

# About Time: Statutory Limitations and Crimes against Humanity

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## **Time Matters: Statutory Limitations and Crimes against Humanity**

Experience shows that, when dealing with international crimes, including crimes against humanity, time matters. Indeed, addressing the legacy of widespread or systematic violations, holding perpetrators accountable, and ensuring that victims obtain redress, all too frequently encounter several obstacles, including the application of statutes of limitations.

The angle more often chosen to look at the matter is that of statutes of limitations for criminal prosecution and punishment. In this specific realm, it is generally accepted that, to avoid favouring the impunity of perpetrators, crimes against humanity must be regarded as imprescriptible. A problem that, on the contrary, is too often overlooked – albeit it is strictly related to the former – is the non-applicability of statutes of limitations to civil, administrative or other claims through which victims of crimes against humanity seek redress for the harm suffered.

International legal instruments are rather consistent in affirming the non-applicability of statutes of limitations to criminal proceedings and penalties for crimes against humanity, while the extension of the rule to civil, administrative or other actions to seek reparation is not often explicitly mentioned, albeit, as it will be illustrated below, it is a matter that repeatedly arises in different contexts and is pivotal in ensuring access to justice and redress to victims of such crimes and their families.

In this sense, one can recall the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (entered into force on 11 November 1970). Similar rules are enshrined in the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes (entered into force on 27 June 2003). These treaties have respectively 56 and 8 States parties.

On its part, Article 29 of the Rome Statute of the International Criminal Court establishes that the crimes within the jurisdiction of the Court – thus including crimes against humanity pursuant to Article 7 – shall not be subject to any statute of limitations. In this case, at the time of writing, the number of States parties is 124 and this suggests the existence of a consensus on the matter. With regard to enforced disappearance as a crime against humanity, its imprescriptibility is established in Article 8(1), read in conjunction with Article 5, of the 2006 International Convention on the Protection of All Persons from Enforced Disappearances (entered into force on 23 December 2010 and, at the time of writing, with 72 States parties).

The International Committee of the Red Cross considers that the non-applicability of statutes of limitations to war crimes is a rule of customary nature and the analysis of the relevant practice suggests that this applies also to crimes against humanity. Interestingly, the International Law Commission (ILC) affirmed that “there appears to be no State with a law on crimes against humanity that also bars prosecution after a period of time has elapsed. Rather, numerous States have specifically legislated against any such limitation” (p. 78). Furthermore, the jurisprudence of international courts (such as the Inter-American Court of Human Rights in Barrios Altos v. Peru [para. 41], the European Court of Human Rights in Aslakhanova v. Russia [para. 237] and the International Criminal Tribunal for the Former Yugoslavia in Furundžija [para. 157]) and domestic courts (e.g. Argentina, France, Italy and Mexico) seems to confirm the non-applicability of statutes of limitations to criminal proceedings for crimes against humanity. The customary nature of this rule has been recognised also by scholars (p. 315).

The provisions and practice considered up to this point refer explicitly to the non-applicability of statutes of limitations to criminal proceedings for crimes against humanity, but are silent with regard to civil, administrative or other kind of actions to seek reparation. The 2005 UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity depart from this scheme. In a slightly tautological fashion, Principle 23 sets forth that prescription – of prosecution or penalty – shall not apply to crimes under international law that are by their nature imprescriptible (thus including crimes against humanity). Nevertheless, Principle 23 adds that, “when it

does apply, prescription shall not be effective against civil or administrative actions brought by victims seeking reparation for their injuries". Along the same lines, the 2005 UN 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 Laws establish that

“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. *Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive*”.

*paras. 6-7, emphasis added*

The Draft Articles on Prevention and Punishment of Crimes Against Humanity, adopted in 2019 by the ILC, and currently being considered by the General Assembly, seem to revert to the previous paradigm and refer solely to the non-applicability of statutes of limitations to the offence, without any explicit mention to civil actions or other procedures: “Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall not be subject to any statute of limitations” (Draft Article 6, para. 6).

The non-applicability of statutes of limitations to civil claims concerning the specific international crime of torture is regarded as necessary by the Committee against Torture (CAT), as it recognises the “continuous nature of the effects” of the crime: indeed, “for many victims, passage of time does not attenuate the harm”, which can actually even increase. Failure to consider imprescriptible claims for reparation deprives victims of the “redress, compensation and rehabilitation due to them” (General Comment No. 3, para. 40).

The considerations made by the CAT confirm that the recognition of the non-applicability of statutes of limitations to compensation claims concerning crimes against humanity is as important as upholding such principle for criminal prosecution and punishment and, in a way, can also be seen as a corollary of the latter.

### **Time and Again: Redress for Crimes against Humanity Should not Have an Expiry Date**

The relevance of acknowledging that also civil or other relevant claims related to crimes against humanity are not subject to statutes of limitations is confirmed by the fact that international human rights mechanisms are seized time and again by victims who see systematically frustrated their rights to access to justice and to an effective remedy, as the said principle is not applied.

On 29 November 2018, the Inter-American Court of Human Rights pronounced itself on the non-applicability of statutes of limitations to civil claims concerning crimes against humanity lodged by persons who were subjected to torture during the regime of Pinochet. The Court found that, “insofar as the facts that gave rise to the civil actions for damages for acts characterized as crimes against humanity, such actions should not be subject to the statute of limitations” (para. 89).

The fact that the problem at stake is of a global nature is well represented by the situation faced by victims of crimes against humanity, including conflict-related sexual violence (CRSV), in Bosnia and Herzegovina (BiH).

BiH has not established a domestic reparations programme that would provide those victims with compensation for the harm suffered during the war. For this reason, in order to obtain compensation, around 2009, a large number of victims decided to claim their rights by initiating civil proceedings against one of the two respective entities (i.e. Republika Srpska or Federation of BiH) and sometimes also against the State, which they considered subsidiary liable for the harm inflicted by its former soldiers or police members.

Article 377 of the domestic Law on Obligations provides that when the damage is caused by a criminal offense – for which a longer statute of limitations is foreseen for criminal prosecution – the compensation claim against the responsible person expires only when the statute of limitations for the criminal prosecution expires. However, the result of those court proceedings were many years of judicial turmoil, during which courts in the two entities adopted diametrically opposing interpretations of the relevant domestic provisions.

In 2013, the Constitutional Court of BiH affirmed that compensation claims for non-pecuniary damage directed against the State or the entities are time-barred, failing thus to acknowledge their responsibility to compensate victims. This led to the rejection of compensation claims filed by tens of thousands of victims, many of whom were additionally bound to pay court costs to the very entity/State they had sued. This interpretation *de facto* leaves all victims of crimes against humanity without an enforceable right to compensation at the domestic level. In November 2017, a survivor of CRSV lodged a complaint to the CAT, which rendered its decision in A. v. BiH on 2 August 2019, holding that the application of statutes of limitations to civil claims amounted to a violation of the State’s obligations under Article 14 of the Convention against Torture by failing to provide the complainant with redress, including fair and adequate compensation (para. 7.6). The CAT requested BiH to ensure that the complainant receives compensation and to adapt the legislation and establish an effective reparation scheme at the national level to ensure that victims of war crimes obtain redress (para. 9). Similar considerations would apply to civil or other kind of claims to seek redress for crimes against humanity.

Notwithstanding the findings and recommendations by the CAT (later echoed by the UN Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of Non-recurrence, after his visit to the country [paras 55-58, 110] – whose considerations encompass crimes against humanity), the situation has not improved and domestic courts continue applying statutes of limitations to civil claims concerning both crimes against humanity and war crimes. This led four other victims of CRSV to lodge, on 15 December 2023, a new complaint to the CAT (Case B. and others v. BiH), in the hope that a new and even more detailed decision can put an end to this stalemate.

Similar complaints are likely to continue being lodged to domestic and international courts, until the application of statutes of limitations to compensation claims to seek redress for crimes against humanity is explicitly ruled out.

### **It Is About Time to Address the Issue: The Potential of a Crimes against Humanity Treaty**

In this regard, the ILC recommendation (para. 42) to the General Assembly (UNGA) for the elaboration of a convention based on the Draft Articles on Prevention and Punishment of Crimes against Humanity offers an historical opportunity. If the consideration of the Draft Articles – currently under discussion within the UNGA Sixth Committee – will move on to the next phase of negotiation of a treaty on crimes against humanity, draft Article 6, para. 6, represents the perfect opening to address the matter. In this sense, several States have already expressed themselves in favour of the non-applicability (or at least restriction) of statutory limitations to civil proceedings in which victims of crimes against humanity seek full reparation (e.g. Uruguay, Brazil, Liechtenstein). Several other actors have voiced this position (e.g. Amnesty International, REDRESS and others, as well as the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence). The relevant provision should therefore confirm that criminal prosecution and punishment for crimes against humanity are not subject to any statutes of limitations, but, in the interest of the victims' rights to access justice and redress, it must also explicitly set forth that the same applies to civil proceedings or any other claim victims may bring to seek compensation.

*Note: the authors worked on the above-mentioned case B. and others v. BiH for TRIAL International, i.e. the applicants' legal representative. Ms Citroni and Ms Hanušić Bećirović equally worked on the case A. v. BiH in the same capacity.*