civilians.¹² In Armenia, disciplinary measures against members of the armed forces are regulated by the Disciplinary Statute of the Armed Forces of the Republic of Armenia¹³ and Appendix 14 to the Republic of Armenia Law on Approving the By-Laws of the Garrison Services and Patrol Services of the Armed Forces of the Republic of Armenia. Disciplinary detention for male servicemen is executed in so-called disciplinary isolators;¹⁴ female members of the armed forces are not disciplined through detention, but only through demotion of their rank or discharge from the armed forces.

12. Since the above reservation to the ECHR only applies to disciplinary procedures against members of the armed forces, it follows that Article 5 is thus applicable to members of the armed forces with regard to arrest and detention/imprisonment imposed prior to, during or after criminal trial. In this context, both Article 9 ICCPR and Article 5 ECHR state that the arrest of any individual should be lawful and that the respective persons should be informed of the charges against them in a language that they understand. Detention/prison conditions should also adhere to international standards and persons detained based on criminal charges should be brought promptly before a judge or other legal officer exercising judicial powers¹⁵ and are entitled to trial within a reasonable time. Finally, all persons detained in the above manner should be entitled to appeal against a decision ordering their detention (Article 9 par 4 ICCPR and Article 5 par 4 ECHR).
13. In the Republic of Armenia, civilian courts decide on all criminal cases, also those involving members of the armed forces.¹⁶ Article 49 of the Criminal Code of the Republic of Armenia¹⁷ (hereinafter “the Criminal Code”) on the types of punishment includes service in a disciplinary battalion for members of the armed forces found guilty of crimes against the military service (Articles 356 – 383 of the Criminal Code). Articles 47 – 49 of the Penitentiary Code of the Republic of Armenia¹⁸ (hereinafter “the Penitentiary Code”) specifically regulate confinement in disciplinary battalions, and stress the necessity to respect the detainees’ rights and lawful interests (Article 48).

¹² OSCE-DCAF Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel, p. 219.

¹³ Disciplinary Statute in Armed Forces of the Republic of Armenia, approved by Government Decree #247 on 12 August 1996.

¹⁴ Articles 54-56 of the Disciplinary Statute of the Armed Forces, see also Article 1 of Appendix 14 to the Republic of Armenia Law on Approving the By-Laws of the Garrison Services and Patrol Services of the Armed Forces of the Republic of Armenia.

¹⁵ As stated in Articles 14 ICCPR and Article 6 of the ECHR, the judges/legal officers mentioned in Articles 9 ICCPR and 5 ECHR should also be independent and impartial. See the ECtHR judgment in the case of *Pauwels v. Belgium* of 26 May 1988, application no. 10208/82, par. 38, where the Court found that Article 5 par. 3 of the ECHR had been breached due to a Belgian *auditeur-militair*’s competences, which combined the functions of investigation and prosecution with those of judicial review in the applicant’s case.

¹⁶ Article 92 of the Constitution of the Republic of Armenia differentiates between courts of general jurisdiction, the courts of appeal, the Court of Cassation, as well as specialized courts in cases prescribed by law (the Administrative Court has been set up and is operating since 1 January 2008).

¹⁷ The Criminal Code of the Republic of Armenia, adopted on 18 April 2003, recently amended on 8 April 2010.

¹⁸ The Penitentiary Code of the Republic of Armenia, adopted on 24 December 2004, recently amended on 20 May 2009.

***OSCE ODIHR Note on the Application of Sanctions and Enforcement Measures
Towards Members of the Armed Forces***

14. Article 11 of the Criminal Procedure Code of the Republic of Armenia¹⁹ (hereinafter “the Criminal Procedure Code”) provides for each person’s right to liberty and states that arrest, keeping in custody or forcible placement in a medical or correctional institution may only take place following a court order. Article 11 also reflects other aspects of Article 5 of the ECHR, but also of Article 3 (freedom from ill-treatment), Article 8 (right to private life) and Article 2 (right to life) of the ECHR.
15. According to Article 134 of the Criminal Procedure Code, preventive measures to “prevent inappropriate behavior during criminal proceedings” and ensure the execution of the sentence, also include arrest, which is essentially “detention under arrest” (Article 137 par 1). Arrest may only be effected upon court order (Article 136 par 2) and may usually only last for 2 months prior to the beginning of criminal proceedings (Article 138 par 3). During criminal proceedings, the Criminal Procedure Code does not foresee a specific limitation for arrest (Article 138 par 6).²⁰ Detention takes place in civilian penitentiary centres. Appeals against detention orders are possible under Article 137 par 5 of the Criminal Procedure Code.
16. Generally, the Republic of Armenia’s Law on Treatment of Arrestees and Detainees²¹ provides persons arrested or detained with a number of rights, including those stemming from the ICCPR and the ECHR. This law also applies to the garrison disciplinary isolators where military servicemen are detained for disciplinary reasons; specific rights and duties of servicemen detained therein are also found in Appendix 14 to the Law on Approving the By-Laws of Garrison Services and Patrol Services and Internal Regulations of the Garrison Disciplinary Isolators (approved by Government Decision No. 595 of 22 May 2008). The Law on Treatment of Arrestees and Detainees applies only to persons arrested or detained temporarily, but not to persons convicted and sentenced to imprisonment, who are covered by the Penitentiary Code.
17. Finally, all persons brought before court or detained should have the possibility of an effective remedy (Article 2 ICCPR and Article 13 ECHR²²). Such remedy must be effective in practice as in law, meaning that it should be able to prevent an alleged human rights violation or its continuation, or to provide adequate redress for a violation that has already occurred.²³ In Armenia, Article 65 par 20 of the Criminal Procedure Code outlines the defendant’s right to appeal against all actions and decisions of the bodies of inquiry, investigator, prosecutor, and the court. Articles 13 par. 3 and 18 of the Law on Treatment of Arrestees and Detainees foresees the right to complain about possible human rights violations during arrest and detention.

¹⁹ The Criminal Procedure Code of the Republic of Armenia, adopted on 1 September 1998, recently amended on 17 March 2010.

²⁰ Exceptionally, due to the complexity of the case, pre-trial detention may be extended for up to 1 year (Article 138 par 4).

²¹ Law of the Republic of Armenia on Treatment of Arrestees and Detainees, adopted on 6 February 2002.

²² Article 2 ICCPR and Article 13 ECHR provide a general right to an effective remedy against human rights violations, while Article 19 par 4 ICCPR and Article 5 par 4 ECHR, as mentioned in par 12 *supra*, provide effective remedies against the deprivation of liberty as such.

²³ See the ECtHR’s GC *Kudła v. Poland* judgment of 26 October 2000, application no. 30210/96.

4.2. The Practice of other OSCE participating States

18. While it is not possible to provide an exhaustive overview of the practice of all OSCE participating States on the issue of the detention/imprisonment of those serving in the armed forces, some practices in other OSCE participating States are described below, arranged in alphabetical order. The description of these practices does not necessarily entail their endorsement by the OSCE.

Canada

19. Canadian armed forces personnel arrested and remanded into custody prior to or during trial shall be detained in service or civil custody.²⁴ Service detainees shall be committed to military detention barracks.²⁵ Service convicts shall undergo punishment in civilian penitentiaries or prisons, unless a committing authority orders a convict's committal to a service prison for all or part of the sentence, in accordance with regulations made by the Governor in Council.²⁶
20. A member of the Canadian armed forces, whether convicted or in military detention, is to be dealt with in the same manner as other prisoners in the place where they are undergoing punishment, and all rules applicable in respect of a person sentenced by a civil court to imprisonment in a penitentiary or civil prison, as the case may be, in so far as circumstances permit, apply accordingly.²⁷

France

21. French law provides that all deprivations of liberty pronounced against those under the jurisdiction of the military authorities shall be subject to the rules of general law.²⁸ However, as far as the place of detention or imprisonment of military personnel is concerned, the Military Code provides that in peacetime, all forms of detention or imprisonment (provisional, following an arrest warrant, or following a court judgment) of members of the armed forces shall be served in a military prison, a prison run by the gendarmerie, or, if this is not possible, in a prison designated by the Minister of Defence in accordance with a relevant decree.²⁹

Germany

22. In Germany, the maximum penalty for military disciplinary offences of 21 days can be served in military guard houses. In cases where military

²⁴ Article 158 (1) of the Canadian National Defence Act, R.S., 1985, c. N-5, Act current to 19 August 2010.

²⁵ Article 220 (4) of the Canadian National Defence Act.

²⁶ Articles 220 (1) and (3) of the Canadian National Defence Act.

²⁷ Article 222 (1) of the Canadian National Defence Act.

²⁸ Articles 131 and 356 of the French Military Justice Code, Law no. 65-542 of the 1965 Official Journal of 9 July 1965, entry into force on 1 January 1966, last amended by Law no. 99-929 of 10 November 1999, art. 1 Official Journal of 11 November 1999.

²⁹ Article 135 of the French Military Justice Code.

servicemen commit military offences punishable with no more than 6 months' imprisonment, they may be sentenced to criminal arrest in military detention centres.³⁰ This form of arrest permits the detained servicemen to participate in most aspects of the military service.³¹ In other cases leading to minor prison sentences not exceeding 6 months, the competent prosecutor can move for imprisonment in a military detention centre.³² In more serious cases, members of the armed forces serve their criminal sentences in civilian prisons. The same holds true for pre-trial detention or detention during trial.

Italy

23. In Italy, a distinction is made between those in permanent service of the armed forces, those in temporary service of the armed forces, and those who were formerly in the employment of the armed forces or performed tasks for the armed forces without formally being in their service. It also distinguishes between the types of punishment inflicted.

Those permanently employed in the armed forces and sentenced to life imprisonment or a prison term, or to permanent exclusion of holding public positions, are kept in civilian prisons under regular conditions after being demoted in rank in accordance with the law.

Those permanently employed in the armed forces and sentenced to a prison term for a crime without being excluded from holding public positions, are kept in military detention.

Those permanently employed in the armed forces who have not paid a criminal fine for committing an offence and have hence been condemned to prison instead, are condemned to imprisonment in military prison for no longer than three years, in accordance with a calculation based on the level of the fine.

Those permanently employed in the armed forces and sentenced to imprisonment for minor criminal offences are kept in military prison, counting one day of military imprisonment as two days of regular imprisonment (thus effectively halving the length of the sentence).

Those permanently employed in the armed forces who have not paid a criminal fine for minor criminal offences and have hence been condemned to prison instead, are condemned to imprisonment in military prison for no longer than one year, in accordance with a calculation based on the level of the fine.

Those temporarily employed in the armed forces are treated more or less similarly; those who were formerly in the employment of the armed forces or

³⁰ “*Strafarrest*”, see Section 5 of the Introductory Law to the German Military Criminal Code (*Wehrstrafgesetz*) and Section 9-12 of the Military Criminal Code.

³¹ Section 2 of the Decree on the Enforcement of Prison Sentences, Criminal Arrest, Juvenile Arrest and Disciplinary Arrest by Authorities of the Federal Armed Forces of Germany.

³² Section 5 par 2 of the Introductory Law to the German Military Criminal Code.

***OSCE ODIHR Note on the Application of Sanctions and Enforcement Measures
Towards Members of the Armed Forces***

performed tasks for the armed forces without formally being in their service, however, are kept in civilian prisons.³³

24. As for detention, the same rules apply as for civilians, with certain special features such as the stay of detention in certain cases until the end of military service, or the possibility for the Ministry of Justice to revoke a detention order.³⁴

Moldova

25. As a disciplinary sanction, arrest of members of the Moldovan armed forces can be applied by hierarchically superior officers to male members of the armed forces for periods of up to 3 days or, in exceptional situations, up to 7 days.³⁵ Such arrest is served in detention cells within the military garrison. The use of arrest as a disciplinary sanction against female members of the armed forces is expressly prohibited by law.³⁶
26. The arrest/detention of members of the armed forces as a prevention measure in the course of criminal proceedings follows the general rules of Moldovan criminal procedure. Members of the armed forces placed under detention are held in ordinary penitentiary institutions, under the jurisdiction of the Ministry to Justice. In cases where the suspect is a member of the armed forces, criminal investigation is carried out by the prosecutor himself³⁷ (and not by the criminal investigation body as is usually the case) and such cases are tried by a specialized military court.³⁸ A specific preventive measure applicable to members of the armed forces suspected of having committed a crime is the placement under the supervision of their military unit commander.³⁹

Netherlands

27. In the Netherlands, there is a separate detention/prison regime for military prisoners. In principle, the general rules regarding prisoners apply to military detainees or prisoners.⁴⁰ The law provides, however, that insofar as the rules of the armed forces require it, exceptions to this rule are possible.⁴¹ Military prisoners are generally held at a separate military detention facility, whether they are in preliminary arrest, detention, or post-conviction incarceration,

³³ Articles 60-64 of the Italian Code of Military Justice in Peacetime (*Codice Penale Militare di Pace*), RD n. 303, approved by Royal Decree on 20 February 1941, amended by laws no. 167 of 23 March 1956 and no. 689 of 26 November 1985.

³⁴ Articles 74-76 of the Italian Code of Military Justice in Peacetime.

³⁵ Article 44 (d) of the Law of the Republic of Moldova on the Regulation of Military Discipline (Law no. 52 from 2 March 2007).

³⁶ Article 74 (3) of the Law of the Republic of Moldova on the Regulation of Military Discipline. It should be noted that this practice is not supported by ODIHR, as it could raise issues regarding the equal treatment of men and women in the military (see par 48 *infra* of this Note).

³⁷ Article 270 of the Moldovan Criminal Procedure Code, Law No. 122-XV, adopted on 14 March 2003.

³⁸ Article 37 of the Moldovan Criminal Procedure Code.

³⁹ Article 183 of the Moldovan Criminal Procedure Code.

⁴⁰ Article 1 (s) of the Dutch Law on Principles of Detention (*Penitentiare Beginselenwet*), adopted on 18 June 1998, the general law applicable to all forms of detention in the Netherlands.

⁴¹ Article 78 of the Dutch Law on Principles of Detention.

except when the duration of any such detention exceeds six months.⁴² At the same time, it is legally possible for them to be kept in civilian prisons when this may be necessary.⁴³ Certain exceptions to the general rules on detention are made by government decree: *inter alia*, with respect to food, clothing, health care, social and psychological care, transportation costs and rest and relaxation, the rules of the armed forces continue to apply, and the rules regarding military education apply instead of the general prison rules.⁴⁴

Poland

28. In Poland the appropriate court, punishment and place of detention of military personnel depends on the offence that has been committed. That is, all offences committed in the line of duty, between military personnel, against the military service or disciplinary violations, come within the jurisdiction of military courts.⁴⁵ The same principles apply to military courts, as for ordinary courts, in order to comply with Art 5 and 6 of the ECHR.⁴⁶ All other crimes and offences committed by military personnel are treated based on the same principles and provisions as for civilians⁴⁷. There is one exception to this rule, namely, military personnel ranked major and above are always tried in the first instance (for all crimes) by the military courts⁴⁸.
29. Military personnel in pre-trial detention are kept in ordinary detention centres (civilian), however, they must be afforded separate cells.⁴⁹ Military personnel sentenced by military courts are imprisoned in penitentiary institutions established by the Minister of Defence.⁵⁰ As mentioned above, military personnel sentenced to imprisonment by civilian courts are sent to civilian prisons.
30. The Criminal Code also provides for a special measure of punishment of military personnel, the so-called “military arrest”.⁵¹ This measure, applied by military courts for less grave offences, may last for a period of one month to two years.⁵² This measure is executed in specially designated penitentiary institutions. Military personnel are imprisoned in separate cells based on their

⁴² Article 11 (2) of the Dutch Military Criminal Code (*Wetboek van Militair Strafrecht*), Stb. 111, adopted on 27 April 1903, last amended by Law Stb. 464 of 28 October 1999.

⁴³ Article 12 of the Dutch Military Criminal Code.

⁴⁴ See the Royal Government Decree of 9 June 1982 on the detention regime of armed forces personnel undergoing preliminary arrest, incarceration, remand custody or military detention (*Koninklijk Besluit regiem voor militairen, die voorlopig arrest, resp. gevangenisstraf, hechtenis of militaire detentie ondergaan*), itself based on Articles 1, 10 and 12 of the Dutch Military Criminal Code.

⁴⁵ Article 647 of the Criminal Procedure Code, of 6 June 1997, Official Gazette No. 97.89.555 last amended 28 July 2007, Official Gazette No. 07.112.766.

⁴⁶ For instance, the military court structure comprises of two instances, permitting appeal, with the final instance being the military chamber in the Supreme Court.

⁴⁷ Article 317 of the Polish Criminal Code, of 6 June 1997, Official Gazette No. 97.88.553, last amended 12 July 2007, Official Gazette No. 07.124.859.

⁴⁸ Article 654 of the Polish Criminal Procedure Code, of 6 June 1997, Official Gazette No. 97.89.555 last amended 28 July 2007, Official Gazette No. 07.112.766.

⁴⁹ Articles 240, 241 of the Polish Sentencing Code, of 6 June 1997 Official Gazette No. 90.557.

⁵⁰ Article 228 of the Polish Sentencing Code, of 6 June 1997 Official Gazette No. 90.557.

⁵¹ Article 322 of the Polish Criminal Code, of 6 June 1997, Official Gazette No. 97.88.553, last amended 12 July 2007, Official Gazette No. 07.124.859.

⁵² Article 322 § 2 of the Polish Criminal Code, of 6 June 1997, Official Gazette No. 97.88.553, last amended 12 July 2007, Official Gazette No. 07.124.859.

rank, they must wear their uniforms and they receive education and military training.⁵³ Other forms of punishment of military personnel include dismissal from the army and demotion in rank.⁵⁴

Russian Federation

31. Criminal cases on all offences committed by military servicemen and by citizens undergoing periodical military training are considered by military courts.⁵⁵ A special chapter of the Criminal Code of the Russian Federation is dedicated to the crimes committed against the military service.⁵⁶ For all other crimes and offences determined by the Criminal Code, servicemen bear criminal liability in the same way as civilians. In those cases, they serve their sentences in civilian penitentiary institutions, but are kept separately from civilian prisoners.
32. For crimes committed against the military service, servicemen are usually confined in disciplinary military units or arrest for a period of three months to two years. Deprivations of liberty for up to five years take place in civilian penitentiary institutions. If crimes are committed by a group of servicemen, this is considered as an aggravating circumstance which may lead to a lengthier prison term of up to eight years.
33. Confinement in the military disciplinary unit can substitute deprivation of liberty for up to two years providing that the crime committed and the character of the convicted allow for such substitution. When a convicted military servicemen serves in a disciplinary military unit instead of serving the term in a penitentiary institution, the term of service in the disciplinary military unit shall be determined at the rate of one day of deprivation of liberty per one day of service in the disciplinary military unit.⁵⁷ This term can be served on parole, under the supervision of the chiefs of the respective military battalions⁵⁸.
34. Confinement in disciplinary military units can be imposed for crimes against the established order of military service, committed by servicemen who have been drafted or enlisted under a contract in the Armed Forces [in troops and military formations] as well by reservists during training assemblies.⁵⁹
35. Officers are detained or imprisoned separately from others, and draftees are confined separately from contracted soldiers.⁶⁰ Convicted and non-convicted servicemen are also confined separately.

⁵³ Decree of the Minister of Justice of the Republic of Poland of 26 August 2003, on the organization and implementation of military arrest.

⁵⁴ Article 324 of the Polish Criminal Code, of 6 June 1997, Official Gazette No. 97.88.553, last amended 12 July 2007, Official Gazette No. 07.124.859.

⁵⁵ Articles 31 and 34 of the Criminal Procedure Code of the Russian Federation, in force as of 1 July 2002, last amended on 27 July 2010; also see Article 7 of the Constitutional Law on Military Courts of the Russian Federation.

⁵⁶ Chapter 33 of the Criminal Code of the Russian Federation, adopted by the State Duma on 24 May 1996 and by the Federation Council on 5 June 1996, last amended 27 July 2010.

⁵⁷ Article 55 of the Criminal Code of the Russian Federation.

⁵⁸ Article 187(1) of the Penitentiary Code of the Russian Federation, adopted on 8 January 1997, last amended on 1 July 2010.

⁵⁹ Article 331.1 of the Criminal Code of the Russian Federation.

⁶⁰ Article 150 (1) of the Penitentiary Code of the Russian Federation.

Spain

36. In Spain, arrest of a member of the armed forces is executed in the military facility where the individual serves, or, if this is not possible, in another military facility.⁶¹ Detention of a member of the armed forces is usually executed in a military prison. It can also be carried out on a military base, although the law specifies that the conditions should be as similar as possible to detention in a military prison. If need be, detention can be carried out in a regular civilian detention centre, on the condition that military detainees are kept entirely separate from civilian detainees.⁶²
37. Professional members of the armed forces may also be sentenced to house arrest, or, where necessary, to detention in hospitals, kept under whatever level of guard is considered necessary.⁶³ Non-professional members of the armed forces may be kept within their units and perform such tasks as their superior officer considers necessary, in a military hospital, or, in exceptional cases, under house arrest, kept under whatever level of guard is considered necessary.⁶⁴
38. Members of the armed forces who have been convicted of crimes under military law are kept in military detention facilities as determined by the Ministry of Defence. Members of the armed forces convicted of crimes under general criminal law leading to their discharge from the armed forces are kept in civilian prisons, where they are kept in strict separation from the general prison population. Members of the armed forces who are convicted of crimes under general criminal law but who are not discharged from the armed forces are sentenced to prison in a military prison facility as determined by the Ministry of Defence.⁶⁵

Switzerland

39. Armed forces personnel in Switzerland serve initial arrest and detention in regular civilian detention facilities. Armed forces personnel in Switzerland convicted of regular crimes or crimes under military law also serve their terms in civilian prisons.⁶⁶ However, for minor offences against military discipline, military commanders can order detention for several days in an ‘arrest room’, which serves as a form of disciplinary correction.⁶⁷

United Kingdom

40. In the United Kingdom, a court martial decides on all crimes committed by military servicemen. Both the military police and certain service personnel with such authority may arrest a member of the armed forces reasonably

⁶¹ Article 208 of the Spanish Code of Military Procedure no. 2/1989, adopted on 13 April 1989.

⁶² Articles 221 and 222 of the Spanish Code of Military Procedure.

⁶³ Article 226 of the Spanish Code of Military Procedure.

⁶⁴ *Ibid.*

⁶⁵ Article 42 of the Spanish Military Penal Code, no. 13/1985, adopted on 9 December 1985.

⁶⁶ Article 34b of the Swiss Military Criminal Code of 13 June 1927, no. 321.0, last amended 1 March 2009.

⁶⁷ Articles 190 and 191 of the Swiss Military Criminal Code.

suspected of having committed a service offence.⁶⁸ Members of the armed forces may be kept in military detention before and after being charged.⁶⁹ Those who have committed offences under the Services Disciplinary Acts are kept in the Military Corrective Training Centre, which is not a prison, but an establishment that provides corrective training for those service members sentenced to periods of detention. Service members can be kept there for periods from 14 days to 2 years. Three types of service personnel are kept in this facility:

Those serving in the Royal Navy, Royal Marines, British Army and Royal Air Force who are to remain in the Services after sentence;

Those serving in the Royal Navy, Royal Marines, British Army and Royal Air Force who are to be discharged after their sentence;

Those held in military custody either awaiting the outcome of an investigation, or awaiting placement in a civilian prison or youth offenders' institution.

The categories of detainees/prisoners defined above are kept separate throughout their detention. More serious offenders with longer sentences imposed by general Court Martial are transferred to civilian prisons as part of their dishonorable discharge.⁷⁰

United States

41. In the United States, the Uniform Code of Military Justice (UCMJ) covers specific crimes committed by servicemen in their military capacity. Special court martial tribunals are competent to preside over cases involving violations under this code. U.S. armed forces personnel are kept at military detention facilities throughout any proceedings against them and after conviction. They are initially held at guardhouses and are then transferred to various military detention facilities for detention. When the member of the armed forces has committed a crime against a civilian, civilian courts have jurisdiction over the case. The service member may then be delivered to the civilian authorities for trial. During this trial and the possible subsequent prison term, the soldier will be kept in a civilian detention/prison facility; after the completion of the civilian prison term, the service member is returned to military prison to serve out the remainder of any sentence imposed upon the member following court martial proceedings.⁷¹
42. The United States maintains a number of regional military detention centres for both short-term and long-term detention of armed forces personnel.

⁶⁸ Section 67 of the United Kingdom's Armed Forces Act, approved by Royal Assent on 8 November 2006.

⁶⁹ Part IV of the UK Armed Forces Act (custody).

⁷⁰ For more information, see the overview prepared by the UK Judge Advocate General's office: http://www.hmcourts-service.gov.uk/docs/ojag/sentencing_guide_010607.pdf.

⁷¹ Article 14 of the US Uniform Code of Military Justice, 64 Stat. 109, 10 U.S.C Chapter 47, passed by US Congress on 5 May 1950, latest amendments effected by the National Defense Authorization Acts for Fiscal Years 2006 and 2007.

4.3. Recommendations for the Republic of Armenia

43. In response to the request from the Armenian Military Prosecutor, the above overview of international standards and practices of OSCE participating states demonstrates that in terms of how to sanction and detain members of the armed forces, there is a wide margin of appreciation.
44. Regardless of where military personnel is detained/imprisoned, certain main principles will always need to be taken into account: First of all, the person in question will always need to be arrested and detained/imprisoned in a manner that is consistent with the right to liberty, as required by Articles 9 ICCPR and 5 of the ECHR, at least with regard to non-disciplinary detention (see par 11 *supra*). He/she will need to be able to appeal against the detention or imprisonment itself, and against detention conditions.
45. The conditions of any form of detention/imprisonment may not be such as to constitute inhuman or degrading treatment within the meaning of Article 3 of the ECHR, and each detainee's or prisoner's right to be free from inhuman or degrading treatment, or torture, by others, may also not be violated. Finally, as far as possible, each detainee's or prisoner's right to a fair trial and to an effective remedy may not be unnecessarily undercut or prevented from being exercised. A number of these principles are reflected in the Armenian Law on Treatment of Arrestees and Detainees (see pars 16 and 17 *supra*).
46. The Military Prosecutor's specific request focused on whether servicemen may be kept in detention facilities operated by the Ministry of Defence as a preventive measure. In response, it is noted that as long as such facilities and their staff guarantee the same set of rights to detained servicemen as civilian detention centres would, this new manner of detaining military servicemen would not be in breach of international standards or Armenia's commitments in international human rights instruments or OSCE commitments. The same applies to all facilities where persons are deprived of their liberty.
47. Finally, it should be noted that detention centres operated by the Ministry of Defence should also not provide advantages to those detained therein, so as not to create double standards in the detention of civilians on the one hand and military personnel on the other. There should be no positive or negative discrimination in these or any other detention or prison facilities on the territory of Armenia.
48. This same principle of non-discrimination should also apply to both male and female members of the armed forces – in this context, it is recommended to review Articles 56 and 57 of the Disciplinary Statute of the Armed Forces to ensure that servicemen and servicewomen are subjected to the same disciplinary penalties.
49. The OSCE/ODIHR stands ready to assist in further stages of the legislative drafting process in this regard, pending further requests for assistance from representatives of the Republic of Armenia.

[END OF TEXT]

***OSCE ODIHR Note on the Application of Sanctions and Enforcement Measures
Towards Members of the Armed Forces***

Annex 1

-UNOFFICIAL ENGLISH TRANSLATION-

Ministry of Foreign Affairs
Republic of Armenia

18.06.2010
14/09076

Ambassador Sergey Kapinos
Head of the OSCE Office in Yerevan

Dear Ambassador,

Please find enclosed the letter from the RA Military Prosecutor, in which it is requested to provide information on international standards of the procedure of application of punishments and other enforcement measures towards the servicemen.

We would kindly ask you to provide the requested information if possible.

Respectfully yours,

Arman Kirakossian
Deputy Minister

Annex 2

-UNOFFICIAL ENGLISH TRANSLATION-

RA Military Prosecutor
RA Deputy Prosecutor General

N 19/396-10
13.04.10

Mr. Arman Kirakossian
RA Deputy Foreign Minister

Dear Mr. Kirakossian,

Through the OSCE Office in Yerevan I would kindly ask you to provide me information on the procedure of application of punishments and other enforcement measures towards the servicemen of the RA Armed Forces and the conditions under which they may be compared to the international standards, as well as to initiate the necessary legislative amendments in this regard. The information is requested on the following inquiries:

What kind of standards and which procedure of application of punishments and other enforcement measures are used in the OSCE Participating States.

In particular:

- whether the servicemen are kept in specialised places of detention in the course of application of punishments and other enforcement measures towards the servicemen, or in the same places together with civilians who committed crimes of general nature.
- Whether any of the international standards will be breached if the servicemen are kept in the places of application of punishments and other enforcement measures under the RA Ministry of Defence when detention is used as preventive measure.

Respectfully yours,

I Rank State Advisor of Justice

A.M Khachatryan