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Meeting:	1186 meeting (3-5 December 2013) (DH)
Item reference:	Communication from a NGO (Rule of Law) (25/09/2013) in the case of Virabyan against Armenia (Application No. 40094/05) and reply of the authorities (08/10/2013)

Information made available under Rules 9.2 and 9.3 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion :	1186 réunion (3-5 décembre 2013) (DH)
Référence du point :	Communication d'une ONG (Rule of Law) (25/09/2013) dans l'affaire Virabyan contre Arménie (Requête n° 40094/05) et réponse des autorités (08/10/2013) (***anglais uniquement***)

Informations mises à disposition en vertu des Règles 9.2 et 9.3 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

Department for the Execution of
Judgments of the ECHR Judgments,
DGI-Human Rights and Rule of Law
Council of Europe
F-67075 Strasbourg Cedex
France

1 September 2013
Yerevan, Republic of Armenia

Communication on the execution of
the judgment of ECtHR of 2 October 2012
(became final on 2 January, 2013)

Application No. 40094/05
Virabyan v. Armenia

Dear Registrar,

Pursuant to the Rule 9.2 of the Rules of the Committee of Ministers regarding the supervision of the execution of judgments, the Rule of Law NGO would like to submit its individual communication regarding the implementation of the judgment in the case Virabyan v Armenia (No. 40094/05).

The Rule of Law NGO wishes to submit its views as to the necessity of individual measures to be taken to remedy for a violation of rights found by ECtHR, well as to draw your attention to general measures which need to be taken by the Armenian Government to prevent such violations in the future.

The deadline for submission of the action plan by the Armenian Government on the execution of the above-mentioned judgment expired on 2 July 2013. We encourage the Government to submit its action plan as soon as possible in order to ensure proper and timely execution of the judgment.

Below we submit our suggestions aimed at fair and effective execution of the above mentioned judgment, preceded by a brief summary of relevant findings of the Court and our analysis of thereof:

a) Violation of Article 6 § 2 of the Convention

a. Findings of the Court and their legal consequences for the applicant with regard to securing just satisfaction

In its judgment, the Court reiterated that "{the presumption of innocence} will be violated if a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law. It suffices, even in

the absence of any formal finding, that there is some reasoning to suggest that the official regards the accused as guilty (see *Daktaras v. Lithuania*, no. 42095/98, § 41, ECHR 2000-X).[1]" Having regard to the prosecutor's decision of 30 August 2004 by which criminal proceedings against the applicant were terminated at the pre-trial stage on the ground prescribed by former Article 37 § 2(2) of the Criminal Procedure Code (hereinafter – "CCP"), "which allowed termination of proceedings if, in the prosecutor's opinion, the accused had redeemed the committed act through suffering and other privations which he had suffered in connection with the committed act", the Court noted that "this decision was couched in terms which left no doubt as to the prosecutor's view that the applicant had committed an offence." The Court also noted that the prosecutor concluded that "it was inexpedient to prosecute the applicant because he had also suffered as a result of the committed act", and "in doing so, the prosecutor specifically used the words "during the commission of the offence [the applicant had] also suffered damage" and "by suffering privations [the applicant had] atoned for his guilt" (see paragraph 82 above)"." Both the Court of Appeal and the Court of Cassation upheld this decision and "in doing so, both courts found it to be established that the applicant's claim that he had acted in self-defence was unfounded."[2]

Before concluding that "the reasons for termination of the criminal case against the applicant given by the prosecutor and upheld by the courts with reliance on Article 37 § 2(2) of the CCP were in violation of the presumption of innocence"[3], the Court conveyed a very strong message:

> ***"It should be mentioned that the proceedings before the courts did not determine the question of the applicant's criminal responsibility but the question of whether it was necessary to terminate the case on the grounds provided by the prosecutor. Thus, it cannot be said that these proceedings resulted or were intended to result in the applicant being "proved guilty according to law".[4]***

The Court stated that the applicant, while charged with a crime, was deprived of a proceeding which according to the law could result in a finding on his guilt. As to the issue of what such proceeding should be deemed necessary there are two avenues in the Armenian legal system for the Government to proceed with which we will elaborate more below under the heading "**Suggested individual measure for just satisfaction."**

Thus, the fact still remains that Mr. Virabyan was effectively declared guilty by the final decision of a prosecutor adjudicating the case. That decision did not require as a prerequisite any form of consent from the accused (e.g. non-objection or a motion by the accused himself), was made by the prosecutor ex-officio and no single proceeding was conducted later in the case as to the issue of guilt despite the consistent submissions of the applicant to that effect. Finally, the only form of a judicial review available to Mr. Virabyan to test the

[1] See *Virabyan v. Armenia*, Application No. No. 40094/05, 2 October 2012, para 185
[2] Ibid, paragraphs 188-190
[3] Ibid, paragraph 192
[4] Ibid, paragraph 190

lawfulness of that decision had been a proceeding which ***cannot be said that {was} intended to result in the applicant being "proved guilty according to law".***

It follows that the decision of the prosecutor did not receive any "lawful" judicial review as to the issue of the applicants' guilt, the latter thus being determined by the prosecutor. The decision of the prosecutor as to the issue of guilt stood – not because the judicial instances confirmed the guilt "according to the law", but because judicial instances in the set of proceedings before them could not lawfully upheld or deny the prosecutorial determination of the applicant being guilty. Under such circumstances we believe that the presumption of innocence demands that the prosecutor's decision by which the applicant's guilt was established shall not remain in force, as it does stand till now, and as it (as found by the Court) was never lawfully questioned by the Armenian courts – for the purposes of Article 6 § 2 of the Convention.

The reality, thus, is that the applicant's right to presumption of innocence was violated by the prosecutor's decision, by which he unlawfully lost his status of an accused. The principle of *restitutio in integrum* mandates that the domestic proceedings should resume from the moment at which a constitutional right was violated, i.e. the moment when the prosecutor was a body in charge for a criminal case. First and foremost, that means that the applicant still enjoys the status of the accused in domestic proceedings, a status which he can now be deprived of "according to the law" only in a result of proceedings we are suggesting below as remedies of his violated right.

The rationale behind the suggested measures is as follows: the Court has established the fact that applicant was deprived of his status of the accused unlawfully. By that the Court has acknowledged the fact that the applicant is still to be considered as an accused. Consequently, the Court has recognized that it is mandatory to secure the consent of the accused to close proceedings on non-exonerating grounds, and that, in a case of absence of such a consent, it is necessary to secure exercise of his right to determination of any criminal charge against him at a fair trial.[5]

b. Suggested individual measures for just satisfaction

Based on the foregoing and given the very essence of the right, we believe that violation of Article 6 § 2 of the Convention as found by the Court can be remedied exclusively by **providing the applicant with an access to domestic proceeding** which can and is intended to result in a lawful determination of guilt or innocence in accordance with the Armenian legislation and the Convention. As we said above, there are two options the Armenian Government can proceed aiming to secure the implementation of the Court's judgment in this regard.

[5] The fact that the applicant lost his status of an accused unlawfully, at least based on a law in violation of the presumption of innocence, was admitted even by the Armenian legislature, who later (on 25 May, 2006) amended Article 37 of the CCP to the effect that the consent of the accused shall be obtained prior to closing the criminal case and terminating the prosecution on the ground, based on which the prosecutor closed the applicant's case (see also the Court's judgment in this case, paragraph 184).

First option is reopening of the proceedings and conducting a full ***trial***, a proceeding, which the applicant has demanded throughout the entire process of the case against him. In particular, he "argued that it was not the police officer but he who had acted in necessary self-defence, and requested to be tried by an independent and impartial court in a public hearing and be allowed to prove his innocence. In conclusion, he asked that the prosecutor's decision of 30 August 2004 and that of the Court of Appeal be quashed.[6]" Or, "{t}he applicant also argued that the principle of presumption of innocence had been violated and requested that the charge against him be determined through a public hearing, taking into account that the criminal proceedings had been terminated on non-exonerating grounds and that the charge against him had been found to be proved. He asked that the prosecutor's decision and those of the lower courts be quashed.[7]"

According to **Article 19** of the Armenian Constitution:

> *"Everyone shall have a right to restore his/her violated rights, and to reveal the grounds of the charge against him/her in a fair public hearing under the equal protection of the law and fulfilling all the demands of justice by an independent and impartial court within a reasonable time".*

The second option is provided by the Criminal Procedure Code of Armenia (CCP) - ***the procedure of the acquittal of the accused by a decision of an investigator or a prosecutor***. Below we cite the provisions of the CCP which are applicable to that effect.

> *"Article 35. Circumstances Excluding Criminal Prosecution*
>
> *1. Criminal case cannot be instituted and criminal prosecution may not be started and the instituted criminal case is subject to closure:*
>
> *1) in the absence of any criminal act punishable under the Criminal Code;*
> *2) if the alleged act contains no corpus delicti;*
> *3) if the alleged act, which has resulted in damages, is legitimate under criminal law;*
>
> *2. Criminal prosecution shall be terminated, and the case proceedings—ended as a result of participation of the suspect or the accused in a committed crime not being proven, if all the possibilities of obtaining new evidence have been exhausted.*
>
> *3. At any stage of pre-trial proceedings, the prosecutor, the investigator, upon revelation of circumstances excluding criminal prosecution shall make a decision on a closure of a criminal case or termination of criminal prosecution. Prosecutor is entitled to make such a decision also after taking the case to the court, but before the beginning of the examination of a case in a court.."*
>
> *"Article 66. The Acquitted*

[6] Ibid, paragraph 90
[7] Ibid, paragraph 94

1. The acquitted is a person whose criminal prosecution is terminated or the criminal proceedings are closed, based on Points 1-3 of Article 35 of this Code and Part 2, or acquittal verdict has been adopted.

2. The acquitted is entitled to appeal against the grounds for the closure of criminal proceedings or the acquittal verdict.

As it can be seen from the articles above, the Armenian legislation gives the same procedural status of an acquitted person and the same rights deriving from that status regardless of the fact whether that person was acquitted by a court judgment or a decision of a prosecutor or an investigator. All that matters here is the nature of grounds based on which a case against the accused shall be closed, namely, based on exonerating grounds.

Although **the most preferred option for the applicant would be to have a public trial** where he would have opportunity to have his innocence established, **we do not consider it legal that his innocence could be proven by a decision determining the guilt of police officers who tortured him only.** We think that the lack of effective investigation of torture claims established by the Court should be fixed in a separate set of proceedings which we suggest as an individual measure of remedying the applicant's violated rights under Article 3 and Article 14 of the Convention (see below).

We also think it is a legitimate prerogative of a prosecutor not to bring those whom he or she considers to be innocent on trial. **Hence, the choice as to which way to proceed lies with a prosecutor: to bring the case to trial or to drop charges and exonerate the applicant. If the prosecutor comes to a conclusion that the applicant is guilty, the case should be brought to court. If the prosecutor decides the opposite, the applicant should be acquitted. The rights of the applicant will not be violated if the prosecutor choses the second option, as under paragraph 2 of Article 66 of the CCP,** "{t}he acquitted is entitled to appeal against the grounds for the closure of criminal proceedings or the acquittal verdict."

We strongly feel that this case fully falls under the wording expressed in the following provision of the Preamble to the Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights (Adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Ministers' Deputies):

"… in certain circumstances the … obligation {under Article 46 of the Convention} may entail the adoption of measures, other than just satisfaction awarded by the Court in accordance with Article 41 of the Convention and/or general measures, which ensure that the injured party is put, as far as possible, in the same situation as he or she enjoyed prior to the violation of the Convention (restitutio in integrum)."

The 1st operative paragraph of the said recommendation invites the Contracting Parties "to ensure that there exist at national level adequate possibilities to achieve, as far as possible, restitutio in integrum."

When interpreting this operative provision in the paragraph 2 to of the Explanatory Memorandum of Recommendation No. R (2000) 2, the Committee of Ministers refers to the case law of the Court to the effect that "a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach"[8].

Therefore, **the failure to restore the situation existing prior to the violation would be deemed lawful, only if such a restoration is impossible**. **Armenia has already introduced the necessary changes in its domestic legislation complying with the requirement of paragraph 4 of the Explanatory Memorandum, inviting the states "to ensure that their legal systems contain the necessary possibilities to achieve, as far as possible, restitutio in integrum, and, in particular, provide adequate possibilities for re-examining cases, including reopening proceedings."** In particular, Article 426, prime 1, of the CCP (as edited on 20 May, 2010) states the following:

> *"1. **Only** a judicial act which has taken legal effect shall be re-examined based on newly discovered or new circumstances.*
> *2. The judicial acts of the first instance court shall be re-examined by the Review Court, and the judicial acts of the Review Court and those of the Cassation Court shall be re-examined by the Cassation Court."*

Article 426, prime 4, paragraph 1(2) of the CCP (as edited on 20 May 2010) sets forth the grounds for the re-examination of cases based on the new circumstances and states the following:

> *"1. The judicial acts shall be re-examined in the following instances:*
> *…2) by a final judgment or a decision of an international tribunal to which the Republic of Armenia is a party a fact of violation of a right prescribed under an international treaty of the Republic of Armenia has been substantiated."*

As if responding to the possible argument of an Armenian Government that Article 426, prime 1, and consequently Article 426, prime 4, paragraph 1(2), applies only to cases which were adjudicated by a final *judicial* act, and not a prosecutorial decision, the Constitutional Court of the Republic of Armenia examined the constitutionality of a word *"only"* contained in Article 426, paragraph 1, and found it unconstitutional by a judgment No. 935, dated from February 4, 2011[9]. In particular, the Constitutional Court decided to:

*"Declare the expression **"only"** contained in Article 426, paragraph 1, of the Criminal Procedure Code of the Republic of Armenia as being in contradiction with Article 18 of the Constitution of the Republic of Armenia and void – to the extent that it precludes re-examination of other final legal acts on the grounds of newly discovered or new circumstances in conformity with the procedure prescribed by law thus putting into jeopardy the right of a person to an effective legal remedy in particular before the competent public bodies during the pre-trial stage of the proceedings."*[10]

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[8] Papamichalopoulos v Greece of 31 October 1995, para 34, Series A 330-B

[9] http://www.arlis.am/DocumentView.aspx?docid=65480

[10] Article 18 of the Constitution (as edited in 2005):

Thus, it can be stated that Armenia has undertaken legislative measures necessary to comply with the 1st operative provision of the said Recommendation which is characterized as "the basic principle behind the recommendation that all victims of violations of the Convention should be entitled, as far as possible, to an effective *restitutio in integrum*. The Contracting Parties should, accordingly, review their legal systems with a view to ensuring that the necessary possibilities exist."[11]

Based on the foregoing, we conclude that paragraph 10 of the Explanatory memorandum is fully relevant to this case, namely that "it is primarily in the field of criminal law that the re-examination of a case, including the reopening of proceedings, is of the greatest importance."

Paragraph 13 of the Explanatory Memorandum to the said Recommendation addresses the issue of **who will need to apply** to the domestic authorities to re-open a proceeding or to re-examine a case:

> *"The recommendation does not deal with the problem of who ought to be empowered to ask for reopening or re-examination. Considering that the basic aim of the recommendation is to ensure an adequate protection of the victims of certain grave violations of the Convention found by the Court, the logic of the system implies that the individuals concerned should have the right to submit the necessary requests to the competent court or other domestic organ. Considering the different traditions of the Contracting Parties, no provision to this effect has, however, been included in the recommendation."*

"Everyone shall be entitled to effective legal remedies to protect his/her rights and freedoms before judicial as well as other public bodies.

Everyone shall have a right to protect his/her rights and freedoms by any means not prohibited by the law. …

Everyone shall in conformity with the international treaties of the Republic of Armenia be entitled to apply to the international institutions protecting human rights and freedoms with a request to protect his/her rights and freedoms."

[11] Despite the mentioned changes in the CPC, the Prosecutor's Office has never applied to the courts for re-opening or re-examination of the cases in which the ECtHR has found violations. Moreover than that, so far only in two cases (namely in *Misha Harutyunyan v. Armenia* and in *Maxim Gasparyan v. Armenia*) the proceedings have been re-opened, and in both instances that happened after applicants applied to the courts. In the case of Harutynyan, the Cassation Court granted the request of the applicant, re-opened the case and sent it to the court of first instance for trial. The trial court conducted judicial examination, excluded as inadmissible the evidence obtained through torture and finally delivered a guilty judgment against the applicant. In the case of Gasparyan in which the ECtHR found a violation in the use of administrative detention, the applicant applied to the criminal trial court for re-opening of the proceedings. The criminal court transferred the case to the administrative court based on lack of jurisdiction. The administrative court sent the case back to the criminal court with a reasoning that the case was of a criminal nature as it was declared by the ECtHR. The criminal court accepted the case for hearing and involved a prosecutor to participate in the case but proceeded with its examination based on the procedures set by the Civil Procedure Code. In a result of these proceedings the court closed the case against the applicant. All of this has been done to avoid delivery of an acquittal judgment in the case. Thus, it can be fairly concluded that the provisions of the CPC allowing for re-opening of cases based on the ECtHR findings have proven to be ineffective in practice.

In our view, as expressed above, the form of re-opening of the proceedings fully depends on a prosecutor's decision: either to acquit the accused applicant (i.e. to terminate prosecution against him exonerating grounds), which he is obliged to do if there are no grounds to send a case to the court[12], or to send the case to the court for the judicial examination of the criminal charges brought against the applicant on their merits. The *restitutio in integrum* for the applicant means that we still have the accused who strongly opposes the closing his case on non-exonerating grounds, and this new situation shall be properly solved "in accordance with the law", i.e. in compliance with the findings of the Court in this case and the amendments made to Article 37 of CCP to the effect of impossibility of closing a case on non-exonerating grounds if the accused is against that.

Article 426, prime 2 of the CCP (Persons authorized to bring appeals for re-examination of cases based on new or newly emerged circumstances) provides a list of persons authorized to bring up such appeals. These are:

> *"Interested persons who dealt with that circumstance, except for the bodies of criminal prosecution*
>
> *… 4. The Prosecutor General and his/her deputies."*

Thus, the prosecution should ex-officio re-open the proceedings and act in accordance with the mentioned findings.

b) Substantive and procedural violations of Article 3 and procedural violation of Article 14 of the Convention in conjunction with Article 3

a. *Findings of the Court and their legal consequences for the applicant with regards to the just satisfaction*

In the judgment, the Court noted that "Armenian law provides a remedy to the victims of alleged ill-treatment"[13], and having analysed the efforts of the authorities to this effect ruled as follows:

> *1. In view of the foregoing, the Court concludes that the investigation into the applicant's allegations of ill-treatment undertaken by the authorities was ineffective, inadequate and fundamentally flawed. It was not capable of producing credible findings and leading to the establishment of the facts of the case. The authorities failed to act with due diligence and cannot be said to have been determined to identify and punish those responsible."*

b. *Suggested individual measure for just satisfaction*

[12] We must reiterate here the requirement set in Article 35, paragraph 3 of the CCP, that "{a}t any stage of pre-trial proceedings, the prosecutor, the investigator, upon revelation of circumstances excluding the criminal prosecution, shall make decision on a closure of a criminal case or termination of criminal prosecution."
[13] Ibid, paragraph 136

The Court expressed its clear position that the applicant was subjected to torture, that the applicant was deprived of an effective investigation into his allegations of ill-treatment, including the allegation that his ill-treatment had been politically motivated.

As noted by the Court "at all stages of the investigation the applicant presented a consistent and detailed description of who had ill-treated him and how. His allegations were compatible with the description of his injuries contained in various medical records (see paragraphs 31 and 66 above)."[14] The Court decided that his allegations did not receive effective investigatory response from the authorities. That means that the allegations still stand, remain unanswered, and the principle of *restitutio in integrum* will necessarily mean that the Government is still obliged to effectively respond to those allegations since April 25, 2004, when the applicant made his first allegations of ill-treatment by the police.[15]

As it was mentioned by the Court in paragraph 136 of the judgment, "Armenian law provides a remedy to the victims of alleged ill-treatment". The Court referred to the applicable provisions of the CCP which were in effect at the time of a violation and which are applicable to date. Here, we would like to reiterate the observations of the Court as to the requirements of those provisions which then and now still provide the Armenian Government with a complete legislative inventory to take its second chance of proper investigation of the applicant's allegations of torture:

> *"2. According to Article 176, the grounds for instituting criminal proceedings include, inter alia, information about crimes received from individuals and discovery of information about a crime or traces and consequences of a crime by the body of inquiry, the investigator, the prosecutor, the court or the judge while performing their functions.*
>
> *3. According to Article 177, information about crimes received from individuals can be provided orally or in writing. An oral statement about a crime made during an investigative measure or court proceedings shall be entered respectively into the record of the investigative measure or of the court hearing."*
>
> *"…4. According to Article 181, one of the following decisions must be taken in each case when information about a crime is received: (1) to institute criminal proceedings, (2) to reject the institution of criminal proceedings, or (3) to hand over the information to the authority competent to deal with it.*
>
> *5. According to Article 182, if there are reasons and grounds to institute criminal proceedings, the prosecutor, the investigator or the body of inquiry shall adopt a decision to institute criminal proceedings."*

We strongly believe that the findings of the Court as to the lack of effective investigation into the applicant's allegations of torture are to be considered by the prosecutors and investigators as constituting sufficient grounds to "institute criminal proceedings". In our opinion, there could be no other remedy for this violated right other than launching an

[14] Ibid, paragraph 154
[15] Ibid, paragraph 36

investigation capable of determining the facts and revealing those responsible for the acts of torture against the applicant.

Concluding our submissions as to the necessary individual measures to be taken in order to secure just satisfaction for the applicant, we would like to emphasize that **the fact of finding of a violation by the Court does not itself exempt a member state from its permanent commitment to comply with its general obligation under Article 1 of the Convention, i.e. to "secure to everyone within their jurisdiction the rights and freedoms defined in Section I of {the} Convention."** The international obligation of the states to secure exercise of human rights by everybody within their jurisdiction is equally applicable both to the potential future applicants to the Court, and to those applicants, who have already turned to the remedy of judicial review by the Court and succeeded.

In this regard, the procedure of Committee of Ministers' supervision over the implementation of Court judgments by the member states shall in no way give them any more of a margin of appreciation than the one that is allowed by the Court itself when considering the sufficiency of the efforts of member states to conform with the requirements of the respective articles of the Convention.

<u>Suggested general measures to prevent similar violations in the future</u>

This case has revealed several systemic problems of Armenian criminal procedure both in legislative and practical aspects. We believe that implementation of the below suggested measures can remedy the judicial and law enforcement practices to the effect of preventing similar violations in the future.

1. *Mandatory nature of the experts' findings for the trier of fact*

   Under Article 108 of the CCP (Circumstances determined in case of availability of certain evidence**):**

"In criminal procedure, the following circumstances are to be determined only after receiving and examining beforehand the following evidence:

1) Cause of death and nature and the degree of health damage - report of the expert in forensic medicine is to be presented…. "

Despite the fact that the quoted provision provides that a forensic examination report is only provided subject to prior to the determination (by the investigator, prosecutor or a judge) of a nature and the degree of health damage, till now it has been an absolute rule followed by both the judicial and the law enforcement practices that forensic experts' opinions on the subject matter are mandatory for the mentioned officials.

Of course, if an investigator or a prosecutor happen to disagree with such expert's report, for reasons of insufficient clarity or incompleteness (Article 251, paragraph 1 of the CCP), or

find that expert's report is ungrounded or raises suspicion, or the evidences on which it was based were recognized invalid, or the procedural rules of examination were breached (Article 251, paragraph 2 of the CCP), or a judge, after having examined the expert's report and after having heard the opinion of each party on it (Article 344, paragraph 2 of the CCP) they can appoint an additional or a repeated examination, but what is troubling is that they find that their own conclusions as the nature and the degree of health damage should be necessarily based on an expert report.

This is even more troubling given the fact that "the degree of health damage" is a criterion which the Criminal Code utilizes in qualification of crimes (see Article 112 and Article 113 cited below), and consequently for their classification based on the degree of danger – with all negative consequences for suspects and defendants, such as qualification of a crime as one to be charged even more routine denial of bail motions, classifying a crime under the category of public prosecution offences, etc.

The situation is worsened even more when we turn to paragraphs 2 and 3 of Article 114 of the CCP (The Expert's Report):

> *"2. The expert can be questioned for the purpose of elucidation of his report.*
> *3. The protocol of the expert's questioning cannot replace the expert's report."*

Thus, even if there were a trial enabling the applicant to cross-examine the expert the testimony of that expert would lead to an additional or a repeated expert examination at best. In the worst case scenario the written report by the same expert would still be effectively used as evidence in spite of any possible positive outcomes of a spontaneous cross-examination of the expert at trial. The option of a repeated or additional expertise would be highly improbable given the fact that in the case of an objective examination, the places of the "victim" and the "perpetrator" would be necessarily changed which was impossible within the framework of the trial in the criminal proceedings against the applicant.

Thus, taking into account the established judicial practices in Armenia it can be positively stated that the court without appointment of an additional or a repeated expertise would base determination of applicant's guilt on the written examination given by the expert in the pre-trial stage of the same case {against the applicant} regardless of what the same expert would have testified at the trial.

2. *Contradictions between the Armenian legislative, judicial and administrative practices and the Convention*

The mentioned misinterpretation of Article 108, paragraph 1 of the CCP, in conjunction with the actual wording of Article 114, paragraph 3, contradicts to the Convention and several provisions of the Armenian law.

In particular, it contradicts to Article 6.3(d) of the Convention, according to which the defendant is entitled to effectively cross-examine witnesses against him. It contradicts to Article 25 of the CCP (Free Assessment of Evidence) which is placed in section 2 of the CCP (Principles of Criminal Proceedings) and stipulate as follows:

> *"1. The judge, as well as the agency for inquest, the investigator, or the prosecutor shall assess the evidence in accordance to their inner belief.*
>
> *2. No evidence shall have a pre-determined force in criminal proceedings. The judge, as well as the agency for inquest, the investigator, or the prosecutor shall not deal with the evidence in a biased way or give more or less significance to ones in comparison with the others, before the examination of all the available evidence in accordance with a due process of law."*

Secondly, the mentioned misinterpretation of Article 108, paragraph 1, in conjunction with the actual wording of Article 114, paragraph 3, contradicts to the Law on Legal Acts of the Republic of Armenia (adopted on April 3, 2002), in that under paragraph 1 of Article 86 (Interpretation of a Legal Act) of that Law:

> *"A legal act shall be interpreted in accordance to the literal meaning of the words and expressions contained therein, taking into consideration the requirements of the law. The interpretation of a legal act shall not change its meaning."*

Thus, there are two changes required:

(i) **practical – to stop the practice of unequivocal relying on written reports of experts and start adopting such judicial acts in which court conclusions as to "the nature and the degree of health damage" would consider the expert reports on equal footing with in-trial testimony, this providing the accused with opportunity to effectively challenge the report through the cross-examination of the expert at trial, and**

(ii) **(ii) legislative – either to remove the paragraph 3 of Article 114 from the Code, or to rephrase it to the effect that the results of the questioning (in reality – results of an in-trial cross-examination) of the expert *"shall be considered independent evidentiary item capable of replacing written report of an expert."***

By doing this, Armenia will take a huge step in transition from the inquisitorial written type of the criminal procedure to its adversarial oral type.

3. ***Lack of a comprehensive, precise and predictable legal authority regulating the criteria to be applied by the experts in determination of the nature and degree of the health damages***

Given the crucial consequences of the classification of a bodily injury to one or another group of severity, the criteria for such an assessment should become much

more predictable and consistent with the requirements of principles of quality of the law and legal certainty as interpreted by the Court in its well established case law.

Under paragraph 1 of Article 112 of the Criminal Code (2003) a damage inflicted to the health is considered as grave if that:

> *"is dangerous for life or caused loss of eye-sight, speech, hearing or any organ, loss of functions of the organ, or was manifested in irreversible ugliness on face, as well as caused other damage dangerous for life or caused disorder, accompanied with the stable loss of no less than one third of the capacity for work, or with complete loss of the professional capacity for work obvious for the perpetrator, or caused disruption of pregnancy, mental illness, drug or toxic addiction…"*[16]

Article 113 of the Criminal Code defines a medium gravity damage to the health as:

> *"{a} bodily injure or any other damage to health which is dangerous for life and did not cause consequences envisaged in Article 112 of this Code, but caused protracted health disorder or significant stable loss of no less than one third of the capacity to work."*[17]

We strongly believe that the criteria set above (especially for the crime set in Article 112) should be better spelled out in a separate legal act, which will inform the legislation and the judicial, law enforcement and administrative (in particular - forensic) practices with what the principle of legal certainty does mean and imply. The suggested predictability, preciseness and consistence of the criteria will preclude arbitrariness of decision making on such important matters.

As to the practical implications for the applicant in this case, given the above mentioned practices well established in Armenia, **had forensic experts concluded that the applicant suffered *grave* health damages and not the ones of *medium gravity*, it would have been impossible for investigators and prosecutors to initiate and investigate such a criminal case in which he being the only perpetrator would suffer the most serious bodily injuries, while the victim suffered the least serious ones. Clearly, the obligation for investigators and prosecutors to have the perpetrator and the victim change their places with one another would be more obvious.**

We would be pleased to provide you with any further information or documents that may be required.

Sincerely yours,

Artak Zeynalyan,

Chairman, Rule of Law NGO

[16] Punished with imprisonment for the term of 3 to 7 years.

[17] Punished with arrest for the term of 3 to 6 months or imprisonment for the term of up to 3 years.

Department for the Execution of Judgments of
the European Court of Human rights

Your ref.: DG1/GM/IKM/VD/Ima

8 October 2013

Dear Ms.Mayer,

With reference to the communication of the Rule of Law NGO (25 September 2013), concerning the execution of the ***Virabyan v. Armenia*** judgment**,** I would like to inform you that the Government of Armenia has undertaken a number of legislative measures for effective execution of the *Virabyan v. Armenia* judgment, as well as other judgments establishing violations of similar nature.

In the *Virabyan v. Armenia* judgment (Application no. 40094/05, 2 October 2012) the Court stated, *inter alia*, that *"(...) the ground for termination of criminal proceedings envisaged by former Article 37 § 2(2) of the CCP in itself presupposed that the commission of an imputed act was an undisputed fact. In view of the foregoing, the Court considers that the reasons for termination of the criminal case against the applicant given by the prosecutor and upheld by the courts with reliance on Article 37 § 2(2) of the CCP were in violation of the presumption of innocence."*

In this respect, the Government stresses out that the legislative measures, namely, the amendments made to the Code of Criminal Procedure of the Republic of Armenia (hereinafter referred to as "the CCP") exclude the possibility of future violations of similar character. Particularly, the questionable Article 37 of the CCP was amended even before the Court's judgment by HO-91-N Law of the Republic of Armenia of 25 May 2006 "On Making Changes and Additions to the Code of Criminal Procedure of the Republic of Armenia".

By the abovementioned changes the relevant legal provision, further established by the Court to be incompatible with person's constitutional and conventional rights and allowing the termination of proceedings if, in the prosecutor's opinion, the accused had redeemed the committed act through suffering and other deprivations which he had suffered in connection with the committed act, was eliminated.

In regard to the NGO's allegations about the failure of the authorized state bodies to re-open Applicant's case and provide him with the possibility to litigate the Prosecutor's decision in question, the Government submits that due to the necessary changes in the domestic legislation,

namely, by thoroughly determining the grounds, terms and list of persons authorized to lodge appeals for having final judgments re-opened, Applicant was free to apply for re-examination of his case within Articles 426^1-426^9 of the CCP.

Moreover, as to the issue raised by the NGO in light of the case of *Ashughyan*, regarding the alleged legislative possibility to challenge the judicial act by the Prosecutor General or his Deputies, the Government claims that even assuming that Prosecutor General was obliged by law to act on Applicant's behalf and lodge an appeal to have his case re-opened, the time-limits prescribed by Article 426^2, namely the three-months' period, was expired for the Prosecutor General and the Deputy Prosecutors General as well. It should be mentioned that it is impossible for the Prosecutor General or the Deputy Prosecutor General to predict in advance whether in each certain case the interested party is going to avail of his or her rights or not, and to carry out the necessary actions on their own.

Lastly, as to the allegedly necessary general measures suggested by the NGO in order to prevent similar violations in the future, the Government would like refer to Rule 9.2 of the *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements* and advise that this part of communication should not be considered by the Committee of Ministers, since, firstly, the Articles which are mentioned under that part of the communication, have no concern with this judgment and its implementation and therefore this part of communication out of remits as to "with regard to the execution of [the *Virabyan v. Armenia* judgment] under Article 46 § 3 of the Convention, and secondly, the Government believes that the process of execution of judgments should not be used as a platform for irrelevant discussions.

We strongly believe that the general measures undertaken by the Government of Armenia will prevent violations of similar nature in the future.

Yours sincerely,

Ruben Melikyan

Deputy Minister of Justice

Deputy Government Agent