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Contact: Anna Austin
Tel: 03 88 41 22 29

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Meeting: 1214 meeting (2-4 December 2014) (DH)

Item reference: Communication from the authorities (19/11/2014) in reply to DH-DD(2014)1231 concerning the case of Virabyan against Armenia (Application No. 40094/05)

Information made available under Rule 8.2.a 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 : 1214 réunion (2-4 décembre 2014) (DH)

Référence du point : Communication des autorités (19/11/2014) en réponse au DH-DD(2014)1231 concernant l'affaire Virabyan contre Arménie (requête n° 40094/05) (***anglais uniquement***).

Informations mises à disposition en vertu de la Règle 8.2.a des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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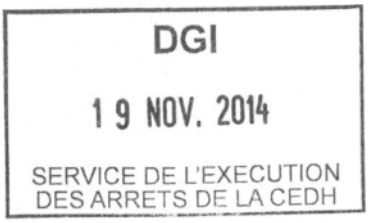

GOVERNMENT RESPONSE TO THE SUBMISSION OF HELSINKI CITIZENS' ASSEMBLY – VANADZOR

Case of *Virabyan v. Armenia*

(no. 40094/05, final on 02/01/2013)

Department for Relations with the European Court of Human Rights
Ministry of Justice of the Republic of Armenia

18 November 2014

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RESPONSE TO THE SUBBMITIONS IN RESPECT OF *VIRABYAN* CASE

INTRODUCTION

1. This is the Government's response to the communication from the Helsinki Citizens Assembly-Vanadzor NGO (hereinafter, the NGO) pursuant 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, with regard to the execution of *Virabyan* judgement (no. 40094/05, final on 02/01/2013) under Article 46§2 of the European Convention on Human Rights (hereinafter, Convention). The Government is grateful for the NGO's work on the promotion and protection of human rights, as well as bringing forward improvement with regard to the execution of the judgment in question.

2. The NGO has made recommendations in relation to: (i) presentation of the action plan for the execution of the judgment in the part of torture as an act, committed on the ground of discrimination; (ii) bringing the national legislation criminalizing "torture" (Article 119 of the Criminal Code of the Republic of Armenia) in conformity with the definition of torture in accordance with Article 1of the Convention against Torture and other Cruel, Inhuman or Degrading treatment or Punishment (hereinafter, UNCAT); (iii) defining torture applied to any protected group on the basis of discrimination on any ground as an aggravating circumstance of torture.

3. In writing the response, the Government has tried to give answers to the issues raised in the submissions in the case of *Virabyan v. Armenia.*

RESPONSE TO RECCOMENDATIONS

(i) Presentation of the Action Plan

4. With respect to the presentation of the action plan for the execution of the judgment in the part of torture, the Government would like to inform that, in order to improve the effectiveness of supervision, as well as to define as quickly as possible the measures required to execute a judgment, the Government periodically sends information to the Committee of Ministers on measures taken to accelerate the execution process. It is worth to mention that the last consolidated Action Plan communicated from Armenia concerning the *Virabyan* case was sent to the Committee of Ministers on 25 February 2014. Considering resent developments in respect of the case in question (*among the others,* reopening of the case, amendments to the Criminal Code and Criminal Procedural Code – both submitted for the final approval) the Government will present the revised and updated version of the Action Plan in the near-term perspective.

(ii) Bringing the national legislation criminalizing "torture" in conformity with the definition of torture in accordance with Article 1 of the UNCAT

5. The Government reiterates that the amendments to the new Criminal Code have been submitted to the final approval. 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 UNCAT, the article defining torture was totally amended and 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

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penalty for this crime reflects the gravity of the act of torture, as required by article 4 of the UNCAT. 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.

6. In its submissions the NGO also raised the concern about the effectiveness of new Draft Criminal Procedure Code, in particular article 110, to secure basis for comprehensive and effective investigation into acts of torture. The Government disagrees with such assessment and stresses that article 110, which, *inter alia*, stipulates the minimum rights[1] of the arrested person can be considered as a fundamental safeguard against any form of ill-treatment. Moreover, the minimum rights prescribed in this article are totally in conformity with 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 [2]) 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.

7. Moreover, according to the existing case-law of the Court of Cassation[3], 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.

8. In addition to the mentioned, the Government would like to inform, 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

[1] 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.

[2] 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.

[3] 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.

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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 in accordance with CPT standards; (iii) to report the administration of the Police of the Republic of Armenia on any case of detecting violation of CPT standards, as well as on any *prima facie* similar complaint and to send immediately, as prescribed by law, the relevant materials together with the complaint to the Special Investigation Service of the Republic of Armenia; (iv) to ensure that 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.

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 are 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.

(iii) Defining torture applied to any protected group on the basis of discrimination on any ground as an aggravating circumstance of torture.

10. In that respect the Government notes that relevant international bodies and organizations (*among the others*, CAT, CPT) in their periodic reports, have emphasized the importance of harmonizing the legal definition of torture with the one existing under the relevant international legal instruments. The Government reiterates that upon the Draft Law on making changes and amendments to the Criminal Code of the RA, the new definition of torture, among the other elements, fully covers the purposive elements as recognized in the UNCAT. Torture conducted on any discriminative basis, both under the new definition, as well as the one stipulated under the article 1 of the UNCAT, is considered as a separate purposive element. Accordingly, if we accept the NGO's recommendation, separate this purposive element from the main definition and consider the torture based discrimination as an aggravating circumstance, this will artificially narrow the scope of situations where the incident can be qualified as torture. In particular, in order to qualify the act as a torture, all the elements mentioned in the definition of torture shall be present. If we separate the discrimination based purposive element of torture from the main definition, it will lead to impossibility of qualifying certain types of conduct as torture.

11. Consequently, cases when a person is tortured, for example, only for holding certain political views, as it was in *Virabyan* case cannot be qualified as torture, as the mandatory purposive element will lack. Thus, in this respect, the recommendation instead of emphasizing the importance of strong protection against discrimination based torture, only will limit the scope of situations when the incident can be qualified as torture and consequently will weaken protective mechanisms.

CONCLUSION

12. Although emphasizing the importance of the recommendations provided in the NGO's submission, as well as accepting that the field in question has some problematic aspects, without expressing once again its disagreements already mentioned above, the Government would like to note that Armenian authorities make continuous efforts to improve and harmonize the exiting legislation and practice by putting them in conformity with the best international standards. Accordingly, the issue of increasing the effectiveness of fighting against torture is one of the critical points emphasized by the State in its human rights action plans, as well as in the criminal-procedural reforms.