

Case-law Information Note 261

April 2022

Advisory opinion requested by the Armenian Court of Cassation

Request no. [P16-2021-001](#)

26.4.2022 [GC]

Legal summary

Article 7

Nullum crimen sine lege

Nulla poena sine lege

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

Background and question – The request of the Armenian Court of Cassation was made in the context of criminal proceedings against two police officers implicated in the ill-treatment in April 2004 of the applicant in the case of *Virabyan v. Armenia*. In its judgment of 2 October 2012 in that case, the Court unanimously found procedural and substantive violations of Article 3. More specifically, it found 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. In the context of the Committee of Ministers' supervision of the execution of the Court's judgment under Article 46 § 2 (not as yet closed), new criminal proceedings were instituted and charges were brought against the police officers implicated in Mr Virabyan's ill-treatment under Article 309 § 2 of the Criminal Code (CC). Whilst the trial court found that the defendants had committed an offence under that 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 which had expired in April 2014. This decision was upheld by the Court of Appeal. The prosecutor lodged an appeal on points of law to the Court of Cassation which then had to determine whether the proceedings were to be considered under the aforementioned ten-year limitation period or whether they were to be seen as covered by the exception in Article 75 § 6 of the CC, whereby no limitation period could apply to certain types of offences (offences against peace and humanity or envisaged in international treaties to which Armenia was a Party and which prohibit the application of limitation periods). The Court of Cassation thus requested the Court to give an advisory opinion on the following question:

“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?”

Opinion –

(a) *General observations regarding the context of the present advisory opinion request* – The question so framed implicitly recognised the hierarchy of laws in the Armenian domestic system as enunciated in Article 75 § 6 of the CC and Article 5 § 3 of the Armenian Constitution. In particular,

the latter provision 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. Bearing in mind the Court of Cassation's reliance on Article 3 when framing the present request, the Court deemed it useful, before turning to the question asked specifically with reference to Article 7, to reiterate its case-law relating to limitation periods under Article 3 in so far as relevant for the present opinion.

In particular, the prohibition of torture had achieved the status of *jus cogens* or a peremptory norm in international law. In cases concerning torture or ill-treatment inflicted by State agents, criminal proceedings ought not to be discontinued on account of a limitation period; amnesties and pardons should not be tolerated; and the manner in which the limitation period was applied had to be compatible with the requirements of the Convention. It was thus difficult to accept inflexible limitation periods admitting of no exceptions. Moreover, the Court had found a violation of the procedural aspect of Article 3 in cases where the application of limitation periods had been brought about by the failure of the authorities to act promptly and with due diligence; where prosecutions had become 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; on account, chiefly, of the absence of appropriate provisions in the national law capable of adequately punishing acts amounting to torture. In that connection, the Court 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".

Notwithstanding, it would be unacceptable for national authorities to compensate for the failure to discharge their positive obligations under Article 3 at the expense of the guarantees of Article 7, one of which was that the criminal law must not be construed extensively to an accused's detriment. In particular, and for the purposes of the present Advisory Opinion, the Court noted that it did not follow from the current state of the Court's case-law that a Contracting Party was required under the Convention not to apply an applicable limitation period and thereby effectively to revive an expired limitation period. The Court had recognised, in the context of the reopening of proceedings, that there might be situations where it was *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 might arise, for example, in cases in which the alleged perpetrators were acquitted and could not 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 might raise issues concerning legal certainty and might thus have a bearing on a defendant's rights under Article 7.

(b) Question concerning Article 7 – The Court first reiterated the general principles developed in its case-law as regards the requirements of legal certainty and foreseeability under Article 7. In this context it recalled, *inter alia*, that, as it had held on several occasions, limitation might 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 had been committed. Limitation periods, which were a common feature of the domestic legal systems of the Contracting States, served several purposes, which included 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.

In its relevant Article 7 rulings, the Court had not found legislative changes extending a limitation period which had not yet expired to constitute a failure to comply with that provision. At the same time, it could also be deduced from its case-law, that where criminal responsibility had 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. It followed that where a criminal offence under domestic law was subject to a statute of limitation and became 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”.

In the present context, the Court had not been 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 was 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 Code of Criminal Procedure, or an already existing provision in Article 75 § 6 of the CC specifying an exception whereby no limitation period was to apply in the circumstances described therein.

Conclusion (unanimously): Where a criminal offence was subject to a statute of limitation pursuant to the domestic law and the applicable limitation period had already expired, Article 7 of the Convention precluded the revival of a prosecution in respect of such an offence.

It was 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, could provide for a sufficiently clear and foreseeable legal basis within the meaning of Article 7 to conclude that the criminal offence in question was not subject to a statute of limitation.

(See *Coëme and Others v. Belgium*, 32492/96 and 4 others, 22 June 2000, [Legal Summary](#); *Virabyan v. Armenia*, 40094/05, 2 October 2012, [Legal Summary](#); *Del Río Prada v. Spain* [GC], 42750/09, 21 October 2013, [Legal Summary](#); *Mocanu and Others v. Romania* [GC], 10865/09 and 2 others, 17 September 2014, [Legal Summary](#); *Antia and Khupenia v. Georgia*, 7523/10, 18 June 2020. See also 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, P16-2019-001, 29 May 2020, [Legal Summary](#))