REPORT ON APPEAL HEARING OF THE CASE # 1-553/10; # 22-2154/2011 AT THE SAINT PETERSBURG CITY COURT ON APRIL 21, 2011

BY A MISSION OF THE INTERNATIONAL COMMISSION OF JURISTS

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The International Commission of Jurists

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Report

Having received credible information about possible violations of fair trial principles in a criminal case in St. Petersburg, the ICJ took a decision to send a Mission of observation at the appeal hearing on case # 1-553/10; # 22-2154/2011 at the Saint Petersburg City Court against Gurgen Stepanyan, Vardan Sakanyan, Tigran Arutyunyan. The report provides a general overview of the pre-trial investigation and the court of appeal hearing. As explained below, the appeal hearing was held *in camera* and despite a request by the ICJ request that it be open for observers, it was closed. Nevertheless the ICJ observers were able to meet with the Deputy President of the Court and with lawyers involved in the case, and to study documents in the case. The observers express their gratitude to all who met with them and who assisted in the Mission.

Observers

Gulnora Ishanhanova – ICJ commissioner, former attorney of the Tashkent Bar Association with 26 years of experience, former chair of the Tashkent City Branch of the Uzbekistan Bar Association, currently Chief Research Specialist of the Legal Problems Study Center.

Maksim Timofeev - Lawyer, St. Petersburg, Russia.

Gulnora Ishanhanova received an *Ordre de Mission* from the ICJ and was appointed as the principal rapporter for the trial observation mission.[1] Maksim Timofeev received an *Ordre de Mission* from the ICJ and participated in the Mission as an associate rapporteur.

Parties at the Trial

The criminal case was considered at the first instance court by Kryukov A. V., a judge of the Moskovsky District Court of Saint Petersburg, with the participation of Polyakov A. V., the Chief Assistant Prosecutor of the Moskovsky district of Saint Petersburg; Janiashvili I. V., Vartanov V. E. Kuzmin S. V., defence attorneys acting in the interests of

[1] Annex 1, *Ordre de Mission* from ICJ

Stepanyan, the defendant, Novolodsky Y. M. attorney acting in the interests of Sakanyan, defendant; Petrosyan G. O. attorney acting in the interests of Arutyunyan, defendant; Avakyan D. K., translator; with Budin A. N. as a secretary, with the presence of the defendants Stepanyan, Saakyan, and Arutyunyan.

The charges and the main elements of the investigation and the trial in the first instance

Gurgen Stepanyan, Vardan Sakanyan and Tigran Arutyunyan were accused of participation in murder (abettor, executor, accessory); in addition, Stepanyan was accused of robbery, rape and theft.

Gurgen Stepanyan was accused of committing crimes under articles 33 part 4[2], 105(1) of the Russian Federation Criminal Code[3] (of 1996), article 162(2) of the RFCC [4] (of 2004), article 131(2)(в) of the RFCC[5] (of 2003), article 161(2)(г) of the RFCC[6] (of 2003).

Vardan Sakanyan was accused of committing a crime under article 105(1) of the RFCC (of 1996).

Tigran Arutyunyan was accused of committing a crime under articles 33(5), 105(1) of the RFCC (of 1996).

The case was forwarded to the Moskovsky District Court of St. Petersburg, which on 27 May 2010, decided that the criminal case was to be heard on the merits. The text of the Court verdict for this case states that it was delivered on 12 December 2010.

Imputed acts[7]

According to the descriptive part of judgment of the court of first instance,[8] Stepanyan committed an accessory offence in the form of abetting murder, i.e. intentional infliction of death to another person, in particular:

- The court of first instance found that, no later than on 21 August 2001, Stepanyan conceived a criminal intent to murder Armen Arakelyan, who had arrived in St. Petersburg. At the same time, Stepanyan, using his relations of trust with Sakanyan and Arutyunyan, through persuasion abetted the latter to murder Arakelyan in the way they considered convenient: thus he abetted the murder. Sakanyan and Arutyunyan gave the latter their agreement to commit the murder of Arakelyan, and thereby they colluded with Stepanyan to commit the crime.

[2] Article 33 of the Russian Federation Criminal Code. Kinds of crime accessories.
[3] Article 105 of the Russian Federation Criminal Code. Murder.
[4] Article 162 of the Russian Federation Criminal Code. Robbery with violence.
[5] Article 131 of the Russian Federation Criminal Code. Rape.
[6] Article 161 of the Russian Federation Criminal Code. Abbrochment.
[7] A detailed description of the imputed crimes is given in the report in order to demonstrate a dubious qualification of the crime in the case.
[8] See Annex 1 (verdict of the Moskovsky district court of Saint Petersburg, pages 2-7).

Sakanyan undertook the role of an executor, and prepared a knife and a chisel in advance, counting on Arutyunyan's help in committing the murder.

- According to the case materials cited by the Court, on 21 August 2001, between 14:00 and 14:50, Sakanyan and Arutyunyan tracked Arakelyan down to house #197 in the Moskovsky prospect of St. Petersburg, chased and attacked him on the stairs of the "Khoztovary" ["Housewares"] store. By his actions. Arutyunyan eliminated any possible obstacles for Sakanyan to commit the murder. He put his arms around the victim to prevent resistance and to make it possible for Sakanyan to hit the victim without impediment, and also by his presence at the crime scene and by his active participation he prevented help being rendered to Arakelyan or suppression of the crime by eyewitnesses.

According to the Court, Sakanyan committed murder, i.e. intentional infliction of death to another person, particularly as follows:

- The Court found that, no later than on 21 August 2001, to accomplish Stepanyan's directions to carry out their mutual intent to commit the murder of Arakelyan, and trying to break Arakelyan's resistance, Sakanyan intentionally punched him twice in his face with his fist and subsequently stabbed the victim 10 times with a knife in the areas of the vital organs (chest, stomach, back and neck) and with a chisel nine times into the areas of the vital organs location (chest, stomach, back and neck) and also his limbs with the purpose of murdering him. Subsequently, he and Arutyunyan escaped from the crime scene.

The Court further found that Arutyunyan committed an accessory offence in the form of aiding in a murder, i.e. intentional infliction of death to another person, in particular:

- It was stated that, no later than on 21 August 2001, Arutyunyan and Sakanyan gave their agreement to commit the murder of Arakelyan. Thus, they colluded with Stepanyan to commit the crime. Arutyunyan aided Sakanyan in committing the murder of Arakelyan, by his actions made it easier for Sakanyan to hit the victim without impediment and actively participated in preventing eyewitnesses from suppressing the crime by rendering help to Arakelyan.

In addition, Stepanyan was accused of committing robbery with violence, i.e. attacking other persons with the purpose of plundering their possessions with the use of force which was hazardous for life and health committed by means of an item used as a weapon. In particular:

According to the case materials cited by the court, on a day in July 2008 at around 10 p.m. Stepanyan was near "Klinskoe" café at: 35 bldg. 2, Doblest str., Saint Petersburg. There he argued with a person whom he had not known before (the identity of the

person is kept in secret, so in accordance with the procedure provided by law he was given a pseudonym "Vlasov I.Y."). Stepanyan attacked Vlasov using violence which was hazardous for life and health; hit the victim, inflicting harm to Vlasov's health; took a knife he had with him, and openly stole a gold chain that belonged to Vlasov and cost no less than 90 000 roubles, having torn it off the victim's neck.

Stepanyan was also accused of committing a rape, consisting in sexual intercourse with the use of violence against a victim, in particular:

- It was stated that, on a day in August 2008 in the evening from 9 p.m. to 10 p.m. in the "Klinskoe" café, Stepanyan saw a woman whom he had not known before. (Her identity is confidential, so in accordance with the procedure provided by law she was given a pseudonym "Drobysheva M.P."). He waited for Drobysheva to leave the café and followed her. Then he caught her by her arm and using force dragged her into a car. He drove the car to an abandoned place and committed sexual violence having threatened her with death if she informed the law enforcement bodies. Furthermore, it was stated that, with mercenary intent, Stepanyan openly stole gold earrings with diamonds and a ring with diamonds which belonged to the victim and were worn by her.

In accordance with article 31 of the Russian Federation Criminal Procedure Code (RFCPC), the Court came to the conclusion that all the crimes that Stepanyan, Sakanyan and Arutyunyan were charged with, were under the District Court jurisdiction.

The Verdict

Having considered the criminal case, the Court found defendant Stepanyan**:**

- guilty of committing the crime under articles 33(4), 105(1) of the RFCC and to be sentenced to deprivation of liberty for the term of seven years;

- guilty of committing the crime under article 162(2) of the RFCC, and to be sentenced to deprivation of liberty for the term of five years with monetary fine in the amount of 100 000 roubles;

- guilty of committing the crime under article 131(1) of the RFCC, and to be sentenced to deprivation of liberty for the term of four years;

- guilty of committing the crime provided under article 161(2)(r) of the RFCC, and to be sentenced to deprivation of liberty for the term of three years without monetary fine.

Based on art. 69(3) of the RFCC, Stepanyan was finally sentenced to deprivation of liberty for the term of 11 years with monetary fine of 100 000 roubles in a high security prison.

By the court verdict, the criminal defendant Sakanyan was found guilty of committing the crime under art. 105(1) of the RFCC and was sentenced to deprivation of liberty for the term of 9 years with service of his sentence in a penitentiary of high security.

Defendant Arutyunyan was found guilty of committing a crime provided for under art. 33(5), art.105(1) of the RFCC and was sentenced to deprivation of liberty for the term of six years with service of his sentence in a penitentiary of high security.

Concerns raised by the defence regarding the investigation and the first instance trial

In its submissions to the appeal court, the defence raised a number of concerns regarding procedural irregularities during the investigation and first instance trial.

a) during the preliminary investigation of the criminal case

In regard to the preliminary investigation, the defence alleged:

- that the investigation body did not evaluate witness O.O. Miklyaev's testimony adequately in terms of its credibility as required under art. 88 p.1 of the RFCC. As a result, the place where Armen Arakelyan was murdered was wrongly determined;

- that witnesses who allegedly saw the murderers attack the victim were not identified. Neither was the place where two unidentified persons attacked Armen Arakelyan and inflicted 20 bodily injuries on him determined;

- that conclusions of the investigation contradicted the evidence collected. For example, a statement contained in the indictment that all 24 bodily injuries were inflicted on the victim by "man #2" contradict the factual evidence collected in the case;

- absence of evidence in support of the statement contained in the indictment that "*G.G. Stepanyan who had had strong antipathy for Arakelyany A. M based on mutual antipathy of both a personal and a commercial nature for a long period of time, conceived a criminal intent to murder Arakelyan A. M;"*

- that the version of events concerning the participation of Yurik Chatikyan, Arakelyan's acquaintance, was not explored, although unlike G.G. Stepanyan, he had real inducement to murder and was the only one to know ahead of time where Arakelyan and his girlfriend Kovalenko L.A. would be in the middle of the day on 21 of August, 2001;

- that there was an intentionally incorrect qualification of the criminal act attributed to Stepanyan, Sakanyan and Arutyunyan as a "simple murder", instead of due qualification of it according to article 105(2)(ж) of the RFCC. The case as well as the indictment was sent to the Deputy Prosecutor of the city who knowingly approved the incorrect indictment in contempt of article 221(1)(2) of the RFCPC. Thus the case was

considered by an inappropriate district court instead of being given due consideration at the city court with participation of the jury. According to the defence, this was done to avoid a trial with participation of the jury who would most certainly acquit the defendants in this case.

b) during the first instance trial of the case

The defence alleged that at first instance, the court did not take into consideration important evidence presented by the defence, including:

- The evidentiary material supporting the fact that the proposition contained in the indictment (based on witness O.O. Miklyaev's testimony) which says that Armen Arakelyan's murder happened on the stairs leading to the "Kinomir" store (now "Sumki" store), in the defence's opinion "do no correspond to reality".

- Analysis of witnesses L.N. Yamova's, Y.V. Boroyan's, R.A. Gushan's testimonies which shows that 23 bodily injuries (of 24 found on A.Arakelyan's body) were inflicted on the victim not at the place where his body was found, but 10-15 meters away from that place in the direction of the Victory square.

- Video materials attached to the case which show that from the place where witness Miklyaev stayed it was impossible to visually observe the events happening in the left part of the house #197, Moskovsky prospect, i.e. the place where the murder of Armen Arakelyan was really committed and where his body was found.

c) Compliance with Russian Federation legislation

The defence alleged that the court of first instance acted contrary to Russian Federation legislation, including:

- Norms of the criminal procedure law of the Russian Federation that regulate the rules for evaluating evidence, disregard of which led to the court delivering an illegal and ungrounded verdict on the case.[9]

- Requirements contained in art. 299(3) of the CPCRF according to which "If several criminal defendants are accused of committing a crime, then the court resolves the issues indicated in this article, part1, paragraphs 1-7 in regard of each defendant separately".[10]

[9] Article 88 part 1 of the Russian Federation Criminal Procedure Code ("Rules for evaluating evidence") mandatorily prescribes the court to observe the rule according to which "Each evidence is subject to evaluation in terms of relevance, admissibility and reliability, and all collected evidences in totality are subject to evaluation in terms of sufficiency for resolution of the criminal case".

[10] The most important question out of the range indicated in article 299, part 1, paragraphs 1-7 of the Russian Federation Criminal Procedure Code is the question provided for in p. 4) "Is the defendant guilty of commitment of the crime".

Observation of the Appeal Hearing

In April 2011, the International Commission of Jurists decided to conduct an observation of the criminal trial in the Saint Petersburg City Court.

The purpose of the mission was to observe the appeal hearing on this case. The mission studied the case materials, interviewed the defence, the defendants' relatives, and the Deputy Chair of the Court.

The observers were not allowed to be present at the appeal hearing. It had been announced prior to the hearing by a letter from the Court that the court session would be held *in camera* . Yet, the observers studied the materials of the case as well as publications about the case. The observers were not able to meet with the father of the deceased who was recognised as the victim in this case but who did not participate in the appeal court hearing due to his residence in Armenia. During the first instance trial the victim announced that he would not be able to attend the trial.

Observer Gulnora Ishanhanova arrived in St. Petersburg on 19 April 2011. On 20 April she held a meeting with one of the defence lawyers in this case, Yuri Mikhailovich Novolodskiy, Chair of the Baltic City Bar Association. The defence provided copies of all the main documents of the case, including the court of first instance verdict, appeals, the prosecutor's accusatory speech at the first instance trial, written analysis of the case materials, defence lawyer's speech at the appeal trial, video recording of the defendants' arrest and of the attorneys' investigation of the place of the crime. The defence informed the observer about violations of the national legislation and of the international standards related to criminal justice which the defence alleged had occurred during the investigation and the trial.

On 21 April 2011 at 9.30 a.m., both the observers came to the St. Petersburg City Court. The appeal hearing was scheduled for 10.00 that morning. V.N. Yepifanova, the Chair of the Court, did not meet with the observers, and informed them of the possibility for them to meet with A.A. Ponomaryov, the Chair's deputy.

At a brief meeting with the observers, A.A. Ponomaryov said that "the Court proceedings on the case were conducted as a session *in camera* because there were elements of a crime against sexual freedom, while the decision about the order of hearing of the case at the appeal trial shall be made by the appeal court". According to Ponomaryov, the defense attorneys had to file a motion to request the presence of the observers. Ponomaryov refused to take *Ordre de Mission* from the ICJ observers.

Hence, the question of Stepanyan's, Sakanyan's and Arutyunyan's guilt of committing the murder imposed to them had to be resolved by the court *"in regard of each defendant separately"*.

At 10:15, the parties were invited to the judgement hall #309. The observers entered the hall together with the parties. However, the associate judge insisted that only "the parties to the process" should enter the hall and "strangers" should leave. The defendant's lawyers stated that there were no "strangers" in the hall. The defence also stated that they had entered a motion about conducting public judgment proceedings with the presence of the ICJ observers. The court answered that the court hearing had to commence and the motion should be discussed in the prescribed order. The observers left the courtroom and were out until the end of the court session, because as the observers were later informed, the board denied the motion of the defence to conduct an open hearing with the presence of the ICJ observers and declared the hearings to be in camera on the same grounds as the first instance court (since one of the counts was related to rape). For that reason, the observers were not given an opportunity to observe the hearing directly. Therefore, in referring to the facts they rely on the documents received during the mission and on the information obtained from the persons with whom the observers had an opportunity to discuss the details of the case and of the appeal procedures.

After the hearings ended, the observers interviewed some of the defense representatives who informed them about the timeline of the events developing during the preliminary investigation and about alleged breaches of law during the investigation and the primary jurisdiction trial.

The Appeal Hearing

The criminal case was considered at the St. Petersburg City Court by the Appeal Board consisting of: Dokina, Chairperson; Board members Chulkova (rapporteur), Savelyeva, and Ivanova (secretary). The prosecution was represented by Polyakov, State Prosecutor, and the defence by attorneys Kuzmin, Novolodsky, Vartanov, Janiashvili as Stepanyan's defense, attorney Novolodsky as Sakanyan's defence, attorney defender G.O. Petrosyan as Arutyunyan's defence.

The Parties' Positions

Public Prosecutor: the Prosecutor in his appeal motion (кассационное представление) asked the Court to change the Court verdict and to remove the reference that the court take into account the aggravating circumstances in sentencing of the accused from the descriptive part of the verdict, as at a later point in the judgment the Court stated that the circumstances that aggravated the accused persons' guilt according to article 63 RFCC were not established. He also asked for the removal of another reference that in sentencing the Court took into consideration the life conditions of the accused and their families, as this circumstance is not provided for under article 60 of the RFCC.

Defendants: In his appeal, Stepanyan asked for his conviction to be quashed and for the case to be sent to a new examination starting from the phase of preliminary hearings, claiming that starting from the preliminary investigation phase the prosecution intentionally gave a wrong legal qualification to the actions of all persons accused in

this case under article 105(1) RFCC which caused a violation of his constitutional right to consideration of this criminal case by the City Court of jury. He analyzed the evidence of witnesses and found them to be interested in the outcome of the case. One of the brothers was murdered, the other was a witness of the prosecution. Stepanyan raised objections against the accusation of robbery with violence and rape claiming that he had an alibi that was supported by evidence of witnesses and also by the documents proving his stay at hotels in Lipetsk, Gelenjik, Voronezh at the date of the crime which was committed in St. Petersburg. He also cited a document ordering maintenance of his car and proving that he had received money transfers in the city of Gelenjik at this time. He considered the evidence of the witnesses and the victims to be far-fetched.

Referring to violations of art. 381(1), art. 382(2) of the RFCC, the defence lawyer Kuzmin representing the defendant Stepanyan asked that the sentence be quashed and the case to be sent to a new judicial examination. He suggested that due to an incorrect legal qualification of the accused persons' actions under art. 105(1) of the RFCC, the verdict had been delivered by an illegal composition of the court, and criminal procedure code requirements of jurisdiction had been violated. Moreover, he expressed his disagreement with the Court's position regarding the interpretation of article 252 of the RFCC and suggested that provisions of article 47(1) and (2) of the Russian Federation Constitution, art. 6(1) of the European Convention on Human Rights and Fundamental Freedoms, art. 1(1), art. 8(3), art. 11(1), art. 228, art. 227(1)(1), art. 34(3) of the RFCPC allowed the Court to return the case back to the Prosecutor for removal of factors that hinder its consideration of the case in the Court. The attorney stated that in evaluating the evidence of Stepanyan's guilt in committing the crimes provided for under articles 33(4) – 105(1), 162(2), 131(1), 161(2)(г) of the RFCC, the court violated requirements of articles 14(3), 15(3) of the RFCC. He characterized the witness statements of the witnesses as inconsistent and contradictory. He also suggested that the statements of Chatikyan and Ayrapetyan on which the accusation against Stepanyan of participation in murder was based, were evaluated by the Court without its taking into account information regarding their interest in the outcome of the case: Stepanyan was accused of murdering the brothers of the mentioned witnesses, however his guilt was not confirmed; Chatikyan and Ayrapetyan changed their statements during interrogations, and they did not eyewitness the events, and there had been no objective verification of data provided by them.

The attorney stated that the verdict did not support the judge's conclusion that Stepanyan had had personal antipathy and animosity of a personal and commercial nature in regard to Arakelyan. And the fact of Stepanyan's alibi who was in the town of Gelenjik in July-August of 2008 proves Stepanyan's non-involvement in commitment of crime against the victim, Vlasov.

The attorney referred to contradictions in defendant "Drobysheva's" statements and their inconsistency with the statements of witness Ivanyuk, who was a musician of the "Klinskoe" café, including lack of clarity as to the time at which the crime was

committed. He also disagreed with the evaluation of evidence proving Stepanyan's absence in St. Petersburg during the period indicated by "Vlasov" and "Drobysheva".

In his appeal, attorney Novolodskiy defending Stepanyan, alleged that the verdict was illegal, groundless and that the case should be sent for reconsideration by a new judicial examination starting from the phase of the preliminary hearings. He argued that, in violation of art. 229 of the RFCC, the Court had mentioned general factual information about the circumstances of the crime committed against Arakelyan and confirmed the guilt of each defendant with general evidence in contravention of the law requirements on the necessity to resolve the issue of the guilt with regard to each defendant. The allegation of Chatikyan's involvement in the murder of Arakelyan was not examined. although there were grounds to do so.

The attorney did not agree with the evaluation of the evidence in the verdict, which he considered to be faulty and insufficient to prove Stepanyan's guilt. Based on the inspection report of the crime scene and evidence of witness Miklyaev, the data about the place of the murder contained contradictions.

Moreover, on a plastic handle of the chisel collected at the scene of action for dactyloscopic examination, fingerprints were found that did not match with the fingerprints of Sakanyan. There were sufficient reasons to consider that someone purposefully replaced the handle of the chisel with one not related to the case.

In his appeal, attorney Vartanov defending Stepanyan asked to quash the verdict as illegal, groundless and delivered in violation of the requirements under article 297 of the RFCC. He stated that the Court's conclusions did not correspond to the factual circumstances of the case.

Attorney Janiashvili was also of the view that Stepanyan's guilt had not been proven, and the evaluation of the evidence had been carried out in violation of art. 299 of the RFCC.

In his appeal attorney Novolodskiy defending Stepanyan substantiated his arguments about a violation of his right to have the case considered by the Court with a composition and with a judge corresponding to the proper jurisdiction assigned to this case by the law.

When comparing the evidence given by witness Miklyaev, who indicated the place of the crime to be near the "Kinomir" store (currently called "Sumki" [Bags]) with the data from the inspection report of the crime scene containing a photo-board with the image of Arakelyan's body near the stairs leading to the "Khoztovary" [Houseware] store, Sakanyan's defense suggested that the distance between the actual place of murder recorded in the inspection report of the crime scene, and the place of murder incorrectly shown by witness Milyaev, constituted 45-50 meters. They considered that this fact

completely discredited the physical ability of the latter to distinguish the facial features of the murderers observed by Miklyaev for 5-7 seconds and made his evidence doubtful regarding identification of Sakanyan and Arutyunyan. This was confirmed by Chesnokov, a specialist in the field of engineering psychology.

Attorney Novolodskiy pointed to a violation of criminal procedure legislation, in particular the fact that the text of the verdict was dated 6 December 2010 while according to the court record and the factual data it was declared on 8 December 2010. Comparing the audio-record and the text of the verdict declared the defense found additional arguments in the printed text of the verdict.

In his appeal, attorney Petrosyan, defending Arutyunyan asked to vacate the verdict and to withdraw the criminal prosecution in regard to Arutyunyan. In particular, he noted that the description of the persons who committed the crime that was recorded in primary statements of witnesses Bobrysheva and Miklyaev did not indicate the guilt of this defendant, casting doubts on the credibility of Miklyaev's testimony. He disputed witness Chatikyan's, witness Ayrapetyan's, and witness Yablokova's testimony because they had not had eyewitness knowledge of the crime and references of each of them to their sources of information were not confirmed by anything or anybody

Thus, the defense disputed the accusations and proposed that the court verdict should be quashed for the following reasons:

- The evidence collected in the case was unacceptable, unreliable and insufficient (the tests used in the Russian criminal law) to find the accused persons guilty.

- the investigation could not collect proof of the accused persons' participation in the murder being investigated and intentionally "lowered" the legal qualification of the crime. Thus, despite the fact that the murder was committed by a group of persons with a previous agreement (the commitment of crime by a group of persons with a previous agreement is indicated in the indictment and in the Court verdict), it re-assessed the actions of the accused persons from 105(2) to art. 105(1) of the RFCC, i. e. to a crime under the jurisdiction of a District Court instead of the City Court of jury as it is provided for under article 31 of the RFCPC (jurisdiction of criminal cases)[11]. This had the consequence that the accused were tried without a jury.

[11] 3. The followings shall be subject to jurisdiction of the Supreme court of a republic, territorial or regional court, court of a city of federal importance, court of an autonomous region and court of an autonomous area:
1) criminal cases dealing with crimes provided for in articles 105 part 2, of the Russian Federation Criminal Code; (in edition of Federal laws as of 29 May, 2002 N 58-ФЗ, of 8 December, 2003 N 161-ФЗ, of 30 December, 2008 N 321-ФЗ, of 5 May, 2010 N 76-ФЗ, of 27 July, 2010 N 195-ФЗ)
By the decision of the Constitutional Court of the Russian Federation of April 6, 2006 N 3-П inter-related provisions of article 32, article 4, part 4 of the Federal Law as of August 20, 2004 N 113-ФЗ and article 8, part 1, i. 5 of the Federal Law as of December 18, 2001 N 177-ФЗ to the extent to which they regulate the issue of possible consideration by military district court with participation of jury, of criminal cases dealing with crimes of especially high gravity committed against life on the territory under jurisdiction of that court, are recognized as not contradicting the Constitution of the Russian Federation.

- Persons not accessories to the crime were convicted.

- The text of the verdict states that the verdict was delivered and published on 6 December 2010, while it follows from the court records that the court left for consultation on 6 December, 2010, returned from the consultation room and pronounced the verdict on 8 December 2010. The text of the verdict pronounced does not coincide with the printed text.

Decision of the Appeal Board (Court of Cassation)

Based on the decision of the Appeal Board it is evident that after examination of the materials of the criminal case and discussion of the arguments, the appeal court decided the verdict was to be quashed under article 381(1)[12] of the RFCPC due to the violation of the criminal procedure law, particularly provisions of article 297 of the RFCPC.[13]

The Court noticed in its determination that based on article 310(1) of the RFCPC, after the verdict is signed the court returns to the courtroom and pronounces the verdict. The verdict is the final document of the judicial proceeding that is proclaimed in the name of the State; the law outlines the significance of the judicial verdict as the essential act of justice and binds Courts to strictly observe legislative requirements applied to it. The date of the verdict determination is an integral requisite of its introductory part according to article 304 of the RFCPC. The day the judge signs the verdict and when it is pronounced shall be deemed as the date of the verdict. It is clear from the text of the verdict that it was pronounced on December 6, 2010, while according to the judicial records the date of 6 December 2010 was the day when the court just left for consultation, and its return from the consultation room and the verdict pronunciation took place on 8 December 2010.

The Court decided that this violation of the procedure of criminal justice was a substantial violation of the criminal procedure law that required unconditional abolition of the court verdict. Based on this finding, the Court quashed the verdict and sent the criminal case for a new judicial examination starting from the stage of the trial, not from the stage of preliminary hearings as had been sought by the defence. The consequence of this was that there was to be no reconsideration of question of the nature of the charges against the accused, or of the proper composition of the court which should try the case, including whether the case should be tried before a jury (RF CPC article 229). The Court noted that it had no opportunity to express its position regarding the convictions of Stepanyan, Sakanyan and Arutyunyan, pointing out that

[12] Article 381(1). Violation of the criminal procedure law: Seen as the grounds for the cancellation or for an alteration of the judicial decision by the court of the cassation instance, shall be such violations of the criminal procedural law, which by depriving of or by restricting the rights of the participants in the criminal court proceedings, guaranteed by the present Code, by the non-observation of the court proceedings or in any other way have influenced or could have influenced the passing of a lawful, substantiated and just sentence.

[13] Article 297. Legality, Substantiation and Justice of the Sentence

1. The court sentence shall be legal, substantiated and just.

2. The sentence shall be recognized as legal, substantiated and just, if it is passed in conformity with the demands of the present Code and relies on the correct application of the criminal law.

during new judicial examination it was necessary to consider arguments provided at the appeals and to come to a proper decision on this basis. The appeal complaints were partly satisfied. The prosecutor's appeal motion (представление) was also partly satisfied in connection with the relevance of arguments about general principles for sentencing provided for in article 60 of the RFCC.

The judicial board also addressed the question of measures of restraint in regard to the persons who were in detention. It ordered detention for the term of two months.

Conclusions of the Observers

As mentioned earlier in the report, the observers could not be present at the hearing as the Court ordered the session to be *in camera* even before the court hearing itself in the letter the ICJ received from the Court. The formal decision to conduct the proceedings *in camera* was made by the Court after it had barred the observers from being present in the courtroom and announced that "strangers" should leave the courtroom. However, according to article 241(2) of the RFCPC "conducting the judicial proceedings in camera shall be allowed on the ground of a court ruling or resolution". This could only have happened at a part of the hearing which should still have been public. The observers emphasize that the right to public proceedings is an important guarantee of a fair judicial examination and can be restricted only in exceptional cases. This right is contained in the European Convention of Human Rights (article 6) and the International Covenant on Civil and Political Rights (article 14), to both of which the Russian Federation is a party. Even when this right is restricted, the procedural rules regulating public access to the judicial examination must be carefully observed. In particular, this concerns the national criminal procedure legislation. Public scrutiny ensures transparency of proceedings and acts as an important safeguard for an individual and the society.[14] A public hearing allows to maintain public confidence in the justice system.[15] As the European Court has explained: "By rendering administration of justice transparent, publicity contributes to the achievement of … a fair trial, the guarantee of which is one of the principles of any democratic society".[16]

In regard to the present case, a simple reading of article 241(2) leads to the conclusion that to conduct court hearings *in camera* the court had to decide to do so. Up to the point that such a decision was made, the hearing should have been open *a priori* as it is provided for under article 241(1) of the RFCPC. Thus the decision about conducting court hearings *in camera* had to be made in an open procedure and only after that, members of the public including the observers could be required to leave the courtroom. The observers are also not aware of the reasons for the judge's requirement to file a motion for the observers to be present at the trial by the defence. The observers note that the mission of observation does not represent the interests of any of the parties

[14] UN Human Rights Committee, General Comment 32, para. 28.
[15] European Court of Human Rights, *Stefanelli v San Marino Judgement*, 8 February 2000, para. 19.
[16] *Ibid.*

in the trial and under Russian Federation law, no additional motions are needed for the observers or any other members of the public to be present at any hearing which is not closed according to the Russian law.

While *in camera* trials are not prohibited *per se*, public hearings serve as an important guarantee in protection of the rights of an accused in a criminal trial. In strictly defined circumstances, closed hearings may be seen as a legitimate limitation of the right to a public hearing, including for example where they are necessary for the protection of private life. However it should be noted that no reasons can be used as a pretext to close a hearing and in any case closing only a part of a hearing can be considered.

Without taking a position on the merits of the case, and regardless of the particular violations which served as grounds for the decision to quash the judgment, the observers consider sending the case for reconsideration to the Court of first instance to be a positive outcome of the proceedings. The Court appears to have acted appropriately its decision to remedy the procedural violations identified. It is however notable that the decision to quash the convictions was based on a relatively minor procedural point, while allegations of more conspicuous irregularities in the process raise more serious questions regarding compliance of the process with the Russian law and international human rights standards.

The investigation and the Court of the first instance qualified the crime of which all the accused were convicted as a simple murder. It follows from the text of the verdict that the Court considered a murder of one person at the same time by two people assisting each other at a preliminary instigation by a third person to be a crime falling under article 105(1) of the RFCC. The RFCC, however, considers a murder committed "by a group of persons, by a group of persons with a preliminary agreement or an organized group" as a crime falling under article 105(2)(ж). These crimes are to be tried by a jury, under RFCC Art. 30(2)(2). The defence suggested that such an obvious misqualification of the crime had not been accidental, but was a means of avoiding scrutiny by a jury. It is certainly the case that a qualification of the crime committed by a group of persons as a simple crime leads to avoidance of the jurisdiction of the jury. In this context, it should be noted that the acquittal rate in ordinary courts in the Russian Federation is usually less than one per cent, whereas the acquittal rate of the jury trial hovers around 20 per cent.[17] The defence in the case presented arguments for applying a qualification of the crime which would be in conformity with the RFCC requirements, but such arguments were ignored by all the judicial instances. The observers note with concern that the appeal court's decision to order reconsideration of the case from the trial stage, rather than from the stage of the preliminary hearings, means that questions raised by the defence regarding the proper composition of the Court, and in particular, the question of trial before a jury, are not to be reconsidered. The observers are convinced that the Court, in the re-hearing of the case, must give proper consideration to this issue taking,

[17] The State of the Judiciary in Russia, Report of the ICJ Research Mission on Judicial Reform ot the Russian Federation, on 20-24 June 2010, http://www.icj.org/dwn/database/Mission_Report_FINAL_ENG.pdf, p. 28.

into account the arguments of the defence and make a grounded decision about the qualification of the crime and its appropriate jurisdiction.

The observers recall that equality of arms is a principle of fundamental importance at every stage of the criminal procedure. Any evidence casting any doubt on the guilt of a person must be interpreted in favour of the accused.[18] This is necessary to ensure that a person receive a fair trial, which is a right guaranteed both by the Russian Federation legislation and by international treaties to which Russia is a party. The right to a fair hearing imposes an obligation on the judicial authorities of states to ensure that during the process "… a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to the decision"[19] is carried out. While the appeal did not address many of the allegations of failure to observe the Russian Federation criminal procedure law raised by the defence during the appeal hearing, the observers note that several serious concerns were pointed to by the defence in their motions. An opportunity now exists to examine these allegations and address any violations or irregularities. The ICJ observers hope that these allegations of violations of the Russian criminal procedure will be given due consideration by the Court in the re-hearing of the case.

[18] ECtHR Judgement of 6 December 1988, Barbera, Messegue and Jabardo, para. 77.
[19] EctHR Judgement of 19 April 1993, Kraska v Switzerland, para. 30.