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(VENICE COMMISSION)

COMMENTS

ON THE CASE *SANTIAGO BRYSÓN DE LA BARRA ET AL* (ON CRIMES AGAINST HUMANITY)

AMICUS CURIAE BRIEF FOR THE CONSTITUTIONAL COURT

OF PERU

by

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I. Introduction – Crimes Against Humanity

Crimes against humanity belong among the most serious crimes under international law.[1] They are *"particularly odious offences constituting a serious attack on human dignity or a grave humiliation or degradation of one or more human beings"*.[2] Used for the first time in 1915, to denote the massacres against the Armenian population committed in the Ottoman Empire, the term entered into the legal vocabulary after the World War II with the prosecution of German and Japanese war criminals. It was included into the Charters of the Nuremberg and Tokyo International Military Tribunals as well as the legislation adopted for the national level (Council Control Law No. 10). The main purpose behind the incorporation of this category of crimes, previously undefined in any international treaty, was to prevent impunity being granted to those, who committed crimes comparable in their gravity and seriousness to war crimes but which could not be technically qualified as such. In the Nuremberg trial alone, 15 out of the 24 accused were found guilty of crimes against humanity. The principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgments of the Tribunal, including those referring to crimes against humanity, were officially affirmed by the UN General Assembly in the resolution 95(I) of 11 December 1946.[3] Despite this evolution at the international level, it was not uncommon for national states in the post-WWII setting to prosecute war criminals for common offences such as murder (Czechoslovakia, France, Poland etc.), applying their pre-WWII criminal legislation.

During the Cold War period, two international instruments relating to crimes against humanity were adopted at the universal (UN) level, namely the 1968 *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* (in force since 1970) and the 1973 *International Convention on the Suppression and Punishment of the Crime of Apartheid* (in force since 1976). The latter instrument inspired the Council of Europe to adopt, in 1974, the *European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes* (in force since 2003). At the same time, several countries introduced "crimes against humanity" as a specific category of crimes into their national criminal law systems (Czechoslovakia – Penal Code No. 140/1961 Coll.[4], France – Loi du 26 décembre 1964[5]). Various national prosecutions for crimes against humanity were also led from late 1940s to early 1990s, mostly still for offences committed during the World War II in Europe by the Nazis or their collaborators in various European states (Israel: Eichmann 1961, France: Barbie 1987[6]).

The category of crimes against humanity has undertaken a rapid evolution in the post-Cold War period. At the international level, these crimes were incorporated into the Statutes of the *ad hoc* International Criminal Tribunals for the former Yugoslavia and for Rwanda, created by the UN Security Council the early 1990s; the Rome Statute of the permanent International Criminal Court established in 1998; and the statutes of various mixed tribunals (Special Court for Sierra Leone etc.). The Statutes as well as the case-law of

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[1] See generally, M. C. Bassiouni, *Crimes Against Humanity in International Criminal Law,* Second Revised Edition, Kluwer Law International, The Hague, 1999; L. May, *Crimes Against Humanity. A Normative Account,* Cambridge University Press, Cambridge, 2005.

[2] *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General,* Pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005, par. 178.

[3] G. A. Res. 95(I) *Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal,* 11 December 1946.

[4] The Penal Code contained a specific chapter of crimes against humanity, which included the following crimes: genocide, torture and other inhuman and cruel treatment, promotion and propagation of movements aimed at suppressing human rights and freedoms, as well as several war crimes.

[5] Loi n°64-1326 du 26 décembre 1964 tendant à consta ter l'imprescriptibilité des crimes contre l'humanité. The law constituted of a single article, which stated: ***"****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 gu'elle figure dans la charte du tribunal international du 8 août 1945, sont imprescriptibles par leur nature."*

[6] France, *Barbie,* Cour d´assises du department du Rhone, 4 July 1987 and Court of Cassation, 3 June 1988.

the tribunals have contributed to the clarification of the definition of crimes against humanity, which now seems more or less settled. Occasionally, other, non-criminal international courts and tribunals, such as the International Court of Justice, the European Court of Human Rights or the Inter-American Court on Human Rights have been called upon to pronounce on the definition of crimes against humanity or some aspects of their prosecution (immunities, statutory limitations etc.). The UN International Law Commission decided to include crimes against humanity among crimes against the peace and security of mankind, which codified in the 1996 *Draft Code of Crimes against the Peace and Security of Mankind.*

The changes at the international scene have propelled a similar evolution at the domestic level. Over the past two decades, many states have enacted specific legislation on crimes against humanity or have amended their older laws in the light of the new development in the area (Belgium, France, the United Kingdom, etc.). Moreover, more national courts than ever before have been confronted with cases involving past or present crimes against humanity (France: *Touvier* 1994 and *Papon* 1998, Netherlands: *Bouterse* 2001, Estonia: *Kolk and Kislyiy* 2003, Germany: *Demjanjuk* 2011, Spain: *Pinochet* 1998, Belgium: *Pinochet* 1998*,* UK: *Pinochet* 1999, etc.). In the result of these events, there is now a substantive body of international instruments, national legislation and international and national case-law which defines crimes against humanity and specifies the conditions, under which those who have (allegedly) perpetrated such crimes may be prosecuted. Some of the rules applicable in this area have also acquired customary nature.

II. Prosecuting Past Crimes Against Humanity – Dilemmas Faced

The prosecution of crimes against humanity gives rise to various factual and legal dilemmas. This is particularly true, when it takes place before national judicial organs and/or when it pertains to crimes committed in the past, e.g. under the previous political regime. Unlike international criminal tribunals, national judicial organs do not always dispose of a legal instrument allowing them to prosecute crimes under international law as such. And even if they do, such crimes are not necessarily defined in the same way as under international law, nor do they apply under the same conditions as at the international level. Moreover, the relevant provisions of national penal codes relating to crimes against humanity are often of a rather recent date, enacted over the past years or decades, which makes their applicability to crimes committed in the past, before their enactment, questionable. Yet, in contradistinction to international criminal tribunals, national judicial organs do not mostly have any *a priori* limits of the jurisdiction *ratione temporis* imposed upon them and, thus, cannot divest themselves of the case by invoking temporal inadmissibility. They have to deal with it and pronounce upon the guilt or innocence of alleged perpetrators.

In so doing, national judicial organs may, depending on their respective domestic legal orders, prosecute alleged perpetrators either for common crimes (such as homicide, murder, rape etc.), mostly with aggravating circumstances, or for specific offences inspired by international law (defined generally as “crimes against humanity” or as individual crimes such as attacks against humanity, torture, persecution, apartheid, enforced disappearance etc.). Both options give rise to certain legal problems dilemmas. The prosecution for *common crimes* often faces the obstacles of statutory limitations, amnesties, and immunities. Even with those obstacles overcome, national judicial organs still have to decide, in what ways and to what extent they are to take into account the serious nature of the relevant offences – this factor is particularly relevant when deciding upon the sentence. In some cases, they also need to deal with questions of jurisdiction, especially if the concept of universal jurisdiction is used, and modes of participation in the commission of crimes.

The prosecution for *specific offences* is on its turn often confronted with the objections alleging violations of the principles of non-retroactivity and *nullum crimen sine lege*. National judicial organs have to find out, whether the relevant act could have been qualified as a crime against humanity at the moment of its commission. If no national legislation was available at that moment, they may be induced – if their national legal order permits so – to look for the legal basis in conventional or customary international law. In so doing, they have to discuss both the general definition of crimes against humanity and the concrete offences falling into that category in a specific (past) period. The issue of statutory limitations, amnesties, immunities, jurisdiction and modes of participation may arise in this context as well. In general, the questions relating to the principles of retroactivity/*nullum crimen sine lege,* the definition of crimes against humanity, the sentences applied in this context and the applicability of statutory limitations, seem to be the most general and most cogent and will be therefore dealt with in this opinion.

III. Prosecuting Past Crimes Against Humanity – European Experience

European countries have a relatively rich tradition of prosecuting crimes against humanity and other crimes under international law (war crimes, genocide, and crimes against peace). In view of the intricate history of the continent, many countries also have experiences with prosecuting past (historical) crimes. Three main categories of prosecutions could be distinguished in this context. The first category pertains to serious crimes committed during *World War II* by the Nazis, their collaborators from various European countries and, less frequently, by the Allies (especially the USSR). Most of these trials took place in the aftermath of the World War II and were mostly based on the countries´ common criminal legislation from the pre-war period. Yet, the impossibility to prosecute some war criminals due to their escape or to political circumstances granting them impunity, have extended World War II-trials far to the second half of the 20th and even the beginning of the 21th century.[7] These trials have been regularly confronted with the objections of retroactivity and statutory limitations and have contributed to the clarification of these areas.

The second category relates to *crimes of communism,* i.e. crimes committed in the Central and Eastern European countries during the period in which those were ruled by communist parties. Non-prosecutable in that period, these crimes, which have often occurred as far back as in the 1950s or – for the USSR – in the 1920s and 1930s, could only be brought to national courts after the fall of communism in 1989-1990. In those former socialist states, in which prosecutions have taken place (Baltic countries,[8] Germany for the events in the Eastern Germany, the Czech Republic, Hungary, etc.), courts have often used the national criminal legislation available in the communist period, holding the offenders responsible for common crimes. In some cases, international law has been invoked directly to buttress the prosecution. Similarly to the post-World War II trials, the prosecution of communist crimes has given rise to the objections of retroactivity and statutory limitations that national courts have had to deal with.

The third category is rather *heterogeneous.* It includes various trials led in the post-Cold War period which do not fall into one of the two previous categories. Most of those trials have revolved around crimes committed in the post-Cold war period either in Europe

[7] France, *Touvier,* French Court of Appeal of Paris, 13 April 1992, Court of Cassation, 27 November 1992 and 19 April 1994; and *Papon,* Cour d´assises de Gironde, 2 April 1998 and Court of Cassation, 11 April 2004.

[8] Estonia, *Paulov Case,* Supreme Court, 21 March 2000; Estonia, *Kolk and Kislyiy Case,* Saare County Court, 10 October 2003; Estonia, *Kolk and Kislyiy Case,* Tallinn Court of Appeal, 27 January 2004; Lithuania, *Baranauskas Case,* Case No. 1A-498, Appeal Court of Lithuania, 3 December 2001; Lithuania, *Misiūnas Case,* Case No. 1-119, Vilnius Regional Court, 30 December 2002, and Appeal Court of Lithuania, 26 March 2003; Lithuania, *Vilčinskas Case,* Case No. 1-91, Vilnius Regional Court,15 February 2005.

(especially in the former Yugoslavia) or in other continents (Rwanda). The cases have been more and more frequently adjudicated on the basis of specific legislation adopted after 1990 and pose, therefore, less legal problems than in the past. Yet, some of the issues, especially those of non-retroactivity have remained relevant in this period as well. Moreover, general developments in the area of international criminal law, coupled with the effort to redress past wrongs, have invigorated the interest in crimes committed in the past century, if not further back in the history. This interest has manifested itself in attempts to hold accountable persons who committed, organised or ordered crimes against humanity in the previous decades, such as the former dictators from the Latin America.[9] Those cases have again brought in the issues of retroactivity, statutory limitations and immunities. Moreover, the post-Cold War trials have also produced new legal problems, focusing for instance on the extent and scope of the universal jurisdiction or the modes of participating in international crimes.

In addition to the decisions taken by national courts, relevant European case-law pertaining to crimes against humanity includes the judgments and decisions delivered by the European Court of Human Rights (hereafter the ECHR) and, up to 1997, also the European Commission of Human Rights. The ECHR, established by the 1950 *European Convention on Human Rights,* is not a criminal court and hence, it does not decide about the individual accountability for crimes under international law. Instead, it pronounces upon the compliance with the European Convention by state parties and, in case of violations of human rights, it may award just satisfaction. Yet, in so doing, it sometimes has to comment upon issues of more general interest, including various aspects of the prosecution of serious crimes under international law (retroactivity, the applicability of statutory limitations etc.). So far, it has dealt with such questions in a dozen of cases, pertaining to (alleged) crimes committed during the World War II,[10] in the communist period,[11] or in the post-Cold War area.[12] There is also case-law relating to war crimes and other crimes under international law,[13] which might have some relevance for the issues discussed here as well.

IV. Retroactivity/*Nullum Crimen Sine Lege* – European Practice

It is one of the main principals of modern criminal law that individuals can only be held accountable for acts which were criminal at the time of their commission (*nullum crimen sine lege*).[14] The use of retroactive laws, which would criminalize certain acts *ex post facto,*

[9] United Kingdom, *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte,* 3 W.L.R. 1456 (H.L. 1998), 2 W.L.R. 272 (H.L. 1999), 2 W.L.R. 827 (H.L. 1999); Spain, *Scilingo Case,* No. 16/2005 Audiencia Nacional, Penal chamber, 3d section, 19 April 2005.

[10] ECmHR, *X. v. Belgium,* Application No. 268/57, Decision, 20 July 1957; ECmHR, *Jentzsch v. Federal Republic of Germany,* Application No. 2604/64, Decision, 6 October 1970; ECmHR, *X v. the Netherlands,* Application No. 9433/81, Decision, 11 December 1981; ECmHR, *Altmann (Barbie) v. France,* Application No. 10689/83, Decision, 4 July 1984; ECmHR, *Touvier v. France*, Application No. 29420/95, Decision, 13 January 1997; ECHR, *Sawoniuk v. the United Kingdom*, Application No. 63716/00, Decision, 29 May 2001; ECHR, *Papon v. France,* Application No. 54210/00, Decision, 15 November 2001; ECHR, *Farbtuhs v. Latvia*, Application No. 4672/02, Judgment, 2 December 2004.

[11] ECHR, *K. – H. W. v. Germany,* Application No. 37201/97, Judgment, 22 March 2001; ECHR, Streletz*, Kessler and Krenz v. Germany,* Applications No. 34044/96, 35532/97, 44801/98, Judgment, 22 March 2001; ECHR, *Kolk and Kislyiy v. Estonia,* Applications No. 23052/04 and 24018/04, Judgment, 17 January 2006; ECHR, *Korbely v. Hungary,* Application No. 9174/02, Judgment, 19 September 2008; ECHR, *Polednová v. The Czech Republic,* Application No. 2615/10, Decision, 21 June 2011.

[12] ECHR, *Brecknell v. the United Kingdom* Application No. 32457/04, Judgment, 27 November 2007;*; McCartney v. the United Kingdom* Application No. 34575/04, Judgment, 27 November 2007; *McGrath v. the United Kingdom* Application No. 34651/04, Judgment, 27 November 2007*; O'Dowd v. the United Kingdom*, Application No. 34622/04, Judgment, 27 November 2007; ECHR, *Reavey v. the United Kingdom,* Application No. 34640/04, Judgment, 27 November 2007.

[13] ECHR, *Kononov v. Latvia,* Application No. 36374/04, Judgment, 24 July 2008 and Grand Chamber Judgment, 17 May 2010

[14] See also M. Boot, Nullum Crimen Sine Lege *and the Subject Matter Jurisdiction of the International Crminal Court. Genocide, Crimes against Humanity and War Crimes,* Intersentia, 2002.

is considered a serious violation of human rights. The prohibition of retroactivity is enshrined in various international human rights instruments (Article 15 of the ICCPR, Article 7 of the European Convention) and it is even sometimes ranked among non-derogable human rights (Article 15 of the European Convention). The rationale behind the prohibition was summed up by the Venice Commission as follows: *"The prohibition of the retrospective application of criminal law relates to the principle of the legality of punishment and is as such part of the wider principle of the rule of law. This prohibition is necessary from the viewpoint of legal certainty, which means that an individual can be prosecuted only for actions, which were foreseeable as criminal offences at the time when they were committed. It would not be fair to be sentenced for actions that were not considered criminal offences at the time they were committed Another argument for the need to prohibit the retroactive application of criminal law is the principle of impartiality and objectivity of the State governed by the rule of law, which means that the State itself must respect the laws in force and must not change them to obtain a specific result in relation to a previous situation."*[15]

The prosecution of past crimes against humanity often gives rise to allegations of the violation of the principle of non-retroactivity. It is so especially in cases when specific provisions on crimes against humanity, incorporated into national legal orders rather recently, are used in the prosecution of crimes committed several decades ago. A similar problem may arise in situations in which individuals are prosecuted under the legislation in force at the time of the commission of the crimes, but this legislation is interpreted and/or applied in the light of more recent developments. This happens, when, for instance, some grounds of justification enshrined in the original legal regime are subsequently made unavailable to the alleged criminals or when the legislation on statutory limitations is retroactively changed to render some crimes imprescriptible.[16]

When confronted with these objections, national judicial organs can invoke the premise, explicitly stated in several human rights instruments, that the principle of non-retroactivity does 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 recognized by the community of nations"*(Article 15-2 of the ICCPR, see also Article 7-2 of the European Convention). A prosecution which is *prima facie* retroactive can therefore be fully lawful under both international and national law, if it is established and evidenced that already at the time of its commission, the relevant act qualified as a crime against humanity or another crime under international law. Moreover, the legal system of the state need to contain rules making it possible for individuals to be held accountable on the basis of international law either by rendering international law directly applicable in the territory (the principle of monism) or by endowing its rules with the domestic legal force by means of transformation (the principle of dualism).

Over the past decades, judicial organs in various European countries have dealt with the objection of retroactivity in cases relating to past crimes against humanity. Most of them have persistently rejected this objection, following the line of argumentation outlined in the previous paragraph. French courts have done so in a series of cases relating to crimes committed during the World War II (*Barbie* 1987, *Touvier* 1994, *Papon* 1998). Retroactivity was the most actively discussed in the course of the proceedings in the *Touvier case.* In the early 1970s, Paul Touvier who had served as a commander of the Second Unit of the French militia in Lyon in the 1940s was charged with crimes against humanity consisting in ordering the assassination of several Jewish hostages. Since the legislation on crimes against humanity was enacted in France only in 1964, French courts faced the problem of the retroactive application of this legislation to the events having occurred 20 years earlier.

[15] Venice Commision, *Amicus Curiae Brief for the Constitutional Court of Georgia,* Opinion No. 523/2009, March 2009, par. 5-6.
[16] This latter issues is dealt with in the final section of this opinion.

They solved it by invoking Article 7-2 of the European Convention and by claiming that this provision, as the French Ministry of Foreign Affairs in its report on the matter suggested, *"did provide both for the past and the future".*[17]

After 1990, the same approach has been followed by the courts of the three Baltic countries (Estonia, Latvia, and Lithuania) in the prosecution of crimes committed during the Soviet era. For instance, in the *Kolk and Kislyiy* Case,[18] the two applicants were accused of having participated in 1949 in a deportation of the civilian population from Estonia to remote areas of the USSR. This act was qualified as a crime against humanity under the Criminal Code of the Republic of Estonia, adopted in 2001, by the Saare County Court. In their appeal against the first instance court decision, the applicants raised the issue of retroactivity, arguing that the Criminal Code of the RSFSR which had been applicable in the territory of Estonia in 1946, had not known the category of crimes against humanity. These crimes were only made punishable in Estonia in 1994. Rejecting the claim, the Tallinn Court of Appeal invoked both the provisions of the Criminal Code, which makes *"crimes against humanity /…/ punishable, irrespective of the time of the commission of the offence"*[19] and Article 7-2 of the European Convention which *"did not prevent punishment of a person for an act which, at the time of its commission, had been criminal according to the general principles of law recognised by civilised nations".*[20]

Yet, though dominant, this approach is not uniformly shared. In some cases, national courts in Europe have refused to apply recent legislation to crimes committed in the past. Some of them have also shown reluctance to rely on the rules of international law, valid at the time of the commission of the crime. This stance was taken by the Netherlands Supreme Court in the *Bouterse Case.*[21] Desi Bouterse is the former guerrilla leader from Suriname, responsible for the 1982 "December murders" in which 15 persons opposing the military rule in the country were executed. In 2000 he was sentenced under the 1988 *Act Implementing the Torture Conviction* by the Amsterdam Court of Appeal. In 2001, the Supreme Court quashed the decision arguing that the retroactive application of the 1988 Act to the events occurred in 1982 violated the principle of legality enshrined in the Dutch Constitution, which made no exception for international crimes. The Court also refused to apply customary international law, holding that the Dutch Constitution did not permit national courts to disregard domestic statutes conflicting with customary international law. A similar line of argument was held, though indirectly, by the UK House of Lords in the famous *Pinochet Case.*[22] The case primarily revolved around the extradition of the former Chilean dictator, Augusto Pinochet, from the UK to Spain, where he was accused of torture and assassination of political opponents. Yet, when deciding upon the extradition, the House of Lords had to clarify, whether the crimes Pinochet was accused of, would be criminal in the UK. In its final decision issued in March 1999, it held that only crimes committed after 1988, when the Criminal Justice Act implementing the *UN Convention Against Torture* was adopted in the UK, would be prosecutable in the UK.

The issue of retroactivity relating to the grounds of justification has been discussed especially by German courts in cases concerning intentional shooting of people trying to escape from Eastern to Western Germany over the intra-German border. In a series of

[17] Cit. in ECmHR, *Touvier v. France*, Application No. 29420/95, Decision, 13 January 1997, p. 5.
[18] Estonia, *Kolk and Kislyiy Case,* Saare County Court, 10 October 2003; Estonia, *Kolk and Kislyiy Case,* Tallinn Court of Appeal, 27 January 2004;
[19] Cit. in ECHR, *Kolk and Kislyiy v. Estonia,* Applications No. 23052/04 and 24018/04, Judgment, 17 January 2006, p. 3.
[20] Ibid.
[21] The Netherlands, *In re Bouterse,* Supreme Court, 18 September 2001.
[22] United Kingdom, *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte,* 3 W.L.R. 1456 (H.L. 1998), 2 W.L.R. 272 (H.L. 1999), 2 W.L.R. 827 (H.L. 1999).

decisions,[23] German courts have rather consistently rejected the argument that the shooting at the borders had been justified by the Eastern German legislation in force before 1989 and that attempts to take this ground of justification subsequently away would constitute a violation of the principle of legality. In the most elaborate decision in the matter, the German Federal Constitutional Court stated that the grounds of justification aimed at *"exonerate(ing) the intentional killing of persons who sought nothing more than to cross the intra-German border unarmed and without endangering interests generally recognised as enjoying legal protection",* collided with fundamental human rights and, as such, had to be rejected. The Constitutional Court, somewhat surprisingly, recognized that this rejection derogated from the principle of legality, yet it held such derogation justifiable on the basis of *"the requirements of absolute justice".* Unlike the courts in France or the Baltic countries which have relied on positivist arguments drawn from national and international law, German courts have resorted to a more natural-law like argumentation influenced by the post-WWII theorists (Radbruch).

The ECHR has so far had only limited opportunity to pronounce on the retroactivity in the prosecution relating to crimes against humanity, with most cases focused on the issue of statutory limitations (dealt with below). Yet, in the few cases available, it has shown a clear preference for the approach held by the courts in France, Germany and the Baltic states. In *K. – H. W. V. Germany* (2001) and *Streletz, Kessler and Krenz v. Germany* (2001), the ECHR claimed that the subsequent removal of the ground of justification for the border shootings did not violate Article 7 of the European Convention, since *"a State practice such as the GDR's border-policing policy, which flagrantly infringes human rights /.../ cannot be covered by the protection of Article 7 § 1 of the Convention".*[24] In *Kolk and Kislyiy v. Estonia* (2006), it concluded that *"even if the acts /.../ could have been regarded as lawful under the Soviet law at the material time, they were nevertheless found by the Estonian courts to constitute crimes against humanity under international law at the time of their commission. The Court sees no reason to come to a different conclusion".*[25] In *Korbely v. Hungary* (2008), though declaring violation of Article 7, the Court indicated that should the elements of crimes against humanity as applicable under international law in the 1950s be present in the case, the applicant could have been lawfully prosecuted for his crimes despite the absence in the Hungarian Criminal Code in force in the 1950s of specific provisions relating to international crimes. In *Kononov v. Latvia* (2010), the Court concluded that Latvia could prosecute the applicant for crimes committed in 1944 based on international law in force at that time. Though the case pertained to war crimes, the judgment made it clear that the same conclusion would apply to other crimes under international law, including crimes against humanity.[26]

The survey of the European practice shows that both national courts of various European countries and the ECHR have, with some notable exceptions, a tendency not to regard the prosecution of past crimes, *prima facie* based on retroactive legislation, as necessarily unlawful. The dominant trend is to prosecute past crimes specifically as "crimes against humanity" and to ground the prosecution on the rules of international law applicable at the time of the commission of the alleged crimes. This approach is compatible with Article 15-2 of the ICCPR and Article 7-2 of the ECHR; yet, it can only be applied in countries, which allow for the prosecution based on international law. In some countries, past crimes are prosecuted as common crimes, under the national legislation in place at the time of their

[23] For more details, see ECHR, *Streletz, Kessler and Krenz v. Germany,* Applications No. 34044/96, 35532/97, 44801/98, Judgment, 22 March 2001; and ECHR, *K. – H. W. v. Germany,* Application No. 37201/97, Judgment, 22 March 2001.
[24] Ibid., par. 90.
[25] ECHR, *Kolk and Kislyiy v. Estonia,* Applications No. 23052/04 and 24018/04, Judgment, 17 January 2006, par. 9.
[26] See also ECHR, *Van Anraat v. The Netherlands,* Application No. 65389/09, 6 July 2010; *Polednová v. The Czech Republic,* Application No. 2615/10, Decision, 21 June 2011.

commission. In these countries, the objection of retroactivity mostly arises in relation to the interpretation and application of the given legislation (grounds of justification, statutory limitations etc.). The tendency in these cases is to resort to natural-law based arguments and to reject the use of provisions, which would collide with the standard of justice.

V. Definition of Crimes Against Humanity – European Practice

The category of crimes against humanity has undertaken an interesting development in the course of the 20th century. The outcome of this evolution is nowadays largely codified in Article 7 of the 1998 Rome Statute of the International Criminal Court, which reflects the current state of customary international law and has, over the past 13 years, inspired the national legislation in many states. Yet, Article 7 of the Rome Statute and the corresponding provisions in national criminal codes can hardly be *expressis verbis* applied to crimes against humanity committed in the past. While the term "crimes against humanity" itself has been consistently used at least since the post-WWII trials of German and Japanese war criminals, the notion designed by this term has changed quite a lot during that period. When deciding whether to prosecute crimes committed in the past as "crimes against humanity", it is therefore always necessary to consuder, whether this category already existed at the given (past) period and and if so, how it it was conceptualized.

As already stated, the category of crimes against humanity was introduced into the (written) positive law, both international and national, after the WWII – provisions on those crimes were included into the Charters of the Nuremberg and Tokyo International Military Tribunals and taken over by some legislative acts used at the national level (Council Control Law No. 10 for Germany). Yet, all these acts were applied to the events which had occurred during the World War II, i.e. in 1939-1945. The allegation, explicitly stated in the Nuremberg trial and repeatedly confirmed since then by numerous national and international judicial bodies, was that though not previously codified in any written instruments, those crimes had been well established in customary international law already during WWII.[27] There is thus no doubt, that the category was well in place both during and after the Cold War and that crimes committed in those periods can aspire to be qualified as crimes against humanity. Yet, when deciding upon them, it is necessary to take into account the way in which crimes against humanity were conceptualized at the given period. This pertains both to the general definition of crimes against humanity and the concrete offences included into that category.

The general definition of crimes against humanity is, as is the case for all crimes under international law, rather complex and comprehensive. While several of its elements have remained constant over the decades, others have been modified, added or eliminated. The "hard core" of the definition, which has always characterized these crimes, deals with the nature of these crimes, their targets and the required *mens area.* Crimes against humanity need to occur as part of a widespread or systematic attack; to be directed against the civilian population; and to be committed intentionally and with the knowledge of the attack. These three requirements are present in all the relevant international instruments, the national legislation[28] and the international and national case-law. The "soft coat" of the definition, which has on the contrary undertaken changes, pertains to the so called war nexus; the general policy requirement; and the discriminatory intent. While older treaty instruments, acts, and judicial decisions include these elements, more recent ones, including

[27] See, for instance, France: Barbie 1987, Touvier 1994 and Papon 1998, Germany: Demjanjuk 2011.
[28] See, for instance, Article 212-1 of the French Penal Code *("Constitue également un crime contre l'humanité /.../ l'un des actes ci-après commis en exécution d'un plan concerté à l'encontre d'un groupe de population civile dans le cadre d'une attaque généralisée ou systématique"*).

the Rome Statute of the ICC,[29] omit them. Any court prosecuting past crimes therefore has to decide, whether at the moment of their commission, these elements were still/were not already required.

The definition of crimes against humanity has been primarily applied and interpreted by international criminal tribunals (Nuremberg and Tokyo Tribunals, ICTY, ICTR, ICC, mixed tribunals, etc.). Yet, some of its aspects have been also commented upon by national judicial organs of various European countries and the ECHR. The issue of the general policy requirement has repeatedly come up in the European case-law. It indicates whether crimes against humanity need to be committed as part of a state action or policy. European courts have been divided in the matter. Some have indeed confirmed the need for such an element. Thus, in the *Barbie* (1988) and *Touvier* (1992) Cases, the French Court of Cassation required that *"the criminal act be affiliated with the name of a state practicing a policy of ideological hegemony".*[30] Similarly, in the *Menten* Case (1981), the Dutch High Council claimed that *"the concept of crimes against humanity /…/ requires that the crimes /…/ form part of a system based on terror or constitute a link in consciously pursued policy directed against particular groups of people".*[31] Yet, in other cases, the general policy requirement has not abandoned. Ruling in the *Papon* Case (1997), the French Court of Cassation stated that the definition of crimes against humanity did not require that an individual adhere to a policy of ideological hegemony or make part of a criminal organization.

The war nexus requirement has been commented upon in a few cases. In the *Salgotarjan* case, relating to the 1956 Hungarian insurrection, the Hungarian Supreme Court confirmed that the requirement was (still) in place in the 1950s and that, hence, offences committed outside an armed conflict could not qualify as crimes against humanity but has to be prosecuted as common crimes. In more recent cases (e.g. German border shooting cases), the war nexus has not been mentioned anymore, which indicated its gradual disappearance from the definition in the second half of the 20th century.

Occasionally, European courts and the ECHR have pronounced upon the notion of "civilians" in the definition of crimes against humanity. In the *Korbely* Case (2001),[32] the Hungarian courts had to decide, whether armed insurgents taking part in the 1956 Hungarian insurrection could count as "civilians" under this definition. They came to an affirmative answer, qualifying the killing of an armed leader of one insurgent group, Tamás Kaszás, as a crime against humanity. In 2008, the decision was reviewed by the ECHR, which found it in violation of Article 7 of the European Convention. Criticizing the approach of the Hungarian courts, the ECHR argued that *"Tamás Kaszás did not fall within any of the categories of non-combatants protected by common Article 3. Consequently, no conviction for crimes against humanity could reasonably be based on this provision in the present case in the light of relevant international standards at the time".*[33] Moreover, already in the 1980s, an interesting debate over whether crimes against humanity could be committed against non-civilians was led in France. While the Court of Appeal[34] concluded that they could not and that all crimes committed against enemy combatants had to count as war crimes, the Court of Cassation[35] was less categorical in this respect, leaving open the option that such crimes could qualify as war crimes and crimes against humanity at the same time.

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[29] The Rome Statute of the ICC defines crimes against humanity as *"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"* (Article 7-1).
[30] Cit. in M. E. Badar, From the Nuremberg Charter to the Rome Statute, 5 *San Diego Int´l L J,* 2004, at 112.
[31] Cit. in ibid., at 112-113.
[32] Hungary, *Korbely Case,* Budapest Regional Court, 18 January 2001.
[33] ECHR, *Korbely v. Hungary,* Application No. 9174/02, Judgment, 19 September 2008, par. 94.
[34] France, Court of Appeal of Lyon, *Decision of 4 October 1985.*
[35] France, Court of Cassation, *Judgment of 20 December 1985.*

The catalogue of offences falling into the category of crimes against humanity has also gone through gradual changes since the World War II. The current catalogue contained in the Rome Statute[36] encompasses 11 crimes: some of them were qualified as crimes against humanity already in the Charters of the Nuremberg and Tokyo Tribunals; others have been added to the list later. Together with enslavement, deportation, inhuman acts and persecution, murder and extermination belong to the former category. Most individuals prosecuted for past crimes against humanity in national courts of various European countries over the past decades have been charged either with one of those two crimes, or – in the context of the Baltic countries – with the crime of deportation. The definitions of these specific offences do not seem to have posed any particular problems in European courts, which therefore have not paid too much attention to them, relying either on the definitions in the Rome Statute, or simply on a common-sense understanding of what "murder" or "deportation" means.

VI. Sentences for Crimes Against Humanity – European Practice

Crimes against humanity belong among the most serious crimes under international law. Considered as odious and brutal acts which shock the conscious of humanity, they are outlawed by both customary and treaty rules of international law. They can be prosecuted at either international or national level – in the two cases, their prosecution is invariably done in the interest of the international community as a whole. It seems logical to expect that the serious nature of these crimes should also be reflected in the severity of sentences, inflicted upon their perpetrators. This issue is mainly left to the regulation by national legal orders and/or statutes of international criminal tribunals. Customary international law merely requires that sentences be proportionate to the gravity of the crime. This relatively simple principle gets more difficult to apply, when past crimes are concerned. Here, the lapse of time could cast doubts on how well the sentence is able to perform the corrective, deterrent and preventive function which are normally entrusted to it. While the prosecution certainly is, even after several decades, warranted, the fact that it takes place and that impunity is prevented is often seen as more important than the sentence itself. Humanitarian factors, such as the (often high) age and (often weak) health state of alleged perpetrators, who moreover usually do not pose any real threat to the society any more, also play a role in this area.

When deciding upon sentences for past crimes against humanity, national (and also international) judicial bodies are therefore confronted with uneasy dilemmas. The case-law of the European courts shows that they have mostly sought to cope with these dilemmas on an *ad hoc* manner, carefully considering the specific circumstances of each individual case. In the result, sentences – even for identical offences and perpetrators in similar positions – vary extensively among courts and cases. For instance, while the officers of the Vichy regime were sentenced to rather harsh punishments by the French courts (*Barbie* – life imprisonment, *Touvier* – life imprisonment, *Papon* – 10 years of imprisonment and suppression of all civil and political rights), the former leaders of the GDR got milder sentences (*Streletz* – 5.5 years of imprisonment, *Kessler* – 7.5 years of imprisonment, *Krenz* – 6.5 years of imprisonment). The fact that the former were formally charged with crimes against humanity, while the latter were prosecuted for common crimes, could have had a

[36] The catalogue includes: (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; and (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

role to play here. Other factors might have included – in addition to the nature of concrete offences and the personal profile of the perpetrators – the general scope of the crimes committed by the respective regimes (holocaust x border shootings) and the very nature of those regimes (treasonous WWII regime x socialist Cold War regime).

One element, which seems to be common in the European case-law despite all the other differences, pertains to the distinction regularly made between, on the one hand, those who ordered and organized the relevant crimes against humanity and, on the other hand, those, who merely executed them. It is considered that members of the former group ("big fish") should be penalised more severely, for they must have had the adequate knowledge and the capacity to preview the consequences of their acts and to understand the nature of the crimes they ordered. As the leaders or high rank officials of the former regime, moreover, they can hardly claim to have acted under duress or out of mistake or ignorance. Members of the latter group ("small fish") are, on the contrary, often treated with some clemency reflecting the fact that sometimes they were not only perpetrators, but also, in a sense, victims themselves. It is accepted that they could have had more problems to correctly understand the context, in which they acted, and to foresee the legal consequences of their acts. The arguments of duress, lack of knowledge or simple mistake are also more easily available to them. The distinction made between the two groups could be well illustrated on the decisions rendered by German courts and the ECHR in the border shooting cases.

The first case, *Streletz, Kessler and Krenz,* concerned three senior officials of the GDR, who participated in the determination of the general policy of the country, including the policy with respect to the borders. German courts found them guilty of the death of a number of people who had tried to flee the GDR across the border in 1971-1989, and sentenced them, as indirect principals in homicide, to 5.5-7.5 years of imprisonment. The second case, *K.-H. W.,* involved a German citizen who in 1972, during his regular military service, shot a man trying to cross the inter-German border. In 1993, he was sentenced for intentional homicide to one year and 10 months' juvenile detention, suspended on probation. In passing the sentences, the German courts*"duly took account of the differences in responsibility between the former leaders of the GDR and the applicant".*[37] This approach was upheld by the ECHR. The Court stressed that the first three applicants *"because of the very senior positions* /…/ *could not have been ignorant of the GDR's Constitution and legislation, or of its international obligations and the criticisms of its border-policing regime /…/. Moreover, they themselves had implemented or maintained that regime* /and/ *were therefore directly responsible for the situation which obtained at the border between the two German States".*[38] The fourth applicant, on the contrary, *"undergone the indoctrinations"*[39] and *"was in a particularly difficult situation on the spot, in view of the political context in the GDR at the material time".*[40] In the ECHR view, it was legitimate for the German courts to take these factors into account when determining the sentence.

VII. Statutory Limitations for Crimes Against Humanity – European Practice

Statutory limitations (prescription) in criminal law set the maximum period of time, within which the prosecution of a certain offence may be lawfully initiated.[41] Once this period expires, the prosecution should be time-barred. There is a division between legal scholars as to whether the institution is substantive or procedural in nature and whether the expiration of

[37] ECHR, *K. – H. W. v. Germany,* Application No. 37201/97, Judgment, 22 March 2001, par. 81.
[38] ECHR, *Streletz, Kessler and Krenz v. Germany,* Applications No. 34044/96, 35532/97, 44801/98, Judgment, 22 March 2001, par. 78.
[39] ECHR, *K. – H. W. v. Germany,* Application No. 37201/97, Judgment, 22 March 2001, par. 71.
[40] Ibid., par. 76. See also Lithuania, *Misiūnas Case,* Case No. 1-119, Appeal Court of Lithuania, 26 March 2003, in which the fact that the accused committed the crime due to service subordination and the difficulty to choose a way of right conduct thereto, was regarded as an extenuating circumstance.
[41] For more details on the topic, see R. A. Kok, *Statutory Limitations in International Law,* T.M.C. Asser Press, The Hague, 2007.

the period therefore has an impact only upon the jurisdiction to prosecute a certain act or also upon the very criminality of this act.[42] Statutory limitations (prescription) are well-known in both *common law* and *civil law* countries. They have traditionally applied to most, if not all, common crimes. Yet, in the recent decades, the trend has been to remove them for the most serious offences, including crimes against humanity and other crimes under international law. Crimes against humanity (and war crimes) are declared imprescriptible by two international treaties – the 1968 *UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* (in force since 1970)[43] and the 1974 *European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes* (in force since 2003);[44] by the Rome Statute of the ICC; [45] and by many national legal orders.[46] It is considered by some that the rule on the non-applicability of statutory limitations in case of crimes against humanity is also customary by nature.

Judicial organs prosecuting past crimes against humanity are regularly confronted with the objection of statutory limitations/prescription. This objection is often coupled with that of retroactivity, for national legal acts declaring crimes against humanity imprescriptible have been in most countries adopted rather recently. The latter objection is also frequently invoked vis-à-vis the acts suspending the operation of statutory limitations for the period, in which the persecution was impossible due to the political situation – such acts have been, in the post-1990 setting, enacted in several Central and Eastern European countries such as the Czech Republic,[47] Germany,[48] Hungary,[49] Poland,[50] or Romania[51] The case law of European national courts and of the ECHR shows that all these objections have been in most cases rejected as unfounded. Yet, the rationale behind this rejection has not been unanimous. There is also a division of approach in cases, in which past crimes against humanity have been prosecuted as common crimes, usually in themselves liable to statutory limitations.

Judicial organs ruling against the applicability of statutory limitations to crimes against humanity, qualified as such, have mostly based their decision upon the regulation existing under international law. Some of them have considered imprescribility as an inherent feature of those crimes, making thus any objections of retroactivity inapplicable. This line of argumentation was adopted by the Belgian court requesting the extradition of Pinochet, which held: *"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 cannot be prescribed and that this principle is*

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[42] For more details, see Venice Commision, *Amicus Curiae Brief for the Constitutional Court of Georgia,* Opinion No. 523/2009, March 2009, par. 7-9.

[43] The Convention has 54 parties and 9 signatories (status at 12 July 2011). The number of European parties is rather low and includes exclusively states from Central and Eastern Europe.

[44] The Convention has 7 parties (Belgium, Bosna and Hercegovina, Montenegro, the Netherlands, Romania, Serbia and Ukraine) and 1 signatory (France).

[45] Article 29: *"The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations."*

[46] See, for instance, Czechoslovakia, *Penal Code,* 29 November 1961; GDR, *Act on the non-applicability of statutory limitations to Nazi crimes and war crimes,* 1 September 1964; France, *Loi tendant à constater l'imprescriptibilité des crimes contre l'humanité,* 26 December 1964; Netherlands, *Act containing provisions on the elimination of statutory limitations with respect to war crimes and crimes against humanity,* 8 April 1971. For a comprehensive overview of the national legislation in force by 1966, see UN Doc. E/CN.4/906, *Question of non-applicabilityof statutory limitation to war crimes and crimes against humanity. Report by the Secretary General,* 15 February 1966.

[47] Czech Republic, 1993 *Act on the Illegality of the Communist Regime,* Act No. 198/1993 Coll.

[48] Germany, 1990 *German Introductory Act to the Criminal Code,* Article 315a, amended on 26 March 1993, 27 September 1993 and 22 December 1997.

[49] Hungary, 1991 *Zétényi-Takacs Bill,* Article 1§1; 1993

[50] Poland, *Act of 4April 1991.*

[51] Romania, 1992 *Act on Judicial Organization,* Act No. 92/1992 Coll., Article 91.

directly applicable in the domestic legal order."[52] The view was shared by the Spanish court requesting the extradition of the same person, which stated: *"La imprescriptibilidad de tales crímenes está sancionada por el Convenio de 1968. La declaración de ese convenio no es ex novo, sino que se ha interpretado como el reconocimiento por la comunidad internacional de un carácter, el de imprescriptibilidad, que caracteriza a esos crímenes desde su configuración en 1945, como uno de sus caracteres esenciales."*[53]

Other courts have founded the imprescriptibility of crimes against humanity on the provisions of the 1968 *UN Convention* and the acts implementing this convention in national legal orders. In so doing, they have not, however, usually hesitated to apply these instruments to crimes committed before their adoption claiming, as the Estonian courts did in the *Kolk and Kislyiy* case that *"no statutory limitation applies to crime against humanity, irrespective of the date on which they were committed"*.[54] Such was also the position of French courts in the *Barbie* and *Touvier* cases and of the ECHR in its review of some of these cases.[55] A more difficult and delicate situation for national courts arise in countries, in which past crimes against humanity are prosecuted on the basis on common penal legislation, and/or where statutory limitations for such crimes have been either removed, or declared temporarily suspended, by *ex post facto* national legislation only. This is most typically the case of Germany. When declaring past crimes (qualified as common crimes) imprescriptible, German courts could not rely on international law. Instead, they have invoked arguments based on justice and natural law. Thus, in 1994, the Federal Supreme Court held that the suspension of prescription periods for political crimes committed in the GDR was fully justified, because *"it was not the will of the legislator that "state crimes" that had not be prosecuted for political reasons /…/ would become statutorily barred"*.[56] This argument was shared by the Constitutional Court of the Czech Republic, in its review of the 1993 *Act on the Illegality of the Communist Regime.*[57]

A somewhat modified view of the issue came from Hungary. In a series of the so called retroactive cases, the Hungarian Constitutional Court was asked in the 1990s to decide upon the compatibility with the national Constitution of several subsequently adopted acts suspending statutes of limitations for crimes committed during the communist period. The first three cases[58] related to acts which did not specifically referred to crimes against humanity or other crimes under international law. The Constitutional Court found those acts retroactive and in violation of the principle of legality. The last two cases focused on the 1993 *Act concerning the procedures in the matter of criminal offences during the 1956 October Revolution and Freedom Struggle*, which contained provisions on the imprescriptibility of crimes against humanity and war crimes. In the fourth decision[59] rendered in 1993, before the act was promulgated, the Court approved of it in principle, suggesting nonetheless some corrections to be brought into its text. The approval was explained by the fact that Hungary had in 1970 ratified the 1968 UN Convention and thus *"assumed the international obligation to declare, even with retroactive force, that the statutes of limitation may never expire with respect to /…/ crimes against humanity".*[60] In 1996, the Court reviewed the 1993 Act once again,[61] this time after its promulgation. Since the suggestions made in the 1993 decision had not been taken into account, the Court struck

[52] Belgium, *In re Pinochet Ugarte,*Tribunal of First Instance, 6 November 1998.
[53] Spain, *Pinochet Case,* Audencia Nacional Madrid,18 December 1998.
[54] Cit. in ECHR, *Kolk and Kislyiy v. Estonia,* Applications No. 23052/04 and 24018/04, Judgment, 17 January 2006, p. 9.
[55] Ibid.
[56] Germany, Federal Supreme Court, 18 January 1994, cit. in. R. A. Kok, op. cit., p. 196.
[57] Czech Republic, *Decision on the Act on the ilegality of the Communist Regime,* Constitutional Court, 21 December 1993.
[58] Hungary, Decisions No. 2086/A/1991/15, 41/1993 and 42/1993, Constitutional Court, 1992-1993.
[59] Hungary, Decision No. 53/1993, Constitutional Court, 1993.
[60] Ibid., §V-3.
[61] Hungary, Decision No. 36/1996, Constitutional Court, 1996.

the Act down as unconstitutional. Yet even then, it confirmed its previous position on the imprescriptibility of crimes against humanity.[62]

The survey of the European case-law shows that there is a clear tendency to treat crimes against humanity as imprescriptible. Courts are, however, not uniform in whether the imprescriptibility constitutes an inherent feature of these crimes or whether it is attached to them later by a rule of customary international law or by an international treaty (for instance the 1968 UN Convention). Those in favour of the latter view moreover disagree as to whether such a rule/treaty provision only produce effects towards events occurred after its creation/ adoption or whether it can (or even must) be applied to any crimes against humanity irrespective of the date of their commission. Finally, some courts believe that the non-applicability of statutory limitations to crimes against humanity (qualified as such or as common crimes), or their suspension for the period in which the crimes could not be prosecuted due to political reasons, corresponds to higher principles of objective justice and internal morality of law and does not need any other justification.

VIII. Conclusions

Due to its troubled history in the 20th century, the European continent has got rich experiences in prosecuting past crimes against humanity. It has gained these experiences especially in the prosecutions of crimes committed during the World War II, crimes of communism, and crimes committed by autocratic or totalitarian regimes in other parts of the world. The prosecutions have confronted national courts of the European countries, and occasionally also the ECHR reviewing many of the national decisions, with a series of uneasy dilemmas. These dilemmas and the European response to them can be summed up as follows:

1. *Retroactivity/Nullum crimen sine lege.* The prosecution of past crimes is not considered retroactive, if it is proved that at the time of their commission, those crimes could have been qualified as crimes against humanity under applicable rules of international law. Past crimes may also be prosecuted under common criminal legislation. Then, the objections mostly arise in respect of the interpretation and application of this legislation and can be addressed by means of natural-law (justice) based arguments.

2. *Definition of crimes against humanity.* Quite a general consensus exists in Europe that the category of crimes against humanity emerged in international law (at the latest) by the mid-20th century. There have been no extensive discussions on the general requirements of crimes against humanity and the concrete offences falling into this category, in national European courts and the ECHR. The case-law indicates a gradual disappearance of the war nexus requirement in the second half of the 20th century, a hesitation over the general policy requirement and an uncertainty about the notion of civilians. Most prosecutions has involved charges of murder or deportation, which seem relatively clear, sparing European courts the need to discuss the definition of concrete offences.

3. *Sentences for crimes against humanity.* Various countervailing factors play a role in the determination of the severity of sentences to be imposed upon perpetrators of past crimes against humanity. The decision has to be made on an *ad hoc* basis, taking into account the concrete circumstances of any individual case. Yet, there is a clear tendency

[62] *"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."* Ibid., p. 4673.

in Europe to distinguish between those who ordered the crimes and those who merely executed them and to impose harsher penalties upon members of the former group.

4. *Statutory limitations for crimes against humanity.* In Europe, crimes against humanity are largely seen as imprescriptible. This quality is ascribed to them by virtue of international law, though there is uncertainty as to whether imprescriptibility constitutes an inherent feature of those crimes or has developed gradually by means of treaty or customary rules. The non-applicability of statutory limitations to crimes against humanity (qualified as such or as common crimes), or their suspension for the period in which these crimes could not be prosecuted due to political reasons, is also sometimes derived from the principles of objective justice and internal morality of law.