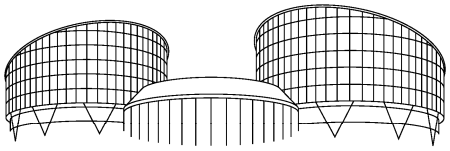

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

ADVISORY OPINION

on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture

Requested by
the Armenian Court of Cassation

(Request no. P16-2021-001)

STRASBOURG

26 April 2022

This opinion is final. It may be subject to editorial revision.

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Robert Spano, *President*,
Jon Fridrik Kjølbro,
Síofra O'Leary,
Yonko Grozev,
Georges Ravarani,
Marko Bošnjak,
Egidijus Kūris,
Branko Lubarda,
Armen Harutyunyan,
Alena Poláčková,
Pauliine Koskelo,
Jolien Schukking
Maria Elósegui,
Lorraine Schembri Orland,
Mattias Guyomar,
Ioannis Ktistakis,
Andreas Zünd, *judges*,

and Søren Prebensen, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 13 January and 16 March 2022,

Delivers the following opinion, which was adopted on the last-mentioned date:

PROCEDURE

1. In a letter of 1 February 2021 sent to the Registrar of the European Court of Human Rights ("the Court"), the Armenian Court of Cassation requested the Court, under Article 1 of Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("Protocol No. 16"), to give an advisory opinion on the question set out in paragraph 10 below.

2. On 11 March 2021 the Court of Cassation provided further materials and explanations as requested by the Court. The advisory opinion request was therefore considered by the Court to have been formally lodged on the latter date.

3. On 10 May 2021 the panel of five judges of the Grand Chamber of the Court, composed in accordance with Article 2 § 3 of Protocol No. 16 and Rule 93 § 1 of the Rules of Court, decided to accept the request.

4. The composition of the Grand Chamber was determined on 12 May 2021 in accordance with Rules 24 § 2 (h) and 94 § 1.

5. By letters of 12 May 2021 the Registrar informed the parties to the domestic proceedings that the President was inviting them to submit to the Court written observations on the request for an advisory opinion, by 2 July

2021 (Article 3 of Protocol No. 16 and Rule 94 § 3). Within that time-limit, written observations were submitted by the Armenian General Prosecutor's Office and by Mr H.M. and Mr A.A.

6. The Armenian Government ("the Government") submitted written observations under Article 3 of Protocol No. 16. The Commissioner for Human Rights of the Council of Europe did not avail herself of that right.

7. Written observations were also received from a group of non-governmental organisations (REDRESS, Association for the Prevention of Torture, International Federation of ACATs (Action by Christians for the Abolition of Torture), International Rehabilitation Council for Torture Victims and Organisation Mondiale Contre la Torture) which had been granted leave by the President to intervene (Article 3 of Protocol No. 16).

8. Copies of the observations received were transmitted to the Court of Cassation, which did not submit any observations (Rule 94 § 5).

9. After the close of the written procedure, the President of the Grand Chamber decided that no oral hearing should be held (Rule 94 § 6).

THE QUESTION ASKED

10. The question asked in the request for an advisory opinion was worded as follows:

> "Would non-application of statutes of limitation for criminal responsibility for torture or any other crimes equated thereto by invoking the international law sources be compliant with Article 7 of the European Convention, if the domestic law provides for no requirement for non-application of statutes of limitation for criminal responsibility?"

THE BACKGROUND AND THE DOMESTIC PROCEEDINGS GIVING RISE TO THE REQUEST FOR OPINION

11. On 2 October 2012 the Court found a violation of Article 3 (both substantive and procedural) in the case of *Virabyan v. Armenia* (no. 40094/05, §§ 165-179, 2 October 2012). It held that Mr Virabyan had been subjected to torture while in police custody in April 2004 and that the authorities had failed to conduct an effective investigation into his allegations of ill-treatment. No prosecution had been launched against the police officers and the only criminal case (no. 27203404) instituted at the material time, which had later been terminated, had been that against Mr Virabyan for assaulting one of the police officers – one of the alleged perpetrators of the torture.

12. Following the Court's judgment on 21 August 2014, criminal case no. 27203404 was reopened.

13. On 10 May 2016 the investigator, on the basis of the materials of that criminal case, instituted a new criminal case (no. 62212316) under Article 309 § 2 of the Criminal Code ("the CC"), which provides for a penalty for exceeding authority by a public official accompanied by the use of violence (see paragraph 42 below). He also decided to disjoin that case into a separate set of proceedings.

14. On 17 and 20 February 2017 two of the police officers implicated in the applicant's ill-treatment, Mr H.M. and Mr A.A., were charged under the above-mentioned Article 309 § 2.

15. On 10 March 2017 the investigator dropped the charges against the police officers and terminated criminal case no. 62212316 on the grounds that the relevant limitation period (ten years) had expired, apparently relying on Article 75 § 1(3) of the CC and Article 35 § 1(6) of the Code of Criminal Procedure ("the CCP") (see paragraphs 40 and 44 below).

16. On 15 December 2017 the prosecutor quashed that decision, finding that the investigator had failed to examine whether the termination of the proceedings was compatible with international law (the prosecutor referred, in particular, to the case of *Mocanu and Others v. Romania* ([GC], nos. 10865/09 and 2 others, § 326, ECHR 2014 (extracts)).

17. The criminal case was resumed and later brought to trial.

18. On 22 February 2019 the First Instance Court of General Jurisdiction of the Ararat and Vayots Dzor Regions delivered its judgment. The court examined the charges against the two police officers and concluded that they had committed an offence and were subject to criminal responsibility under Article 309 § 2 of the CC.

In doing so, it held, at the outset, that the criminal case against the officers could not be terminated and the prosecution could not be discontinued on the basis of Article 35 § 1(6) of the CCP (see paragraph 44 below) because the officers "had not accepted their guilt". The court considered further, however, with reference to Article 75 of the CC and Article 35 of the CCP (see paragraphs 40-41 and 44-48 below) and to the fact that the criminal case against the officers had been terminated because of the expiry of the relevant limitation period (see paragraph 15 above), that the resumption of the criminal case and the officers' indictment with reference to the *Mocanu and Others* case were unacceptable because the prosecution had failed to explain why the position expressed in that case should prevail over the requirements of Article 75 of the CC and Article 35 § 1(6) of the CCP.

19. It noted that the United Nations Convention Against Torture ("UNCAT") contained no provisions prohibiting the application of limitation periods, such that the United Nations Committee Against Torture ("CAT") had raised this issue only on an advisory basis, recommending that the Armenian authorities introduce legislative changes abolishing the limitation periods in cases of torture. However, while both the CAT and the

Armenian authorities had accepted the need for legislative changes, the only change introduced was a new Article 309.1 in the CC establishing the offence of torture (see paragraph 43 below), whereas no changes had been made to either Article 75 of the CC or Article 35 of the CCP, despite the fact that Article 75 of the CC set out an exhaustive list of offences in respect of which limitation periods were not applicable or were only applicable with restrictions. That meant that there were no legal restrictions on applying limitation periods to offences not listed in Article 75 of the CC, including to persons who had committed acts of torture.

20. As regards the Convention, the court held that it contained no explicit restrictions on the application of limitation periods in cases of torture and other forms of ill-treatment, whereas the judgments of the Court were not incorporated into domestic law and, in any event, Armenia had not been a party to the case of *Mocanu and Others* (cited above). The court concluded, with reference to Article 5 § 3 of the Constitution (see paragraph 34 below), that, in such circumstances, there was no conflict between Article 75 of the CC and the provisions of the Convention. The court further held that by applying the above-mentioned judgment of the Court, which had not been given until 2014, the prosecutor had failed to take into account the prohibition on retroactivity of unfavourable criminal laws and other legal acts enshrined both in Article 13 § 2 of the Criminal Code (see paragraph 38 below) and the Convention and had thereby breached the accused's rights as guaranteed by those instruments.

21. In the light of the foregoing, the trial court concluded that the limitation period in Article 75 § 1(3) of the CC was applicable in the accused persons' case and that they were to be exempted from criminal responsibility under Article 309 § 2 of the CC.

In conclusion, it found both accused guilty under Article 309 § 2 of the CC but exempted them from criminal responsibility by applying the limitation period set out in Article 75 § 1(3) of the CC.

22. On 28 March 2019 the prosecutor lodged an appeal, arguing that the application of the limitation period and the exemption of the accused from criminal responsibility had violated the requirements of the Convention, which prohibited the application of limitation periods in cases of torture. The prosecutor referred in that connection to the exception set out in the second sentence of Article 75 § 6 of the CC (see paragraph 41 below) and submitted that, while the UNCAT and the Convention did not explicitly prohibit the application of limitation periods in cases of torture, both the CAT in its General Comment No. 3 (§§ 38 and 40) and the Court in its judgments in the cases of *Okkali v. Turkey* (no. 52067/99, § 76, ECHR 2006-XII (extracts)) and *Mocanu and Others* (cited above) imposed such an obligation. The judgments of the Court were an integral part of the Convention and were directly applicable. Furthermore, the prohibition of torture and other forms of ill-treatment was a *jus cogens* norm, and

exemption from criminal responsibility in cases of such acts through the application of limitation periods resulted in a breach of a State's international obligations. The prosecutor requested that Article 75 § 1(3) of the CC should not be applied and that an appropriate punishment be imposed on the accused.

23. On 4 April 2019 the accused also lodged an appeal, arguing that the judgment had been unsubstantiated and unreasoned and that they were innocent.

24. On 4 July 2019 the Criminal Court of Appeal dismissed both appeals and upheld the judgment of the First Instance Court. It held that the requirements of domestic law did not allow the courts in this particular case to apply directly the case-law of the Court regarding the prohibition of the application of limitation periods. The findings of the First Instance Court that the accused were to be exempted from criminal responsibility in accordance with Article 75 § 1(3) of the CC (see paragraph 40 below) had been lawful and reasoned, taking into account the need to uphold the principles of lawfulness and equality of all before the law, the requirement that questions of a person's guilt and punishment be determined only by the rules of criminal law and the unacceptability of applying criminal law by analogy. If, in breach of those requirements, the limitation period were not applied, this would lead to a violation of the accused's rights and would be liable to produce legal uncertainty and be characterised as arbitrariness.

25. On 30 August 2019 the prosecutor lodged an appeal on points of law, repeating the arguments raised in his appeal (see paragraph 22 above). He further argued that the exception set out in the second sentence of Article 75 § 6 of the CC was applicable and had been breached in this case, because the application of limitation periods in respect of acts of torture was prohibited under Article 3 of the Convention. As one of the grounds for admissibility of the appeal, the prosecutor referred to Article 414.2 § 1(1) of the CCP (see paragraph 49 below), arguing that there was a need for development of the law with regard to the prohibition of the application of limitation periods enshrined in Article 75 § 6 of the CC. In particular, it was necessary to determine whether there was an absolute prohibition on the application of limitation periods in cases of torture and other forms of ill-treatment, in the light of the Court's case-law and the UNCAT.

26. On 25 November 2019 the Court of Cassation admitted the prosecutor's appeal on points of law for examination, finding that the appeal complied, *inter alia*, with the requirements of Article 414.2 § 1(1) of the CCP.

27. It appears that the accused also lodged an appeal on points of law, which was declared inadmissible by the Court of Cassation for lack of merit.

28. On 27 January 2021 the Court of Cassation held a hearing on the prosecutor's appeal, with both parties appearing and making submissions in

support of their positions. The prosecutor was asked by the court, *inter alia*, whether the non-application of the limitation period as required by the CC would result in a breach of any of the defendants' Convention rights, including Article 7, which allowed punishment only on the basis of the law. According to the prosecutor, there was no such risk because international law prohibited the application of limitation periods and Article 7 would not be violated because account was to be taken of international norms having higher legal force. He was further asked to comment, *inter alia*, on the exception set out in the second sentence of Article 75 § 6 of the CC, including, among other things, whether he knew of any international treaties prohibiting the application of limitation periods, in reply to which the prosecutor referred to the case-law of the Court, as well as the UNCAT. The accused submitted that the courts had correctly exempted them from criminal responsibility by applying the limitation period provided for by law.

29. On the same date the Court of Cassation decided to submit a request to the Court for an advisory opinion.

That court found at the outset, with reference to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the UNCAT, the findings of the International Criminal Tribunal for the former Yugoslavia ("the ICTY") in the case of *Prosecutor v. Furundzija* (IT-95-17/I-T judgment of 10 December 1998, §§ 144-54) and the Court's case-law under Article 3 of the Convention, that the prohibition of torture was absolute and therefore constituted *jus cogens*. The States were under an obligation to ensure an effective investigation into, and the punishment of, such acts, and the identification and accountability of perpetrators of such acts had become a universal trend.

30. As regards the application of limitation periods in such criminal cases, the Court of Cassation first reiterated the contents of Article 7 of the Convention, Article 35 § 1(6) of the CCP, Articles 75 § 6, 309 § 2 and 309.1 of the CC (see paragraphs 41 to 44 below). It noted that in its above-mentioned judgment the ICTY had stated that one of the consequences of the *jus cogens* character given by the international community to the prohibition of torture was that torture could not be covered by a statute of limitation. In a number of judgments (in particular, *Yeter v. Turkey*, no. 33750/03, § 70, 13 January 2009, and *Mocanu and Others*, cited above, § 326) the Court had held that criminal proceedings concerning cases of ill-treatment or torture by agents of the State must not be terminated by statute of limitation and that CAT had stressed in that regard that statutes of limitation must not be applicable to acts of torture.

The Court of Cassation further observed that, in addition to the above, the Court had stressed that the manner of non-application of limitation periods should also comply with the requirements of Article 7 of the Convention (in this connection, the Court of Cassation again referred to

Mocanu and Others, cited above, § 326). Furthermore, the Venice Commission had stated that the principle of legal certainty might be invoked in order to prevent the restoration of an expired limitation period. It was also worth mentioning that in a case concerning war crimes, which were similarly considered a *jus cogens* norm, the Court had concluded that no limitation periods were applicable to the acts committed by the applicant (see *Kononov v. Latvia* [GC], no. 36376/04, §§ 229-33, ECHR 2010).

31. The Court of Cassation, moreover, noted that the Committee of Ministers, in the course of execution of the *Virabyan* judgment, had highlighted the importance of non-application of limitation periods in cases of torture as a general measure. However, no relevant laws had been passed in Armenia to date. In such circumstances, the rule set out in Article 75 § 6 of the CC (see paragraph 41 below), which prohibited the application of limitation periods in respect of certain offences against peace and humanity, was still applicable. At the same time, the legislature had also specified that no limitation periods were applicable to persons who had committed offences envisaged by international treaties to which Armenia was a party, if such treaties prohibited the application of limitation periods.

32. In the light of the above, the Court of Cassation concluded that, in order to rule on the prosecutor's appeal, there was need to submit a request for an advisory opinion to the Court, taking into account, on the one hand, the legal standards developed by the Court and other international bodies regarding the *jus cogens* nature of the prohibition of torture, and, on the other hand, the importance of complying with the requirements of Article 7 of the Convention. It thus decided to request the Court to address the question quoted at paragraph 10 above.

RELEVANT DOMESTIC LAW AND PRACTICE

33. The relevant provisions of the Armenian Constitution, Criminal Code and Code of Criminal Procedure, as well as the relevant case-law of the Court of Cassation, read as follows.

I. THE CONSTITUTION AS AMENDED IN 2015

34. Article 5 § 3 provides that, in the event of a conflict between international treaties ratified by Armenia and Armenian laws, the provisions of the international treaties are to apply.

35. Article 72 provides that no one is to be held guilty for any act or omission which did not constitute a criminal offence at the time it was committed. Nor is a heavier penalty to be imposed than the one that was applicable at the time the criminal offence was committed.

36. Article 73 § 1 provides that laws and other legal instruments worsening a person's legal situation have no retroactive effect.

II. THE 2003 CRIMINAL CODE

37. Article 12 § 1 provides that the criminality and punishability of an act are to be determined in accordance with the criminal law in force at the time it was committed.

38. Article 13 § 2 provides that a law defining the scope of the offence, increasing the severity of the penalty or worsening the offender's situation in any other way has no retroactive effect.

39. Article 19 § 4 provides that intentional acts for which the maximum penalty provided by the CC does not exceed ten years' imprisonment are considered "grave offences". Article 19 § 5 provides that intentional acts for which the maximum penalty provided by the CC exceeds ten years' imprisonment or is life imprisonment are considered "particularly grave offences".

40. Article 75 § 1(3) provides that a person is exempted from criminal responsibility if ten years have passed from the moment of commission of a "grave offence". Article 75 § 1(4) provides that a person is exempted from criminal responsibility if fifteen years have passed from the moment of commission of a "particularly grave offence".

41. Article 75 § 6 provides that no limitation periods apply to persons who have committed offences against peace and humanity envisaged by Articles 384, 386-391 and 393-397 of the CC. Nor do any limitation periods apply to persons who have committed offences envisaged by international treaties to which Armenia is a party if such treaties prohibit the application of limitation periods.

42. Article 309 § 2 provides that intentional acts committed by a public official which obviously fell outside the scope of his or her authority and caused significant damage to the rights and lawful interests of individuals or legal entities, or the lawful interests of society or the State, if accompanied by the use of violence, arms or special means, are punishable by two to six years' imprisonment, with forfeiture of the right to hold certain posts or carry out certain activities for a period not exceeding three years.

43. On 9 June 2015, with effect from 18 July 2015, amendments were made to the CC, and a new provision, Article 309.1, was added, introducing "torture" as an offence punishable by four to eight years' imprisonment, with forfeiture of the right to hold certain posts or carry out certain activities for a period not exceeding three years (Article 309.1 § 1). The same act, if committed together with a number of aggravating circumstances as listed in Article 309.1 § 2, was punishable by seven to twelve years' imprisonment, with forfeiture of the right to hold certain posts or carry out certain activities for a period of three years.

III. THE 1999 CODE OF CRIMINAL PROCEDURE

44. Article 35 § 1(6) provides that if the relevant limitation period has expired, no criminal case may be instituted and no criminal prosecution may be carried out, whereas a criminal case that has already been instituted must be terminated.

45. Article 35 § 3 provides that the investigator and the prosecutor must decide to terminate the proceedings or to discontinue the prosecution if they discover, at any stage of the pre-trial proceedings, circumstances precluding the continuation of the criminal case. The prosecutor may also discontinue the case after it has been brought before a court, but before the commencement of the court hearings.

46. Article 35 § 4 provides that the prosecutor is obliged to declare the discontinuation of the prosecution if, during the court proceedings, he or she discovers circumstances precluding the prosecution. Such declaration will serve as grounds for the court to terminate the proceedings and to discontinue the prosecution.

47. Article 35 § 5 provides that the court must determine the issue of discontinuing the prosecution if it discovers circumstances precluding the prosecution.

48. Article 35 § 6 provides that it is not permissible to terminate the criminal case and discontinue the prosecution on the basis of, *inter alia*, Article 35 § 1(6) of the CC if the accused objects. In such cases, criminal proceedings will continue under ordinary procedure.

49. Article 414.2 § 1(1) provides that an appeal on points of law is admissible for examination if the Court of Cassation considers that its decision on the issues raised in the appeal may be important for the uniform application of the law.

IV. THE 2021 CRIMINAL CODE

50. On 5 May 2021 Armenia adopted a new Criminal Code, which will enter into force on 1 July 2022. Pursuant to the new Code, no limitation periods are applicable to the offence of torture and the offence of abusing or exceeding authority by a public official accompanied by use of violence.

V. CASE-LAW OF THE COURT OF CASSATION

51. In decision no. KD3/0038/01/17 of 10 January 2020, which concerned a criminal case in which the applicable limitation period had expired, the Court of Cassation held as follows:

> "17. From the analysis of [Article 35 of the CCP] it can be seen that it lists the circumstances established under the law which exclude the possibility for both criminal prosecution and the conduct of a criminal case. If any of the circumstances

> listed is found to exist, the criminal case must be terminated and the criminal prosecution discontinued.
>
> ...
>
> 20. ... the Court of Cassation reiterates that the legislature regards the expiry of a limitation period as a circumstance precluding the conduct of a criminal case and the criminal prosecution ... At the same time, the criminal procedure law sets out the consent of the accused as a precondition for the termination of a case on the grounds of expiry of the limitation period, in the absence of which the proceedings must continue in accordance with the general procedure. In particular, in cases where a person objects to the refusal to institute a criminal case, the discontinuation of the criminal prosecution or the termination of the case on the grounds of expiry of the limitation period, he must be afforded the opportunity to contest the charge against him at a trial.
>
> In cases where the relevant limitation period for imposition of criminal responsibility expires at the trial stage, the obligation to apply the procedure for termination of criminal responsibility in respect of the accused on that ground lies with the court. Furthermore, the trial stage must be understood as consisting of the proceedings both before the first instance court and before the courts of appeal and cassation. In particular, the court must clarify whether the accused consents to the discontinuation of the criminal prosecution against him on the grounds of expiry of the limitation period. If such consent is given, the court is obliged to discontinue his criminal prosecution; if no such consent is given, the court must continue the court proceedings in accordance with the general procedure, but it must discontinue the criminal prosecution when delivering judgment."

52. Since in the same case an amnesty was applied to the accused and he was exempted from punishment, the Court of Cassation addressed that question as well, and held that, where the courts faced a choice between applying an amnesty and applying a limitation period in accordance with Article 35 of the CCP, they were obliged to give preference to the latter because its legal consequences were more favourable for the person concerned. In particular, the application of an amnesty exempted the person only from punishment (in case of a guilty verdict), whereas the application of a limitation period exempted the person from criminal responsibility in general.

THE COURT'S OPINION

I. PRELIMINARY CONSIDERATIONS

A. General principles relating to the scope of the Court's examination

53. The Court reiterates that, as stated in the Preamble to Protocol No. 16, the aim of the advisory opinion procedure is to further enhance the interaction between the Court and national authorities and thereby reinforce the implementation of the Convention, in accordance with the principle of subsidiarity, by allowing the designated national courts and tribunals to request the Court to give an opinion on "questions of principle relating to

the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto" (Article 1 § 1 of Protocol No. 16) arising "in the context of a case pending before [them]" (Article 1 § 2 of Protocol No. 16). The aim of the procedure is not to transfer the dispute to the Court, but rather to give the requesting court guidance on Convention issues when determining the case before it. The Court has no jurisdiction either to assess the facts of a case or to evaluate the merits of the parties' views on the interpretation of domestic law in the light of Convention law, or to rule on the outcome of the proceedings. Its role is limited to furnishing an opinion in relation to the questions submitted to it. It is for the requesting court or tribunal to resolve the issues raised by the case and to draw, as appropriate, the conclusions which flow from the opinion delivered by the Court for the provisions of national law invoked in the case and for the outcome of the case (see *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*, P16-2018-001, § 25, 10 April 2019 ("*Advisory opinion P16-2018-001*")).

54. The Court has inferred from Article 1 §§ 1 and 2 of Protocol No. 16 that the opinions it delivers under this Protocol "must be confined to points that are directly connected to the proceedings pending at domestic level". Their value also lies in providing the national courts with guidance on questions of principle relating to the Convention applicable in similar cases (ibid., § 26).

55. In formulating its opinion, the Court will take due account of the written observations and documents submitted by the participants in the proceedings. Nevertheless, the Court's task is not to reply to all the grounds and arguments submitted to it or to set out in detail the basis for its reply; under Protocol No. 16, the Court's role is not to rule in adversarial proceedings on contentious applications by means of a binding judgment but rather, within as short a time-frame as possible, to provide the requesting court or tribunal with guidance enabling it to ensure respect for Convention rights when determining the case before it (see *Advisory opinion P16-2018-001*, cited above, § 34).

B. General observations regarding the context of the present advisory opinion request

56. The Court notes at the outset that the pending case in the context of which the present advisory opinion request was made arose on account of acts that had occurred in April 2004 and in relation to which, by its judgment of 2 October 2012 in *Virabyan v. Armenia*, the Court had unanimously found procedural and substantive violations of Article 3 of the Convention (see *Virabyan*, cited above, §§ 165-179). Subsequently, in the

context of the Committee of Ministers' supervision of the execution of the Court's judgment under Article 46 § 2 of the Convention (not as yet closed), on 21 August 2014 the criminal case was reopened. On 10 May 2016 new criminal proceedings were instituted and on 17 and 20 February 2017 charges were brought against two of the police officers implicated in the applicant's ill-treatment, Mr H.M. and Mr A.A., under Article 309 § 2 of the Criminal Code (see paragraphs 12 to 14 above). Whilst the trial court found that the defendants had committed an offence under this provision, it held that they were exempted from criminal responsibility by virtue of the ten-year limitation period in Article 75 § 1(3) of the CC (see paragraph 21 above), which decision the Court of Appeal upheld (see paragraph 24 above). The ten-year period had expired in April 2014. A question for the Court of Cassation to determine on further appeal, and which prompted it to make the present advisory opinion request, is whether the proceedings fall to be considered under the aforementioned ten-year limitation period or whether they are to be seen as covered by the exception in Article 75 § 6 of the CC, whereby no limitation period can apply to certain types of offences (offences against peace and humanity or envisaged in international treaties to which Armenia is a Party and which prohibit the application of limitation periods – see paragraph 25 above).

57. The Court of Cassation thus asked the Court to clarify whether it would be compatible with the defendants' rights under Article 7 of the Convention if the domestic courts were to refrain from applying the limitation period applicable in their case pursuant to the above-mentioned international rules (see paragraphs 29-32 above), including Article 3 of the Convention, relating to the prohibition of torture and other forms of ill-treatment and the requirement to punish such acts. The question as so framed implicitly recognises the hierarchy of laws in the Armenian domestic system as enunciated in Article 5 § 3 of the Armenian Constitution and Article 75 § 6 of the CC (see paragraphs 34 and 41 above).

58. Bearing in mind the Court of Cassation's reliance on Article 3 of the Convention when framing the present request (see paragraph 29 above), the Court deems it useful, before turning to the question asked specifically with reference to Article 7 of the Convention, to reiterate its case-law relating to limitation periods under Article 3 in so far as relevant for the present opinion.

59. The Court notes at the outset that it has accepted that the prohibition of torture has achieved the status of *jus cogens* or a peremptory norm in international law (see *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, §§ 60-61, ECHR 2001-XI). Furthermore, it may be recalled that in the judgment in the leading case of *Mocanu and Others* (cited above, § 326), also referred to by the Court of Cassation, the Court held as follows:

> "The Court has also held that in cases concerning torture or ill-treatment inflicted by State agents, criminal proceedings ought not to be discontinued on account of a

> limitation period, and also that amnesties and pardons should not be tolerated in such cases (see *Abdülsamet Yaman v. Turkey*, no. 32446/96, § 55, 2 November 2004; [*Yeter*, cited above, § 70]; and [*Association "21 December 1989" and Others v. Romania*, nos. 33810/07 and 18817/08, § 144, 24 May 2011]). Furthermore, the manner in which the limitation period is applied must be compatible with the requirements of the Convention. It is therefore difficult to accept inflexible limitation periods admitting of no exceptions (see, *mutatis mutandis*, *Röman v. Finland*, no. 13072/05, § 50, 29 January 2013)."

60. While finding on the facts that the relevant investigation had been terminated essentially on account of the statutory limitation of criminal liability, the Court held that the procedural obligations arising under (Article 2 and) Article 3 could hardly be considered to have been met where an investigation was terminated through statutory limitation of criminal liability resulting from the authorities' inactivity (see *Mocanu and Others*, cited above, § 346).

61. Thus, the Court has found a violation of the procedural guarantees of Article 3 in cases where the application of limitation periods was brought about by the failure of the authorities to act promptly and with due diligence (see, among other authorities, *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, §§ 97 and 145-47, ECHR 2004-IV (extracts); *Abdülsamet Yaman*, cited above, § 59; *Yeşil and Sevim v. Turkey*, no. 34738/04, §§ 38-42, 5 June 2007; *Erdoğan Yılmaz and Others v. Turkey*, no. 19374/03, § 57, 14 October 2008; *Erdal Aslan v. Turkey*, nos. 25060/02 and 1705/03, §§ 75-79, 2 December 2008; *Pădureţ v. Moldova*, no. 33134/03, § 75, 5 January 2010; *Karagöz and Others v. Turkey*, nos. 14352/05 and 2 others, §§ 53-55, 13 July 2010; *Savin v. Ukraine*, no. 34725/08, §§ 70-71, 16 February 2012; *Uğur v. Turkey*, no. 37308/05, § 105, 13 January 2015; and *Barovov v. Russia*, no. 9183/09, § 42, 15 June 2021).

62. It should further be recalled that the Court has found violations of Article 3 where prosecutions became time-barred owing to the inadequate characterisation by the domestic authorities of acts of torture or other forms of ill-treatment as less serious offences, leading to shorter limitation periods and allowing the perpetrator to escape criminal responsibility (see, among other authorities, *Pădureţ*, cited above, § 75; *Velev v. Bulgaria*, no. 43531/08, § 61, 16 April 2013; and *O.R. and L.R. v. the Republic of Moldova*, no. 24129/11, §§ 73-74, 30 October 2018).

63. Moreover, on several occasions the Court has found a failure to comply with Article 3 guarantees chiefly on account of the absence of appropriate provisions in the national law capable of adequately punishing acts amounting to torture (see *Cestaro v. Italy*, no. 6884/11, § §§ 218-226, 7 April 2015; *Azzolina and Others v. Italy*, nos. 28923/09 and 67599/10, §§ 149-65, 26 October 2017; *Cirino and Renne v. Italy*, nos. 2539/13 and 4705/13, §§ 106-12, 26 October 2017; and *Blair and Others v. Italy*, nos. 1442/14 and 2 others, §§ 118-34, 26 October 2017). In that connection, the Court also noted that the offences in question had been subject to a

statute of limitation, "a circumstance which in itself [sat] uneasily with its case-law concerning torture or other ill-treatment" (see *Abdülsamet Yaman*, cited above, § 55; *Cestaro*, cited above, § 208; *Cirino and Renne*, cited above § 110; and *Blair and Others*, cited above, § 118-34).

64. The Court is mindful of the difficulties that may be encountered in the process of execution of its judgments in cases concerning torture and other forms of ill-treatment because of the existence of statutes of limitation in the domestic systems of the member States. However, it notes that a number of member States have taken various measures in order to resolve this problem and thereby to prevent impunity for State officials who have committed such acts. Thus, several member States, including Turkey, the Republic of Moldova, Romania and now Armenia itself, have amended their legislation by abrogating the statutes of limitation for acts of torture. In others, like Italy, to ensure that criminal proceedings do not become time-barred, the law was amended in 2020 to the effect that the limitation period is suspended after the first-instance judgment for the remaining duration of the criminal proceedings.

65. The Court notes that in the case of *Virabyan* (cited above), it found a violation of Article 3 on the grounds that the applicant had been subjected to torture and that the authorities had failed to carry out an effective investigation into his allegations of ill-treatment. However, in the Court's opinion, it would be unacceptable for national authorities to compensate for the failure to discharge their positive obligations under Article 3 of the Convention at the expense of the guarantees of Article 7 of the Convention, one of which is that the criminal law must not be construed extensively to an accused's detriment (see *Myumyun v. Bulgaria*, no. 67258/13, § 76, 3 November 2015, with regard to the latter requirement with references to *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, § 36, ECHR 1999-IV; *Kononov*, cited above, § 185; and *Del Río Prada v. Spain* [GC], no. 42750/09, § 78, ECHR 2013).

66. In particular, and for the purposes of the present Advisory Opinion, it should be noted that it does not follow from the current state of the Court's case-law that a Contracting Party is required under the Convention not to apply an applicable limitation period and thereby effectively to revive an expired limitation period. The Court has recognised, in the context of the reopening of proceedings, that there may be situations where it is *de jure* or *de facto* impossible to reopen criminal investigations into the incidents giving rise to the applications being examined by the Court. Such situations may arise, for example, in cases in which the alleged perpetrators were acquitted and cannot be put on trial for the same offence, or in cases in which the criminal proceedings became time-barred on account of the statute of limitation set out in the national legislation. Indeed, the reopening of criminal proceedings that were terminated on account of the expiry of the statute of limitation may raise issues concerning legal certainty and may

thus have a bearing on a defendant's rights under Article 7 of the Convention (see *Taşdemir v. Turkey* ((dec.), no. 52538/09, § 14, 12 March 2019).

II. QUESTION CONCERNING ARTICLE 7 OF THE CONVENTION

67. Turning to the specific question which the Court of Cassation has requested it to answer, the Court finds it useful first to reiterate the general principles developed in its case-law as regards the requirements of legal certainty and foreseeability under Article 7 of the Convention. In *Del Río Prada* (cited above; see also *Rohlena v. the Czech Republic* [GC], no. 59552/08, § 50, ECHR 2015), it set out the following general principles (also reproduced in *Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law, requested by the Armenian Constitutional Court*, no. P16-2019-001, § 60, 29 May 2020 ("*Advisory opinion P16-2019-001*"):

> "(a) *Nullum crimen, nulla poena sine lege*
>
> 77. The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 even in time of war or other public emergency threatening the life of the nation. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *S.W. v. the United Kingdom*, 22 November 1995, § 34, Series A no. 335-B; *C.R. v. the United Kingdom*, 22 November 1995, § 32, Series A no. 335-C; and *Kafkaris* [*v. Cyprus* [GC], no. 21906/04], § 137[, ECHR 2008]).
>
> 78. Article 7 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage (concerning the retrospective application of a penalty, see *Welch v. the United Kingdom*, 9 February 1995, § 36, Series A no. 307-A; *Jamil v. France*, 8 June 1995, § 35, Series A no. 317-B; *Ecer and Zeyrek v. Turkey*, nos. 29295/95 and 29363/95, § 36, ECHR 2001-II; and *Mihai Toma v. Romania*, no. 1051/06, §§ 26-31, 24 January 2012). It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege* – see *Kokkinakis v. Greece*, 25 May 1993, § 52, Series A no. 260-A). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy (see *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII; for an example of the application of a penalty by analogy, see *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, §§ 42-43, ECHR 1999-IV).
>
> 79. It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him

criminally liable and what penalty he faces on that account (see *Cantoni v. France*, 15 November 1996, § 29, *Reports of Judgments and Decisions* 1996-V, and *Kafkaris*, cited above, § 140).

80. The Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision (see *Coëme and Others*, cited above, § 145, and *Achour v. France* [GC], no. 67335/01, § 43, ECHR 2006-IV).

...

(c) Foreseeability of criminal law

91. When speaking of 'law' Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability (see *Kokkinakis*, cited above, §§ 40-41; *Cantoni*, cited above, § 29; *Coëme and Others*, cited above, § 145; and *E.K. v. Turkey*, no. 28496/95, § 51, 7 February 2002). These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries.

92. It is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see *Kokkinakis*, cited above, § 40, and *Cantoni*, cited above, § 31). However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances (see *Kafkaris*, cited above, § 141).

93. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (ibid.). The progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition in the Convention States (see *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A). Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see *S.W. v. the United Kingdom*, cited above, § 36; *C.R. v. the United Kingdom*, cited above, § 34; *Streletz, Kessler and Krenz* [*v. Germany* [GC], nos. 34044/96 and 2 others], § 50[, ECHR 2001-II]; *K.-H.W. v. Germany* [GC], no. 37201/97, § 85, 22 March 2001; *Korbely v. Hungary* [GC], no. 9174/02, § 71, ECHR 2008; and *Kononov v. Latvia* [GC], no. 36376/04, § 185, ECHR 2010). The lack of an accessible and reasonably foreseeable judicial interpretation can even lead to a finding of a violation of the accused's Article 7 rights (see, concerning the constituent elements of the offence, *Pessino v. France*, no. 40403/02, §§ 35-36, 10 October 2006, and *Dragotoniu and Militaru-Pidhorni v. Romania*, nos. 77193/01 and 77196/01, §§ 43-44, 24 May 2007; as regards the penalty, see *Alimuçaj v. Albania*, no. 20134/05, §§ 154-62, 7 February 2012). Were that not the case, the object and the purpose of this provision – namely

> that no one should be subjected to arbitrary prosecution, conviction or punishment – would be defeated."

68. The Court further emphasises that the scope of the concept of foreseeability depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in relation to persons carrying out a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails (see *Vasiliauskas v. Lithuania* [GC], no. 35343/05, § 157, ECHR 2015, and *Advisory opinion P16-2019-001*, § 61).

69. As already mentioned above, the development resulting from a gradual clarification of the rules of criminal liability through judicial interpretation must be consistent with the essence of the offence and be reasonably foreseeable. A judicial interpretation that follows a perceptible line of case-law could be regarded as reasonably foreseeable (see *S.W. v. the United Kingdom*, cited above, §§ 41-43, and *C.R. v. the United Kingdom*, cited above, §§ 39-41). The requirement in question can be fulfilled even where the domestic courts interpret and apply a provision for the first time (see, as an example, *Jorgic v. Germany*, no. 74613/01, §§ 106-09, ECHR 2007-III; *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 115, ECHR 2015; and *Huhtamäki v. Finland*, no. 54468/09, §§ 46-54, 6 March 2012).

70. The Court also reiterates that it is not its task to substitute itself for the domestic courts as regards the assessment of the facts and their legal classification, provided that these are based on a reasonable assessment of the evidence. More generally, the Court points out that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. Its role is thus confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see *Rohlena*, cited above, § 51, with further references).

71. However, the Court's powers of review must be greater when the Convention right itself, Article 7 in the present case, requires that there was a legal basis for a conviction and sentence (ibid., § 52).

72. The Court further reiterates that, as it has held on several occasions, limitation may be defined as the statutory right of an offender not to be prosecuted or tried after the lapse of a certain period of time since the offence was committed. Limitation periods, which are a common feature of the domestic legal systems of the Contracting States, serve several purposes, which include ensuring legal certainty and finality and preventing

infringements of the rights of defendants, which might be impaired if courts were required to decide on the basis of evidence which might have become incomplete because of the passage of time (see *Coëme and Others*, cited above, § 146).

73. In the aforementioned case, the Court was called upon to determine whether legislative changes extending a limitation period, which had not yet expired, posed a problem under Article 7. The Court accepted that the extension of the limitation period had indeed prolonged the period of time during which prosecutions could be brought in respect of the offences concerned and therefore detrimentally affected the applicants' situation, in particular by frustrating their expectations. However, this did not entail an infringement of the rights guaranteed by Article 7, since that provision could not be interpreted as prohibiting an extension of limitation periods through the immediate application of a procedural law where the relevant offences had never become subject to limitation (ibid., § 149). In reaching that conclusion, the Court attached importance to the fact that the domestic court had followed the generally recognised principle that, save where expressly provided to the contrary, procedural rules apply immediately to proceedings that are under way (the *tempus regit actum* principle) (ibid., § 148).

74. The Court later relied on these findings to conclude that rules on limitation periods did not define offences and the penalties for them and could be construed as laying down a simple precondition for the assessment of the case, declaring a complaint under Article 7 manifestly ill-founded (see *Previti v. Italy* (dec.), no. 1845/08, § 80, 12 February 2013, in which the applicant complained that he had been unable to benefit from a more favourable limitation period introduced while his criminal case had been still pending before the supreme court). This finding was later confirmed in a number of similar cases, including *Biagioli v. San Marino* ((dec.), no. 8162/13, § 90, 8 July 2014, where a law was introduced which, unlike at the time of the commission of the offence by the applicant, required the suspension of the prescribed limitation period in certain circumstances and which was applied in the applicant's case) and *Borcea v. Romania* ((dec.), no. 55959/14, § 64, 22 September 2015, in which the applicant, an accused in criminal proceedings, was unable to benefit from legislative changes introducing a more favourable limitation period in respect of the offence imputed to him).

75. Thus, as can be seen from the rulings summarised above, legislative changes extending a limitation period which had not yet expired have not been found to constitute a failure to comply with Article 7 of the Convention.

76. However, in contrast to those cases, the Court found a violation of Article 7 in a recent case in which the applicants had been convicted of an offence which was time-barred (see *Antia and Khupenia v. Georgia*,

no. 7523/10, §§ 38-43, 18 June 2020). In doing so, the Court, while reiterating the definition and purpose of limitation periods stated at paragraph 72 above, observed that in this context, the main question before it, subject to its power of review under Article 7, was whether there was a valid legal basis for the applicants' conviction in view of the expiry of the statute of limitation in respect of the relevant offence.

77. In other words, as can be deduced from the Court's findings above, where criminal responsibility has been revived after the expiry of a limitation period, it would be deemed incompatible with the overarching principles of legality (*nullum crimen, nulla poena sine lege*) and foreseeability enshrined in Article 7 (see paragraphs 67 to 71 above). It follows that where a criminal offence under domestic law is subject to a statute of limitation, and becomes time-barred so as to exclude criminal responsibility, Article 7 would preclude the revival of a prosecution in respect of such an offence on account of the absence of a valid legal basis. To hold otherwise would be tantamount to accepting "the retrospective application of *the criminal law* to an accused's disadvantage" (emphasis added) (see *Del Río Prada*, cited above, § 78, quoted at paragraph 67 above).

78. In the present context, the Court is not presented with a legislative extension of a limitation period before its expiry in a case pending for adjudication, but with a situation where the requesting court is to determine whether to apply a ten-year limitation period, pursuant to Article 75 § 1(3) of the CC and Article 35 § 1(6) of the CCP, or an already existing provision in Article 75 § 6 of the CC specifying an exception whereby no limitation period is to apply in the circumstances described therein. Having regard to the general considerations outlined in paragraphs 70 and 71 above, it is first and foremost for the national court to determine, within the context of its domestic constitutional and criminal law rules, whether rules of international law having legal force in the national legal system, in the present instance pursuant to Article 5 § 3 of the Constitution (see paragraph 34 above), can provide for a sufficiently clear and foreseeable legal basis within the meaning of Article 7 of the Convention to conclude that the criminal offence in question is not subject to a statute of limitation.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

Delivers the following opinion:

Where a criminal offence is subject to a statute of limitation pursuant to the domestic law and the applicable limitation period has already expired, Article 7 of the Convention precludes the revival of a prosecution in respect of such an offence. It is first and foremost for the national court to determine whether rules of international law having legal force in the

national legal system can provide for a sufficiently clear and foreseeable legal basis within the meaning of Article 7 of the Convention to conclude that the criminal offence in question is not subject to a statute of limitation.

Done in English and French, and delivered in writing on 26 April 2022.

Søren Prebensen	Robert Spano
Deputy to the Registrar	President

In accordance with Article 4 § 2 of Protocol No. 16 to the Convention and Rule 94 § 2 of the Rules of Court, the separate opinion of Judge Harutyunyan is annexed to this judgment.

R.S.O.
S.C.P.

CONCURRING OPINION OF JUDGE HARUTYUNYAN

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On the whole I agree with the advisory opinion provided by the Grand Chamber at the request of the Armenian Court of Cassation. However, I believe that the Grand Chamber did not elaborate upon some important issues, finding that there was no need to go so far for the purposes of the requested *amicus curiae*. The Convention cannot be interpreted in a vacuum. From that perspective it would have been preferable for the Court to clarify the view expressed in paragraph 78 of the opinion, without interfering with the State's authority to interpret its own Constitution. That is why, having in mind the specificities of the national legal system, I have written this concurring opinion with the purpose of shedding light on the relevant legal issues.

In order to preserve the sequence of the factual circumstances and to convey the analysis in its entire legal context, I preferred to begin with the general background to the case.

I. BACKGROUND TO THE CASE

The request for an advisory opinion was made by the Armenian Court of Cassation regarding the reopening of the criminal case of Grisha Virabyan following the Court's judgment in *Virabyan v. Armenia* (no. 40094/05, 2 October 2012). The question referred by the Armenian Court of Cassation was the following:

> "Would non-application of statutes of limitation for criminal responsibility for torture or any other crimes equated thereto by invoking the international law sources be compliant with Article 7 of the European Convention, if the domestic law provides for no requirement for non-application of statutes of limitation for criminal responsibility?"

The case of *Virabyan v. Armenia* was brought before the Court on 10 November 2005. The applicant alleged that he had been tortured while in police custody and that no effective investigation had been carried out into his allegations of torture, that the grounds on which criminal proceedings against him had been terminated violated the presumption of innocence and that the ill-treatment he was subjected to had been motivated by his political opinion.

The applicant was a member of one of the main opposition parties in Armenia, the People's Party of Armenia (PPA). In early 2003 a presidential election was held, which was found by an international mission to fall short of international standards. Mass protests followed and the PPA's candidate challenged the results. The applicant was allegedly involved in a number of protests and rallies that took place in 2003 and 2004.

On 23 April 2004 the applicant was arrested by the police for allegedly carrying a firearm at a rally on 12 April 2004. The applicant alleged that later that day, while he was in police custody, one police officer had asked him a number of questions relating to his political views and his intentions

to change the government and upset the stability of the country. He alleged that later at the station he had been severely beaten by a group of police officers. In self-defence, he had struck back by hitting an officer with a mobile phone charger. The treatment to which he had been subjected included being punched and kicked and hit in the groin with a metal object. He had been beaten until he fell unconscious. The police officers involved alleged that the applicant had been aggressive and used foul language and had attacked one of them, resulting in the others stepping in by way of defence. The applicant was charged with using force against a public official.

Later that day, an investigation was conducted (by an investigator the applicant alleged was biased), during which various officers denied that the applicant had been hit and stated that they were unaware of his political affiliation although they knew that he was a friend of the PPA candidate. During the investigation, the applicant was taken to hospital. Despite doctors' recommendations, he was not allowed to stay overnight but was taken back and forced to spend the night in the police cell.

On 24 April 2004 the applicant was returned to hospital, where the doctors noted damage to his scrotum including a haematoma and laceration. An operation was required, and the applicant's left testicle was removed. Later that day the investigator, acknowledging that the applicant had been injured during the earlier events at the police station, released him from custody.

On 30 April 2004 the applicant raised allegations of torture and beatings with the Prime Minister, the General Prosecutor and the Heads of the National and Regional Police. On the same date, the Armenian Ombudsman, who had been following the case, informed the General Prosecutor and the Head of National Police that there was evidence of cruel, inhuman or degrading treatment. In May 2004 the applicant's criminal prosecution was taken over by the District Prosecutor's office of Yerevan. The applicant then lodged a complaint with the District Prosecutor in June 2004. Despite these complaints, coupled with evidence of the applicant's injuries recorded by medical experts, no assessment was made of the alleged acts of the police officers and the applicant's complaint was dismissed on 7 June 2004.

In September 2004 a decision was delivered by the District Prosecutor to end the criminal proceedings against the applicant. This decision only referred to the version of the events as presented by the police and concluded that the police had acted in self-defence when beating the applicant and therefore were not guilty of torture. Furthermore, while the prosecutor did not find the applicant innocent of the charges brought against him, he justified the decision not to prosecute on the basis that the incurable injuries he had suffered at the hands of the police were adequate punishment for his alleged crime. The applicant appealed through the judicial system,

arguing that the police officers had escaped criminal responsibility and that an insufficient investigation had been carried out. His appeals were ultimately unsuccessful, and the applicant brought his case before the Court.

On 2 October 2012 the Court found that there had been breaches of the substantive and procedural aspects of Article 3 of the Convention, as well as a breach Article 6 § 2 and of Article 14 in conjunction with Article 3.

II. KEY DEVELOPMENTS FOLLOWING THE COURT'S JUDGMENT

A. Judicial proceedings

Following the Court's judgment in *Virabyan*, on 21 August 2014 a criminal case was reopened. On 10 May 2016 the investigator launched a new criminal investigation under Article 309 § 2 of the Criminal Code, which provides for a penalty for exceeding authority by a public official accompanied by use of violence. On 10 March 2017 the investigator dropped the charges against the police officers and terminated the criminal case on the ground that the relevant limitation period of ten years had expired, under Article 75 of the Criminal Code and Article 35 § 1(6) of the Code of Criminal Procedure. On 15 December 2017 the prosecutor quashed that decision, finding that the investigator had failed to examine the accountability of terminating the proceedings in the context of international law (the prosecutor referred to the case of *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 326, ECHR 2014 (extracts)).

On 22 February 2019 the First Instance Court of General Jurisdiction of the Ararat and Vayots Dzor Regions delivered its judgment, finding that two police officers, Mr H.M. and Mr A.A., had committed a crime under Article 309 § 2 of the Criminal Code. Nevertheless, the First Instance Court emphasised that taking into account Article 75 of the Criminal Code and Article 35 of the Code of Criminal Procedure, no criminal responsibility could be imposed as the limitation periods had expired and the prosecution had failed to prove how the Court's judgment in *Mocanu and Others* (cited above) should prevail over the requirements of Article 75 of the Criminal Code and Article 35 § 1(6) of the Code of Criminal Procedure. On 4 July 2019 the Criminal Court of Appeal upheld the judgment of the First Instance Court. On 30 August 2019 the prosecutor lodged an appeal on points of law with the Armenian Court of Cassation.

B. Political developments

Grisha Virabyan is currently living in Belgium as a political refugee. In several interviews, as well as during the criminal investigation, Mr Virabyan claimed that one of the officers who had subjected him to ill-treatment was Mr A.K., who in 2013 (after the Court had given its judgment in 2012) had

been promoted and appointed as the Chief of the Yerevan Police Department. Prior to that, A.K. had worked in the police system since the 1990s, and during the events of 1 March 2008 he had held the position of head of the Soviet department of the Yerevan City Police Department. A year after the bloody post-election events, he was awarded the Medal for Outstanding Maintenance of Public Order ("Հ աս ար ակ ակ ան կ ար գ ի գ ե ր ազ ան ց պահ պան մ ան հ ամ ար "). According to mass media reports, A.K. died in 2015 in Pyatigorsk, Russia, following a gas explosion at a private brewery.

III. ARGUMENTS FOR BRINGING THE CASE BEFORE THE GRAND CHAMBER

A. Inconsistent case-law

The case-law of the Court does not appear to have a clear stance either on the issue of whether limitation periods for the crime of inflicting torture, degrading or inhuman treatment fall within the scope of Article 3 or Article 7 of the Convention, or on the issue of whether Article 3 should be understood as an absolute prohibition immune to any limitation periods.

In four cases, the Court has held quite clearly that a particular situation examined under Article 3, namely ill-treatment inflicted by State agents, had to be regarded differently. In those cases, the Court was unwilling to accept limitation periods (see *Mocanu and Others*, cited above, § 326; *Abdülsamet Yaman v. Turkey*, no. 32446/96, § 55, 2 November 2004; *Okkalı v. Turkey*, no. 52067/99, § 76, ECHR 2006-XII (extracts); and *Yeter v. Turkey*, no. 33750/03, § 70, 13 January 2009).

In particular, in *Mocanu and Others* (cited above, § 326) the Court stated:

> "The Court has also held that in cases concerning torture or ill-treatment inflicted by State agents, criminal proceedings ought not to be discontinued on account of a limitation period, and also that amnesties and pardons should not be tolerated in such cases ... Furthermore, the manner in which the limitation period is applied must be compatible with the requirements of the Convention. It is therefore difficult to accept inflexible limitation periods admitting of no exceptions."

The recent case-law of the Court has been more reluctant to adopt this approach and has accepted situations where it can be "impossible to reopen criminal investigations" (see *Taşdemir v. Turkey* (dec.), no. 52538/09, § 14, 12 March 2019).

B. Nature and scope of Article 3 and Article 7

In order to bring more consistency to the above-mentioned issue, it was necessary to develop the Court's holistic approach towards the issue of limitation periods, and to clarify whether this question should be addressed

under Article 7 in more general terms, or as something inherently specific to Article 3, deriving from its nature and purpose. In this context, the Court's approach has also not been uniform. Mostly, it has refrained from ruling on such issues under Article 7 on the grounds that they are a purely procedural matter. In the above-mentioned cases, however, the Chamber brought the question within the scope of Article 3 of the Convention.

It was of the utmost importance for the Grand Chamber to provide clarity on this issue. In particular, it was important to define whether the question of the limitation period for the crime of ill-treatment was specific to and inherent in Article 3, especially when the ill-treatment had been inflicted by a public official, or whether the limitation period was a part of a larger discussion under Article 7. The Grand Chamber, as can be seen, provided all the clear answers to these questions.

C. Execution of the Court's judgments

The execution of the Court's judgments lies at the heart of the construction of the European public order of human rights, without which the Convention will lose its value and become merely a declarative instrument. Similarly to this case, judgments such as *Moreira Ferreira v. Portugal (no. 2)* ([GC], no. 19867/12, 11 July 2017) give out certain signals regarding the Court's approach towards the development of its requirements for domestic remedies across Europe. The present case is also important because, by and large, it concerns the constitutional interplay between the Court and the national judicial authorities.

It must also be taken into account that in certain jurisdictions, judicial proceedings relating to ill-treatment might take a long time, thus meaning that the exhaustion of domestic remedies is a lengthy process. Moreover, the Court's practice shows that it can also take more than five years itself to deliver a judgment. In such circumstances, victims will automatically be deprived of the opportunity to have their case reopened under domestic law as a result of limitation periods, and this may constitute inhuman treatment towards the victim.

D. Prohibition of torture as *jus cogens*

Article 3 has a specific nature in comparison with other provisions of the Convention. It must be recalled that the prohibition of torture is part of customary international law and has become a peremptory norm (*jus cogens*). The prohibition is grounded in a widespread international practice and in the *opinio juris* of States, taking into account the fact that it derives from almost all the international agreements under the auspices of the United Nations, or other regional human rights mechanisms. It must also be noted that the practice of torture has acquired an absolute nature (for

example, see the judgment of the International Court of Justice (ICJ) of 20 July 2012 in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *ICJ Reports* 2012, § 99, and the judgment of the International Criminal Tribunal for the former Yugoslavia (ICTY) of 10 December 1998 in *Prosecutor v. Furundžija*, Case No. IT-95-17/1, §§ 153-57). Torture and inhuman and degrading treatment are not limited to the physical pain and suffering caused to the person. Their ultimate aim is the annihilation of the victim's identity and integrity. In the light of these considerations, the eventual impunity of the perpetrator diminishes the victim's hope for justice. Consequently, taking into account the deeply sensitive nature of the crime of ill-treatment, impunity on grounds of limitation periods amounts to a continuing violation.

In this context, this was a good opportunity for the Court to advance the *jus cogens* doctrine of Article 3 and assert that it is only the prosecution of crimes of torture that will make the time work in favour of the interests of the victim and the protection of human rights.

IV. SUBSTANTIVE ANALYSIS OF THE QUESTIONS RAISED

> "Would non-application of statutes of limitation for criminal responsibility for torture or any other crimes equated thereto by invoking the international law sources be compliant with Article 7 of the European Convention, if the domestic law provides for no requirement for non-application of statutes of limitation for criminal responsibility?"

To answer this question several elements should be analysed:

- Prohibition of torture as *jus cogens* in international law
- Nature of Article 3 of the Convention
- Contextual analysis in the light of present-day developments

A. Prohibition of torture as *jus cogens* in international law

Article 5 of the 1948 Universal Declaration of Human Rights provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." This Article is widely regarded as expressing customary international law. Within the United Nations framework, torture and other cruel, inhuman or degrading treatment or punishment are explicitly prohibited under a number of international treaties, which are legally binding on the States which have ratified them.[1] The prohibition is

[1] Torture and other forms of ill-treatment are prohibited under, *inter alia*, Article 7 of the International Covenant on Civil and Political Rights; the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Article 37 of the Convention on the Rights of the Child; Article 10 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and Article 15 of the Convention on the Rights of Persons with Disabilities. Additionally, Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that everyone has "the right to security of person and

grounded in a widespread international practice and in the *opinio juris* of States, taking account of the fact that it appears in numerous international instruments of universal application and has been introduced into the domestic law of almost all States, and that acts of torture are regularly denounced within national and international fora. In 2012 the International Court of Justice stated that the prohibition of torture was part of customary international law and had become a peremptory norm (*jus cogens*) (see *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, cited above, § 99).

1. States Parties' obligation to investigate

Under both the United Nations Convention against Torture ("the UNCAT") and the International Covenant on Civil and Political Rights ("the ICCPR"), States Parties have a duty to investigate allegations of torture or cruel, inhuman or degrading treatment.

Article 12 of the UNCAT provides:

> "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."

This obligation to investigate is complemented by Article 13, which provides that individuals have the right to complain to the competent authorities, and that the State must take steps to protect the complainant and witnesses against reprisals. Articles 12 and 13 also apply to acts of cruel, inhuman or degrading treatment.

In the case of *Belgium v. Senegal*, the ICJ clarified the nature and meaning of the obligation to prosecute by indicating that Article 7 § 1 of the UNCAT required the State in whose territory the suspect was present to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect. Under Article 6 § 2 of the UNCAT, that State was thus obliged to make a preliminary inquiry immediately from the time that the suspect was present in its territory, it being understood that the obligation to submit the case to the competent authorities, under Article 7 § 1, might or might not result in the institution of proceedings, in the light of the evidence before them, relating to the charges against the suspect (see *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, cited above, § 95). Furthermore, the ICJ noted that the obligation on a State to prosecute,

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protection by the State against violence or bodily harm" and the Committee on the Elimination of Discrimination against Women has stated that "[g]ender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, [including the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment,] is discrimination within the meaning of article 1 of the [Convention on the Elimination of All Forms of Discrimination against Women]" (CEDAW, General Recommendation No. 19, 1992, § 7).

provided for in Article 7 § 1 of the UNCAT, was intended to allow the fulfilment of the UNCAT's object and purpose, which was "to make more effective the struggle against torture" (Preamble to the UNCAT). It added that it was for that reason that proceedings should be undertaken without delay (see *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, cited above, § 115).

While the United Nations Committee against Torture (CAT) has given no specific guidance on the maximum time which may elapse between the emergence of grounds for suspicion of ill-treatment and the commencement or completion of an investigation, it stressed in the case of *Blanco Abad v. Spain* that promptness was essential both to ensure that the victim could not continue to be subjected to such acts and also because in general, unless the methods employed had permanent or serious effects, the physical traces of torture, and especially of cruel, inhuman or degrading treatment, soon disappeared (see *Blanco Abad v. Spain*, CAT Communication No. 59/1996, 14 May 1998, § 8.2). In that case, the Committee considered a period of eighteen days between the initial report of ill-treatment and the initiation of an investigation too long.

The State's obligation to ensure a prompt and impartial investigation does not depend on the submission of a formal complaint. Rather, it is sufficient that torture has been alleged by the victim (see *Parot v. Spain*, CAT Communication No. 6/1990, 2 May 1995; *Blanco Abad*, cited above, § 8.6; and *Ltaief v. Tunisia*, CAT Communication No. 189/2001, 14 November 2003, § 10.6), or that other reasonable grounds exist to believe that torture or ill-treatment may have occurred, whatever the origin of the suspicion (see *Blanco Abad*, cited above, § 8.2, and *Ltaief*, cited above, § 10.5).

Article 2 § 1 of the ICCPR requires the State to ensure the rights under the ICCPR to all individuals within its territory and subject to its jurisdiction, and Article 2 § 3 provides that persons whose rights are violated must have an effective remedy. Taken together with Article 7, these provisions mean that complaints of ill-treatment must be investigated promptly and impartially by competent authorities (see Human Rights Committee, CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), § 14).

Investigations conducted by the State must be effective. In *Fuenzalida v. Ecuador*, an investigation into allegations of torture and ill-treatment by the applicant had been initiated and subsequently rejected by a criminal court. The United Nations Human Rights Committee (HRC) found this investigation insufficient in the specific circumstances of the case, as there was no evidence that an incident in which the author had suffered a bullet wound had been investigated by the court (see *Fuenzalida v. Ecuador*, HRC Communication No. 480/1991, 12 July 1996, § 9.4).

The State's obligation to investigate extends even to acts of a prior regime. In its General Comment on Article 7, the HRC stated:

> "Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible." (see Human Rights Committee, CCPR General Comment No. 20, cited above, § 15)

Thus, in *Rodríguez v. Uruguay*, the State's failure to investigate allegations that the applicant had been tortured by the secret police of the former military regime amounted to a violation of Article 7 in connection with Article 2 § 3 of the ICCPR, irrespective of the existence of a law granting amnesty (see *Rodríguez v. Uruguay*, HRC Communication No. 322/1988, 19 July 1994). Furthermore, notwithstanding the viability of other avenues of redress, the HRC found in *Zelaya Blanco v. Nicaragua* that responsibility for investigations fell under the State Party's obligation to grant an effective remedy (see *Zelaya Blanco v. Nicaragua*, HRC Communication No. 328/1988, 20 July 1994, § 10.6).

Article 4 of the UNCAT provides:

> "1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
>
> 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."

The CAT has not specified a minimum penalty that would appropriately reflect the gravity of the crime of torture. Nevertheless, in *Urra Guridi v. Spain*, the CAT found that the imposition of light penalties on three Civil Guard officers who had been found guilty of torture was incompatible with the duty to impose appropriate punishment, and therefore constituted a violation of Article 4 § 2.[2]

Furthermore, the CAT considered that the pardons subsequently granted to the Civil Guard officers in that case had had the practical effect of allowing torture to go unpunished and encouraging its repetition. The pardons therefore constituted a violation of Article 2 § 1 of the UNCAT, which requires that States take effective measures to prevent torture.[3] By similar reasoning, the CAT has considered that amnesties for the crime of torture are incompatible with States' obligations under Article 4. The CAT has stated:

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[2] *Urra Guridi v. Spain*, CAT Communication No. 212/2002, 17 May 2005, § 6.7. The sentences imposed on the Civil Guard officers who had been found guilty of torturing a suspected member of ETA had been reduced by the Spanish Supreme Court from four years' imprisonment to one, prior to the granting of pardons by the Council of Ministers.

[3] Ibid., § 6.6.

> "In order to ensure that perpetrators of torture do not enjoy impunity, [States Parties must] ensure the investigation and, where appropriate, the prosecution of those accused of having committed the crime of torture, and ensure that amnesty laws exclude torture from their reach."[4]

This obligation to apply criminal law to all acts of torture is unlimited in time, so no statute of limitations should apply to the crime of torture.[5]

In particular, the CAT has stated that Turkey should

> "Repeal the statute of limitations for crimes involving torture, expedite the trials and appeals of public officials indicted for torture or ill-treatment, and ensure that members of the security forces under investigation or on trial for torture or ill-treatment are suspended from duty during the investigation and dismissed if they are convicted."[6]

2. Nature of this obligation under international law

In general, the State's obligations to prevent, investigate and punish grave violations of human rights and of international humanitarian law must not be understood as simple obligations of conduct, but rather as obligations of result (*obligation de résultat*), as these are peremptory norms of international law, safeguarding fundamental human rights. In the domain of *jus cogens*, such as the absolute prohibition of torture, the State's obligations must entail both acting diligently and achieving a result; otherwise, we will find ourselves in a situation of "legitimised impunity".

The absolute prohibition of grave violations of human rights (such as torture) entails obligations which can only be of result, endowed with a necessarily objective character. In the international human rights law framework, it is not the result that is conditioned by the conduct of the State, but, quite the contrary, it is the conduct of the State that is conditioned by the attainment of the result aimed at by the norms for the protection of the human being. The conduct of the State ought to be that which is conducive to compliance with the obligations of result.

It must not be forgotten that the absolute prohibition of torture has resulted from increased awareness of the horror and the inhumanity of the practice of torture.

3. Non-application of limitation periods for the crime of torture

While the UNCAT does not explicitly address limitation periods, the CAT has stated that the UNCAT requires States to ensure that "acts by any

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[4] CAT, Concluding Observations on Azerbaijan, UN Doc. A/55/44, 1999, § 69(c). See also CAT, Concluding Observations on Senegal, UN Doc. A/51/44, 1996, § 117; CAT, Concluding Observations on Chile, UN Doc. CAT/C/CR/32/5, 2004, § 7(b); CAT, Concluding Observations on Bahrain, UN Doc. CAT/CO/34/BHR, 2005, § 6(d); CAT, Concluding Observations on Cambodia, UN Doc. CAT/C/CR/31/7, 2005, § 6.

[5] See, for example, CAT, Concluding Observations on Turkey, UN Doc. CAT/C/CR/30/5, 2003, § 7(c); CAT, Concluding Observations on Chile, UN Doc. CAT/C/CR/32/5, 2004, § 7(f).

[6] CAT, Concluding Observations on Turkey, UN Doc. CAT/C/CR/30/5, 2003, § 7(c).

person which constitute complicity or participation in torture, can be investigated, prosecuted and punished without time limitations."[7] The CAT has relied on Articles 1, 2, 4 and 14 of the Convention and affirmed that there should be no limitation periods for the prosecution of torture. It has also stressed that torture should not be time-barred even if it does not amount to a war crime or crimes against humanity.

In its country-specific Conclusions and Recommendations reports, the CAT has urged States to abolish limitation periods for torture.[8] In one of the reports it stated that "bearing in mind the long-established *jus cogens* prohibition of torture, the prosecution of acts of torture should not be constrained by the principle of legality or the statute of limitation".[9] In considering the fourth periodic report of Italy in 2007, the CAT stressed as follows:

> "The Committee is of the view that acts of torture cannot be subject to any statute of limitations and it welcomes the statement made by the State party's delegation that it is considering a modification of the time limitations."[10]

Additionally, in considering the fifth and sixth reports of Italy in 2017, the CAT stated:

> "The Committee is concerned that the crime of torture is subject to a statute of limitations of 18 years. The Committee recommends that the State party ensure that the offence of torture is not subject to any statute of limitations, in order to preclude

[7] CAT, Concluding Observations on Denmark, UN Doc. CAT/C/DNK/CO/5, 2007, § 11.

[8] CAT, Concluding Observations on Turkey, UN Doc. CAT/C/CR/30/5, 2003, § 7(c); CAT, Concluding Observations on Slovenia, UN Doc. CAT/C/CR/30/4, 2003, § 6; CAT, Concluding Observations on Chile, UN Doc. CAT/C/CR/32/5, 2004, § 7(f); CAT, Concluding Observations on Denmark, UN Doc. CAT/C/DNK/CO/5, 2007, § 11; CAT, Concluding Observations on Spain, UN Doc. CAT/C/ESP/CO/5, 2009, § 21; CAT, Concluding Observations on Bulgaria, UN Doc. CAT/C/BGR/CO/4-5, 2011, § 8; CAT, Concluding Observations on Andorra, UN Doc. CAT/C/AND/CO/1, 2013, § 7; CAT, Concluding Observations on Latvia, UN Doc. CAT/C/LVA/CO/3-5, 2013, § 8; CAT, Concluding Observations on Lithuania, UN Doc. CAT/C/LTU/CO/3, 2014, § 9; CAT, Concluding Observations on Montenegro, UN Doc. CAT/C/MNE/CO/2, 2014, § 6; CAT, Concluding Observations on Serbia, UN Doc. CAT/C/SRB/CO/2, 2015, § 8; CAT, Concluding Observations on Moldova, UN Doc. CAT/C/MDA/CO/3, 2017, § 4; CAT, Concluding Observations on Venezuela, UN Doc. CAT/C/CR/29/2, 2002, § 6;CAT, Concluding Observations on Jordan, UN Doc. CAT/C/JOR/CO/2, 2010, § 9; CAT, Concluding Observations on Algeria, UN Doc. CAT/C/DZA/CO/3, 2008, § 11; CAT, Concluding Observations on Kyrgyzstan, UN Doc. CAT/C/KGZ/CO/2, 2013, § 10; CAT, Concluding Observations on the Holy See, UN Doc. CAT/C/VAT/CO/1, 2014, § 9; CAT, Concluding Observations on Sierra Leone, UN Doc. CAT/C/SLE/CO/1, 2014, §§ 9-10; CAT, Concluding Observations on Thailand, UN Doc. CAT/C/THA/CO/1, 2014, § 10; CAT, Concluding Observations on Uruguay, UN Doc. CAT/C/URY/CO/3, 2014, § 16; CAT, Concluding Observations on Guatemala, UN Doc. CAT/C/GTM/CO/5-6, 2013, § 8; CAT, Concluding Observations on Burkina Faso, UN Doc. CAT/C/BFA/CO/1, 2014, § 9; CAT, Concluding Observations on Guinea, UN Doc. CAT/C/GIN/CO/1, 2014, § 8; CAT, Concluding Observations on Lebanon, UN Doc. CAT/C/LBN/CO/1, 2017, § 13.

[9] CAT, Concluding Observations on Spain, UN Doc. CAT/C/ESP/CO/5, 2009, § 21.

[10] CAT, Concluding Observations on Italy, UN Doc. CAT/C/ITA/CO/4, 2007, § 19.

> any risk of impunity in relation to the investigation of acts of torture and the prosecution and punishment of perpetrators."[11]

It is evident that the CAT has continuously made categorical statements regarding the incompatibility of limitation periods with international law, as well as recommendations to abolish the limitation period for the crime of torture.[12] It should be noted that the CAT has raised the issue of the statute of limitations and recommended that the Armenian authorities ensure that persons convicted of torture are not subject to any statute of limitations.[13] It has also recommended that the Armenian authorities introduce legislative changes abolishing limitation periods for acts of torture.[14] However, the Armenian authorities have failed to do this. Furthermore, they have even promoted one of the perpetrators after the commission of such a grave violation.

The Republic of Armenia ratified the UNCAT in 1993 and is bound by it. In accordance with the Armenian Constitution,[15] the UNCAT not only prevails over national laws but was a constitutive element of the legal system of the Republic of Armenia according to the Constitution of 1995, as

[11] CAT, Concluding Observations on Italy, UN Doc. CAT/C/ITA/CO/5-6, 2017, § 13.

[12] CAT, Concluding Observations on Turkey, UN Doc. CAT/C/CR/30/5, 2003, § 7(c); CAT, Concluding Observations on Slovenia, UN Doc. CAT/C/CR/30/4, 2003, § 6; CAT, Concluding Observations on Chile, UN Doc. CAT/C/CR/32/5, 2004, § 7(f); CAT, Concluding Observations on Denmark, UN Doc. CAT/C/DNK/CO/5, 2007, § 11; CAT, Concluding Observations on Spain, UN Doc. CAT/C/ESP/CO/5, 2009, § 21; CAT, Concluding Observations on Bulgaria, UN Doc. CAT/C/BGR/CO/4-5, 2011, § 8; CAT, Concluding Observations on Andorra, UN Doc. CAT/C/AND/CO/1, 2013, § 7; CAT, Concluding Observations on Latvia, UN Doc. CAT/C/LVA/CO/3-5, 2013, § 8; CAT, Concluding Observations on Lithuania, UN Doc. CAT/C/LTU/CO/3, 2014, § 9; CAT, Concluding Observations on Montenegro, UN Doc. CAT/C/MNE/CO/2, 2014, § 6; CAT, Concluding Observations on Serbia, UN Doc. CAT/C/SRB/CO/2, 2015, § 8; CAT, Concluding Observations on Moldova, UN Doc. CAT/C/MDA/CO/3, 2017, § 4; CAT, Concluding Observations on Venezuela, UN Doc. CAT/C/CR/29/2, 2002, § 6;CAT, Concluding Observations on Jordan, UN Doc. CAT/C/JOR/CO/2, 2010, § 9; CAT, Concluding Observations on Algeria, UN Doc. CAT/C/DZA/CO/3, 2008, § 11; CAT, Concluding Observations on Kyrgyzstan, UN Doc. CAT/C/KGZ/CO/2, 2013, § 10; CAT, Concluding Observations on Holy See, UN Doc. CAT/C/VAT/CO/1, 2014, § 9; CAT, Concluding Observations on Sierra Leone, UN Doc. CAT/C/SLE/CO/1, 2014, §§ 9-10; CAT, Concluding Observations on Thailand, UN Doc. CAT/C/THA/CO/1, 2014, § 10; CAT, Concluding Observations on Uruguay, UN Doc. CAT/C/URY/CO/3, 2014, § 16; CAT, Concluding Observations on Guatemala, UN Doc. CAT/C/GTM/CO/5-6, 2013, § 8; CAT, Concluding Observations on Burkina Faso, UN Doc. CAT/C/BFA/CO/1, 2014, § 9; CAT, Concluding Observations on Guinea, UN Doc. CAT/C/GIN/CO/1, 2014, § 8; CAT, Concluding Observations on Lebanon, UN Doc. CAT/C/LBN/CO/1, 2017, § 13.

[13] CAT, Concluding Observations on Armenia, CAT/C/ARM/CO/3, 2012, § 10.

[14] On 27 May 2021 Armenia promulgated a new Criminal Code, which will come into force on 1 July 2022. Pursuant to Article 83 § 9 of the new Code, the crime of torture will not be subject to limitation periods.

[15] Article 5 § 3 of the 2015 Constitution of the Republic of Armenia provides that in the event of a conflict between the norms of international treaties ratified by the Republic of Armenia and those of laws, the norms of international treaties are to apply. Article 6 of the 1995 Constitution of the Republic of Armenia, as well as Article 6 of the amended Constitution in 2005, states that if international treaties define norms other than those provided by national laws, the norms of international treaties are to prevail.

well as an integral part of the Armenian legal system by virtue of the 2005 amendment of the Constitution. While neither Article 75 of the Criminal Code nor Article 35 of the Code of Criminal Procedure provides for the non-application of limitation periods to acts of torture, the national laws cannot be interpreted in a vacuum and, instead, should be interpreted in accordance with the rules of international law, which has primacy over national law in the event of a conflict. Therefore, at the time when the acts of torture to which the present case relates were committed, namely in April 2004, Armenia had already undertaken obligations under the UNCAT, and made commitments to follow the interpretations of the CAT on the non-application of limitation periods to the crime of torture. Consequently, the domestic courts' interpretations should have been in compliance with Armenia's international obligations, pursuant to which acts amounting to torture are not subject to any statute of limitations.

Victims of torture who have no access to justice are victims of a continuing violation until that violation ceases. The passing of time for such a grave violation of inherent rights cannot lead to subsequent impunity. Impunity is an additional violation of human rights. The imperative of the preservation of the integrity of human dignity stands well above pleas of non-retroactivity (see *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, cited above, separate opinion of Judge Cançado Trindade, § 149).

The UNCAT does not contain any provision on limitation periods or indications on non-retroactivity. Its aim is to guarantee the non-repetition of acts of torture and to that end it enhances the fight against impunity.

It should be noted that the Court referred to the Conclusions and Recommendations of the CAT (2003) in the 2004 case of *Abdülsamet Yaman v. Turkey* and stated that where a State agent had been charged with crimes involving torture or ill-treatment, it was of the utmost importance for the purposes of an "effective remedy" that criminal proceedings and sentencing were not time-barred and that the granting of an amnesty or pardon should not be permissible (see *Abdülsamet Yaman*, cited above, § 55). The position of the Court is in line with developments in international law, as well as with the international obligation concerning the non-application of limitation periods in respect of acts of torture. The position of the Court also demonstrates its willingness to follow the path of international law in its case-law. Additionally, it is important to highlight the fact that the Court expressed that position even before the judgment in *Virabyan* (cited above) had been delivered.

B. Nature of Article 3 of the Convention

1. Absolute nature

The Court consistently refers to the prohibition of torture and inhuman or degrading treatment in Article 3 of the Convention as absolute. The Court has declared that even in the most difficult of circumstances, such as the fight against terrorism or crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment (see *Ramirez Sanchez v. France* [GC], no. 59450/00, § 115, ECHR 2006-IX) and that the philosophical basis underpinning the absolute nature of the right under Article 3 does not allow for any exceptions or justifying factors or balancing of interests (see *Gäfgen v. Germany* [GC], no. 22978/05, § 107, ECHR 2010).

Unlike most Convention Articles, Article 3 does not fit a two-stage model of human rights adjudication, in which the Court first establishes whether the right has been interfered with, and then determines whether such interference could be justified as necessary in a democratic society to achieve a legitimate aim. Instead, its application only requires that a certain threshold has been met: ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (see *Ireland v. the United Kingdom*, 18 January 1978, § 162, Series A no. 25). When treatment falls within the scope of Article 3, it is absolutely prohibited and under no circumstances can it be justified. In its principled rhetoric, the Court thus excludes all considerations of proportionality or balancing from having any relevance to the application of Article 3.

2. No statute of limitations for a specifically dangerous type of crime of torture

In the cases of *Abdülsamet Yaman*, *Okkalı*, *Yeter* and *Mocanu and Others* (all cited above), the Court found that the application of limitation periods was not acceptable and was therefore incompatible with the seriousness of the crime of torture committed by public officials against individuals. This position is fully in line with the development of the prohibition of torture as a *jus cogens* and *erga omnes* rule under international law.

In *Abdülsamet Yaman* (cited above, § 55) the Court, referring to the UNCAT, stated:

> "The Court further points out that where a state agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an 'effective remedy' that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible. The Court also underlines the importance of the suspension from duty of the agent under investigation or on trial as well as his dismissal if he is convicted (see Conclusions and Recommendations of the United Nations Committee against Torture: Turkey, 27 May 2003, CAT/C/CR/30/5)."

As recognised in international law, the Court here rightly correlated the exclusion of limitation periods with the concept of an effective remedy for victims of such horrible crimes.

In *Okkalı* (cited above, § 76) the Court expressed the following position:

> "The Court reaffirms that, when an agent of the State is accused of crimes that violate Article 3, the criminal proceedings and sentencing must not be time-barred and the granting of an amnesty or pardon should not be permissible."

In *Yeter* (cited above, § 70) the Court noted:

> "As regards the disciplinary proceedings, the Court observes that although the accused police officers were suspended from duty, the disciplinary proceedings against them were terminated as they benefited from Amnesty Law no. 4455. As a result, no disciplinary sanction was imposed on them. In this connection, the Court reaffirms that when an agent of the State is accused of crimes that violate Article 3, the criminal proceedings and sentencing must not be time-barred and the granting of an amnesty or pardon should not be permissible ..."

Additionally, in *Mocanu and Others* (cited above, § 326) the Court stated:

> "The Court has also held that in cases concerning torture or ill-treatment inflicted by State agents, criminal proceedings ought not to be discontinued on account of a limitation period, and also that amnesties and pardons should not be tolerated in such cases. Furthermore, the manner in which the limitation period is applied must be compatible with the requirements of the Convention. It is therefore difficult to accept inflexible limitation periods admitting of no exceptions."

C. Contextual analysis in the light of present-day developments

The present case should also be viewed within the country-specific and European public order context. Firstly, it must be noted that the proceedings before the Court concerning such a sensitive and urgent case lasted around seven years. The application in *Virabyan v. Armenia* was submitted to the Court on 10 November 2005 and the judgment was delivered on 12 October 2012. Such a practice on the part of the Court contributes to the possible impunity of perpetrators of the crime of torture. In addition to this, after the Court delivered its final judgment, it took another four years for the national authorities to reopen the criminal investigation in the light of the *Virabyan* judgment. As shown above, this practice is totally unacceptable under international law. This also raises another concern about the abuse of the rule of law by the member States of the Council of Europe. It must be noted that in the present case the perpetrators of torture were promoted for their service, and the case was reopened only after the death of one of the perpetrators, who in the meantime had served as Chief of the Yerevan Police Department. From another point of view, the fact that the victim still remains in Belgium as a political asylum-seeker proves that there is still a need for restoration of justice. The penalties must be equivalent to the crimes committed, otherwise this opens the door to impunity and gives rise

to ineffective remedies. I would like to further note that in my opinion the Armenian authorities of the relevant time breached Article 17 of the Convention *vis-à-vis* the State's obligation to refrain from "engaging in any activity or performing any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention".

D. The messages of the Grand Chamber

In the context of the present advisory opinion, I believe that the following points are to be regarded as the core of the position taken by the Grand Chamber:

1. In paragraph 59 of the advisory opinion the Grand Chamber has very clearly underlined that the prohibition of torture and ill-treatment has achieved the status of *jus cogens* in international law and that the Court will therefore apply the Convention in harmony with a peremptory norm of international law.
2. In paragraph 64 of the advisory opinion the Grand Chamber has touched upon the issue of statutory limitations, underlining that acts of torture and/or ill-treatment are not considered to be subject to limitation periods.
3. In paragraphs 65 and 66, the Grand Chamber has emphasised that if such limitation periods are provided for under national law, they cannot be removed retrospectively.
4. In paragraph 65 of the advisory opinion the Grand Chamber has underlined that a breach by the given member State of its positive obligations under Article 3 of the Convention cannot be compensated for by the retrospective amendment of national legislation, thus by shifting the burden onto individuals.
5. In paragraph 78 of the opinion the Grand Chamber has explicitly referred to the Armenian Constitution (as amended in 2015), namely Article 5 § 3, and noted that it is up to the Armenian authorities to interpret their obligations under international law in order to ensure that there is a sufficiently clear legal basis within the meaning of Article 7 of the Convention.

In this context, it must be taken into consideration that unlike the text of the 2015 amendments to the Constitution of the Republic of Armenia,

- in 2004, at the time of the commencement of the criminal proceedings against Mr Virabyan and thus the failure to comply with the prohibition of torture and ill-treatment, Article 6 of the Constitution adopted in 1995 stated (emphasis added):

"International treaties that have been ratified **are a constituent part of the legal system of the Republic.** If norms are provided for in such a treaty other than those provided for by laws of the Republic, then **the norms provided for in the treaty shall prevail**."

- in 2014, at the time of the reopening of the criminal case following the Court's judgment and the opening of a new criminal investigation on the grounds of exceeding authority by a public official, Article 6 of the Constitution as amended in 2005 stated (emphasis added):

"International treaties are **an integral part of the legal system of the Republic of Armenia**. If ratified international treaties define norms other than those provided for by laws, **such norms shall apply**."

The above-mentioned provisions indicate that at the relevant times, the applicable provisions of the Constitution considered international treaties not only to have priority over domestic law but also to be an integral part of national legislation.

E. Conclusion

In the light of the foregoing, the following should be summarised:

1. Article 4 of the UNCAT requires a State to ensure that all acts of torture are offences under its criminal law. Armenia ratified and acceded to the UNCAT in September 1993, yet the comments by the CAT highlight that it had failed to implement the obligation arising under Article 4 by 2004.

Article 75 § 6 of the Criminal Code provides: "No limitation periods shall be applied with regard to persons who have committed criminal offences provided for in international treaties of the Republic of Armenia, where a prohibition on the application of a limitation period is laid down in those treaties."

Article 4 of the UNCAT requires the criminalisation of torture as understood in Article 75 § 6 of the Criminal Code. Armenia's failure to implement this obligation cannot be the source of the non-application of Article 75 § 6. After all, Articles 26 and 27 of the Vienna Convention on the Law of Treaties provide that a treaty like the UNCAT must be implemented in good faith and that a State cannot "invoke the provisions of its internal law as justification for its failure to perform a treaty". This was also recognised by the Permanent Court of International Justice (PCIJ) in *Treatment of Polish Nationals*, in which it held that "a State cannot adduce

as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force".[16]

Whereas in the present case a contrary domestic provision was not even in existence, such non-existence cannot be regarded as a justification for the State's failure to perform its duties either.

As concerns the second criterion under Article 75 § 6, namely that a limitation period should be laid down in the respective treaty, it is true that the UNCAT does not specifically address this matter. However, the CAT has reiterated that torture should not be time-barred, as highlighted in its 2012 Concluding Observations on Armenia.[17]

Although the views of treaty bodies are not binding, their importance has been highlighted in the ICJ's *Diallo* case. Referring to the HRC, the ICJ held that "it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty" and that "when the [ICJ] is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question".[18]

The importance of treaty bodies has been further reiterated by the Venice Commission, which emphasised the following:

> "'... the legal norms on which the treaty bodies pronounce themselves are binding obligations of the States parties, and therefore the pronouncements of the treaty bodies are more than mere recommendations that can be readily disregarded because a State Party disagrees with the interpretation adopted by the HRC or with its application to the facts.' Moreover, States Parties cannot simply ignore them, but have to consider them in good faith (*bona fide*). On the other hand, 'they are not debarred from dismissing them, after careful consideration, as not reflecting the true legal position with regard to the case concerned. Not to react at all to a finding by the HRC, however, would appear to amount to a violation of the obligations under the ICCPR.'[19] The legal consequence is that member states are under the obligation to take the HRC's final views into consideration in good faith."[20]

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[16] PCIJ, *Advisory Opinion on the Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (February 1932), p. 24.

[17] CAT, Concluding Observations on Armenia, CAT/C/ARM/CO/3, 2012, § 10. See also CAT, Concluding Observations on Spain, UN Doc. CAT/C/ESP/CO/5, 2009, § 21: CAT, Concluding Observations on Italy, UN Doc. CAT/C/ITA/CO/4, 2007, § 19: and CAT, Concluding Observations on Italy, UN Doc. CAT/C/ITA/CO/5-6, § 13.

[18] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Merits, Judgment, *ICJ Reports 2010*, §§ 66-67.

[19] C. Tomuschat, "Human Rights Committee", in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press online: 2013), § 14.

[20] Venice Commission, "Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts", CDL-AD(2014)036, 8 December 2014, § 78.

2. Article 5 § 3 of the Constitution of Armenia provides that in the event of a conflict between international treaties ratified by Armenia and Armenian laws, the provisions of the international treaties are to apply. Article 75 § 6 of the Criminal Code provides that limitation periods do not apply to persons who have committed offences envisaged by international treaties to which Armenia is a party, if such treaties prohibit the application of limitation periods.

The *jus cogens* prohibition of torture overrides national provisions on limitation. As a consequence of the negative effect of the *jus cogens* nature of the prohibition, any law providing for a limitation period is therefore, *ab initio*, contrary to international norms and could never be legally applied.

There is thus no question of the applicability of Article 7 of the Convention as there was never a valid law that provided for limitation; the non-applicability of limitation periods was legal *ab initio* and foreseeable as having been part of national legislation pursuant to the *jus cogens* prohibition of torture and time-limits in relation thereto.

Even if the prosecution has already become time-barred under national law, this is irrelevant as such a law could never have legal effect.