

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

THIRD SECTION

CASE OF MARTIROSYAN v. ARMENIA

(Application no. 23341/06)

JUDGMENT

STRASBOURG

5 February 2013

FINAL

05/05/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.



In the case of Martirosyan v. Armenia,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Josep Casadevall, *President,*
Corneliu Bîrsan,
Alvina Gyulumyan,
Ján Šikuta,
Luis López Guerra,
Nona Tsotsoria,
Valeriu Griţco, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 15 January 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 23341/06) against the Republic of Armenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Armenian national, Mr Vahagn Martirosyan ("the applicant"), on 12 May 2006.

2. The applicant was represented by Ms L. Sahakyan, a lawyer practising in Yerevan, and Mr A. Ghazaryan, a non-practising lawyer. The Armenian Government ("the Government") were represented by their Agent, Mr G. Kostanyan, Representative of the Republic of Armenia at the European Court of Human Rights.

3. The applicant alleged, in particular, that his pre-trial detention was lengthy and unjustified, and that that his conviction was based on unforeseeable application of criminal law.

4. On 2 December 2008 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1969 and lives in the town of Vanadzor, Lori Region of Armenia.

6. The applicant worked as the Lori Regional Branch Manager of the Credit Service Bank (hereafter, the Bank).

7. On 19 March 2002 criminal proceedings were instituted on account of abuse of official capacity by the former management of the Bank through embezzlement of funds entrusted to it by another company.

8. On 8 April 2002 the Lori Regional Court issued a judicial warrant authorising the search of the premises of the Bank's Lori Regional Branch with the aim of seizing relevant accounting documents.

9. On 22 April 2002 the applicant was questioned as a witness and was asked various questions about the Bank's activities in dealing with the funds entrusted to it. According to the applicant, during the following year he was questioned as a witness on seven other occasions.

10. On 29 November 2002 the prosecutor's office ordered an expert examination of the Bank's financial records.

11. On 1 April 2003 the applicant was arrested.

12. On 2 April 2003 the applicant was formally charged under paragraph 4 of Article 90, paragraph 4 of Article 90 in conjunction with Article 17, and Article 187 of the former Criminal Code (hereafter, the former CC) with embezzlement through abuse of his official capacity and official falsification through preparation and use of false accounting documents. It appears that ten other persons, including A.D., were also charged with involvement in the above crimes and later stood trial with the applicant.

13. On the same date the Kentron and Nork-Marash District Court of Yerevan granted the investigator's motion seeking to have the applicant placed in pre-trial detention for a period of two months. In doing so, the District Court referred to the nature and degree of dangerousness of the acts of which the applicant was accused, as well as all the grounds envisaged by Article 135 § 1 of the Code of Criminal Procedure (hereafter the CCP).

14. On 16 April 2003 the applicant, who had a defence lawyer, lodged an appeal against this decision.

15. On 2 May 2003 the Criminal and Military Court of Appeal dismissed the applicant's appeal.

16. On 23 May 2003 the Kentron and Nork-Marash District Court of Yerevan decided to grant the investigator's motion seeking to have the applicant's detention extended for two months, referring to the need to carry out further investigative measures. The applicant did not lodge an appeal against that decision.

17. On 23 July 2003 the Kentron and Nork-Marash District Court of Yerevan decided to grant the investigator's motion seeking to have the applicant's detention extended for one more month, namely until 1 September 2003, on the same ground. The applicant did not appeal against that decision.

18. On 1 August 2003 a new Criminal Code (hereafter, the new CC) entered into force in Armenia.

19. On 11 August 2003 the charges against the applicant were adapted to the new CC and on 12 August 2003 he was formally charged under Article 179 § 3 (1), Article 179 § 3 (1) in conjunction with Article 38 and 325 § 2 of the new CC.

20. On 26 August 2003 the applicant was informed of the conclusion of the investigation and was granted access to the case file which apparently consisted of 34 volumes of written materials. It appears that the applicant finished familiarising himself with the materials of the case on 10 November 2003.

21. On 11 November 2003 the applicant complained to the prosecutor that, *inter alia*, he had been kept in detention since 1 September 2003 without a court decision and requested to be released.

22. On 13 November 2003 the prosecutor dismissed the applicant's complaint as unfounded.

23. On 14 November 2003 the prosecutor approved the indictment and the case was transmitted to the Kentron and Nork-Marash District Court of Yerevan for examination.

24. On 17 November 2003 Judge A. of the Kentron and Nork-Marash District Court of Yerevan decided to admit the case to his proceedings.

25. On 1 December 2003 Judge A. decided to set the case down for trial, fixing the date of the first hearing for 8 December 2003 and finding, *inter alia*, that there were no grounds to change or cancel the applicant's detention.

26. Between 8 December 2003 and 13 September 2005 the District Court held 57 hearings at varying intervals, ten of which were apparently adjourned. At the trial the indictment was maintained by prosecutors T. and A.

27. As it appears from the handwritten court transcripts, at the hearing of 15 December 2004 the applicant filed a motion seeking to be released from detention. Upon a request of a representative of the victim, Judge A. postponed the examination of the applicant's motion until the next court hearing due to take place on 27 December 2004. At the hearing of 27 December 2004 the applicant requested the trial court not to examine his motion lodged at the previous hearing, and Judge A. left it without examination.

28. According to the applicant, during the hearing of 27 December 2004 two of his co-defendants lodged two other motions with the trial court. At the time those motions were made, his written motion to be released, lodged at the previous court hearing, was still lying on the judge's desk. As the judge retired to the deliberation room in order to decide on the two motions of the co-defendants, he expected the judge to examine his motion too. However, as the judge came back and pronounced his decision on the two

co-defendants' motions only, he realised that his motion to be released had not been examined. The judge's behaviour caused considerable stress to him and his family members, who were present in the court room. As a result, a dispute broke out between him and the judge, which grew into a polemic involving all the co-defendants, their defence lawyers and the court audience. The court room became very noisy and the judge announced that he was going to adjourn the hearing. It was at that moment that he gave in to his emotions and announced that if the judge continued subjecting him and his family to psychological anguish, he would better never examine the motion. Immediately thereafter, the judge adjourned the hearing and left the court room. The judge apparently took his emotional announcement as an explicit request to withdraw the motion as he then decided to leave it without examination. In substantiation of his account of the events, the applicant attached written statements made to that effect by one of the co-accused, A.D. and his mother.

29. On 14 November 2005 the Kentron and Nork-Marash District Court of Yerevan delivered its judgment. The District Court found the applicant guilty under Article 179 § 2 (3) in conjunction with Article 38, and Article 325 § 1 of the new CC of abetting one of the co-defendants to embezzle funds, and of falsification and use of documents such as various credit agreements concluded between the Bank and a third person. The District Court sentenced the applicant to two years and six months' imprisonment under Article 179 § 2 in conjunction with Article 38, and discontinued the proceedings under Article 325 § 1 by applying a statute of limitations. The applicant was immediately released from detention since he had already served the term of his sentence.

30. On 29 November 2005 the applicant lodged an appeal. It appears that during the examination of the appeal by the Criminal Court of Appeal the applicant submitted that he could not have been considered as a perpetrator of an offence under Article 325 § 1.

31. On 10 April 2006 the Criminal Court of Appeal upheld the judgment of the District Court finding, *inter alia*, that any person who had reached the age of 16 and had a legal capacity, including a private employer, could be considered as a perpetrator under Article 325 § 1.

32. On 20 April 2006 the applicant lodged an appeal on points of law. In his appeal he argued, *inter alia*, that Article 325 of the new CC should not have been applied to his case as documents of a private bank could not be considered as official and, consequently, their falsification fell outside its scope.

33. On 1 June 2006 the Court of Cassation dismissed the applicant's appeal. The Court of Cassation found, *inter alia*, that:

> "Documents to which public authorities give legal significance are considered official. Official documents may be issued both by public authorities, their officials and bodies of local self-government, and by legal entities, commercial and other types

of organisations. Such documents as credit or other financial documents drawn up by commercial banks can also be considered as [official documents], since they also have legal significance...”

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Code of Criminal Procedure

34. The relevant provisions of the Code of Criminal Procedure, as in force at the material time, read as follows:

Article 65: The rights and obligations of the accused

“2. The accused, in accordance with the procedure prescribed by this Code, is entitled: ... (12) to file motions...”

Article 134: The concept and types of preventive measures

“1. Preventive measures are measures of compulsion imposed on an arrestee or the accused in order to prevent their inappropriate behaviour in the course of the criminal proceedings and to ensure the enforcement of the judgment.

2. Preventive measures include: (1) detention; (2) bail; ...

3. Detention and bail can be imposed only on the accused...”

Article 135: Grounds for imposing a preventive measure

“1. The court, the prosecutor, the investigator or the body of inquiry can impose a preventive measure only when the materials obtained in the criminal case provide sufficient grounds to believe that the suspect or the accused may: (1) abscond from the authority dealing with the case; (2) hinder the examination of the case during the pre-trial or court proceedings by exerting unlawful influence on persons involved in the criminal proceedings, by concealing or falsifying materials significant for the case, by failing to appear upon the summons of the authority dealing with the case without valid reasons or by other means; (3) commit an act prohibited by criminal law; (4) avoid criminal liability and serving the imposed sentence; and (5) hinder the execution of the judgment.

2. Detention and its alternative preventive measure can be imposed on the accused only if the highest punishment prescribed for the [committed] crime is imprisonment for a term exceeding one year or if there are sufficient grounds to believe that the suspect or the accused could commit any of the actions referred to in the first paragraph of this article.

3. When deciding on the necessity of imposing a preventive measure or choosing the type of preventive measure to be imposed on the suspect or the accused, the following should be taken into account: (1) the nature and degree of danger of the

imputed offence; (2) the personality of the suspect or the accused; (3) age and state of health; (4) sex; (5) occupation; (6) family status and dependants, if any; (7) property situation; (8) whether he has a permanent residence; and (9) other important circumstances."

Article 136: Imposition of a preventive measure

"2. Detention and bail shall be imposed only by a court decision upon the investigator's or the prosecutor's motion or of the court's own motion during the court examination of the criminal case. The court can replace the detention with bail also upon the motion of the defence."

Article 137: Detention

"1. Detention is the keeping of a person detained in places and conditions prescribed by law.

...

4. When deciding on detention, the court shall simultaneously determine the issue of the accused's possible release from detention on bail and, accepting the possibility of such release, shall set the amount of bail...

5. The court's decision to choose detention as a preventive measure can be contested before a higher court."

Article 138: Detention period

"1. The accused's detention period shall be calculated from the moment of his being taken into custody at the time of the arrest or, if he was not arrested, from the moment of enforcement of the court decision imposing detention.

...

3. During the pre-trial proceedings of a criminal case the detention period cannot exceed two months, except for cases prescribed by this Code ... The running of the detention period in the pre-trial proceedings of a criminal case shall be suspended when the prosecutor transmits the criminal case to the court or when the accused or his lawyer are familiarising themselves with the case file...

4. During the pre-trial proceedings of a criminal case the accused's detention period can be prolonged by a court for up to one year in view of the particular complexity of the case.

5. During the pre-trial proceedings of a criminal case the accused's detention period may not exceed ... one year...

6. There is no maximum detention period during the trial."

Article 139: Extension of the detention period

"1. If it is necessary to extend the accused's detention period, the investigator or the prosecutor must submit a well-grounded motion to the court not later than ten days before the expiry of the detention period. The court, agreeing with the necessity of extending the detention period, shall adopt an appropriate decision not later than five days before the expiry of the detention period.

2. When deciding on the extension of the detention period, the court is entitled to accept the possibility of releasing the accused on bail and to set the amount of bail.

3. When deciding on the extension of the accused's detention period, the court shall extend the detention period within the limits prescribed by this Code, on each occasion for a period not exceeding two months."

Article 150: Appeal against preventive measures

"2. A court decision on application of a preventive measure may be appealed against to the court of appeal."

Article 288: Judicial control of lawfulness and reasons for imposing or not imposing detention as a preventive measure

"1. The judicial control of lawfulness and reasons for imposing or not imposing detention as a preventive measure, as well as for extending or refusing to extend a detention period, shall be performed by the appeal court."

Article 292: Decisions to be adopted when preparing a case for trial

"The judge who has taken over a case shall examine the materials of the case and within fifteen days from the date of taking over the case shall adopt one of the following decisions: (1) to set the case down for trial..."

Article 293: The decision to set the case down for trial

"1. The court shall decide to set the case down for trial, if the materials of the case do not contain circumstances allowing termination of the proceedings and if there were no substantial violations of procedural law during the pre-trial proceedings.

2. The decision setting the case down for trial shall contain ... a decision cancelling, modifying or imposing a preventive measure..."

Article 300: A decision on preventive measures

"When adopting decisions [during the preparation of the case for trial] ... the court is obliged to decide whether or not to impose on the accused a preventive measure and whether or not the preventive measure, if such has been imposed, is justified."

Article 312: Deciding on a preventive measure

"The court, in the course of the court proceedings, having heard the defendant's explanation and the opinion of the parties, is entitled to impose, modify or cancel a preventive measure in respect of the defendant."

B. The Criminal Code of 1961 (no longer in force as of 1 August 2003)

35. The relevant provisions of the Code, as in force at the material time, read as follows:

Article 17: Complicity

"Complicity is the pre-meditated joint participation in the commission of an offence of two or more persons..."

Article 90: Embezzlement of property through appropriation, dissipation or abuse of official capacity

"[1.] Appropriation or dissipation of property entrusted to a person or placed under his management, as well as embezzlement committed by an official through abuse of his official capacity, shall be punishable by imprisonment for a period not exceeding three years or by a fine in the amount between forty and sixty times the fixed minimum wage, with or without deprivation of the right to occupy certain posts or to carry out certain activities.

...

[4.] The same act, if committed on a particularly large scale, shall be punishable by six to twelve years' imprisonment with confiscation of personal property."

Article 187: Official falsification

"Official forgery, namely the entering of obviously untrue data into official documents, falsification, scratching off [the date] or entering a [false] date, the preparation and provision of obviously false documents, or the entering of obviously false records into the registers, committed by a public official for selfish ends or other personal motives, shall be punishable by imprisonment for a period not exceeding two years or correctional labour for the same period or removal."

Article 213: Falsification of documents and the preparation, use or sale of false documents, stamps, seals, forms or licence plates of vehicles

"1. Falsification of a State or societal enterprise-, institution- or organisation-issued certificate or other document conferring an entitlement or absolving from liability for the purpose of using or selling such a document, as well as the preparation or sale of false stamps, seals or forms of State or societal enterprises, institutions or organisations or licence plates of vehicles for the same purposes shall be punishable

by imprisonment for a period not exceeding three years or correctional labour for a period not exceeding two years. ...”

C. The Criminal Code of 2003 (in force from 1 August 2003)

36. The relevant provisions of the Code, as in force at the material time, read as follows:

Article 38: Types of accomplice

“1. The executor together with the organiser, the abettor and the aider are considered accomplices.

...

4. The person who has aided the offence with advice, instructions, provision of information, means or instruments, or elimination of obstacles, as well as the person who has promised in advance to conceal the offender, the means and instruments of the crime, the traces of the crime or the objects acquired by criminal means, as well as the person who has promised in advance to acquire or realise such objects, is considered the abettor.”

Article 179: Appropriation or dissipation

“2. [Appropriation or dissipation, namely the embezzlement of considerable amounts of somebody else’s property entrusted to the offender] ... if committed ... on a large scale ... shall be punishable by a fine in the amount between four hundred and seven hundred times the minimum wage or by two to four years’ imprisonment or by deprivation of the right to occupy certain posts or to carry out certain activities or without such deprivation.

3. [The same act] ... if committed ... on a particularly large scale ... shall be punishable by four to eight years’ imprisonment with or without confiscation of property.”

Article 325: Falsification, sale or use of documents, stamps, seals, forms or licence plates of vehicles

“1. Falsification of a certificate or other official document conferring an entitlement or absolving from liability to be used or to be sold by the falsifier himself or another person, or the sale of such a document, or the preparation or sale of false seals, stamps, forms or licence plates of vehicles for the same purposes, as well as the use of an obviously false document shall be punishable by a fine in the amount between two hundred and four hundred times the minimum wage, or by correctional labour for a period not exceeding one year, or by imprisonment for a period not exceeding two years.

2. The acts envisaged by the first paragraph of this Article, if committed by a group of persons by conspiracy, shall be punishable by correctional labour for a period not exceeding two years or by imprisonment for a period not exceeding four years.”

D. Judgments of domestic courts

37. By a judgment of 22 May 2001 the Kentron and Nork-Marash District Court of Yerevan found an individual guilty under Article 213 of the former CC for drawing up false accounting documents of a private enterprise.

38. By a judgment of 20 January 2003 the Malatia-Sebastia District Court of Yerevan found individuals guilty under, *inter alia*, Article 213 of the former CC for falsification of Spanish residence permit.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

39. The applicant complained that his pre-trial detention was lengthy and unjustified. He relied on Article 5 § 3 of the Convention, which reads as follows:

> "3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

Admissibility

Exhaustion of domestic remedies

(a) The parties' submissions

40. The Government submitted, *inter alia*, that the applicant did not exhaust the domestic remedies in respect of this complaint. Firstly, he did not lodge an appeal on points of law against the decision of the Criminal Court of Appeal of 2 May 2003. Secondly, the applicant did not avail himself of his right under Article 136 § 2 of the CCP to lodge a motion to be released from detention during the trial. In particular, although he did lodge such motion at the court hearing of 15 December 2004, he withdrew it at the next hearing, which resulted in its non-examination by the trial court. Lastly, the applicant did not lodge appeals against two decisions of the Kentron and Nork-Marash District Court of Yerevan extending his detention on remand.

41. The applicant submitted, *inter alia*, that the CCP did not define appeal procedures against decisions of the Court of Appeal taken in respect of pre-trial detention. At the material time, Article 288 of the CCP explicitly stipulated that a judicial review of lawfulness of court decisions on pre-trial detention was to be carried out by the Court of Appeal.

42. As to the possibility to be released from detention during the trial, the applicant pointed out that Armenian law did not define any limitation on the period of detention during trial and judges usually did not set any time-limit for such detention. Such practice was found by the Court to be contrary to the principle of lawfulness under Article 5 § 1 of the Convention in the cases of *Stašaitis v. Lithuania* (no. 47679/99, §§ 21, 67-68, 21 March 2002) and *Nakhmanovich v. Russia* (no. 55669/00, §§ 44, 70-71, 2 March 2006). The same happened in his case as Judge A., together with the decision setting his case down for trial, ruled on extension of his detention during trial without specifying its time-limit. As to his motion to be released from detention lodged on 15 December 2004, firstly, Judge A.'s decision to postpone its examination until the next hearing was unsubstantiated. Secondly, at the next court hearing of 27 December 2004 he did not request to withdraw that motion but made an emotional statement during the polemic that broke out in the court room. However, Judge A. took his statement for an explicit request and decided to leave the motion to be released unexamined. Thirdly, he had serious doubts as to the objective impartiality of Judge A. In particular, in the period when his trial was held, the Department of Protection of State Interests of the Prosecutor General's Office, headed by prosecutor T. who was one of the prosecutors maintaining his indictment at the trial, was leading a criminal case instituted in relation with the alleged unlawfulness of one of the judgments delivered by Judge A. Lastly, the deficiencies of the first instance court were impossible to remedy as no appeal lay against a decision of the first instance court taken in respect of detention during the trial.

(b) The Court's assessment

43. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges those seeking to bring a case against the State before an international judicial body to use first the remedies provided by the national legal system, thus dispensing States from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal systems. In order to comply with the rule, normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged (see, among other authorities, *Assenov and Others v. Bulgaria*, no. 24760/94, § 85, ECHR 1999-VIII). As far as Article 5 § 3 is concerned the Court reiterates that the domestic courts are obliged under Article 5 § 3 to review the continued detention of persons

pending trial with a view to ensuring release when circumstances no longer justify continued deprivation of liberty (see *McKay v. the United Kingdom* [GC], no. 543/03, § 45, ECHR 2006-X; and *Kaszczyniec v. Poland*, no. 59526/00, § 51, 22 May 2007).

44. The Court notes that Armenian criminal law makes a distinction between detention during the investigation and detention during the trial. Unlike detention during the investigation which is ordered and extended by a court decision each time for no more than two months and cannot exceed a certain period of time, no maximum detention period is prescribed during the trial. Moreover, once the trial court decides on the accused person's detention during the trial, it is not obliged to refer to that issue on its own motion thereafter. However, in accordance with Article 136 § 2 of the CCP the trial court could replace the accused person's detention with bail upon the motion of the defence (see paragraph 34 above). Nothing indicates that lodging such motion by the accused or his legal representatives during the trial could not have afforded redress in respect of the alleged breach of the Convention. Consequently, lodging such motion must be considered as an effective remedy as far as an alleged violation of Article 5 § 3 is concerned.

45. Turning to the circumstances of the present case, the Court notes that the applicant's pre-trial detention lasted from 1 April 2003, the date on which he was arrested, until 14 November 2005, the date on which the trial court delivered its verdict in respect of the applicant. It lasted thus in total 2 years, seven months and two weeks. However, the applicant spent most of that period, that is, from 8 December 2003 to 14 November 2005, in detention during the trial. It was therefore open for him and his defence lawyers to seek the applicant's release on bail pending the court proceedings, which they failed to do.

46. It is true that during the court hearing of 15 December 2004 the applicant lodged a motion to be released from detention, whose examination was postponed until the next court hearing of 27 December 2004. However, during the next court hearing, he withdrew his motion. The applicant alleged that he had not requested the trial court to withdraw that motion, but made an emotional announcement to that effect in a heated debate between him and the judge. Even assuming that it was indeed the case and that Judge A. made use of the applicant's emotional announcement by taking it as an explicit statement, the Court considers that the applicant could have lodged such a motion again during the subsequent court hearings, which he apparantly failed to do. As to the applicant's allegation that Judge A. was not impartial, there is nothing in the case file indicating that the applicant raised this issue either before the domestic courts or in his present application to the Court. The Court therefore cannot accept this argument.

47. Lastly, as far as the applicant's detention pending the investigation is concerned, the Court notes that it was twice extended by a decision of the Kentron and Nork-Marash District Court of Yerevan, namely on 23 May

and 23 July 2003 (see paragraphs 16 and 17 above). However, both times the applicant did not appeal against such extension to the Criminal Court of Appeal and therefore did not avail himself of the remedy as provided for by Articles 137 § 5, 150 § 2 and 288 § 1 of the CCP (see paragraph 34 above).

48. Based on the above, the Court considers that the applicant, who was represented by a defence lawyer, by not lodging appeals against the two court orders extending his detention on remand and failing to pursue properly or to re-lodge his motion to be released from detention with the trial court, failed to exhaust the domestic remedies available to him under the domestic law.

49. It follows that this part of the application must be rejected for non-exhaustion of domestic remedies pursuant to Article 35 §§ 1 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

50. The applicant further complained that Article 325 of the new CC under which he was convicted lacked legal certainty as opposed to its predecessor in the former CC, namely Article 213 which contained the words "State and societal organisations". Therefore, the interpretation and application of Article 325 to his case went beyond what could be reasonably foreseen by him. In this respect, he invoked Article 7 of the Convention, which reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

A. Admissibility

51. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

52. The Government submitted that the applicant's conviction under Article 325 of the new CC was compatible with the requirements of Article 7 of the Convention. In particular, falsification of documents was an offence prohibited by Article 213 of the former CC at the time when the applicant committed the crime. As could be seen from its wording, the document conferring an entitlement or absolving from liability was not confined to state or societal enterprises, institutions or organisations, as various documents of legal significance could be falsified by an individual or a representative of a legal entity. Hence, Article 213 clearly defined the crime, and its provisions were in compliance with the standards of foreseeability and accessibility as required by the Convention. Furthermore, the judicial practice on interpretation and application of Article 213 did not exclude individuals having no links with the state or societal institutions from being convicted under that Article. Accordingly, the offence of which the applicant was convicted corresponded to the *corpus delicti* of Article 213 of the former CC. In substantiation of their claims, the Government submitted two judgments delivered by the domestic courts at the time when the former CC was still in force, by which individuals had been convicted under Article 213.

53. As to Article 325 of the new CC, the Government submitted that it fully corresponded to the principle of legal certainty. In particular, the notion of "an official document" as interpreted by the Court of Cassation in its decision of 1 June 2006 corresponded to the interpretation of the notion of "other document conferring an entitlement or absolving from liability" of Article 213.

54. The applicant submitted that the offence of which he was convicted did not correspond to the *corpus delicti* of Article 213. This was confirmed by the fact that no charge under that Article had been brought against him at the time when the former CC was still in force. Trade organisations were not allowed under the Soviet socialistic legal and political order, as the Soviet totalitarian system allowed only State, collective and societal institutions, organisations or enterprises. Trade organisations emerged only after the change of the political order and independence of Armenia. However, the former CC had stayed in force for many years after Armenia had become independent with only several articles amended. Article 213 was not among the amended articles.

55. The applicant further pointed out that the decisive factor for the applicability of Article 213 was whether a document was issued by "State or societal enterprise, institution or organisation". It meant that if an individual or an official falsified a document not issued by a state or societal

enterprise, institution or organisation Article 213 could not apply since the object and purpose of that article was to criminalise actions directed against the State regime. That was proved by the fact that Article 213 was included in Chapter 10 of the former CC and was entitled "Crimes against the Regime". In Soviet Armenia the regime was run exclusively by the State. Consequently, any action against the regime was directed against the State. The only exception to that rule was an action directed against societal organisations which were specially mentioned in Article 213 of the former CC. Thus, the offence of which he was convicted did not comply with the *corpus delicti* of Article 213. Consequently, the Court of Cassation's interpretation of the notion of "official document" as contained in Article 325 of the new CC was inconsistent with the interpretation of that notion under Article 213 of the former CC. Even though Article 213 of the former CC clearly established the scope of its application, the domestic courts often applied it widely and arbitrarily to persons who had falsified official documents of trade organisations. In that sense, there was a significant difference between the statutory norm and the case-law. As a result, the given legal provision failed to meet the requirement of foreseeability.

2. The Court's assessment

(a) General principles

56. The Court reiterates that the guarantee enshrined in Article 7 of the Convention is an essential element of the rule of law. 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 *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 92, 17 September 2009; or *Huhtamäki v. Finland*, no. 54468/09, § 41, 6 March 2012). Article 7 is not confined to prohibiting the retroactive application of criminal law to the disadvantage of an accused. 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*) and the principle that criminal law must not be extensively construed to the detriment of an accused, for instance by analogy. From these principles it follows that an offence must be clearly defined in law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. 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 written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability (see, among other authorities, *S.W. v. the*

United Kingdom and C.R. v. the United Kingdom, judgments of 22 November 1995, Series A no. 335-C, §§ 34-35 and §§ 32-33; and *Streletz, Kessler and Krenz v. Germany* [GC], no. 34044/96, 35532/97, 44801/98, § 50, ECHR 2001-II).

57. In any system of law, including criminal law, however clearly drafted a legal provision may be, 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. Indeed, in the Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. 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, among others, *S.W.*, cited above, § 36; *Streletz, Kessler and Krenz*, cited above, § 50; and *K.-H. W. v. Germany* [GC], no. 37201/97, § 45, ECHR 2001-II).

(b) Application of the principles to the present case

58. The Court notes that, in the present case, at the time when the applicant committed the imputed acts, the former CC of Soviet Armenia was in force. During the criminal proceedings against the applicant, the former CC lost effect and was replaced by the new CC of Armenia under Article 325 of which the applicant was subsequently charged and convicted.

59. The Court further observes that it was not in dispute between the parties that Article 213 of the former CC was the predecessor of Article 325 of the new CC. The applicant, however, claimed that Article 213 was confined to falsification of documents issued by the State or societal institutions or organisations only. In turn, the Government claimed that Article 213 was applicable irrespective of whether a falsified document was issued by a State institution, private legal entity or an individual.

60. In this respect, the Court notes that, as it appears from the materials submitted by the Government, at least after the fall of the Soviet regime, acquisition of independence by Armenia and the change of legal, political and economic order the Armenian courts applied Article 213 to cases of falsification of any document bearing a legal significance, including that of a private enterprise (see paragraphs 37 and 38 above).

61. The Court further points out that on 14 November 2005 the Kentron and Nork-Marash District Court of Yerevan found the applicant guilty, *inter alia*, under Article 325 § 1 of the new CC for falsification of documents such as credit agreements concluded between the Bank and a third person. As was subsequently indicated by the Court of Cassation, any document to which the authorities attached legal significance, irrespective of whether it was issued by public authorities or commercial legal entities, fell within the notion of "official document" under Article 325 of the new CC. The Court

does not consider that such interpretation of the notion of "official document" was inconsistent with the essence of the offence of falsification under Armenian law, or that, by adopting it, the domestic courts extended the notion of the offence to the extent that it manifestly fell out of its scope. It remains, therefore, to be established whether such interpretation of the offence of falsification could reasonably be foreseen by the applicant at the time of committing the offence.

62. In this respect, the Court notes that the interpretation of the notion of "other document conferring an entitlement or absolving from liability" under Article 213 of the former CC corresponds to the notion of "other official document" the domestic courts adopted in respect of Article 325 of the new CC. In view of the similarity of the interpretation and application of the criminal law between the former and the new Criminal Codes, the Court considers that the compliance with that law were adequately foreseeable by the applicant at the time of committing the imputed acts, if not as a matter of common knowledge, then with the assistance of a legal advice (compare *Moiseyev v. Russia*, no. 62936/00, § 241, 9 October 2008). The fact that the applicant was not charged under Article 213 of the former CC when it was still in force cannot, in the Court's opinion, indicate conclusively that the applicant's acts did not objectively constitute an offence under that Article at the time when they were committed.

63. Furthermore, the Court observes that the applicant was found guilty under Article 325 § 1 of the new CC whose maximum term of imprisonment was less than that under Article 213 § 1 of the former CC, i.e. two years as compared to three years (see paragraphs 35 and 36 above). Hence, there was no retroactive application of criminal law to the applicant's disadvantage in the present case. In any event, no penalty under Article 325 § 1 was imposed on the applicant as the criminal proceedings against him were discontinued in that part by the trial court under the statute of limitations (see paragraph 29 above).

64. There has therefore been no violation of Article 7 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

65. The applicant also raised a number of other complaints under Article 5 § 1 and Article 6 § 1 of the Convention.

66. Having regard to all the material in its possession, and in so far as these complaints fall within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the unforeseeable application of the criminal law admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 7 of the Convention.

Done in English, and notified in writing on 5 February 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President