

**GALATASARAY UNIVERSITY
INSTITUTE OF SOCIAL SCIENCES
DEPARTMENT OF PUBLIC LAW**

**STATUTORY LIMITATIONS IN INTERNATIONAL
CRIMINAL LAW: GENOCIDE, CRIMES AGAINST
HUMANITY AND WAR CRIMES**



MASTER'S THESIS

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This work is dedicated to those who perished at the hands of evil, but still rose without fear, despair, or dismay, only to keep up the good fight.

You shall overcome one day.

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ABSTRACT

This thesis is about the (non-)applicability of statutory limitations on international crimes, in respect to personal criminal responsibility. Under the light of international instruments, and national and international case-law, this work tries to determine, whether or not statutory limitations are applicable on several international crimes. When the answer to this question is affirmative, the conditions for this application are also analysed. The 1915 (alleged) Ottoman atrocities against its Armenian population have a special Part because of its importance on this subject. Even though determining whether these atrocities constitute one of the core crimes is not a purpose of this thesis, the (non-)applicability of statutory limitations on this issue is discussed under possibilities.

The question of whether or not applying them to international crimes has always been on the table since the very first trials of WWII-era crimes. Statutes of limitations in domestic laws have often been used to create the infamous concept of “impunity” through which many perpetrators of international crimes have avoided criminal prosecution. Authors of these crimes tend to hold high- or low-ranking positions in a State’s hierarchy. Accordingly, they are able to escape from the grasp of justice for many years. The examples of this phenomenon is too numerous to count.

In this thesis, the aforementioned question of whether non-applicability of statutory limitations on “core international crimes” has become a norm of customary international law is also analysed. For this purpose, the first subject to touch upon is the crimes on which international criminal law can (and often is) applied, either by national or by international criminal tribunals and courts. This list can be summarized as genocide, crimes against humanity, war crimes, aggression, torture, enforced disappearance, terrorism, piracy, and slave trade. Although there is tendency to include more crimes into this list, the international community seems to have stayed at this point for now.

For the purposes of this thesis and for practical reasons, only three set of crimes are chosen: genocide, crimes against humanity, and war crimes. Torture and

forced disappearance are also touched upon due to their close relation to the crimes at hand and the abundance of relative case-law which also enlighten our area of research. Some of the international crimes do not bring out the question of applicability of statutory limitations and some others constitute subjects which would extend the scope of this thesis further than intended. There are only a handful of judgments touching on the crime of aggression which is also deemed as a highly-politicized crime. Terrorism, as a *sui generis* crime, is criminalized by most of the States worldwide. Consequently, there are too many judicial decisions and legislative actions to introduce a general international norm in respect to this crime. The States which are conducting legal and/or police operations on the contemporary concept of piracy generally bring the perpetrators swiftly to the grasp of the judicial authorities. Lastly, due to the minor visibility of slave trade in the modern society for the last decades, this crime is also left out of the scope.

The concept of statutory limitations and different States' approaches on this subject are also briefly discussed from a perspective of comparative law. At the end, statutory limitations are defined basically as "*the deadline for filing a lawsuit*", "*a statute providing for a timeframe within which criminal proceedings must be instituted*", "*passing of time which removes the State's power to punish*", "*a non-exculpatory procedural defense that bars prosecution of a crime (...) after a fixed period of time has lapsed in which no relevant legal action was taken*".

Throughout the thesis, the statutory limitations for the execution of the punishment, no matter how often asserted by the scholars and adopted by many countries (especially those of Civil Law systems), do not fall into the category of subjects which will be discussed in this work. Therefore, the concepts "statutory limitation", "statute of limitation", "prescription" and "time bar" relate to the time limit which bars the judicial authorities to initiate an investigation and/or a criminal trial, unless stated otherwise.

In the following part, the instruments of international criminal law are analysed in relation to whether they include provisions regarding statutory limitations. The 1948 Genocide Convention, the 1949 Geneva Conventions and its additional protocols, the 1984 Torture Convention, or the conventions regarding the

crime of enforced disappearance do not include any such provision. The statutes (or laws) of the international(ized) criminal courts and tribunals are also looked under this light. For some of these bodies, the question of (non-)applicability of statutory limitations did not surface due to either the chronologically close proximity of crimes at hand and the prosecutions taking place, or the treaty law by which those States are bound.

This brings forward the topic of international conventions, the sole purpose of which is to govern the area of statutory limitations: the 1968 UN Convention and the 1974 European Convention. While the former is accepted to have codified an already-established norm of international law, thus, letting the prohibition of statutory limitations on international crimes to be applied retroactively, the latter is only applicable to crimes after its entry-into-force. Unfortunately, neither of these conventions have attracted enough States to argue that they have evolved into creating, or at least codifying, customary international law.

On the other hand, some national and international legal bodies have chosen to interpret all the aforementioned conventions and relevant soft-law instruments to have become a part of *jus cogens*. The relationship between *lex lata* and *lex ferenda* is also touched upon in respect to this problematic.

Many national and international decisions and rulings are gathered for the purposes of this thesis. For example, the decisions of European Court of Human Rights, Inter-American Court of Human Rights, Extraordinary Chambers in the Courts of Cambodia, Supreme Iraqi Criminal Tribunal, International Criminal Tribunal for the former Yugoslavia, and of many others are deeply analysed. In addition, under two different groups (namely; the crimes in Europe and the crimes in Latin America), judgments of national criminal courts and tribunals are also included in this thesis in addition to relevant domestic legislations.

Towards the end, the 1915 (alleged) atrocities of the Ottoman Empire against its Armenian citizens are inspected in respect to (non-)applicability of statutory limitations to the relevant acts. Even though there is no single standpoint on this issue (whether these acts constitute genocide, crimes against humanity, or war

crimes, or do not arise any criminal responsibility), all three options are viewed in their connection with statutory limitations applicable to them.

Consequently, it becomes evident that the crime of genocide and the crimes against humanity cannot be applicable to these (alleged) atrocities due to the fact that they have both came into existence after the acts committed. However, if one accepts that these crimes are retroactive, (i) the (alleged) genocide against Armenians cannot prescribe; (ii) the non-applicability of statutory limitations on crimes against humanity had not become a norm by the time the (alleged) atrocities were committed; and (iii) the (alleged) war crimes during the 1915 incidents has become time-barred in respect to personal criminal responsibility.

This outcome also resonates with the general outcome of this thesis. First of all, the crime of genocide has already seen as an imprescriptible crime since the very beginning of the concept. Secondly, by the time this thesis is submitted, the crimes against humanity have become such a series of crimes that they are not subject to statutory limitations. Lastly, war crimes are still accepted to be under the margin of manoeuvre of the States which will exercise criminal jurisdiction over a crime or criminal.

Considering the possibilities created by today's technology, a lot of internet-based materials are used in the preparation of this thesis. The links to their respective websites are given between quote marks wherever applicable. Most of the judicial decisions, legislative actions, and international documents are retrieved into this work from online sources. However, they are often referred to by using their original or common denominations and without proper linkage to their websites because of the possibility that they are easy enough to pinpoint without these links.

RESUME

Cette thèse est sur la (non-)applicabilité des législations domestiques de prescription. À la lumière des instruments internationaux et de la jurisprudence nationale et internationale, ce travail essaye de déterminer si la prescription s'applique ou non aux crimes internationaux. Lorsque la réponse à cette question est affirmative, les conditions de cette demande sont également analysées. Les atrocités (présumées) ottomanes de 1915 contre sa population arménienne ont une partie spéciale en raison de son importance sur ce sujet. Bien que déterminer si ces atrocités constituent l'un des crimes internationaux fondamentaux n'est pas un but de cette thèse, la (non-)applicabilité des limitations législatives de prescription sur cette question est discutée sous les possibilités différents.

La question de savoir si les appliquer ou non aux crimes internationaux a toujours été considéré depuis les tout premiers procès des crimes de l'ère de la Seconde Guerre mondiale. Les limitations législatives de prescription en droits internes sont souvent utilisées à créer le concept infâme de "l'impunité" avec laquelle nombreux auteurs de crimes internationaux ont évité les poursuites pénales. Les auteurs de ces crimes ont tendance à occuper des postes de haut ou de bas rang dans la hiérarchie d'un État. Par conséquent, ils peuvent échapper à la justice pour de nombreuses années. Les exemples de ce phénomène sont trop nombreux à compter.

Dans cette thèse, la question susmentionnée de savoir si la non-applicabilité des limitations statutaires sur les crimes internationaux fondamentaux est devenue une norme du droit international coutumier est également analysée. À cette fin, le premier sujet à aborder est celui des crimes sur lesquels le droit pénal international peut être (et souvent est) appliqué, soit par des cours et tribunaux pénaux nationaux, soit par des cours et tribunaux pénaux internationaux. Cette liste peut être résumée comme le génocide, les crimes contre l'humanité, les crimes de guerre, l'agression, la torture, la disparition forcée, le terrorisme, la piraterie et la commerce des esclaves. Bien qu'il y ait une tendance à inclure davantage de crimes dans cette liste, la communauté internationale semble avoir séjourné à ce stade pour l'instant.

Aux fins de la présente thèse et pour des raisons pratiques, seuls trois types de crimes sont choisis: le génocide, les crimes contre l'humanité et les crimes de guerre. La torture et la disparition forcée sont également touchées en raison de leur relation étroite avec les crimes susmentionnés et de l'abondance de la jurisprudence relative qui illumine également notre domaine de recherche. Certains des crimes internationaux ne mettent pas en évidence la question de l'applicabilité des limitations statutaires et d'autres constituent des sujets qui étendraient la portée de cette thèse plus loin que prévu. Il n'y a qu'une poignée de jugements touchant le crime d'agression qui est également considéré comme un crime hautement politisé. Le terrorisme, comme un crime *sui generis*, est criminalisé par la plupart des États du monde entier. En conséquence, il existe de trop nombreuses décisions judiciaires et des mesures législatives à introduire une norme internationale générale à l'égard de ce crime. Les États qui mènent des opérations juridiques et / ou policières sur le concept contemporain de piraterie amènent généralement les auteurs rapidement à la connaissance des autorités judiciaires. Enfin, en raison de la faible visibilité du commerce des esclaves dans la société moderne depuis quelques décennies, ce crime est également exclu de cette thèse.

Le concept de prescription et les approches des différents États sur ce sujet sont également brièvement discutés dans une perspective de droit comparé. À la fin, la prescription est définie comme « le délai pour déposer un procès », « une loi prévoyant un délai dans lequel les procédures pénales doivent être engagées », « passage du temps qui supprime le pouvoir de l'État de punir », « une défense procédurale non-disculpatoire qui interdit la poursuite d'un crime après une période de temps fixe qui s'est écoulée dans laquelle aucune action en justice pertinente n'a été prise ».

Tout au long de la thèse, la prescription pour l'exécution de la peine, même si elle est affirmée par la doctrine et adoptées par de nombreux pays (en particulier ceux des systèmes de droit civil), ne tombent pas dans la catégorie des sujets qui seront discutés dans ce travail. Par conséquent, les concepts de «*statutory limitations*», de «*statute of limitations*», de «prescription» et de «barre temporelle» concernent le délai qui interdit aux autorités judiciaires d'ouvrir une enquête criminelle et / ou un procès criminel, sauf indication contraire.

Dans la partie suivante, les instruments du droit pénal international sont analysés en ce qui concerne la question de savoir s'ils contiennent des dispositions relatives à la question de prescription. La Convention de génocide de 1948, les Conventions de Genève de 1949 et ses protocoles additionnels, la Convention de Torture de 1984, ou les conventions sur la disparition forcée ne contiennent pas telles provisions. Les statuts (ou les lois) des cours et tribunaux internationaux / internationalisés sont également examinés sous cette notion. Pour certains de ces organes, la question de (non-)applicabilité des prescriptions n'a pas été abordée en raison de la proximité chronologique des crimes et des poursuites, ou bien du droit des traités par lequel ces États sont liés.

Cela présente le sujet des conventions internationales, dont le seul but est de régir le domaine des limitations statutaires : la Convention de l'ONU de 1968 et la Convention européenne de 1974. Pendant que la première soit acceptée d'avoir codifié une norme de droit international déjà établie, laissant ainsi interdire l'interdiction de prescriptions sur les crimes internationaux, la dernière n'est applicable qu'aux crimes après son entrée en vigueur. Malheureusement, aucune de ces conventions n'a attiré suffisamment d'États pour affirmer qu'ils ont évolué en créant, ou au moins en codifiant, le droit international coutumier.

D'autre part, certains organes juridiques nationaux et internationaux ont choisi d'interpréter toutes les conventions susmentionnées et les instruments de *soft law* pertinents pour conclure que cette interdiction est devenue une norme de *jus cogens*. La relation entre *lex lata* et *lex ferenda* est également abordée à l'égard de cette problématique.

Plusieurs décisions et jugements nationaux et internationaux sont recueillis aux fins de la présente thèse. Par exemple, ceux de la Cour Européenne des Droits de l'Homme, de la Cour interaméricaine des Droits de l'Homme, des Chambres extraordinaires dans les Cours de Cambodge, du Tribunal suprême d'Iraq, du Tribunal pénal international pour l'ex-Yougoslavie, et de plein d'autres sont profondément analysés. De plus, sous deux groupes différents (les crimes en Europe et les crimes en Amérique latine), les jugements des cours et tribunaux pénaux

nationaux sont également inclus dans cette thèse, en plus des législations nationales pertinentes.

Vers la fin, les atrocités (présumées) de 1915 de l'Empire ottoman contre ses citoyens arméniens sont inspectées en ce qui concerne la (non-)applicabilité de prescription aux actes pertinents. Bien qu'il n'y ait pas de point de vue unique sur cette question (que ces actes constituent un génocide, des crimes contre l'humanité ou des crimes de guerre, ou ils ne posent aucune responsabilité pénale), les trois options sont considérées en relation avec les limitations de prescription qui leur sont applicables.

En conséquence, il devient évident que le crime de génocide et les crimes contre l'humanité ne peuvent être applicables à ces atrocités (présumées) dues au fait qu'elles sont créées par le droit international après les actes commis. Toutefois, si l'on admet que ces crimes sont rétroactifs, (i) le génocide (préssumé) contre les Arméniens ne peut pas prescrire ; (ii) la non-applicabilité de prescription sur les crimes contre l'humanité n'avait pas devenu une norme au moment où les atrocités (présumées) ont été commises ; et (iii) les crimes (et délits) de guerre (présumés) au cours des incidents de 1915 sont prescrits en ce qui concerne la responsabilité pénale personnelle.

Ce résultat est parallèle à résultat général de présente thèse. Tout d'abord, le crime de génocide est toujours considéré imprescriptible depuis le début du concept. Deuxièmement, au moment où cette thèse est soumise, les crimes contre l'humanité sont devenus une telle série de crimes qu'ils ne sont pas soumis à des restrictions domestiques de prescription. Enfin, les crimes de guerre sont encore acceptés sous la marge de manœuvre des États qui exerceront la juridiction pénale sur un crime ou un criminel.

Compte tenu des possibilités créées par la technologie d'aujourd'hui, de nombreux matériaux basés sur Internet sont utilisés dans la préparation de cette thèse. Les liens vers leurs sites Web respectifs sont donnés entre les cotes, le cas échéant. La plupart des décisions judiciaires, des actions législatives et des documents internationaux sont récupérés dans ce travail à partir de sources en ligne.

Cependant, ils sont souvent appelés par utilisant ses dénominations originales ou commune et sans liens appropriés à leurs sites Web, en raison de la possibilité qu'ils soient assez faciles à les identifier sans ces liens.



ÖZET

Bu tez, şahsi cezai sorumluluk dâhilinde, uluslararası suçlar üzerinde zamanaşımı uygulanıp uygulanamayacağı üzerinedir. Bu çalışma, uluslararası metinler ile ulusal ve uluslararası yargı kararları ışığında, birtakım uluslararası suçlar üzerinde zamanaşımı hükümlerinin uygulanıp uygulanmayacağının belirlenmesini hedeflemiştir. Bu soruya verilecek yanıtın olumlu olması durumunda, bu uygulamanın şartları da ayrıca tahlil edilmiştir. 1915 Ermeni Olayları'nın bu tez içerisinde ayrıca bir bölüme sahip olmasının nedeni de, bu konu dâhilinde özellik arz etmesidir. Her ne kadar bu olayların belirli uluslararası suçlar oluşturup oluşturmadığı tezin kapsamı dışındaysa da; bu suçların her biri açısından, zamanaşımı hükümlerinin uygulanıp uygulanmayacağı değerlendirmesi yapılmıştır.

İkinci Dünya Savaşı sırasında işlenmiş suçlara ilişkin ilk yargılamalardan bu yana, zamanaşımı hükümlerinin uluslararası suçlara uygulanıp uygulanamayacağı sorunsalı önem arz etmektedir. İç hukuklardaki zamanaşımı hükümleri “cezasızlık” konseptinin yaratılmasında özellikle kullanılmaktadır. Bu konsept sayesinde, uluslararası suçların failleri, ceza soruşturma ve kovuşturmasından kaçabilmişlerdir. Bunun sebebi ise, bu faillerin genelde, yüksek veya düşük seviyede, bir devlet hiyerarşisi içerisine pozisyonları olmasından ileri gelmektedir. Bu pozisyonları ve buna bağlı güç veya korunma sebebiyle, faillerin adaletten kaçabildikleri ortadadır. Bu fenomenin örnekleri ise sayılamayacak kadar çoktur.

Bu tezde, “çekirdek uluslararası suçlar”da zamanaşımı kurallarının uygulanıp uygulanamayacağına ilişkin yukarıda bahsi geçen sorunsalın uluslararası teamül hukuku normu hâline gelip gelmediği de ayrıca analiz edilmiştir. Bu amaç doğrultusunda, değinilmesi gereken ilk konu, ulusal ve uluslararası mahkeme ve divanlarca, uluslararası ceza hukukunun uygulanabildiği (ve sıklıkla uygulandığı) suçların belirlenmesidir. Bu liste; soykırım, insanlığa karşı suçlar, savaş suçları, saldırı, işkence, zorla kaybettirme, terörizm, deniz haydutluğu ve köle ticareti olarak ortaya konulabilir. Her ne kadar bu listeye başkaca suçların da eklenmesi yönünde bir eğilim mevcutsa da; uluslararası toplum, şimdilik bu listeyi böylece kabullenmiş görünmektedir.

Tezin amacı dâhilinde ve pratik sebeplerde ötürü; soykırım, insanlığa karşı suçlar ve savaş suçları, bu tezde irdelenecek suçlar olarak seçilmiştir. İşkence ve zorla kaybettirme suçlarına ise; bahsi geçen üç kategoriye esas itibariyle yakınlığı ve konumuza ışık tutacak mahkeme kararlarının bolluğu sebebiyle, yeri geldikçe değinilmiştir. Bazı uluslararası suçların, zamanaşımı uygulanabilirliği açısından önem arz etmemesi ve bazılarının ise tezin kapsam ve amacını beklenenin çok üzerine çıkaracağı sebeplerinden ötürü, böyle bir seçim yapılmıştır. Zira örneğin saldırı suçuna ilişkin olarak ilgili mahkeme kararı sayısı oldukça az olup, bu suç aynı zamanda ziyadesiyle politik niteliktedir. Yine, *sui generis* bir suç olarak terörizm suçları dünyada birçok devlet tarafından ceza hukuku kapsamına alınmıştır. Bu sebeple de, bu suça ilişkin genel nitelikte bir norma ulaşmak için oldukça fazla sayıda mahkeme kararı ve yasal düzenleme mevcuttur. Güncel deniz haydutluğu olaylarına ilişkin olarak; bu konuda kolluk eliyle ve/veya hukuken önlem almaya yönelen devletlerin, bu suçun faillerini ivedilikle hukuki otoriteler önüne getirdikleri gözlemlenebilir. Son olarak, köle ticaretinin modern toplumun son döneminde özellikle azalmış olması sebebiyle, bu suç da tez kapsamı dışında tutulmuştur.

Zamanaşımı konsepti ve farklı devletlerin bu kuruma bakışları da, karşılaştırmalı hukuk perspektifiyle, kısaca tartışılmıştır. Sonuçta, zamanaşımı şu şekillerde tanımlanabilmiştir: “bir dava açılmasına ilişkin son mühlet”, “ceza soruşturmasının başlatılması için öngörülen zaman aralığını gösteren yasal düzenleme”, “devletin cezalandırma gücünü ortadan kaldırır şekildeki zaman geçişi”, “önceden belirlenmiş bir zaman periyodu dâhilinde ilgili yasal işlemlerin yapılmaması sebebiyle, bir suçun soruşturulmasını / kovuşturulmasını engelleyen ve fakat suçsuzluğa ilişkin olmayan usuli bir savunma”.

Tez boyunca, dava zamanaşımı ve ceza zamanaşımı arasında bir ayrım yapılmıştır. Her ne kadar doktrince ortaya konulmuş ve birçok ülke tarafından (özellikle Kıt’a Avrupası Hukuku’nu benimsemiş olanlarca) benimsenmişse de; ceza zamanaşımı tez dışında tutulmuştur. Bu sebeple, bu konuya ilişkin terimler, aksi belirtilmedikçe, dava zamanaşımını anlatır şekilde kullanılmıştır.

Takip eden bölümde, uluslararası ceza hukuku belgeleri, zamanaşımına ilişkin içerip içermedikleri hükümlere ilişkin olarak, tahlil edilmiştir. 1948 Soykırım

Sözleşmesi, 1949 Cenevre Konvansiyonları ve ek protokoller, 1984 İşkence Sözleşmesi veya zorla kaybettirmeye ilişkin uluslararası sözleşmeler, zamanaşımına ilişkin herhangi bir açık hüküm içermemektedirler. Uluslararası(laşmış) ceza mahkeme ve divanlarının statüleri (veya bunları kuran kanunlar) de ayrı bu kapsamda incelenmiştir. Bu makamların bir kısmı için, uluslararası suçlarda zamanaşımı uygulanıp uygulanmayacağı hususu ya kronolojik yakınlık sebebiyle ya da ilgili devletlerin tarafı oldukları başkaca uluslararası sözleşmeler sebebiyle önem arz etmemiştir.

Bu noktada, tek amacı bu alanın düzenlenmesi olan, 1968 ve 1974 sözleşmeleri gündeme gelmektedir. Gerçekten de 1968 (BM) Sözleşmesi'nin, hâlihazırda teamül hukukunun parçası hâline gelmiş olan bir normu kodifiye ettiği kabul edilmekte ve böylece geriye yönelik işlerlik kazanmaktadır. 1974 (Avrupa Konseyi) Sözleşmesi ise bu noktada 1968 Sözleşmesi'nden ayrılmakta ve yalnızca yürürlüğe girmesinden sonraki suçlar için hüküm ifade etmektedir. Buna karşın her iki sözleşmenin de uluslararası teamül hukukuna ilişkin bir norm yarattığı veya kodifiye ettiği hususunda tespit yapılmasını sağlayacak bir konsensüs oluşturacak kadar devleti kendisine taraf etmeyi başardıkları söylenemez.

Diğer yandan, bazı ulusal ve uluslararası yargılama makamları, yukarıda bahsedilen sözleşmeleri ve *soft-law* enstrümanları ışığında, tez konusu ilkenin *jus cogens*'in bir parçası olduğu sonucuna ulaşmışlardır. Bu problematik kapsamında önem kazanan *lex lata* – *lex ferenda* (olan hukuk – olması gereken hukuk) ilişkisine de ayrıca değinilmiştir.

Birçok ulusal ve uluslararası yargı karar ve hükümleri, tezin amaçlarına uygun olarak toplanmıştır. Örneğin; Avrupa İnsan Hakları Mahkemesi, İnter-Amerikan İnsan Hakları Mahkemesi, Kamboçya Olağanüstü Daireleri, Irak Yüksek Ceza Mahkemesi, Eski Yugoslavya için Uluslararası Ceza Mahkemesi ve daha birçok makamın kararları derinlemesine analiz edilmiştir. Öte yandan, iki farklı grup altında (“Avrupa’da işlenen suçlar” ve “Latin Amerika’da işlenen suçlar” şeklinde), yerel mahkeme kararları ve ilgili yasal mevzuat da teze dâhil edilmiştir.

Sonuca doğru yaklaşırken, Osmanlı İmparatorluğu’nun Ermeni vatandaşlarına karşı işlediği iddia edilen ve kısaca “1915 Olayları” olarak nitelendirilen fiiller de zamanaşımı hükümlerinin uygulanabilirliği kriterleri dâhilinde irdelenmiştir. Her ne kadar bu olayların soykırım mı insanlığa karşı suç mu yoksa savaş suçu mu teşkil ettiği, ya da hiçbir suç teşkil etmediği yönünde tek bir bakış açısı bulunmasa da; her üç seçenek dâhilinde zamanaşımı kurallarının uygulama alanı bulup bulamayacağı değerlendirmesi yapılmıştır.

Neticeten, soykırım suçu ve insanlığa karşı suçların, iddia edilen fiillerden sonra hukuk düzeninde ortaya çıkmış olduğu ve bu yüzden geriye dönük olarak 1915 Olayları’na uygulanamayacağı sonucuna varılmıştır. Buna karşın, şayet bu suçların geriye yürür nitelikte olduğu ihtimalinde, şu sonuçlara varılabilecektir: (i) şayet bu eylemler soykırım suçunun unsurlarını oluşturuyorsa, eylemlere ilişkin olarak zamanaşımı hükümlerinin uygulanamayacağı, (ii) insanlığa karşı suçlar açısından, bu zamanaşımsızlık kuralının, iddia edilen fiillerin işlenme tarihi itibarıyla, uluslararası hukuk normu hâline gelmediği, ve (iii) 1915 Olayları kapsamında işlendiği iddia edilen savaş suçlarının, kişisel cezai sorumluluk anlamında, zamanaşımına uğramış olduğu.

Keyfiyet, tezin genel sonuçları ile de paraleldir. Öncelikle, soykırımın suç olarak kabul edildiği zamandan bu yana, tamamen zamanaşımsız olarak benimsendiği ortadadır. İkincisi, bu tezim teslim edilme tarihi itibarıyla, insanlığa karşı suçların da zamanaşımı hükümlerine tabi olmadığı sonucuna varılmıştır. Son olarak, savaş suçlarının ise hâlâ olay veya şahıs hakkında cezai takibat yapmak yetkisini kendisinde gören ülkenin iç hukukunun zamanaşımına ilişkin düzenlemelerine tâbi olduğu kabul edilmelidir.

Bu tezin hazırlanmasında, günümüz teknolojisinin ortaya koyduğu fırsatlardan yararlanmak mümkün olmuş, böylece birçok internet tabanlı kaynak kullanılmıştır. Mümkün olan her ihtimalde, tırnak işaretleri arasında, ilgili internet sitelerine gerekli linkler verilmiştir. Birçok mahkeme kararı, ulusal yasal düzenleme ve uluslararası doküman, bu surette internet üzerinden temin edilmiştir. Buna karşın, bu son üç gruba, orijinal ve bilindik kısaltmalar kullanılarak göndermeler yapılmış ve

referanslarda bulunulmuş, temine ilişkin internet adreslerine link verme yöntemi kullanılmamıştır.



INTRODUCTION

International criminal law can be defined basically as a field of public international law where the *hostis humani generis*¹ is prosecuted and put into trial. Perpetrators of genocide, crimes against humanity or war crimes, wagers of aggressive wars, authors of grave violations of human rights, pirates, slave traders, and terrorists – international criminal law is used to deal with them all.

It is not easy to put these people before criminal authorities to be held responsible of their crimes. For they are either at the highest ranks of a State (e.g. for aggression and conspiracy to commit genocide) or holding official positions in it (or behaving in a *de facto* capacity) (e.g. for war crimes and torture), or simply proving too hard to be brought before justice (e.g. for piracy *jure gentium*). This results in the infamous concept of impunity.

Fighting impunity is among the foremost aims of international criminal law. To the actualisation of this, the system has gradually adopted new principles (such as criminality of heads of States in respect to core international crimes) and new modes of liability (such as command responsibility and joint criminal enterprise).

¹ Eng: “enemy of [all] mankind”. The term is first used in respect to “piracy *jure gentium*” to show the universal jurisdiction applicable by every State concerning itself and dealing with this crime. *de Than and Shorts* observe the following: “(...) *accepted abhorrence of piracy worldwide, that it is now recognised as one of the few international crimes having universal jurisdiction as well as coming under the umbrella of customary international law. Thus, by committing the crime of piracy the offenders have put themselves outside the pale and protection of all states, i.e. the pirates have become hostis humani generis. As a result, it is now universally acknowledged that all States possess the jurisdiction and responsibility to arrest and prosecute those involved in piratical acts.*” (Clair de Than / Edwin Shorts, **International Criminal Law and Human Rights**, First Edition, Sweet & Maxwell, London, 2012, p.257, para.9-001). However, other international crimes have become so rampant and gradually fallen under the category of universally-prosecutable crimes in a way that it is now possible to say that the offenders of core international crimes are also viewed as *hostis humani generis*. For example in the case of *Filargita*, the US Court of Appeals decided that “*Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become — like the pirate and slave trader before him — hostis humani generis, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.*” (USA, *Filargita*, United States Court of Appeals, Second Circuit, “*Filartiga v. Pena-Irala*”, 630 F.2d 876 (1980), 30 June 1980) (emphasis added). For the contemporary use of this term in respect to the international crime of terrorism, see; Douglas R. Burgess Jr., “Hostis Humani Generi: Piracy, Terrorism and a New International Law” in **University of Miami International and Comparative Law Review**, Vol. 13, Spring 2006, pp.293-341.

Non-applicability of statutory limitations on international crimes has also become a tool to fight impunity, surfacing in the immediate aftermath of World War II². Crimes committed by Nazis and their collaborators, the ones which are committed in Cold War era communist States, or during junta regimes have been always vulnerable to be time-barred according to domestic criminal provisions. To the detriment of this phenomenon and the benefit of the fight against impunity, the subjects of international criminal law have developed the theory of non-applicability of statutory limitations on international crimes. In this thesis, the question of whether this theory has evolved into a norm of international law, and if so, whether it encompasses all of core international crimes will be answered.

A) Crimes under International Criminal Law

There are several types of international crimes which have been accepted by sources of international law, may it be of national character or by statutes of international criminal tribunals.³ These can be catalogued as follows: genocide, crimes against humanity, war crimes, aggression, forced disappearance, torture, terrorism, piracy, and slave trade.⁴

Under this chapter, the definitions of these crimes will be shown as briefly as possible under the light of their respective and/or widely accepted documents, for the limited purposes of this thesis. The so-called “core international crimes” will be described first (Sub-chapter 1), and then the crimes which are also relevant to our research will be discussed (Sub-chapter 2). Lastly, other crimes (of least relevance) will be touched upon (Sub-chapter 3).

1- Core international crimes

The term “core international crimes” should not be considered as a binding category, but rather a deduction from the decisions of national and international

² Hereinafter mentioned as “WWII”.

³ For the concept of “international crime”, see; Roger O’Keefe, **The Concept of an “International Crime”**, United Nations Audiovisual Library of International Law, 2011.

⁴ Antonio Cassese, **International Law**, Second Edition, Oxford University Press, New York, 2005, p.436-451; Antonio Cassese, **International Criminal Law**, Oxford University Press, New York, 2003, p.80-183; Ilias Bantekas / Susan Nash, **International Criminal Law**, Third Edition, Routledge-Cavendish, London, 2007, p.113-232.

criminal procedures, of statutes of international criminal courts and tribunals, and of scholarly works.

Most of the national criminal codes and statutes of international tribunals since Nuremberg trials provide the punishability of these crimes which “*involve the violation not only of rules of conventional law, but also of customary law.*”⁵

The Article 5 of the 1998 Rome Statute also entails that only these crimes are under jurisdiction of the International Criminal Court (if, of course, other criteria are met), which are genocide (a), crimes against humanity (b), war crimes (c), and aggression (d).⁶

a. Genocide:

The Article 2 of The Convention on the Prevention and Punishment of the Crime of Genocide which was adopted by the United Nations General Assembly on 9 December 1948 as General Assembly Resolution 260 defines the crime of genocide as

*“any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.”*⁷

⁵ Ruth Alberdina Kok, **Statutory Limitations in International Criminal Law**, PhD thesis (Academisch Proefschrift), University of Amsterdam, 2007, p.17.

⁶ A Special Rapporteur of the UN International Law Commission, in the Commission Report of 65th Session in 2013 (A/68/10) Annex B, considers only genocide, crimes against humanity, and war crimes as “core crimes” and notes that “*A fourth core crime is expected to become an operable part of the International Criminal Court’s jurisdiction – the crime of aggression.*”

⁷ Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948. U.N.T.S. No. 1021, vol. 78 (1951), p. 277

b. Crimes against Humanity:

Although there is no single definition of crimes against humanity under international law, there are several documents which are widely accepted by international community and/or applied by international tribunals.

The notion of crimes against humanity was introduced for the first time in 1915, in respect to the atrocities against the Armenian population in the Ottoman Empire, by the joint declaration of British, Russian and French governments: *“In view of those **new crimes of Turkey against humanity and civilization**, the Allied governments announce publicly to the Sublime-Porte that they will hold personally responsible these crimes all members of the Ottoman government and those of their agents who are implicated in such massacres.”*⁸

In the aftermath of the WWII, the Allies have included the crimes against humanity into the list provided by the Charter of the International Military Tribunal (IMT)⁹ even though Article 6 of the London Charter limits the scope of this crime within the context of a war:

*“(...) The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (...) (c) **CRIMES AGAINST HUMANITY**: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”*

⁸ “Telegram sent by the US Embassy in Constantinople to the US Department of State on May 29, 1915” (emphasis added) (Cited in: Cassese, **International Criminal Law**, p.101) (The full text of the dispatch is retrieved from and can be found on the official website of the Armenian National Institute in Washington, DC: “http://www.armenian-genocide.org/Affirmation.160/current_category.7/affirmation_detail.html”) (Access date: 15 July 2017).

⁹ “Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis. Signed at London, on 8 August 1945” and “Charter of the International Military Tribunal” to the said Agreement (UN Treaty Series No.251, 1951, pp.280-300)

Whereas the definition of the crimes against humanity that is embodied into the Rome Statute of the International Criminal Court¹⁰ which 124 States-party have ratified or acceded into¹¹, rejects this limit. Article 7 of the Rome Statute sets forth the following:

“1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

c. War crimes:

War crimes can be defined very broadly as *“violations of laws and customs of war.”*¹² They can be traced to as early as Ancient Greece.¹³ Even in the Old Testament, there are provisions which are related to wartime measures to be taken by

¹⁰ “Rome Statute of the International Criminal Court”, Rome, 17 July 1998. UN Treaty Series, vol. 2187, p.3. (Retrieved on 15 July 2017 from the official website of the UN Treaty Collection: “<https://treaties.un.org/doc/Publication/UNTS/Volume%202187/v2187.pdf>”)

¹¹ As of 15 July 2017, there are 124 State-parties and 139 signatories to the Statute. This number drops severely in respect to the amendments to the Statute, particularly in relation to the Kampala Amendments of 2010. There are several signatories which have repealed their signatures, including Russia and Sudan. (This information was retrieved from the official websites of the Assembly of the State-parties to the ICC and of the UN Treaty Collection: “<https://asp.icc-cpi.int/>” and “<https://treaties.un.org/>” respectively.)

¹² Cassese, **International Law**, p.437.

¹³ *Homer*, in his epic work *Iliad*, narrates the death of Hector at the hands of Achilles who later exposes and mistreats his body before the Trojans (Homer, ...)

the Israelites.¹⁴ Islamic Law also protects, *inter alia*, a category of persons who normally do not take part in hostilities.¹⁵

This category includes prohibition of certain methods of warfare (commonly known as *The Hague law* after the city where 1899 and 1907 peace conferences were held¹⁶) and protection of certain categories of persons and objects (also known as *Geneva law* which consists of, among others, the 1929 Conventions, the 1949 Conventions, the 1977 Protocols, and the 2005 Protocol)¹⁷.

¹⁴ Deuteronomy 20:12-13-14 “*And if it will make no peace with thee, but will make war against thee, then thou shalt besiege it: / And when the Lord thy God hath delivered it into thine hands, thou shalt smite every male thereof with the edge of the sword: / But the women, and the little ones, and the cattle, and all that is in the city, even all the spoil thereof, shalt thou take unto thyself; and thou shalt eat the spoil of thine enemies, which the Lord thy God hath given thee.*” (**Illustrated Bible – (Authorized) King James Version**, Collins, China (not dated)).

¹⁵ “*During war, it is not permissible to kill women, children, elderly, or those who are blind, paralyzed, or one-handed (...)*” Ömer Nasuhi Bilmen, **Hukuki İslâmiyye ve Istılahatı Fıkhiyye Kamusu**, Bilmen Yayinevi, İstanbul (not dated), p.368 (in Turkish) (Translation belongs to the author of this work.).

¹⁶ 1899: “Convention for the Pacific Settlement of International Disputes”, “Convention with respect to the Laws and Customs of War on Land”, “Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864”, “Declaration concerning the Prohibition of the Discharge of Projectiles and Explosives from Balloons or by Other New Analogous Methods”, “Declaration concerning the Prohibition of the Use of Projectiles with the Sole Object to Spread Asphyxiating Poisonous Gases”, and “Declaration concerning the Prohibition of the Use of Bullets which can Easily Expand or Change their Form inside the Human Body such as Bullets with a Hard Covering which does not Completely Cover the Core, or containing Indentations”.

1907: “Convention for the Pacific Settlement of International Disputes”, “Convention respecting the Limitation of the Employment of Force for Recovery of Contract Debts”, “Convention relative to the Opening of Hostilities”, “Convention respecting the Laws and Customs of War on Land”, “Convention relative to the Rights and Duties of Neutral Powers and Persons in case of War on Land”, “Convention relative to the Legal Position of Enemy Merchant Ships at the Start of Hostilities”, “Convention relative to the Conversion of Merchant Ships into War-ships”, “Convention relative to the Laying of Automatic Submarine Contact Mines”, “Convention concerning Bombardment by Naval Forces in Time of War”, “Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (of 6 July 1906)”, “Convention relative to Certain Restrictions with regard to the Exercise of the Right of Capture in Naval War”, “Convention relative to the Establishment of an International Prize Court”, “Convention concerning the Rights and Duties of Neutral Powers in Naval War”, and “Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons”.

¹⁷ 1929: “Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field” and “Convention relative to the Treatment of Prisoners of War”.

1949: “Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field”, “Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea”, “Convention relative to the Treatment of Prisoners of War”, and “Convention relative to the Protection of Civilian Persons in Time of War”.

1977: “Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts” and “Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts”.

2005: “Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem”.

The 1998 Rome Statute also defines these crimes in detail in its Article 8.¹⁸

d. Aggression:

The crime of aggression is considerably a newer concept considering the fact that waging a(n aggressive) war had been one of the most prominent features of international diplomacy until the 20th century. The first successful application of the provisions relating to this crime was revealed by the post-WWII *ad hoc* tribunals, namely the International Military Tribunal and the International Military Tribunals in the Far East.¹⁹

Article 6 of the IMT Charter annexed to of the London Agreement of 1945, although using the term “crime against peace” instead of “aggression”, sets forth the following:

“The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing; (...)”

Article 8 *bis* of the Rome Statute also provides a definition of this crime, after the 2010 Kampala Amendments²⁰:

¹⁸ For further information, see; Knut Dörmann, **Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary**, ICRC, Cambridge University Press, Cambridge, 2003.

¹⁹ Before the establishments of the IMT and the IMTFE, post-WWI era also brought forward the possibility of prosecution of Kaiser Wilhelm II who was deemed to have caused the “Great War”. Even though Article 227 of the Treaty of Versailles (“Treaty of Peace between the Allied and Associated Powers and Germany”) provided for his prosecution, he was never put on trial. (William A. Schabas, **Uluslararası Ceza Mahkemesine Giriş**, 2. Bası, Cambridge University Press, Cambridge, 2004, Çeviren: Gülay Arslan, Uluslararası Af Örgütü Türkiye Şubesi, Legal Yay., İstanbul, 2006, p.17-18 (in Turkish))

²⁰ “Review Conference of the Rome Statute of the International Criminal Court” took place between 31 May and 11 June 2010 and resulted with two amendments. The crime of aggression is incorporated into the Statute as its Article 8 *bis*, by Resolution RC/Res.6 (“Adopted at the 13th plenary meeting, on 11 June 2010, by consensus”), and in accordance with the UN General Assembly Resolution 3314 (XXIX) of 14 December 1974.

“1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations. (...)”

2- Related international crimes

Even though the core international crimes are mainly the ones which are put under the jurisdictions of international(ized) criminal courts and tribunals, may it be permanent or *ad hoc*, there are several more crimes punishability of which are provided by either treaty law, customary international law, or both.

Considering the main purpose of this thesis, these crimes also need a special consideration because of the contemporary developments in this regard. Under this chapter, the crimes of forced disappearance (a) and torture (b) will be briefly laid down.

These crimes are not only prohibited in relation to wartime offences or to as widespread and systematic atrocities, but also as single acts. This is mainly the outcome of recent developments in international law, particularly in relation to internal conflicts and times of political instability.

a. Torture

Torture is such a conduct that international criminal law penalises it as a war crime²¹, as a crime against humanity²², and even as a genocidal act²³. Additionally, torture has also “secured its place” under international criminal law, as a discreet *sui*

²¹ “Common Article 3 of the 1949 Geneva Conventions explicitly prohibits “cruel treatment and torture [and] outrages upon personal dignity, in particular humiliating and degrading treatment” with respect to persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause.” (Practice Relating to Rule 90 of the ICRC Customary Law Principles)

²² e.g. Article 7 of the 1998 Rome Statute sets forth that “For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (...) (f) Torture; (...)”

²³ Article 2 (b) of the 1948 Genocide Convention accepts “[c]ausing serious bodily or mental harm to members of the group” as a genocidal act.

generis crime. Thus, even if it is done as a single atrocity without a large-scale practice or a link to an armed conflict, its perpetrator may be held responsible before criminal authorities. This is mainly because of its outrageous character and the need to punish its authors even if it does not amount to one of the core international crimes.²⁴ This perspective is also promoted by the ICTY in the decisions *Furundžić*²⁵ and *Kunarac and others*²⁶ and by the ICTR in *Akayesu*²⁷.

Article 1 (1) of the 1984 Torture Convention defines torture as

*“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”*²⁸

b. (En)Forced Disappearance

The term “forced disappearance” and the criminalization of it as a separate crime was the result of atrocities under junta regimes in South America. While these acts may constitute, as long as they are perpetrated as part of systematic and

²⁴ ICTY, *Furundžić*, Trial Chamber, “Prosecutor v. Anto Furundžić”, Judgement, 10 December 1998, para.146: “The existence of this corpus of general and treaty rules proscribing torture shows that the international community, aware of the importance of outlawing this heinous phenomenon, has decided to suppress any manifestation of torture by operating both at the interstate level and at the level of individuals. No legal loopholes have been left.” (Cited in: Cassese, **International Criminal Law**, p.151).

²⁵ ICTY, *Furundžić*, Trial Chamber, “Prosecutor v. Anto Furundžić”, Judgement, 10 December 1998, para.162.

²⁶ ICTY, *Kunarac and others*, Trial Chamber, “Prosecutor v. Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković”, Judgement, 22 February 2001, para. 488-497.

²⁷ ICTR, *Akayesu*, Trial Chamber I, “The Prosecutor versus Jean-Paul Akayesu”, Case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 593.

²⁸ “UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”; adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984; entered into force on 26 June 1987, in accordance with its article 27 (1).

widespread atrocities, crimes against humanity, sole events are also regarded punishable by international law.

The Inter-American Convention on the Forced Disappearance of Persons (IACFDP)²⁹ and the UN International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED)³⁰ are the main treaties which regulate this area and their definitions do not contain considerable differences.

Article II of the IACFDP sets forth that *“the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees”* constitutes a forced disappearance.

The ICPPED uses the term “enforced disappearance” under its Article 2 which defines the act as

“the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”

3- Other international crimes

In contemporary international law, it is endorsed by some of the States and received by various authors that certain transnational crimes (such as drugs

²⁹ The full text is retrieved from and can be found on the official website of the Organization of American States: “<http://www.oas.org/juridico/english/treaties/a-60.html>” (Access date: 15 July 2017).

³⁰ UN Treaty Series Vol. 2716, 2010, I. Nos. 48088, p.56.

trafficking, corruption of foreign officials and smuggling migrants³¹) should be criminalized under international criminal law.³² These crimes are mostly dealt with intra-State cooperation and national courts. Additionally, only a few international judicial bodies have thus far been authorised to exercise jurisdiction over criminal responsibilities of alleged perpetrators under treaty law or customary law.

Some others, like *apartheid*, seem to be criminalized under international law by their respective multilateral conventions³³. However, the developments in this area of law have either precluded or have not yet reached to the possibility for an international body to exercise jurisdiction over them.³⁴

On the other hand, the crimes which are listed below should be accepted as criminalized under international law due to their character and to decisions of various international bodies which have applied jurisdiction over them.

a. Terrorism

Even though terrorism, like forced disappearance and torture, may constitute sub-categories of crimes against humanity³⁵ or war crimes³⁶, it is also considered to be a discreet international crime.³⁷

³¹ Cryer/Friman/Robinson/Wilmshurst, **An Introduction to International Criminal Law and Procedure**, Second Edition, Cambridge University Press, Edinburgh, 2011, p.334.

³² Roger S. Clark, "Amendments to the Rome Statute of the International Criminal Court Considered at the first Review Conference on the Court, Kampala, 31 May-11 June 2010", **Goettingen Journal of International Law** 2, Goettingen, 2010.

³³ The [UN] International Convention on the Suppression and Punishment of the Crime of Apartheid, New York, 30 November 1973.

³⁴ *Dugard*, among others, refers to the fact that no one in South Africa was prosecuted for crime of apartheid. He also invokes the provisions of the 1977 Additional Protocol I of the Geneva Conventions and the 1998 Rome Statute which provide the punishability of *apartheid* as a grave breach of the Protocol or an act of "crime against humanity" respectively. He then concludes: "*the Apartheid Convention is dead as far as the original cause for its creation – apartheid in South Africa – is concerned, but that it lives on as a species of the crime against humanity, under both customary international law and the Rome Statute of the International Criminal Court.*" (John Dugard, **Convention on the Suppression and Punishment of the Crime of Apartheid**, United Nations Audiovisual Library of International Law, 2008) (Retrieved from the official website: "http://legal.un.org/avl/pdf/ha/cspca/cspca_e.pdf") (Access date: 16 July 2017) (emphasis added).

³⁵ For further reading, see; Cassese, **International Criminal Law**, p.175; and, Cryer et al., *ibid*, p.351.

³⁶ For example; Article 33(1) of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) of 1949 prohibits "*all measures of intimidation or of terrorism.*"

³⁷ M. Yasin Aslan, **Defense against Terrorism in International Criminal Law**, 1. Baskı, Bilge Yay., Ankara, 2014, p.23-25 (in Turkish).

Due to the political character of this crime, numerous international documents which are governing this area, and hundreds of national law (and accordingly, national points-of-view) declaring themselves over both national and international terrorist acts, there is no single definition of terrorism under international law.³⁸

For example; in respect to Pan Am Flight 103 bombing trial (*Lockerbie bombing*), Scottish Court in the Netherlands³⁹ has exercised British law. The Special Tribunal for Lebanon (STL), although an internationalized tribunal in nature⁴⁰, applied the terrorism-related legislations of Lebanese law in the same way.⁴¹

Cassese, the first President of the STL, deduces elements of the crime of terrorism from several sources which are mentioned foregoing and from decisions of the (inter)national judiciary and consultative bodies:

*“terrorism consists of (i) acts normally criminalized under any national penal system, or assistance in the commission of such acts whenever they are performed in the time of peace; those acts must be (ii) intended to provoke a state of terror in the population or to coerce a state or an international organization to take some sort of action; and finally (iii) are politically or ideologically motivated; that is, are not based on the pursuit of private ends.”*⁴²

³⁸ Micaela Frulli, “Le droit international et les obstacles à la mise en œuvre de la responsabilité pénale pour crimes internationaux” in (sous la direction de) Cassese/Delmas-Marty, **Crimes Internationaux et Juridictions Internationales**, 1^{re} édition, Presses Universitaires de France, Paris, 2002, p.221 : “La communauté internationale n’a pas réussi à donner une définition générale du crime de terrorisme international.”

³⁹ “The High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998” was the main document governing these trials. Article 3 (2) of the Order sets forth that “*Except as provided for in this Order, proceedings before the High Court of Justiciary sitting in the Netherlands shall be conducted in accordance with the law relating to proceedings on indictment before the High Court of Justiciary in Scotland.*” (The full text of the order is retrieved from and can be found on the official website of the British government on legislative issues: “<http://www.legislation.gov.uk/ukxi/1998/2251/article/1/made>”) (Access date: 15 July 2017).

⁴⁰ Situated “in Leidschendam, near The Hague, Netherlands”, established “by an Agreement between the United Nations and the Lebanese Republic pursuant to Security Council resolution 1664 (2006) of 29 March 2006”, and composed of Lebanese and international judges who are “appointed by the [UN] Secretary-General”. (Information retrieved from the official website of the STL: “www.stl-tsl.org” and from the Statute of the STL on the same website.) (Access date: 15 July 2017).

⁴¹ Article 2 of the Statute of the STL (Cited in: Cryer et al., *ibid*, p.187; Cassese, *ibid*, p.149).

⁴² Cassese, *ibid*, p.165

b. Piracy

Piracy, since the Age of Discoveries, has been perceived by the Western civilizations as one of the most heinous crimes due to the risk it imposes onto the trading operations and the well-beings of the crews and passengers on board of ocean-going vessels.⁴³ Therefore, these early imperialistic powers proclaimed piracy as a *jure gentium* crime which allowed (and has been allowing⁴⁴) every State to prosecute pirates wherever they may be found.⁴⁵

The 1982 United Nations Convention on the Law of the Sea, in its Article 101 (which is accepted to have codified the customary law on this issue⁴⁶ and “*which repeats the wording of the Geneva Convention on the High Seas 1958*”⁴⁷), sets forth that

“*Piracy consists of any of the following acts:*

(a) *any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:*

(i) *on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;*

(ii) *against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;*

⁴³ For example, the Ottoman relationship with Barbarian corsairs and the Ottoman treaties with European States to combat the menace of Barbarian piracy are quite peculiar. For further elaboration on this subject (in Turkish): Öktem/Kurtdarcan, **Deniz Haydutluğu ve Korsanlık - Tarihi ve Hukuki Boyutlarıyla**, 1. Baskı, Denizler Kitabevi, İstanbul, 2011.

⁴⁴ See, for example, the trial of a Somali pirate captain who was detained on board of an Iranian vessel: He and his crew had taken over the command of the ship and used it as a base of operations to further hijack bigger ships at the open sea. The Dutch ship *HMS Tromp*, which was on duty as a part of NATO's *Operation Ocean Shield*, intervened and taken the captain and a part of the crew into custody and brought them to the Netherlands. The captain was convicted of the crime of piracy as a result of the application of “universal jurisdiction” principle. (Netherlands, *Prosecutor v. V01*, Court of Appeal of The Hague, 22-004920-12 (ECLI:NL:GHDHA:2014:1006), Appeals Judgment, 21 March 2014) (Retrieved from and can be found on the official case-law website of the T.M.C. Asser Institute: “<http://www.internationalcrimesdatabase.org/Case/3261>”) (Access date: 15 July 2017).

⁴⁵ Piracy is accepted to be the first crime to which universal jurisdiction may be exercised. Cryer *et al.* assert the reasoning of this as “*piracy, which is subject to universal jurisdiction owing to it occurring, by definition, on the high seas*” (Cryer *et al.*, *ibid*, p.51).

⁴⁶ Öktem/Kurtdarcan, *ibid*, p.55.

⁴⁷ Martins Paparinskis, “Piracy” in Antonio Cassese (editor in chief), **The Oxford Companion to International Criminal Justice**, Oxford University Press, 2009, p.455.

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."

c. Slave Trade

Even though the prohibition of slavery under international law is a long-established rule⁴⁸, only slave trade was accepted to be an international crime. There have been, in fact, numerous international courts to have jurisdiction on slavery-related issues, particularly in respect to slave trade, long before the establishment of post-WWI tribunals.⁴⁹ A British court also deemed this act to be a "*trade contrary to the general law of nations.*"⁵⁰

Article 1 of the 1926 Slavery Convention⁵¹ provides that

"(2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves."

The 1982 United Nations Convention on the Law of the Sea, in its Article 99, stipulates that

"Every State shall take effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall ipso facto be free."

⁴⁸ the 1926 Slavery Convention; the 1930 Forced Labour Convention; the Universal Declaration of Human Rights Art.4; ICCPR art.8; ECHR Art.4; the 1956 UN Supplementary Slavery Convention etc.

⁴⁹Jennifer S. Martinez, "Anti-Slavery Courts and the Dawn of International Human Rights Law" in **Yale Law Journal**, Vol. 117, Fall 2007, p. 550 (also, Stanford Public Law Working Paper No.984077).

⁵⁰ UK, *the Fortuna*, Admiralty Court, 1811 (165 Eng. Rep. 1240).

⁵¹ "The Convention to Suppress the Slave Trade and Slavery", League of Nations Treaty Series, Vol. 60, pp. 253–270.

Article 110 of the same convention which bears the title of “*Right of visit*” justifies a warship to board a foreign ship on the high seas if “*the ship is engaged in the slave trade.*” It seems that the drafters of this provision considered the right to visit as a use of police force.⁵²

Finally, it is also important to note that the IMT Charter of 1945 recognized “*enslavement*” as a war crime, and “*deportation to slave labor*” as a crime against humanity.⁵³

B) Concept of Statutory Limitations

Under national criminal laws, a statutory limitation is a time limit which either bars the prosecution to open investigation against the suspect or forbids the State authorities to execute a penal decision of a criminal court upon the convicted.⁵⁴ As pointed out incisively by the Supreme Court of Illinois, US,

“*Statutes of limitations in criminal cases differ from such statutes in civil cases, in that in the latter they are statutes of repose while in the former they create a bar to the prosecution.*”⁵⁵

The statutory limitations for the execution of the punishment, no matter how often asserted by the scholars and adopted by many countries (especially those of Civil Law systems), do not fall into the category of subjects which will be discussed in this work. This is mainly because the modern criminal laws often do not accept an accused to be tried completely *in absentia* due to the fair trial standards. In addition, once the accused tried and found guilty through an appropriate legal process, it is up to the administrative authorities of the State (or in respect to decisions of international criminal organs, the State authorities which are empowered by treaty law) to execute this decision. Lastly, as pointed out correctly by Kok, “*in the*

⁵² Hüseyin Pazarcı, **Uluslararası Hukuk**, 8. Bası, Turhan Kitabevi, Ankara, 2009, p.287 (in Turkish).

⁵³ Article 6 of the London Charter of the International Military Tribunal.

⁵⁴ Valérie Malabat, “Prescription et imprescriptibilité des infractions internationales”, in (sous la direction de) Ascensio/Dcaux/Pellet, **Droit International Pénal**, 2eme édition révisée, CEDIN, Edition Pedone, Paris, 2012, p.580-581. Micaela Frulli, “Le droit international et les obstacles à la mise en œuvre de la responsabilité pénale pour crimes internationaux”.

⁵⁵ USA, *People v. Ross*, Supreme Court of Illinois, 325 Ill. 417, 420, 156 N.E. 303, 304 (1927).

*national and international debates, the emphasis is on the [first] category of statutes.”*⁵⁶

Therefore, in this work, the concepts “statutory limitation”, “statute of limitation”, “prescription” and “time bar” will relate to the time limit which bars the judicial authorities to initiate an investigation and/or a criminal trial, unless stated otherwise.

In consequence, statutory limitations can be defined basically as “*the deadline for filing a lawsuit*”⁵⁷, “*a statute providing for a timeframe within which criminal proceedings must be instituted*”⁵⁸, “*passing of time which removes the State’s power to punish*”⁵⁹, “*a non-exculpatory procedural defense that bars prosecution of a crime (...) after a fixed period of time has lapsed in which no relevant legal action was taken*”⁶⁰, “*the reason (...) which topples the relation of criminality between the defendant and the State*”⁶¹, or “*rules which state that after the expiration of a certain time since committing a crime criminal prosecution becomes inadmissible.*”⁶²

Traditionally, this concept is studied under two main points: whether it is considered to be a part of substantive criminal law or criminal procedural law (Sub-chapter 1), and comparative studies on it and its application by various legal systems (Sub-chapter 2).

⁵⁶ Kok, *ibid*, p.25.

⁵⁷ The official website of the California Courts (The Judicial Branch of California): “<http://www.courts.ca.gov/9618.htm>” (Rights reserved by “Judicial Council of California [, US]”, 2017) (Access date: 15 July 2017).

⁵⁸ Kok, *ibid*, p.24.

⁵⁹ Timur Demirbaş, **Ceza Hukuku Genel Hükümler**, 6. Bası, Seçkin Yayıncılık, Ankara, 2009, p. 678 (in Turkish) (Tr: “*belirli bir sürenin geçmesinin devletin cezalandırma yetkisini ortadan kaldırmasına, zamanaşımı denilir.*”) (Translation to English belongs to the author of this work.).

⁶⁰ Jan Arno Hessbruegge, “Justice Delayed, not Denied: Statutory Limitations and Human Rights Crimes” in **Georgetown Journal of International Law**, vol.43, 2011-2012, p.338.

⁶¹ Kubilay Taşdemir, **Ceza Hukukunda Zamanaşımı**, 2. Baskı, Ankara, 2015, p.18 (in Turkish) (Translation to English belongs to the author of this work.).

⁶² Helmut Kreicker “Statutory Limitations” in Antonio Cassese (editor in chief), **The Oxford Companion to International Criminal Justice**, Oxford University Press, 2009, p.522.

1- Substantive v. Procedural

National legislations depart whether a statute of limitation is part of the substantive criminal law or criminal procedural law. This distinction is especially important due to its outcomes on retroactivity.

When a State's legislative organ renders a new act in respect to prolonging the prescription period, the question arises whether this new time limit will be applied on crimes which are already expired or yet to be so.

The principle of applying the law in favour of the suspect⁶³ also plays a crucial part in this regard. In other words, if a statute of limitation is extending the time limit within which the legal action must be instituted, this new *ex post facto* law should be accepted to be to the detriment of the suspect.

The national legislations which accept the statutes of limitation as a part of substantive criminal law tend to implement this new act to crimes which have yet to be prescribed. If a prosecution is not time-barred, the legislation may not enact a law that can extend the prescription period only due to the fact that this new act would not be in favour of the suspect.⁶⁴

On the other hand, where the statutory limitations are regarded to be a part of criminal procedural law, an act which extends (or reduces) the time limit to be exercised on a non-prescribed crime due to the principle of imminent application of procedural changes in legislation, regardless of its consequences on the suspect.⁶⁵

⁶³ ICTY, *Nikolić*, Trial Chamber II, “*Prosecutor v. Dragan Nikolić*”, Sentencing Judgement, 18 December 2003, para.161: “*Lex mitior [if the law relevant to the offense has been amended, the less severe law should apply] (...) constitutes an internationally recognized standard.*” (Cited in: Jennifer Trahan, **Genocide, War Crimes, Crimes against Humanity – A Topical Digest of the Case Law of the International Criminal Tribunal for the Former Yugoslavia**, Human Rights Watch, USA, 2006, p.682).

⁶⁴ Demirbaş, *ibid*, p.136-137.

⁶⁵

2- Statutory limitations in various legal systems

The reasons why a comparative approach needs to be implemented in this work are, (i) that the international criminal law has developed, in part, through the practices of national judicial bodies; (ii) that these practices are often regarded to determine whether or not a norm constitutes a customary international law or a general principle of law common to the major legal systems in the world⁶⁶ or even part of the *jus cogens*; and (iii) that the position of statutory limitations in respect with the principles of legality and (non-)retroactivity.

Domestic provisions on statutory limitations in respect to ordinary (non-international) crimes can be summarized under their respective legal systems. This distinction helps to understand and pinpoint the general attitudes of the States: Civil Law countries (a), Common Law countries (b), and Sharia countries (c). Soviet law on this matter will not be analysed.

a. Civil Law countries

Most of the Civil Law countries include various provisions on statutory limitations in their national legislations in respect to ordinary crimes. Both Roman and Germanic roots of this practice provided prescription periods for ordinary crimes, with the exception of serious offences such as treason and apostasy.⁶⁷

For “*crimes*”, French Criminal Procedure Code sets forth a period of 20 years⁶⁸ with some exceptions, such as genocide and crimes against humanity (both imprescriptible)⁶⁹. Crimes of enforced disappearance and terrorism are not

⁶⁶ Article 21 (1) of the 1998 Rome Statute of the ICC: “*The Court shall apply: (...) (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.*”. Article 38 (1) of the Statute of the ICJ: “*The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (...) c. the general principles of law recognized by civilized nations;*”

⁶⁷ Kok, *ibid*, p.25.

⁶⁸ Article 7 (1) of *Code de procédure pénale*: “*L'action publique des crimes se prescrit par vingt années révolues à compter du jour où l'infraction a été commise.*”

⁶⁹ (Repealed) Article 213-5 of *Code pénal*: “*L'action publique relative aux crimes prévus par le présent sous-titre [Sous-titre 1er : Des crimes contre l'humanité], ainsi que les peines prononcées, sont imprescriptibles.*” Article 7 (3) of *Code de procédure pénale*: “*L'action publique des crimes*

prosecutable 30 years after they are conducted.⁷⁰ While ordinary “*délits*” are subject to a prescription period of 6 years, “*délits de guerre*” are time barred 20 years after their commissions.⁷¹

Article 20 of the Dutch Criminal Code provides different prescription periods for different crimes in respect with their gravity and which varies from 3 years to 20 years.⁷² However, the 2003 International Crimes Act (as amended in 2005), under its Section 13, specifies that the expiration of the right to institute criminal proceedings or to impose a sentence, as defined in Articles 70 and 76 of the Penal Code as amended, “*shall not apply to the crimes defined in this Act [which are genocide, crimes against humanity, war crimes and torture]*”.⁷³

Turkish Criminal Code of 2005 (which has historically been based on Italian Criminal Code since 1926)⁷⁴ also embraces statutory limitations which vary between 8 and 30 years.⁷⁵ On the other hand, for genocide, crimes against humanity and

mentionnés aux articles 211-1 à 212-3 dudit code [Code pénal] est imprescriptible.” These articles are related to genocide and crimes against humanity.

⁷⁰ Article 7 (2) of *Code de procédure pénale*.

⁷¹ Article 8 of *Code de procédure pénale*.

⁷² Unofficial translation of the Dutch *Wetboek van Strafrecht* by the European Judicial Training Network (EJTN) (http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafrecht_ENG_PV.pdf) (as of 4 December 2016): “*Section 70: 1. The right to institute criminal proceedings shall be precluded upon lapse of the period of limitation of:*

1°. 3 years for all minor offences;

2°. 6 years for serious offences punishable by a fine, detention or imprisonment not exceeding 3 years;

3°. 12 years for serious offences punishable by a determinate term of imprisonment of more than 3 years;

4°. 20 years for serious offences punishable by a term of imprisonment of more than 10 years”

⁷³ Cited in: ICRC Customary International Humanitarian Law Database - Practice Relating to Rule 160 / Netherlands: (“https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_nl_rule160”) (Access date: 16 July 2017).

⁷⁴ Melike Batur Yamaner / Emre Öktem, “Imprescriptibilité des crimes de guerre: réflexions à partir d’un cas concernant la Turquie”, in (sous la coordination générale de) Jean-François Akandji-Kombé, **L’Homme dans la Société Internationale**, Bruylant, Bruxelles, 2013, p.1134-1135.

⁷⁵ Article 66 (1) of *Türk Ceza Kanunu*: “*Unless otherwise provided for by law, criminal proceedings shall be discontinued upon the lapse of:*

a) 30 years for offences requiring a penalty of aggravated life imprisonment,

b) 25 years for offences requiring a penalty of life imprisonment,

c) 20 years for offences requiring a penalty of imprisonment of not less than 20 years,

d) 15 years for offences requiring a penalty of imprisonment of more than 5 years and less than 20 years,

e) 8 years for offences requiring a penalty of imprisonment of not more than 5 years or a judicial fine.” (Translation by the European Commission for Democracy through Law (“Venice Commission”) of 15 February 2016) (“<http://www.legislationline.org/documents/section/criminal-codes/country/50>”) (Access date: 16 July 2017).

torture are excluded from this provision by the articles 76 (4), 77 (4) and 94(6) of the same code respectively, and are imprescriptible.

b. Common Law countries

Customarily, Common Law countries do not accept statutory limitations in consonance with the ancient principle of *nullum tempus occurrit regi* (“no time-lapse can bar the King[‘s right to prosecute]”)⁷⁶. Admitting, this principle should be considered to be fading due to the United States’ continuing legislations on prescription and the United Kingdom’s legal harmonisation with the continental Europe.

*“[C]ommon law systems traditionally did not provide for fixed prescription periods and left it instead to the courts to dismiss cases related to events in a distant past on grounds of abuse of authority.”*⁷⁷ Thus, there are several judicial responses to this historic lack, such as “abuse of process doctrine”, “staleness of offence doctrine” and “*nolle prosequi*”. All three procedural techniques aim to establish, or rather protect, the due process of a criminal prosecution in opposition to the length of time between the commission of the offence and the institution of the criminal proceedings and to the lack of evidence because of this time-period.⁷⁸

This position was upheld by the European Court of Human Rights (ECtHR) in the *Sawoniuk* case where the Chamber held that the problems arising with the passage of time (including gathering evidence exculpatory to the suspect) can be solved by the court (of first instance) on a case-by-case basis and that prescription does not have to be provided under every legal system.⁷⁹

⁷⁶ Editors (not specified), Notes: “Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution” in **University of Pennsylvania Law Review**, vol.102, March 1954, pp.630-653. (“http://scholarship.law.upenn.edu/penn_law_review/vol102/iss5/4”) (Access date: 16 July 2017).

⁷⁷ Jan Arno Hessbruegge, *ibid*, p.338.

⁷⁸ Kok, *ibid*, p.36-37.

⁷⁹ ECtHR, *Sawoniuk v. the United Kingdom*, Chamber, Decision of inadmissibility, 2001: “*This Court finds that no issue can arise under Article 6 insofar as the jury was left to decide for itself whether the evidence dating back to events in 1943 was credible and reliable.*”

In the English and Welsh common law, only a few statutes provided for criminal prescription periods historically, e.g. Treason Act of 1695 (3 years)⁸⁰. The researches on the prescription system of the UK usually disregard these provisions.⁸¹ Nonetheless, the modern acts have considerably more provisions in this regard, such as Magistrates' Courts Act, under its Section 127 (1), sets forth that “(...) *a magistrates' court shall not try an information or hear a complaint unless the information was laid, or the complaint made, within 6 months from the time when the offence was committed (...)*”⁸² or, about the crimes of defamation, Limitation Act articulates a time limit of 1 year.⁸³

The American system⁸⁴, on the other hand, is one step closer to the Civil Law systems, in as much as it has “*introduced time-bars for civil action and less serious criminal offenses through statutes of limitations.*”⁸⁵ Capital offenses, such as murder, are imprescriptible both under the Title 18 of the Federal Code⁸⁶ and the criminal codes of federated States⁸⁷. Some of the federated States have legislations accepting the applicability of statutory limitations on various offenses, e.g. arson⁸⁸, course of sexual conduct against a child⁸⁹, manslaughter⁹⁰.

⁸⁰ Treason Act 1695, Section V. This statute is still in force in England and Wales.

⁸¹ See, for instance: Anja Osterhaus, **Timed Out: Statutes of Limitations and Prosecuting Corruption in EU Countries**, Transparency International, Berlin, 2010, p.21.

⁸² Magistrates' Courts Act 1980, Section 127, subsection (1).

⁸³ Limitation Act 1980, Section 4A (“*Time limit for actions for defamation or malicious falsehood*”), “*The time limit under section 2 of this Act shall not apply to an action for—*

(a) libel or slander, or

(b) slander of title, slander of goods or other malicious falsehood,

but no such action shall be brought after the expiration of one year from the date on which the cause of action accrued.” (Retrieved from and can be found on the official legislations website of the UK: <http://www.legislation.gov.uk/ukpga/1980/58/section/4A>) (Access date: 5 December 2016).

⁸⁴ This includes the federal criminal code, States' and other entities' criminal codes and law systems of Marshall Islands, Federated States of Micronesia, and Palau. (Kok, *ibid*, p.31, fn.134.)

⁸⁵ Jan Arno Hessbruegge, “Justice Delayed, not Denied: Statutory Limitations and Human Rights Crimes” in **Georgetown Journal of International Law**, vol.43, 2011-2012, p.338.

⁸⁶ U.S. Code: Title 18 - Crimes and Criminal Procedure. (Retrieved from and can be found on the official website of the Cornell Law School “<https://www.law.cornell.edu/uscode/text/18>”) (Access date: 16 July 2017).

⁸⁷ Texas Code of Criminal Procedure Art. 12.01. (1) (A).

⁸⁸ California Penal Code Section 451.5 and Section 800. (Retrieved from the official website of the Californian legislature: “<http://leginfo.ca.gov/>”) (Access date: 6 December 2016).

⁸⁹ New York Criminal Procedure Law § 30.10 (3) (e).

⁹⁰ Ohio Revised Code Title XXIX: Crimes – Procedure Ch. 2901 (A) (3). (Retrieved from the official website of the Ohioan State government, “<http://codes.ohio.gov/orc/2901.13>”) (Access date: 6 December 2016).

c. Sharia countries

The Sharia can be defined as “*the entirety of basic principles*”⁹¹ of Islamic Law. However, in today’s modernized society, only a few of States with Islamic populations as majorities recognize the Sharia as their primary source of law.⁹² For example, while Iran has a codified law established on the Islamic principles⁹³; Afghanistan has a legal system which also incorporates traditional legal provisions of customary tribal law⁹⁴.

Criminal part of the Sharia consists of two classes of crimes: (i) the crimes against the rights of the God, such as highway robbery (*qat`a at-tariyq*) or sexual intercourse out of wedlock (*zina*); and (ii) the crimes against the rights of the person, such as murder or petty theft. While the former category results with serious punishments (*hudud*), the others are considered to be corrected by either restitution (*diyya*) or retaliation (*qisas*).⁹⁵

In Saudi Arabia, where the Sharia (especially the Quran) is the exclusive source of law, “Hadd crimes carry an implicit limitation period, since the failure of witnesses to immediately come forward with their evidence would likely introduce enough doubt to prevent conviction.” On the other hand, the criminal proceedings in respect to the crimes against the rights of the person are imprescriptible.⁹⁶

⁹¹ Hüseyin Hatemi, **İslam Hukuku Dersleri**, 4. Bası, Sümer Kitabevi, 2012, İstanbul, p.17 (in Turkish) (Translation belongs to the author of this work.).

⁹² For further information on the standpoint of Islamic Law in respect to international humanitarian law, see; Ahmed Rechid, “L’Islam et le Droit des Gens” in **Recueil des Cours - Académie de Droit International, 1937-II, tome 60**, Paris, p.371 et seq.

⁹³ Constitution of Iran, Article 167: “*The judge is bound to endeavor to judge each case on the basis of the codified law. In case of the absence of any such law, he has to deliver his judgement on the basis of authoritative Islamic sources and authentic fatawa [sic]. (...)*” (Translation by University of Bern) (Retrieved from the website of the project: “http://www.servat.unibe.ch/icl/ir00000_.html”) (Access date: 6 December 2016).

⁹⁴ For further information on Afghan system, see; Hamid M. Khan, **Islamic Law, Customary Law, and Afghan Informal Justice**, United States Institute of Peace Special Report, Washington DC, 2015.

⁹⁵ Mireille Delmas-Marty, “La responsabilité pénale en échec (prescription, amnistie, immunités)” in (sous la direction de) Cassese / Delmas-Marty, **Juridictions Nationales et Crimes Internationaux**, 1er édition, Presses Universitaires de France, Paris, 2002, pp.613-652, p.619.

⁹⁶ Jeffrey K. Walker, “The Rights of the Accused in Saudi Criminal Procedure” in **Loyola of Los Angeles International and Comparative Law Review**, 1993, Los Angeles, p.871.

The 1999 Iranian Criminal Code of Procedure⁹⁷ and Nigerian⁹⁸ Criminal Code Act⁹⁹ also provide for statutory limitations for various offenses.

C) Chosen Crimes and Objectives

1- Crimes chosen for the thesis

As mentioned above, there are many crimes which are deemed to be of international character. However, not all of them are always regarded to be an “international crime.” Furthermore, some of the international crimes do not bring out the question of applicability of statutory limitations and some others constitute subjects which would extend the scope of this thesis further than intended.

There are only a handful of judgments touching on the crime of aggression. This scarcity and highly-politicized character¹⁰⁰ of this crime make it virtually impossible to observe the question of applicability of statutory limitations.

Terrorism, as a discreet crime, is criminalized by most of the States worldwide. Consequently, there are too many judicial decisions and legislative actions to introduce a general international norm in respect to this crime.¹⁰¹ In

⁹⁷ For example; Article 173 of the Islamic Republic of Iran's Criminal Code of Procedure for Public and Revolutionary Courts (English translation by Iran Human Rights Documentation Center can be found at “<http://www.iranhrdc.org/english/human-rights-documents/iranian-codes/1000000026-english-translation-of-the-islamic-republic-of-irans-criminal-code-of-procedure-for-public-and-revolutionary-courts.html>”) (Access date: 6 December 2016).

⁹⁸ Even though Nigeria is also a part of the Common Law system, the Sharia is applied especially in the northern parts of the State.

⁹⁹ For example; Nigerian Criminal Code Act (Chapter 77) “43. *A person cannot be tried for treason, or for any of the felonies defined in the three last preceding sections, unless the prosecution is commenced within two years after the offence is committed.*” (Approved version of International Labour Organization. Retrieved from and can be found on “[http://www.nigeria-law.org/Criminal%20Code%20Act-PartI-II.htm#Chapter 6](http://www.nigeria-law.org/Criminal%20Code%20Act-PartI-II.htm#Chapter%206)”) (Access date: 6 December 2016).

¹⁰⁰ Kestenbaum observes the following: “By definition, the crime of aggression involves official state acts at the highest levels, and individual-level responsibility for aggression arises out of a state’s responsibility for acts of aggression. Thus, technical legal challenges like the act of state or political acts doctrines, combined with a lack of state willingness (or ability, as often is the case for the victim state) to prosecute the crime, create serious challenges to successful prosecution under any form of jurisdiction at the national level. Additionally, politicization of any attempt to seek justice for the crime of aggression may prevent successful prosecutions or taint the outcomes of aggression trials.” (Jocelyn Getgen Kestenbaum, “Closing Impunity Gaps for the Crime of Aggression” in *Chicago Journal of International Law*, Vol. 17, No.1, Art.2, pp.51-79, p.75) (footnote removed).

¹⁰¹ See, in general; Emre Öktem, *Terörizm, İnsancıl Hukuk ve İnsan Hakları*, 2. Basım, Derin Yay., İstanbul, 2011 (in Turkish).

addition, the conventions on international terrorism do not contain any norm on imprescriptibility of these crimes.¹⁰²

Piracy is also an area of criminality which rarely results with a concrete question of prescription. It is true that this crime is not just a part in history books, seeing the rampaging pirates in Somalia or Indonesia. However, the States which are conducting legal and/or military operations on this issue generally bring the perpetrators swiftly to the grasp of the judicial authorities. In addition, the aforementioned old character of Piracy has also been allowing all States to exercise jurisdiction freely enough to not to let perpetrators escape for the time-limits provided.

Due to the minor visibility of slave trade in the modern society for the last decades¹⁰³, the explanations on piracy above are also applicable on this crime.

Thus, for the purposes of this thesis, only genocide, crimes against humanity and war crimes will be analysed in respect to (non-)applicability of statutory limitations. Torture and forced disappearance will also be touched upon due to their close relation to the crimes at hand and the abundance of relative case-law which may also enlighten our area of research.

2- Objectives of the thesis

Under the light of international instruments (Part I), and national and international case-law (Part II), this work will try to determine, whether or not statutory limitations are applicable on several international crimes, i.e. genocide, crimes against humanity and war crimes. If the answer to this question would be affirmative, the conditions for this application will also be analysed.

¹⁰² Frulli, *ibid*, p.239: “*Lastly, it must be noted that the conventions regarding terrorism do not contain any norm on the imprescriptibility of crimes.*” (Fr: “*Enfin, il faut noter que les conventions en matière de terrorisme international ne contiennent aucune règle sur l’imprescriptibilité des crimes.*”) (Translation belongs to the author of this work.)

¹⁰³ “[F]rom the relevant treaty provisions and from the lack of recent case law, it would appear that the abolition of slavery in all its forms was achieved long ago and therefore that this international crime is merely of historical interest. However, it is far more accurate to state that slavery and forced labour continue to be an international problem.” (de Than/Shorts, *ibid*, p.263.)

Towards the end, the 1915 (alleged) Ottoman atrocities against its Armenian population will have a special Part because of its importance on this subject. Even though determining whether these atrocities constitute one of the core crimes is not a purpose of this thesis, the (non-)applicability of statutory limitations on this issue will be discussed under possibilities, i.e. if they constitute war crimes, if they constitute crimes against humanity, or if they constitute genocidal acts (Part III).



I) Statutory Limitations in International Criminal Law Instruments

After WWII, there was a strong inclination in international community to codify the existing norms of international law, and further create new ones, through legal texts. This was especially true regarding international criminal law. The post-war developments included not only the judgments of Nuremberg and Tokyo tribunals, but also the adoption of Resolution 95 (I) by the UN General Assembly in 1946¹⁰⁴, the 1948 Genocide Convention, and the 1949 Geneva Conventions.

Even though, this process slowed down due to the Cold War after the first wave¹⁰⁵, there were several more improvements which are related to this work: human rights instruments (such as the 1950 European Convention on Human Rights and the 1969 American Convention on Human Rights, and their additional protocols), the 1968 UN Convention on Statutory Limitations, the 1974 European Convention on Statutory Limitations, the 1977 Protocols, and the 1984 UN Torture Convention.

This advance was followed by the decisions of ICTY and ICTR, both founded after the gross atrocities of post-Cold War world. Finally, in 1998, the international community has finally reached an agreement on the long-dreamt project of establishing a permanent international criminal body, International Criminal Court.

Under this part, firstly, the binding instruments will be analysed (Chapter A), and then there is going to be a brief introduction into the so-called “Soft Law” will

¹⁰⁴ “General Assembly resolution 95 (I) was adopted on 11 December 1946 on the initiative of the United States delegation. The adoption of this resolution followed the judgment of 1 October 1946 by the International Military Tribunal (‘IMT’) at Nürnberg which sentenced twelve Nazi defendants to death and seven to periods of imprisonment ranging from ten years to life. The agreement for the establishment of the IMT had been signed in London on 8 August 1945. Attached to this agreement was “The Charter of the International Military Tribunal” (‘the IMT Charter’).” These principles included (I) punishment of real persons through criminal procedure as a means to enforce international law; (II) direct criminal liability under international criminal law even if domestic laws do not envisage such a crime to be punishable; (III) denial of immunity to high-ranking government officials; (IV) denial of “superior orders” defence; (VI) definition of “crimes against peace”; and (VII) acceptance of complicity as a separate form of criminal liability. (Antonio Cassese, **Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal**, United Nations Audiovisual Library of International Law, 2009) (Retrieved from the official website of the project, “http://legal.un.org/avl/ha/ga_95-I/ga_95-I.html”) (Access date: 9 December 2016)

¹⁰⁵ Köksal Bayraktar, “Uluslararası Suçların Genel Özellikleri” in Bayraktar/Evik/Kurt, **Özel Ceza Hukuku Cilt I: Uluslararası Suçlar**, 1. Baskı, On İki Levha Yayınları, İstanbul, 2016, p.10-11 (in Turkish). Cassese, **International Criminal Law**, p.30-31.

be discussed (Chapter B) in respect to their relations and impacts to the subject at hand. Finally, the reports or views of some of the influential secondary sources of international law regarding the question of (non-)applicability of statutory limitations will be touched upon (Chapter C).

A) Hard Law

1- Fundamental conventions on substantive international criminal law

Neither the 1948 Genocide Convention¹⁰⁶, nor the 1949 Geneva Conventions and its additional protocols of 1977¹⁰⁷ contain provisions which prohibit the application of statutory limitations on international crimes. It is also true that these instruments do not explicitly permit the State-members to provide for such an obstacle.

However, their respective provisions on “obligation to prosecute”¹⁰⁸ those who are responsible for genocide or “grave breaches”¹⁰⁹ necessarily bring out the problem of “impunity thorough time.” If a State-party has a domestic provision envisaging such a statute onto these crimes, a perpetrator may very well use it to escape from the grasp of justice; especially if he/she is in a position of power in the respective State.¹¹⁰

¹⁰⁶ Malabat, *ibid*, 575. William A. Schabas, **Genocide in International Law: the Crime of Crimes**, Cambridge University Press, Cambridge, 2000, p.414.

¹⁰⁷ Frulli, *ibid*, p.237.

¹⁰⁸ For the concept of “obligation to prosecute,” see generally, Jan Wouters, **The Obligation to Prosecute International Law Crimes**, opinion paper on researches, KU Leuven Institute for International Law (Retrieved from the official website “<https://www.law.kuleuven.be/iir/nl/onderzoek/opinions/obligationtoprosecute.pdf>”) (Access date: 10 December 2016).

¹⁰⁹ Common Article 49 / 50 / 129 and 146 to the 1949 Geneva Conventions sets forth that “*The High Contracting Parties undertake to enact any legislation necessary to provide **effective penal sanctions** for persons committing, or ordering to be committed, any of the grave breaches of the present Convention (...)*” (emphasis added). Article V of the 1948 Genocide Convention also provides that “*The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide **effective penalties for persons guilty** of genocide or any of the other acts (...)*” (emphasis added)

¹¹⁰ Schabas, *ibid*, p.414.

This view was upheld by some authors including *Hessbruegge* who argues that this lack of “explicit permission” means that such a time-limit is unacceptable under international criminal law. He then concludes:

*“General international law does not know the prescription of rights or obligations due to mere passage of time. A claim can only lapse if a state, by reason of its conduct, validly acquiesced into it. Such acquiescent conduct would be difficult to establish in relation to the prosecution of human rights crimes, as the rules governing the basic rights of human norms owed to the international community as a whole (erga omnes norms). Therefore, the entire international community of states, by reason of its conduct, would have to acquiesce in their lapse. (...) There is also no specific rule in international human rights law that would provide an individual with a right to prescription. (...)”*¹¹¹

Except the last sentence quoted, this point-of-view seems to be highly objectionable. Because of the centuries-old principle of Westphalian sovereignty, States, as a rule, (i) have sovereignty over their own domestic legal orders; and (ii) cannot be obliged to be part of an international rule which they had not taken a part in its creation or to which they wished to be a party afterwards.¹¹² All States are free to adopt legislations under their domestic orders unless there is an imperative international norm (*jus cogens*) prohibiting it. In other words, while the rule is being free to determine the national legal system, a prohibition by international law is the exception.

This rule is also upheld by a sole arbitrator in *Island of Palmas case*¹¹³. Even though the arbitration was on the concept and outreach of territorial sovereignty, the award also included some crucial parts to outline the scope of the legal sovereignty of the State. One can come to the conclusion from this arbitral decision that there are

¹¹¹ Hessbruegge, *ibid*, p.346-347.

¹¹² For further information, see generally; Lassa Oppenheim, **International Law: A Treatise, vol. I**, 2nd Edition, London, 1912 (Available at “<http://www.gutenberg.org/files/41046/41046-h/41046-h.htm>”); and Aslan Gündüz, **Milletlerarası Hukuk**, 7. Baskı, Beta Yay., İstanbul, 2014 (in Turkish).

¹¹³ *Island of Palmas case (Netherlands, USA)*, Arbitrator: Max Huber, The Hague, 1928, arbitral award. “Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.” (Reports of International Arbitral Awards, vol. II, p.838).

two main aspects of sovereignty under international law, namely (i) the State is under no authority to use its power unless the obligations deriving from the international law; and (ii) the State uses this power on its territory exclusively.¹¹⁴

In conclusion, only if there is a norm of international law which limits the authority of a State on a given subject, that State is bound to provide a set of rules. It is also observable that there is no explicit limitation in the 1949 Conventions and additional protocols for statutory limitations. Thus, these instruments per se cannot be accepted to be compelling State-members to exclude statutory limitations under their national legal orders.

The 1948 Convention, although not containing any norms regarding the non-applicability of statutory limitations, is nonetheless accepted to be outlawing such domestic provisions.¹¹⁵

The 1984 Torture Convention does not provide for any provision which permits or prohibits the application of statutory limitations on torture either.¹¹⁶ The Committee against Torture (CAT), which is founded by this Convention and supervises State-members on this issue, have been developing its own interpretations and recommendations.

For instance, in its relatively recent observation report on Japan, the CAT “reiterates (...) that the State party should bring its legislations on the statute of limitations fully in line with its obligations under the Convention, so that perpetrators of acts of torture are prosecuted and convicted in accordance with the gravity of the acts, as required by article 4 of the Convention, without time limitations.”¹¹⁷

In respect to the crime of forced disappearance, Article VII of the 1994 IACFDP stipulates that “[1] *Criminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to*

¹¹⁴ Hüseyin Pazarcı, *Uluslararası Hukuk*, p.149 (in Turkish).

¹¹⁵ See, *infra*, p.123 et seq. and p.129 et seq.

¹¹⁶ Frulli, *ibid*, p.237.

¹¹⁷ Concluding observations on the second periodic report of Japan, adopted by the Committee at its fiftieth session (6-31 May 2013), Advance Unedited Version (CAT/C/SR.1164), 29 May 2013.

statutes of limitations. [2] However, if there should be a norm of a fundamental character preventing application of the stipulation contained in the previous paragraph, the period of limitation shall be equal to that which applies to the gravest crime in the domestic laws of the corresponding State Party.”

2- Statutes of international criminal adjudication bodies

a. Post-WWII trials

The statutes of the IMT and IMTFE are also silent on whether or not statutory limitations would apply on international crimes committed during WWII.¹¹⁸ This is mainly due to their chronological proximity to the crimes to be tried by their respective tribunals.¹¹⁹ These *ad hoc* tribunals did not address the question of applicability of statutes of limitations either. However, for the subsequent trials to be held in Germany, the occupation authorities of the Allies¹²⁰ in Germany have adopted the Control Council Law No.10 which provided a retroactive suspension for prescription.¹²¹

Even though Control Council Law No.10 is a statute for suspension, the mere existence of this statute compels us to reject the idea that there need to be an explicit permission in international instruments for statutory limitations to be applied onto international crimes.

For the allied war crimes courts which tried war criminals after the decision of the IMTFE¹²², no such suspension statute was enacted by Allies. The Protocol¹²³

¹¹⁸ Malabat, *ibid*, p.575.

¹¹⁹ Kok, *ibid*, p.83.

¹²⁰ “United States – France – Great Britain – Soviet Union: Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany and supplementary statements, June 5, 1945” in *American Journal of International Law* Vol. 39, No. 3, Supplement: Official Documents (Jul., 1945), pp. 171-178.

¹²¹ Article II (5): “*In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect to the period from 30 January 1933 to 1 July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment.*” (Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 1945.) (Retrieved from the website of the Avalon Project of the Yale Law School: “<http://avalon.law.yale.edu/imt/imt10.asp>”) (Access date: 10 December 2016).

¹²² For example; *Nanjing war crimes tribunals* which were established by the nationalist China in 1946 and *Khabarovsk war crime trials* which were conducted by the Soviets to try those who were

annexed to the 1951 Treaty of San Francisco¹²⁴ which ended the official state of war between Japan and most of the Allies¹²⁵, contained this suspension only for civil actions of private persons, not for criminal actions, especially not for authors of international crimes.¹²⁶ In addition, under Article 11 of said Treaty, “*Japan accepts the judgments of the International Military Tribunal for the Far East and of other Allied War Crimes Courts both within and outside Japan (...).*”¹²⁷

b. ICTY - ICTR

While creating the statutes of the International Criminal Tribunal for the former Yugoslavia¹²⁸ and the International Criminal Tribunal for Rwanda¹²⁹, the UN

allegedly part of the so-called *Unit 731* which was in charge of Japan’s biological warfare. For further information, see, respectively; Philip R. Piccigallo, **The Japanese on Trial - Allied War Crimes Operations in the East, 1945-1951**, University of Texas Press, Austin, 1979; and, Otozō Yamada, **Materials on the Trial of Former Servicemen of the Japanese Army: Charged with Manufacturing and Employing Bacteriological Weapons**, [USSR] Foreign Languages Publishing House, 1950.

¹²³ “Protocol relating to provisions for regulating the question of contracts, periods of prescription and negotiable instruments, and the question of contracts of insurance, upon the restoration of peace with Japan. Opened for signature at San Francisco, on 8 September 1951” (UN Treaty Series, vol.136, no.1834)

¹²⁴ “Treaty of Peace with Japan (with two declarations). Signed at San Francisco, on 8 September 1951” (UN Treaty Series, vol.136, No.1832)

¹²⁵ The USSR and the Republic of China signed different peace treaties with Japan.

¹²⁶ B. Periods of Prescription: “1. *All periods of prescription or limitation of right of action or of the right to take conservatory measures in respect of relations affecting persons or property, involving nationals of the signatories hereto who, by reason of the state of war, were unable to take judicial action or to comply with the formalities necessary to safeguard their rights, irrespective of whether these periods commenced before or after the outbreak of war, shall be regarded as having been suspended, for the duration of the war in Japanese territory on the one hand, and on the other hand in the territory of those signatories which grant to Japan, on a reciprocal basis, the benefit of the provisions of this paragraph. These periods shall begin to run again on the coming into force of the Treaty of Peace signed this day. The provisions of this paragraph shall be applicable in regard to the periods fixed for the presentation of interest or dividend coupons or for the presentation for payment of securities drawn for repayment or repayable on any other ground, provided that in respect of such coupons or securities the period shall begin to run again on the date when money becomes available for payments to the holder of the coupon or security.*

2. *Where, on account of failure to perform any act or to comply with any formality during the war, measures of execution have been taken in Japanese territory to the prejudice of a national of one of the signatories being an Allied Power under the said Treaty of Peace, the Japanese Government shall restore the rights which have been detrimentally affected. If such restoration is impossible or would be inequitable the Japanese Government shall provide that the national of the signatory concerned shall be afforded such relief as may be just and equitable in the circumstances.*”

Annex XVI (B) of the “Treaty of Peace with Italy. Signed at Paris, on 10 February 1947” also has similar provisions. (UN Treaty Series, vol.49, No.747, 1950, p.233)

¹²⁷ For further information on Tokyo trials and their aftermath, see generally; Antonio Cassese / B.V.A. Rolling, **The Tokyo Trial and Beyond: Reflections of a Peacemonger**, 1st edition, Polity Press, Cambridge, 1994.

¹²⁸ “International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991”. Statute for the International Criminal Tribunal for Yugoslavia, UN Security Council Resolution 808, 1993.

Security Council have not considered prescription periods to constitute an obstacle for the trials and punishments due to the facts that (i) there had not been enough time between the commission of crimes and the establishment of tribunals for statutes of limitation to take effect under (former) Yugoslavian or Rwandan criminal legal systems; (ii) (former) Yugoslavian and Rwandan legislations did not provide for statutory limitations for international crimes by the time the atrocities committed; and (iii) both countries were State-members¹³⁰ to the 1968 Convention.

Even though statutory limitations were not a direct issue during the criminal proceedings of these tribunals, there had been some related questions answered by them.¹³¹

c. International Criminal Court (ICC)

Article 29 of the 1998 Rome Statute, which bears the title of “Non-applicability of statute of limitations,” sets forth that “*The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.*”

This direct ban is in line with the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind¹³², the “Siracusa Draft” of 1995¹³³, with the 1995 report of the Ad Hoc Committee on the Establishment of an International Criminal

¹²⁹ “International Criminal Tribunal for Rwanda”. Statute for the International Criminal Tribunal for Rwanda, UN Security Council Resolution, 955, 1994.

¹³⁰ The dates of effect for the 1968 Convention are 15 July 1975 for Rwanda and 11 November 1970 for Yugoslavia (Socialist Federal Republic of). (This data was retrieved on 11 December 2016 from the official treaty-law website of the UN “<https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280034934>”)

¹³¹ See *infra*, p.63.

¹³² “Report of the International Law Commission on the work of its forty-third session (29 April-19 July 1991)”, A/46/10, p.79. Retrieved from and can be found on the official website of the UN: “http://legal.un.org/ilc/documentation/english/reports/a_46_10.pdf” (Access date: 16 December 2016). This provision was discarded from the 1996 version of the Draft Code (Frulli, *ibid*, p.238).

¹³³ “Draft Statute for an International Criminal Court - Alternative to the ILC-Draft - (Siracusa-Draft)”. Retrieved from and can be found on the official legal database website of the ICC: “https://www.legal-tools.org/uploads/tx_ltpdb/Alternative_Siracusa_Draft_1995_.pdf” (Access date: 16 December 2016).

Court¹³⁴, and with the 1996 report of the Preparatory Committee on the Establishment of an International Criminal Court¹³⁵.

Article 29 should always be read under the light of Article 11 (1) which regulates the “jurisdiction *ratione temporis*” of the ICC: “*The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.*” Therefore, the question of whether Article 29 would be applied retroactively will not arise.¹³⁶

Article 29 is located under Part III which bears the title “General principles of criminal law”, rather than under Part II (“Jurisdiction, admissibility and applicable law”). *Malabat* points out that the ICC Statute accepts the crimes under its jurisdiction imprescriptible by principle and by nature, instead of in relation to the competence of the Court.¹³⁷

The complementary character¹³⁸ of the jurisdiction of the ICC in respect to statutes of limitations under national laws also poses a serious question. If the prosecution of a core international crime is time-barred under national legislation of a State where normal criminal proceedings are expected to be carried out, the ICC may very well declare this case admissible due to the inability or unwillingness of this State and start criminal proceedings under the Rome Statute. Through the provisions of articles 17 and 29, the ICC will be able to undertake the duty to try a crime/criminal, especially if a statute of limitation seems to be used as a means to impunity.¹³⁹

¹³⁴ “Report of the Ad Hoc Committee on the Establishment of an International Criminal Court”, Supplement No. 22 (A/50/22). Retrieved from and can be found on the official legal database website of the ICC: “https://www.legal-tools.org/uploads/tx_ltpdb/doc21168.pdf” (Access date: 16 December 2016).

¹³⁵ “Report of the Preparatory Committee on the Establishment of an International Criminal Court - Volume II (Compilation of proposals)”, Supplement No. 22A (A/51/22). Retrieved from and can be found on the official legal database website of the ICC: “https://www.legal-tools.org/uploads/tx_ltpdb/doc21329.pdf” (Access date: 16 December 2016).

¹³⁶ William A. Schabas, *Uluslararası Ceza Mahkemesine Giriş*, pp.92-95 (in Turkish).

¹³⁷ *Malabat*, ibid, p.578.

¹³⁸ Article 17 of the Rome Statute sets forth that the ICC would exercise jurisdiction over a crime only if “(...) the State [which normally has jurisdiction over this crime] is unwilling or unable genuinely to carry out the investigation or prosecution (...)”

¹³⁹ Kok, ibid, pp.109-110. Schabas, ibid, pp.144-145. Kreicker, ibid, p.524. William A. Schabas, “General Principles of Criminal Law in the International Criminal Court Statute (Part III)” in *European Journal of Crime, Criminal Law, and Criminal Justice*, Issue 1998-4, p.419.

To avoid this situation and to fulfil other obligations arising from the Rome Statute, most of the State-members have adopted legislations which impose, *inter alia*, non-applicability of statutory limitations for core international crimes. Some of the State-members did not enact such legislative changes even after ratifying the Rome Statute. These States interestingly include Germany¹⁴⁰ and Netherlands¹⁴¹ in respect to war crimes of minor gravity, and France¹⁴² for all war crimes (both *crimes de guerre* and *délits de guerre*, even after an extensive criminal law reform on statutory limitations in 2017¹⁴³).¹⁴⁴ Crimes against humanity and genocide, on the other hand, are not subject to prescription in these States.

d. East Timor panels (District Court of Dili)

The UN Transitional Administration in East Timor (UNTAET) decreed the Regulation 2000/15¹⁴⁵ to try those who were responsible for the series of gross atrocities¹⁴⁶ perpetrated in 1999. Following this Regulation, the Special Panels of the Dili District Court started to hear cases.

The Regulation, under its Section 17, provides for imprescriptibility to genocide, crimes against humanity, war crimes, and torture. Other crimes under the

¹⁴⁰ While Article 5 of *Völkerstrafgesetzbuch* (Code of Crimes against International Law) excludes international crimes from statutes of limitation, this exception would only be applied on *Verbrechen* (serious criminal offences). This category of crimes excludes those for which are subject to less than one-year imprisonment. The translation of the *Völkerstrafgesetzbuch* by the Max Planck Institute for Foreign and International Criminal Law can be found on the official website of the Institute: “<https://www.mpicc.de/files/pdf1/vstgbleng2.pdf>”. (Access date: 9 April 2017)

¹⁴¹ As discussed *supra* (see, p.19), international crimes are imprescriptible under Dutch legislation. However, as pointed out by the Dutch Ministry of Defence in an official correspondence to the Human Rights Watch (HRW), “[t]he only exception to this provision is for the least serious category of war crimes and commander responsibility related to these crimes.” (The correspondence was retrieved from and can be found on the official website of the HRW: “https://www.hrw.org/sites/default/files/related_material/schools-netherlands.pdf”) (Access date: 11 December 2016).

¹⁴² See Article 462-10 of *Code pénal*.

¹⁴³ “LOI n° 2017-242 du 27 février 2017 portant réforme de la prescription en matière pénale”

¹⁴⁴ Kok, *ibid*, 110.

¹⁴⁵ UNTAET Regulation No.2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, 6 June 2000. (Retrieved from the official website of the UN peacekeeping: “<http://www.un.org/en/peacekeeping/missions/past/etimor/untactR/Reg0015E.pdf>”) (Access date: 11 December 2016).

¹⁴⁶ Section 1.3 of the Regulation: “The panels established (...) shall exercise jurisdiction in accordance with Section 10 of UNTAET Regulation No. 2000/11 and with the provisions of the present regulation with respect to the following serious criminal offences: (a) Genocide; (b) War Crimes; (c) Crimes against Humanity; (d) Murder; (e) Sexual Offences; and (f) Torture.”

jurisdiction of the Panels, namely murder and sexual offenses, are subject to statutory limitations of domestic law^{147, 148}

e. Special Court for Sierra Leone (SCSL)

*“The Special Court for Sierra Leone was set up in 2002 as the result of a request to the United Nations in 2000 by the Government of Sierra Leone for “a special court” to address serious crimes against civilians and UN peacekeepers committed during the country’s decade-long (1991-2002) civil war.”*¹⁴⁹

The Statute of the SCSL was annexed to the Agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone.¹⁵⁰ The Court has jurisdiction on a series of crimes, not only international, but also of domestic nature. Neither in the Statute nor in the Agreement, there is a norm concerning the applicability of statutory limitations on the crimes under the jurisdiction of the Court.

This was also in consequence of the limited time between the commission of crimes and the establishment of the Court¹⁵¹ and, in addition, of the fact that Sierra Leone is a country from the Common Law tradition¹⁵² where statutory limitations are not generally applicable to serious crimes.¹⁵³

¹⁴⁷ “17.1 The serious criminal offences under Section 10.1 (a), (b), (c) and (f) of UNTAET Regulation No. 2000/11 and under Sections 4 to 7 of the present regulation shall not be subject to any statute of limitations.

17.2 The serious criminal offences under Section 10.1 (d) to (e) of UNTAET Regulation No. 2000/11 and under Sections 8 to 9 of the present regulation shall be subject to applicable law.”

¹⁴⁸ For further information on the District Court of Dili and observations on its early jurisprudence, see, *inter alia*; Suzannah Linton, “Prosecuting Atrocities at the District Court of Dili” in **Melbourne Journal of International Law, Vol.2(2)**, October 2001.

¹⁴⁹ This introduction was retrieved from the official website of the Residual Special Court of Sierra Leone which is empowered to oversee the continuing legal obligations of the SCSL after its closure in 2013: “<http://www.rscsl.org/>” (Access date: 11 December 2016).

¹⁵⁰ The texts of the Statute and the Agreement are retrieved from and can be found on the web pages of the RSCSL respectively: “<http://www.rscsl.org/Documents/scsl-statute.pdf>” and “<http://www.rscsl.org/Documents/scsl-agreement.pdf>” (Access date: 11 December 2016).

¹⁵¹ Article 1 of the Statute dictates the start of the Court’s temporal jurisdiction as “since 30 November 1996”.

¹⁵² Hanatu Kabbah, **Sierra Leone Legal System and Legal Research**, Updated Version, GlobaLex, Hauser Global Law School, 2014, section 7.3.

¹⁵³ Kok, *ibid*, p.112.

f. Extraordinary Chambers in the Courts of Cambodia (ECCC)

Among the internationalized courts and tribunals, the question of statutory limitations emerged the most for the Extraordinary Chambers in Cambodia. This is merely because the traditional background of the Cambodian legal system (namely, French legal system) and the passage of time between the crimes committed and jurisdiction exercised.

The agreement between the UN and Cambodia entered into force in 2005. In the meantime, the Cambodian government had enacted the “Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea”¹⁵⁴ which is the main document to govern the establishment and jurisdiction of the ECCC.

Article 3-new (2) of this Law sets forth a suspension statute as an exception to general provisions under Cambodian law, which reads as follows: “*The statute of limitations set forth in the 1956 Penal Code shall be extended for an additional 30 years for the crimes enumerated above, which are within the jurisdiction of the Extraordinary Chambers.*”

In addition, the imprescriptibilities of genocide and crimes against humanity were included in articles 4 and 5 respectively. Because of the heavy influence of French legal system on Cambodia, war crimes were not among those for which statutory limitations would not be applied.¹⁵⁵

These articles seem to be accepted to be of declarative character, i.e. genocide and crimes against humanity would be accepted imprescriptible before the entry-

¹⁵⁴ Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) is retrieved from and can be found on the official website of the ECCC: “https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf” (Access date: 11 December 2016).

¹⁵⁵ Under French criminal system, war crimes are subject to prescription in respect to their gravity: for *crimes de guerre*: 30 years; for *délits de guerre*: 20 years. (Repealed Article 462-10 of *Code pénal*: “*L'action publique à l'égard des crimes de guerre définis au présent livre se prescrit par trente ans. (...) / L'action publique à l'égard des délits de guerre définis au présent livre se prescrit par vingt ans. (...)*”) (Retrieved from and can be found on the official website of legislative data of French government: “<https://www.legifrance.gouv.fr>”) (Access date: 11 December 2016).

into-force of this Law. Therefore, for such crimes which would have become time-barred under the 1956 Cambodian Penal Code by the time this Law was enacted, the ECCC would be able to prosecute and punish those who are deemed responsible. In other words, articles 4 and 5 of this Law declared that genocide and crimes against humanity were already imprescriptible crimes when these atrocities were committed, thus, already-prescribed crimes would also be prosecutable under this Law.¹⁵⁶

g. Regulation 64 Panels in the Courts of Kosovo

The Special Representative of the Secretary-General of the UN for the UN Mission in Kosovo (UNMIK) has issued Regulation No.2000/64¹⁵⁷, “[f]or the purpose of ensuring the independence and impartiality of the judiciary and the proper administration of justice”.

While the ICTY also has jurisdiction over the crimes in this former-Yugoslavian country, “the main purpose [of these panels] was to support more peaceful relations between different groups in society and to address allegations of human rights violations”¹⁵⁸. However, due to some political and legal obstacles, the Panels tried some important war crimes cases too.¹⁵⁹

¹⁵⁶ Kok and Swart also agree with this explanation: “The absence of a provision [regarding retroactive application of articles 4 and 5] suggests that the Statute applies retroactively; it thus permits the reopening of cases involving already prescribed crimes.” (Kok, *ibid*, p.113) and “‘UNTAET Regulation 2000/15 and the Cambodian Law apply to events that have occurred before the Regulation and the Law entered into force. It is not wholly impossible that, as a result, persons could be tried for crimes with regard to which limitation periods have already elapsed. In the past, this has always been the most controversial aspect of eliminating statutory limitations retrospectively. It is, therefore, important to note that, in abolishing statutes of limitation for specific categories of international crimes, neither the Regulation nor the Law makes an exception for cases in which limitation periods had already run out.’” (A.H.J. Swart, “Internationalized Courts and Substantive Criminal Law” in Romano/Nollkaemper/Kleffner, **Internationalized Criminal Courts and Tribunals: Sierra Leone, East timor, Kosovo, and Cambodia**, Oxford University Press, Oxford, 2004, p.312-313.)

¹⁵⁷ UNMIK/REG/2000/64 is enacted on 15 December 2000 with the title “On Assignment of International Judges/Prosecutors and/or Change of Venue”. (The text retrieved from the official website of the Mission: “http://www.unmikonline.org/regulations/2000/re2000_64.htm”) (Access date: 11 December 2016).

¹⁵⁸ Cryer et al., *ibid*, p.189.

¹⁵⁹ For further information on the outcome of the hybrid court system in Kosovo, see; Derek M. Welski, **Hybrid Court System in Kosovo: Has EULEX proven to be the device to strengthen the independence and effectiveness of the judiciary?**, Group for Legal and Political Studies, policy report No.11, Prishtina, 2014.

UNMIK has also adopted two new laws, namely the Provisional Criminal Code of Kosovo and the Provisional Criminal Procedure Code of Kosovo.¹⁶⁰ The former, under its Article 95, provides that “*No statutory limitation shall apply to the prosecution or execution of punishment of genocide, war crimes and crimes against humanity, as well as of other criminal offences to which statutory limitation cannot be applied under international law.*”¹⁶¹ The category of “other criminal offences” includes torture for which the ICTY had already decided on.¹⁶²

h. War Crimes Chambers in Bosnia and Herzegovina

For the completion strategy of the ICTY and the ongoing investigations being carried out within the Bosnia and Herzegovina, the War Crimes Chambers are empowered to try those who are deemed responsible for carrying out war-related crimes in this State, either through referral¹⁶³ by the ICTY or by the national prosecution authorities. Nevertheless, the Chambers did not have exclusive jurisdiction over international crimes.¹⁶⁴

Cryer *et al.* notes that “*The Chamber operates under national law, including new criminal and criminal procedure codes introduced by the [Office of the High Representative]*”¹⁶⁵. Article 19 of the Criminal Code reads as follows: “*Criminal prosecution and execution of a sentence are not subject to the statute of limitations for criminal offences of genocide, crimes against humanity and war crimes, or for other criminal offences that, pursuant to international law, are not subject to the statute of limitations.*”¹⁶⁶

¹⁶⁰ UNMIK regulations 2003/25 and 26 of 6 July 2003.

¹⁶¹ Retrieved from and can be found on the official website of the UNMIK: “http://www.unmikonline.org/regulations/2003/RE2003_25_criminal_code.pdf” (Access date: 11 December 2016).

¹⁶² ICTY, *Prosecutor v. Furundžia*, Trial Chamber II, 1998, para.157: “*(...) torture may not be covered by a statute of limitations (...).*”

¹⁶³ For referral procedure in respect to ICTY, see; Michael Bohlander, “Referring an indictment from the ICTY and ICTR to another court - Rule 11*bis* and the consequences for the law of extradition” in **International and Comparative Law Quarterly**, vol.55, Issue 1, Cambridge University Press, 2006, p.219.

¹⁶⁴ Kate Clark, **War Reparations and Litigation: the case of Bosnia**, International Litigation Series No.1, Nuhanovic Foundation – Center for War Reparations, Amsterdam, 2014, p.21-22.

¹⁶⁵ Cryer *et al.*, *ibid.*, p.193.

¹⁶⁶ The official English translations of these codes and other criminal legislation of Bosnia and Herzegovina can be found on the official website of the Office of the High Representative: “http://www.ohr.int/?page_id=68240” (Access date: 11 December 2016).

i. War Crimes Chamber in Serbia

The War Crimes Chamber of the Belgrade District Court and specialized Prosecutor's Office for War Crimes are created in 2003 with the support of OSCE, "*but which is entirely national in nature.*"¹⁶⁷ From this point-of-view, it is different than its counterpart in Bosnia and Herzegovina. On the other hand, the ICTY has referred some cases to this Chamber too.¹⁶⁸

Article 108 of the Serbian Criminal Code, which is applied by the Chamber, stipulates that "*There shall be no statute of limitation for criminal prosecution and enforcement of penalty for offences stipulated in articles 370 through 375 hereof, and for criminal offences that pursuant to ratified international treaties cannot be subject to limitations.*"¹⁶⁹

However, it was observed by OSCE that there is a tendency in this Chamber to accept lapse of considerable time as a mitigating factor in favour of the accused.¹⁷⁰

j. Supreme Iraqi Criminal Tribunal

After the 2003 invasion of Iraq by a United States-led coalition, the Iraqi Interim Governing Council established the Iraqi Special Tribunal (IST) on 10 December 2003, days before the capture of Saddam Hussein, the chief suspect to be tried by this Tribunal.¹⁷¹

¹⁶⁷ Cryer et al., *ibid*, p.195.

¹⁶⁸ "(...) *the Serbian War Crimes Prosecutor's Office has issued a number of indictments. These indictments include those for crimes committed in Zvornik, Bosnia and Herzegovina in 1992, which the ICTY's Office of the Prosecutor transferred to the Serbian War Crimes Prosecutor's Office.*" (Statement retrieved from the official website of the ICTY: "<http://www.icty.org/en/outreach/capacity-building/development-local-judiciaries>" on 16 December 2016.)

¹⁶⁹ Articles 370, 371, 372, 373, 374, and 375 are related to genocide, crimes against humanity, and war crimes. The official 2006 translation of the Code by the OSCE Mission to Serbia and Montenegro is retrieved from and can be found on the official website of the OSCE: "<http://www.osce.org/serbia/18244?download=true>" (Access date: 13 December 2016).

¹⁷⁰ OSCE, **War crimes proceedings in Serbia (2003-2014) – An analysis of the OSCE Mission to Serbia's monitoring results**, OSCE Mission to Serbia, Belgrade, 2015, p.79.

¹⁷¹ Cryer et al., *ibid*, p.194.

The Statute of the IST¹⁷², which was adopted by the Coalition Provisional Authority, identified genocide (Article 11), crimes against humanity (Article 12), war crimes (Article 13), and certain crimes¹⁷³ under Iraqi domestic law (Article 14) as *ratione materiae* of the Tribunal.¹⁷⁴

Article 17 (d) of the Statute sets forth that “[t]he crimes stipulated in Articles 11 to 14 shall not be subject to any statute of limitations.”

In 2005, in consequence of the Law of the Supreme Iraqi Criminal Tribunal¹⁷⁵ enacted by the Iraqi government, the IST was abolished¹⁷⁶ and incorporated into the domestic system with all its decisions and rules of procedure.¹⁷⁷ This transition did not lead to a change in respect to crimes under the jurisdiction of the Tribunal or to the non-application of statutory limitations: “*The crimes stipulated in Articles 11, 12, 13, and 14 of this Law shall not be subject to any statute of limitations.*”¹⁷⁸

k. Extraordinary African Chambers

The Chambers were a result of the 2012 agreement signed between the African Union and Senegal to establish a special court with international elements within the Senegalese judicial system. The main purpose of this Agreement was to try international crimes committed in Chad from 7 June 1982 to 1 December 1990, particularly former Chadian President Hissène Habré.¹⁷⁹

¹⁷² Coalition Provisional Authority Order No.48: “Delegation of Authority Regarding an Iraqi Special Tribunal”, 10 December 2003. (The full text of the Order and “The Statute of the Iraqi Special Tribunal” annexed to it are retrieved from and can be found on the official website of the [US] Library of Congress: “https://www.loc.gov/law/help/hussein/docs/20031210_CPAORD_48_IST_and_Appendix_A.pdf”) (Access date: 16 July 2017).

¹⁷³ Such as “*attempt to manipulate the judiciary*”, “*wastage of national resources*”, and “*use of the armed forces of Iraq against an Arab country*” (a special form of aggression) (For further elaboration, see; Claus Kress, “The Iraqi Special Tribunal and the Crime of Aggression” in **Journal of International Criminal Justice**, 2, 2004, Oxford University Press, pp.347-352.)

¹⁷⁴ Article 10 of the Statute annexed to the Order No.48

¹⁷⁵ Published in Al-Waqa’i Al-Iraqiya (Official Gazette of the Republic of Iraq), 18 October 2005, Law No.4006. Translation by the International Center for Transitional Justice, 2006, can be found on the website of the “Global Justice Project: Iraq”: “<http://gjpi.org/wp-content/uploads/2009/02/iraqstatuteengtrans.pdf>” (Access date: 16 December 2016)

¹⁷⁶ Article 37 of the Law of the Supreme Iraqi Criminal Tribunal

¹⁷⁷ Article 38 of the Law of the Supreme Iraqi Criminal Tribunal

¹⁷⁸ Article 17 (4) of the Law of the Supreme Iraqi Criminal Tribunal

¹⁷⁹ “*Accord entre le gouvernement de la république du Sénégal et l’union africaine sur la création de chambres africaine extraordinaires au sein des juridictions sénégalaises*” and annexed “*Statut des chambres africaines extraordinaires au sein des juridictions sénégalaises pour la poursuite des*

Article 9 of the Statute rejects the applicability of statutes of limitation on the crimes under the jurisdiction of the Chambers, namely genocide (Article 5), crimes against humanity (Article 6), war crimes (Article 7), and torture (Article 8).¹⁸⁰

Moreover, the Senegalese legislation provided for a statute of limitation of 10 years for crimes such as torture or murder. However, this time-limit would not be applied while the prosecution of the suspect is impossible.¹⁸¹ The main suspect, Hissène Habré, ruled over Chad until December 2000. After his deposition, criminal actions were brought against him under both Belgian and Chadian legislations in this 10-year period.¹⁸² Therefore, the statute of limitation was not applicable under ordinary Chadian law either.¹⁸³

The most important milestone for the EAC, thus, was rendering of the final judgment by the Assize Chambers.¹⁸⁴ However, in this decision, there was no direct explanation or referring to the (non-)applicability of statutory limitations on international crimes.

In 2017, the Appeals Chamber¹⁸⁵ “*affirmed Habré’s conviction for war crimes, crimes against humanity and torture but acquitted him of rape.*”¹⁸⁶

crimes internationaux commis au Tchad durant la période du 7 juin 1982 au 1^{er} décembre 1990” were retrieved from the official website of the Chambers: “<http://www.chambresafricaines.org/pdf/accord%20UA-Senegal%20Chambres%20africaines%20extra%20Aout%202012.pdf>” (Access date: 12 December 2016).

¹⁸⁰ Article 9: “*Les crimes relevant de la compétence des Chambres africaines extraordinaires sont imprescriptibles.*”

¹⁸¹ Article 7 of *Code de procédure pénale*: “*La prescription est suspendue par tout obstacle de droit ou de fait empêchant l'exercice de l'action publique.*”

¹⁸² Information deducted from the official website of the Chambers: “<http://www.chambresafricaines.org/>”) (Access date: 12 December 2016)

¹⁸³ Human Rights Watch, **Le jugement de Hissène Habré: Le temps presse pour les victimes**, No.2, 2007, p.21. (Retrieved from the official website of the HRW on 12 December 2016: “<https://www.hrw.org/sites/default/files/reports/habre0107frweb.pdf>”)

¹⁸⁴ Senegal (EAC), “*Ministère public c. Hissein Habré*”, Chambre africaine extraordinaire d’Assises, Jugement, 30 May 2016. (The full text can be retrieved from the official website of the Chambers: “http://www.forumchambresafricaines.org/docs/JugementCAEd%27Assises_Penal&Civil_.pdf”) (Access date: 11 March 2017)

¹⁸⁵ Senegal (EAC), “*Le Procureur général c. Hissein Habré*”, Chambre africaine extraordinaire d’Assises de la Cour d’Appel de Dakar, Arrêt, 27 April 2017.

¹⁸⁶ “Dispositif” of the said *Arrêt* (Cited in: Press release of Amnesty International: “Chad: Hissène Habré Appeal Ruling Closes Dark Chapter for Victims”, 27 April 2017) (“<https://www.amnesty.org/en/press-releases/2017/04/chad-hissene-habre-appeal-ruling-closes-dark-chapter-for-victims/>”) (Access date: 16 July 2017).

3- Human rights conventions

a. European Convention on Human Rights (ECHR)

The ECHR¹⁸⁷ does not stipulate any norm regarding statutory limitations and the only provision in respect to international crimes is under its Article 7 which bears the title “*No punishment without law*”¹⁸⁸. The second paragraph of this Article was indeed provided to bar Nazi war criminals to allege that, by the time their crimes were committed, they were not criminalized under domestic laws.¹⁸⁹

Questions may also arise (and indeed have arisen) under articles 5 and 6 of the ECHR which are related to “right to liberty and security” and “right to a fair trial” respectively.

There have been several decisions and judgments where either the EComHR or the ECtHR ruled upon the (non-)applicability of statutes of limitation onto international crimes.¹⁹⁰

b. International Covenant on Civil and Political Rights (ICCPR)

The ICCPR¹⁹¹ is also silent on the (non-)applicability of statutory limitations on international crimes. The monitoring body of the ICCPR, the Human Rights Committee (CCPR), has declared itself on this issue on numerous occasions. Human

¹⁸⁷ The amended full text of the Convention can be found on the official website of the ECtHR: “http://www.echr.coe.int/Documents/Convention_ENG.pdf” (Access date: 13 December 2016).

¹⁸⁸ “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.*”

¹⁸⁹ Rona Aybay, *Uluslararası Yargı*, 1. Basım, Alfa Basım Yayım, İstanbul, 2013, p.86 (in Turkish). Even though this argument was rejected by the IMT, the founders of the ECHR system were quite sceptical because of the independent character of the European Commission of Human Rights (hereinafter and hereinbefore referred to as “EComHR”) and of the European Court of Human Rights (hereinafter and hereinbefore referred to as “ECtHR”).

¹⁹⁰ See, *infra*, p.69-76.

¹⁹¹ International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966; entry into force 23 March 1976, in accordance with its Article 49.

rights violations under junta regimes, torture and forced disappearances are among those which have been addressed by this body in respect to statutory limitations.

The CCPR issues reports States-member's positions vis-à-vis human rights violations. On a number of occasions, the Committee advised them to adopt or change legislations in a way that gross violations of human rights, *inter alia* international crimes, would be imprescriptible.

For instance, "Concluding observations of the Human Rights Committee" on Panama¹⁹² prescribes that

*"the Committee is concerned that the legal investigation in many of the documented cases has not yet been concluded, while others have been declared time-barred (articles 2 and 6 of the Covenant). / The State party should ensure that all cases of serious human rights violations, including those documented by the Truth Commission, are duly investigated, that those responsible are brought to justice and, where appropriate, punished and that the victims or their family members receive fair and adequate compensation. The statute of limitations on offences involving serious human rights violations should be abolished."*¹⁹³

c. American Convention on Human Rights (ACHR)

Even though the ACHR¹⁹⁴ does not provide any provision regarding the (non-)applicability of statutory limitations on international crimes, the Inter-American Court of Human Rights (IACtHR) has ruled on this issue various times in its judgments and decisions which will also be discussed *infra*.¹⁹⁵

¹⁹² "Consideration of Reports Submitted by States Parties under Article 40 of the Covenant - Concluding observations of the Human Rights Committee" (The text can be found on the official website of the UN: "http://www.un.org/ga/search/view_doc.asp?symbol=CCPR/C/PAN/CO/3") (Access date: 16 December 2016)

¹⁹³ Emphasis added.

¹⁹⁴ "Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969" (The text of the Convention is retrieved from and can be found on the official website of the Inter-American Commission on Human Rights: "<http://www.cidh.org/basicos/english/Basic3.American%20Convention.htm>") (Access date: 16 December 2016).

¹⁹⁵ See, *infra*, p.76.

d. African Charter on Human and People's Rights (ACHPR)

The Charter¹⁹⁶ does not have any provision in this regard either. The African Court of Human and People's Rights, accordingly, has not declared itself on this issue yet.

However, the African Commission on Human and People's Rights, the supervisory body for the Charter, has enacted the "Statement: International Day in Support of Victims of Torture" on 26 June 2016 where it underlined that

*"States should ensure that they criminalise torture in accordance with [the 1984 Torture Convention]; take into account the specific needs of vulnerable groups in the justice process including by providing legal aid; waive state secrecy laws when allegations of torture are raised; **waive statutes of limitation as regards allegations of torture**; and ensure execution of judgements."*¹⁹⁷

e. Arab Charter on Human Rights

Article 8 of the 2004 Charter¹⁹⁸ declares statutory limitations incompatible with human rights in respect to torture:

*"1. No one shall be subjected to physical or psychological torture or to cruel, degrading, humiliating or inhuman treatment. / 2. Each State party shall protect every individual subject to its jurisdiction from such practices and shall take effective measures to prevent them. The commission of, or participation in, **such acts shall be regarded as crimes that are punishable by law and not subject to any statute of limitations**. Each State party shall*

¹⁹⁶ "Adopted by the eighteenth Assembly of Heads of State and Government, June 1981 - Nairobi, Kenya" (The text of the Charter can be found on the official website of the African Commission on Human and People's Rights: "<http://www.achpr.org/instruments/achpr/>") (Access date: 16 December 2016).

¹⁹⁷ (Emphasis added) This statement was published on 26 June 2016 and can be retrieved from the official website of the said Commission: "<http://www.achpr.org/news/2016/06/d223/>") (Access date: 16 December 2016)

¹⁹⁸ "League of Arab States, Arab Charter on Human Rights, May 22, 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), entered into force March 15, 2008" cited in the official website of the Human Rights Library of University of Minnesota: "<http://hrlibrary.umn.edu/>" (Access date: 16 July 2017).

*guarantee in its legal system redress for any victim of torture and the right to rehabilitation and compensation.”*¹⁹⁹

4- Conventions directly concerned with statutory limitations

a. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity

The 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity²⁰⁰ was adopted and opened for signature, ratification and accession by United Nations General Assembly Resolution 2391 (XXIII) of 26 November 1968. As of 12 December 2016, there are 9 signatories and 55 State-parties (barely more than one fourth of the UN State-members) to the Convention.²⁰¹

In the preamble of the Convention, it is recognized that “*it is necessary and timely to affirm in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity,*” thus, assuming that these crimes have always been imprescriptible.²⁰² Therefore, as pointed out correctly by *Malabat*, the 1968 Convention is accepted to have (or claims to have) a “declarative character”.²⁰³

In line with this part of the Preamble, Article I sets forth that

*“No statutory limitation shall apply to the following crimes, **irrespective of the date of their commission:** (a) War crimes (...); (b) Crimes against humanity whether committed in time of war or in time of peace (...), eviction by armed attack or occupation and inhuman acts resulting from the policy of*

¹⁹⁹ Emphasis added. This provision was not in the 1994 version of this document.

²⁰⁰ United Nations, Treaty Series, vol.754, p.73. Hereinbefore or hereinafter referred as “the 1968 Convention”.

²⁰¹ Information retrieved from and can be found on the official website of the UN: “https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-6&chapter=4&clang=en#4” (Access date: 16 July 2017). *Kok* witnesses that, by September 2006, 49 States had ratified the Convention. (*Kok*, *ibid*, p.88).

²⁰² *Kok*, *ibid*, p.91.

²⁰³ *Malabat*, *ibid*, p.577: “*la Convention des Nations Unies sur l’imprescriptibilité des crimes de guerre et des crimes contre humanité (...) lie ainsi l’imprescriptibilité à la nature des crimes commis et ne peut donc avoir que vertu déclarative de l’imprescriptibilité.*” (emphasis added)

*apartheid, and the crime of genocide as defined in the 1948 Convention (...), even if such acts do not constitute a violation of the domestic law of the country in which they were committed.”*²⁰⁴

Article II includes participation in, direct incitement to, and conspiracy to commit these crimes to this list. Article IV imposes States to abolish any existing statutes of limitation.

As it is clearly seen, the crimes of genocide, *apartheid*, and “eviction by armed attack or occupation” are interestingly counted under the sub-paragraph (b), instead of under their own respective sub-paragraphs.

There have been two main reasons why some of the States rejected to be a party to the Convention even though they took part in its creation: (i) an extremely broad and ambiguous *ratione materiae*; and (ii) a *ratione temporis* which creates a probable reopening of prosecutions for already prescribed crimes.²⁰⁵

b. European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes

To overcome (or rather, address) the aforementioned problems of the 1968 Convention, another multilateral convention was enacted, this time under the auspices of the Council of Europe.²⁰⁶

The 1974 European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes was enacted by the Council of Europe on 25 January 1974 and entered into force 27 June 2003.²⁰⁷ As of 12

²⁰⁴ Emphasises added.

²⁰⁵ Kok, *ibid*, pp.89-92. Malabat, *ibid*, p.584. Hessbruegge, *ibid*, p.348. Frulli, *ibid*, p.237. Cherif Bassiouni, **Crimes against Humanity in International Criminal Law**, Second Revised Edition, Kluwer Law International, The Hague, 1999, p.227. Alia Yılmaz, **Uluslararası Ceza Hukuku El Kitabı**, Beta Yay., 2001, p.244 (in Turkish).

²⁰⁶ Hessbruegge, *ibid*, p.348.

²⁰⁷ Hereinafter referred to as “the 1974 (European) Convention”. The text of the Convention is retrieved from and can be found on the official website of the Council of Europe (CoE): “<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900010168007617f>” (Access date: 12 December 2016).

December 2016, there are 8 State-members to the Convention and 1 signatory which has not ratified it.²⁰⁸

The CoE, in its official website, argues that “[t]he aim of this Convention is to ensure that the punishment of crimes against humanity and the most serious violations of the laws and customs of war is not prevented by statutory limitations whether in relation to prosecution or to the enforcement of the punishment.”²⁰⁹

Due to the aforementioned problems of the 1968 Convention, some of the European States wanted to create their own treaty on the issue of non-application of statutory limitations on international crimes.²¹⁰ The 1968 Convention and the 1974 Convention are different in their nature. Article 1 of the 1974 Convention contains the list of crimes which would not be subject to statutory limitations in a methodical way. Article 2 sets forth that “(1) [t]he present Convention applies to **offences committed after its entry into force in respect of the Contracting State concerned.** / (2) It applies also to offences committed before such entry into force **in those cases where the statutory limitation period had not expired at that time.**”^{211 212}

Thus, both of the objections Western States had risen against the 1968 Convention, i.e. in respect to *ratione materiae* and to *ratione temporis*, were satisfied. However, this Convention did not receive much support either.²¹³ Kok believes that this is mainly because of (i) domestic provisions to exclude most of the international crimes from statutes of limitation, which were adopted between 1964

²⁰⁸ Signatory: France; States-member: Belgium, Bosnia and Herzegovina, Malta, Montenegro, Netherlands, Romania, Serbia, Ukraine. (This list and ratification dates can be accessed through the website of the CoE: “http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/082/signatures?p_auth=XmW7ERSC”) (Access date: 20 May 2017).

²⁰⁹ The text of the 1974 Convention is retrieved from the official website of the CoE: “<http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/082>” (Access date: 16 December 2016).

²¹⁰ Explanatory Report to the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, p.3, para.8. (This report was retrieved from and can be found on the official website of the CoE: “<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900016801ce394>”) (Access date: 12 December 2016).

²¹¹ Emphasises added.

²¹² For further elaboration of the differences between the 1968 and the 1974 conventions, see; Malabat, *ibid*, p.577-578.

²¹³ Only through the membership procedures of some of the former Yugoslavian States, the number of ratification of this Statute has increased to 9.

and 1990; and (ii) Article 29 of the ICC Statute which also recognizes the non-applicability of statutory limitations to core international crimes.²¹⁴

B) Soft Law

1- The United Nations (UN)

a. General Assembly

Resolution 95 (I) of the United Nations General Assembly (UN GA) in 1946 did not have any provision regarding the non-applicability of statutory limitations on international crimes. This is due to the mere fact that neither the London Statute nor the decision of the IMT responded to such an obstacle.

In 1967, the UN GA adopted Resolution 2338 (XXII) which recognizes that *“it is necessary and timely to affirm in international law, through a convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application”*.²¹⁵ This exact wording is also included in the Preamble of the 1968 Convention.

The UN GA, with its Resolution 2391 (XXIII), opened the 1968 Convention for signature.²¹⁶ The 1969 UN GA Resolution 2583 (XXIV) invited *“States concerned which have not yet signed or ratified the Convention to do so as soon as possible”*.²¹⁷ This invitation was repeated in two other resolutions, namely 2840 (XXVI)²¹⁸ and 3074 (XXVIII)²¹⁹.

²¹⁴ Kok, *ibid*, pp.95-96.

²¹⁵ This resolution was retrieved from the official website of the UN: “<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/236/73/IMG/NR023673.pdf>” (Access date: 16 December 2016).

²¹⁶ “Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity”, 1227th Plenary meeting, 26 November 1968.

²¹⁷ “Question of the punishment of war criminals and of persons who have committed crimes against humanity”, 1834th Plenary meeting, 15 December 1969.

²¹⁸ “Question of the punishment of war criminals and of persons who have committed crimes against humanity”, 2025th plenary meeting, 18 December 1971.

²¹⁹ “Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity”, 2187th plenary meeting, 3 December 1973.

In respect to the forced disappearances, the UN GA “Declaration on the Protection of all Persons from Enforced Disappearance”²²⁰ was adopted. Article 17 of this Declaration, not completely prohibited, but seriously restricted possible applications of statutory limitations onto this crime.²²¹

b. International Law Commission

Resolution 177 (II)²²² of the UN GA directed the ILC to “[p]repare a draft code of offences against the peace and security of mankind (...).” With this mandate the ILC has started to prepare this draft code which would be one of the most important founding *Soft Law* documents to lead to the 1998 Rome Statute. In 1954, the first version of the Draft Code was adopted.²²³ In this text, the question of (non-)applicability of statutory limitations on international crimes was not touched upon.

Due to another mandate provided by the UN GA in 1981,²²⁴ the ILC resumed its work to elaborate the Draft Code. This led to the adoption of two interconnected documents, namely the 1994 “Draft Statute for an International Criminal Court”²²⁵ and the 1996 “Draft code of crimes against the peace and security of mankind”²²⁶.

²²⁰ UN GA, A/RES/47/133, 92nd plenary meeting, 18 December 1992.

²²¹ “1. Acts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified.

2. When the remedies provided for in article 2 of the International Covenant on Civil and Political Rights are no longer effective, the statute of limitations relating to acts of enforced disappearance shall be suspended until these remedies are re-established.

3. Statutes of limitations, where they exist, relating to acts of enforced disappearance shall be substantial and commensurate with the extreme seriousness of the offence.” (Cited in: Kok, *ibid*, p.114).

²²² “Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal”, 123rd plenary meeting, 21 November 1947.

²²³ “Draft Code of Offences against the Peace and Security of Mankind (1954)”, “Text adopted by the International Law Commission at its sixth session, in 1954, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (at para. 54). The report, which also contains commentaries on the draft articles, appears in Yearbook of the International Law Commission, 1954, vol. II.”

²²⁴ “A/RES/36/106”, UN GA Resolution 36/106, 10 December 1981. This resolution was retrieved from the official website of the UN: “<http://www.un.org/documents/ga/res/36/a36r106.htm>” (Access date: 17 July 2017).

²²⁵ Yearbook of the International Law Commission, 1994, vol. II (Part Two). “Text adopted by the Commission at its forty-sixth session, in 1994, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session”

²²⁶ Yearbook of the International Law Commission, 1996, vol. II (Part Two). “Text adopted by the International Law Commission at its forty-eighth session, in 1996, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session”

Neither of these documents contains a provision regarding statutory limitations.²²⁷ However, during the work of the ILC, “Report of the International Law Commission on the work of its forty-third session (29 April-19 July 1991)”²²⁸ was published. Chapter IV of this Report is devoted to the preparation of the Draft Code. Article 7 of this provisional Draft Code stipulates that “*No statutory limitation shall apply to crimes against the peace and security of mankind.*”²²⁹

For the purpose of achieving a single convention on crimes against humanity, a Special Rapporteur was appointed by the ILC who, in 2016, submitted his “Second report on crimes against humanity”.²³⁰ Annex II to this Report contains a specific prohibition on statutory limitations: Draft Article 5 (3) provides that “*Each State also shall take the necessary measures to ensure that (...) (b) an offence referred to in this draft article²³¹ shall not be subject to any statute of limitations (...).*”

The Special Rapporteur also observes that “*One of the key issues identified by States for not joining the [1968 Convention] was a concern with the retroactive effect of the prohibition on a statute of limitations. Article 1 of the Convention prohibited a statute of limitations “irrespective of their date of commission” (art. I), thereby requiring States parties to abolish statutory limitations with retroactive effect. An alternative approach to such a prohibition in a new convention would be to prohibit statutory limitations, but not with retroactive effect, either by affirmatively stating as much or by not addressing the issue.*”²³²

²²⁷ Ambos shows the difference between 1991 and 1996 draft and argues that this lack was the result of inclusion of crimes other than genocide, crimes against humanity, and war crimes: “*Any statutory limitations on the crimes within the jurisdiction of the Court are ruled out by article 29. Such a rule is possible because the Court’s jurisdiction is limited to the core crimes set out in articles 5 to 9, namely genocide, war crimes, crimes against humanity and aggression. In former instruments or drafts, a statute of limitations was either not totally excluded or the question was left open due to uncertainty about the crimes to be included in the instrument.*” Kai Ambos, “General Principles of Criminal Law in the Rome Statute” in **Criminal Law Forum**, 10, 1999, p.24.

²²⁸ A/46/10, “Report of the International Law Commission on the work of its forty-third session, 29 April - 19 July 1991, Official Records of the General Assembly, Forty-sixth session, Supplement No. 10”. Yearbook of the International Law Commission, 1991, vol. II (Part Two).

²²⁹ p.94 of the Report

²³⁰ A/CN.4/690, 21 January 2016.

²³¹ Draft Article 5 (1): “*(...) committing a crime against humanity; attempting to commit such a crime; and ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.*” (Annex II, p.104) (footnote added).

²³² p.34, para.50. The relevant paragraph continues as follows: “*Article 28 of the Vienna Convention on the Law of Treaties provides that “[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party*”. The ICJ applied article 28 in the context of a treaty addressing a crime (torture) in

c. Commission on Human Rights

UNCHR was the principal functional organ of the Economic and Social Council (ECOSOC) which dealt with human rights issues until 2006 when it was replaced²³³ with the UN Human Rights Council.

One of the most important developments leading to the 1968 Convention was the 21st session of the Commission of Human Rights during which the “Question of the punishment of war criminals and of persons who have committed crimes against humanity” was considered and Resolution 3 (XXI) (E/4024) was adopted. This Resolution requested the UN Secretary-General to “*undertake a study of the problem raised in international law by war crimes and crimes against humanity, and of existing legal procedures to ensure that no period of limitation applied to such crimes.*”²³⁴

The Secretary-General submitted his study on 15 February 1966, bearing the same title.²³⁵ At the end, the Commission came to the conclusion that statutory limitations should have been explicitly permitted by international law, had the drafters wanted them to be applied to international crimes. Thus, the non-applicability of statutes of limitation on international crimes was already a norm of international law according to the Commission.²³⁶

Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) *finding that the “the obligation to prosecute the alleged perpetrators of acts of torture under the Convention applies only to facts having occurred after its entry into force for the State concerned”. Thus, without a clearly stated contrary intention, a treaty will generally not apply to actions taken entirely prior to the State’s acceptance of the treaty.*” (footnote removed).

²³³ UN GA Resolution 60/251 of 15 March 2006.

²³⁴ **Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity**, UN Audiovisual Library of International Law, 2002, p.1.

²³⁵ ECOSOC, E/CN.4/906, 15 February 1966.

²³⁶ The Report reads as follows: “(...) [The UN] has attempted to define the principles of international law whose violation should be punished. This has led, both within the United Nations and outside it, to the conferment of a special status on certain crimes against the international public order and to contemplation of the establishment of a permanent international criminal jurisdiction. The fact that, in the absence of such a jurisdiction, these crimes are at present subject to trial in national courts does not mean that the bringing of charges is not an international matter. **It therefore appears natural and in conformity with legal principles that such crimes should not be subject to any period of limitation unless and until international law, which determines what charges can be brought, decides otherwise.** In fact international law makes no such provision. On the contrary, it lays an obligation on the States concerned to ensure effective and exemplary punishment for such crimes, the reason being, no doubt, that such punishment is more necessary to the international public order than the punishment of crimes under ordinary municipal law is to the national public order. (...) [T]he

In the following months, the Commission rendered the Report E/4184²³⁷ which led to the ECOSOC Resolution 1158 (XLI) of 5 August 1966.²³⁸ Both documents urged “*all States to observe the principle of international law according to which no statutory limitation shall be applied to war crimes and crimes against humanity and to continue their efforts to ensure the arrest, extradition and punishment of persons responsible for war crimes and crimes against humanity.*” The ECOSOC Resolution 1220 (XLII) of 1967 finally transmitted “*the preliminary draft convention on the non-applicability of statutory limitation to war crimes and crimes against humanity*”²³⁹.

The Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UNCHR (empowered by Resolution 1989/13) prepared in 1996, the “Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law”²⁴⁰ which stipulated that “*[s]tatutes of limitations shall not apply in respect of periods during which no effective remedies exist for violations of human rights and humanitarian law.*”²⁴¹

In the following year, a new rapporteur of the same institution also submitted a report called “Question of the impunity of perpetrators of human rights violations (civil and political)”.²⁴² Paragraph 31 sets forth that “*Prescription is without effect in the case of serious crimes under international law, such as crimes against humanity. It cannot run in respect of any violation while no effective remedy is available.*”

silence on this point of all international instruments drawn up since the Second World War on punishment of war crimes, crimes against peace and crimes against humanity, which form the new international criminal law, can be interpreted only as recognition of the principle that there is no period of limitation for such crimes.” (emphasis added) (“IV. Conclusion”, p.117, para.157).

²³⁷ E/CN.4/916: “Report on the twenty-second session, 8 March – 5 April 1966”, “Economic and Social Council, Official Records: forty-first session, Supplement No. 8”.

²³⁸ E/RES/1158 (XLI): “Question of punishment of war criminals and of persons who have committed crimes against humanity”, 1445th plenary meeting, 5 August 1966.

²³⁹ E/RES/1220 (XLII): “Question of punishment of war criminals and of persons who have committed crimes against humanity”, 1478th plenary meeting, 6 June 1967.

²⁴⁰ ECOSOC, E/CN.4/Sub.2/1996/17, 24 May 1996. (Cited in: Theo van Boven, **The United Nations 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**, Introductory Note, UN Audiovisual Library of International Law, 2010, p.1). Kok, *ibid*, p.114.

²⁴¹ ECOSOC, E/CN.4/Sub.2/1996/17, 24 May 1996, Principle No.9

²⁴² ECOSOC, E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997.

The 1998 “Final report submitted by Ms. Gay J. McDougall, Special Rapporteur [on Contemporary Forms of Slavery]”²⁴³ also contains several provisions on statutory limitations: *“It is well established that there are no statute of limitation barriers to prosecutions for serious crimes under international law. (...) This modern position is a natural extension of the Nürnberg Tribunal precedent and is reaffirmed in international treaties addressing the subject and prohibiting the application of statutory limitations to certain war crimes and crimes against humanity, such as [the 1968 Convention] and [the 1974 Convention]. A number of domestic courts have in fact continued to convict Nazi war criminals for international crimes committed nearly 50 years ago during the Second World War despite defence arguments based on statute of limitations concerns.”*²⁴⁴

With Resolution 1999/33, the Commission appointed Professor M. Cherif Bassiouni as the Special Rapporteur on “Civil and Political Rights, including the Questions of: Independence of the Judiciary, Administration of Justice, Impunity”. Under Chapter IV of his report²⁴⁵, it was pointed out that *“6. Statutes of limitations shall not apply for prosecuting violations of international human rights and humanitarian law norms that constitute crimes under international law. 7. Statutes of limitations for prosecuting other violations or pursuing civil claims should not unduly restrict the ability of a victim to pursue a claim against the perpetrator, and should not apply with respect to periods during which no effective remedies exist for violations of human rights and international humanitarian law norms.”*

In 2005, an independent expert to update “the Set of principles to combat impunity” submitted her report.²⁴⁶ Principle 23 of the updated Set provides that *“Prescription - of prosecution or penalty - in criminal cases shall not run for such period as no effective remedy is available. / Prescription shall not apply to crimes under international law that are by their nature imprescriptible. (...)”*²⁴⁷

²⁴³ ECOSOC, E/CN.4/Sub.2/1998/13, 22 June 1998.

²⁴⁴ ECOSOC, E/CN.4/Sub.2/1998/13, 22 June 1998, para.87

²⁴⁵ ECOSOC, E/CN.4/2000/62, 18 January 2000.

²⁴⁶ ECOSOC, E/CN.4/2005/102/Add.1, 8 February 2005.

²⁴⁷ In respect to this Report and Principles, Kok observes that *“the Special Rapporteur pointed out that [w]hile the revised text therefore does not specify which international crimes are imprescriptible, the general trend in international jurisprudence has been towards increasing recognition of the relevance of this doctrine not only for such international crimes as crimes against humanity and war crimes, but*

In the same year, the Commission adopted (i) “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 by the Commission on Human Rights” with its Resolution 2005/35 of 19 April 2005²⁴⁸; and (ii) Resolution on Impunity (Human Rights Resolution 2005/81 of 21 April 2005).²⁴⁹

The former instrument was later approved by the ECOSOC with Resolution 2005/30 of 25 July 2005 which recommended the UN GA to adopt these principles and guidelines.²⁵⁰ At the 64th plenary meeting of 16 December 2005, the UN GA “adopted and proclaimed” them by its Resolution 60/147.²⁵¹ Principle IV of this document reads as follows:

“IV. Statutes of limitations

6. Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law. (...)”

In the Paragraph 4 of the Resolution on Impunity, on the other hand, the UNCHR urged “*States, in accordance with their obligations under applicable international law, to remove remaining statutes of limitations on such crimes (...)*.”

d. Human Rights Council

Since the establishment of the UNHRC, there is not much progress in the area of (non-) applicability of statutory limitations on international crimes. The few

also for gross violations of human rights such as torture and enforced disappearance.’” (Kok, *ibid*, p.115-116.)

²⁴⁸ OHCHR, E/CN.4/RES/2005/35, Human Rights Resolution 2005/35.

²⁴⁹ OHCHR, E/CN.4/RES/2005/81, Human Rights Resolution 2005/81.

²⁵⁰ ECOSOC, E/RES/2005/30, 38th plenary meeting, 25 July 2005.

²⁵¹ UN GA Resolution 60/147, A/RES/60/147, “Resolution adopted by the General Assembly on 16 December 2005 [on the report of the Third Committee (A/60/509/Add.1)]”, “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”, a21 March 2006.

documents which bring up this issue are generally those which only mention the 1968 Convention or the aforementioned documents of ECOSOC.²⁵²

For example, resolutions on “The grave situation of human rights in Lebanon caused by Israeli military operations”²⁵³ and on “Prevention of genocide”²⁵⁴ only recalled the 1968 Convention without going into details or even simply acknowledging this ban.

Article 8 (1) of the draft “International Convention for the Protection of All Persons from Enforced Disappearance”, which was recommended by Resolution 1/1 of the UNHRC to the UN GA to be adopted, provides that

“A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings:

(a) Is of long duration and is proportionate to the extreme seriousness of this offence;

(b) Commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature. (...)”

UNHRC has requested various State-members of the UN to adopt or improve legislations in respect to (non-)applicability of statutory limitations on forced disappearance. For instance, under the auspices of the GA, “Report of the Working Group on Enforced or Involuntary Disappearances on [HRC] mission to Turkey”²⁵⁵ was rendered. This report confirms that

“19. (...) The Working Group notes that Turkey has recently abolished the application of the statute of limitations for the crime of torture and encourages the Government to consider extending this provision to enforced disappearance once it is duly criminalized. 20. In any case, the statute of

²⁵² For further elaboration on the subject of transition from the Commission into the Council, see Report of the [UN] Secretary-General to the UN GA of 23 May 2005: “In larger freedom: towards development, security and human rights for all / Human Rights Council - Explanatory note by the Secretary-General” (A/59/2005/Add.1).

²⁵³ A/HRC/S-2/L.1, 9 August 2006.

²⁵⁴ Human Rights Council, Resolution 7/25, 41st meeting, 28 March 2008, adopted without a vote.

²⁵⁵ A/HRC/33/51/Add.1, 27 July 2016.

limitations cannot be applied in cases of enforced disappearance amounting to crimes against humanity. However, Turkish law does not include acts of enforced disappearance in the definition of crimes against humanity. The Working Group urges the Government to include the practice of widespread or systematic enforced disappearances in the definition of crimes against humanity. (...) 32. Another consequence of the lack of an autonomous criminal offence of enforced disappearance is that, being prosecuted as elements of other crimes, acts of enforced disappearance are subject to the statute of limitations applicable to those crimes. The Working Group has been informed of a number of cases involving enforced disappearance which have been discontinued due to the expiration of the statute of limitations applicable to the crime under which the prosecution was launched.”²⁵⁶

After his mission to Georgia in 2015, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment prepared a report²⁵⁷ in which following observations were made: “*With regard to the prosecution of cases relating to torture, the Special Rapporteur stresses that obstacles to prosecution, such as amnesty, pardons, statute of limitations or prosecutorial discretion to decline prosecution, are not permissible in international law. Cases of torture must be prosecuted; the only legitimate limitations to this obligation are lack of evidence and the duty to respect guarantees of fair trial and due process of law.*”²⁵⁸

In his 2016 Report²⁵⁹ dealing, *inter alia*, with the role of health professionals from the Central Intelligence Agency’s (CIA) enhanced interrogation program between 2001 and 2009 (Case No. USA 1/2005), the Rapporteur observes that “*As interpreted by the Committee Against Torture, this obligation [to investigate, prosecute and punish every act of torture] is not subject to a statute of limitations or to any other impediment to prosecution.*”²⁶⁰

²⁵⁶ Emphasis added.

²⁵⁷ A/HRC/31/57/Add.3, 1 December 2015.

²⁵⁸ A/HRC/31/57/Add.3, 1 December 2015, para.53, p.10.

²⁵⁹ A/HRC/31/57/Add.1, 24 February 2016.

²⁶⁰ A/HRC/31/57/Add.1, 24 February 2016, para.634, p.105.

C) Other Sources

Although it is virtually impossible to discuss, or even mention, every second-tier source of international criminal law which addresses the question of applicability of statutory limitations, some authorities are too important to ignore. They are, either by attribution from aforementioned primary sources or by tradition, in a position of strength when it comes to creating, codifying, or construing the norms of international criminal law.

1- International Committee of Red Cross

The “mandate and mission” of the ICRC is summarized by this NGO as *“[t]he work of the ICRC is based on the Geneva Conventions of 1949, their Additional Protocols, its Statutes – and those of the International Red Cross and Red Crescent Movement – and the resolutions of the International Conferences of the Red Cross and Red Crescent. The ICRC is an independent, neutral organization ensuring humanitarian protection and assistance for victims of armed conflict and other situations of violence. It takes action in response to emergencies and at the same time promotes respect for international humanitarian law and its implementation in national law.”*²⁶¹

In its vast database²⁶² on international humanitarian law, which relies on decades-long experience both in theory and on the field, the ICRC has been codifying rules and practices which are related to their area of expertise. Rule 160 of ICRC confirms that *“Statutes of limitation may not apply to war crimes.”*²⁶³ This provision is based on (i) aforementioned instruments; (ii) decisions of national and international judicial bodies; and (iii) State practice:

“The principle that statutes of limitation do not apply to war crimes is set forth in many military manuals and in the legislation of many States,

²⁶¹ This text is retrieved from and can be found on the official website of the ICRC: “<https://www.icrc.org/en/mandate-and-mission>” (Access date: 18 July 2017).

²⁶² The database of the ICRC on customary international humanitarian law can be found on its official website: “<https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>” (Access date: 18 July 2017).

²⁶³ ICRC, Customary International Humanitarian Law, Rule 160. (“https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule160”) (Access date: 18 July 2017).

including those of States not party to [the 1968 Convention or the 1974 Convention]. There are also official statements to this effect. For example, in 1986, the United States wrote a note to Iraq (also not party to the [1968] Convention) to the effect that individuals guilty of war crimes could be subject to prosecution at any time, without regard to any statute of limitations. In a letter to the UN Secretary-General in 1993, Yugoslavia stated that war crimes were not subject to statutes of limitation. In 2000, upon signature of the [1998 Rome Statute], Egypt stated that it was a “well established principle that no war crime shall be barred from prosecution due to the statute of limitations”. There is also case-law of States not party to the [1968 or 1974] Conventions in which the courts concerned ruled that statutes of limitation do not apply to war crimes. It is significant that several States that objected earlier to a prohibition of statutory limitations, or whose legislation was not clear on this point, have now ratified the [Rome Statute] or the [1968 Convention] thus recognizing the principle that statutes of limitation do not apply to war crimes.”²⁶⁴

It seems that the ICRC has a wide definition of “war crimes” which also includes crimes against humanity and genocide. Because, firstly, not every breach of “laws and customs of war” amounts to war crime, and secondly, war crimes, *stricto sensu*, constitute the category on which international community is the least convinced to accept the non-applicability of statutory limitations in comparison to genocide and/or crimes against humanity.²⁶⁵

2- International Association of Penal Law

Association Internationale de Droit Pénal (AIDP) was, with International Institute of Higher Studies in Criminal Sciences (ISISC) and Max Planck Institute for Foreign and International Criminal Law (MPI), a part of the consortium which created the “Draft Statute for an International Court: Alternative to the ILC-Draft” (“Siracusa Draft”) in 1995.²⁶⁶

²⁶⁴ ICRC, Customary International Humanitarian Law, Rule 160, “International and non-international armed conflicts” (footnotes removed).

²⁶⁵ See, *infra*, p.121 and p.129 et seq.

²⁶⁶ “Draft Statute for an International Criminal Court - Alternative to the ILC-Draft - (Siracusa-Draft), prepared by a Committee of Experts” is retrieved from and can be found on the official website of the

As explained in the foregoing chapters, the ILC was the primary UN-body which prepared the instruments leading to the 1998 Rome Statute. The Siracusa Draft, on the other hand, was a rather private initiative which influenced the crafters²⁶⁷ of the ICC.

The Committee of Experts to enact the Siracusa Draft included significant scholars of international law, such as M. Cherif Bassiouni, Michael Scharf, Otto Triffterer, and Kai Ambos.

Article 33q, bearing the title of “Statute of Limitation” stipulated that “*There is no statute of limitation for genocide, serious war crimes, crimes against humanity (or aggression).*”

The AIDP also had a strong influence before the adoption of the 1968 Convention. In 1966, the AIDP prepared a questionnaire “*on the existence of a general principle providing for the imprescriptibility of international crimes, prior to the adoption of an international instrument in this regard*”.²⁶⁸ The answers to this questionnaire divided the scholars into two schools in respect to our work: (i) those who believe that non-applicability of statutory limitations on international crimes is already an international norm, thus, that such a convention would be “declarative”; and (ii) those who do not consider it to be part of customary international law, consequently a new treaty would be of “constituent” character.

By 1966, the UNCHR was of the opinion that such a convention would be of declaratory character. However, given the lack of support by the international community, the question is subject to discussion. This marks that the aforementioned questionnaire and the answers to it are still important as it was in 1966.

ICC: “https://www.legal-tools.org/uploads/tx_ltpdb/Alternative_Siracusa_Draft__1995_.pdf” (Access date: 18 July 2017).

²⁶⁷ For instance, Giovanni Conso (Italy), the elected President of the UN Diplomatic Conference on Establishment of International Criminal Court was a member of the AIDP. (Press Release BIO/3167 L/2872; retrieved from the official website of the ICC: “https://www.legal-tools.org/uploads/tx_ltpdb/doc41747.htm”) (Access date: 18 July 2017).

²⁶⁸ Kok, *ibid*, p.86.

3- American Bar Association

Even though there are similar institutions all over the world, the ABA has been especially influential, not only through its members in authoritative posts in international community or being in a position of power vis-à-vis the US government, but also by enacting important reports and texts itself.

After the Haitian failure to punish Duvalier family due to statutory limitations,²⁶⁹ the chair of the ABA Section of International Law, Barton Legum, presented a report on the non-applicability of statutory limitations on international crimes.²⁷⁰ In his eyes, genocide, crimes against humanity and serious war crimes are imprescriptible under customary international law.²⁷¹ The report consequently asks the ABA to “*issue a policy statement urging all countries not to apply a statute of limitations to serious crimes.*”²⁷² Consequently, the House of Delegates of the ABA adopted a resolution in its Annual Meeting of 2013.²⁷³

In the following year, the ABA Center for Human Rights prepared a report which was turned into a resolution. This document endorsed the US Congress “*to enact legislation to prevent and punish crimes against humanity*” and further urged the US government “*to take an active role in the negotiation and adoption of a new*

²⁶⁹ For further information regarding the (non-)prosecution of the Duvalier family, see; Amanda M. Klasing, **Haiti’s Rendezvous with History: The Case of Jean-Claude Duvalier**, Human Rights Watch, USA, 2011.

²⁷⁰ “American Bar Association Section of International Law – Report to the House of Delegates” (107A) is retrieved from and can be found on the official website of the ABA: “https://www.americanbar.org/content/dam/aba/uncategorized/international_law/2013_hod_annual_meeting_107A.authcheckdam.pdf” (Access date: 18 July 2017).

²⁷¹ “*Customary international law also proscribes statutes of limitations for the prosecution and punishment of serious war crimes. Like genocide and crimes against humanity, the international community considers certain war crimes among “the gravest crimes in international law.” Typical definitions of serious war crimes include willful killing, torture or inhumane treatment, and willfully causing great suffering or serious bodily injury.*” (p.9-10)

²⁷² It further reads as follows: “*Doing so will minimize the likelihood that relevant authorities will misapply or misunderstand this well-settled and important legal principle; advance the deterrent objective of the proscription by promoting a proper understanding of this legal principle in countries in which the ABA is making contributions; and contribute to the betterment of human rights around the globe.*” (p.13)

²⁷³ “Resolutions with Reports to the House of Delegates - 2013 Annual Meeting - San Francisco, California - August 12-13, 2013” is retrieved from and can be found on the official website of the ABA:

“http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2013_hod_annual_resolutionswithreports.authcheckdam.pdf” (Access date: 18 July 2017).

global convention for the prevention and punishment of crimes against humanity.”²⁷⁴

The current developments in the adoption process of such a new convention include a draft article on the non-applicability of statutory limitations.²⁷⁵

4- Princeton Principles on Universal Jurisdiction

In 2001, the participants in the Princeton Project on Universal Jurisdiction (namely the Program in Law and Public Affairs of Princeton University, Woodrow Wilson School of Public and International Affairs of Princeton University, International Commission of Jurists, American Association for the International Commission of Jurists, Netherlands Institute of Human Rights and Urban Morgan Institute for Human Rights), proposed a series of principles which will be called “Princeton Principles on Universal Jurisdiction”.²⁷⁶

In this rather scholarly work²⁷⁷, Principle 6 sets forth that “*Statutes of limitations or other forms of prescription shall not apply to serious crimes under international law as specified in Principle 2(1).*” In the latter principle it is accepted that “[f]or purposes of these Principles, serious crimes under international law include: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture.”

In the Commentary section of the Principles, it was argued that “*Principle 6 reaffirms that statutes of limitations do not apply to crimes covered by universal jurisdiction. Conventional international law supports this position, at least as concerns war crimes and crimes against humanity [in light of the 1968 Convention].*”²⁷⁸

²⁷⁴ American Bar Association Center for Human Rights – Report to the House of Delegates” (300) is retrieved from and can be found on the official website of the ABA: “http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2014_hod_annual_meeting_300.authcheckdam.pdf” (Access date: 18 July 2017).

²⁷⁵ See, for instance, “Third report on crimes against humanity” by Sean D. Murphy, Special Rapporteur of the ILC (A/CN.4/704), p.5.

²⁷⁶ “The Princeton Principles on Universal Jurisdiction” by “Princeton Project on Universal Jurisdiction” is retrieved from and can be found on the official website of the said university’s “Program in Law and Public Affairs”: “https://lapa.princeton.edu/hosteddocs/unive_jur.pdf” (Access date: 18 July 2017).

²⁷⁷ Kok, *ibid*, p.306.

²⁷⁸ The Princeton Principles on Universal Jurisdiction, p.51.

II) Practice of Statutory Limitations in International Criminal Law

International law is applicable both by international order and by national authorities. This is especially valid for international criminal law. An author of a war crime, for example, can be tried both by relevant national judicial authorities or an international body created for the purpose of trying such acts (of course, the principle of *ne bis in idem* needs to be respected). Usually, jurisdictions of international courts and tribunals do not supersede those of national organs.²⁷⁹

In fact, most of the judgments and decisions to be found are those which are rendered by national courts. This, of course, does not relieve them from the obligation of applying international norms. For example, Article 90 of the Turkish Constitution of 1982, which sets forth that “[i]nternational agreements duly put into effect have the force of law. (...) In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail”²⁸⁰, obliges domestic judges to take international treaties into consideration wherever possible.²⁸¹ In the first case, where an ordinary international treaty contradicts with a domestic provision, the judge should decide by using standard techniques such as *lex specialis* - *lex generalis* and *lex posterior* - *lex prior*. On the other hand, if the treaty is concerned with fundamental rights, the contradicting domestic law has to be put aside and not applied.

Under this Part, the decisions of courts and tribunals on the question of (non-)applicability of statutory limitations on international crimes will be analysed. The decisions of international judicial bodies (Chapter A), secondly, those of domestic courts (Chapter B) will be discussed.

²⁷⁹ See, for example, complementarity of the jurisdiction of ICC (Art.29 of the Rome Statute) and referral of indictments by the ICTY to national authorities of former-Yugoslavian States (.....)

²⁸⁰ Former translation of the Grand National Assembly of Turkey (*Türkiye Büyük Millet Meclisi*) is retrieved from and can be found on its official website: “https://global.tbmm.gov.tr/docs/constitution_en.pdf” (Access date: 17 December 2016).

²⁸¹ Some authors argue that parliamentary acts are necessary for Turkish courts to apply customary international norms. See, for instance; Pazarcı, *Uluslararası Hukuk*, p.28 (in Turkish).

A) International case-law

Aside from the statutes illuminated in the foregoing, the decisions of the international judicial and quasi-judicial bodies will be analysed here. In other words, under this Chapter, only the decisions where the relative organ declared itself in a comprehensive or uncoupled manner will be discussed. On the other hand, if a decision is merely repeating the relevant statute or national law, and/or of no significant importance, it will not be analyzed.

The first sub-chapter is devoted to the decisions, judgments and rulings of criminal courts and tribunals of international character (Sub-Chapter 1). Afterwards, those rendered by judicial human rights mechanisms will be discussed (Sub-Chapter 2).

1- International criminal tribunals and internationalized criminal courts

a. International Criminal Tribunal for the former Yugoslavia (ICTY)

Even though the statute of the ICTY was indifferent on prescription, the Court nevertheless declared itself on this issue. In the *Furundžia* case, a Trial Chamber has ruled, as an *obiter dictum*,²⁸² that “*torture may not be covered by a statute of limitations (...)*.”²⁸³ The Appeals Chamber did not reject this standpoint.²⁸⁴

This ruling, even though not a binding solution to the question at hand, shows the spread of the principle of non-applicability of statutory limitations on international crimes from core international crimes to a rather contemporary international crime such as torture. The Court explicitly accepts the prohibition of

²⁸² Under the doctrine of *stare decisis*, a judgment is composed of two parts, *ratio decidendi* and *obiter dictum*, where the former is binding and the latter is “said in passing”.

²⁸³ ICTY, *Prosecutor v. Furundžia*, Trial Chamber II, Judgment, 10 December 1998, para.157: “*It would seem that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption.*”

²⁸⁴ ICTY, *Prosecutor v. Furundžia*, Appeals Chamber, Judgment, 21 July 2000.

torture as part of *jus cogens*,²⁸⁵ thus, elevating this crime toward the level of core international crimes.

On the other hand, the Court lacks jurisdiction *ratione materiae* on torture as a separate crime.²⁸⁶ Furthermore, the Court did not clarify enough how it reached this conclusion.²⁸⁷ Lastly, it did not enlarge this application to all war crimes or to crimes against humanity.

In the case *Prosecutor v. Darko Mrđa*²⁸⁸, the ICTY declared itself once more in respect to (non-)applicability of statutory limitations in international criminal law and on the question of whether a time-lapse would constitute a mitigating factor for the accused: *“Trial Chamber recalls that **the crimes against humanity and war crimes over which the Tribunal exercises jurisdiction belong to the most serious category of crimes. The importance of international prosecution of the perpetrators of such serious crimes diminishes only slightly over the years, if at all. On this point, it is important to recall Article 1 of the [1968 UN Convention] (ratified by the former Yugoslavia on 9 June 1970 and currently in force in Bosnia and Herzegovina), which stipulates that such crimes are not subject to statutory limitation. (...) For crimes of a seriousness justifying their exclusion from statutory limitation, the Trial Chamber considers that a lapse of time of almost twelve years between the commission of the crimes and sentencing proceedings is not so long as to be considered a factor for mitigation.**”*²⁸⁹

b. Special Court for Sierra Leone (SCSL)

A judge of the Appeals Chamber of the SCSL, in his separate opinion to the “Decision on Lack of Jurisdiction / Abuse of Process: Amnesty provided by the

²⁸⁵ ICTY, *Prosecutor v. Furundžija*, Trial Chamber II, Judgment, 10 December 1998, para.153: “While the erga omnes nature just mentioned appertains to the area of international enforcement (lato sensu), the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules. (...)”

²⁸⁶ However, the Court has jurisdiction on war crimes and crimes against humanity. Torture, as explained above (see, *supra*, “Introduction”, p.8), may constitute either of these crimes and the accused was found guilty of the former category.

²⁸⁷ Kok, *ibid*, p.106.

²⁸⁸ ICTY, *Prosecutor v. Darko Mrđa*, Trial Chamber I, Sentencing Judgment, 31 March 2004.

²⁸⁹ para.103-104 (footnote removed) (emphasis added).

Lomé Accord”²⁹⁰, rejected, *inter alia*, the applicability of statutory limitations on serious human rights by recalling the aforementioned *Furundžia* decision and *Barrios Altos* case²⁹¹.

c. Extraordinary Chambers in the Courts of Cambodia (ECCC)

A pre-trial chamber of the ECCC, in its “Decision on Ieng Sary’s Appeal against the Closing Order” ruled that “*At the outset, the Pre-Trial Chamber observes that the Co-Investigating Judges' Closing Order indicted the Charged Person for Grave Breaches, which amounts to a confirmation of ECCC's jurisdiction to try the Charged Person for such crimes. The CoLawyers' challenge against this confirmation of jurisdiction is based on an assertion that the domestic statutory limitation period applies also to international crimes. The Geneva Conventions, which are the applicable law under Article 6 of the ECCC Law, provide that war crimes are not subject to any statute of limitations, which indicates that there is no statute of limitations applicable. The submission to the contrary is without merit. As the Appellant makes no jurisdictional challenge, the ground is inadmissible.*”²⁹² This position was recently upheld by the Trial Chamber before which the same argument raised.²⁹³

This point-of-view resulted from the fact that, for most of the time-period during which the statutory limitations might be deemed passed, the judicial mechanisms of the Cambodia were not functioning: “*The underlying principle of statutes of limitations is to provide for a time frame within which criminal proceedings must be instituted. As such, it presupposes that judicial institutions operate effectively, so proceedings can be instituted. State practice contains several examples where statutes of limitation were suspended on the basis that the judicial*

²⁹⁰SCSL, *Prosecutor v. Allieu Kondewa*, Appeals Chamber, “Decision on Lack of Jurisdiction / Abuse of Process: Amnesty provided by the Lomé Accord”, 25 May 2004, para.44-45 of the “Separate Opinion of Justice Robertson”.

²⁹¹ See, *supra*, p.63 and *infra*, p.76-77.

²⁹² ECCC, *Co-Prosecutors v. Ieng Sary*, Pre-trial Chamber, “Decision on Ieng Sary’s Appeal against the Closing Order”, 11 April 2011, para.73 (emphasis added).

²⁹³ ECCC, *Co-Prosecutors v. Nuon*, Trial Chamber, “Decision on Defence Preliminary Objection Regarding a Statute of Limitations for Grave Breaches of the Geneva Conventions of 12 August 1949”, 31 October 2014, para.8: “*Neither the Geneva Conventions nor customary international law places any temporal limitation on the prosecution of grave breaches. In the absence of an express jurisdictional limit in the ECCC Law or in international law, this argument [on the applicability of statutory limitations on war crimes] is unfounded.*”

*institutions were not functioning, notably as a result of an ongoing conflict or a dictatorship regime. Suspension of statutes of limitations when judicial institutions are not functioning is also perceived as being necessary to protect the victims' right to reparation of serious violations of human rights resulting from crimes such as the ones subject to the jurisdiction of the ECCC, through prosecution of the authors of the crimes. The Pre-Trial Chamber therefore agrees with and adopts the Trial Chamber unanimous finding **that statutes of limitation do not run where the judicial institutions are not functioning.***²⁹⁴

It is also important to note here that the Pre-Trial Chamber also found the retroactive extension of the statute of limitations before its expiry lawful.²⁹⁵ However, in respect to domestic crimes, such as murder and torture, which were already time-barred before this “extension”, mainly due to the Article 3 (new) (2) of the ECCC Law²⁹⁶, the Cambodian judges and international judges have different perspectives.

In a decision rendered by the Trial Chamber of the ECCC²⁹⁷, the opinions of these two groups severely differed: On the one hand “*The Trial Chamber Cambodian judges have previously found that the Accused can be prosecuted for the domestic crimes of murder and torture, as the limitation period established by the 1956 Penal Code had not expired by the time the ECCC investigation against the Accused commenced in 2006. Article 3 (new) of the ECCC Law does not prevent consideration of whether or not the limitation period for the domestic crimes allegedly committed by the Accused has expired. The Cambodian judges therefore do not need to consider whether Article 3 (new) of the ECCC Law is (as required by Article 33 (new), paragraph 2, of the ECCC Law) in accordance with Articles 14 and 15 of the ICCPR.*”,²⁹⁸ on the other, “*In general terms, the prohibition against the retroactive application of criminal law protects the values of legal certainty and*

²⁹⁴ ECCC, *Co-Prosecutors v. Ieng Sary*, Pre-trial Chamber, “Decision on Ieng Sary’s Appeal against the Closing Order”, 11 April 2011, para.285 (emphasis added).

²⁹⁵ ECCC, *Co-Prosecutors v. Ieng Sary*, Pre-trial Chamber, “Decision on Ieng Sary’s Appeal against the Closing Order”, 11 April 2011, para.282.

²⁹⁶ “*The statute of limitations set forth in the 1956 Penal Code shall be extended for an additional 30 years for the crimes enumerated above, which are within the jurisdiction of the Extraordinary Chambers.*”

²⁹⁷ ECCC, *Co-Prosecutors v. KANG Guek Eav alias Duch*, Trial Chamber, “Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes”, 26 July 2010.

²⁹⁸ para.36. The decision of the Constitutional Council Decision on EC Law of 12 February 2001 had also been used by the Cambodian judges to support their perspective.

*safeguards the implementation of the principle of impartiality and objectivity by a State in accordance with the rule of law. An interpretation of Article 3 (new) of the ECCC Law as allowing a reinstatement of the right to prosecute domestic crimes in relation to a limited number of individuals and after the expiry of statutory limitations may accordingly be perceived as an infringement of that duty of impartiality and objectivity.”*²⁹⁹

d. Supreme Iraqi Criminal Tribunal

In its landmark (and the most important) decision³⁰⁰, the IST tried the former leader of Iraq, Saddam Hussein, and found him guilty of crimes against humanity. Even though the criminal procedure that was held before this Tribunal and the verdict reached at the end of it were deemed “*a fundamentally flawed process*”³⁰¹ and “*a significant step away from the rule of law*”³⁰² by various influential NGOs, the Tribunal’s decision is nevertheless important for this work due to its reliance on international criminal law, rather than on domestic provisions, in respect to applicability of statutory limitations on international crimes.

The Tribunal first observed that “*crimes against humanity during a time of peace have become part of international customary law after the entry in effect on November 11, 1970, of the [1968 Convention]. This is also the case for the Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, 1973. (...) These are used frequently, which shows that these principles are taken into*

²⁹⁹ para.53

³⁰⁰ SICT, *Prosecutor v. Hussein et al., (Al-Dujail Case)*, Case No. 1/9 First/2005, Trial Judgment, “Judgment of the Dujail Trial at the Iraqi High Tribunal”, 11 May 2006. (The English translation of the decision was retrieved from the official website of the T.M.C. Asser Institute: “http://www.asser.nl/upload/documents/3272012_3403305-11-2006%20-%C2%A0Iraqi%20High%20Tribunal%20Judgement%C2%A0Saddam%20Hussein.pdf”) (Access date: 11 March 2017)

³⁰¹ Amnesty International, UK, Press release, “Iraq: Amnesty International deplores execution of Saddam Hussein”, 30 December 2006. Retrieved from its official website: “<https://www.amnesty.org.uk/press-releases/iraq-amnesty-international-deplores-execution-saddam-hussein>” (Access date: 18 July 2017).

³⁰² Human Rights Watch, New York, 30 December 2006, “Iraq: Saddam Hussein Put to Death - Hanging After Trial Undermines Rule of Law”. Retrieved from its official website: “<http://pantheon.hrw.org/legacy/english/docs/2006/12/30/iraq14950.htm>” (Access date: 18 July 2017).

*consideration and have become akin to binding legal rules and form an implicit agreement involving countries in general.”*³⁰³

In the following parts, the Tribunal ruled that *“The question that comes to mind now is whether there was international convention in 1982 which prescribes the criminalization of acts and omissions that are considered crimes against humanity in time of peace. In the opinion of this Tribunal, the answer is affirmative. Such international convention existed at that time. Nevertheless, Article one of the [1968 Convention] has settled that issue when it stipulated: “No statutory limitation shall apply to the following crimes, irrespective of the date of their commission.”*”³⁰⁴

The decision reads as follows: *“There was some disagreement with regard to considering the statutory limitations on past crimes part of international customary law, although most jurists are of the opinion that those crimes have become connected with the peremptory norms of international law (Jus Cogens), and thus statutory limitation does not apply thereto. Rather, any state may resort to the idea of international competence in order to prosecute those crimes, irrespective of the place and time when these crimes were perpetrated. The Iraqi Criminal Tribunal Law has affirmed this viewpoint, as Article 17 (First) provided that statutory limitation shall not apply to invalidate the criminal trial and punishment for crimes that fall under the Tribunal’s jurisdiction and set forth in Articles 11, 12 and 13 of this Law.”*³⁰⁵

The puzzling issue here is that, on the one hand, Iraq was not a State-party to the 1968 Convention by the time the atrocities at hand were committed, and on the other, the Tribunal did not seem to consider the low amount of States which had ratified the Convention to be an obstacle for the latter to be part of customary international law: *“We recognize that Iraq did not ratify the [1968 Convention] prior to 1982, nor afterward, and that the text of Article 17 (First) had been enacted first with the promulgation of the Special Iraqi Tribunal Law in 2003, and then of the*

³⁰³ SICT, *Prosecutor v. Hussein et al.*, (Al-Dujail Case), Case No. 1/9 First/2005, Trial Judgment, “Judgment of the Dujail Trial at the Iraqi High Tribunal”, 11 May 2006, p.38.

³⁰⁴ SICT, *Prosecutor v. Hussein et al.*, (Al-Dujail Case), Case No. 1/9 First/2005, Trial Judgment, “Judgment of the Dujail Trial at the Iraqi High Tribunal”, 11 May 2006, p.39.

³⁰⁵ SICT, *Prosecutor v. Hussein et al.*, (Al-Dujail Case), Case No. 1/9 First/2005, Trial Judgment, “Judgment of the Dujail Trial at the Iraqi High Tribunal”, 11 May 2006, p.40.

*Supreme Iraqi Criminal Tribunal (SICT) Law of 2005. However, we still believe that most international conventions, namely **the ones legislated (general international conventions) were actually a codification of a prior binding international custom. Thus we see that Iraq is bound thereto.** If they are not considered a (legislated) general international convention, they comprise at the very least binding customary rules. The first Article of the aforesaid Convention is clear and explicit in ways that do not require jurisprudence with respect to the invalidation of statutory limitations concerning international crimes, including crimes against humanity, regardless of when these were committed. In other words, crimes against humanity in time of peace existed in international custom prior to 1982, and exist also as written provisions in the aforesaid Convention of 1968. **These written provisions are in fact the codification of prior international custom.**”³⁰⁶*

This point of view was later upheld by the Appeals Commission of the same Tribunal.³⁰⁷ In its decision, the Appeals Commission ruled that “*mass murder crimes were stated in international treaties in 1948 and were ratified by Iraq on January 20, 1959. Thus, by ratifying them they became part of Iraqi laws, and Iraq is committed to the articles stated in the first and second paragraphs of the court law, and therefore they are valid and this is binding on Iraq in light of its clear ratification*”³⁰⁸ and rejected, *inter alia*, the applicability of statutory limitations on crimes against humanity.

2- Human rights courts

a. European Commission of Human Rights

The very first decision from the human rights bodies of the Convention system to rule on our subject was an admissibility decision of the European

³⁰⁶SICT, *Prosecutor v. Hussein et al.*, (Al-Dujail Case), Case No. 1/9 First/2005, Trial Judgment, “Judgment of the Dujail Trial at the Iraqi High Tribunal”, 11 May 2006, p.40 (emphasis added).

³⁰⁷ SICT, *Prosecutor v. Hussein et al.*, Al-Dujail Case, Case No. 29/c/2006, Appeals Commission of the Iraqi High Tribunal, Appeal Opinion, 26 December 2006. (The English translation of the decision was retrieved from the official website of the T.M.C. Asser Institute: “http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Iraq/dujail_appellate_chamber_opinion_26-12-2006.pdf”) (Access date: 11 March 2017).

³⁰⁸ SICT, *Prosecutor v. Hussein et al.*, Al-Dujail Case, Case No. 29/c/2006, Appeals Commission of the Iraqi High Tribunal, Appeal Opinion, 26 December 2006, p.11.

Commission of Human Rights (EComHR), *X. v. FRG* (1976).³⁰⁹ The case concerned the length of criminal proceedings against a suspect of Nazi war crimes.³¹⁰ While declaring the application inadmissible, “*the Commission had regard to the fact that the rules of prescription do not apply to war crimes and that the international community requires the competent authorities of the Federal Republic of Germany to investigate and prosecute these crimes despite the difficulties encountered by reason of the long time that has elapsed since the commission of the acts concerned.*”³¹¹

In 1997, a landmark decision was rendered by the EComHR, *Touvier v. France*.³¹² France had abolished statutory limitations from its criminal law system in respect to crimes against humanity by 1964.³¹³ The applicants (Paul Touvier’s wife and children) argued that, *inter alia*, his prosecution according to this new law violated Article 7 (1) of the ECHR, which provides for the principle of legality. However, the EComHR decided that “*the offence of a crime against humanity and the rule that there can be no lime bar were laid down by the Charter of the Nuremberg International Tribunal annexed to the inter-Allied Agreement of 8 August 1945 and that a French law of 26 December 1964 referring expressly to that Agreement provides that the prosecution of crimes against humanity cannot be time barred.*”, thus, found the French law and practice compatible with the Convention.³¹⁴ It is worth underlying that neither the IMT Charter nor UN GA Resolution 95 (I) included any provision regarding non-applicability of statutory limitations to crimes against humanity.³¹⁵

³⁰⁹ EComHR, *X. v. FRG*, Application No. 6946/75, Decision on Admissibility, 6 July 1976.

³¹⁰ EComHR, *X. v. FRG*, p.114.

³¹¹ EComHR, *X. v. FRG*, pp.115-116 (emphasis added); Kok, *ibid*, p.96.

³¹² EComHR, *Touvier v. France*, Application No. 29420/95, Decision on Admissibility, 13 January 1997.

³¹³ France, “Loi n° 64-1326 du 26 décembre 1964 tendant à constater l’imprescriptibilité des crimes contre l’humanité”, Article unique (1): “*Les crimes contre l’humanité, tels qu’ils sont définis par la résolution des Nations Unies du 13 février 1946, prenant acte de la définition des crimes contre l’humanité, telle qu’elle figure dans la charte du tribunal international du 8 août 1945, sont imprescriptibles par leur nature.*”

³¹⁴ EComHR, *Touvier v. France*, Application No. 29420/95, Decision on Admissibility, 13 January 1997, p.161 (emphasis added).

³¹⁵ “Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis. Signed at London, on 8 August 1945” and “Charter of the International Military Tribunal” to the said Agreement (UN Treaty Series No.251, 1951, pp.280-300). UN GA, A/RES/1/95, “Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal.”, 11 December 1946.

b. European Court of Human Rights

After the transition³¹⁶ of the main judicial powers from the EComHR to the ECtHR, the latter kept and further improved the jurisprudence, both by quality and by quantity, in respect to (non-)application of statutory limitations in international criminal law.

Although it is not directly on our subject, in *Coëme and others v. Belgium* (2000),³¹⁷ the Court found that retroactively extending prescription periods before the expiration of that time-limit does not violate Article 7 of the Convention. The Chamber ruled that “*this does not entail an infringement of the rights guaranteed by Article 7, since that provision cannot be interpreted as prohibiting an extension of limitation periods through the immediate application of a procedural law where the relevant offences have never become subject to limitation.*”³¹⁸

In the following year, the ECtHR has ruled itself on the compatibility of the former Eastern German Penal Code which provided imprescriptibility for core international crimes. This case is known as *K.-H.W. v. Germany*³¹⁹ where the main issue was the conviction of 3 senior officials of East Germany for participating in the killing of East Germans attempting to escape to West Germany. The unified German authorities found the applicants guilty according to legislations of East Germany. However, the Court found that, pursuant to Article 9(2) of the German Unification Treaty, this provision remained applicable even after the Unification; accordingly, the convictions did not violate the Convention.³²⁰

In the case *Cyprus v. Turkey*³²¹ of the same year, the Court, by applying its longstanding doctrine of “continuous violation”, held the respondent government accountable in respect to not carrying out an effective investigation for missing

³¹⁶ The ECtHR declares this transition in its brief introductory brochure as “*Entry into force of Protocol No. 11 to the Convention, instituting “the new Court”*”. (Council of Europe – European Court of Human Rights, **the Court in Brief**, “Key Dates”, Strasbourg, date unknown) (This brochure is retrieved from the official website of the Court: “http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf”) (Access date: 12 March 2017).

³¹⁷ ECtHR, *Coëme and others v. Belgium*, Applications nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Chamber, Judgment, 18 October 2000.

³¹⁸ ECtHR, *Coëme and others v. Belgium*, 18 October 2000, para.149.

³¹⁹ ECtHR, *K.-H.W. v. Germany*, 37201/97, Grand Chamber, Judgment, 22 March 2001.

³²⁰ Kok, *ibid*, p.97.

³²¹ ECtHR, *Cyprus v. Turkey*, 25781/94, Grand Chamber, Judgment, 10 May 2001.

Greek-Cypriots after its military intervention onto the island in 1974. The Court ruled, after observing the gravity of the situation and the military presence in the region, that *“there could be no limitation in time as regards the duty to investigate and inform, especially as it could not be ruled out that the detained persons who had disappeared might have been the victims of the most serious crimes, including war crimes or crimes against humanity.”*³²²

One of the main legislations of the UK in respect to core international crimes is the War Crimes Act 1991³²³ which confers jurisdiction to the British courts to try people for war crimes committed during WWII. Due to its varying regulations on citizenship, only one person was tried and convicted under this Act: Anthony Sawoniuk. After his conviction by domestic courts due to his membership to the local Nazi-supported Belorussian Auxiliary Police and carrying out killings on several occasions, he applied to the ECtHR alleging, because of the lapse of time between the commission of crimes and the criminal procedure, the memories of the witnesses would not be based upon by the domestic courts. The Court observed that *“the Convention does not impose any time-limit in respect of war crime prosecutions (see also the [1968 UN Convention, and the [1974 European Convention], both of which provide that statutory limitation periods shall not apply to the prosecution of those offences).”* and further ruled that *“no issue can arise under Article 6 insofar as the jury was left to decide for itself whether the evidence dating back to events in 1943 was credible and reliable.”*³²⁴

Concerning violations of Article 3, prohibition of torture and ill-treatment, the ECtHR has, on numerous occasions, ruled that the obligation for an effective investigation also includes the imprescriptibility. For instance, in *Abdulsamet Yaman v. Turkey*³²⁵, the Court reiterated *“that where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an “effective remedy” that criminal proceedings and sentencing are*

³²² ECtHR, *Cyprus v. Turkey*, 10 May 2001, para.145.

³²³ The full text of the Act is retrieved from the official website for legislations of the UK: (<http://www.legislation.gov.uk/ukpga/1991/13>) (Access date: 12 March 2017).

³²⁴ ECtHR, *Sawoniuk v. the UK*, 63716/00, Decision on Admissibility, 29 May 2001 (emphasis added).

³²⁵ ECtHR, *Abdulsamet Yaman v. Turkey*, 32446/96, Chamber, Judgment, 2 November 2004.

not time-barred and that the granting of an amnesty or pardon should not be permissible.”³²⁶

In *Kolk and Kislyiy v. Estonia*³²⁷, the Court explicitly accepted the retrospective application of the 1968 UN Convention to which the respondent government became a State-party after the commission of the crimes at hand. “*The Court reiterates that Article 7 § 2 of the Convention expressly provides that this Article shall not prejudice the trial and punishment of a person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations. This is true of crimes against humanity, in respect of which the rule that they cannot be time-barred was laid down by the Charter of the Nuremberg International Tribunal. (...) no statutory limitation applies to crimes against humanity, irrespective of the date on which they were committed.*”³²⁸

In a landmark decision related to crimes committed in Eastern Europe by Soviets, *Kononov v. Latvia*³²⁹, the Grand Chamber of the ECtHR ruled that “*The parties essentially disputed (...) whether the applicant’s prosecution (on the basis that there was no limitation period for the relevant offences) amounted to an ex post facto extension of a national limitation period which would have applied in 1944 and whether, consequently, that prosecution amounted to a retrospective application of the criminal law. (...) The Court observes that, had the applicant been pursued for war crimes in Latvia in 1944, Chapter IX on “Military crimes” in the 1926 Criminal Code, of itself, would not have covered the above-described relevant war crimes (the applicant and the Government of the Russian Federation agreed): a domestic court would therefore have had to rely upon international law to found the charges of war crimes. Equally, section 14 of the 1926 Criminal Code, with its limitation periods applicable to crimes foreseen by that Code only, could have had no application to war crimes sourced under international law and there was no provision in that Code saying that its prescription provisions could have had any such application. On the contrary, the Court notes that the 1926 Criminal Code was conceived of as a system*

³²⁶ ECtHR, *Abdulsamet Yaman v. Turkey*, 2004, para.55 (emphasis added).

³²⁷ ECtHR, *Kolk and Kislyiy v. Estonia*, Application nos. 23052/04 and 24018/04, Chamber, Decision on Admissibility, 17 January 2006.

³²⁸ ECtHR, *Kolk and Kislyiy v. Estonia*, 2006, p.9-10 (emphasis added).

³²⁹ ECtHR, *Kononov v. Lithuania*, 36376/04, Grand Chamber, Judgment, 17 May 2010.

to pursue “dangerous social acts” which could harm the established socialist order (...). In such circumstances, a domestic prosecution for war crimes in 1944 would have required reference to international law, not only as regards the definition of such crimes, but also as regards the determination of any applicable limitation period.”³³⁰

The decision continues to read as follows: “However, international law in 1944 was silent on the subject. Previous international declarations [Including the St James Declaration 1942; the Moscow Declaration 1943; and the Charters of the IMTs Nuremberg and Tokyo.] on the responsibility for, and obligation to prosecute and punish, war crimes did not refer to any applicable limitation periods. (...) The essential question to be determined by the Court is whether at any point prior to the applicant’s prosecution, such action had become statute-barred by international law. It follows from the previous paragraph that **in 1944 no limitation period was fixed by international law as regards the prosecution of war crimes. Neither have developments in international law since 1944 imposed any limitation period on the war crimes charges against the applicant.**”³³¹ It is fair to admit that the ECtHR, at that time, came to the conclusion from the lack of explicit permission in international law that the crimes at hand are imprescriptible.

In the case *Janowiec and others v. Russia* of 2013³³², the Grand Chamber, in respect to the lack of proper investigations on Katyn atrocities³³³, refrained from declaring itself on determining whether they constituted war crimes and whether statutory limitations are applicable on international crimes. The judgment of the Grand Chamber reads as follows: “By the time the Convention was ratified by the Russian Federation on 5 May 1998, more than fifty-eight years had passed since the execution of the Polish prisoners of war. Having regard to the long lapse of time, to the material that came to light in the intervening period and to the efforts that were deployed by various parties to elucidate the circumstances of the Katyn massacre,

³³⁰ ECtHR, *Kononov v. Lithuania*, 36376/04, Grand Chamber, Judgment, 17 May 2010, para.229-230 (*mutatis mutandis*); Batur Yamaner/Öktem, *ibid*, p.1141.

³³¹ ECtHR, *Kononov v. Lithuania*, 17 May 2010, para.231-232 (*mutatis mutandis*) (emphasis added); Batur Yamaner/Öktem, *ibid*, p.1141-1142.

³³² ECtHR, *Janowiec and others v. Russia*, Applications nos. 55508/07 and 29520/09, Grand Chamber, Judgment, 21 October 2013.

³³³ For further information on the atrocities in Katyn, see, *inter alia*; Maria Szonert-Binienda, “Was Katyn a Genocide?” in *Case Western Reserve Journal of International Law*, Vol. 44, Issue 3, 2012, pp.633-717.

*the Court finds that, as regards the period after the critical date, the applicants cannot be said to have been in a state of uncertainty as to the fate of their relatives who had been taken prisoner by the Soviet army in 1939. It necessarily follows that what could initially have been a “disappearance” case must be considered to be a “confirmed death” case.”*³³⁴

On the other hand, the decision of the Chamber in 2012 in the same case had declared that **“the mass murder of Polish prisoners by the Soviet secret police had the features of a war crime. Both the Hague Convention IV of 1907 and the Geneva Convention of 1929 prohibited acts of violence and cruelty against war prisoners and the murder of prisoners of war constituted a “war crime” within the meaning of Article 6 (b) of the Nuremberg Charter of 1945. Although the USSR was not a party to the Hague or Geneva Conventions, the obligation to treat prisoners humanely and abstain from killing them clearly formed part of the international customary law which it had a duty to respect. In its declaration of 26 November 2010, the Russian Parliament recognised that the mass extermination of Polish citizens had been “an arbitrary act by the totalitarian State”. It is further noted that war crimes are imprescriptible in accordance with Article I (a) of the [1968 Convention], to which Russia is a party.”**³³⁵

In 2014, the ECtHR upheld the reopening of criminal proceedings against a Croatian war criminal to the detriment of him. This case is known as *Marguš v. Croatia*³³⁶ where the Croatian authorities re-indicted a pardoned accused due to his involvement in the Yugoslavian conflict (*lato sensu*). Article 406 (1) (5) of the Code of Criminal Procedure of Croatia³³⁷, bearing the title “Reopening of proceedings”, sets forth that *“Criminal proceedings concluded by a final judgment dismissing the charges may exceptionally be reopened to the detriment of the accused (...) where it has been established that amnesty, pardon, statutory limitation or other circumstances excluding criminal prosecution are not applicable to the criminal offence referred to in the judgment dismissing the charges.”*³³⁸ The Grand Chamber, after relying heavily on international law (which included, *inter alia*, the 1968 UN

³³⁴ ECtHR, *Janowiec and others v. Russia*, 21 October 2013, para.185.

³³⁵ ECtHR, *Janowiec and others v. Russia*, 21 October 2013, para. 140 (emphasis added).

³³⁶ ECtHR, *Marguš v. Croatia*, 4455/10, Grand Chamber, Judgment, 27 May 2014.

³³⁷ CR: *Zakon o kaznenom postupku*

³³⁸ The translation belongs to the ECtHR and is retrieved from the Judgment.

Convention), found that “*A growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights.*”³³⁹ Even though this judgment is not directly on our subject, the approach of the Court on amnesties should be viewed as highly related, especially because of the aforementioned domestic provision of Croatia.

The ECtHR, for the case *Mocanu and others v. Romania*³⁴⁰, reiterated that “*in cases concerning torture or illtreatment inflicted by State agents, criminal proceedings ought not to be discontinued on account of a limitation period, and also that amnesties and pardons should not be tolerated in such cases. (...) [T]he manner in which the limitation period is applied must be compatible with the requirements of the Convention. It is therefore difficult to accept inflexible limitation periods admitting of no exceptions.*”³⁴¹

In *Vasiliauskas v. Lithuania*³⁴², the Court held the crime of genocide to be imprescriptible under customary international law, and that retroactive application of such a provision would not violate with the Convention as long as the elements of the crime (to be applied in the criminal proceedings) are accessible and foreseeable by the time the crime is committed.

c. Inter-American Court of Human Rights

In one of the most influential decisions on the (non-)applicability of statutory limitations on international crimes, *Barrios Altos*³⁴³, the IACtHR has radically

³³⁹ ECtHR, *Marguš v. Croatia*, 27 May 2014, para.139.

³⁴⁰ ECtHR, *Mocanu and others v. Romania*, Applications nos. 10865/09, 45886/07 and 32431/08, Grand Chamber, Judgment, 17 September 2014.

³⁴¹ ECtHR, *Mocanu and others v. Romania*, 17 September 2014, para.326 (*mutatis mutandis*). The “Concurring Opinion of Judge Pinto de Albuquerque, Joined by Judge Vučinić” in this case put forward that “*the criminal punishability of crimes against humanity without any time-limit can be considered as a principle of customary international law, binding on all States.*” (para.5 of the said “Concurring Opinion”).

³⁴² ECtHR, *Vasiliauskas v. Lithuania*, 35343/05, Grand Chamber, Judgment, 20 October 2015. The main legal question in this case arose from the discrepancy between the definitions of genocide in international law and in Lithuanian law.

³⁴³ IACtHR, *Chumbipuma Aguirre et al. v. Peru (Barrios Altos case)*, Judgment (Merits), 14 March 2001.

improved its longstanding doctrine of “continuous violation”.³⁴⁴ The Court decided unanimously that “*all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended 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.*”³⁴⁵

The case was based on the inefficient criminal proceedings of Peruvian authorities in respect to the extra-judicial killing of 15 people in 1991, thus was not related directly to core international crimes. However, the wording of the judgment explicitly incorporates every serious human rights violations, including, if not especially, crimes against humanity, war crimes and genocide.³⁴⁶

In *Trujillo Oroza v. Bolivia*³⁴⁷, the Court clearly “repeated” his judgment in the *Barrios Altos* case³⁴⁸, and declared that “*Bolivia should investigate, identify and punish those responsible for the harmful facts that are the subject of the instant case. This obligation will subsist until it has been fully complied with.*”³⁴⁹ This point-of-view, albeit implicitly, does not accept statutory limitations for serious human rights

³⁴⁴ Kok, *ibid*, p.102. See, for example, IACtHR, *González Medina and Family v. Dominican Republic*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 27 February 2012, para.285 (e): “*Since this case relates to a grave violation of human rights, and taking into consideration the continuing or permanent nature of forced disappearance the effects of which do not cease until the fate or whereabouts of the victim are established or his remains are identified, the State must abstain from using mechanisms such as amnesty to benefit the authors, or any other similar provision, such as prescription, non-retroactivity of the criminal law, res judicata, ne bis in idem or any similar grounds for exemption of responsibility to avoid this obligation*” (emphasis added).

³⁴⁵ *Barrios Altos* case, para.41 (Translation retrieved from the website “<http://www.worldcourts.com>” and verified by Kok, *ibid*, p.102) (Access date: 19 March 2017); emphasis added.

³⁴⁶ In his “Separate Opinion” in the case of *Winston Caesar v. Trinidad and Tobago* (IACtHR, Judgment, 11 March 2005, para.17), the then-President of the Court Judge Antônio Augusto Cançado Trindade (of Brazil) explained that “*In its historical Judgment in the case, concerning Peru, of the massacre of Barrios Altos (2001), e.g., the Inter-American Court warned that provisions of amnesty, of prescription and of factors excluding responsibility, intended to impede the investigation and punishment of those responsible for grave violations of human rights (such as torture, summary, extra-legal or arbitrary executions, and forced disappearances) are inadmissible; they violate non-derogable rights recognised by the International Law of Human Rights. This case-law has been reiterated by the Court (with regard to prescription) in its decision in the Bulacio versus Argentina case (2003).*” (emphasis added).

³⁴⁷ IACtHR, *Trujillo Oroza v. Bolivia*, Judgment (Reparations), 27 February 2002.

³⁴⁸ IACtHR, *Trujillo Oroza v. Bolivia*, 27 February 2002, para.106.

³⁴⁹ IACtHR, *Trujillo Oroza v. Bolivia*, 27 February 2002, para.111 (emphasis added).

violations and is also put forward in the cases *El Caracazo v. Venezuela*³⁵⁰ and *Myrna Mack Chang v. Guatemala*³⁵¹ by clear reference to the *Barrios Altos*.³⁵²

In *Bulacio v. Argentina*³⁵³, the Court rendered another judgment which was to be referred frequently in the future. The majority stipulated that “*With respect to the extinguishment invoked with respect to an ongoing case under domestic law, this Court has stated that **extinguishment provisions or any other domestic legal obstacle that attempts to impede the investigation and punishment of those responsible for human rights violations are inadmissible**. The Court deems that the general obligations enshrined in Articles 1(1) [States’ “Obligation to Respect Rights”] and 2 [“Domestic Legal Effects”] of the American Convention require that the States Party adopt timely provisions of all types for no one to be denied the right to judicial protection, enshrined in Article 25 [“Right to Judicial Protection”] of the American Convention.*”³⁵⁴

The judgment continues to read as follows: “*In accordance with the obligations undertaken by the States pursuant to the Convention, no domestic legal provision or institution, including extinguishment, can oppose compliance with the judgments of the Court regarding investigation and punishment of those responsible for human rights violations. If that were not the case, the rights enshrined in the American Convention would be devoid of effective protection. This understanding of the Court is in accordance with the language and the spirit of the Convention, as well as the general principles of law; one of these principles is that of pacta sunt servanda, which requires ensuring effective application of the provisions of a treaty in the domestic legal system of the States Party.*”³⁵⁵

In another case where extrajudicial killings were of concern again, *Moiwana Village v. Suriname*³⁵⁶, the Court observed that “*As the Tribunal has asserted on*

³⁵⁰ IACtHR, *El Caracazo v. Venezuela*, Judgment (Reparations), 29 August 2002, para.119.

³⁵¹ IACtHR, *Myrna Mack Chang v. Guatemala*, Judgment (Merits, Reparations and Costs), 25 November 2003, para.276.

³⁵² Kok, *ibid*, p.103.

³⁵³ IACtHR, *Walter David Bulacio v. Argentina*, Judgment (Merits, Reparations and Costs), 18 September 2003.

³⁵⁴ IACtHR, *Bulacio*, para.116 (footnotes removed) (emphasis added).

³⁵⁵ IACtHR, *Bulacio*, para.117.

³⁵⁶ IACtHR, *Moiwana Village v. Suriname*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 15 June 2005.

*repeated occasions, no domestic law or regulation – including amnesty laws and statutes of limitation – may impede the State’s compliance with the Court’s orders to investigate and punish perpetrators of human rights violations. If this were not the case, the rights found in the American Convention would be deprived of effective protection.”*³⁵⁷

The IACtHR has declared itself once more in connection with (non-)applicability of statutory limitations on gross violations of human rights in the judgment in the case of *La Cantuta v. Peru*³⁵⁸, related to enforced disappearance and extra-judicial killings. The judgment, before clearly referring to the Universal Declaration of Human Rights, the ICCPR, the Geneva Conventions and additional Protocols, the 1968 UN Convention and many other documents related to international criminal law, concluded that

*“the acts involved in the instant case have violated peremptory norms of international law (jus cogens). Under Article 1(1) of the American Convention, the States have the duty to investigate human rights violations and to prosecute and punish those responsible. In view of the nature and seriousness of the events, all the more since the context of this case is one of systematic violation of human rights, the need to eradicate impunity reveals itself to the international community as a duty of cooperation among states for such purpose. Access to justice constitutes a peremptory norm of International Law and, as such, it gives rise to the States’ erga omnes obligation to adopt all such measures as are necessary to prevent such violations from going unpunished, whether exercising their judicial power to apply their domestic law and International Law to judge and eventually punish those responsible for such events, or collaborating with other States aiming in that direction.”*³⁵⁹

In a case “about the arbitrary arrest and murder of a professor and community activists during the days following the coup by the Chilean military junta

³⁵⁷ IACtHR, *Moiwana Village v. Suriname*, para.167 (repeated in para.206) (footnote removed) (emphasis added).

³⁵⁸ IACtHR, *La Cantuta v. Peru*, Judgment (Merits, Reparations and Costs), 29 November 2006.

³⁵⁹ IACtHR, *La Cantuta v. Peru*, para.160.

against President Allende”³⁶⁰, *Almonacid-Arellano (et al.) v. Chile*³⁶¹, the Court declared, once more, that “*The State may not invoke any domestic law or provision to exonerate itself from the Court's order to have a criminal court investigate and punish those responsible for Mr. Almonacid-Arellano’s death. (...) Additionally, **the State may not invoke the statute of limitations** (...). Indeed, as a crime against humanity, the offense committed against Mr. Almonacid-Arellano is neither susceptible of amnesty nor extinguishable.*” before explicitly referring to the 1968 Convention.

The judgment reads further as: “*Even though the Chilean State has not ratified said Convention, the Court believes that **the non-applicability of statutes of limitations to crimes against humanity is a norm of General International Law (ius cogens)**, which is not created by said Convention, but it is acknowledged by it. Hence, the Chilean State must comply with this imperative rule.*”³⁶²

In another case related to forced disappearances, “*Guerrilha do Araguaia*” v. *Brazil*³⁶³, the IACtHR referred to its previous judgments, particularly to the *Barrios Altos* case,³⁶⁴ and rendered that “*the State must take into account that said crimes are not bound by a statute of limitations (...) [and] must remove all the de facto and de iure obstacles that maintain the impunity of the facts*”.³⁶⁵

In his Concurring Opinion, the *ad hoc* judge of Brazil for this case, Roberto de Figueiredo Caldas went even further: “***The crimes of enforced disappearance, extrajudicial summary executions, and torture perpetrated by the State to systematically repress the Guerrilha do Araguaia are examples of crimes against humanity. As such, they deserve different treatment, that is, their judgment cannot be prevented by the passage of time, such as statute of limitations or provisions of amnesty norms.** / The General Assembly of the Organization of the United Nations adopted [the 1968 UN Convention]. It should be noted that it is not a characteristic*

³⁶⁰ Diane Chang, “Almonacid Arellano et al. v. Chile” in *Loyola of Los Angeles International and Comparative Law Review*, Vol. 38, 2016, pp.1067-1083, Abstract, p.1067

³⁶¹ IACtHR, *Almonacid-Arellano (et al.) v. Chile*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 26 September 2006.

³⁶² IACtHR, *Almonacid-Arellano (et al.) v. Chile*, para.151-153 (emphases added).

³⁶³ Alternative quotation: IACtHR, *Gomes Lund (et al.) v. Brazil*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), 24 November 2010.

³⁶⁴ IACtHR, “*Guerrilha do Araguaia*” v. *Brazil*, para.171.

³⁶⁵ IACtHR, “*Guerrilha do Araguaia*” v. *Brazil*, para.253-254.

*of this Convention that it is the creator-innovator of Law, but rather that it is conciliatory, reason for which, though not ratified by the State, should be applied by the State. (...) On the other hand, 42 years after its adoption at the international level, Brazil remains without proper ratification of the [1968 Convention], despite having signed it. That omission was certainly the result of political pressure from the group of soldiers who carried out the atrocities described in this proceeding. However, **this lack of ratification is overcome, since, as the Court understood, its mandatory compliance is derived from international custom and not from the act of ratification. The applicability of these crimes comes as a category of general international law, which is not born from the Convention, but it is recognized in it.** (...) [T]he international jurisprudence, customs, and doctrine establish that no law or rule of law, such as provisions of an amnesty, the statute of limitations, and other exclusionary punishments, should prevent a State from meeting its **inalienable obligation to punish crimes against-humanity**".³⁶⁶*

B) National Case-law

The only source of case-law in respect to international criminal law, let aside the (im)prescriptibility of core international crimes, is not international judicial bodies. On the contrary, the national courts have always been the primary source of international law both in abundance of decisions and in reflecting the points-of-view of the States, the primary actors in international law. This approach is also compatible with the principle of complementary in public international law.

Under this Chapter, the case-law which has arisen from the decisions and judgments of the national judicial systems will be analysed. For a better understanding, this Chapter is divided into 2 sub-chapters, each of which is related to the crimes authored in a certain geographical area: in Europe (Sub-Chapter 1), and in Latin America (Sub-Chapter 2).

³⁶⁶ IACtHR, "*Guerrilha do Araguaia*" v. *Brazil*, "Concurring Opinion from Judge *ad hoc* Roberto de Figueiredo Caldas in regard to the Judgment from the Inter-American Court of Human Rights in the Case of *Gomes Lund et. al. ("Guerrilha Do Araguaia")* vs. *Brazil* of November 24, 2010" para.23, 24, 27, and 30 (*mutatis mutandis*) (emphasis added).

1- Crimes in Europe

This Sub-Chapter is devoted to the WWII-era crimes and crimes committed during late-communist transitional periods, authored in Europe, in respect to the national judicial authorities before which the criminal proceedings took place.

a. German law & practice

The German law and the domestic practice related to it are, in essence, based on Nazi-era crimes. Although there have been a considerable amount of cases which put Nazi perpetrators to trial in other countries such as France³⁶⁷, Italy³⁶⁸, and even Israel³⁶⁹, most of the atrocities were made subject to criminal proceedings in Germany and according to German law.

This is particularly reasonable considering the relatively dense presence of the authors of Nazi crimes in Germany and the Allied occupation of German territories after the fall of Third Reich. One of the very first actions the Allies took on German soil was the adoption of the Control Council Law No. 10³⁷⁰, in 1946, which, for the time being, resolved the question of (non-)applicability of statutory limitations on core international crimes. Article II (5) of the Control Council Law No. 10 stipulated that *“In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect to the period from 30 January 1933 to 1 July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment.”*³⁷¹ This provision was more or less incorporated into the legislations of the occupied zones of the respective Allies as well.³⁷²

³⁶⁷ See, for example; *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie* (also known as “Barbie case”) in France.

³⁶⁸ See, for example; Italy, *Hass and Priebke*, Tribunale Militare di Roma, Sentenza, 1 August 1996.

³⁶⁹ See, for example; Israel, *Eichmann*, District Court of Jerusalem, Judgment, 12 December 1961, 36 ILR 5-276.

³⁷⁰ Allied Control Council Law No. 10, “Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity”, 20 December 1945 (hereinafter referred to as “Control Council Law No. 10”).

³⁷¹ The text of the Council Law No. 10 was retrieved from the official website of the Avalon Project of the Yale University, “<http://avalon.law.yale.edu/imt/imt10.asp>” (Access date: 08 April 2017).

³⁷² See, for example, Official Journal for the British Occupied Zone, 23 May 1947, p.65: “§3. *Nonapplicability of statutory limitations to criminal actions. The provisions on statutory limitations, with respect to the timeframe from 30 January 1933 until 8 May 1945, do not bar prosecution and punishment. The prescription is deemed to be suspended for that period.*” (Kok, *ibid*, p.129, fn.446).

At this point, it is of serious importance to emphasize that the Allies which took control of the German mainland (namely; the USA, the UK, the USSR, and France) considered statutory limitations to be able to construct an obstacle for the punishment of Nazi criminals.³⁷³

Even though the aforementioned provision of the Control Council Law No. 10 provided for a “suspension statute” *in lieu* of a general clause prohibiting statutory limitations for Nazi-related crimes³⁷⁴, it was still important to observe such a general tendency towards imprescriptibility for crimes committed during a relatively close period of time, considering especially the internationally backed³⁷⁵ authority and collectively respected powers of the Allies.³⁷⁶

After the Allies handed over judicial powers to the proper Western German authorities in 1949, the question of (im)prescriptibility of core international crimes of Nazi-era resurfaced. Even though the criminal legislations of the Third Reich were discarded, the 1871 German Penal Code nevertheless provided for various provisions regarding statutory limitations. This resulted into several legislative actions which aimed at obstructing the running of prescription periods for crimes which were not already time-barred.

One of the most important acts bearing this aim was the 1965 Act³⁷⁷ which was later found constitutional by the German Federal Constitutional Court³⁷⁸. The Act had a character of a suspension statute which “*would postpone the expiry of prescription periods of crimes of murder until 31 December 1969 at the latest.*”³⁷⁹

³⁷³ It is also worth underlining that, by the time the Control Council Law No. 10 was enacted, the USA and the UK did not apply any sort of statutory limitations in respect to most serious crimes in their respective jurisdictions.

³⁷⁴ Kok, *ibid*, p.83, para.82.

³⁷⁵ See, for example, the amount of State-parties to the London Agreement of August 8th 1945 which was the last and most important legal basis to prosecute Nazi criminals, and which led to the creation of the IMT by “the Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis”.

³⁷⁶ As known, these Allied countries which took control of Germany would constitute 4 of the total 5 permanent members of the UN Security Council (the fifth being China) (Article 23 (1) of the UN Charter).

³⁷⁷ Federal Republic of Germany, “*Das Gesetzes über die Berechnung strafrechtlicher Verjährungsfristen*”, 13 April 1965, BGBl. I, 315.

³⁷⁸ Ger: *Bundesverfassungsgericht*

³⁷⁹ Kok, *ibid*, para.155.

The Court of Karlsruhe, in 1969, reached the conclusion³⁸⁰ that the 1965 Act did not violate the principle of legality (“*nullum crimen nulla poena sine lege*”) which was enshrined in the Article 103 (2)³⁸¹ of the German Federal Basic Law (Constitution)³⁸², due to the facts that (i) the 1965 Act made a difference between the already-prescribed crimes and the crimes for which the period of prescription were already running; and that (ii) “*the length of the prescribed prescription period is not something, upon which a perpetrator, who violates the law, possesses any inalienable, protected claim. The subsequent extension of the prescription period by law does not violate the prohibition of retroactive punishment*”^{383 384}.

After this decision, the German legislators grew even bolder and passed two more legislations, both equally important, in 1969³⁸⁵ and in 1979³⁸⁶, where the former provided for another suspension statute and the latter accepted the non-applicability of statutory limitations to the crime of murder.

While these legal developments were taking place in Western Germany, the Eastern Germany was dealing with the issue of statutory limitations in a slightly different manner. On the one hand, the Soviet Occupation Zone, by 1947, also had a provision³⁸⁷ in line with the Control Council No. 10; on the other hand, the Constitution of the German Democratic Republic, under its Article 5, stipulated the binding effect of the generally recognized rules of international law.³⁸⁸

³⁸⁰ Federal Republic of Germany, BVerfGE, 25, 269, 26 February 1969.

³⁸¹ “*An act may be punished only if it was defined by a law as a criminal offence before the act was committed.*” The official translation of the German Federal Basic Law can be found on “<https://www.btg-bestellservice.de/pdf/80201000.pdf>” (Access date: 08.04.2017).

³⁸² Ger: “*Grundgesetz für die Bundesrepublik Deutschland*”

³⁸³ Kok, *ibid*, para.156.

³⁸⁴ For the historically important role of the Court of Karlsruhe in respect to protection of human rights and rule of law, see; Justin Collings, **Democracy’s Guardians – A History of the German Federal Constitutional Court – 1951-2001**, Oxford University Press, 2015.

³⁸⁵ Federal Republic of Germany, “2. Gesetz zur Reform des Strafrechts”, 4 July 1969, BGBl. 1969 I, 717.

³⁸⁶ Federal Republic of Germany, “16. Strafrechtsänderungsgesetz”, 17 July 1979, BGBl. I, 1046.

³⁸⁷ German Democratic Republic, *Oberlandesgericht Gera*, NJW 1947/48, 31 Nr. 34: “*With respect to Nazi crimes (...) the time of the Third Reich will be considered as a suspension of the statute of limitations.*” (Cited in: Kok, *ibid*, p.134, fn.482).

³⁸⁸ Article 5 (1) of the Constitution of the German Democratic Republic of 7 October 1949: “*The generally recognized rules of international law are binding upon state authority and every citizen.*” (The English translation of the 1949 Constitution can be found and was retrieved from the official website of the research centre CVCE of the University of Luxembourg, “http://www.cvce.eu/content/publication/1999/1/1/33cc8de2-3cff-4102-b524-c1648172a838/publishable_en.pdf”) (Access date: 08.04.2017).

Kok observes that “*The non-applicability of statutory limitations was considered by the Eastern German authorities as a generally recognised rule of customary international law, since none of the international instruments adopted in the wake of World War II, such as St. James’s Declaration of 1942, Moscow Declaration of 1943, London Agreement of 8 August 1945, Control Council Law No. 10, and the Principles of the International Military Tribunals as confirmed by the United Nations General Assembly in 1946, contained any provision on statutes of limitation. This constitutional provision implicitly provided for the non-applicability of statutory limitations to World War II crimes. In 1961, Eastern German courts confirmed this interpretation of the 1949 Constitution.*”³⁸⁹

After the codification of these principles by the “*Law on the Non-Applicability of Statutory Limitations to Nazi Crimes and War Crimes*”³⁹⁰ in 1964 and the adoption of 1968 Penal Code³⁹¹ which incorporated the former Law, the imprescriptibility under Eastern German Law became clearer. These legislations were later followed by the ratification of the 1968 Convention and the adoption of new provisions into the Penal Code, in 1973.

These new provisions included a new category of imprescriptible crimes, namely “crimes against human rights”³⁹², definition of which was not clear. However, even this vague inclusion resulted into the prosecution of the crimes authored by the agents of the former communist regime.

In 1990, the FRG (Western Germany) and the GDR (Eastern Germany) were reunited in line with the Unification Treaty³⁹³ which provided for the applicability of

³⁸⁹ Kok, *ibid*, para.160.

³⁹⁰ “*Gesetz über die Nichtverjährung von Nazi- und Kriegsverbrechen*” of 1 September 1964. This Law explicitly provides for the non-applicability of statute of limitations on committing, ordering, and encouraging crimes against humanity, crimes against the peace, and the war crimes, during the Nazi regime (between 30 January 1933 and 8 May 1945).

³⁹¹ German Democratic Republic, 1968 Penal Code, 6 April 1968. Article 91 (2) stipulated that: “*The generally recognised norms of international law concerning the punishment of crimes against the peace, against humanity and of war crimes are directly applicable. These categories of crimes are not subject to statutes of limitation.*” (Kok, *ibid*, p.135, fn.486.).

³⁹² Ger: *Verbrechen gegen die Menschenrechten*

³⁹³ “The Unification Treaty between the FRG and the GDR” (Berlin, 31 August 1990). (The English translation of the Treaty was retrieved from and can be found the official website of the research centre CVCE of the University of Luxembourg, “http://www.cvce.eu/content/publication/1997/10/13/2c391661-db4e-42e5-84f7-bd86108c0b9c/publishable_en.pdf”) (Access date: 9 April 2017).

the 1968 East German Penal Code in respect to its provisions on non-applicability of statutory limitations on the aforementioned 4 categories of crimes.³⁹⁴

In 2002, German legislators adopted the Code of Crimes against International Law³⁹⁵ which, under its Article 5, stipulates that “*The prosecution of serious criminal offences (“Verbrechen”) pursuant to this Act and the execution of sentences imposed on their account shall not be subject to any statute of limitations.*”

Aside from the Nazi-era crimes, the legal authorities of the unified Germany also had to deal with criminal proceedings against the officials of the quasi-communist regime in the former Eastern Germany. These trials generally resulted from the shootings of civilians which took place along the borders between two German States.³⁹⁶

The approach regarding the Nazi crimes was taken again by German authorities, i.e. adoption of suspension statutes. In this regard, 3 amendments were enacted between 1993 and 1997.³⁹⁷ In addition, two decisions from high courts of Germany, firstly by the Federal Court of Justice (*Bundesgerichtshof*) in 1994³⁹⁸, and secondly, by the Federal Constitutional Court (*Bundesverfassungsgericht*) in 1998³⁹⁹ were rendered.

In addition to the legislations from Berlin, these coherent jurisprudence from two of the highest judicial authorities of Germany solved the issue by similarizing the prosecutions of the GDR-era to the Nazi-era: “*1) Where the right to prosecute has not become statutorily barred pursuant to the GDR law at the point of time of the*

³⁹⁴ For further reading in respect to the (then probable) impacts of the Reunification onto international law, see, von der Dunk / Kooijmans, “The Unification of Germany and International Law”, **Michigan Journal of International Law**, Vol.12, Spring 1991, pp.510-557; and, Kay Hailbronner, “Legal Aspects of the Unification of the Two German States”, **European Journal of International Law**, Vol.2 (1991), No.1, pp.18-44.

³⁹⁵ Ger: *Völkerstrafgesetzbuch*

³⁹⁶ The qualification of these crimes (whether they constitute crimes against humanity, “crimes against human rights”, or simply crime of murder) are beyond the scope and aim of this work.

³⁹⁷ (i) Germany, Amended Introductory Act to the Criminal Code, 26 March 1993, BGBl. I, p.392: “*Gesetz über das Ruhen der Verjährung bei SED-Unrechtstaten.*” (“*1. Verjährungsgesetz*”); (ii) Germany, Amended Introductory Act to the Criminal Code, 27 September 1993, BGBl. I, p.1657. (“*2. Verjährungsgesetz*”); (iii) Germany, Amended Introductory Act to the Criminal Code, 22 December 1997, BGBl. I, p. 3223: “*Gesetz zur weiteren Verlängerung strafrechtlicher Verjährungsfristen und zur Änderung des Gesetzes zur Entlastung der Rechtspflege.*” (“*3. Verjährungsgesetz*”).

³⁹⁸ Germany, BGHSt 40, 48, 18 January 1994, NJW 1994, 2237.

³⁹⁹ Germany, BVerfG 2 BvR 61/96, 12 May 1998, NJW 1998, p.2587.

Unification, is at the determination of a more lenient statute the question of prescription to eliminate; 2) A not prescribed GDR crime can even then be prosecuted, if it would also be punishable pursuant to the (lex loci delicti) law of the Federal Republic, but pursuant to provisions of the Penal Code in the Federal Republic had already become prescribed.”⁴⁰⁰

As a result of these legislative and judicial actions, the German authorities prosecuted and convicted countless Nazi-era criminals. For example, in as late as 2016, the District Court in Detmold found Reinhold Hanning, a guard in Auschwitz concentration camp, guilty of 170.000 counts of accessory to murder.⁴⁰¹

b. French law & practice

As discussed above, French domestic law have various provisions regarding (non-)applicability of statutory limitations on core international crimes. On the one hand, crimes against humanity are imprescriptible; on the other hand, war crimes are subject to prescription in respect to their gravity.⁴⁰²

This imprescriptibility is the result of a parliamentary act adopted in 1964. The 1964 Law⁴⁰³ accepted only the crimes against humanity to be imprescriptible under domestic law. This point was later preserved by the French *Code pénal* of 1994.⁴⁰⁴

⁴⁰⁰ Germany, BGHSt 40, 48, 18 January 1994, NJW 1994, 2237 (Cited in: Kok, *ibid*, p.172, fn.764).

⁴⁰¹ Germany, Landgericht Detmold, 4 Ks 45 Js 3/13-9/15, Urteil, 17 June 2016 (The German text of the decision is retrieved from and can be found on the official website for legal database of the federated State of North Rhine-Westphalia: “http://www.justiz.nrw.de/nrwe/lgs/detmold/lg_detmold/j2016/4_Ks_45_Js_3_13_9_15_Urteil_20160617.html”). For further information related to the Court decision, see, “<http://www.telegraph.co.uk/news/2016/06/17/former-auschwitz-guard-sentenced-to-five-years-in-prison/>”, and “<https://trialinternational.org/latest-post/reinhold-hanning/>”, “<https://www.ft.com/content/052877e4-3487-11e6-ad39-3fee5ffe5b5b>” (Access date: 22 April 2017).

⁴⁰² See, *supra*, p.18-19.

⁴⁰³ France, Loi n° 64-1326, Journal Officiel, 29 December 1964, p.17788, Article unique: “*Les crimes contre l’humanité, tels qu’ils sont définis par la résolution des Nations unies du 13 février 1946, prenant acte de la définition des crimes contre l’humanité, telle qu’elle figure dans la Charte du Tribunal international du 8 août 1945, sont imprescriptibles par leur nature.*” (emphasis added) (The official text was retrieved from the official website for legal database of the France, Légifrance: “https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000000684761”) (Access date: 22 April 2017).

⁴⁰⁴ See, *supra*, p.18-19.

This dual approach of the French legislators has even shown itself in the *travaux préparatoires* of the ICC Statute. The French committee to the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court put forward the need for “*a statute of limitations for war crimes*”.⁴⁰⁵

In a landmark case related to the “Treaty laying down the Statute of the International Criminal Court”, the French Constitutional Council observed, *inter alia*, that “*under the Statute, the International Criminal Court could be validly seised on the grounds of an amnesty statute or internal rules on limitation; in such a case, France, even if a State were neither unwilling nor unable to act, might be required to arrest and surrender to the Court a person accused of conduct covered by an amnesty or limitation period in French law; this would violate the essential conditions for the exercise of national sovereignty*”⁴⁰⁶ and that, thus, “*Authorisation to ratify the treaty laying down the Statute of the International Criminal Court requires amendment of the Constitution.*”⁴⁰⁷

In a most recent legislation in French law, a 2017 parliamentary act⁴⁰⁸ related to statutory limitations in criminal field derogated the aforementioned Article 213-5 of the *Code pénal* and added a similar article to the *Code de procédure pénale*. The new Article 7 (3) provides that crime of genocide and crimes against humanity are imprescriptible while war crimes are still subject to statutes of limitation.⁴⁰⁹

⁴⁰⁵ Kok, *ibid*, p.148, fn.590; UN Doc. A/Conf.183/C.1/WGPP/L.4, p.4, fn.7; UN Doc. A/CONF.183/C.1/WGPP/L.4/Corr.1, fn. 7: “*There should be a statute of limitations for war crimes.*”

⁴⁰⁶ France, Conseil constitutionnel, “*Traité portant statut de la Cour pénale internationale*”, Décision n° 98-408 DC, 22 January 1999 (Journal officiel du 24 janvier 1999, page 1317, Recueil, p.29, ECLI:FR:CC:1999:98.408.DC), para.34. It is also worth noting that the Council found that “*no constitutional rules or principles prohibit the provision that there may be no limitation period for the most serious crimes of international concern*”. The original translation of the decision into English by the Council can be found and retrieved from *Légifrance*: “<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1999/98-408-dc/version-en-anglais.93320.html>” (Access date: 30 April 2017).

⁴⁰⁷ France, Conseil constitutionnel, “*Traité portant statut de la Cour pénale internationale*”, Décision n° 98-408 DC, 22 January 1999, Article 1 of the operative part of the Decision.

⁴⁰⁸ France, “*Loi n° 2017-242 du 27 février 2017 portant réforme de la prescription en matière pénale (1)*”. (The official text was retrieved from the official website for legal database of the France, *Légifrance*:

“https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=01556090EAABCC8F49D6DDBBCF39E7CA.tpdila14v_2?cidTexte=JORFTEXT000034096721”) (Access date: 22 April 2017).

⁴⁰⁹ Fr: “*L'action publique des crimes mentionnés aux articles 211-1 à 212-3 dudit code [Code pénal] est imprescriptible.*” These articles are related to genocide and crimes against humanity.

It is also worth mentioning the new Article 9-3 of the *Code de procédure pénale*, added by the 2017 Law. This article dispose that “*All legal obstacles, provided by law, or all obstacles of fact, insurmountable and attributable to force majeure, which make impossible the setting in motion or the exercise of public action, suspend prescription.*”⁴¹⁰ It is obvious from this Law that French legislation has moved the concept the statutory limitations from ordinary criminal law to criminal procedural law.

Considering the abovementioned contemporary approach against impunity, taken especially by the ECtHR and IACtHR,⁴¹¹ the position of France will incline towards refusing not only applicability of statutory limitations, but also other institutions of clemency, such as amnesty and pardon, in respect to international crimes.⁴¹²

This trend has also shown itself in the decisions of French judiciary. In the *Barbie case*,⁴¹³ the French Court of Cassation, acknowledging the non-applicability of statutory limitations on crimes against humanity *vis-à-vis* the prescriptibility of war crimes, somewhat stretched the allegations against the defendant. The head of Gestapo in Lyon during the Nazi occupation, Klaus Barbie, the infamous “Butcher of Lyon”, was prosecuted of war crimes and found guilty *in absentia* by the District Court of Lyon shortly after WWII.⁴¹⁴

After his expulsion (instead of extradition)⁴¹⁵ from Bolivia, he was brought to Lyon. This expulsion (and his following arrest) was challenged before the Court of Appeal of Lyon which subsequently decided that “*crimes against humanity are of such a nature that they are subject to an international repressive order, which does*

⁴¹⁰ Fr: “*Tout obstacle de droit, prévu par la loi, ou tout obstacle de fait insurmontable et assimilable à la force majeure, qui rend impossible la mise en mouvement ou l'exercice de l'action publique, suspend la prescription.*” (The translation belongs to the author of the present work.)

⁴¹¹ See, *supra*, p.71-80.

⁴¹² Fabri/Morte/Lambert-Abdegawad/Martin-Chenut, “Les institutions de clémence (amnistie, grâce, prescription) en droit international et droit constitutionnel comparé”, **Archives de politique criminelle**, 2006/I (No.28), pp.237-255.

⁴¹³ “Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie” (hereinafter referred to as “the Barbie case”).

⁴¹⁴ France, Permanent Military Tribunal of Lyon, 29 April 1952 and 25 November 1954 (Cited in: Stover/Peskin/Koenig, **Hiding in Plain Sight - The Pursuit of War Criminals from Nuremberg to the War on Terror**, University of California Press, Oakland, 2016, p.111; Kok, *ibid*, p.143, fn.546).

⁴¹⁵ The accused was not extradited from Bolivia for a long time due to the lack of bilateral extradition treaty between Bolivia and France (Kok, *ibid*, p.143).

*not acknowledge borders and rules of extradition.”*⁴¹⁶ This decision was later upheld by the Court of Cassation on 6 October 1983, on the ground that “*Crimes against humanity are subject not only to internal French law but also to an international repressive order. The Statute of the International Military Tribunal of Nuremberg and the Resolution of the United Nations of 13 February 1946 confirms that all necessary measures must be taken by UN Member States to punish crimes against humanity and war crimes, and to return persons suspected of having committed such crimes to the country where they perpetrated the offenses so that they may be tried and punished accordingly.*”⁴¹⁷

In consequence, he was indicted before the relevant courts of Lyon for his involvement in killing members of the French resistance during occupation. Court of Appeal of Lyon ruled that his actions constituted crimes against humanity which are imprescriptible.⁴¹⁸ This decision was later found in conformity with domestic and international law by Court of Cassation: “*The principle that statutes of limitations do not apply to crimes against humanity, as laid down in the Law of 1964, was a principle recognised by all civilised nations.*”⁴¹⁹

⁴¹⁶ France, *Barbie*, Cour d’Appel de Lyon (Chambre d’accusation), Arrêt, 8 July 1983, JDI 782-783.

⁴¹⁷ France, *Barbie*, Cour de Cassation (Chambre criminelle), N° de pourvoi: 83-93194, Rejet, 6 October 1983. English summary of this case was retrieved from and can be found on the official website for legal database of the TMC Asser Institute: “<http://www.internationalcrimesdatabase.org/Case/183>” (Access date: 23 April 2017). Official summary of the decision reads as follows: “*Selon l’accord de Londres et le statut du tribunal militaire international du 8 août 1945, et comme le recommande la résolution des Nations-Unies du 13 février 1946, les personnes soupçonnées d’être les auteurs de crimes contre l’humanité doivent être renvoyées dans les pays où ces crimes ont été commis, pour y être jugées, sans que soit nécessairement utilisée la procédure de l’extradition ; ces dispositions sont conformes aux principes généraux de droit reconnus par l’ensemble des nations, auxquels se réfèrent le Pacte international relatif aux droits civils et politiques ainsi que la convention européenne des droits de l’homme et des libertés fondamentales, et elles sont régulièrement intégrées à l’ordre juridique interne où elles bénéficient d’une autorité supérieure à celle des lois, en vertu de l’article 55 de la Constitution.*” (Retrieved from Légifrance: “<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007060867>” (Access date: 23 April 2017)..)

⁴¹⁸ France, *Barbie*, Cour d’Appel Lyon (Chambre d’accusation), Arrêt, 28 October 1983.

⁴¹⁹ France, *Barbie*, Cour de Cassation (Chambre criminelle), N° de pourvoi: 83- 94425, Rejet, 26 January 1984. English summary of this case was retrieved from the official website for legal database of the TMC Asser Institute on 23 April 2017: “<http://www.internationalcrimesdatabase.org/Case/182>”. Official summary of the decision reads as follows: “***Les crimes contre l’humanité sont imprescriptibles par nature ; leur imprescriptibilité se déduit tant des principes généraux de droit reconnus par l’ensemble des nations que du statut du tribunal militaire international annexé à l’accord de Londres du 8 août 1945 et la loi du 26 décembre 1964 s’est bornée à confirmer que cette imprescriptibilité était déjà acquise, en droit interne, par l’effet des textes internationaux auxquels la France avait adhéré. Ainsi, bien que commis plus de trente ans avant la mise en mouvement de l’action publique, des crimes contre l’humanité ne sont pas couverts par la prescription.***” (Emphasis added.)

In 1985, same appellate body identified these crimes as war crimes, which resulted in the prosecution of Barbie to be time-barred because of the then 10-year-long statutory limitation for war crimes.⁴²⁰ This decision was quashed by the Court of Cassation which sent the case to be heard before the Court of Appeal of Paris: *“Crimes against humanity and war crimes can be committed successively or simultaneously. The conduct for which Barbie was sentenced to death as a result of in absentia trials by the Lyon military tribunal in 1952 and 1954 can form **the basis for new proceedings against him for crimes against humanity, which are not subject to a statute of limitations pursuant to the Law of 26 December 1964.** / According to the wording of the Statute of the International Military Tribunal at Nuremberg, persecutions are crimes against humanity where they are directed against non-combatants and committed in application of a deliberate State policy for racial, religious or political motives. Such persecutions are war crimes where they are characterised by the fact that they are useful for the conduct of the war. In application of these principles, the Supreme Court sent Barbie’s case back to the Cour d’assises who are to examine charges of persecution as crimes against humanity against innocent Jews in view of the Final Solution. Acts perpetrated against Resistance fighters are excluded as war crimes, which are extinct due to the expiration of the statute of limitations.”*⁴²¹

While interpreting the 1964 Law, the position of Court of Cassation in respect to war crimes and crimes against humanity differed widely: *“In contrast to crimes against humanity, war crimes are directly connected with the existence of a situation of hostilities declared between the respective States to which the perpetrators and the victims of the acts in question belonged. Following the termination of hostilities, it is necessary that the passage of time should be allowed to blur acts of brutality which may have been committed in the course of armed conflict, even if those acts constituted violations of the laws and customs of war or were not justified by military necessity, provided that those acts were not of such a nature as to deserve the qualification of crimes against humanity. **There is no principle of law with an***

⁴²⁰ France, *Barbie*, Cour d’Appel Lyon (Chambre d’accusation), Arrêt, 4 October 1985, 78 ILR 127.

⁴²¹ France, *Barbie*, Cour de Cassation (Chambre criminelle), N° de pourvoi: 85-95166, Arrêt, 20 December 1985. The interpretation of this decision is retrieved from the official website for legal database of the TMC Asser Institute on 23 April 2017: “<http://www.internationalcrimesdatabase.org/Case/189>” (emphasis added).

authority superior to that of French law which would allow war crimes (...) to be declared not subject to statutory limitations.”⁴²²

During these proceedings, a third party (applied to be joined as a civil part to the criminal proceedings against Barbie, which was declared inadmissible by the Public Prosecutor considering that the acts alleged constituted war crimes (which are subject to a 10-year statutory period). This decision was upheld by the Court of Appeal of Lyon⁴²³ and later brought before the Court of Cassation by the same third party. The latter court declared that

*“Crimes against humanity, within the meaning of Article 6(c) of the Statute of the [IMT] are inhuman acts and acts of persecution committed by the State pursuing a policy of ideological hegemony in a systematic way against individuals by reason of their belonging to a particular racial or religious group, or against adversaries of this State policy, whatever form the latter’s opposition may take. The underlying facts constituting crimes against humanity may at the same time constitute war crimes within the meaning of Article 6(b) of the Statute of the [IMT]. / Individuals participating in the war effort may be the victims of crimes against humanity if the crimes were committed in a systematic and widespread manner and justified politically by the national socialist ideology. **Neither the motives of the victims nor their eventual quality as combatants or hostages in the armed conflict preclude the existence of the intentional element common to crimes against humanity.**”* and sent the case again to the Court of Appeal of Paris.⁴²⁴

Lastly, on 4 July 1987, Court of Assizes of Rhone found Barbie guilty of crimes against humanity and sentenced him to life imprisonment.⁴²⁵ After his appeal,

⁴²² France, *Barbie*, Cour de Cassation (Chambre criminelle), N° de pourvoi: 85-95166, Arrêt, 20 December 1985 (emphasis added) (Kok, *ibid*, p.145, para.178).

⁴²³ France, *Barbie*, Cour d’Appel Lyon (Chambre d’accusation), Arrêt, 25 April 1986.

⁴²⁴ France, *Barbie*, Cour de Cassation (Chambre criminelle), N° de pourvoi: 86-92714, Cassation et règlement de juges, 25 November 1986. English summary of this case was retrieved from the official website for legal database of the TMC Asser Institute on 23 April 2017: “<http://www.internationalcrimesdatabase.org/Case/164>” (emphasis added).

⁴²⁵ France, *Barbie*, Cour d’Assises du Rhône, Judgment, 4 July 1987.

the Court of Cassation once more rejected his grounds, thus, definitively finalized the judgment.⁴²⁶ The decision reads as follows:

*“The principle that crimes against humanity are not subject to any statute of limitations applies to both the prosecution and the punishment of crimes against humanity. It therefore precludes the application of a rule of national law, which allows an individual convicted of such an offense to evade justice because of the expiration of a given time period when, as here, no penalty was incurred. Barbie may not consequently invoke the expiration of his death sentence handed down in 1954 as grounds for evading life imprisonment considering that his sentence was never carried out.”*⁴²⁷

It is important to note here that, in *Tadić case*, the ICTY referred to the decision of the Court of Appeal of Lyon from a perspective which differentiated the prerequisites of domestic law and the exigence of applying directly the international law on its own cases:

*“While instructive, it should be noted that the court in the Barbie case was applying national legislation that declared crimes against humanity not subject to statutory limitation, although the national legislation defined crimes against humanity by reference to the United Nations resolution of 13 February 1946, which referred back to the Nürnberg Charter (law of 26 December 1964; and the fact that a crime against humanity is an international crime was relied upon to deny the accused’s appeal on the bases of disguised extradition and an elapsed statute of limitations.”*⁴²⁸

⁴²⁶ France, *Barbie*, Cour de Cassation (Chambre criminelle), N° de pourvoi: 87-84240, Rejet, 3 June 1988.

⁴²⁷ Translation to English and interpretation belongs to the official website for legal database of the T.M.C. Asser Institute: “<http://www.internationalcrimesdatabase.org/Case/173>” (Access date: 23 April 2017) (Emphasis added.). Fr: “*Le principe d’imprescriptibilité, résultant du statut du Tribunal militaire international de Nuremberg annexé à l’accord de Londres du 8 août 1945 et de la résolution des Nations Unies du 13 février 1946, fait obstacle à ce qu’une règle de droit interne permette à une personne déclarée coupable d’un crime contre l’humanité de se soustraire à l’action de la justice en raison du temps écoulé, que ce soit depuis les actes incriminés ou depuis une précédente condamnation, dès lors qu’aucune peine n’a été subie.*” (The original text in French is retrieved from Légifrance : “<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007063407>”) (Access date: 23 April 2017).

⁴²⁸ ICTY, *Prosecutor v. Tadić*, Trial Chamber II, Judgment and Opinion in First Instance: the Prosecutor v. Duško Tadić a/k/a “Dule”, 7 May 1997, p.232, para.642 (Cited in: Kok, *ibid*, p.105, fn.361).

In another notable case, the French courts addressed this time the crimes committed by the French collaborators of the Nazis in the Occupied France during WWII. The accused was *Paul Touvier* who was first found guilty of treason and of collaborating with the enemy by the courts of Lyon and Chambéry respectively. The prescription periods for these sentences elapsed in March 1967. However, as discussed above, the statutory limitations for crimes against humanity were already abolished by the 1964 Law. Accordingly, his actions against French resistance and Jewish population were still prosecutable.⁴²⁹

After series of proceedings before the courts of various instances, Court of Appeal of Paris decided that criminal proceedings for the offences complained of were time-barred.⁴³⁰ The Court held that the 1964 Law “*applied differently with respect to crimes that had not become prescribed on the one hand, and already prescribed crimes on the other hand (...) that already prescribed crimes could not become ‘unprescribed’ pursuant to the 1964 Act*”.⁴³¹

This decision was later quashed by the Court of Cassation which stated that “*on the grounds, inter alia, that it was the Indictments Chamber's task to determine whether, pursuant to the international conventions including (...) European Convention of Human Rights, the presumed perpetrator of a crime against humanity could benefit from the rule that criminal proceedings were time-barred.*” and “*referred the case back to the Indictments Chamber of Paris Court of Appeal.*”⁴³²

Later on, in 3 judgments, “*the Indictments Chamber of the Paris Court of Appeal, taking formal note of the replies by the Minister for Foreign Affairs, ruled that the prosecution of the crimes against humanity had not become prescribed.*”⁴³³

⁴²⁹ English summary of this case was retrieved from the official website for legal database of the T.M.C. Asser Institute: “<http://www.internationalcrimesdatabase.org/Case/38#p2>” (Access date: 30 April 2017).

⁴³⁰ France, *Touvier*, Cour d’Appel Paris (Chambre d’accusation), 27 October 1975.

⁴³¹ Kok, *ibid*, p.148, para.184

⁴³² France, *Touvier*, Cour de Cassation (Chambre criminelle), 30 June 1976. *Touvier v. France*, Application No. 29420/95, EComHR, Decision on Admissibility, 13 January 1997, p.152.

⁴³³ Kok, *ibid*, pp.144-145, para.177.

In 1989, the Indictments Chamber of Court of Appeal of Paris dismissed the application for his release from detention on the ground that “*he was being prosecuted for a crime which, pursuant to the [1964 Law], was not subject to limitation.*”⁴³⁴ “*On 13 April 1992, the Cour d’Appel in Paris found that, apart from the crimes committed on 28 and 29 June in Rillieux, there was insufficient grounds to indict Touvier and declared the charges inadmissible. With regards to the Rillieux murders, the Court found that these actions could not be qualified as crimes against humanity, thus ruling that the prescription period in which an action could be brought had elapsed.*”⁴³⁵ This decision, too, was quashed by the Court of Cassation. “*The Cour de Cassation held that under Article 6(c) of the Statute of the [IMT], instigators or accomplices in the formulation or execution of a common plan or conspiracy to commit a crime against humanity are responsible for all acts performed by any persons in execution of such plan. The Cour de Cassation noted that the crimes were committed on instigation of the Germans and that Touvier executed the crimes. Thus, under Article 6(c), the Rillieux murders could be qualified as crimes against humanity.*”⁴³⁶

At the end of the proceedings, Paul Touvier was found guilty of aiding and abetting a crime against humanity by the Court of Assizes of Yvelines⁴³⁷ which was later upheld by the Court of Cassation.⁴³⁸ After his death in prison in 1996, his wife and children applied to the European Commission of Human Rights, on the ground that, *inter alia*, the 1964 Law violated the principle of legality. This application led to

⁴³⁴ EComHR, *Touvier v. France*, Application No. 29420/95, Decision on Admissibility, 13 January 1997, p.153.

⁴³⁵ France, *Touvier*, Cour d’Appel Paris (chambre d’accusation), Arrêt, 13 April 1992. English summary of the *Touvier* case was retrieved from the official website for legal database of the TMC Asser Institute: “<http://www.internationalcrimesdatabase.org/Case/38#p4>” (Access date: 30 April 2017).

⁴³⁶ France, *Touvier*, Cour de Cassation (Chambre criminelle), N° de pourvoi: 92-82409, Cassation partielle, 27 November 1992. Fr: “*Les auteurs ou complices de crimes contre l’humanité tels que définis par l’article 6 du statut du Tribunal militaire international de Nuremberg ne sont punis que s’ils ont agi pour le compte d’un pays européen de l’Axe ; tel serait le cas de celui qui se serait rendu complice d’assassinats commis à l’instigation d’une organisation déclarée criminelle comme appartenant à un pays ayant pratiqué une politique d’hégémonie idéologique.*” The full text can be found on “http://www.asser.nl/upload/documents/20121107T024316-touvier_cassation_arret_27-11-92.pdf”. (Access date: 30 April 2017)

⁴³⁷ France, *Touvier*, Cour d’Assises d’Yvelines, Jugement, 20 April 1994.

⁴³⁸ France, *Touvier*, Cour de Cassation (Chambre criminelle), Rejet, 1 June 1995.

the EComHR's decision on non-admissibility, due to its "*manifestly ill-founded*"⁴³⁹ character.⁴⁴⁰

c. Italian law & practice

After his extradition from Argentina, Erich Priebke, a German mid-level SS commander who took part in the infamous Fosse Ardeatine Massacre while serving in Italy during WWII, was put on trial before military judiciary in Italy, alongside with Karl Hass, another SS officer with German nationality, who also had a role in the Ardeatine action.

On 1 August 1996, the Military Court of Rome ruled that legal proceedings against Priebke were not possible due to his crimes were already time-barred by the time he was arrested.⁴⁴¹ The Court "*concluded that the killings of the Italian partisans constituted war crimes, which are subject to life imprisonment.*"⁴⁴² This decision was later overturned by the Italian Supreme Court of Cassation "*due to an incorrect interpretation of the law.*"^{443 444}

The second time Military Court of Rome declared itself on the case; it took a different approach regarding the applicability of statutory limitations on war crimes, i.e. the Court regarded the maximum amount of prison time for war crimes, namely, life imprisonment, and found the crimes authored by the defendants imprescriptible. In addition, the Court held that war crimes cannot become time-barred in accordance with Article 10 (1) of the Italian Constitution⁴⁴⁵ which stipulates that the Italian legal system is in conformity with the generally recognized principles of international law.

⁴³⁹ *Touvier v. France*, Application No. 29420/95, EComHR, Decision on Admissibility, 13 January 1997, p.162.

⁴⁴⁰ For further information on the *Touvier case*, see Tigar/Casey/Giordani/Mardemootoo, "Paul Touvier and the Crimes against Humanity" in **Texas International Law Journal**, 1995, Vol.30, pp.285 et seq.

⁴⁴¹ Italy, *Hass and Priebke*, Tribunale Militare di Roma, Sentenza, 1 August 1996.

⁴⁴² Kok, *ibid*, p.152, para.189.

⁴⁴³ English summary of the *Hass and Priebke* case was retrieved from and can be found on the official website for legal database of the TMC Asser Institute: "<http://www.internationalcrimesdatabase.org/Case/1104>" (Access date: 6 May 2017).

⁴⁴⁴ Italy, *Hass and Priebke*, Corte Suprema di cassazione, Sentenza, 15 October 1996.

⁴⁴⁵ Art. 10 (1) of the Constitution of the Italian Republic: "*The Italian legal system conforms to the generally recognised rules of international law.*" Official translation of the Constitution by the Constitutional Court of Italy is retrieved from and can be found on its website: "http://www.cortecostituzionale.it/documenti/download/pdf/The_Constitution_of_the_Italian_Republic.pdf" (Access date: 6 May 2017).

⁴⁴⁶ “The Court considered that Italy was bound by a rule of customary international law, or even *jus cogens*, providing for the non-applicability of statutory limitations. Despite the fact that Italy never ratified the 1968 UN Convention, the Court based its decision mainly upon conventional international law.”⁴⁴⁷

This *in abstracto* application of the question of (non-)applicability of statutory limitation was upheld by the Military Court of Appeal in 1998. However, the Court did not declared itself on the question of whether non-applicability of statutory limitations on international crimes constituted a part of *jus cogens*.⁴⁴⁸ This decision was later maintained by the Supreme Court of Cassation.⁴⁴⁹

d. Hungarian law & practice

The reason why Hungary is among the States which are discussed in this work is that, after the fall of communist regime, the new democratic regime chose the path of “legality” instead of “morality”.⁴⁵⁰ As observed above,⁴⁵¹ the German standpoint to the question of applicability of statutory limitations on international crimes seemed to be towards punishing the authors of these crimes instead of showing clemency through statutory limitations. On the other hand, the Hungarian judiciary was rather strict while answering this question.

Especially following the 1956 Uprising, the communist regime in Hungary, supported by the Soviet military, committed atrocities which were later deemed crimes against humanity.⁴⁵² The Hungarian Constitutional Court, declaring itself on an *a priori* constitutional control⁴⁵³ case⁴⁵⁴ after the adoption of a parliamentary act,

⁴⁴⁶ Italy, *Hass and Priebke*, Tribunale Militare di Roma, Sentenza, 22 July 1997.

⁴⁴⁷ Kok, *ibid*, p.153, para.190.

⁴⁴⁸ Italy, *Hass and Priebke*, Military Court of Appeal, 7 March 1998.

⁴⁴⁹ Italy, *Hass and Priebke*, Corte Suprema di cassazione, Sentenza, 16 November 1998.

⁴⁵⁰ Kok, *ibid*, p.183, para.250.

⁴⁵¹ See, *supra*, p.82-87.

⁴⁵² However, the ECtHR found that “it has not been shown that it was foreseeable that the applicant’s acts constituted a crime against humanity under international law.” in ECtHR, *Korbely v. Hungary*, 9174/02, Grand Chamber, Judgment, 19 September 2008, para.95.

⁴⁵³ The so called “*a priori*” control is the direct control by the control mechanism (in most cases, the constitutional court) before the controlled act’s entry into force (a so-called “preventive norm control”). The *a posteriori* control, on the contrary, is the control exercised by the relevant judicial authorities after the act in question becomes the law (Özen Ülgen, **İptal ve İtiraz Başvuruları Bakımından Anayasa Yargısında İlk İnceleme**, Beta Yay., İstanbul, 2013, p.9 (in Turkish)).

in 1991, regarding the issue of recommencement of statutory limitations for communist-era crimes, concluded in 1992 that (i) the 1991 Act constituted a suspension statute which, by being applied retroactively, would violate the “*nullum crimen nulla poena sine lege*” principle to the detriment of the accused; (ii) such a retroactive statute of suspension of prescription also violated the principle / exigence⁴⁵⁵ of legal certainty and immunity from criminal prosecution would grant the accused a “right”; and (iii) the provision of the Act suspending statutory limitations of crimes which were not prosecuted on “political grounds” was also unconstitutional due to its vague context.

In 1993, the Constitutional Court ruled twice more in cases regarding first, the suspension of prescription between 1944 and 1989 and second, the compulsion of judicial authorities to prosecute the authorities of the communist-era. The Court found both of these acts unconstitutional.⁴⁵⁶

*“On 16 February 1993 Parliament passed an Act⁴⁵⁷ which provided, inter alia, that – having regard to the [1968 Convention] – certain acts committed during the 1956 uprising were not subject to statutory limitation. (...) On 13 October 1993 the Constitutional Court adopted a decision⁴⁵⁸ in the matter, laying down certain constitutional requirements concerning the prosecution of war crimes and crimes against humanity. It held that **the statutory limitation on the punishability of a certain type of conduct could be removed by the lawmaker only if that conduct had not been subject to a time-limit for prosecution under Hungarian law at the time when it had been committed – the sole exception being if international law***

⁴⁵⁴ Hungary, Constitutional Court, Decision on the Statutory Limitations, No. 2086/A/1991/14, 5 March 1992.

⁴⁵⁵ For further information regarding the question of whether legal certainty constitutes a “principle” or an “exigence”, see Özge Aksoylu, **La Conciliation par le Juge de la Légalité et de la Sécurité juridique: Comparaison Franco-Turc**, Ph.D. thesis, 2011, Istanbul (in French), “Introduction”.

⁴⁵⁶ Hungary, Constitutional Court, Decision, 41/1993 (VI. 30.), AB határozat, 29 June 1993. Hungary, Constitutional Court, Decision, 42/1993 (VI. 30.), AB határozat, 29 June 1993. For further information regarding these decisions, see the official website of the Venice Commission: “<http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1993-2-012>” and “<http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1993-2-013>” (Referral by the official website of the Hungarian Constitutional Court, “hunconcourt.hu”). (Access date: 19 May 2017).

⁴⁵⁷ “Procedures Concerning Certain Crimes Committed During the 1956 Revolution”

⁴⁵⁸ Hungary, Constitutional Court, Decision on War Crimes and Crimes against Humanity, No. 53/1993 (X.13 AB), 13 October 1993.

*characterised the conduct as a war crime or a crime against humanity and removed its statutory limitation, and moreover if Hungary was under an international obligation to remove that limitation. Consequently, it declared section 1 of the Act unconstitutional, since that provision was aimed at the removal of the statutory limitation on the punishability of such conduct which did not fall within the category of war crimes.”*⁴⁵⁹

However, the Court upheld the constitutionality of the second article due to the fact that, by signing the 1968 Convention, “*Hungary undertook an obligation not to apply its own statute of limitations in cases involving war crimes and crimes against humanity.*”⁴⁶⁰ This point-of-view was built on the Article 7 (1) of the (former) Hungarian Constitution⁴⁶¹ which sets forth that “*‘the generally recognized rules of international law’ are part of Hungarian law, even without separate (further) transformations.*”⁴⁶²

The Court ruled that “*No international legal document defining international substantive or procedural law contains any time limitation on prosecution and punishment of war crimes and crimes against humanity. But in the aftermath of the Nuremberg and Tokyo trials, several countries prosecuted war crimes on the basis of their domestic law, and with the approach of the expiration of the statute of limitations, domestic statutory measures were taken to extend or suspend the statute of limitation, or to authorize its non-applicability. The aim of the [1968 Convention] was precisely the termination of the uncertainties and randomness associated with various domestic laws when the Convention declared*

⁴⁵⁹ ECtHR, *Korbely v. Hungary*, 9174/02, Grand Chamber, Judgment, 19 September 2008, para.16-17, *mutatis mutandis* (emphasis and footnotes added to the official text of the ECtHR).

⁴⁶⁰ This information was retrieved from the official website of the Venice Commission and can be accessed through “<http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1993-3-015>” (Access date: 19 May 2017). (Referral by the official website of the Hungarian Constitutional Court, “hunconcourt.hu”).

⁴⁶¹ The current Constitution of Hungary was adopted on 18 April 2011. The equivalent norm to the former Article 7 (1) is the Article Q (3) of the 2011 Constitution which provides that “*Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by promulgation in legal regulations.*” (The English translation was retrieved from the official website of the Hungarian Government and can be found on the official website of the Hungarian government: “<http://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf>”) (Access date: 19 May 2017)

⁴⁶² Kok, *ibid*, p.180, para.243.

that the war crimes and crimes against humanity enumerated therein "do not lapse irrespective of the date of their commission".

The decision reads as follows: “(...) *Those international conventions and documents which define war crimes and crimes against humanity, and which are undoubtedly part of the generally recognized and unconditionally applied rules of international law, do not regulate the statute of limitation. For this reason, those states which prosecute these crimes on the basis of international law may apply their own domestic penal laws concerning the statute of limitation and are not compelled to declare that their statutory limitations may never expire. **The [1968 Convention], as well as the [1974 Convention], may not be regarded as part of customary international law or a generally recognized principle of international law. But those states which ratified either one of the two conventions assumed the international obligation to declare, even with retroactive force, that the statutes of limitation may never expire with respect to the war crimes and crimes against humanity enumerated in the conventions.***”⁴⁶³

This decision led to an amendment by the Hungarian parliament, which resulted in several prosecutions regarding the 1956 Uprising. In one of these cases, the judicial authorities found the 1993 Law lacking in legal definitions in respect to the *tipicità*⁴⁶⁴ of crimes.⁴⁶⁵ After this decision, a new pre-enactment review was introduced before the Hungarian Constitutional Court.

The Court ruled that “*With the nullification of the law there is no obstacle preventing the state from pursuing the offender of war crimes and crimes against humanity as defined by the international law (...) It is the international law itself*

⁴⁶³ The English translation of the decision was retrieved from the official website of the ICRC and can be found on “https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/xsp/.ibmmodes/dominio/OpenAttachment/applic/ihl/ihl-nat.nsf/E781668BA0B17804C1256B220039E303/CASE_TEXT/Decision%20of%20the%20Constitutional%20Court%20-%202012%20October%201993.pdf” (Access date: 19 May 2017) (emphases added).

⁴⁶⁴ This Italian term of criminal law can be translated as “typicity” even though this word do not widely accepted in English (or rather, Anglo-Saxon) legal doctrine. Some authors, especially in Turkish doctrine, accept *tipicità* to constitute a so called fourth element of a crime (the others are *actus reus*, *mens rea*, and unlawfulness). The term may be vaguely translated as “legal definition of crime”. See Reed/Bohlander/Wake/Smith, **General Defences in Criminal Law: Domestic and Comparative Perspectives**, Routledge, New York, 2016, p.316.

⁴⁶⁵ Kok, *ibid*, p.182, para.246.

*which defines the crimes to be persecuted [sic] and to be punished as well as all the conditions of their punishability.”*⁴⁶⁶ It was also accepted in the decision that “*The non-applicability of statutes of limitation applies only with respect to those crimes, which were already exempted from statutes of limitation according to Hungarian law at the time of their commission, except when customary international law qualifies the element as a war crime or a crime against humanity, determines or allows its imprescriptibility, and when Hungary has an international obligation to exclude the application of statutory limitations.*”⁴⁶⁷

Kok observes that “*The Constitutional Courts of the Czech Republic and Germany both concluded that suspending prescription periods retroactively with respect to crimes committed during the former communist regime did not violate the principle of legality. (...) The Hungarian Constitutional Court, however, concluded explicitly that the reopening of cases involving already prescribed crimes constituted a violation of this principle, including the principle of legal certainty. This ‘formal’ approach towards some fundamental principles of law is, according to Zifcak, caused by the fact that in Hungary, the repression, apart from the period from 1956 to 1963, was considerably less severe than that in Czechoslovakia and former Eastern Germany.*”⁴⁶⁸

Among these cases related to the 1956 Uprising, one of the defendants was János Korbely who later applied to the ECtHR which led to the decision *Korbely v. Hungary*. His allegation was that “*he had been convicted for an action which did not constitute any crime at the time when it had been committed.*”⁴⁶⁹ He was among those who were found guilty of crimes against humanity in respect to his actions against *hors de combat* during the 1956 Uprising. After discussing the aforementioned decisions of the Hungarian Constitutional Court and the 1968 Convention, the Grand Chamber concluded that, by 1956, “*it has not been shown that it was foreseeable that the applicant’s acts constituted a crime against humanity*

⁴⁶⁶ Tamás Hoffman, “Individual criminal responsibility for crimes committed in non-international armed conflicts – The Hungarian jurisprudence on the 1956 volley cases” in Manacorda/Nieto, **Criminal Law between War and Peace: Justice and Cooperation in criminal matters in international military interventions**, Ediciones de la Universidad de Castilla-La Mancha, Cuenca, 2009, p.739.

⁴⁶⁷ Hungary, Constitutional Court, Decision, 36/1996 (IX 4.). AB, 4 September 1996.

⁴⁶⁸ Kok, *ibid*, p.183, para.251-252 (*mutatis mutandis*).

⁴⁶⁹ ECtHR, *Korbely v. Hungary*, 19 September 2008, para.2.

*under international law. As a result, there has been a violation of Article 7 of the Convention.*⁴⁷⁰ The Court, however, did not declare itself whether or not the non-application of statutory limitations on crimes against humanity constituted a violation of the Convention.

e. Turkish law & practice

The notions of genocide and crimes against humanity were not a part of the Turkish criminal law until as late as 2005 when the new Turkish Criminal Code was adopted.⁴⁷¹ The repealed Criminal Code (Law No.765) did not contain any provision regarding genocide or crimes against humanity and provided for a 20-year-long prescription period for torture.⁴⁷² After the entry-into-force of the Law No.6459⁴⁷³, the crime of torture became an imprescriptible crime too. Turkey is not a State-party either to the 1968 UN Convention⁴⁷⁴ or to the 1974 European Convention.⁴⁷⁵

Even though Turkish history contains various periods of military junta regimes and allegations regarding atrocities against minorities, Turkish judicial authorities have been reluctant to prosecute those who are deemed to have authored international crimes. There are several cases, however, where they were faced with declaring themselves.

In a case regarding the torture allegations during the junta regime between 1980 and 1983, the Gaziantep Public Prosecutor's Office declared the criminal complaint inadmissible due to the assumption that the prosecution of the alleged

⁴⁷⁰ ECtHR, *Korbely v. Hungary*, 19 September 2008, para.95.

⁴⁷¹ Turkey, Criminal Code, No.5237, Passed on: 26.09.2004 (Official Gazette No.25611 dated 12.10.2004).

⁴⁷² Turkey, (repealed) Criminal Code, Law No.765, Passed on: 01.03.1926 (Official Gazette No.320 dated 13.03.1926), articles 102, 243, and 450.

⁴⁷³ Turkey, Law on Amendment of Various Laws, in context of Human Rights and Freedom of Expression (Tr: "*İnsan Hakları ve İfade Özgürlüğü Bağlamında Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun*"), No:6459, Passed on: 11.04.2013 (Official Gazette No.28633 dated 30.04.2013).

⁴⁷⁴ The list of State-parties to the 1968 UN Convention can be found on the official website of the UN: "https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-6&chapter=4" (Access date: 20 May 2017).

⁴⁷⁵ The list of State-parties to the 1974 Convention is retrieved from and can be found on the official website of the Council of Europe: "http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/082/signatures?p_auth=XmW7ERSC" (Access date: 20 May 2017).

crime was already time-barred by the time the complaint was introduced.⁴⁷⁶ This standpoint was later upheld by the decision of Kilis Court of Assizes⁴⁷⁷ which was challenged before the Turkish Court of Cassation⁴⁷⁸ by the Public Prosecutor's Office of Yargıtay. After briefly dwelling on ECtHR jurisprudence and Turkey's international obligations, the Court ruled that *"In our domestic law it is obvious that, up to 07 May 2004 where the Article 90 (5) of the Constitution was amended⁴⁷⁹, it is not possible to argue [in favour of] the non-applicability of statutory limitations on criminal action according to the principle of nullum crimen nulla poena sine lege; and that, after the entry-into-force of the constitutional amendment, such statutory limitations in respect to the crimes related to the Articles 2 and 3 of the ECHR cannot be applied."*⁴⁸⁰ However, the High Court still found these investigations to be contrary to principles of domestic and international criminal standards due to the fact that, by the time the complaints were brought forward (and the Constitution was amended), the crimes were already prescribed.

Concerning an allegation of war crime during the 1974 military operations on Cyprus, the Public Prosecutor's Office in Bakırköy engaged itself in 2009. To determine whether the alleged acts were time-barred, the prosecutor had recourse to an expert's report where two professors of law discussed the issue and came to the conclusion that the crimes at hand were already time-barred by the time the suspect revealed his alleged actions. Accordingly, the Prosecutor decided not to prosecute the case.

The authors of the report on which they based their article⁴⁸¹, argued that *"it seems difficult to conclude that the non-applicability of statutory limitations has become a norm of customary international law."*⁴⁸² They also put forward that *"the*

⁴⁷⁶ Turkey, Public Prosecutor's Office in Gaziantep, 2012/8570 Sor. 2012/22160 K., 13 July 2012.

⁴⁷⁷ Turkey, Kilis Ağır Ceza Mahkemesi, 2012/1832 D. İş, 22 November 2012.

⁴⁷⁸ Tr: "Yargıtay"

⁴⁷⁹ For further information related to this article, see, *supra*, p.62.

⁴⁸⁰ Turkey, Yargıtay 1. Ceza Dairesi, E.2013/2656 K.2013/7378, 04 December 2013. Tr: *"İç hukukumuzda; 7.5.2004 tarihinde Anayasa'nın 90/5 maddesinin 3. tümcesine kadar olan evrede; suç ve cezada kanunilik ilkesi uyarınca dava zamanaşımının uygulanamayacağına pozitif hukuk açısından ileri sürülemeyeceği Anayasa'nın 90/5 fıkrasının 3. tümcesinin yürürlüğü tarihinden itibaren ise AİHS'nin 2. ve 3. maddelerindeki suçlar yönünden dava zamanaşımının uygulanamayacağı açıktır."* (Translation belongs to the author of this work.) (Footnote added.).

⁴⁸¹ Batur Yamaner/Öktem, *ibid*, p.1133.

⁴⁸² Batur Yamaner/Öktem, *ibid*, p.1141. Fr : *"il paraît difficile de conclure que la non-applicabilité des limites de prescription soit devenue une norme coutumière."* (Translation belongs to the author of this work.).

*new [Turkish] Criminal Code excluded the war crimes from the principle of imprescriptibility which is limited to the crime of genocide and to crimes against humanity. Such a provision permits to conclude that Turkey has always considered war crimes to be prescriptible.*⁴⁸³

f. South American law & practice

After the defeat of the Nazis, a considerable amount of perpetrators fled to Latin America where they sought a safe haven from national and international prosecutions. They tried and often accomplished to benefit from the military junta regimes. There are several cases where national judicial authorities in these countries concerned themselves in respect to extradition requests from European countries. The reason why the (non-)applicability of statutory limitations posed a question is that, in respect to the generally acknowledge rule of “double-criminality” in extradition cases, the judicial authorities of the extraditing country have to examine whether the alleged crimes are time-barred in respect to their own judicial system.

One of these countries from which alleged authors of international crimes were extradited was Argentina. These fugitives include Adolf Eichmann, Josef Schwammberger, and Erich Priebke. Eichmann was abducted by Israeli agents in 1961 and later prosecuted and convicted in Israel.⁴⁸⁴

In the case of *Schwammberger*, after an extradition request from West Germany, Argentinian courts needed to decide whether his prosecution would be

⁴⁸³ Batur Yamaner/Öktem, *ibid*, p.1144. Fr : “le nouveau Code pénal exclut les crimes de guerre du principe de l’imprescriptibilité qui se limite au crime de génocide et aux crimes contre l’humanité. Une telle réglementation permet de conclure que la Turquie considère toujours les crimes de guerre comme étant prescriptibles.”

⁴⁸⁴ See; Israel, *Eichmann*, District Court of Jerusalem, “Attorney General of the Government of Israel v. *Eichmann*”, Criminal Case No. 40/61, Judgment, 12 December 1961. It is worth mentioning here that in this case, the District Court of Jerusalem ruled that “Because of the extreme gravity of the crime against the Jewish People, the crime against humanity and war crime, the Israeli legislator has provided that such crimes shall never prescribe, while the crime of membership in a hostile organization shall be prescribed on the lapse of twenty years.” This standpoint was not rejected by the Supreme Court (Israel, *Eichmann*, Supreme Court of Israel, “Attorney General of the Government of Israel v. *Eichmann*”, Criminal Appeal 336/61, Judgment, 29 May 1962) (Cited in: Hüseyin Günel, **Hannah Arendt ve İnsanlığa Karşı Suçlar**, 1. Baskı, Dost Kitabevi, Ankara, 2015 (in Turkish); Hannah Arendt, **Eichmann and the Holocaust**, Penguin Books – Great Ideas, London, 2005; Amnesty International, **Eichmann Supreme Court Judgment - 50 Years On, Its Significance Today**, Amnesty International Publications, UK, 2012. The decision of the District Court in English was retrieved from and can be found on the official website of the T.M.C. Asser Institute: “<http://www.internationalcrimesdatabase.org/Case/192>” (Access date: 19 July 2017).

statutorily barred. The Federal Appeals Court of La Plata came to the conclusion that his actions constituted crimes against humanity for which no statutory limitations could be applied under international law. The importance of this decision arises from the fact that the Court, while acknowledging the lack of Argentinian ratification of the 1968 Convention, nevertheless relied on customary international law.⁴⁸⁵

The Court went even further and concluded that, since there was no treaty-law which provides for applicability of statutory limitations on crimes against humanity, these crimes are deemed to be imprescriptible, and that the effects of this imprescriptibility has to be considered to have a retroactive effect in respect to international law.⁴⁸⁶ This viewpoint was upheld by the Argentinian Supreme Court in the next year.⁴⁸⁷

In the case of *Priebke*, the Argentinian judicial authorities' considerations constituted slightly different approaches. First of all, the Federal Appeals Court in General Roca (in Rio Negro) quashed the decision of the court of first instance sustaining the request for extradition, on the ground that the prescription period had run out for the crime of homicide.⁴⁸⁸ This decision was later overturned by the Supreme Court which, after confirming its aforementioned decision in the case *Schwammberger*, concluded in majority that Priebke's actions might constitute the crime of genocide for which international law does not recognize prescription, and that "*statutes of limitations did not have any effect where crimes against humanity are concerned.*"^{489 490}

It is worth mentioning here that, while Argentina has developed jurisprudence where the impunity was denied to Nazis, Chile on the other hand protected its strict

⁴⁸⁵ Argentina, *Schwammberger*, Cámara Federal de Apelaciones de La Plata, Decision on the extradition of Josef Schwammberger, Rtro. Ex Sala III L.29 f*172/263, 30 August 1989. For further information regarding this decision, see the ICC's official website for international criminal law database: "<https://www.legal-tools.org/en/browse/record/115213/>" (Access date: 22 May 2017).

⁴⁸⁶ Kok, *ibid*, p.157, para.197.

⁴⁸⁷ Argentina, *Schwammberger*, Corte Suprema, Extradition Josef Franz Leo Schwammberger, 20 March 1990.

⁴⁸⁸ Argentina, *Priebke*, Cámara Federal de Apelaciones de General Roca, Decision on the extradition of Erich Priebke, date unknown.

⁴⁸⁹ The official website of the ICC for its case-law database: "<https://www.legal-tools.org/en/browse/record/be180b/>" (Access date: 22 May 2017).

⁴⁹⁰ Argentina, *Priebke*, Corte Suprema, Extradition of Erich Priebke, causa n° 16.063/94, 2 November 1995.

interpretation on prescriptibility of international crimes. In *Walther Rauff* case, the Chilean Supreme Court refused to extradite a mid-ranking SS commander. Even though this decision is considered to be effected by the Pinochet regime in Chile,⁴⁹¹ the German request had been already denied definitively as early as 1963: “*the Supreme Court refused to extradite the defendant to Germany, because of expiration of the prescription period of fifteen years*”⁴⁹² as provided for in the Chilean Penal Code. The Chilean Supreme Court denied that the crime of genocide did not prescribe under international law.”⁴⁹³

1- Crimes in Latin America

a. Argentinian law & practice

The dictator of Argentina between 1976 and 1981, Jorge Rafael Videla, was first among those who were put to trial in respect to the atrocities committed during junta regimes in Latin America.⁴⁹⁴ In *Jorge Rafael et al.*, Argentinian courts addressed the crimes against humanity during his dictatorship.⁴⁹⁵ In respect to the forced disappearance of children during the fallen regime, the prescription period envisaged by the Argentinian domestic law has already passed. During these proceedings, federal judge Marquevich “*concluded that these practices were part of a centrally coordinated plan ordered by Videla (...), that the crimes were of such gravity that they should be considered crimes against humanity. As such, under international law they are not subject to any statute of limitations, even though the laws and treaties establishing this principle were not in force at the time the crimes were committed.*”⁴⁹⁶

⁴⁹¹ (edited by) Giuliana S. Bullard, **Disclosure: Newsletter of the Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group**, National Archives (of the USA), Maryland, 2002, p.2.

⁴⁹² For the crime of murder.

⁴⁹³ Chile, *Walter Rauff*, Supreme Court, 1963; Kok, *ibid*, p.159, para.200 (footnote added) (*mutatis mutandis*).

⁴⁹⁴ See the article published in New York Times after his death; Elias L. Lopez, “Jorge Rafael Videla, Jailed Argentine Military Leader, Dies at 87” in **New York Times - 17 May 2013**, New York (This article can be found on the official website of the newspaper: “<http://www.nytimes.com/2013/05/18/world/americas/jorge-rafael-videla-argentina-military-leader-in-dirty-war-dies-at-87.html>”) (Access date: 4 June 2017).

⁴⁹⁵ Kok, *ibid*, p.188-189, para.261.

⁴⁹⁶ Argentina, *Jorge Rafael y otros*, Poder Judicial de la Nación Videla, 13 July 1998 (opinion Roberto José Marquevich, Juez Federal). Human Rights Watch, **Argentina: Reluctant Partner - The Argentine Government's Failure to Back Trials of Human Rights Violators**, Volume 13, Issue 5

The report of the Human Rights Watch on this issue reads as follows: “Argentina ratified the [1968 Convention] in 1995 (...). As precedent, Marquevich cited the cases of two Nazi war criminals, Josef Franz Schwammberger and Erich Priebke (...). In the extradition hearings the courts held that international law did not permit statutes of limitations for crimes against humanity, and that international law trumped domestic legislation in such cases. Invoking articles 75 and 118 of the Argentine Constitution (as amended in 1994), which refer, respectively to the supremacy of human rights treaties over domestic law, and international law, Marquevich held that the same principle must be applied to international crimes committed in Argentina itself.”⁴⁹⁷

In 1999, the Federal Criminal Appeals Court (Federal Court of Buenos Aires) dismissed Videla’s appeal and confirmed the judgment. The Court ruled that “*the abduction of babies constitutes the crime of forced disappearance, which is a so-called continuing crime*”, thus, calculating the prescription period from the point on which whereabouts of the victim is learnt. The Court also came to the conclusion that “*The crime of forced disappearance of persons constitutes a crime against humanity, and as such is not subject to statutory limitations, whatever the date of its commission. Moreover, the Chamber maintains that this characteristic prevails over any contrary dispositions that may be contained in internal laws, again irrespective of the date on which the offence was committed.*”⁴⁹⁸

2 years later, the same issue was addressed in respect to the extradition request for the former Chilean dictator Pinochet regarding an assassination which was deemed a crime against humanity. The Court, taking the Article 6 (c) of the IMT Statute into consideration, concluded that such crimes were imprescriptible and,

(B), December 2001 (the full report can be retrieved from the official website of the HRW: “<https://www.hrw.org/legacy/reports/2001/argentina/index.html>”) (Access date: 4 June 2017) (emphasis added).

⁴⁹⁷ Ibid, fn.46, *mutatis mutandis*.

⁴⁹⁸ Argentina, *Jorge Rafael y otros*, Federal Court of Buenos Aires, *Videla, Jorge Rafael s/incidente de apelación y nulidad de la prisión preventiva* (Ruling on Pre-trial Detention), 9 September 1999 (emphasis added). Rodolfo Mattarollo, “Recent Argentine Jurisprudence in the Matter of Crimes Against Humanity” in **International Commission of Jurists Review – Impunity, Crimes Against Humanity and Forced Disappearance, No 62-63, September 2001** (The full Review can be found on and is retrieved from the official website of the International Commission of Jurists: “<https://www.icj.org/wp-content/uploads/2013/08/ICJ-Review-62-63-2001-eng.pdf>”) (Access date: 4 June 2017) (cited in Kok, *ibid*, p.189, para.262).

therefore, Chile needed to extradite Pinochet. The decision reads as follows: “*The domestic validity of the Law of Nations, through its constitutional establishment, legislative recognition, and jurisprudential application, modified the conditions of punishability (including the ones related to prescription) and left the relative exigencies of the principle of legality satisfied.*”⁴⁹⁹

In 2004, in the case *Arancibia Clavel*, Argentinian Supreme Court declared once more that crimes against humanity “*are not subject to ordinary provisions on statutory limitations.*”⁵⁰⁰ The Argentinian Supreme Court, after receiving the news of ratification of the 1968 Convention in 2003, reached out to interpret it: “*The 1968 UN Convention only affirmed the non-applicability, which means the recognition of a norm that is already in existence as part of customary international law. (...) In this way, the prohibition on the retroactivity of criminal law is not being violated, but rather a principle of customary international law is reaffirmed as being already in existence at the time of the commission of the acts.*”⁵⁰¹

b. Chilean law & practice

The atrocities of *Videla*, the former dictator of Argentina, were also made subject to criminal proceedings in Chile. The Chilean Court of Appeal in Santiago tried and found him guilty on the ground that grave breaches of the Geneva Conventions are imprescriptible: “*Any attempt by a State to tamper with the criminality of and consequent liability for acts which infringe the laws of war and the*

⁴⁹⁹ Argentina, *Pinochet*, Camara Nacional Criminal y Correccional Federal Sala 2 (National Criminal and Correctional Federal Court Chamber 2), *Pinochet Ugarte, Augusto s/ prescripción de la acción penal* (Pinochet Ugarte, Augusto concerning statute of limitations, Causa 17439, 15 May 2001. Esp: “*La vigencia interna del Derecho de Gentes, a través de su consagración constitucional, reconocimiento legislativo y aplicación jurisprudencial, modifica las condiciones de punibilidad (inclusive en lo relativo a la prescripción) y deja satisfechas las exigencias relativas al principio de legalidad.*” (Cited in: Iván Bazán Chacón, “Los delitos de genocidio y de lesa humanidad. La cuestión de la imprescriptibilidad” in *Derecho & Sociedad*, Núm. 21 (2003), pp.45-58.) (Translation belongs to this author.).

⁵⁰⁰ Kok, *ibid*, p.190, para.265.

⁵⁰¹ Argentina, *Arancibia Clavel*, Corte Suprema de Justicia de la Nación (Supreme Court), *Arancibia Clavel, Enrique Lautaro s/homicidio calificado y asociación ilícita y otros*, causa no 259, Judgment, 24 August 2004; cited in Kok, *ibid*; the full text of the decision in Spanish can be found and retrieved from the legal database of the ICC: “<https://www.legal-tools.org/doc/610f30/pdf/>” (Access date: 12 June 2017).

rights of persons in wartime is beyond the State's competence while it is a Party to the Geneva Conventions on humanitarian law."⁵⁰²

In the case *María Barros Perelman* in 2005, the Fifth Chamber of the Court of Appeal of Santiago ruled that "*The non-applicability of statutory limitations to crimes against humanity stems ... from a specific category of norms of general international law ("ius cogens"). (...) The prohibition of criminal action under domestic law with respect to crimes against humanity is null and void because **the non-applicability of statutory limitations to crimes against humanity is an imperative norm of general international law**, which has ... been incorporated into constitutional law by way of international treaties and [prior to this incorporation] was binding as a general principle of international human rights law.*"⁵⁰³

Two years later, the Supreme Court of Chile declared itself once more on this question, in the *Victor Raúl Pinto* case.⁵⁰⁴ The Court "*found that a domestic amnesty law could not be applied to jus cogens violations of crimes against humanity or the obligation to prosecute such offences which, as part of the domestic law of Chile, prevailed over Chilean legislation*"⁵⁰⁵ through acknowledging that "*among the characteristics that distinguish ... [war crimes], the most notable include the non-applicability of statutes of limitation.*"⁵⁰⁶

c. European practice

One of the most important prosecutions, if not the most, in the entirety of international criminal law is probably the case of *Pinochet*, where a number of inter-dependent issues, both procedural and on merits (such as immunity, amnesty, universal jurisdiction, fitness to stand trial, crime of torture, and statutory limitations)

⁵⁰² Kok, *ibid*, p.195, para.272. Chile, *Videla*, Corte de Apelaciones de Santiago, Judgment, Rol 13.597-94, 26 September 1994.

⁵⁰³ Chile, *María Barros Perelman*, Fifth Chamber of the Court of Appeal of Santiago, Case No.24.471-2005, 5 September 2009 (cited in ICRC Customary IHL database - Practice Relating to Rule 160 - Chile) (Access date: 24 June 2017) .

⁵⁰⁴ Chile, *Victor Raúl Pinto*, Corte Suprema de Justicia de la Nación (Supreme Court), *Re Víctor Raúl Pinto v. Relatives of Tomas Rojas*, Decision of Annulment, No.3125-04, 13 March 2007.

⁵⁰⁵ Tomas Weatherall, **Jus Cogens - International Law and Social Contract**, Cambridge University Press, Cambridge, 2015, p.463.

⁵⁰⁶ ICRC Customary IHL database - Practice Relating to Rule 160 - Chile.

were addressed by the judicial authorities of various States. Under this sub-chapter, his prosecution in Spain and Belgium will be discussed.

In 1998, a former investigative magistrate in Spain, Judge Baltasar Garzón⁵⁰⁷, issued an international warrant for the arrest of *Pinochet*,⁵⁰⁸ arguing that some atrocities authored in Chile during his regime overpassed the gravity echelon of crimes against humanity which were not subject to statutes of limitations even though Spain was not a State-party either to the 1968 Convention or to the 1974 Convention and Spanish Criminal Code provided for imprescriptibility only for genocide⁵⁰⁹.⁵¹⁰ After observing various international documents applicable to the UK (such as Moscow Declaration of 1943, the Statute of the IMT, and the 1948 Convention), Judge Garzón came to the conclusion that “*the crimes at hand are imprescriptible*”.⁵¹¹ Even though this prosecutorial practice did not amount to a judicial decision, other countries’ approach to it brought further attention to Judge Garzón’s warrant.

⁵⁰⁷ Garzón was (and actually is) seen as a prominent figure in international criminal law, sometimes referred to as “Superjudge”. This “fame” does not only arise from his prosecution of Pinochet, but also of former president of the USA George W. Bush, former US Secretary of State Henry Kissinger, of the aforementioned Argentinian junta, and of various terrorist organizations like ETA (*Euskadi Ta Askatasuna*, an armed Basque-nationalist terrorist organization in the Basque Country) and GAL (*Grupos Antiterroristas de Liberación*, an illegal Spanish state-terrorist group established to fight ETA) (David Sugarman, “The Pinochet precedent and the ‘Garzon effect’: on catalysts, contestation and loose ends” in *Amicus Curiae Issue 42 July/August 2002*, pp.10-16).

⁵⁰⁸ Spain, *Pinochet*, Juzgado Central de Instrucción número cinco de la Audiencia Nacional Española, 18 October 1998. Garzón’s warrant and the decisions rendered in Spain regarding the issue was later published: Maruja Torres / Luis Sepulveda (vv. aa.), **El caso de España contra las dictaduras Chilena y Argentina - Los documentos del juez Garzón y la Audiencia Nacional**, Planeta 1ª Ed., 1998. (Cited in: Andrea Bianchi, “Immunity versus Human Rights: The *Pinochet* Case” in *European Journal of International Law*, Vol.10, No.2, pp.237-277.)

⁵⁰⁹ Article 131 (4) of the Spanish Criminal Code in force, on the other hand, sets forth that “*Crimes against humanity and of genocide and offences against persons and assets protected in the case of armed conflict, except those punished under Article 614, shall not have a statute of limitations.*” Regarding the penalties, Article 133 (2) of the Code provides a parallel provision: “*Penalties imposed for crimes against humanity and of genocide and for offences against protected persons and assets in the event of armed conflict, except those punished under Article 614, shall not have a statute of limitations.*” (Organic Act 10/1995, Dated 23rd November, on the Criminal Code, Publication: Official State Gazette number 281 on 24th November 1995) (Translation to English belongs to the [Spanish] Ministerio de Justicia) Before the amendments in 2003 and 2010, the former article read as follows: “*In no case shall the crime of genocide be subject to statutory limitations.*” (Translation belongs to the ICRC.)

⁵¹⁰ For further information regarding the prosecution of Pinochet in Spain, see, Richard Wilson, “Prosecuting Pinochet: International Crimes in Spanish Domestic Law” in *Human Rights Quarterly*, No.4, Nov. 1999, pp. 927-979.

⁵¹¹ Translation from French to English belongs to the author of this work. An unofficial translation from Spanish to French (named “*Texte d’Accusation du juge espagnol Baltasar Garzon en date du 18 Octobre 1998 contre Augusto Pinochet*”) was retrieved from and can be found on the official website of the T.M.C. Asser Institute: “http://www.asser.nl/upload/documents/20120516T095741-Pinochet%20Texte%20d%20Accusation_18-10-1998.pdf” (Access date: 15 June 2017).

Belgian authorities also took a firm approach in respect to the apprehension and prosecution of Pinochet. Belgian War Crimes Law of 1993⁵¹² made it possible for the domestic judiciary to request extraditions of foreign authors of international crimes on the ground of the principle of “universal jurisdiction.”⁵¹³ An investigation judge in Brussels, Damien Vandermeersch, put forward such a request⁵¹⁴ related to Pinochet and the UK even though the alleged offense, crime against humanity, was not defined explicitly in the 1993 Law or in the Belgian Penal Code.⁵¹⁵ The order of judge, relying heavily on customary international law⁵¹⁶, reads as follows: *“Prescription does not seem to be a principle of international criminal law and appears to be irreconcilable with the character of the offences... Their imprescriptibility is inherent in their nature. Therefore, we find that, as a matter of customary international law, crimes against humanity can not [sic] prescribe and that this principle is directly applicable in the domestic legal order.”*⁵¹⁷

In the case *Bouterse*, which was related to the prosecution of “*Desiré Bouterse, a Surinamese politician, (...) [who] led a coup d’état in 1980 and became the military leader of Suriname until 1987. Relatives of victims of the so-called December murders of 8 and 9 December 1982, when 15 opponents of the military regime headed by Bouterse were tortured and subsequently killed, brought a*

⁵¹² Belgium, “Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977” (Law on the Suppression of Grave Breaches of the 1949 Geneva Conventions and the 1977 Protocols), 16 June 1993. Article 8 of the 1993 Law provides for imprescriptibility only on war crimes (Fr: “*Ne sont pas applicables aux infractions prévues à l'article premier de la présente loi, l'article 21 du Titre préliminaire du code de procédure pénal et l'article 91 du code pénal relatifs à la prescription de l'action publique et des peines.*”).

⁵¹³ Serhat Sinan Kocaoğlu, “Uluslararası Ceza Hukuku ve 5237 Sayılı Türk Ceza Kanunu Perspektifinden Evrensellik İlkesi” in *Ankara Barosu Dergisi Yıl:68 Sayı:2010/1*, pp.67-93, Ankara, 2010 (in Turkish).

⁵¹⁴ Belgium, *Pinochet*, Juge d'instruction au tribunal de première instance de Bruxelles, *In re Augusto Pinochet Ugarte*, Ordonnance, 6 November 1998.

⁵¹⁵ Since 2003, “Article 136ter of the Belgian Penal Code provides for the punishability of crimes against humanity.” (Kok, *ibid*, p.198, fn.941).

⁵¹⁶ By the time the order was issued, Belgium was not a State-party to the 1968 Convention or the 1974 Convention (cited in Kok, *ibid*, p.198, para.278).

⁵¹⁷ Luc Reydam, “Belgian Tribunal of First Instance of Brussels (investigating magistrate), November 8, 1998” in *American Journal of International Law*, Vol.93, Issue: 3, July 1999, pp.700-703 (cited in Kok, *ibid*, p.198, para.278; and in, Gerhard von Glahn / Jamers Larry Taulbee, *Law Among Nations – An Introduction to Public International Law*, 11th Edition, Routledge, New York, 2017, p.435, fn.107) (emphasises added). Fr: “*Ainsi si l'on doit considérer que le caractère imprescriptible des crimes contre l'Humanité résulte de la nature même de ces crimes, il y a lieu de conclure à l'existence d'une règle coutumière de droit international consacrant l'imprescriptibilité des crimes contre l'humanité et que cette règle est applicable en droit interne.*”

*complaint against Bouterse in the Netherlands.*⁵¹⁸ The alleged offenses were crimes against humanity and torture (as a discreet crime). During the procedure before the Amsterdam Court of Appeal, “*an independent expert Dugard [sic] was heard. He concluded that crimes against humanity are exempted from statutes of limitations. In his view, the imprescriptibility of crimes against humanity constituted a rule of customary international law or even a rule of jus cogens: ‘(...) In my opinion **the 1968 Convention was, at least, declaratory of customary international law as it stood in 1968 with the result that crimes against humanity committed thereafter were imprescriptible.** In their very nature such crimes, which have the character of jus cogens, are imprescriptible.*”⁵¹⁹,⁵²⁰ The Court did not declared itself on the issue of (non-)applicability of statutory limitations on crimes against humanity or torture.⁵²¹ However, while quashing this decision, the Supreme Court of the Netherlands ruled that “*while binding treaties could prevail over domestic law pursuant to Article 94 of the Dutch Constitution, unwritten international law, such as customary international law, does not have the same status*”⁵²², thus, “*held that the prescription period of eighteen years provided for in the Dutch Penal Code could not be ignored by invoking principles of customary international law*”⁵²³.⁵²⁴ ⁵²⁵

⁵¹⁸ The English summary of the case and the judgment in Dutch were retrieved from and can be found on the official website of the T.M.C. Asser Institute: “<http://www.internationalcrimesdatabase.org/Case/1082>” (Access date: 25 June 2017).

⁵¹⁹ The Netherlands, *Boutarse*, Expert’s Report, *Opinion Re Bouterse*, ELRO- No. AA 8427, 7 July 2000.

⁵²⁰ Kok, *ibid*, p.202, para.288 (*mutatis mutandis*) (footnote changed) (emphasis added).

⁵²¹ The Netherlands, *Boutarse*, Court of Appeal of Amsterdam, Judgment, 20 November 2000.

⁵²² T.M.C. Asser Institute, “<http://www.internationalcrimesdatabase.org/Case/1082>” (Access date: 25 June 2017).

⁵²³ Kok, *ibid*, p.202, para.288.

⁵²⁴ The Netherlands, *Boutarse*, Hoge Raad der Nederlanden (High Council of the Netherlands) (Criminal Chamber), Uitspraak, 18 September 2001, Case number: LJN: AB1471.

⁵²⁵ For further information regarding the *Boutarse* case, see; Liesbeth Zegveld, ‘The Bouterse Case’ in *Netherlands Yearbook of International Law*, Dec.2001, Vol.XXXII, pp. 97-118.

III) (Alleged) Ottoman Atrocities of 1915 on Armenian Population

An incredibly contentious argument has been taking place for more than a century regarding the (alleged) Ottoman atrocities⁵²⁶ on its Armenian population in and after 1915. Some authors define these acts as genocide⁵²⁷, while others use somewhat “milder”⁵²⁸ terminology, such as crimes against humanity⁵²⁹ and war crimes⁵³⁰. Some even refuse any criminal responsibility and reject criminal allegations against Ottoman authorities altogether on the ground that the acts did not amount to any of the said crimes, but simply constituted a form of re-establishment of Armenian population.⁵³¹

⁵²⁶ The reason why the term “atrocities” was chosen for this work instead of several other terms (including, but not limited to, “war crime”, “massacre”, “forced deportation”, “ethnic cleansing”, or “brutality”) is that, whilst the former is a rather objective and neutral denomination, but the rest are either directly legal terms (which are needed to be determined through appropriate political or judicial mechanisms), or bear, by nature, extremely and prejudicially negative senses. In addition, the lack of any “proper” definitive judicial decisions on these acts also force the word “alleged” to be used in this thesis. For further information regarding the word “atrocities” and its evolution into the term “war crime”, see; Alan Kramer, “Combatants and Noncombatants: Atrocities, Massacres, and War Crimes”, in (edited by) John Horne, **A Companion to World War I**, Blackwell Companions to World History, Wiley-Blackwell, 2012, pp.188-201.

⁵²⁷ Vahakn N. Dadrian, **Documentation of the Armenian Genocide in Turkish Sources**, Institute on the Holocaust and Genocide, 1991. Raymond H. Kévorkian / Paul B. Paboudjian, **1915 Öncesinde Osmanlı İmparatorluğu’nda Ermeniler**, İkinci Baskı, Aras Yay., İstanbul, 2013 (in Turkish). Hasan Cemal, **1915: Armenian Genocide**, Hrant Dink Foundation, İstanbul, 2015. Aydın Akyüz, **Gecikmiş Bir Yüzleşme - Ermeni Soykırımı**, Ceylan Yay., İstanbul, 2015 (in Turkish).

⁵²⁸ For the elaboration of the subject of gravity between core international crimes, see; Micaela Frulli, “Are Crimes against Humanity More Serious than War Crimes?” in **European Journal of International Law**, Vol.12, No.2, 2001, pp.329-350.

⁵²⁹ *de Than and Shorts* consider the 1915 (alleged) atrocities as the first example of crimes against humanity, but observe that “*at that time it was universally accepted that it remained principally a matter for the national authorities to decide whether or not legal action was to be taken against the perpetrators of such crimes.*” (*de Than / Shorts*, *ibid*, p.87-88). *Akçam* seems confused over whether to define these acts as “genocide” or “crimes against humanity”: Taner Akçam, **The Young Turks’ Crime Against Humanity - The Armenian Genocide and Ethnic Cleansing in the Ottoman Empire**, Princeton University Press, Princeton and Oxford, 2012.

⁵³⁰ It is important to note that once these acts are viewed in the light of war crimes, the question of whether they were authored under “imperative military necessity” will arise (Even the 1998 Rome Statute considers “*military necessity*” (Art. 8 (a) (iv)), “*necessities of the conflict*” (Art. 8 (c) (xi)), and “*necessities of war*” (Art. 8 (b) (xiii)) as legal justifications.). For example, *Sonyel* writes the following: “*The removal of many Armenians from certain areas to others was justified by the Ottoman government as a measure dictated by ‘imperative military necessity’. The Ottomans argued that their state, at the time, was locked in a life-and-death struggle with its external enemies, and the relocations were necessary for the security needs of the state, as many Armenians were in revolt and cooperating with its enemies.*” (Salahi Sonyel, **The Great War and the Tragedy of Anatolia (Turks and Armenians in the Maelstrom of Major Powers)**, 2nd Edition, Turkish Historical Society, Ankara, 2001, p.121) (For further information regarding “military necessity” and its application in international criminal law, see, *inter alia*; Nobuo Hayashi, “Requirements of Military Necessity in International Humanitarian Law and International Criminal Law” in **Boston University International Law Journal**, Vol. 28, 2010, pp.39-140).

⁵³¹ *Pazarıcı*, after analysing the acts under the lights of core international crimes, comes to the conclusion that the 1915 (alleged) atrocities do not amount to genocide, crimes against humanity, or war crimes (Hüseyin Pazarıcı, **Türk Dış Politikasının Başlıca Sorunları**, 1. Bası, Turhan Kitabevi,

The purpose of this Part is limited to analysing the probable applicability of statutory limitations on these crimes. In other words, if these acts constitute a core international crime, can the authors be held responsible even though more than 100 years have passed? This work does not reflect its author's point of view in respect to the definition of these acts as various core international crimes, nor does it aim to present a complete and clear picture of what happened regarding the (alleged) 1915 atrocities.

Even though it may seem moot, considering almost all of the (alleged) authors are dead and thus these acts cannot become subject of criminal prosecutions, this analyse nevertheless bears importance due to the facts (i) that Armenian governments throughout the years have put forward several branches of demands⁵³² in line with these (alleged) atrocities, and (ii) that contemporary understanding of State responsibility for international crimes has amounted to a point where the Turkish State⁵³³ need to feel “on edge” more that it has ever needed to feel so⁵³⁴.⁵³⁵ Under the first Chapter, a brief explanation of historical events, including the post-WWI trials will be presented (Chapter A). Afterwards, the (non-)applicability of statutory limitations on various core international crimes which may deemed arisen from the 1915 (alleged) atrocities will be analysed (Chapter B).

Ankara, 2015, p.52-73 (in Turkish)). *Sonyel* considers the genocide claims to be “invalid, as they are not based on facts.” (Sonyel, *ibid*, p.188). *Aslan* considers that the *actus reus* and *mens rea* of the acts at hand do not amount to genocide, and that due to “military necessities” of the WWI, the deportations of the Armenian population cannot be considered as a crime against humanity (M. Yasin Aslan, **Teoride ve Uygulamada Savaş Suçları**, 2. Baskı, Bilge Yay., Ankara 2014, p.143).

⁵³² See, in general; Gülseren Aytaş, **Ermeni Talepleri ve Türkiye'nin Hakları**, İstanbul Barosu Yay., İstanbul, 2010 (in Turkish).

⁵³³ It is also important to note that today's Republic of Turkey is accepted to be the “continuing State” of the dissolved Ottoman Empire (For further information, see; Emre Öktem, “Turkey: Successor or Continuing State of the Ottoman Empire?” in **Leiden Journal of International Law**, 24 (2011), pp.561-583). This point of view is rejected by *Pazarıcı* (Pazarıcı, *ibid*, p.73.)

⁵³⁴ See, for instance, “First report on succession of States in respect of State responsibility” by Pavel Šturma, Special Rapporteur appointed by the ICL (A/CN.4/708, 31 May 2017).

⁵³⁵ For the State responsibility regarding international crimes under relatively new developments in international law, see, *inter alia*; André Nollkaemper, “State Responsibility for International Crimes: A Review of Principles of Reparation” in Working Papers 2009, Amsterdam Center for International Law, University of Amsterdam (later published in; Aristotle Constantinides / Nikos Zaïkos (ed.s), **The Diversity of International Law: Essays in Honour of Professor Kalliopi K. Koufa**, Martinus Nijhoff Publishers, 2009); Marina Spinedi, “State Responsibility v. Individual Responsibility for International Crimes: *Tertium Non Datur*?” in **European Journal of International Law**, Vol. 13, No. 4, 2002, pp.898-899.

A) Historical Background

In the heat of the WWI, one of the most important decisions which will later be severely criticized was going to be the Ottoman order of deportation (May 1915)⁵³⁶ of the Armenian population of eastern and central Anatolia to other parts of the Empire because of their alleged interference to and treacherous acts in the war against Russian Empire.

Although it has been criticized widely⁵³⁷, the order of deportation is nevertheless the main document where the deportation and alleged genocidal intent found their legal basis. However, this document was preceded by a law, “*Sevk ve İskân Kanunu*” (Relocation and Resettlement Law)⁵³⁸, published on the official gazette on 1 June 1915.⁵³⁹ Some authors believe that there was a genuine German influence on the decision of deportation and the following developments on this issue.⁵⁴⁰

During the deportations, hundreds of thousands⁵⁴¹ Armenian civilians died either by massacring⁵⁴², epidemic diseases and hunger,⁵⁴³ and/or similar harsh

⁵³⁶ The Ottoman text is retrieved from and can be found on the Turkish State Archives website: “https://www.devletarsivleri.gov.tr/assets/file/1915_Olaylari/resim/2600belge/1198.PDF” (Access date: 26 June 2017).

⁵³⁷ See, for example; R.A. Safrastyan, “The Decision of the Ottoman Government on the Deportation of Armenians (May 30, 1915)” in **Armenological Issues, Bulletin 1**, Yerevan, 2014.

⁵³⁸ Adopted by Sultan Mehmed V Reşad on 14 May 1915. Interestingly, the Law did not include any words related to Armenians (or any other ethnic groups of the Ottoman Empire), but rather, empowered the army, *inter alia*, to forcibly transfer any civilians “*resisting the military authorities’ activities regarding the orders of the government, the defence of the land, or the public order*” (Translation belongs to the author of this work.).

⁵³⁹ This Law would eventually be revoked on 4 November 1918, days before the signing of the Armistice between the Allies and the Ottoman Empire. (Turgay Akkuş, “Birinci Dünya Savaşı Sürecinde Bursa’da Sevk ve İskân Uygulamaları ve Sonuçları” in **Ankara Üniversitesi Osmanlı Tarihi Araştırma ve Uygulama Merkezi (OTAM) Dergisi, Sayı 23, Bahar 2008**, Ankara, 2010, pp.1-52 (in Turkish); Rıdvan Akın, “İttihat ve Terakki Hükümetleri’nin Divan-ı Harb-i Örfi’de Yargılanması ve Malta Sürgünleri (1918–1921)” in **Galatasaray Üniversitesi Hukuk Fakültesi Dergisi 2014/1 (Doç. Dr. Melike Batur Yamaner’in Anısına Armağan) Cilt I**, pp.59-120 (in Turkish)).

⁵⁴⁰ Ortaylı claims that German authorities during the WWI not only wanted the Armenians to be deported, but also convinced the Ottoman State when the latter desired to stop the process (İlber Ortaylı / Erol Şadi Erdinç, **İttihat ve Terakki - Osmanlı İmparatorluğu’nda Gizli Örgütlenmeler ve Darbeler**, İnkılâp Yay., İstanbul, 2016, p.89 (in Turkish)).

⁵⁴¹ The death toll varies between 200.000 and 2.500.000 people: Bantekas/Nash, *ibid*, p.125: “*at least 1.5 million*”; Justin McCarthy, “The Population of Ottoman Armenians” in **The Armenians in the Late Ottoman Period**, The Turkish Historical Society for The Council of Culture, Arts and Publications of The Grand National Assembly of Turkey, Ankara, 2001, pp.65-85, p.78: “*a loss of 584,000*”; A. P. Hacobian, **Armenia and the War - An Armenian’s Point of View with an Appeal to Britain and the Coming Peace Conference**, George H. Doran Company, New York, 1918,

conditions of deportation⁵⁴⁴. In response, the governments of the UK, France, and Russia signed a declaration “denouncing the atrocities as ‘**crimes against humanity and civilization**’⁵⁴⁵, further noting the criminal culpability of all members of the Turkish Government and its agents.”⁵⁴⁶

The Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, which “was established to determine the authors of World War I and to recommend penalties for persons that committed war crimes”⁵⁴⁷, also used a similar choice of words in respect to the 1915 (alleged) atrocities: “All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.”⁵⁴⁸

After the Armistice of Mudros of 30 October 1918,⁵⁴⁹ most of the Empire was occupied and some of the (alleged) authors of the violations during the deportations

preface, para.2: “the number is variously estimated at from 500,000 to 800,000”; Sina Akşin, **Ana Çizgileriyle Türkiye’nin Yakın Tarihi**, İmaj Yay., 2001: “200.000”.

⁵⁴² Akçam argues that even the civilian population took part in killing the Armenians during the deportation process (Taner Akçam, **Türk Ulusal Kimliği ve Ermeni Sorunu**, 4. Baskı, Su Yay., İstanbul, 1995, p.174 (in Turkish). Lewy also observes that Kurdish, Circassian, and/or Turkish bandits, gendarmerie personnel, and army deserters hit the Armenian convoys and caused at least a part of the deaths (Guenter Lewy, **The Armenian Massacres in the Ottoman Turkey: A Disputed Genocide**, University of Utah Press, Salt Lake City, 2005. Cited in: Hüseyin Pazarcı, *ibid*, p.49).

⁵⁴³ McCarthy observes that “The massive mortality in Anatolia was the product of total war in which no quarter was given, as well as years in which no crops were harvested and disease ravaged populations already ravaged by hunger. All shared starvation and disease; each side killed the other mercilessly. It is no wonder that death tolls were so high. Those who elevate the mortality of one group or ignore the mortality of another mistake the lesson of the times, which is not of persecutors and the oppressed, but of general inhumanity.” (Justin McCarthy, *ibid*, p.79).

⁵⁴⁴ Över observes in the German documentations that most of the Armenian civilians arriving to Aleppo were sickly and famished (Kıvanç Galip Över, **Alman Belgelerinde Ermeni Meselesi ve 1915**, I. Basım, Kaknüs Yay., İstanbul, 2007, p.137-146).

⁵⁴⁵ The first draft included a different term, “*crimes against Christianity and civilization*”, but this wording was rejected by the French delegate on the ground that it excluded the Muslim population in France and the UK (Cassese, **International Criminal Law**, p.102.) (emphasis added).

⁵⁴⁶ Bantekas/Nash, *ibid*, p.125 (footnote added) (emphasis added). See also; William A. Schabas, **Uluslararası Ceza Mahkemesine Giriş**, p.60.

⁵⁴⁷ Harry M. Rhea, “The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties and its Contribution to International Criminal Justice after the Second World War” in **Criminal Law Forum**, Vol. 25, Issue 1, 2014, pp.147-169, p.147.

⁵⁴⁸ “Report presented to the preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties” (Conference of Paris 1919), 29 March 1919, in **American Journal of International Law**, Vol. 14, No. 1/2 (Jan. - Apr., 1920), pp. 95-154, p.117 (emphasis added) (Cited in: Cassese, **International Criminal Law**, p.102, fn.9.).

⁵⁴⁹ Tr: “*Mondros Mütarekesi*”. The English translation of the Armistice can be found on the official website of the German History in Documents and Images initiative of the German Historical Institute

were prosecuted.⁵⁵⁰ Before the domestic courts, 86 persons in sum were charged, most of which were found guilty of various domestic crimes^{551, 552} “*Akçam contends that Armenian deaths are premeditated and so constitute genocide and bases his argument mostly on the actions of Ottoman courts-martial of 1919-1920, which convicted officials of the government of the Committee of Union and Progress of organizing massacres of Armenians.*”^{553, 554}

Maogoto observes the following in respect to these trials and the following developments:

“Beginning in January 1919, Turkish authorities, directed and often pressured by Allied authorities in Istanbul, arrested and detained scores of wartime political and military leaders. Those arrested comprised four groups: (1) the members of Ittihad’s⁵⁵⁵ Central Committee; (2) war-time cabinet ministers; (3) a host of provincial governors; and (4) high-ranking military officers. The suspects were transferred to a detention facility in a military prison maintained by the Turkish Defence Ministry. [Of these, twenty-six were ordered released by the Court Martial itself with the assertion, ‘There is no case against them.’] Subsequently, forty-one of the suspects were released by Turkish authorities on the basis that they were

(Vol.6 Weimar Germany, 1918/19-1933): “http://germanhistorydocs.ghi-dc.org/pdf/eng/armistice_turk_eng.pdf” (Access date: 27 June 2017).

⁵⁵⁰ The prosecutions and trials took place before courts martial. Feridun Ata, “Divân-ı Harb-i Örfî Mahkemelerinde Ermeni Tehciri Yargılamalarına İstatistiksel Bir Bakış (1919-1921)” in **Atatürk Araştırma Merkezi Dergisi**, Sayı 62, Cilt 25, Temmuz 2005 (in Turkish).

⁵⁵¹ The list of crimes include “negligence in the execution of one’s duties or failure to carry out a superior order”, “undue interference with civilian or military officials”, “murder”, “premeditated coercion to destroy or rob supplies or goods”, and “abuse of an official position” (Cassese, **International Criminal Law**, p.103, fn.11).

⁵⁵² For more information regarding these trials, see; Feridun Ata, **İşgal İstanbul’unda Tehcir Yargılamaları**, 2. Baskı, Türk Tarih Kurumu, Ankara, 2011 (in Turkish); Dadrian/Akçam (derleyenler), “**Tehcir ve Taktıl: Divan-ı Harb-i Örfî zabıtları: İttihad ve Terakki’nin Yargılanması: 1919-1922**”, İkinci Baskı, İstanbul Bilgi Üniversitesi Yayınları, İstanbul, 2010 (in Turkish); Vartkes Yeghiayan, **Malta Belgeleri: İngiltere Dışişleri Bakanlığı “Türk Savaş Suçluları” Dosyası**, Belge Yay., İstanbul, 2007 (in Turkish).

⁵⁵³ Taner Akçam, **A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility**, Metropolitan Books, New York, 2007, p.371-373.

⁵⁵⁴ Yücel Güçlü, book review article of “‘A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility’ by Taner Akçam” in **Belleten Cilt: LXXI, Sayı: 262, December 2007**, Türk Tarih Kurumu, Ankara (footnote added).

⁵⁵⁵ What is meant by *İttihad* is the ruling party of the Ottoman Empire during WWI: Party of Union and Progress (Tr: *İttihat ve Terakki Fırkası*). For further information, see; Tarık Zafer Tunaya, **Türkiye’de Siyasal Partiler - Cilt 3: İttihat ve Terakki, Bir Çağın, Bir Kuşağın, Bir Partinin Tarihi**, Genişletilmiş 6. Baskı, İletişim Yay., İstanbul, 2015 (in Turkish).

innocent. (...) [T]he senior British military officer involved in negotiation the terms of Turkey's surrender (...), informed London with regard to the released suspects that 'there was every reason to believe, [they] were guilty of the most heinous crimes...mainly in connection with massacres'. On 28 May 1919, sixty-seven detainees were seized from the Istanbul military prison in a surprise swoop by the British. Twelve of the prisoners, mostly ex-ministers, were taken to the island of Mudros, the rest to Malta. The twelve ministers were eventually transferred to Malta, where the number of prisoners rose to 118 by August 1920.”⁵⁵⁶

The trials which were meant to take place in Malta never materialized. For the suspects who were exiled to Malta, the criminal trials on Ottoman soil were separated.⁵⁵⁷ *Akın* witnesses that

“While proceedings had been kept going, the British High Command exiled some of the alleged suspects to Malta Island including Sait Halim and Talat Pasha government's members, senators, deputies, commanders and public administrators of the former era so as to prosecute before an international war crimes tribunal. / These practices gradually continued until the resignation of last Damat Ferit Pasha's government in the autumn of 1920. After the fall of pro-British Damat Ferit cabinet, court-martial decisions had been opened to appeal and it was understood that many convictions had proved to be a very arbitrary ground. / As for the Malta exiles, as a result of uncompromising and determined attitude of Ankara government, they were liberated by exchange with the all the interned British nationals in Anatolia, including Colonel Rawlinson at the port of İnebolu.”⁵⁵⁸

As pointed out rightly by *Bass*, another reason these courts-martial did not succeed was the lack of proper evidence to incriminate and prosecute the (alleged) authors of the 1915 atrocities: “*Britain pressured the defeated Sublime Porte into*

⁵⁵⁶ Jackson Nyamuya Maogoto, “Reading the Shadows of History: The Turkish and Ethiopian ‘Internationalized’ Domestic Crime Trials” in (edited by) Kevin Jon Heller / Gerry Simpson, **The Hidden Histories of War Crimes Trials**, Oxford University Press, First Edition, 2013, pp.289-305, p.293-294 (*mutatis mutandis*) (footnote expanded) (footnote added).

⁵⁵⁷ *Akın*, *ibid*, p.87.

⁵⁵⁸ *Akın*, *ibid*, Abstract, p.60 (Translation belongs to the author himself).

setting up a special court-martial in Constantinople. Ironically, Britain's own legalism worked against its hopes of punishing the Turks. As they tried to set up trials, the British realized that finding sufficient evidence, like testimony from scattered Armenian witnesses and documents secreted away in Ottoman archives, would be dauntingly difficult."⁵⁵⁹

These trials were later seen by Turkish authorities and authors as an early example of "*politicized judiciary*"⁵⁶⁰ and deemed to contain serious violations of the principle of fair trial.⁵⁶¹ The Treaty of Sèvres⁵⁶², which was the peace treaty served by the Central Powers to the Turkish State, included provisions regarding, *inter alia*, punishments of the 1915 (alleged) atrocities.⁵⁶³ However, this treaty never came into force due to the Turkish War of Independence and the treaties of Alexandropol (Gümrü)⁵⁶⁴, Kars⁵⁶⁵ and Lausanne^{566, 567}. These treaties do not contain any provisions regarding statutory limitations, but instead, amnesty articles, probably because of the temporal proximity of the acts perpetrated.

Article 10 of the Treaty of Alexandropol stipulates that the First Armenian Republic has denounced from all of its rights embedded in the Treaty of Sèvres even though the latter has never come into force.

⁵⁵⁹ Gary Jonathan Bass, **Stay the Hand of Vengeance: The Politics of War Crimes Tribunals**, Princeton University Press, 3rd printing, USA, 2002, p.107.

⁵⁶⁰ Akın, *ibid*, p.115 (Translation to English belongs to the author of this work.).

⁵⁶¹ Akın, *ibid*, p.115 (Akın also observes that some of the judges in these trials were later found guilty by other judicial mechanisms). Pınar Taşer, **Mütareke Dönemi'nde Divan-ı Harb-i Örfiler (1918-1922)**, unpublished Master's Degree thesis, Anadolu University Institute of Social Sciences, Eskişehir, 2005, p.14.

⁵⁶² "Treaty of Peace between the Allied Powers and Turkey", signed in France on 10 August 1920, but never ratified by Turkey and most of the Central Powers.

⁵⁶³ Article 215 (III) and Part VII of the Treaty of Sèvres. Article 230 (I) is especially important for the purposes of this work: "*The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on 1 August 1914.*" (emphasis added). Ayşen Sekmen Çakar, "İnsanlığa Karşı Suçlar" in **Türkiye Barolar Birliği Dergisi, Vol.103 (2012)**, Ankara, 2012, pp.169-198 (in Turkish), p.174.

⁵⁶⁴ Treaty of Alexandropol signed in Gümrü (Alexandropol) on 2 December 1920. The translation of the official Turkish name of this treaty to English is "Treaty of Peace between Turkey and Armenia" (Cited in: İsmail Soysal, **Türkiye'nin Siyasal Andlaşmaları, I. Cilt (1920-1945)**, Türk Tarih Kurumu, Ankara, 1983 (in Turkish), p.25-26.) (Translation belongs to the author of this work).

⁵⁶⁵ "Treaty of Friendship between Turkey, the Socialist Soviet Republic of Armenia, the Azerbaijan Socialist Soviet Republic, and the Socialist Soviet Republic of Georgia", signed in Kars, on 23 October 1921.

⁵⁶⁶ "Treaty of Peace with Turkey", signed in Lausanne (Switzerland) on 24 July 1923.

⁵⁶⁷ Schabas, *ibid*, p.60.

Treaty of Kars, under its Article XV, sets forth that *“Each of the Contracting Parties agrees to promulgate, immediately after the signature of the present Treaty, a complete amnesty to citizens of the other Party for crimes and offenses committed during the course of the war on the Caucasian front.”*

Treaty of Lausanne, containing a “Declaration of Amnesty” annexed to it, provides for a complete amnesty for any crimes committed *“for reasons of a political or military nature”*.⁵⁶⁸ Article V goes even further: *“All sentences pronounced for the above reasons shall be annulled, and any proceedings already instituted shall be stayed.”* The courts martial had already been closed down legally by the Turkish State on 11 August 1920.⁵⁶⁹

Bassiouni argues that *“the political motivations behind this compromise could not disguise the fact that amnesties are only granted for crimes, which even if not prosecuted does not negate their legal existence.”*⁵⁷⁰ After witnessing Bassiouni, Bantekas and Nash also set forth their standpoint: *“up to that point the term ‘humanity’ and its link to ‘crime’ had no fixed legal meaning.”*⁵⁷¹

The lack of political will from the Allies (such as Italy) was also a reason why the “Sèvres plan” never came into existence. Öktem argues that Italy signed the Treaty of Sèvres with the pre-determined will of not ratifying it due to a serious discontent in respect to post-WWI colonial partitioning. He then concludes: *“It is also possible that after two years of anticipation after the war, some States might even have signed the treaty without thinking the possibility of ratification due to an urgent necessity of a decision. From the very start, even [the Prime Minister of*

⁵⁶⁸ Article IV of the said Declaration provides that *“Turkish nationals, and reciprocally nationals of the other Powers signatory of the Treaty of Peace signed this day who may have been arrested, prosecuted or sentenced by the authorities of the said Powers or by the Turkish authorities respectively, for reasons of a political or military nature previous to the 20th November, 1922, on territory which remains Turkish in accordance with the said Treaty of Peace, shall benefit from the amnesty, and, if they are detained, shall be handed over to the authorities of the States of which they are the nationals. (...)”* (English text was retrieved from and can be found on the official website of the Turkish Ministry of Foreign Affairs: http://www.mfa.gov.tr/viii_-declaration-of-amnesty.en.mfa) (Access date: 27 June 2017).

⁵⁶⁹ Their *de facto* presence would exist as late as the retaking of Istanbul by Turkish State on 6 October 1923. Taner Akçam, **İnsan Hakları ve Ermeni Sorunu (İttihat ve Terakki’den Kurtulus Savası’na)**, 1. Baskı, İmge Kit., Ankara, 1999, p.550-551 (cited in Taşer, *ibid*, p.180.)

⁵⁷⁰ M. Cherif Bassiouni, **Crimes against Humanity in International Criminal Law**, First Edition, Martinus Nijhoff Publishers, Dordrecht, The Netherlands, 1992, p.175-176 (Cited in: Bantekas/Nash, *ibid*, p.126.).

⁵⁷¹ Bantekas/Nash, *ibid*, p.126 (footnote added).

Greece,] Venizelos and [the Prime Minister of the UK,] Lloyd George were sharing the concern that the treaty was practically inapplicable.”⁵⁷²

B) (Non-)Applicability of Statutory Limitations on the 1915 (Alleged) Atrocities

Even though there is no consensus on whether the 1915 (alleged) atrocities constitute any of the core international crimes, it is still of importance to try to determine whether statutory limitations would apply to these crimes.

1- Qualification as war crimes

If these acts are deemed to be “*violations of the laws and customs of war*” in the sense of the Article 6(b) of the IMT Charter of 1945 (in other words, as “war crimes”⁵⁷³), statutory limitations in domestic laws⁵⁷⁴ would be applicable. There are still too many States which can enjoy freely their rights to exercise their own domestic criminal provisions on international crimes, unless they have explicitly limited such a sovereignty right by becoming a State-party to a treaty. In respect to finding a rule of customary international law governing this area, only after 1945, there is a tendency to accept war crimes imprescriptible.

Firstly, as accurately observed by Kok, “*It is often assumed that a rule of customary international law prohibiting the application of statutes of limitations to international crimes already existed in the immediate aftermath of World War II. This point of view has been adopted many times after the start of international discussions on statutes of limitation in 1964. (...) A closer examination of the available material, however, makes clear that the reasoning construing the existence of a principle providing for the imprescriptibility of international crimes in the period from 1945 to 1964 is not convincing. First, none of the international post*

⁵⁷² Emre Öktem, “Uluslararası Andlaşmanın İmza İle Onay Arasındaki Hukuki Rejimi” in **Galatasaray Üniversitesi Hukuk Fakültesi Dergisi 2014/1 (Doç. Dr. Melike Batur Yamaner’in Anısına Armağan) Cilt I**, pp.461-504, p.463, fn.4 (in Turkish) (Translation belongs to the author of this work.).

⁵⁷³ For other international and national standpoints regarding the definition of “war crimes” see; ICRC Customary IHL database - Practice Relating to Rule 156: Definition of War Crimes.

⁵⁷⁴ It is also worth repeating that there is no norm in international criminal law directly providing for statutory limitations on international crimes.

*World War II instruments adopted in that period contained a principle stating or implying that international crimes are not subject to statutory limitations. (...) [The Allied authorities] solved potential problems by adopting suspension statutes, entailing that prescription periods were suspended during that period.”*⁵⁷⁵

Secondly, even today, there is not enough State practice to deduce that non-applicability of statutory limitations on war crimes has evolved into a binding norm of international law.⁵⁷⁶ France, for example, as a State-party to the 1998 Rome Statute, did not remove such an obstacle from its criminal legislations even after its massive legislative amendments in as late as 2017.⁵⁷⁷ Therefore, as long as the 1915 (alleged) atrocities are considered amounting to war crimes, statutory limitations of the country which will exercise criminal jurisdiction on them will be applicable.

Lastly, it is also worth mentioning that both the (alleged) perpetrators and the victims were of Ottoman citizenship.⁵⁷⁸ In addition, the places where the deportations (and the related acts) took place were on Ottoman soil.⁵⁷⁹ Some authors argue that these facts remove the “international” character of the 1915 (alleged) atrocities, and therefore, it is not possible to define these acts as war crimes provided by the 1907 Conventions.⁵⁸⁰

2- Qualification as crimes against humanity

As pointed out above⁵⁸¹, the 1915 (alleged) atrocities created the opportunity to put forward the concept of “crimes against humanity” for the first time in history. It is, therefore, obvious to conclude that, before the perpetration of these acts, there

⁵⁷⁵ Kok, *ibid*, p.295-296, para.440-441.

⁵⁷⁶ For information regarding customary international law and the role of State practice in the creation of it, see; Antonio Cassese, **International Law**, p.153-169; and, in general; Emre Öktem, **Uluslararası Teamül Hukuku**, 1. Baskı, Beta Yay., İstanbul, 2013 (in Turkish).

⁵⁷⁷ See, *supra*, p.34 fn.43 and p.88 fn.409.

⁵⁷⁸ Diren Çakmak, “Soykırım Suçu: Suçun Gerçekleştiği Ruanda Örneği (1994) ve Suçun Gerçekleşmediği Ermeni Tehciri (1915)” in **38th International Congress of Asian and North African Studies – Papers – International Relations, Vol. II**, Atatürk Supreme Council for Culture, Language and History, Ankara, 2011, pp.501-524, p.518-519 (in Turkish).

⁵⁷⁹ Pazarıcı, *ibid*, p.73.

⁵⁸⁰ Meltem Uluada, **Geçmişten Günümüze Ermeni Meselesi ve Sözde Soykırımın Uluslararası Kriterler Açısından Değerlendirilmesi**, Atılım University - Institute of Social Sciences, Master’s Degree Thesis, Ankara, 2006, p.98 (in Turkish). Lucas Vergnaud, **Le Périmètre du Crime contre l’Humanité**, Master’s Degree Thesis (Master 2 Recherche « Droit international »), Université Montesquieu Bordeaux-IV, 2009, p.8.

⁵⁸¹ See, *supra*, p.4.

had not been a norm of international law on such a crime, let aside on the punishability of it. In other words, according to the universally accepted norm of international law⁵⁸² (and of human rights law)⁵⁸³, *nullum crimen nulla poena sine lege*,⁵⁸⁴ a person charged with his/her involvement in the 1915 (alleged) atrocities cannot be found guilty of crimes against humanity.

Assuming that the 1915 (alleged) atrocities legitimately constitute crimes against humanity (in other words, a non-retroactive application of the crime at hand is possible), these crimes can also be subjected to statutory limitations of the country which will exercise criminal jurisdiction on them. This is also arising from the deduction that, by 1915, there was no universally recognized norm of international law which recognizes the non-applicability of statutory limitations on crimes against humanity.

3- Qualification as genocide

It is a fact that a number of States⁵⁸⁵ and some authors⁵⁸⁶ have recognized the 1915 (alleged) atrocities as “genocide”. Even though affirming or negating these recognitions and standpoints is beyond the scope and purposes of this thesis, it is

⁵⁸² Bantekas and Nash observe in the *travaux préparatoires* of the 1998 Rome Statute that “the vast majority of fundamental general principles of national laws, such as the principle of legality and the prohibition of retroactive laws, have matured into customary and treaty norms.” (Bantekas/Nash, *ibid*, p.4-5).

⁵⁸³ Judge Theodor Meron, the President of the International Residual Mechanism for Criminal Tribunals (MICT) and the former President of the ICTY, in a statement before the ECtHR, argued that “This is certainly true at the ICTY, where we are governed in all that we do by **the fundamental criminal law precept of nullum crimen sine lege** and where, in a myriad decisions and judgements, we have weighed such questions as the right of an accused to represent himself on appeal, the scope of the principle of the equality of arms, and the standard for establishing fitness to stand trial. In addressing these and other fair-trial questions, we have—not surprisingly—turned time and again to the case-law of this Court concerning Article 6 of the European Convention. This is not simply because the fair trial provisions in the ICTY’s Statute mirror in many respects those found in Article 6 but also because of the leading authority and invaluable guidance of this Court’s extensive jurisprudence addressing fair-trial guarantees.” (emphasis added) (Theodor Meron, **Human Rights Standards in the Jurisprudence of International Criminal Courts and Tribunals**, 25 January 2013, Opening of the Judicial Year of the European Court of Human Rights, ECtHR, Strasbourg, 2013, p.3) (The full text of this statement can be found on and retrieved from the official website of the ECtHR on 2 July 2017: “http://www.echr.coe.int/Documents/Speech_20130125_Meron_eng.pdf”).

⁵⁸⁴ For further information on this principle and its application in international criminal law, see, *inter alia*; Cryer et al., *ibid*, p.17-21.

⁵⁸⁵ For example, France has “publicly recognized the 1915 Genocide of Armenians.” (See, Article 1, “Loi n° 2001-70 du 29 janvier 2001 relative à la reconnaissance du génocide arménien de 1915”: “*La France reconnaît publiquement le génocide arménien de 1915.*”) (Translation belongs to the author of this work.).

⁵⁸⁶ See, *supra*, p.113 fn.527.

worth analysing the (non-)applicability of statutory limitations in the concept of the 1915 (alleged) atrocities.

The first time the term “genocide” came to being was in the works of Raphael Lemkin, during the WWII.⁵⁸⁷ His works influenced⁵⁸⁸ the international community to adopt the 1948 Genocide Convention just after the war.⁵⁸⁹

In its landmark advisory opinion in 1951, the International Court of Justice (ICJ) declared that *“The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as “a crime under international law” involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (1) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that **the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.** A second consequence is **the universal character both of the condemnation of genocide and of the co-operation required “in order to liberate mankind from such an odious scourge” (Preamble to the Convention).** The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be **definitely universal in scope.** It was in fact approved on December 9th, 1948, by **a resolution which was unanimously adopted by fifty-six States.**”*⁵⁹⁰

The first conviction by an international court for genocide is delivered by the ICTR in the context of Rwandan genocide: the *Akayesu* decision of 1998⁵⁹¹.

⁵⁸⁷ For further information regarding Lemkin and the 1915 (alleged) atrocities, see; Vartkes Yeghiayan / L. Fermanian, **Rafael Lemkin'in Ermeni Soykırımı Dosyası**, Belge Yay., İstanbul, 2009 (in Turkish).

⁵⁸⁸ William A. Schabas, **Genocide and International Law**, United Nations Audiovisual Library of International Law, 2008, Outline of Lecture, p.2. A. Dirk Moses, “Raphael Lemkin, Culture, and the Concept of Genocide” in Donald Bloxham and A. Dirk Moses (eds.), **The Oxford Handbook on Genocide Studies**, Oxford University Press, Oxford, 2010, pp.19-41, p.19.

⁵⁸⁹ Raphael Lemkin, **Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress**, Carnegie Endowment for International Peace, Washington DC, 1944 (Cited in: Schabas, **Uluslararası Ceza Mahkemesine Giriş**, p.54, fn.37).

⁵⁹⁰ ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, ICJ, Reports 1951, p.23 (emphases added).

⁵⁹¹ ICTR, *Akayesu*, Trial Chamber I, The Prosecutor v. Jean-Paul Akayesu, Judgment, 2 September 1998.

Before this decision, even the perpetrators of the Holocaust were put on trial before the IMT and found guilty of crimes against humanity, instead of genocide. The main reason behind this is probably the fact that even the word “genocide” came into being with the works of Lemkin during the WWII, not before. Thus, in line with the principle of *nullum crimen nulla poena sine lege*, the crime of genocide might have come into existence only after 1944.

Accordingly, for the acts perpetrated during the 1915 (alleged) atrocities, it is not possible to reach to the conclusion of genocide. In other words, in relation to the possible qualification of the 1915 (alleged) atrocities as crimes against humanity, these acts cannot be defined as “genocide”.

However, after the request of the Turkish Armenian Reconciliation Commission (TARC) project, to the International Center for Transitional Justice (ICTJ), “to help provide an “independent legal analysis” on the applicability of the 1948 Genocide Convention to events which occurred during the early twentieth century.”⁵⁹³, the ICTJ drew up a report in 2003, arguing that the 1915 (alleged) atrocities, “viewed collectively, can (...) be said to include **all of the elements of the crime of genocide as defined in the Convention**, and legal scholars as well as historians, politicians, journalists and other people would be justified in continuing to so describe them.”⁵⁹⁴

The report also provides that “International law generally prohibits the retroactive application of treaties unless a different intention appears from the treaty or is otherwise established. **The Genocide Convention contains no provision mandating its retroactive application.** To the contrary, the text of the Convention strongly suggests that it was intended to impose prospective obligations only on the States party to it. Therefore, **no legal, financial or territorial claim arising out of**

⁵⁹² Rona Aybay, *ibid*, p.106.

⁵⁹³ Tigran Mkrtchyan, “The Role of NGOs in Turkey-Armenia Rapprochement” in (Edited by) Mustafa Aydın, **Non-Traditional Security Threats and Regional Cooperation in the Southern Caucasus**, IOS Press, Netherlands, 2011, pp.154-162, p.157.

⁵⁹⁴ “The Applicability of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide to Events which Occurred During the Early Twentieth Century - Legal Analysis Prepared for the International Center for Transitional Justice”, p.17 (emphasis added).

the Events could successfully be made against any individual or state under the Convention.”⁵⁹⁵

In the scenario where these acts are deemed to constitute genocide, a prescription period on this crime would not be arguable: The criminal prosecution of a person for the crime of genocide, under any circumstances, cannot be time-barred.

Schabas, after observing that the 1948 Convention do not include any provisions regarding the (non-)applicability of statutory limitations on genocide, argues incisively that “*it can hardly now be contested that genocide should not be subject to statutory limitation, even if not explicitly required by the Convention. A State that retained provisions of this nature in its domestic legislation would be in breach of articles V (obligation to enact legislation), VI (duty to prosecute) and VII (obligation to extradite). A teleological interpretation of these provisions compensates for the silence of the Convention.*”⁵⁹⁶

In other words, unlike war crimes and crimes against humanity, the crime of genocide has always been considered to be imprescriptible from the moment of its birth. Thus, if its retroactive application would be possible, its authors would be held responsible even if the statutory limitations of the relevant domestic law(s) had passed.

However, it is beyond doubt that there should be a limit to this possible retroactive application of the 1948 Convention. *Aktan* justifiably argues that “*In this context, one could list the Cathars being subjected to genocide in France in the 1206-48 period, the Jews in Spain through the 14th century to 1492, the genocide of indigenous peoples who created the Inca, Aztec and Maya civilizations by the Spaniards in the 16th and 17th centuries, and the so-called Red Indians, by the Americans in the 18th and 19th centuries. Also, there was the Dutch Boers’ apartheid regime in the Union (later, Republic) of South Africa in the 19th and 20th centuries*

⁵⁹⁵ ICTJ, *ibid*, p.4 (emphases added) (Cited in: Pazarcı, *ibid*, p.59; İbrahim Kaya “Türkiye - Ermenistan İlişkilerinin Normalleş(tiril)mesi: Hukuksal Değerlendirmeler” in Dinçer/Özdal/Necefoğlu (editörler), **Yeni Dönemde Türk Dış Politikası - Uluslararası IV. Türk Dış Politikası Sempozyumu Tebliğleri**, USAK Yay., Ankara, 2010, pp.223-234, p.230).

⁵⁹⁶ William A. Schabas, **Genocide in International Law: the Crime of Crimes**, p.414.

*and, during the same time, the Australian aborigines were subjected to some genocidal acts by the white Australians.”*⁵⁹⁷

Even if it is beyond the scope of this thesis, the need for a distinction between imprescriptibility of individual criminal responsibility and State responsibility from international crimes also arises on this aspect. The passage of time, in this regard, needs to be evaluated while concluding whether or not the responsibility of a State arises from international crimes committed by that State's (*de facto* or *de jure*) agents. In other words, the question of probable State responsibility of Turkey needs to be answered in accordance with the time passed between the (alleged) crimes committed and such a claim raised. One should also keep in mind that the lack of proper and definitive decision on individual responsibility by a criminal court or tribunal.

Lastly, regarding the 1915 (alleged) atrocities as a domestic issue (instead of an inter-State problem) also raises the question of legal link of causality, especially while keeping in mind that the concept of “genocide” did not come into existence until 1944. This lack of inter-State relationship is also important in respect to a possible legal or political action aiming to hold Turkey responsible as a State.⁵⁹⁸

Even if Turkey's State responsibility on these acts would be accepted to exist, one can always argue that Armenian lack of insisting demands for criminal prosecutions has amounted to a point where the latter has lost such a right vis-à-vis the former. For example, in as late as 2009, both States were still not imposing the question of criminal responsibility on the negotiation table: “Protocol on Development of Relations between the Republic of Turkey and the Republic of Armenia”, while not providing for any legal provision regarding the 1915 (alleged) atrocities, included the establishment of “*the sub-commission on the historical dimension to implement a dialogue with the aim to restore mutual confidence between the two nations, including an impartial scientific examination of the historical records and archives to define existing problems and formulate*

⁵⁹⁷ Gündüz Aktan, “The Armenian Problem and International Law” in **Gündüz Aktan – What He Said and What He Wrote**, Ankara, 2012, pp.229-276, p.242-243.

⁵⁹⁸ For a contradicting point-of-view, see, in general; Rodney Dakessian, **Les effets juridiques des massacres commis contre les arméniens en 1915 et leurs modes de résolutions judiciaires et extrajudiciaires possibles**, Ph.D. Thesis, Université Jean Moulin (Lyon 3), 14 décembre 2012.

recommendations, in which Turkish, Armenian as well as Swiss and other international experts shall take part”, thus, left the issue to historians instead of lawyers.⁵⁹⁹



⁵⁹⁹ Signed on 10 October 2009 in Zurich. Due to a decision from Armenian Constitutional Court of 12 January 2010), “*President Sargsyan[of Armenia] recalled the Protocols from the Parliament of Armenia in February 2015.*” Turkey, on the other hand, has ratified the Protocol. (Information and Protocol are retrieved from the official website of the Turkish Ministry of Foreign Affairs: “<http://www.mfa.gov.tr/relations-between-turkey-and-armenia%20.en.mfa>”) (Access date: 20 July 2017). The non-official translation of the decision of the Armenian Constitutional Court can be found on its official website: “<http://www.concourt.am/english/decisions/common/pdf/850.pdf>” (Access date: 26 June 2017). For further information regarding this issue, see, *inter alia*; Semih İdiz, “The Turkish-Armenian Debacle” in **Insight Turkey**, Vol.12, No.2, 2010, SETA Foundation, pp.11-19.

CONCLUSION

International criminal law has an always-evolving spirit. This can be observed throughout history. Aside from the general objectives of criminal law, international criminal law has always taken more steps to (i) hold the authors of the most heinous crimes responsible through prosecutions and trials; (ii) uphold human rights in a way which cannot be used by typical human rights mechanisms; and (iii) thus, combat impunity,⁶⁰⁰ since the trial and execution of Peter von Hagenbach in 1474 (which is deemed the first example of an international judicial body applying international criminal law).⁶⁰¹

It is not always easy to accomplish these aims without at least loosening (if not bending) already-established rules of international law. After all, international criminal law, while earning itself an important position inside public international law, has taken a “revisionist” attitude, rather than a “*status quoist*” approach. In other words, to base its own rules in the system (such as invalidity of “superior orders defence”⁶⁰², torture as a discreet international crime⁶⁰³, or criminality of heads of States), it had created its own exceptions.

These exceptions are always in consistence with basic human rights standards and principles of criminal law such as legality, non-retroactivity, and *ne bis in idem*. Even though some judicial decisions are deemed contrary to one or more of these principles, the authorities rendering the former tried to be observant of the latter. One

⁶⁰⁰ Cryer *et al.* list the objectives of international criminal law as retribution, deterrence, incapacitation, rehabilitation, denunciation/education, justice for victims, recording history, post-conflict reconciliation, etc. (Cryer *et al.*, *ibid*, p.22).

⁶⁰¹ M. Cherif Bassiouni, “From Versailles to Rwanda in 75 Years: The Need to Establish a Permanent International Criminal Court” in **Harvard Human Rights Journal**, Spring 1997, Vol.10, pp.11 (Cited in: Schabas, **Uluslararası Ceza Mahkemesine Giriş**, p.15). Michael P. Scharf / William A. Schabas, **Slobodan Milosevic on Trial: a companion**, Continuum, 2002, p.39: “*The history of international war crimes trials begins with the 1474 prosecution of Peter von Hagenbach, a Burgundian governor./ After it was discovered that his troops had raped and killed innocent civilians and pillaged their property during the occupation of Breisach, Germany, Hagenbach was tried before a tribunal of twenty-eight judges from the allied states of the Holy Roman Empire, which at that time included Austria, Bohemia, Luxembourg, Milan, the Netherlands, and Switzerland. Hagenbach was found guilty of murder, rape, and other crimes against the 'laws of God and man', stripped of his knighthood, and sentenced to death.*”

⁶⁰² For further information on “superior orders”, see, *inter alia*; Gökhan Güneysu, **Uluslararası Hukukta Amirin Emri**, 1. Baskı, XII Levha Yay., İstanbul, 2015 (in Turkish); Yoram Dinstein, **The Defence of 'Obedience to Superior Orders' in International Law**, Reprinted Edition, Oxford University Press, Great Britain, 2012; and Cryer *et al.*, *ibid*, p.415 *et seq.*

⁶⁰³ See, *supra*, p.8.

of the most important examples of this issue has arisen from the Nuremberg trials where the IMT found the basis of the crime of aggression in a treaty (Kellogg–Briand Pact of 1928)⁶⁰⁴ which, while outlawing it, did not even “*specifically penalised aggression*”⁶⁰⁵. It is therefore possible to say that the IMT took a part of the *lex ferenda* (“what the law should be”), and made it into *lex lata* (“the law as it exists”)⁶⁰⁶.

The non-applicability of statutory limitations is also one of these important exigencies through which international criminal law fights impunity and fulfil the other aforementioned objectives. After all, as observed accurately by *Fabri et al.*, a statute of limitation is another way of “clemency”.⁶⁰⁷ Thus, it is vital prosecute those who are responsible for the most nefarious crimes no matter how much time passes between the commission of the crime and the initiation of prosecution.

However, it is not easy to conclude that this exigency has turned into a principle for all core international crimes. It is clear that genocide, since its acceptance as an international crime, has always been perceived imprescriptible by the subjects of international law. Moreover, there is abundant national and international case-law (and other sources of State practice and international documents) to show that crimes against humanity cannot be subjected to statutory limitations. On the other hand, there are still a considerably large number of countries which accept statutes of limitation applicable to war crimes.⁶⁰⁸

The lack of any provision in international documents allowing statutory limitations to be applicable on core international crimes does not suffice to consider that international criminal law has come to a point to “outlaw” such applicability. On

⁶⁰⁴ “General Treaty for Renunciation of War as an Instrument of National Policy” (also known as “Pact of Paris”) (“Signed at Paris, August 27, 1928”) (League of Nations, Treaty Series, Vol. 94, p.57, No:2137).

⁶⁰⁵ Bantekas/Nash, *ibid*, p.500 (Cited in: Tezcan/Erdem/Önok, **Uluslararası Ceza Hukuku**, 2. Baskı, Seçkin Yay., Ankara, 2014, p.267, fn.149).

⁶⁰⁶ Noora Arajarvi, “Between Lex Lata and Lex Ferenda? Customary International (Criminal) Law and the Principle of Legality” in **Tilburg Law Review**, Vol. 15, 2010-2011, pp.163-182, p.180.

⁶⁰⁷ Fabri/Morte/Lambert-Abdelgawad/Martin-Chenut, *ibid*. p.237-238.

⁶⁰⁸ It is not possible to deny such a tendency, especially after Article 29 of the Rome Statute which provides for imprescriptibility for crimes falling under the jurisdiction of the ICC (namely; genocide, crimes against humanity, war crimes, and aggression). However, the number of States-party to the ICC is still not convincing to reach to the conclusion that other States will refrain to apply their domestic statutory limitations on core international crimes as *opinion juris sive necessitatis* (arising from this Statute even though they are not States-party to it).

the contrary, the amount of national laws and international treaties which aim the imprescriptibility show that international law has been leaving this issue to domestic provisions.

For example, if international law had reached to the point of imprescriptibility of core international crimes by the end of WWII, the Allied powers would not need Control Council No.10 to suspend prescription periods for Nazi atrocities. The 1968 Convention, which is accepted to be codifying an already-established norm of international law and, thus, is applicable retroactively, does not have enough States-party to show that non-applicability of statutory limitations is part of customary international law, let aside part of *jus cogens*.

International criminal law, exercised at both national and international levels of judicial mechanisms, cannot lead to prosecution and punishment of the perpetrators “at all costs”. The authorities need to follow the basic human rights principles and fair trial guarantees, one of which is the prohibition of retroactive criminal law.

This brings out the question of whether a retroactive extension (or abolition) of statutory limitations would be possible. Even though the answer to this question amounts to a point which is beyond the scope of this thesis, it is fair to admit that such an act on extension/abolition is only possible if the crime at hand is not already time-barred by the time such an act is adopted.⁶⁰⁹

International crimes indeed constitute the most important crimes in the sense of a need to prosecute and punish, because no matter how crucial the UN Charter is to protect (and, when the time comes, re-establish) peace and security, the international system also needs a strong set of rules (including mechanisms of penalty) to solidify them and proof itself against *hostis humani generis* (not only pirates, but also perpetrators of all other international crimes).

However, fighting these “enemies” has to be done in a way every fight should be carried out: according to its rules. Therefore, it is important to always keep human

⁶⁰⁹ For further analysis on this issue, see; Kok, *ibid*, p.331-333.

rights and judicial guarantees in mind while prosecuting and punishing the authors of international crimes.



BIBLIOGRAPHY

- 1) AKÇAM, Taner, **A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility**, Metropolitan Books, New York, 2007
- 2) AKÇAM, Taner, **İnsan Hakları ve Ermeni Sorunu (İttihat ve Terakki'den Kurtulus Savaşı'na)**, 1. Baskı, İmge Kit., Ankara, 1999, p.550-551
- 3) AKÇAM, Taner, **The Young Turks' Crime Against Humanity - The Armenian Genocide and Ethnic Cleansing in the Ottoman Empire**, Princeton University Press, Princeton and Oxford, 2012
- 4) AKÇAM, Taner, **Türk Ulusal Kimliği ve Ermeni Sorunu**, 4. Baskı, Su Yay., İstanbul, 1995
- 5) AKIN Rıdvan, "İttihat ve Terakki Hükümetleri'nin Divan-ı Harb-i Örfi'de Yargılanması ve Malta Sürgünleri (1918-1921)" in **Galatasaray Üniversitesi Hukuk Fakültesi Dergisi 2014/1 (Doç. Dr. Melike Batur Yamaner'in Anısına Armağan) Cilt I**, pp.59-120
- 6) AKKUŞ, Turgay "Birinci Dünya Savaşı Sürecinde Bursa'da Sevk ve İskân Uygulamaları ve Sonuçları" in **Ankara Üniversitesi Osmanlı Tarihi Araştırma ve Uygulama Merkezi (OTAM) Dergisi, Sayı 23, Bahar 2008**, Ankara, 2010, pp.1-52
- 7) AKSOYLU, Özge, **La Conciliation par le Juge de la Légalité et de la Sécurité juridique: Comparaison Franco-Turc**, Ph.D. thesis, Istanbul, 2011
- 8) AKŞİN, Sina, **Ana Çizgileriyle Türkiye'nin Yakın Tarihi**, İmaj Yay., 2001
- 9) AKTAN, Gündüz, "The Armenian Problem and International Law" in **Gündüz Aktan – What He Said and What He Wrote**, Ankara, 2012, pp.229-276
- 10) AKYÜZ, Aydın, **Gecikmiş Bir Yüzleşme - Ermeni Soykırımı**, Ceylan Yay., İstanbul, 2015
- 11) AMBOS, Kai, "General Principles of Criminal Law in the Rome Statute" in **Criminal Law Forum, 10**, 1999, pp.1-32
- 12) Amnesty International, **Eichmann Supreme Court Judgment - 50 Years On, Its Significance Today**, Amnesty International Publications, UK, 2012
- 13) ARAJARVI, Noora, "Between Lex Lata and Lex Ferenda? Customary International (Criminal) Law and the Principle of Legality" in **Tilburg Law Review, Vol. 15, 2010-2011**, pp.163-182

- 14) ARENDT, Hannah, **Eichmann and the Holocaust**, Penguin Books – Great Ideas, London, 2005
- 15) ASLAN, M. Yasin, **Defense against Terrorism in International Criminal Law**, 1. Baskı, Bilge Yay., Ankara, 2014
- 16) ASLAN, M. Yasin, **Teoride ve Uygulamada Savaş Suçları**, 2. Baskı, Bilge Yay., Ankara 2014
- 17) ATA, Feridun, “Divân-ı Harb-i Örfî Mahkemelerinde Ermeni Tehciri Yargılamalarına İstatistiksel Bir Bakış (1919-1921)” in **Atatürk Araştırma Merkezi Dergisi**, Sayı 62, Cilt 25, Temmuz 2005
- 18) ATA, Ferudun, **İşgal İstanbul’unda Tehcir Yargılamaları**, 2. Baskı, Türk Tarih Kurumu, Ankara, 2011
- 19) AYBAY, Rona, **Uluslararası Yargı**, 1. Basım, Alfa Basım Yayım, İstanbul, 2013
- 20) AYTAŞ, Gülseren S., **Ermeni Talepleri ve Türkiye’nin Hakları**, İstanbul Barosu Yayınları, İstanbul, 2010
- 21) BANTEKAS, Ilias / NASH, Susan, **International Criminal Law**, Third Edition, Routledge-Cavendish, London, 2007
- 22) BASS, Gary Jonathan, **Stay the Hand of Vengeance: The Politics of War Crimes Tribunals**, Princeton University Press, 3rd printing, USA, 2002
- 23) BASSIOUNI, M. Cherif, **Crimes against Humanity in International Criminal Law**, First Edition, Martinus Nijhoff Publishers, Dordrecht, The Netherlands, 1992
- 24) BASSIOUNI, M. Cherif, **Crimes against Humanity in International Criminal Law**, Second Revised Edition, Kluwer Law International, The Hague, 1999
- 25) BASSIOUNI, M. Cherif, “From Versailles to Rwanda in 75 Years: The Need to Establish a Permanent International Criminal Court” in **Harvard Human Rights Journal**, Spring 1997, Vol.10, pp.11
- 26) BATUR YAMANER, Melike / ÖKTEM, Emre, “Imprescriptibilité des crimes de guerre: réflexions à partir d’un cas concernant la Turquie”, in (sous la coordination générale de) Jean-François Akandji-Kombé, **L’Homme dans la Société Internationale**, Bruylant, Bruxelles, 2013, pp.1133-1146
- 27) BAYRAKTAR, Köksal, “Uluslararası Suçların Genel Özellikleri” in BAYRAKTAR, Köksal / EVİK, Vesile Sonay / KURT, Gülşah, **Özel Ceza**

Hukuku Cilt I: Uluslararası Suçlar, 1. Baskı, On İki Levha Yayınları, İstanbul, 2016

- 28) BIANCHI, Andrea, “Immunity versus Human Rights: The *Pinochet* Case” in **European Journal of International Law**, Vol.10, No.2, pp.237-277
- 29) BİLMEN, Ömer Nasuhi, **Hukuki İslâmiyye ve Istılahatı Fıkhiyye Kamusu**, Bilmen Yayınevi, İstanbul, not dated
- 30) BOHLANDER, Michael, “Referring an indictment from the ICTY and ICTR to another court - Rule 11*bis* and the consequences for the law of extradition” in **International and Comparative Law Quarterly**, vol.55, Issue 1, Cambridge University Press, 2006, pp.219-226
- 31) van BOVEN, Theo, **The United Nations 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 (Introductory Note)**, UN Audiovisual Library of International Law, 2010
- 32) (edited by) BULLARD, Giuliana S., **Disclosure: Newsletter of the Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group**, National Archives (of the USA), Maryland, 2002
- 33) BURGESS Jr., Douglas R., “Hostis Humani Generi: Piracy, Terrorism and a New International Law” in **University of Miami International and Comparative Law Review**, Vol. 13, Spring 2006, pp.293-341
- 34) CASSESE, Antonio, **International Criminal Law**, Oxford University Press, New York, 2003
- 35) CASSESE, Antonio, **International Law**, Second Edition, Oxford University Press, New York, 2005
- 36) CASSESE, Antonio, **Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal**, United Nations Audiovisual Library of International Law, 2009
- 37) CASSESE/ACQUAVIVA/FAN/WHITING, **International Criminal Law Cases and Commentary**, Oxford University Press, New York, 2011
- 38) CASSESE, Antonio / ROLLING, B.V.A., **The Tokyo Trial and Beyond: Reflections of a Peacemonger**, 1st edition, Polity Press, Cambridge, 1994

- 39) CHACÓN, Iván Bazán, “Los delitos de genocidio y de lesa humanidad. La cuestión de la imprescriptibilidad” in **Derecho & Sociedad, Núm. 21 (2003)**, pp.45-58
- 40) CHANG, Diane, “Almonacid Arellano et al. v. Chile” in **Loyola of Los Angeles International and Comparative Law Review, Vol. 38, 2016**, pp.1067-1083
- 41) CLARK, Kate, **War Reparations and Litigation: the case of Bosnia**, International Litigation Series No.1, Nuhanovic Foundation - Center for War Reparations, Amsterdam, 2014
- 42) CLARK, Roger S., “Amendments to the Rome Statute of the International Criminal Court Considered at the first Review Conference on the Court, Kampala, 31 May-11 June 2010” in **Goettingen Journal of International Law 2**, Goettingen, 2010
- 43) COLLINGS, Justin, **Democracy’s Guardians - A History of the German Federal Constitutional Court – 1951-2001**, Oxford University Press, 2015
- 44) Council of Europe - European Court of Human Rights, **the Court in Brief**, “Key Dates, Strasbourg, date unknown
- 45) CRYER/FRIMAN/ROBINSON/WILMSHURST, **An Introduction to International Criminal Law and Procedure**, Second Edition, Cambridge University Press, Edinburgh, 2011
- 46) ÇAKAR, Ayşen Sekmen, “İnsanlığa Karşı Suçlar” in **Türkiye Barolar Birliği Dergisi, Vol.103 (2012)**, Ankara, 2012, pp.169-198
- 47) ÇAKMAK, Diren, “Soykırım Suçu: Suçun Gerçekleştiği Ruanda Örneği (1994) ve Suçun Gerçekleşmediği Ermeni Tehciri (1915)” in **38th International Congress of Asian and North African Studies - Papers - International Relations, Vol. II**, Ankara, 2011, pp.501-524
- 48) DADRIAN, Vahank / AKÇAM, Taner (derleyenler), **“Tehcir ve Taktir”: Divan-ı Harb-i Örfî zabıtları: İttihad ve Terakki’nin Yargılanması: 1919-1922**, İkinci Baskı, İstanbul Bilgi Üniversitesi Yayınları, İstanbul, 2010
- 49) DAKESSIAN, Rodney, **Les effets juridiques des massacres commis contre les arméniens en 1915 et leurs modes de résolutions judiciaires et extrajudiciaires possibles**, Ph.D. Thesis, sous la direction de M. Emile-François Callot: Université Jean Moulin (Lyon 3), thèse soutenue le 14 décembre 2012.
- 50) DELMAS-MARTY, Mireille, “La responsabilité pénale en échec (prescription, amnistie, immunités)” in (sous la direction de) Cassese / Delmas-Marty,

- Juridictions Nationales et Crimes Internationaux**, 1^{er} édition, Presses Universitaires de France, Paris, 2002, pp.613-652
- 51) DEMİRBAŞ, Timur, **Ceza Hukuku Genel Hükümler**, 6. Bası, Seçkin Yayıncılık, Ankara, 2009
- 52) DINSTEIN, Yoram, **The Defence of 'Obedience to Superior Orders' in International Law**, Reprinted Edition, Oxford University Press, Great Britain, 2012
- 53) DÖRMANN, Knut, **Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary**, ICRC, Cambridge University Press, Cambridge, 2003
- 54) DUGARD, John, **Convention on the Suppression And Punishment of the Crime of Apartheid**, United Nations Audiovisual Library of International Law, 2008
- 55) von der DUNK / KOOIJMANS, “The Unification of Germany and International Law”, **Michigan Journal of International Law**, Vol.12:510, Spring 1991, pp.510-557
- 56) Editors (not specified), Notes: “Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution” in **University of Pennsylvania Law Review**, vol.102, March 1954, pp.630-653
- 57) FABRI / MORTE / LAMBERT-ABDEGAWAD / MARTIN-CHENUT, “Les institutions de clémence (amnistie, grâce, prescription) en droit international et droit constitutionnel comparé”, **Archives de politique criminelle**, 2006/I (No.28), pp.237-255.
- 58) FRULLI, Micaela, “Le droit international et les obstacles à la mise en œuvre de la responsabilité pénal pour crimes internationaux” in (sous la direction de) Cassese/Delmas-Marty, **Crimes Internationaux et Juridictions Internationales**, 1^{er} édition, Presses Universitaires de France, Paris, 2002
- 59) FRULLI, Micaela, “Are Crimes against Humanity More Serious than War Crimes?” in **European Journal of International Law**, Vol.12, No.2, 2001, pp.329-350
- 60) von GLAHN, Gerhard / TAULBEE, James Larry, **Law Among Nations - An Introduction to Public International Law**, 11th Edition, Routledge, New York, 2017

- 61) GÜÇLÜ, Yücel, book review of “‘A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility’ by Taner Akçam” in **Belleten Cilt: LXXI, Sayı: 262, December 2007**, Türk Tarih Kurumu, Ankara
- 62) GÜNAL, Hüseyin, **Hannah Arendt ve İnsanlığa Karşı Suçlar**, 1. Baskı, Dost Kitabevi, Ankara, 2015
- 63) GÜNDÜZ, Aslan, **Milletlerarası Hukuk**, 7. Baskı, Beta Yay., İstanbul, 2014
- 64) GÜNEYSU, Gökhan, **Uluslararası Hukukta Amirin Emri**, 1. Baskı, XII Levha Yay., İstanbul, 2015
- 65) HACOBİAN, A. P., **Armenia and the War - An Armenian’s Point of View with an Appeal to Britain and the Coming Peace Conference**, George H. Doran Company, New York, 1918
- 66) HAILBRONNER, Kay, “Legal Aspects of the Unification of the Two German States”, **European Journal of International Law, Vol.2 (1991), No.1**, pp.18-44.
- 67) HATEMİ, Hüseyin, **İslam Hukuku Dersleri**, 4. Bası, Sümer Kitabevi, İstanbul, 2012
- 68) HAYASHI, Nobuo, “Requirements of Military Necessity in International Humanitarian Law and International Criminal Law” in **Boston University International Law Journal, Vol. 28:39, 2010**, pp.39-140
- 69) HESSBRUEGGE, Jan Arno, “Justice Delayed, not Denied: Statutory Limitations and Human Rights Crimes” in **Georgetown Journal of International Law, vol.43**, 2011-2012, p.335
- 70) Human Rights Watch (not specified), **Argentina: Reluctant Partner - The Argentine Government's Failure to Back Trials of Human Rights Violators**, Volume 13, Issue 5 (B), December 2001
- 71) Human Rights Watch, **Le jugement de Hissène Habré: Le temps presse pour les victimes**, No.2, 2007
- 72) İDİZ, Semih, “The Turkish-Armenian Debacle” in **Insight Turkey, Vol.12, No.2, 2010**, SETA Foundation, pp.11-19
- 73) HOFFMAN, Tamás, “Individual criminal responsibility for crimes committed in non-international armed conflicts – The Hungarian jurisprudence on the 1956 volley cases” in Manacorda/Nieto, **Criminal Law between War and Peace: Justice and Cooperation in criminal matters in international military interventiones**, Ediciones de la Universidad de Castilla-La Mancha, Cuenca, 2009

- 74) KABBAH, Hanatu, **Sierra Leone Legal System and Legal Research**, Updated Version, GlobaLex, Hauser Global Law School, 2014
- 75) KAYA, İbrahim, “Türkiye - Ermenistan İlişkilerinin Normalleş(tiril)mesi: Hukuksal Değerlendirmeler” in Dinçer/Özdal/Necefoğlu (editörler), **Yeni Dönemde Türk Dış Politikası - Uluslararası IV. Türk Dış Politikası Sempozyumu Tebliğleri**, USAK Yay., Ankara, 2010, pp.223-234
- 76) KESTENBAUM, Jocelyn Getgen, “Closing Impunity Gaps for the Crime of Aggression” in **Chicago Journal of International Law**, Vol. 17, No.1, Art.2, pp.51-7
- 77) KÉVORKIAN, Raymond H. / PABOUDJIAN, Paul B., **1915 Öncesinde Osmanlı İmparatorluğu’nda Ermeniler**, İkinci Baskı, Aras Yay., İstanbul, 2013
- 78) KHAN, Hamid M., **Islamic Law, Customary Law, and Afghan Informal Justice**, United States Institute of Peace Special Report, Washington, DC, 2015
- 79) KLASING, Amanda M., **Haiti’s Rendezvous with History: The Case of Jean-Claude Duvalier**, Human Rights Watch, USA, 2011
- 80) KOCAOĞLU, Serhat Sinan, “Uluslararası Ceza Hukuku ve 5237 Sayılı Türk Ceza Kanunu Perspektifinden Evrensellik İlkesi” in **Ankara Barosu Dergisi Yıl:68 Sayı:2010/1**, pp.67-93, Ankara, 2010
- 81) KOK, Ruth Alberdina, **Statutory Limitations in International Criminal Law**, PhD thesis (Academisch Proefschrift), University of Amsterdam, 2007
- 82) KRAMER, Alan, “Combatants and Noncombatants: Atrocities, Massacres, and War Crimes”, in (edited by) John Horne, **A Companion to World War I**, Blackwell Companions to World History, Wiley-Blackwell, 2012, pp.188-201
- 83) KREICKER, Helmut, “Statutory Limitations” in Antonio Cassese (editor in chief), **The Oxford Companion to International Criminal Justice**, Oxford University Press, 2009
- 84) KRESS, Claus, “The Iraqi Special Tribunal and the Crime of Aggression” in **Journal of International Criminal Justice**, 2, 2004, Oxford University Press, pp.347-352
- 85) LEMKIN, Raphael, **Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress**, Carnegie Endowment for International Peace, Washington DC, 1944

- 86) LEWY, Guenter, **The Armenian Massacres in the Ottoman Turkey: A Disputed Genocide**, University of Utah Press, Salt Lake City, 2005
- 87) LINTON, Suzannah, “Prosecuting Atrocities at the District Court of Dili” in **Melbourne Journal of International Law, Vol.2(2)**, October 2001
- 88) LOPEZ, Elias L., “Jorge Rafael Videla, Jailed Argentine Military Leader, Dies at 87” in **New York Times - 17 May 2013**, New York, 2013
- 89) MALABAT, Valérie, “Prescription et imprescriptibilité des infractions internationales”, in (sous la direction de) Ascensio/Dcaux/Pellet, **Droit International Pénal**, 2ème édition révisée, CEDIN, Paris, 2012
- 90) MAOGOTO, Jackson Nyamuya, “Reading the Shadows of History: The Turkish and Ethiopian ‘Internationalized’ Domestic Crime Trials” in (edited by) Kevin Jon Heller / Gerry Simpson, **The Hidden Histories of War Crimes Trials**, Oxford University Press, First Edition, 2013, pp.289-305
- 91) MARTINEZ, Jennifer S., “Anti-Slavery Courts and the Dawn of International Human Rights Law”, **Yale Law Journal, Vol. 117, Fall 2007**, p. 550 (and as Stanford Public Law Working Paper No.984077)
- 92) MATTAROLLO, Rodolfo, “Recent Argentine Jurisprudence in the Matter of Crimes Against Humanity” in **International Commission of Jurists Review – Impunity, Crimes Against Humanity and Forced Disappearance, No 62-63, September 2001**
- 93) McCARTHY, Justin, “The Population of Ottoman Armenians” in **The Armenians in the Late Ottoman Period**, The Turkish Historical Society for The Council of Culture, Arts and Publications of The Grand National Assembly of Turkey, Ankara, 2001, pp.65-85
- 94) MERON, Theodor **Human Rights Standards in the Jurisprudence of International Criminal Courts and Tribunals, 25 January 2013, Opening of the Judicial Year of the European Court of Human Rights**, ECHR, Strasbourg, 2013
- 95) MKRTCHYAN, Tigran, “The Role of NGOs in Turkey-Armenia Rapprochement” in (Edited by) Mustafa Aydın, **Non-Traditional Security Threats and Regional Cooperation in the Southern Caucasus**, IOS Press, Netherlands, 2011, pp.154-162

- 96) MOSES, A. Dirk, "Raphael Lemkin, Culture, and the Concept of Genocide" in Donald Bloxham and A. Dirk Moses, eds., **The Oxford Handbook on Genocide Studies**, Oxford University Press, Oxford, 2010, pp.19-41
- 97) NEWTON, Michael A., "The Iraqi High Criminal Court: controversy and contributions" in **International Review of the Red Cross**, vol. 88, No.862, June 2006
- 98) NOLLKAEMPER, André, "State Responsibility for International Crimes: A Review of Principles of Reparation" in Working Papers 2009, Amsterdam Center for International Law, University of Amsterdam (later published in Aristotle Constantinides / Nikos Zaïkos (ed.s), **The Diversity of International Law: Essays in Honour of Professor Kalliopi K. Koufa**, Martinus Nijhoff Publishers, 2009)
- 99) OPPENHEIM, Lassa, **International Law: A Treatise**, vol. I, 2nd Edition, London, 1912
- 100) OSCE (War crimes trials monitoring project team of the OSCE Mission to Serbia), **War crimes proceedings in Serbia (2003-2014) – An analysis of the OSCE Mission to Serbia's monitoring results**, OSCE Mission to Serbia, Belgrade, 2015
- 101) O'KEEFE, Roger, **The Concept of an "International Crime"**, United Nations Audiovisual Library of International Law, 2011
- 102) ORTAYLI, İlber / ERDİNÇ, Erol Şadi, **İttihat ve Terakki - Osmanlı İmparatorluğu'nda Gizli Örgütlenmeler ve Darbeler**, İnkılâp Kitabevi, İstanbul, 2016
- 103) OSTERHAUS, Anja, **Timed Out: Statutes of Limitations and Prosecuting Corruption in EU Countries**, Transparency International, Berlin, 2010
- 104) ÖKTEM, Emre, **Uluslararası Teamül Hukuku**, 1. Baskı, Beta Yay., İstanbul, 2013
- 105) ÖKTEM, Emre, **Terörizm, İnsancıl Hukuk ve İnsan Hakları**, 2. Basım, Derin Yay., İstanbul, 2011
- 106) ÖKTEM, Emre, "Turkey: Successor or Continuing State of the Ottoman Empire?" in **Leiden Journal of International Law**, Vol.24 (2011), pp.561-583
- 107) ÖKTEM, Emre, "Uluslararası Andlaşmanın İmza İle Onay Arasındaki Hukuki Rejimi" in **Galatasaray Üniversitesi Hukuk Fakültesi Dergisi 2014/1 (Doç. Dr. Melike Batur Yamaner'in Anısına Armağan) Cilt I**, pp.461-504

- 108) ÖKTEM, Emre / KURTDARCAN, Bleda R., **Deniz Haydutluğu ve Korsanlık – Tarihi ve Hukuki Boyutlarıyla**, 1. Baskı, Denizler Kitabevi, İstanbul, 2011
- 109) ÖVER, Kıvanç Galip, **Alman Belgelerinde Ermeni Meselesi ve 1915**, I. Basım, Kaknüs Yay., İstanbul, 2007
- 110) PAPARINSKIS, Martins, “Piracy” in Antonio Cassese (editor in chief), **The Oxford Companion to International Criminal Justice**, Oxford University Press, 2009
- 111) PAZARCI, Hüseyin, **Türk Dış Politikasının Başlıca Sorunları**, 1. Bası, Turhan Kitabevi, Ankara, 2015
- 112) PAZARCI, Hüseyin, **Uluslararası Hukuk**, 8. Bası, Turhan Kitabevi, Ankara, 2009
- 113) PICCIGALLO, Philip R., **The Japanese on Trial - Allied War Crimes Operations in the East, 1945-1951**, University of Texas Press, Austin, 1979
- 114) RECHID, Ahmed, “L’Islam et le Droit des Gens” in **Recueil des Cours - Académie de Droit International, 1937-II, tome 60**, Paris, p.371
- 115) REED/BOHLANDER/WAKE/SMITH, **General Defences in Criminal Law: Domestic and Comparative Perspectives**, Routledge, New York, 2016
- 116) REYDAMS, Luc, “Belgian Tribunal of First Instance of Brussels (investigating magistrate), November 8, 1998” in **American Journal of International Law, Vol.93, Issue:3, July 1999**, pp.700-703
- 117) RHEA, Harry M., “The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties and its Contribution to International Criminal Justice after the Second World War” in **Criminal Law Forum, Vol. 25, Issue 1, 2014**, pp.147-169
- 118) SAFRASTYAN, R.A., “The Decision of the Ottoman Government on the Deportation of Armenians (May 30, 1915)” in **Armenological Issues, Bulletin 1**, Yerevan, 2014
- 119) SCHABAS, William A., **Genocide in International Law: the Crime of Crimes**, Cambridge University Press, Cambridge, 2000
- 120) SCHABAS, William A., **Genocide and International Law**, United Nations Audiovisual Library of International Law, 2008

- 121) SCHABAS, William A., **Uluslararası Ceza Mahkemesine Giriş**, 2. Bası, Cambridge University Press, Cambridge, 2004, Çeviren: Gülay Arslan, Uluslararası Af Örgütü Türkiye Şubesi, Legal Yay., İstanbul, 2006
- 122) SCHABAS, William A., “General Principles of Criminal Law in the International Criminal Court Statute (Part III)” in **European Journal of Crime, Criminal Law, and Criminal Justice**, Issue 1998-4, pp.400-428
- 123) SCHARF, Michael P. / SCHABAS, William A., **Slobodan Milosevic on Trial: a companion**, Continuum, 2002
- 124) SONYEL, Salahi, **The Great War and the Tragedy of Anatolia (Turks and Armenians in the Maelstrom of Major Powers)**, 2nd Edition, Turkish Historical Society, Ankara, 2001
- 125) SOYSAL, İsmail, **Türkiye'nin Siyasal Andlaşmaları, I. Cilt (1920-1945)**, Türk Tarih Kurumu, Ankara, 1983
- 126) SPINEDI, Marina, “State Responsibility v. Individiaul Responsibility for International Crimes: *Tertium Non Datur?*” in **European Journal of International Law**, Vol. 13, No. 4, 2002, pp.898-899
- 127) STOVER, Eric / PESKIN, Victor / KOENIG, Alexa, **Hiding in Plain Sight - The Pursuit of War Criminals from Nuremberg to the War on Terror**, University of California Press, Oakland, 2016
- 128) SUGARMAN, David, “The Pinochet precedent and the 'Garzon effect': on catalysts, contestation and loose ends” in **Amicus Curiae**, Issue 42, July/August 2002, pp.10-16
- 129) SWART, A.H.J., “Internationalized Courts and Substantive Criminal Law” in Romano/Nollkaemper/Kleffner, **Internationalized Criminal Courts and Tribunals: Sierra Leone, East timor, Kosovo, and Cambodia**, Oxford University Press, Oxford, 2004
- 130) SZONERT-BINIENDA, Maria, “Was Katyn a Genocide?” in **Case Western Reserve Journal of International Law**, Vol. 44, Issue 3, 2012, pp.633-717
- 131) TAŞDEMİR, Kubilay, **Ceza Hukukunda Zamanaşımı**, 2. Baskı, Ankara, 2015
- 132) TAŞER, Pınar, **Mütareke Dönemi’nde Divan-ı Harb-i Örfiler (1918-1922)**, unpublished Master’s Degree thesis, Anadolu University Institute of Social Sciences, Eskişehir, 2005

- 133) TEZCAN, Durmuş / ERDEM, Mustafa Ruhan / ÖNOK, R. Murat, **Uluslararası Ceza Hukuku**, 2. Baskı, Seçkin Yay., Ankara, 2014
- 134) de THAN, Clair / SHORTS, Edwin, **International Criminal Law and Human Rights**, First Edition, Sweet & Maxwell, London, 2012
- 135) TIGAR/CASEY/GIORDANI/MARDEMOOTO, “Paul Touvier and the Crimes against Humanity” in **Texas International Law Journal**, 1995, Vol.30, pp.285 et seq.
- 136) TORRES, Maruja / SEPULVEDA, Luis (vv. aa.), **El caso de España contra las dictaduras Chilena y Argentina - Los documentos del juez Garzón y la Audiencia Nacional**, Planeta, 1ª Ed., Barcelona, 1998
- 137) TRAHAN, Jennifer, **Genocide, War Crimes, Crimes against Humanity – A Topical Digest of the Case Law of the International Criminal Tribunal for the Former Yugoslavia**, Human Rights Watch, USA, 2006
- 138) TUNAYA, Tarık Zafer, **Türkiye’de Siyasal Partiler - Cilt 3: İttihat ve Terakki, Bir Çağın, Bir Kuşağın, Bir Partinin Tarihi**, Genişletilmiş 6. Baskı, İletişim Yay., İstanbul, 2015
- 139) ULUADA, Meltem, **Geçmişten Günümüze Ermeni Meselesi ve Sözde Soykırımın Uluslararası Kriterler Açısından Değerlendirilmesi**, Atılım University - Institute of Social Sciences, Master’s Degree Thesis, Ankara, 2006
- 140) ÜLGEN, Özen, **İptal ve İtiraz Başvuruları Bakımından Anayasa Yargısında İlk İnceleme**, Beta Yay., İstanbul, 2013
- 141) VERGNAUD, Lucas, **Le Périmètre du Crime contre l’Humanité**, Master’s Degree Thesis (Master 2 Recherche « Droit international »), Université Montesquieu Bordeaux-IV, 2009
- 142) WALKER, Jeffrey K. “The Rights of the Accused in Saudi Criminal Procedure” in **Loyola of Los Angeles International and Comparative Law Review**, Los Angeles, 1993
- 143) WELSKI, Derek M., **Hybrid Court System in Kosovo: Has EULEX proven to be the device to strengthen the independence and effectiveness of the judiciary?**, Group for Legal and Political Studies, policy report No.11, Prishtina, 2014
- 144) WILSON, Richard, “Prosecuting Pinochet: International Crimes in Spanish Domestic Law” in **Human Rights Quarterly**, Number 4, November 1999, pp. 927-979

- 145) WEATHERALL, Tomas, **Jus Cogens - International Law and Social Contract**, Cambridge University Press, Cambridge, 2015
- 146) WOUTERS, Jan, **The Obligation to Prosecute International Law Crimes**, opinion paper on researches, KU Leuven Institute for International Law (not dated)
- 147) YAMADA, Otozō, **Materials on the Trial of Former Servicemen of the Japanese Army: Charged with Manufacturing and Employing Bacteriological Weapons**, [USSR] Foreign Languages Publishing House, 1950
- 148) YEGHIAIAN, Vartkes, **Malta Belgeleri: İngiltere Dışışleri Bakanlığı “Türk Savaş Suçluları” Dosyası**, Belge Yay., İstanbul, 2007
- 149) YEGHIAIAN, Vartkes / FERMANIAN, L., **Rafael Lemkin'in Ermeni Soykırımı Dosyası**, Belge Yay., İstanbul, 2009
- 150) YILMAZ, Alia, **Uluslararası Ceza Hukuku El Kitabı**, Beta Yay., 2001
- 151) ZEGVELD, Liesbeth, ‘The Bouterse Case’ in **Netherlands Yearbook of International Law**, Dec.2001, Vol.XXXII, pp. 97-118

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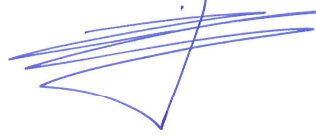
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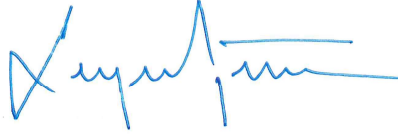
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