HUMAN RIGHTS WATCH

January 2013 legal opinion submitted to Minister of Justice of Turkey

Lifting the statute of limitations for violations of the right to life and torture by suspected state perpetrators

Human Rights Watch considers that repealing the statute of limitations for violations of the right to life and torture by suspected state perpetrators and public officials would be an effective means of combatting Turkey's legacy of impunity for serious human rights abuses, particularly those committed during the early 1990s. Doing so would help Turkey meet its obligation under international law to prosecute and punish those responsible for violations of the right to life and torture, an obligation that cannot be negated by invoking domestic law, or a particular interpretation of domestic law. This paper considers the legal arguments against lifting the statute of limitations, in particular that doing so would amount to retrospective application, in violation of the principle of legality. It concludes that those arguments misinterpret the scope of the principle of legality and misunderstand its underlying purpose.

Background

In the wake of the September 12, 1980 military coup and through the 1990s, international bodies and local human rights groups repeatedly documented Turkey's very high incidence of torture – described by the UN Special Rapporteur on Torture as "systematic" until at least the mid '90s and subsequently as widespread - and many cases of deaths in custody. In the period 1992-96 there were hundreds of enforced disappearances in addition to thousands of unresolved killings by suspected state perpetrators concentrated in the southeast of the country but also in Turkey's major cities. There are strong grounds to argue that these crimes were part of a planned and systematic policy and therefore must be counted as crimes against humanity, a crime of universal jurisdiction which since 2005 has been included as a crime under Turkish law.

When the right of individual application to the European Court of Human Rights (ECtHR) entered into law in 1987, victims and lawyers began to bring cases to the Court, with the Court repeatedly finding serious violations of articles 2 (right to life) and 3 (prohibition on torture) of the European Convention on Human Rights. The ECtHR also established that there was a pattern in Turkey of failure to conduct effective investigations capable of leading to the prosecution of perpetrators of

these crimes. Turkey paid out significant sums of compensation to victims in these cases, but failed to open effective investigations capable of successful prosecutions of the perpetrators.

In Turkey's penal law all crimes are subject to statutory limitations determined by the possible prison sentence applicable to the crime. Under Turkey's old Penal Code (no. 765), applicable to acts committed before June 2005, crimes such as murder where the sentence is life imprisonment are subject to a 20-year statutory limitation on investigation, and up to ten years more for the trial to run; crimes such as ill-treatment and torture are subject to a range from five to ten year statutory limitation on investigation.

While the ECtHR repeatedly found Turkey to have failed victims in their search for justice for the most serious human rights violations in the country's domestic courts, the existence of limiting time frames on investigations and prosecution of the most serious abuses constitute another impediment to justice and may reinforce a pattern of impunity if prosecutors and courts accept them as valid. To date, many police officers in Turkey have escaped prosecution or conviction for torture when investigations and trials have timed out.

There are serious risks that a similar pattern will emerge as the investigations of extrajudicial executions, summary or arbitrary killings that were widespread in the period 1992 to 1996 begin to become timed out as we reach the 20-year mark.

In some of the cases where the ECtHR found violations of the right to life, domestic investigations never progressed after the ECtHR judgment and the cases are now in theory timed out if the statute of limitations is applied. Examples include Ertak v. Turkey[1] which technically timed out in August 2012; Dundar v. Turkey[2] technically timed out in September 2012.

Jurisprudence

Other cases will time out in a matter of months if statute of the limitations is strictly applied: in the case of Ahmet Özkan and others v Turkey[3] the article 2 violation aspects may be timed out in February 2013, with the article 3 violation involving mass torture of villagers having in theory timed

[1] Application No. 20764/92, judgment May 9, 2000.
[2] Application No. 26972/95, judgment September 20, 2005.
[3] Application No. 21689/93, judgment April 6, 2004.

out years ago; Mahmut Kaya v. Turkey[4] may be timed out in February 2013; Taş v. Turkey[5] may be timed out in October 2013; and, Timurtaş v. Turkey[6] may be timed out in August 2013.

Some prosecutors and courts in Turkey have already recognized and sought to address the fact that statutes of limitations can give rise to impunity for state officials who have committed serious human rights violations.

On February 22, 2012, Ankara prosecutor Kemal Cetin issued a decision of non-jurisdiction for the investigation of many claims of torture in different areas of the country in the period following the September 12, 1980 military coup (investigation no. 2012/85; decision no. 2012/137). On the basis of the case-law of the ECtHR and Turkey's obligations under the European Convention, he reasoned that the claims should be investigated by prosecutors in the relevant provinces and that statutes of limitations should not apply, stating:

> "[T]he statute of limitations can never be applied when public officials are the perpetrators of the crimes of violating the right to life, torture and ill-treatment; amnesties may not be applied to such individuals."

Another example of such reasoning can be found in the decision of Ankara specially authorized heavy penal court no. 11 in the case against certain civilian defendants on trial for the notorious arson attack that killed 35 people in a hotel in Sivas in 1993. The court reasoned that where public officials faced trial for violations of the right to life or torture they would not be able to benefit from statutory limitations. While the one defendant in the case categorized as a public official had in fact died during the trial, thus obviating any application of the principle in this case, the reasoning of the court on this point is nevertheless potentially of great relevance to future efforts to investigate and prosecute public officials for serious human rights abuse.

Ultimately the Court of Cassation will decide on the approaches adopted by the Ankara prosecutor and Ankara heavy penal court no. 11 in relation to the application of the statute of limitations in cases concerning human rights violations committed by public officials.

Legislation

Another approach to the obstacle represented by the statute of limitations would be for the parliament to pass a legal amendment to repeal its use in the cases under discussion. In late

[4] Application No. 22535/93, judgment March 28, 2000.
[5] Application No. 24396/94, judgment November 14, 2000.
[6] Application No. 23531/94, judgment June 13, 2000.

November 2012, press reports on the government's fourth judicial reform package mentioned a proposal to repeal the statute of limitations for the crime of torture. Human Rights Watch has proposed that violations of the right to life by suspected state perpetrators should also be included in the amendment and made this argument strongly in meetings with the Minister of Justice and ministry officials and jurists at the High Council of Judges and Prosecutors (HSYK) in Ankara in September following the release of the report "Time for Justice: Ending Impunity for Killings and Disappearances in 1990s Turkey."

The non-applicability of statutes of limitations to serious violations of human rights

The invocation of statutes of limitations to prevent remedy and reparation for serious violations of human rights law and international humanitarian law goes against international norms. In 2006, the United Nations General Assembly adopted by consensus the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*[7] just one year after the then United Nations Commission on Human Rights endorsed the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*.[8] Both of these instruments provide for the non-applicability of statute of limitations to serious violations of human rights law that amount to crimes under international law.[9] In a series of cases starting with Barrios-Alto v Peru in 2001, the Inter-American Court of Human Rights has repeatedly held that a statute of limitations cannot be invoked "to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary, or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law."[10] The Court has been repeatedly clear in clarifying that no non-exculpatory defenses must be applied with the effect of impunity for human rights crimes in holding that "the State may not apply amnesty laws nor argue prescription, non-retroactivity of the criminal law, former adjudication, the *non bis in idem* principle ... or any other similar means of discharging from liability, to excuse itself from this obligation [to identify, prosecute and punish those

[7] A/RES/60/147.

[8] E/CN.4/2005/102/Add.1.

[9] See principles no. 6 of the Basic Principles on Remedies and Reparation and no. 23 of the Principles to Combat Impunity.

[10] Barrios Altos v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 75, para. 41 (March 14, 2001); see also Rochela Massacre v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 163, para, 294 (May 11, 2007); Plan de Sanchez Massacre v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 116, para. 99 (November 19, 2004); Tibi v. Ecuador, Inter-Am. Ct. H.R. (ser. C) No. 114, para. 259 (Sept. 7, 2004). See also Jan Arno Hessbruegge, Justice Delayed, Not Denied: Statutory Limitations and Human Rights Crimes in *Georgetown Journal of International Law*, Vol. 43, No. 2 and Basch, Fernando Felipe. "The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers." American University International Law Review 23, no.1 (2007): 195-229.

responsible for serious crimes]."[11]

Non-retrospectivity and statutes of limitations

During our meetings, Ministry of Justice officials and jurists in different departments in the Ministry expressed the concern that any change in the law to repeal the statute of limitations for these crimes could not be applied to old cases on the ground that it would mean retrospective application in breach of the principle of legality, as laid out in article 7 of the European Convention[12] and article 15 of the ICCPR. [13]

The non-application of the statute of limitations for violations of the right to life and torture that were committed by suspected state perpetrators and public officials does not amount to a violation of the prohibition on the retroactive application of the criminal law. Nor does it conflict with the principle of legality as required by the ICCPR and the European Convention.

There are a number of reasons that this is so:

First, both treaties explicitly recognize that the principle of non-retrospectivity cannot be invoked to prevent the trial and prosecution of someone for a crime that was a crime under international law when it was committed, irrespective of the domestic legislative situation. It is absolutely clear that at the time that these crimes were committed that they were crimes under international law and that Turkey had an obligation to prosecute and punish those crimes at the time, and that this is a continuing obligation. Moreover, there is no question that the acts in question were crimes in Turkey at the time that they were committed. It is simply that the state itself has failed in its duty to act to

[11] "Las Dos Erres" Massacre v. Guatemala, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 211, para. 233 (November 24, 2009);Huilca-Tecse v. Peru, Inter-Am. Ct. H.R. (ser. G) No. 121, l 108 (March 3, 2005); La Cantuta v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162, para. 226 (November 29, 2006).

[12] ECtECHRHR ARTICLE 7

No punishment without law

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.

[13] ICCPR Article 15

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 when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall 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 recognized by the community of nations.

hold its agents accountable in a timely manner. There is no application of retrospectivity to the crimes in question.

Second, a change to the statute of limitations does not change the substance of any crime, but affects the jurisdiction of the courts to prosecute those crimes. So for example, when a special tribunal is established to prosecute past crimes in a conflict, the crimes prosecuted can only be those that existed at the time of the conflict – under national or international law. The fact that the special tribunal is established afterwards to carry out the prosecutions creates a new jurisdiction for those prosecutions. It is not an act of prohibited retroactivity. The ECtHR has itself recognized this in the case of Kononov v. Latvia[14] concerning the prosecution of a soldier in 1998 for war crimes he committed in 1944. The domestic law permitting war crimes prosecutions was only introduced in 1997, and explicitly applied to crimes committed before the law was passed. However, the domestic criminal code applicable in 1944 included a limitation period of 10 years for any crime. The ECtHR upheld the lawfulness of the Latvian legislation, both the introduction of war crimes legislation in 1997 as well as the non-applicability of the 10-year time limitation provided for in the old criminal code in force at the time. The ECtHR thereby acknowledged that human rights law allows states to introduce new jurisdictions for the prosecution of past international crimes into their domestic law and that abolition of a domestic statute of limitations that applies to past international crimes incorporated into domestic law would therefore also be permissible under human rights law and the ECtHR.

Third, the role of a statute of limitations is to encourage prompt action by the state in fulfilling its responsibilities with respect to investigation and prosecution. As a function of the rule of law it acts to prevent arbitrary action by the state, to ensure that the state cannot indefinitely hold out the threat of taking action against individuals by being able to choose whenever it wants to act irrespective of how long has passed when the offence was committed and when it has had plenty of opportunity to do so. Statutes of Limitations should never be designed to play the role of an immunity shield. If there has not been an opportunity to prosecute (for example because an amnesty has been in force, or the victim was a minor and has waited to come of age to join a suit), then this is routinely a ground on which the time provided for within a statute of limitations is reset. This is known as the principle of 'no prescription without effective recourse.'[15] It has been recognized by the UN Human Rights Committee as it applies to the obligation on states party to the ICCPR to provide a

[14] Kononov v Lativa, Application No. 36376/04, judgment May 17, 2010.

[15] See Hessbruegge, Justice Delayed, Not Denied: Statutory Limitations and Human Rights Crimes op. cit..

remedy and prosecute for human rights crimes.[16] This situation is clearly envisioned in both the old and new Turkish penal codes, which permit suspension of statutes of limitations during any period when prosecution is not possible.

Simply, where it is a failure on the part of the state to fulfill its duty to hold its state agents accountable, it cannot benefit from its own wrong-doing. To do so turns the very essence of the function of a statute of limitations on its head. A statute of limitations, should encourage prompt state action, but to invoke it as a defense to prosecution of state agents for crimes of torture and violations of the right to life, is to encourage inaction; it directly rewards a state for not fulfilling its duty to investigate and prosecute by then bestowing immunity on its agents as a direct outcome of that dereliction of duty.

Fourthly, the ban on retrospectivity applies to the substance of an offence. That is to say a person should not be prosecuted for an act or omission that was not a crime at the time it was committed, nor should they be subject to a more serious penalty then they were liable at the time the act was committed. The application of the statute of limitations does not go to the substance of the offence provided for in law (either the constituent acts, or the sanction), but is a procedural matter. Changes to a criminal procedure should not mean that crimes committed prior to the changes cannot be prosecuted.

Turkish officials also referred to the principle that a defendant should always benefit from the most favorable applicable law. They argue that a change in the application of the statute of limitations for crimes committed by agents of the state means that an official charged with such a crime is in a less favorable position than he or she was when they had the benefit of the statute of limitations, and would be immune from prosecution after the set period expired.

This interpretation is a misinterpretation and application of the principle. Its logic would mean that any government could pass a broad amnesty law, bestow immunity on all those who commit serious crimes, and even if the law were subsequently repealed claim that the repeal had no effect since it would place perpetrators at a disadvantage compared to when they had immunity.

Crucially, an official accused of responsibility for a violation of the right to life and enforced disappearance or torture, committed in the mid 1990s is at no greater due process disadvantage than an official accused of responsibility for the same crime committed in the mid 2000s or in 2012.

[16] Concluding Observations of the Human Rights Committee: Argentina, 70th Sess., October 25-26, November 1, 2000, para. 9, U.N. Doc. CCPR/CO/70/ARG (November 15, 2000). Concluding Observations of the Human Rights Committee: Croatia, 97th Sess., October 12-30, 2009, para.10, U.N. Doc. CCPR/C/HRV/CO/2 (November 4, 2009).The Committee called on Croatia to suspend the operation of the statute of limitations to allow the prosecutions of serious violations of the right to life and torture.