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Contact: Anna Austin
Tel: 03 88 41 22 29

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Meeting: 1222 meeting (10-12 March 2015) (DH)

Item reference: Updated action plan (16/02/2015)

Communication from Armenia concerning the case of Virabyan against Armenia (Application No. 40094/05)

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Réunion : 1222 réunion (10-12 mars 2015) (DH)

Référence du point : Plan d'action mis à jour

Communication de l'Arménie concernant l'affaire Virabyan contre Arménie (Requête n° 40094/05) (***anglais uniquement***)

Revised Action Plan
Virabyan v. Armenia
Application no.: 40094/05
Judgment of: 02/10/2012
Final on: 02/01/2013

STATE OF EXECUTION OF THE JUDGMENT

CASE SUMMARY

1. The applicant (member of one of the main opposition parties at the material time in Armenia) was tortured while in police custody on 23 April 2004 and no effective investigation was carried out into his allegations of torture. The applicant's motion to start criminal proceedings into that ill-treatment was dismissed by the Erebuni and Nubarashen district prosecutor, a decision that was upheld by the Appeal Court and the Court of Cassation (substantive and procedural violations of Article 3).

2. In addition, the European Court of Human Rights (hereinafter, the Court) found that: (i) the grounds on which the criminal proceedings against him had been terminated violated the presumption of innocence (violation of Article 6 § 2); (ii) the authorities failed to carry out an effective investigation into the applicant's allegations that his ill-treatment had been politically motivated despite the existence of plausible information which was sufficient to alter them of the need to carry out an initial verification, and depending on the outcome, investigation (procedural violation of Article 14 taken in conjunction with Article 3).

INDIVIDUAL MEASURES

Payment of just satisfaction

3. Within the time frame established under the Convention, EUR 25,000 as compensation for non-pecuniary damages and EUR 6,000 for costs and expenses were paid to the applicant (payment receipt has been annexed to the *Virabyan* Action Plan of 29 November 2013).

Other individual measures

4. Pursuant 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 Court, State authorities ensures the possibility of re-examination of the *Virabyan* case, including reopening of proceedings in order to grant at domestic level a measure as close to *restitutio in integrum* as possible. Making reference to the Court's judgment of 02/10/2012 on *Virabyan v. Armenia* case as a new circumstance, the case has been reopened at national level and now is at varying stages of the investigation process (more detailed below in §§ 26-35).

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GENERAL MEASURES

Legislative measures

a) Substantive violation of Article 3

5. In order to prevent similar violations in future structural legislative reforms have been undertaken to bring national legislation in line with international best practice. As it was previously mentioned in the Government Response to the Submission of Helsinki Citizens' Assembly-Vanadzor NGO in *Virabyan* case, taking into account the fact that national legislation criminalizing torture does not include crimes committed by public officials, as well as it lacks the purposive element recognised in the UN Convention Against Torture (UNCAT), the article defining torture in the Draft amendments to the Criminal Code[1] was brought in conformity with the requirements of Article 1 of the UNCAT. Besides, it ensures that all public officials who engage in conduct that constitutes torture are charged accordingly, and that the penalty for this crime reflects the gravity of the act of torture, as required by Article 4 of the UNCAT.

6. The Government would like to inform that the amended article imposes suitable penalty for such acts (from four to eight years of imprisonment, as well as deprivation of the right to hold certain posts or practice certain activities for up to three years), which is in conformity with the international best practice. Moreover, in contrast with the existing legislation, which stipulates the private criminal prosecution for cases of torture where the sole ground for the initiation of criminal proceedings in such cases is the victim's complaint, the Draft Criminal Procedure Code considers it as a subject of public criminal prosecution, which is initiated by a decision of the supervising Prosecutor. This can be considered as an additional guarantee for ensuring the initiation of criminal proceedings in each such case.

b) Procedural violation of Article 3

7. For the increase of the procedural safeguards, new Draft Criminal Procedure Code, in particular Article 110 secure basis for comprehensive and effective investigation into acts of torture. The Government considers that Article 110, which, *inter alia*, stipulates the minimum rights[2] of the

[1] The Draft amendments to the Criminal Code have been submitted to the Government for the final approval.
[2] To be informed about minimum rights and obligations stipulated by this Article orally from the moment of becoming *de facto* deprived of liberty and in writing at the time of entry into the administrative building of the Inquiry Body or of a body that has the power to conduct the proceedings; To know the reason for depriving him of liberty; To remain silent; To inform a person of his choosing about his whereabouts; To invite an attorney; and To undergo a medical examination if he so demands.

arrested person can be considered as a fundamental safeguard against any form of ill-treatment. It is worth to mention that the minimum rights prescribed in this article are totally in conformity with the CPT standards. The aim of this article, *among the others,* is to create a clear system of mechanisms and procedures through which allegations, indications and evidence of ill-treatment can be communicated. In particular, the rights to have the fact of one's detention notified to a third party, to have an access to a lawyer, and to have an access to a doctor (as well as to invite a doctor of his choice[3]) are crucial for the gathering of evidence and communication of information relating to torture. The Government would like to note that these rights are applied from the very outset of factual deprivation of liberty and can secure the evidence concerning the incident. Any evidential deficiency in that respect can undermine the ability of conducting thorough, comprehensive and objective investigation.

8. Moreover, according to the existing case-law of the Court of Cassation[4], made on 18/12/2009, a person, from the moment of entry into the administrative building of the Inquiry Body or of a body that has the power to conduct the proceedings and before acquiring a legal status of arrested or detained person, acquires a preliminary status of a "brought" person and shall be granted the minimum rights which are as follows: to know the reason for depriving him/her of liberty; to inform a third person about his whereabouts; to invite an attorney; to remain silent. As an additional guarantee, the case-law establishes that, after 4 hours of factual deprivation of liberty, in case if the person is not informed that an arrest record in his respect has been drawn, from that very moment, he/she automatically acquires the legal status of an arrested person, and thus, shall be granted all the rights and guaranties of the arrested person provided by the law.

9. The Government would like to stress that all the above mentioned guarantees, in conjunction with other legislative guarantees measuring the effectiveness of the investigation of torture, aimed at creation of real mechanizes capable of leading to the establishment of the facts of the case, and, if the allegations prove to be true, to the identification and, if justified, punishment of those responsible.

c) <u>Violation of Article 6 § 2</u>

10. Based on the facts of the case the criminal proceedings against the applicant were terminated at the pre-trial stage by the prosecutor's decision of 30 August 2004 on the ground prescribed by

[3] According to Article 43(5) of the Draft Criminal Procedure Code, in case of arrest or detention, a person have the right to demand a medical examination at no cost and to receive a report at no cost, as well as to invite a doctor of his choosing and to communicate with him without any obstacles, including without any visual or auditory surveillance.

[4] See, RA Court of Cassation, decision on criminal case no. EADD/0085/06/09 (որոշում թիվ ԵԱԴԴ/0085/06/09) dated on 18/12/2009.

former Article 37 § 2(2) of the Code of Criminal Procedure (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.

11. As it was mentioned in the previous *Virabyan* Action Plan, on 25 May 2006 Article 37 of the CCP was amended and its sub-paragraph 2(2) was removed. The amended Article 37 prescribes that the court, the prosecutor or, upon the prosecutor's approval, the investigator may terminate the criminal proceedings in cases prescribed by Articles 72, 73 and 74 of the Criminal Code (hereinafter, CC). Article 72 concerns cases in which the accused actively regretted the offence, Article 73 concerns cases in which the accused was reconciled with the victim and Article 74 concerns cases in which, due to a change in the situation, the accused or the act committed by him/her lost their danger for society. According to the amended Article 37 of the CCP, in cases envisaged by Articles 72 and 74 of the CC criminal proceedings may not be terminated if the accused objects. Thus, the amendment in question will prevent the possibility of similar violations in future.

12. Moreover, new Draft Criminal Procedure Code goes further: it provides that prosecutor may decide not to initiate criminal proceedings only if all concrete conditions are cumulatively met. Thus, for the sake of insuring the principle of legal certainty it prescribes more objective criteria for the prosecutor to carry out its discretionary power.

d) Procedural violation of Article 14 in conjunction with Article 3

13. It is worth to mention at the outset that the authorities failure in their duty under Article 14 of the Convention taken in conjunction with Article 3 to take all possible steps to investigate whether or not discrimination may have played a role in the applicant's ill-treatment more related to the concrete practical flaw than legislative deficiency. That is why no specific legislative measures were taken in that respect. At the same time, stressing the importance of enhancing the protection against discrimination, in *contrario* to the existing legislation, the newly drafted article of the Draft Criminal Procedure Code on equality of all without ***discrimination*** has been accorded a force of a principle.

14. As general information the Government would like to inform that the adoption of comprehensive anti-discrimination legislation is a priority policy issue for Armenia. It is worth to inform that with the request of the Ministry of Justice of the Republic of Armenia, for the purpose of a thorough legislative gap analysis as well as aiming at further legislative developments, the Eurasia Partnership Foundation carried out a study on the issues of discrimination and intolerance in Armenia, both from legal and societal points of view. The outcomes of the study process have

already been summarized and the possibility of drafting new comprehensive legislation on anti-discrimination, which will address the notion and types of discrimination, as well as the proof mechanisms and other considerable issues, is in the discussion process.

15. In line with what was said above about the new definition of torture, the Government reiterates that upon the Draft Law on making changes and amendments to the Criminal Code, the new definition of torture, among the other elements, fully covers the purposive elements as recognized under international best practice. In particular, under the new definition, torture conducted on any discriminative basis is considered as a separate purposive element. Inclusion of the discrimination based purposive element of torture in the definition aims, among the others, at widening the scope of situations where the incident can be qualified as torture, and, which is more important, at stressing the importance of criminalization and adequate sanctioning of discrimination based torture acts.

Practical measures

a) *Measures taken to increase awareness of the Convention standards*

i. Publication and dissemination of the judgment

16. The judgment translated and published on the official website of the Ministry of Justice on 21 June 2013[5]. Considering the importance of the prevention of the further possible violations, as well effective implementation of the judgments, the Government ensured the dissemination of the judgment. Relevant authorities involved are provided with respective information about the obligations assumed by the Republic of Armenia under the Convention (in particular, judges, prosecutors, civil servants, police officers).

ii. Public discussions

17. It is worth to inform that Public Council has been created adjacent to the Ministry of Justice comprised of NGO and Media representatives (29 members). [6] In order to increase the co-operation with national human rights institutions, as well as to ensure that they are provided with an opportunity to scrutinize the legislative reforms, *inter alia*, public discussions of Draft Law on making changes and amendments to the Criminal Code of the RA (the new definition of torture has been subject of special consideration) have been organized.

[5] http://moj.am/storage/files/legal_acts/legal_acts_7182269154741_VIRABYAN-last.pdf
[6] http://moj.am/page/576

iii. Education and professional trainings

18. The Government stresses the importance of appropriate university education and professional training programmes as an effective and preventive mechanism for ensuring the Convention standards awareness-raising.[7]

19. The Government would like to inform that education and trainings concerning the developing case-law of the Court, in general, and the judgments delivered against the Armenia, in particular, are included as a component of the common core curriculum provided to judges, prosecutors, police, prison and detention facilities staff, civil servants, advocates, etc. *Among the others*, the *Virabyan* case is also included in the curricula of the Police Academy, the Civil Servant training courses, as well as the Justice Academy of Armenia.

20. In addition to the above-mentioned, it is worth to underline that provision of continuous assistance to the law-enforcement agencies by organization of periodical professional trainings and seminars, which aimed at preparing adequately trained and proficient team in the respective field, are in the center of attention of Armenian authorities. Taking in to account the CPT recommendations that greater emphasis should be given to proper trainings organized for police stuff, the Police Headquarter gives periodic assistance to the stuff of the RA Police System, by providing practical and methodological guidelines in respect of the implementation of the CPT standards and recommendations.

21. Moreover, refering to the CTP/Inf (2015)8 Report on the visit to Armenia from 4 to 10 April 2013, it has been decided that the sections of CPT reports on Armenia that relate to the Police should be introduced to all officers.[8]. In that respect the specific Order No.20 of the Head of the Police of the Republic of Armenia, dated on 27 November 2013, "*On Ensuring the Application of Legal Standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment"* has been also included in the respective training curricula of the Police Academy. In addition to this, for example, in 2013 and 2014 consultation workshops have been organized. The heads of subordinate headquarters and operative divisions, as well as the officers of detention facilities participated. Methodologycal guidelines and Q&A Handbooks were provided to the subordinate headquarters containing legal acts regulating the activity of detention facilities. Furthermore, for the purposes of imporvement of the academic konwledge in that field,

[7] Professional European Convention on Human Rights education and trainings are included as a component of the curriculum of law degree programmes in Armenian universities, as well as qualification-based training programmes organised for public officials; in addition, they are offered as optional discipline to those who wish to specialise.
[8] CTP/Inf (2015)8 Report on the visit to Armenia from 4 to 10 April 2013, §17

relevant materials are included in both the academic and professional training curriculum of the Police Academy.[9]

22. Currently, the respective training curricula of the newly established Justice Academy, the Police Academy, as well as the Law Institute of Ministry of Justice have special training courses on the Convention and the Court's case-law (the *Virabyan* case is also included in the study courses). Particularly, the Justice Academy provides trainings for acting judges and candidates for judges, prosecutors and candidates for prosecutors, investigators, as well as other public officials. The Law Institute provides trainings for penitentiary officials and civil servants. As regards the Police Academy, these courses are provided for police officers and students who study at the Academy. Furthermore, the Police Academy, as it was mentioned above, has a separate training course on the CPT standards.

23. It is also worth to mention that special course on application of Article 3 of the Convention has been designed and is taught at the Justice Academy. Moreover, in the framework of the special project *"Strengthening the application of the European Convention on Human Rights and the case law of the European Court of Human Rights in Armenia"* launched in cooperation with the Council of Europe,[10] a two-day workshop on enhancing skills on specific aspects of Articles 3 and 5 of the Convention has been organized for the professionals from the Ministry of Justice (Department for Relations with the European Court of Human Rights), the Prosecutors Office and the Judicial Department. Specially invited Council of Europe international experts Mr. Juan Carlos DA SILVA and Mr. Eric SVANIDZE presented recent developments concerning the mentioned articles. The workshop was aimed at strengthening the practitioners' knowledge and skills on specifics of application of Article 3 and 5 on national level. In particular, substantive and procedural aspects of Article 3 in line with CPT standards and guidelines have been discussed and applied, among the other cases, to *Virabyan* case.

b) <u>Structural changes</u>

24. As it was acknowledged in the CTP/Inf (2015)8 Report on the visit to Armenia from 4 to 10 April 2013, in the recent yeares the Armenian authorities have made commendable effortes to render the processing of cases of possible police ill-treatment more effective [11]. In particular, as of November 28, 2007 according to the RA Law on "Special Investigation Service", Special

[9] The relevant materials are taughed at the Police Academy, particularly whithin the Bachelors, Masters and Distance Learning Programmes of the Faculty of Law, as well as in the College and the Faculty of Tranings and Qualification of the Police Academy, in the framework of subjects "Human Rights and the Police", "The Major Problems of the Theory of Human Rights".
[10] http://www.coe.int/t/dgi/hr-natimplement/projects/armenia_stengthening_application_ECHRandCaseLaw_en.asp
[11] CTP/Inf (2015)8 Report on the visit to Armenia from 4 to 10 April 2013, §33.

Investigation Service (SIS) has been established in line with Council of Europe recommendations. It is an independent state body and exercises its powers independently. Among the others, it conducts preliminary investigation of the cases related to the crimes committed by the officials of legislative, executive and judicial bodies, employees implementing state special services. Moreover, the Department for Investigation of Torture cases is a specialised unit of SIS, which conducts preliminary investigation of the cases of ill-treatment. During 2014 SIS has examined 82 cases involving offences under Article 119[12] and Article 309§§2, 3[13], out of which 68 criminal cases were initiated.[14]

25. In addition to the mentioned, it has to be emphasised that according to the Order No.20 of the Head of the Police of the Republic of Armenia, dated on 27 November 2013, "*On Ensuring the Application of Legal Standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment"*, investigative bodies should ensure that: (i) police officers' conduct is in accordance with CPT standards when apprehending, arresting persons or performing any other action with respect to them within the limits of their competence; (ii) proper record of cases of ill-treatment and complaints against such treatment are in accordance with CPT standards; (iii) the administration of the Police of the Republic of Armenia reports on any case of detecting violation of CPT standards, as well as on any *prima facie* similar complaint and sends the relevant materials together with the complaint to the SIS, immediately, as prescribed by law; (iv) all police officers are regularly informed of unacceptability of ill-treatment in the course of their activities and of inevitable liability for any such act.

c) <u>Reopening of the proceedings</u>

26. Referring to the Court's judgment of 02/10/2012 on *Virabyan v. Armenia* case as a new circumstance, the representative of *Virabyan* has filed an appeal on the review of the Court of Cassation's 13/05/2005 Decision. Based on that appeal, on 24/10/2013 the Court of Cassation, pursuant to Article 426[4] § 1(2)[1] of the RA Criminal Procedure Code, adopted a decision to:

- *Partially grant the application to review the Court of Cassation's 13.05.2005 Decision with respect to the applicant;*
- *Quash the First Instance Court's 11.12.2004 decision;*

[12] Article 119.*Torture*
[13] Article 309.Exceeding official authorities; Article 309§ 2. Same actions committed with violence, weapons, or special measures; Article 309§ 3. The same act which negligently caused grave consequences.
[14] Due to the fact that Special Investigation Service and consequently its new Investigation Department of Torture conducts preliminary investigation of the cases related to the crimes committed by the officials, significant and plausible results of their activities would be more visible after the entering into force of the new definition of torture, which includes special subject of the crime – crimes committed by public officials (existing legislation criminalizing torture does not include crimes committed by public officials; moreover, it stipulates the private criminal prosecution for cases of torture where the sole ground for the initiation of criminal proceedings in such cases is the victim's complaint).

- *Quash the Criminal and Military Court of Appeal's 03.03.2005 decision;*
- *Sent the case for a new examination to the First Instance Court.*

27. On 22/05/2014, the First Instance Court, examined applicant's appeal to revoke Erebuni and Nubarashen Districts Prosecutor's 30/08/2004 decision to terminate criminal proceedings and discontinue the criminal prosecution. The First Instance Court granted the appeal and revoked the appealed decision.

28. Granting the applicant's appeal, on 22/05/2014 the First Instance Court held:

- *To revoke Erebuni and Nubarashen Districts Prosecutor's 30.08.2004 decision to terminate criminal proceedings and discontinue the criminal prosecution;*
- *To recognize the investigating authority's obligation to remedy the violation of the applicant's rights and freedoms;*
- *In case of reopening the criminal proceedings, to oblige the investigating authority to remedy the violations of the applicant's rights and freedoms established in the European Court's Judgment of 02.10.2012.*

29. The above mentioned judicial act was appealed by the prosecutor participating in the court hearings. The RA Court of Appeal, while examining the prosecutor's appeal, by its decision of 21.07.2014 partially granted the prosecutor's appeal, quashed and modified the First Instance Court's 22.05.2014 decision on fully granting Grisha Virabyan's complaint.

30. By its 21/07/2014 decision, the RA Court of Appeal obliged the prosecutor to remedy the violation of the applicant's rights and freedoms resulting from Erebuni and Nubarashen Administrative Districts of Yerevan prosecutor's 30/08/2004 decision on "Discontinuing criminal prosecution and terminating criminal proceedings", adopted within the criminal case in question.

31. Taking into consideration the Court's 02/10/2012 judgment on *Virabyan v. Armenia* case and the RA Criminal Court of Appeal's 21/07/2014 decision, on 19/08/2014 Erebuni and Nubarashen Administrative Districts' acting prosecutor revoked Erebuni and Nubarashen Districts prosecutor's 30/08/2004 decision to terminate the criminal proceedings and discontinue the criminal prosecution of criminal case in question. The criminal case was transferred to Erebuni Criminal Investigation Department.

32. On 28/08/2014 Erebuni and Nubarashen Districts Prosecutor's Office received the applicant's representative's complaint (dated on 25/08/2014) on revoking Erebuni and Nubarashen Districts Prosecutor Office investigator's 11/08/2004 Decision on partially terminating the criminal case no. 27203404 regarding the officials of Artashat division of Ararat Regional Police Department.

33. Examining the appeal, on 01/09/2014 Erebuni and Nubarashen Districts' prosecutor revoked Erebuni and Nubarashen Districts Prosecutor's Office investigator's 11/08/2004 decision on partial termination of the criminal case no. 27203404 in regard to the officials of Artashat Division of Ararat Regional Police Department.

34. Erebuni and Nubarashen Districts Prosecutor submitted a report to the Deputy Prosecutor General on transferring the criminal case to the RA Special Investigative Service, taking into consideration the following facts confirmed by the Court:

- *In the framework of the discussed criminal case the applicant was subjected to torture;*
- *The State authorities did not carry out effective investigation in regard to applicant's complaints on being subjected to torture;*
- *The applicant's right to the presumption of innocence was violated;*
- *An effective investigation was not carried out in regard to the applicant's complaints on being subjected to ill-treatment based on his political opinion.*

Consequently, the case was referred to the RA Special Investigative Service for the latter to conduct the investigation.

35. In line with other investigative activities, after the re-examination of the shortcomings of the previous forensic examinations, on 28/11/2014 new forensic examination was ordered by the investigating authorities of the Special Investigative Service.

CONCLUSION

36. Currently SIS conducts various investigative activities. At the same time, the Government is actively seized of the matter in question and believes that the investigation will be in compliant with Convention obligations and standards.

37. The Government will update the Committee of Ministers as to the progress of the investigation in the case in question. In light of the progress that has been made in the implementation of the judgment as detailed above under both individual and general measures, the Government is in the position to believe that the case can now be transfer from enhanced to standard supervision.