DIRECTORATE GENERAL
HUMAN RIGHTS AND RULE OF LAW

DIRECTORATE OF HUMAN RIGHTS

DEPARTMENT FOR THE EXECUTION OF JUDGMENTS
OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Virabyan v. Armenia (No. 40094/05)

Measures for the execution of the judgments of the European Court of Human Rights

Memorandum prepared by the Department for the Execution of Judgments of the European Court of Human Rights.

The opinions expressed in this document are binding on neither the Committee of Ministers nor the European Court

This document takes stock of the progress achieved in the execution of the judgment, in particular the measures set out in the updated action plan submitted on 16/02/2015.[1]

[1] DH-DD(2015)206

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Case description

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

2. The authorities also failed to carry out an effective investigation into the applicant's allegations that his ill treatment was politically motivated despite the existence of plausible information which was sufficient to alert the authorities to the need to carry out an initial verification, and depending on the outcome, investigate *(violation of Article 14 taken in conjunction with Article 3 in its procedural limb).*

3. The applicant was formally charged with inflicting violence on a public official. The grounds on which the criminal proceedings against the applicant were terminated violated the presumption of innocence. The prosecutor's decision of 30/08/2004 on termination of the proceedings taken at the pre-trial stage and up-held by the courts, was couched in terms leaving no doubt that the applicant had committed an offence (violation of Article 6§2).

Substantive violation of Article 3

1.1 The facts and the findings of the Court

4. The applicant (a member of one of the main opposition parties at the material time in Armenia) was subjected to ill-treatment characterised as torture by the European Court while in police custody on 23 April 2004. In particular through repeated kicking of his testicles and punching and hitting him with metal objects, which brought severe consequences for his health (the left testicle was removed); beating him with his hands handcuffed behind his back; and blows to his chest and ribs with the aim either to punish or to intimidate him or both.

1.2 Measures taken by the authorities

1.2.1 Individual Measures

5. The just satisfaction was paid within the deadline, including amounts awarded for non-pecuniary damage.

1.2.2 General Measures

Legislative changes underway

6. To prohibit torture:

The Criminal Code will be amended to include a provision 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 torture2.

7. *To introduce safeguards against ill-treatment:*

Article 110 of the new, Draft Criminal Procedure Code, *inter alia,* will stipulate the minimum rights of the arrested person from the outset of factual deprivation of liberty. According to the Action plan, they are fully in conformity with the standards of the Committee for the Prevention of Torture (CPT). The Action plan highlights the right to have the fact of one's detention notified to a third party; to have access to a lawyer, and to have an access to a doctor (as well as to invite a doctor of his choice) as crucial for the gathering of evidence and communication of information relating to torture.

8. According to the Action plan, the draft amendments to the Criminal Code and the Criminal Procedure Code have been submitted to the government for final approval. However, no information has been provided on the next steps or time-table for the adoption of those draft texts.

9. *Domestic case-law*

According to the existing case-law of the Court of Cassation[3], 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. Accordingly they shall be granted the minimum rights 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, if a person is not informed that an arrest record in his respect has been drawn up, 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.

10. *Training and professional education:*

Periodic training and seminars have been organised for police officers and law-enforcement agencies on the Convention and the European Court's case law. In response to the report of the Committee for the Prevention of Torture (CPT)[4] on Armenia of April 2013, sections of CPT reports concerning police officers are now introduced to all officers following a specific Order to this effect by the Head of the Police of the Republic of Armenia[5]. Instructions and guidance on the CPT standards, the Court's case law and the *Virabyan* case have been issued to officers and included in the curriculum of the Police Academy. In addition, in conjunction with the Council of Europe, a special course on the application of Article 3 of the Convention was organised for Ministry of Justice officials, highlighting the relevant CPT standards and the *Virabyan* case.

1.3. Relevant reports

[2] The article will provide for four to eight years or imprisonment and deprivation of the right to hold certain posts or practice certain activities for up to three years. According to the Action plan, these changes will bring the article defining torture in the Criminal Code into conformity with the requirements of Article 1 of the United Nations Convention Against Torture (UNCAT) (see §5 of the Action plan).

[3] Dating from 18/12/2009

[4] CPT/Inf(2015)8

[5] Order No.20 of the Head of the Police of the Republic of Armenia date 27 November 2013 "*On ensuring the application of legal standards of the Euroepan Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment" (see paragraph 21 of the Action plan).*

11. The CPT, in its report published in January 2015[6], concludes that the phenomenon of ill-treatment by the police still remains widespread and that the risk of such treatment is particularly high vis-à-vis persons who do not immediately confess to an offence of which they are suspected or provide other information sought by the police[7]. Whilst noting a number of improvements concerning access to a doctor, the CPT remained concerned about the absence of fundamental safeguards against police ill-treatment that should be in place from the outset of custody; namely, the right to inform a close relative of the deprivation of liberty and access to a lawyer[8]. Similar concerns were voiced by the European Commissioner for Human Rights in his report of 10 March 2015[9]. In addition the CPT and the Commissioner recommend the recording of police interrogations as a safeguard against ill-treatment (as foreseen in the National Human Rights Action Plan).

1.4 Assessment

12. The criminalisation of acts of torture by public officials in the Draft amendments to the Criminal Code should be noted with interest. The adoption of such a provision would appear to respond to the indication that necessary criminal law provisions be introduced to effectively punish serious human rights violations in the Guidelines of the Committee of Ministers in combating impunity[10]. In addition, the absence of such a provision has been extensively criticised by relevant international bodies including the European Commissioner for Human Rights[11], the CPT and the United Nations Committee against Torture[12], and by civil society[13]. Accordingly, the authorities should indicate the next steps and time-table for the adoption of those draft texts, which should be pursued without delay.

13. The information about the safeguards foreseen in the draft Code of Criminal Procedure is also promising. In particular, the right to have the fact of one's detention notified to a third party; to have access to a lawyer, and to a doctor (as well as to invite a doctor of his choice) from the very outset of factual deprivation of liberty are significant safeguards whose absence has been strongly criticised by international human rights bodies. Accordingly, the draft amendments should be adopted as soon as possible and these safeguards should be applied in practice. Consideration should also be given to recording police interrogations, as suggested by the CPT and the European Commission for Human Rights.

14. The information on the Order of the Head of Police "On Ensuring the Application of Legal Standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment" and other awareness raising measures appear of interest. However, whilst these changes to the legislative framework and awareness raising measures appear positive, it is of serious concern that recent CPT and other reports indicate that the phenomenon of ill-treatment by the police remains widespread. Therefore, information is needed on the practical steps taken or envisaged to eliminate ill-treatment, including the steps to implement of the above mentioned legislation (once adopted). Moreover in line with the CPT recommendations[14] and the Committee of Ministers Guidelines on eradicating Impunity for serious human rights violations[15], members of police forces

[6] CPT/Inf(2015)9
[7] Ibid §17
[8] Ibid §§55-59.
[9] CommDH(2015)2 §§76-82
[10] Guidelines for the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, Section III.1.
[11] CommDH(2015)2 §62-63
[12] CAT/C/ARM/CO 3 of 6 July 2012, §10
[13] See DH-DD(2014)1231 Communication from Helsinki Citizens' Assembly-Vanadzor
[14] CPT/Inf(2015)8 §17
[15] See Section III : General measures for the prevention of impunity

should be regularly reminded by their respective hierarchy, at all levels, that ill-treatment is not tolerated and that abuses will be punished.

Procedural violation of Article 3, and Article 3 in conjunction with Article 14

2.1 The facts and findings of the European Court

15. No effective investigation was carried out into the applicant's allegations of ill treatment. The motion of the applicant to start criminal proceedings into his ill-treatment was dismissed by the Erebuni and Nubarashen district prosecutor, that decision was upheld by the Appeal Court and the Court of Cassation.
According to the Court's findings, the investigation was:[16]

- Neither objective nor independent as consideration was only given to the version of events presented by the police officers involved in the case;
- Ineffective, due to failure to secure a timely, proper and objective collection and assessment of medical evidence;
- Inadequate and fundamentally flawed due to the failure of the investigating authority immediately to isolate and question the police officers involved in the incident, thereby failing to prevent possible collusion;
- Lacking thoroughness as the investigation undertaken by the authorities into the applicant's allegation of ill-treatment did not lead to the establishment of the facts; in particular, where investigators did question the police officers, the interviews were a pure formality and the officers were only asked standard and non-inquisitive questions;
- Overall, the investigation was ineffective, inadequate and fundamentally flawed: the authorities failed to act with due diligence to identify and punish those responsible.

16. The authorities also failed 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. The Court considered that the investigating authorities had before them plausible information which was sufficient to alert them to the need to carry out an initial verification and, depending on the outcome, an investigation into possible political motives for the applicant's ill-treatment.

17. In particular the applicant alleged on numerous occasions before the investigating authorities that his ill-treatment had been linked to his participation in the opposition demonstrations and had been politically motivated, requesting that this circumstance be investigated and the perpetrators be punished. Two other witnesses had also made submissions which supported this allegation. However, the authorities did almost nothing to verify this information. Only two police officers were apparently asked if they were aware of the applicant's political affiliation, which can hardly be considered to be a real attempt to investigate such a serious allegation and appears to have been a mere formality (see §§222-224 of the judgment).

2.2 Measures taken by the authorities

2.2.1 Individual Measures

18. On 01/09/2014 following the applicant's representative's request, the Erebuni and Nubarashen Districts' prosecutor revoked the Erebuni and Nubarashen Districts Prosecutor's Office investigator's 11/08/2004 decision criticised by the Court and which terminated the criminal case no. 27203404 in regard to the officials of Artashat Division of Ararat Regional Police Department.

[16] See §§165-178 of the judgment.

The Erebuni and Nubarashen Districts' Prosecutor then submitted a report to the Deputy Prosecutor General on transferring the criminal case to the Special Investigative Service, taking into consideration the following facts confirmed by the European Court;

- the applicant was subjected to torture;
- The State authorities did not carry out an effective investigation in regard to the applicant's complaints he was 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 complaint he was subjected to ill-treatment based on his political opinion.

19. Consequently, the case was referred to the Special Investigative Service (SIS) for the latter to conduct the investigation. In line with other investigative activities, after the re-examination of the shortcomings of the previous forensic examinations, on 28/11/2014 a new forensic examination was ordered by the investigating authorities of the Special Investigative Service.

2.2.2 General measures

20. The Law on the "Special Investigation Service" was adopted on 28 November 2007. According to this law, the Special Investigation Service (SIS) was established. The SIS is an independent body reporting to the Prosecutor General. The Head of the SIS is appointed by the President of the Republic, upon recommendation of the Prosecutor General. Together with a deputy appointed by him, he manages a team of 23 special investigators[17]. Amongst other activities, the SIS conducts preliminary investigations in cases related to crimes committed by officials of legislative, executive and judicial bodies, and employees implementing state services. Moreover, it has a specialised unit, the Department for the Investigation of Torture, which conducts preliminary investigations of cases of ill-treatment. During 2014 the SIS examined 82 cases involving offences under Article 119 (Torture) and Article 309 (exceeding official authority) out of which 68 criminal cases were initiated[18]. The Action plan indicates that results of the work of the SIS will be more visible once the new definition of torture, criminalising the act of torture by public officials[19], enters into force[20].

21. Moreover, the Draft Criminal Procedure Code, will provide that criminal proceedings based only on a victim's complaint will be the subject of public criminal prosecution. This contrasts with the existing legislation, which stipulates a private criminal prosecution for such cases.

22. The authorities indicate in their action plan that their 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 related to problems of practice, rather than legislative deficiency. However, at the same time, they stress the importance of enhancing legislative protection against discrimination. They refer to the new article of the Draft Criminal Procedure Code where, in contrast to the existing legislation, equality of all without discrimination is one of the principles of the code.

23. Moreover, according to the Draft amendments to the Criminal Code, torture conducted on any discriminatory basis is considered as a separate purposive element. Inclusion of the discrimination based purposive element of torture in the definition aims, *inter alia*, at widening the scope of situations

[17] §68 CommDH(2015)2

[18] According to the Action plan, due to the fact that Special Investigation Service and consequently its new Department for the Investigation 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 in the Criminal Code.

[19] See paragraph 1.2.2. above

[20] See footnote 14 of the Action plan

where the incident can be qualified as torture, and stresses the importance of criminalisation and adequate sanctioning of discrimination based, acts of torture.

24. The Action plan also indicates that the adoption of comprehensive anti-discrimination legislation is a priority policy issue for Armenia. With the request of the Ministry of Justice, 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 is being discussed. No information is provided on the timetable for this legislation.

2.3 Relevant reports

25. In its most recent report[21], whilst noting the establishment of the SIS as a major step forward, the CPT has criticised the work of the SIS in practice. In particular, it highlights the fact that the SIS was not involved automatically after allegations of ill-treatment; due to limited resources and lack of operational staff it could not carry out investigative actions on its own including collection of medical and forensic evidence; and files were closed without alleged victims being questioned. The same concerns are raised by the Commissioner for Human Rights in his recent report[22] and the Defender of Rights of the Republic of Armenia[23]. Without giving details, the Defender of Rights indicates that the SIS has developed a draft law intended to overcome the problem of passing its investigation work to other agencies that do not enjoy the same level of independence as the SIS.

26. The work of the SIS has also been criticised by civil society. In 2013 and 2014, the Helsinki Citizens Assembly in its Rule 9 communications underlined that investigations were not properly followed up by the SIS due in part to a failure of the Prosecutor's Office to exercise sufficient oversight[24].

2.4 Assessment

Individual measures

27. The re-opening of the investigation in the *Virabyan* case on the basis of the judgment of the European Court and its transfer to the jurisdiction of the Special Investigative Service SIS is a notable step. However, questions have been raised about the effective functioning of the SIS (for more see general measures).

28. Therefore, it is important to stress that the new investigation should be carried out fully in compliance with the principles of effectiveness and independence, and it should be adequate and objective, as well as leading to the establishment of the facts of the case and should be aimed to identification and punishment of those responsible. Accordingly, the authorities are expected to provide information about the further development of the investigation in a detailed manner including the concrete steps that have been taken to address the shortcomings indicated by the by the Court.

General measures

29. The creation of the SIS was undoubtedly an important step forward aimed to improve the system of effective investigations into cases of ill-treatment involving police officers, and it is

[21] CPT/Inf(2015)9
[22] CommDH(2015)2
[23] Annual report for 2013
[24] DH-DD(2013)1118 and DH-DD(2014)1231 Communication from NGOs Helsinki Citizens Assembly – Vanadzor, and Spitak Helsinki Group (18/10/2013).

considered as independent in structure[25]. Nevertheless, according to the mentioned CPT report and other relevant reports, there are significant shortcomings in the work of SIS which undermine its effectiveness.

30. Aside from the statistical data on the SIS' case processing, the Action plan does not contain information about how the SIS works in practice. In their response to the CPT reports, the authorities have stated that the practice of police officers being engaged in the investigations on police ill-treatment cases is no longer applied, without giving any further detail. In light of the comprehensive criticisms raised about the SIS' working methods and its lack of staffing it would appear that further explanations are necessary to show that the problems identified have been effectively addressed. It is therefore important to receive more detailed information on what kind of steps have been taken to ensure the effectiveness of the SIS. In this regard the information from the Human Rights Defender that SIS has developed a draft law intended to overcome the problem of passing its investigation work to other agencies that do not enjoy the same level of independence as the SIS, appears interesting and the authorities should provide further clarification on this legislative project.

31. The introduction of the criminalisation of the act of torture by public officials already mentioned in the assessment of the substantive violation of Article 3 (see above) will be an important step in responding to this procedural aspect of the violation. As observed by the European Commissioner for Human Rights, the absence of this provision has meant that "no law enforcement agent or member of the security services has ever been convicted of the crime of torture in Armenia"[26]. The inclusion of such a provision in the Criminal Code should enable prosecutions for torture to be carried out. Therefore, as already highlighted under the assessment of the substantive violation of Article 3, the authorities should pursue these amendments without delay.

32. Concerning the violation of Article 3, in conjunction with Article 14, the information provided by the authorities on changes to the legislative framework is interesting. However, as the Action plan itself states the source of the violation in this case arose from practice, rather than the legislative framework and the information provided does not appear to relate to any changes in the practice of investigating torture and ill-treatment. Therefore, information is necessary on the measures taken or envisaged in this respect, to ensure that future investigations of alleged police ill-treatment and torture take full account of any plausible suggestion that the treatment was politically motivated.

Violation of Article 6(2)

3.1 The facts and findings of the European Court

33. This violation of Article 6(2) occurred because the prosecutor's pre-trial decision terminating the charges against the applicant for inflicting violence on a public official violated the presumption of innocence. That decision stated that the proceedings should be terminated because the applicant had committed an offence and "atoned for his guilt"[27]. It was upheld in substance by the domestic courts. The European court noted that the prosecutor's decision was based on Article 37§2(2) of the Criminal Procedure Code, which "in itself presupposed that the commission of an imputed act was an undisputed fact.[28]"

3.2 Measures taken by the authorities

[25] §68 CommDH(2015)2 of 10 March 2015
[26] §62 CommDH(2015)2 of 10 March 2015
[27] §182 of the judgment
[28] §191 of the judgment

3.2.1 Individual measures

34. Based on a request from the applicant's representative, on 24/10/2013 the Court of Cassation, pursuant to Article 426^4 §1(2)[1] of the Criminal Procedure Code, adopted a decision to quash the decisions of the First instance Court and the Court of Appeal on ''Termination of criminal proceedings in respect of the applicant'' (these decisions upheld the impugned prosecutor's decision of 30/08/2004 to terminate the criminal proceedings against the applicant). They sent the case for a new examination to the First Instance Court.

35. On 22/05/2014 the First Instance Court granted the appeal to revoke the Erebuni and Nubarashen Districts Prosecutor's 30/08/2004 decision, and revoked it. The First Instance Court recognized the investigating authority's obligation to remedy the violation of the applicant's rights and freedoms and obliged the investigating authority, in case of reopening the criminal proceedings, to remedy the violations of the applicant's rights and freedoms established in the European Court's judgment.

36. The above mentioned judicial act was further appealed. However, on 19/08/2014 taking into consideration the *Virabyan v. Armenia* judgment and the Criminal Court of Appeal's 21/07/2014 decision, the Erebuni and Nubarashen Administrative Districts' acting prosecutor revoked the Erebuni and Nubarashen Districts prosecutor's 30/08/2004 decision on "Discontinuing criminal prosecution and terminating criminal proceedings". The criminal case was then transferred to Erebuni Criminal Investigation Department, and is pending.

3.2.3 General measures

37. The Criminal Procedure Code was amended and Article 37§2(2) removed. According to the amended Article 37, proceedings may be terminated where the offence is regretted, but only if the accused agrees with this course of action. According to the Action plan, the amendment will prevent the possibility of similar violations in future.

3.3 Assessment

Individual measures

38. The information regarding the reopening of proceedings and revocation of the prosecutor's 30/08/2004 decision which had violated the presumption of innocence is promising. It is essential that the new proceedings be carried out strictly in compliance with the requirements of the Article 6§2 of the Convention and in particular with respect to the principle of the presumption of innocence. It is expected that the authorities will ensure these proceedings go ahead without delay and keep the Committee informed of their outcome.

General measures

39. As Article 37§2(2) of the Criminal Procedure Code is no longer in force, it is no longer possible for a prosecutor to decide to terminate proceedings on the presumption that an offence was committed.