Strasbourg, 28 September 2011

CDL(2011)074*
Or. Engl.

Opinion No. 634 / 2011

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT *AMICUS CURIAE* BRIEF

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

FOR THE CONSTITUTIONAL COURT

OF PERU

on the basis of comments by

Ms Veronica BILKOVA (Member, Czech Republic)
Mr Manuel GONZALEZ OROPEZA (Substitute Member, Mexico)
Ms Anne PETERS (Substitute Member, Germany)

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1 Introduction

1. By letter dated on the 7th June 2011, the Constitutional Court of Peru requested the Venice Commission an amicus curiae brief on the case *Santiago Bryson de la Barra et al*. (case No. 1969-2011-PHC/TC) concerning the punishment crimes against humanity.

2. The Constitutional Court of Peru submitted to the Commission three questions:

a. What case-law have been issued on crimes against humanity by other courts and constitutional equivalent bodies?
b. How the crimes against humanity have been defined and established?
c. Departing from this case-law, what types of facts have been considered as constituting crimes against humanity?

3. Ms Bilkova, M Gonzalez Oropeza and Ms Peters acted as rapporteurs on this issue (CDL(2011)072, 071 and 073).

4. *The present amicus curiae brief was adopted by the Venice Commission at its … plenary session (Venice, … 2011).*

2 Background

5. The background to this request is the lodging at the Constitutional Court of Peru of several complaints (and among them, the one introduced by Mr Bryson and others) against the criminal proceedings and sentencing of those related to the facts which happened in June 1986 in the prison "El Frontón".

6. In June 18th several uprisings took place simultaneously in different prisons and one was "El Frontón". Prisoners took over pavilions, after taking hostages some of the guards and some weapons. The President of Peru issued several orders in which he declared the state of emergency in the region and considered the prisons "restricted military zones". No civilians or judicial authorities were admitted and only the Navy of Peru had the control of the prison. As the Inter-American Court of Human Rights considered proven facts in the *Durand Ugarte* case, even though the riot was already under control on the 19th June, the Navy carried out the demolition of one of the pavilions of the prison causing great number of deaths and wounded prisoners. 111 people died and 34 survived, amounting to a total of 145 persons, while the unofficial list handed by the President of the Penitentiary had concluded that there were 152 inmates. Only 7 corpses were identified after autopsies. The Inter-American Court concluded in the above-mentioned case that:

> *118. In this case, the military in charge of subduing the riots that took place in El Frontón prison resorted to a disproportionate use of force, which surpassed the limits of their functions thus also causing a high number of inmate death toll. Thus, the actions which brought about this situation cannot be considered as military felonies, but common crimes, so investigation and punishment must be placed on the ordinary justice, apart from the fact that the alleged active parties had been military or not.*

7. The National Congress of Peru designated an investigating commission, formally established in August 1987. In December of that year, a report by the majority and one by the minority were submitted to the Congress by this commission. Concerning the criminal proceedings, the State ordered the military justice to be in charge of the investigation of the

events, which carried out such investigation and dismissed the process followed against the liable military parties[1].

8. The Inter-American Court of Human Rights convicted the Peruvian state, considering that the exclusively military court did not constitute an effective recourse to protect the victims and relatives' rights. It further stated that:

> *122. Regarding the proven facts of this case, victims or their relatives did not have an effective recourse that could guarantee their rights leading among other things to a lack of identification of the liable parties during proceedings followed by the military court and the failure to use due diligence to identify and establish the victims' whereabouts. The data involved in the rulings allow considering the investigation of events in El Frontón in anticipation by military tribunals was simply formal.*

9. The Inter-American Court also found that the Peruvian State had a duty to investigate these events.

3 On the notion of crimes against humanity

3.1 General remarks

10. Crimes against humanity belong among the most serious crimes under international law.[2] They are "particularly odious offences constituting a serious attack on human dignity or a grave humiliation or degradation of one or more human beings".[3] Used for the first time in 1915, to denote the massacres against the Armenian population, 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. 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 recognised 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 Resolution 95(I) of 11 December 1946.[4] 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.

11. 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).

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[1] Inter-American Court of Human Rights, *Durand and Ugarte v. Peru,* judgment of 16 August 2000, Series C No. 68, para. 119.

[2] 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.

[3] *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.

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

12. During the sixties and seventies, several countries introduced "crimes against humanity" as a specific category of crimes into their national criminal law systems (such as Czechoslovakia – Penal Code No. 140/1961 Coll.[5], France – Loi du 26 décembre 1964[6]). 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[7]).

13. 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 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 were codified in the 1996 *Draft Code of Crimes against the Peace and Security of Mankind.*

14. 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, Spain, 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, an issue which will be discussed further.

15. Several issues will be analysed in this *amicus curiae* brief: first, the different elements which define a crime against humanity will be revised in the light of the facts which relate to the case; second, the dilemmas stemming from the prosecution of crimes against humanity will be studied; finally, the issue of the sentencing, of crimes against humanity will be analysed. The brief has taken into account relevant case-law from International and national courts and it has an annex with the references to this comparative case-law.

[5] 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.

[6] Loi n°64-1326 du 26 décembre 1964 tendant à constater 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 qu'elle figure dans la charte du tribunal international du 8 août 1945, sont imprescriptibles par leur nature."*

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

3.2 The elements of a crime against humanity

16. A crime against humanity (which can be committed in various forms) normally consists of the following elements: One or several **objective elements** (an inhumane act/conduct, such as murder), a **contextual element** (widespread and systematic attack against civilian population), a **subjective (or mental) element** (knowledge of both the objective element and of the contextual element). For example, the "Elements of Crime", the authoritative explanation of the crimes codified in the ICC-Statute, adopted by the states parties to the Rome Statute,[8] define the crime against humanity of murder (Art. 7(1)(a) ICC-Statute) as follows: *"(1) The perpetrator killed one or more persons; (2) The conduct was committed as part of a widespread or systematic attack directed against a civilian population; (3) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population."* Some other forms of crime against humanity may consist of four or five elements.[9] The Elements of Crime state that the provisions of article 7 ICC-Statute must be "strictly construed, because crimes against humanity are most serious crimes of concern to the international community as a whole."[10]

The objective elements: the conduct

17. A conduct constitutes a crime against humanity, if – in the context of the attack as defined above – an inhumane act is committed with knowledge. There are only two types of conduct which may be relevant for the *Brysón* case, murder and extermination.

18. Concerning murder, the objective element is that the perpetrator kills one or more persons.[11] (Even a conduct against *one single victim* can constitute a crime against humanity if it is committed in the context of a widespread attack.[12]) No other elements are required. In particular, premeditation is not required. Also, defences arising from domestic law, e.g. the need to combat terrorism or the like, are not admitted.[13]

19. The crime against humanity of extermination is characterised by an element of **mass killing**.[14] According to the statutory definition of Art. 7(2) ICC-Statute, the crime against humanity of extermination "includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population". Extermination notably covers measures of "**slow death**".

The contextual elements

3.2.1.1 Inside and outside an armed conflict

20. It is meanwhile acknowledged that under *customary law*, the crime can be committed in times of peace. The narrower formulation in the ICTY-statute is a deviation from customary

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8 Elements of Crimes, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, first session, New York, 3-10 Sept. 2002.

9 See the Elements of Crimes at pp. 5-12.

10 Elements of Crimes, p. 5.

11 Elements of Crimes, p. 5.

12 ICTY, *Prosecutor v. Kupreskic et al.*, TC judgement of 14 January 2000 (IT-95-16-T). para. 550; ICTY, *The Prosecutor v. Mile Mrksi et al.*, Case No.: IT-95-13-R61, Trial Chamber I, 3 April 1996, ("Vukovar Hospital case"), para. 30.

13 Cf. Art. 6 c) Nuremberg Statute: "... whether or not in violation of the domestic law of the country where perpetrated."

14 ICTY, Prosecutor v. Radislav *Kristic*, TC judgment of 2 August 2001, IT-98-33-T, AC judgment of 19 April 2004, IT-98-33-A, para. 502. ICTR, *Kayishema*, TC judgment of 21 May 1999, ICTR-95-1-T, paras144-145; ICTR, *Akayesu*, TC judgment of 2 September 1998, ICTR-96-4-T, para. 591. For the ICC-Statute: Elements of Crimes, p. 6.

law.[15]. The requirement of a link to an armed conflict, still made in the Nuremberg Charter and in the Charter for the Far East Tribunal ("before or during the war"), is no longer part of customary international law.

21. The same has been stated by the Inter-American Court of Human Rights in several cases concerning amnesties issued by the former governments avoiding the prosecution of State agents, military forces or policemen participating in killings. In *Almonacid Arellano v. Chile*, the facts referred to the killing of a civilian by the army in 1973. The Inter-American Court acknowledged in this case that "*the Nuremberg Charter played an important role in establishing the elements that characterize a crime as a "crime against humanity." This Charter provided the first articulation of the elements for such a crime. The original conception of such elements remained basically unaltered as of the date of the death of Mr. Almonacid-Arellano, with the exception that crimes against humanity may be committed during both peaceful and war times.[16]"* The systematic mass killings of a part of the civilians, as well as the forced disappearances, illegal detentions and torture committed during the dictatorship, which lasted from 1973 to 1990, lead to the condemnation of Chile for the breach of the American Convention on Human Rights.

22. In the case *Barrios Altos v. Peru*, which concerned some extrajudicial executions conducted by members of the armed forces (the so called *Colina Group*) of suspected terrorists, the Inter-American Court even added that "*the laws of self-amnesty, besides being manifestly incompatible with the American Convention, and devoid, in consequence, of legal effects, have no legal validity at all in the light of the norms of the International Law of Human Rights. They are rather the source (fons et origo) of an international illicit act: as from their own adoption (tempus commisi delicti), and irrespectively of their subsequent application, they engage the international responsibility of the State. Their being in force creates per se a situation which affects in a continuing way non-derogable rights, which, as I have already indicated, belong to the domain of jus cogens. Once established, by the adoption of such laws, the international responsibility of the State, this is under the duty to put an end to such situation in violation of the fundamental rights of the human person (with the prompt derogation of those laws), as well as, given the circumstances of each case, to provide reparation for the consequences of the wrongful situation created*.[17]". This has been further stated and developed in an important number of other cases, such as the case *La Cantuta v. Peru, Heliodoro Portugal v. Panama, Goiburu et al. v. Paraguay, etc.[18].*

23. The war nexus requirement has been commented upon in a few domestic cases as well. 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.

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[15] ICTY, *Prosecutor v. DuskoTadic,* AC judgment of 15 July 1999, IT-94, 1, A,, para. 251.

[16] Inter-American Court of Human Rights, *Almonacid Arellano v. Chile*. Judgment of 26 September 2006, Series C nª154, para. 96.

[17] Inter-American Court of Human Rights, *Barrios Altos v. Peru*, judgment of 14 March 2011, Series C No. 75, para. 11

[18] See *Goiburú et al. v. Paraguay,* judgment 22 september 2006, Series C nº 153; *La Cantuta v. Peru*, judgment 29 November 2006, Series C, No. 162; *Heliodoro Portugal v. Panama*, judgment 12 August 2008, Series C, No. 183.

3.2.1.2 The "attack"

24. The texts state that an act must be committed "as part of" the attack. This is called the "**nexus requirement**" between the acts of the perpetrator and the attack.[19] In determining whether a nexus exists, the ICC pre-trial chamber II has considered "the characteristics, the aims, the nature or consequences of the act."[20] It might be questioned whether the act (or rather multiple acts) and the attack can be constituted by one and the same behaviour. In that case, the nexus is unquestionably present, because act (or acts) and attack fall into one.

25. The prototypical cases of a crime against humanity were the killing, persecution, and denouncement of Jews in the context of a larger national socialist policy. In that historical situation, what would now be called the "attack" formed the *surrounding, background, or context* of individual crimes. If such a context were needed, the bombardment of a prison could only be qualified as a crime against humanity if the overall policy of the state at the time could be qualified as an "attack". However, it seems that the acts and the attack can be formed by one and the same behaviour.[21] This understanding is corroborated by the statutory definition of "attack" in Art. 7(2) a) of the ICC-Statute which says: " '*Attack directed against any civilian population' means* ***a course of conduct involving the multiple commission of acts*** *referred to in paragraph 1 against any civilian population, …*". This clause implies that the commission of the acts themselves (or the single act itself, see below) in itself forms the "attack". In that sense, the ICC pre-trial chamber II held that "[t]he commission of the acts referred to in article 7(1) of the [ICC-]statute constitute the 'attack' itself and, besides the commission of the acts, no additional requirement for the existence of an 'attack' should be proven."[22] For example, the attack on the World Trade Center of 9/11/2001 is mentioned in textbooks as an example for a crime against humanity.[23] In that case, the acts were multiple murders, and these were committed through the attack itself. There was no "surrounding" attack against any civilian population. Other textbook examples are bombing of a city and poisoning of a well, without mentioning any surrounding, different "attack".[24]

26. To conclude, the "act" and the "attack" can happen *uno actu.* This means that the **blowing up of a prison** itself might constitute **both the "attack" and the "act" (murder)** in the sense of a crime against humanity, if the further requirements are met.

27. The acknowledgement that the crime can be committed in peace times implies that the "attack" is not necessarily an attack in the sense of international humanitarian law. **It need not be a military attack**.[25] The attack can be structural violence.[26] This understanding is corroborated by the statutory definition in Art. 7(2) ICC-Statute: "a course of conduct involving the multiple commission of acts". The "course of conduct" need not be a military one. Laying dynamite may be an "attack".

28. The ICC-Statute in Art. 7(2) defines that the "'[a]ttack directed against any civilian population' means a course of conduct involving the **multiple commission** of **acts**". But according to the case law of the ICTY and the ICTR, the attack can consist in one single act with many victims. It need not consist in a series.[27] This understanding makes sense. It would

[19] ICC, - Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08 of 15 June 2009 ("Bemba confirmation decision"), para. 84.

[20] ICC, *Bemba confirmation decision*, para. 86.

[21] K. Ambos, *Internationales Strafrecht*, München, Beck, 2011, pp. 251 and 257.

[22] ICC, *Bemba confirmation decision*, para. 75.

[23] R. Kolb, *Droit International penal*, Basel, Helbing and Lichtenhahn, 2008, p. 98.

[24] K. Ambos, Ibid., p. 251.

[25] Elements of Crimes, at p. 5.

[26] Kolb Ibid., p. 98.

[27] ICTY: *Prosecutor v. Dario Kordic and Mario Cerkez*, TC judgement of 26 February 2001 (IT-95-14/2-T), AC judgement of 17 December 2004 (IT-95-14/2-A), para. 178; *Prosecutor v. Blaskic*, TC judgement of 3 March 2000 (IT-95-14-T), AC judgement of 29 July 2004 (IT-95-14-A), para. 206; *Prosecutor v. Kupreskic et al.,* TC

be irrational not to punish a mass killing performed by a weapon of mass destruction in one act, while punishing a perpetrator who used a different type of weapon and commited a series of killing.

29. Concerning **the targeted group of the attack** and the actual victims of the act (e.g. murder) are normally not fully identical. But if the attack and the act fall into one (see above), they are identical. It can be "***any civilian population***" and this means the following:

a. *The functional analogy to "hors de combat" in times of peace*: the term "civilian population" is a term of international humanitarian law (IHL), and a relic of the origin of the crime in that body of law. Given the fact that the crime can also be committed in times of peace, the term is misleading. "Civilian population" cannot mean "civilian" in the sense of the Geneva Conventions and the Additional Protocols. The term must be understood broadly.[28] It must be construed in analogy to civilians in armed conflict.[29] A **functional analogy to those "hors de combat"** must be drawn.[30] This means that all persons who are not able to use arms, and who cannot defend themselves are "civilians" for the purposes of the crime. **The crucial criteria are the incapacity to use arms,[31] and/or the need for protection.[32]**

   With regard to the *different* situation of persons carrying arms, it is disputed whether these persons always fall out of the group of civilians (narrower definition of civilians), or whether those carrying arms only fall out of the group of civilians when they are allowed to use those arms (e.g. soldiers, police, etc.).[33] The latter view would imply that rebels, criminals, etc., who carry arms although they are under domestic law not allowed to do so, would still form a part of the "civilians" (broader definition of civilians). Detainees in a camp have been qualified as civilian population for the purposes of a crime against humanity by an Israeli court.[34] In general, prisoners in a prison are without arms and can not defend themselves. They form a "civilian population" in the sense of the crime.

b. *Not necessarily the entire population of a geographic entity*: "Any civilian population" does not need to comprise the entire population of a geographic entity.[35] An attack against parts of the population suffices. In contrast, attacks

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judgement of 14 January 2000 (IT-95-16-T), para. 550; *Tadic Ibid.,* TC, para. 648. ICTR, *Prosecutor v. J. Kajelijeli*, case No. ICTR-98-44A-T, para. 867.

28 ICTY, *Kuprescic*, Ibid., para. 547; ICTY, *Jelisic*, TC judgement of 14 December 1999 (IT-95-10-T), para. 54; ICTY, *Krajisnik*, judgement of 27 September 2006 (IT-00-39-T), para. 706.

29 ICTY, *Tadic* TC, para. 639.

30 R. Kolb Ibid., p. 97.

31 R. Kolb Ibid., p. 97.

32 K. Ambos, Ibid., p. 256.

33 ICTR, *Prosecutor v. Kayishema*, Case No. ICTR-95-1, TC Judgement of 21 May 1999, para. 127: " The Trial Chamber considers that a wide definition of civilian is applicable and, in the context of the situation of Kibuye Prefecture where there was no armed conflict, includes all persons except those who have the duty to maintain public order and have the legitimate means to exercise force. Non-civilians would include, for example, members of the FAR, the RPF, the police and the Gendarmerie Nationale."

34 *D.C. (T.A.), Attorney-General of the State of Israel v. Enigster, 13(B)(5), 1952*: "The detainees at the Greiditz camps and the detainees at the Paulbrick camp consisted of a civilian population in the sense of the aforementioned definition". In the alternative, the court might have found that the fate of those civilian detainees is closely related to that of other civilians, notably those living in the area where those people were captured, and that they therefore only constitute one part of a larger "civilian population." Under such circumstances, the prosecution could establish that the detention and mistreatment reserved to the civilian detainees was just one aspect of a broader criminal campaign which covered a given area and which, for example, saw the burning of houses, the killing and rape of civilians and other violence generally attached with such campaigns."

35 ICTY: *Tadic* TC, Ibid., para. 644; *Kunac* AC, Ibid., para. 90; *Stakic*, AC judgement of 22 March 2006 (IT-97-24-A), para. 247; *Laletilic* TC, Ibid., para. 235; *Brdanin* TC judgement of 1 September 2004 (IT-99-36-T), para.

against "limited and randomly selected individuals", or "single and isolated acts" would not fulfil the requirement of an attack against any civilian population.[36] On the other hand, an ICTY trial chamber in *Limaj* stated that "killing of a number of political opponents" is **not** an "attack" in the sense of the crime.[37] The prisoners in a prison are of course only a limited part of the population. However, these prisoners are not randomly selected. Blowing up a prison with a hundred persons inside need not fall outside the scope of the crime merely because it is not directed against the entire population.

c. *The targeted group may include persons who once performed acts of resistance*. Their previous resistance does not bring those persons outside the ambit of the targeted group.[38] Along that line, the French *Cour de Cassation* had, in the *Barbie* case, stated that a crime against humanity can also be performed against political opponents.[39]

d. *Irrelevance of the presence of soldiers or police*. The presence of non-civilians, such as soldiers or policemen, does not deprive the targeted group of its quality as "any civilian population". It is sufficient that the group is predominantly civilian.[40]

30. Occasionally, European courts and the ECHR have pronounced themselves upon the notion of "civilians" in the definition of crimes against humanity. In the *Korbely* Case (2001),[41] 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. Criticising 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".*[42] 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[43] concluded that they could not and that all crimes committed against enemy combatants had to count as war crimes, the Court of Cassation[44] 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.

31. **The requirement that the attack must be "widespread or systematic"** features only in Art. 3 ICTR-Statute and in Art. 7 ICC-Statute (and in soft law in the ILC drafts of 1991 and 1996). Although the term does not appear in the ICTY-statute, the ICTY has used it in its case law as well. It depends on the definition of the targeted group whether these qualifications are fulfilled, and therefore the group needs to be defined first (see above para. 28). During the

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134. ICTR, *Bisegimana* TC judgement of 13 April 2006 (ICTR-00-60-T) para. 50. ICC, *Bemba confirmation decision*, para. 77.

36 ICC, *Bemba confirmation decision*, para. 77.

37 ICTY TC, *Limaj*, TC judgement of 30 November 2005 (IT-03-66-T), para. 187.

38 ICTY, *Kupresic*, Ibid., para. 549; *Limaj* TC, Ibid., para. 186; *Prosecutor v Naletilic & Martinovic*, TC judgement of 31 March 2003 (IT-98-34-T), para. 235.

39 French Cour de Cassation, 20 Dec. 1985, *Barbie*, ILR 78 (1988), p. 125 *et seq.* (128).

40 ICTY, *Blaskic*, TC judgement of 3 March 2000 (IT-95-14-T), AC judgement of 29 July 2004 (IT-95-14-A), para. 214; *Galic*, AC judgement of 30 November 2006 (IT-98-29-A), para. 144; *Brdanin* TC, para. 134; *Limaj* TC, Ibid., para. 186; *Naletilic*, TC, Ibid., para. 235. ICTR, *Akayesu* TC, Ibid., para. 582.

41 Hungary, *Korbely Case,* Budapest Regional Court, 18 January 2001.

42 ECHR, *Korbely v. Hungary,* Application No. 9174/02, Judgment, 19 September 2008, par. 94.

43 France, Court of Appeal of Lyon, *Decision of 4 October 1985.*

44 France, Court of Cassation, *Judgment of 20 December 1985.*

drafting process of the ICC-statute, this had been controversial. Some states had favoured a cumulative requirement, but were defeated. A compromise was the adoption of the "policy requirement" (see below para. 35).

32. The requirement of a "widespread" attack refers to the **scale** of the attack. It is widespread when it causes a number of victims, a multiplicity of victims.[45] This reading is borne out by the texts of the ILC Draft Codes of 1991 and 1996 which use the term "mass scale" and "large scale", respectively. The quantitative criterion is not objectively definable.[46] In a recent decision, the ICC pre-trial chamber II considered "that the term 'widespread' connotes the large scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims."[47]

33. A conduct is **systematic** if it is organised or follows a plan or pattern. It need not be a formal policy of the state.[48] An attack is not systematic if it is a random or isolated attack.[49]

34. The statutory definition in Art. 7(2) a) ICC-Statute defines the "attack", and here mentions that it must be "*pursuant to or in furtherance of a State or organizational policy* to commit such attack". So the ICC-definition mentions the so-called "policy-element". The phrase in the provision has been interpreted by ICC pre-trial chamber II as implying "that the attack follows a regular pattern", and that the attack "is planed, directed or organized – as opposed to spontaneous acts of violence".[50] It has been and still seems to be **controversial whether the** "policy-element" **is an additional requirement**.[51] The insertion in Art. 7 ICC-Statute was a compromise between those negotiating State parties which sought "systematic" and "widespread" as cumulative requirements, and those which sought them as alternative requirements. The wording in Art. 7(1) posits them as alternative ("or"). But the understanding of "systematic" is that the attack must be organised or follow a plan or pattern (see above). So the additional mentioning of "a State or organizational policy" seems to reduplicate the requirement of "systematic". In the result, this means that an attack which is only widespread but not systematic (i.e. not following a policy in the sense of Art. 7 sec. 2) will not fulfil the requirement.

35. 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".*[52] 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".*[53] Yet, in other cases, the general policy requirement has not been 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.

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45 ICTY, *Tadic* TC, Ibid., para. 648, ICTY, *Blaskic*, Ibid., para. 206. ICTR, *Akayesu* TC, Ibid., para. 580, ICTR, *Bisengimana* TC, Ibid., para. 44.

46 ICTY, *Blaskic,* para.1148.

47 ICC, *Bemba confirmation decision*, para. 83.

48 ICTR, *Akayesu*, para. 580.

49 ICTY, *Tadic* TC, para. 649.

50 ICC, *Bemba confirmation decision*, para. 81.

51 See the arguments against an additional policy requirement in G. Mettraux, Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, *Harvard International Law Journal* 43 (2002), 237-316, pp. 270-282.

52 Cit. in M. E. Badar, From the Nuremberg Charter to the Rome Statute, 5 *San Diego Int´l L J,* 2004, at 112.

53 Cit. in ibid., at 112-113.

36. The bombing of the *Frontón* prison seems to have followed a state policy to combat a resistance group, so that the "policy requirement" is fulfilled anyway.

The mental (subjective) element

37. The mental element of a crime against humanity requires that the perpetrator knew that his conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population. But the mental element does not require proof "*that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization*."[54]

38. Discriminatory grounds are in most formulations of the crime required only for the act of persecution. The Statute of the Rwanda tribunal (Art. 3) is exceptional in requiring discriminatory grounds for all forms of acts.[55] It is unclear whether discriminatory grounds are an objective or a subjective element of the crime.[56]

3.3 The dilemmas faced

39. The prosecution of crimes against humanity gives rise to various factual and legal dilemmas. This is particularly true when prosecution 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, as opposed to international criminal tribunals, national judicial organs usually do not 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.

40. 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. 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.

41. 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

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54 Elements of Crimes, p. 5.

55 See in that sense also the ILC Draft Code of 1954.

56 ICTR, *Akayseu* AC, para. 464 speaks of „discriminatory *intent*", which has a subjective connotation.

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.

3.3.1 The principle of retroactivity: nullum crime sine lege

42. It is one of the main principles 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*).[57] The use of retroactive laws, which would criminalise certain acts *ex post facto,* 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, Article 27 of the American Convention) and it is even sometimes ranked among non-derogable human rights. 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."*[58]

43. 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.[59]

44. When confronted with these objections, national judicial organs can invoke the principle, 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

[57] 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.
[58] Venice Commision, *Amicus Curiae Brief for the Constitutional Court of Georgia,* Opinion No. 523/2009, March 2009, par. 5-6.
[59] This latter issues is dealt with in the final section of this opinion.

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).

45. Over the past decades, national 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. 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".*[60]

46. 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,[61] 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"*[62] 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".*[63]

47. Many countries in Latin America other than Peru have also dealt with the issue of amnesties and statutory limitations to crimes against humanity. The Supreme Court of Justice of Argentina had stated in the judgment of 24th August 2004 (*Enrique Lautaro Arancibia Clavel* case) that "*the very basis of the non statutory limitations to the prosecution of these crimes stems from the fact that the crimes against humanity are in general perpetrated by the same State agents acting outside the criminal law, id est, avoiding any legal control (…). Therefore, it is not possible to sustain logically that it is necessary to guarantee the extinction of the criminal proceedings for the lapse of time in crimes of these nature*"[64]. Chile has also followed this same reasoning in the *Paulino Flores Rivas and others case* (Supreme Court,. Judgment of 13 December 2006) or Uruguay in the framework of the proceedings concerning the (in)famous Condor Operation[65].

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[60] Cit. in ECmHR, *Touvier v. France*, Application No. 29420/95, Decision, 13 January 1997, p. 5.
[61] Estonia, *Kolk and Kislyiy Case,* Saare County Court, 10 October 2003; Estonia, *Kolk and Kislyiy Case,* Tallinn Court of Appeal, 27 January 2004;
[62] Cit. in ECHR, *Kolk and Kislyiy v. Estonia,* Applications No. 23052/04 and 24018/04, Judgment, 17 January 2006, p. 3.
[63] Ibid.
[64] The translation has been done by the Secretariat of the Venice Commission. For the full reference in Spanish, see the Individual Comments to the amicus curiae made, CDL(2011)071.
[65] *José Nino Gavazzo Pereira et al,* judgment issued by the Criminal Judge 19º, 26 March 2009

48. 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.*[66] 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.*[67] 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.

49. 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 decisions,[68] 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 recognised 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.

50. The European Court of Human Rights (ECtHR) has so far had only limited opportunity to pronounce itself 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 ECtHR 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".*[69] In *Kolk and Kislyiy v. Estonia* (2006), it concluded that *"even if the acts ... could have been regarded as*

[66] The Netherlands, *In re Bouterse,* Supreme Court, 18 September 2001.
[67] 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).
[68] 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.
[69] Ibid., par. 90.

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".[70] 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.[71]

51. 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 and Articles 8 and 25 of the ACHR; 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 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.

3.3.2 The statute of limitations of the crime

52. The Statute of limitations (*prescription*) in criminal law sets the maximum period of time, within which the prosecution of a certain offence may be lawfully initiated.[72] 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 the period therefore has an impact only upon the jurisdiction to prosecute a certain act or also upon the very criminality of this act.[73] The statute of limitations (prescription) is well-known in both *common law* and *civil law* countries. It has 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.

53. UN-member states have in 1968 adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[74] Peru has ratified this convention only on 11 Aug 2003, with the following declaration: "In conformity with article 103 of its Political Constitution, the Peruvian State accedes to the 'Convention on the Non-Applicability

[70] ECHR, *Kolk and Kislyiy v. Estonia,* Applications No. 23052/04 and 24018/04, Judgment, 17 January 2006, par. 9.
[71] 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.
[72] For more details on the topic, see R. A. Kok, *Statutory Limitations in International Law,* T.M.C. Asser Press, The Hague, 2007.
[73] For more details, see Venice Commision, *Amicus Curiae Brief for the Constitutional Court of Georgia,* Opinion No. 523/2009, March 2009, par. 7-9.
[74] UN GA 2391 of 26 Nov 1968. United Nations Treaty Series, vol. 754, p. 73. Other conventions (not pertinent for the *Fronton* case) are the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the General Assembly of the United Nations on 30 November 1973, in force for Peru since 11 Dec. 1978; and the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (in force since 2003).

of Statutory Limitations to War Crimes and Crimes against Humanity', adopted by the General Assembly of the United Nations on 26 November 1968, with respect to crimes covered by the Convention that are committed after its entry into force for Peru." This means that non-limitation for a possible crime against humanity in 1986 is not operative *by force of that Convention*.

54. However, the UN-Convention of 1968 only confirms (in a declaratory fashion), that crimes against humanity are not subject to any limitation of prosecution. Its preamble states: "Recognizing 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, …". The non-limitation follows from the very nature of the crime. Non-limitation has, on those grounds, been asserted by numerous domestic courts all over the world.[75]

55. 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[76] related to acts which did not specifically refer 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 non statutory limits to crimes against humanity and war crimes. In the fourth decision[77] 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".*[78] In 1996, the Court reviewed the 1993 Act once again,[79] this time after its promulgation. Since the suggestions made in the 1993 decision had not been taken into account, the Court struck the Act down as unconstitutional. Yet even then, it confirmed its previous position on the inapplicability of the statute of limitations to crimes against humanity.[80]

56. Non-limitation can therefore be said to be either a principle of **customary international law** or a **general principle of law** (in the sense of art. 38 lit. b) and c) of the ICJ statute). This international legal principle has been accepted already before 1986, as the older case-law of domestic courts shows. This means that a crime against humanity committed in 1986 is not subject to statutory limitation.

57. The Peruvian Constitutional Court itself has already pronounced itself in this sense recently. In a judgment issued on the 21 March 2011, the Constitutional Court quoted the Inter-American Court of Human Rights, which has declared that "*all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are*

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[75] French Cour de Cassation, 6 Oct. 1983, *Barbie*, ILR 78 (1988), p. 125 *et seq.* (126). Cour de Cassation, 20 Dec. 1985, ibid., p. 128. Argentinia, Corte suprema de Justicia de la Nacion, Arancibi Clavel etc., causa no 259, 24 August 2004 (A 533, XXXXVIII), para. 25. Italy, Tribunale Militare di Roma, judgement of 22 July 1997, para. 12.d). Belgium, Belgian Tribunal of First Instance of Brussels (Investigating Magistrate), judgement of 8 November 1998, a judgement in the Pinochet affair (see Reydams Luc, In re Pinochet, AJIL 93 (1999), 700-703, p. 703).

[76] Hungary, Decisions No. 2086/A/1991/15, 41/1993 and 42/1993, Constitutional Court, 1992-1993.

[77] Hungary, Decision No. 53/1993, Constitutional Court, 1993.

[78] Ibid., §V-3.

[79] Hungary, Decision No. 36/1996, Constitutional Court, 1996.

[80] *"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.

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 (*Barrios Altos v. Peru*, Judgment of 14 March 2011, Series C, nº 75, para. 41). Moreover, the Inter-American Court stated that "*the statute of limitations is inadmissible in connection with and inapplicable to a criminal action where gross human rights violations in the terms of International Law are involved"* (*Albán Cornejo v. Ecuador*, judgment of 22 November 2007, Series C, nº 171, para. 111). On the basis of this case-law, the Constitutional Court considered that the rule of non applicability of statutory limitations applies not only after the moment of the ratification by Peru of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity in 2003. "*These crimes can not prescribe, no matter the date in which they were perpetrated*".[81]

3.3.3 The customary law status of the crime in 1986

58. It is clear that the criminalisation of such inhumane acts as crimes against humanity crystallised into customary law quite quickly after 1949, through the intense judicial activity of national and international criminal tribunals in the aftermath of the Second World War. In result, crimes against humanity were international crimes under international customary law already in 1986.[82]

4 Sentencing crimes against humanity

59. 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 both 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.

60. 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

[81] Constitutional Court of Peru, judgment of 21 March 2011, para 68.
[82] A. Cassese, Crimes against Humanity, in Cassese/Gaeta/Jones (eds), *The Rome Statute of International Criminal Court: A Commentary*, vol. 1, Oxford, OUP, 2002, p. 356.

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 played a role 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 and the very nature of those regimes (WWII regime versus socialist Cold War regime).

61. 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 organised 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. 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.

62. 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".*[83] This approach was upheld by the ECtHR. 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".*[84] The fourth applicant, on the contrary, *"undergone the indoctrinations"*[85] and *"was in a particularly difficult situation on the spot, in view of the political context in the GDR at the material time".*[86] In the ECtHR view, it was legitimate for the German courts to take these factors into account when determining the sentence.

63. Concerning the international **criminal tribunals' experience**, the penalties imposable by the ICTY and the ICTR are limited to imprisonment (Art. 23 ICTY statute; Art. 23 ICTR-Statute). Death penalty is not foreseen. Perpetrators who have been sentenced for crimes against humanity had always committed other crimes as well, mostly war crimes, sometimes even genocide. The ad hoc tribunals have always imposed one single sentence. It is therefore not

[83] ECHR, *K. – H. W. v. Germany,* Application No. 37201/97, Judgment, 22 March 2001, par. 81.
[84] ECHR, *Streletz, Kessler and Krenz v. Germany,* Applications No. 34044/96, 35532/97, 44801/98, Judgment, 22 March 2001, par. 78.
[85] ECHR, *K. – H. W. v. Germany,* Application No. 37201/97, Judgment, 22 March 2001, par. 71.
[86] 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.

possible to isolate the penalty for the crime against humanity. The crimes were in some cases only committed in form of aiding and abetting.

64. The ICTY has imposed sentences ranging from life imprisonment (in one case, *Galic,* concerning Sarajevo) to three years (*Kolundzija*). Penalties in between were 40 years (*Stakic*), 35 years (*Kristic*, concerning Srebrenica), 30, 28, 25, 20, 18, 15, 12, and 6 years.

65. The ICTR has imposed life imprisonment in four cases (*Akayesu, Musema, Muhimana*, and *Rutaganda*). All four perpetrators also committed genocide, besides crimes against humanity. The ICTR imposed 45 years of imprisonment on *Semanza*, 15 years on *Bisingimana*, 6 years of imprisonment on *Rutaginara*.

66. The crimes against humanity tried by the ICTY and ICTR were mostly committed in the following forms (roughly in order of frequency): persecution, extermination, murder, other inhumane acts, forcible transfer, torture, rape, enslavement. The penalties for crimes against humanity have not *per se* been more serious than for war crimes. The ICC has so far not convicted any perpetrator.

5 Conclusions

67. Due to the troubled history in the 20th century, there has been a wide number of experiences in prosecuting past crimes against humanity. The term entered into the legal vocabulary after the World War II with the prosecution of German and Japanese war criminals in the Nuremberg and Tokyo Tribunals and the definition has been definitively settled in the Statute of Rome. This codification in International Law has been slowly followed by a progressive inclusion of a definition of crimes against humanity by domestic laws, a practice which has increased mainly after the end of the cold war.

68. In Europe, experience has been gained 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 but which have arrived before the European courts. The prosecutions have confronted national courts of the European countries, and occasionally also the ECtHR, reviewing many of the national decisions.

69. In the Latin-American experience, dictatorships and the so called State terrorism have resulted in forced disappearances, extra-judicial executions, torture, etc. Often, these conducts could qualify as crimes against humanity and many countries have had to face their past and try to handle it. Argentina, Chile, Ecuador, Mexico, Panama, Paraguay, Peru, Uruguay… all of these countries have been faced with the duty to prosecute and to ensure the right to truth to victims. The Inter-American Court of Human Rights has built a consistent case-law, considering that crimes against humanity can not have statutory limitations and the criminal procedural rules on *prescriptibility* do not apply to them. In the *Barrios Altos* and *La Cantuta* cases v. Peru, which referred to massacres and extrajudicial killings, the Inter-American Court identified the facts as part of a systematic mechanism of repression to which certain sectors of the population were submitted, having been labelled as “subversive”. The implication of the intelligence services and the framework of impunity existed were key elements to qualify the facts as crimes against humanity.

70. All these experiences have resulted in a series of uneasy dilemmas, which 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 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 ECtHR. The definition of crimes against humanity which has been used by national Latin-American jurisdictions has been the definition contained in the Statute of the International Criminal Court. 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 have involved charges of murder, forced disappearances, extra-judicial killings or deportation, which seem relatively clear.

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. Usually, the decision has to be made on an *ad hoc* basis, taking into account the concrete circumstances of the individual case. Yet, there is a clear tendency in Europe and in the international criminal courts case-law 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.* Crimes against humanity are largely seen as not having statutory limitations. This quality is ascribed to them by virtue of international law, though there is uncertainty as to whether this constitutes an inherent feature of those crimes or has developed gradually by means of treaty or customary rules. 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. 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.

71. The Venice Commission expresses its readiness to assist the Peruvian Constitutional Court further in this respect.

6 Annex of most important decisions and judgments

6.1 International Courts

6.1.1 ICTY

(TC = trial chamber. AC = appeals chamber).

Prosecutor v. Dusko ***Tadic***, TC judgement of 7 May 1997 (IT-94-1-T), AC judgement of 15 July 1999 (IT-94-1-A).
Prosecutor v. ***Jelisic***, TC judgement of 14 December 1999 (IT-95-10-T).
Prosecutor v. ***Kupreskic et al.***, TC judgement of 14 January 2000 (IT-95-16-T).
Prosecutor v. ***Sikirica et al***., TC judgement of 13 November 2001 (IT-95-8-S).
Prosecutor v. ***Blaskic***, TC judgement of 3 March 2000 (IT-95-14-T), AC judgement of 29 July 2004 (IT-95-14-A).
Prosecutor v. ***Kunarac et al***., TC judgement of 22 February 2001 (IT-96-23-T & IT-96-23/1-T), AC judgement of 12 June 2002 (IT-96-23 & IT-96-23/1-A).
Prosecutor v. Dario ***Kordic*** *and Mario* ***Cerkez***, TC judgement of 26 February 2001 (IT-95-14/2-T), AC judgement of 17 December 2004 (IT-95-14/2-A).
Prosecutor v. ***Stakic***, TC judgement of 31 July 2003 (IT-97-24-T), AC judgement of 22 March 2006 (IT-97-24-A).
Prosecutor v. ***Krnojelac***, TC judgement of 15 March 2002 (IT-97-25-T).
Prosecutor v ***Naletilic*** *&* ***Martinovic***, TC judgement of 31 March 2003 (IT-98-34-T).
Prosecutor v. ***Vasiljevic***, TC judgement of 29 November 2003 (IT-98-32-T).
Prosecutor v. ***Kristic***, TC judgement of 2 August 2001 (IT-98-33-T), AC judgement of 19 April 2004 (IT-98-33-A).
Prosecutor v. ***Brdanin***, TC judgement of 1 September 2004 (IT-99-36-T).
Prosecutor v. ***Limaj et al***., TC judgement of 30 November 2005 (IT-03-66-T).
Prosecutor v. ***Krajisnik***, TC judgement of 27 September 2006 (IT-00-39-T).
Prosecutor v. ***Galic***, TC judgement of 5 December 2003, (IT-98-29-T), AC judgement of 30 November 2006 (IT-98-29-A).
Prosecutor v. ***Mrksic***, AC judgement of 5 May 2009 (IT-95-13-1-A).

6.1.2 ICTR

Prosecutor. v Ignace ***Bagilishema***, TC judgement of 7 June 2001 (ICTR-95-1A-T), AC judgement of 3 July 2002 (ICTR-95-1A-A).
Prosecutor v. Jean-Paul ***Akayesu***, TC judgement of 2 September 1998 (ICTR-96-4-T).
Prosecutor v. ***Musema***, TC judgement of 27 January 2000 (ICTR-96-13-A), AC judgement of 16 November 2001 (ICTR-96-13-A).
Prosecutor v. ***Rutaganda***, TC judgement of 6 December 1999 (ICTR-96-3-T).
Prosecutor v. ***Muhimana***, TC judgement of 28 April 2005 (ICTR-95-1B-T).
Prosecutor v. ***Bisengimana***, TC judgement of 13 April 2006 (ICTR-00-60-T).
Prosecutor vs. ***Semanza***, TC judgement and Sentence of 15 May 2003 (ICTR-97-20-T), AC judgement of 20 May 2005 (ICTR-97-20-A).
Prosecutor v. ***Kayishema***, TC judgement of 21 May 1999 (ICTR-95-1-T).
Prosecutor v. ***Rutaganira***, TC judgement of 14 March 2005 (ICTR-95-1C-T).

6.1.3 ICC

- *The Prosecutor v. Omar Hassan Ahmad* ***Al Bashir***, ICC-02/05-01/09. So far only arrest warrant.
- Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08 of 15 June 2009 ("**Bemba** confirmation decision").

6.1.4 European Commission and European Court of HR

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, *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, ***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
ECHR, ***Kolk and Kislyiy** v. Estonia,* Applications No. 23052/04 and 24018/04, Judgment, 17 January 2006
ECHR, ***Brecknell** v. the United Kingdom* Application No. 32457/04, Judgment, 27 November 2007
ECHR, ***McCartney** v. the United Kingdom* Application No. 34575/04, Judgment, 27 November 2007
ECHR, ***McGrath** v. the United Kingdom* Application No. 34651/04, Judgment, 27 November 2007
ECHR, ***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
ECHR, ***Korbely** v. Hungary,* Application No. 9174/02, Judgment, 19 September 2008
ECHR, ***Kononov** v. Latvia,* Application No. 36374/04, Judgment, 24 July 2008 and Grand Chamber Judgment, 17 May 2010
ECHR, ***Polednová** v. The Czech Republic,* Application No. 2615/10, Decision, 21 June 2011

6.1.5 Inter-American Court of HR

***Velásquez Rodríguez** v. Honduras,* judgment 26 June 1987
***Barrios Altos** v Peru*, judgment 14 March 2001
***Almonacid Arellano** et al. v. Chile,* judgment 26 september 2006
***Goiburú** et al. v. Paraguay,* judgment 22 september 2006
***La Cantuta** v. Peru*, judgment 29 november 2006
***Heliodoro Portugal** v. Panama*, judgment 12 August 2008

6.2 National Courts

6.2.1 Argentina,

Complaint filed by the Chilean authorities (Enrique Lautaro Arancibia Clavel), Supreme Court of Justice, judgment 24 August 2004

6.2.2 Belgium

*In re Pinochet Ugarte,*Tribunal of First Instance, 6 November 1998.

6.2.3 France

Cour de Cassation, 3.6.1988, JCP 1988 II Nr. 21, *Barbie*, ILR 78 (1988), pp. 136 *et seq.*, and ILR 100 (1995), pp. 330 *et seq.*
Court of Appeal of Paris, *Touvier*, judgement of 13 April 1992, Court of Cassation, judgement of 27 November 1992 and 19 April 1994.

Cour d'assises de Gironde, *Papon*, judgement of 2 April 1998, Court of Cassation, judgement of 11 April 2004.

6.2.4 Canada

R. v. Finta, Supreme Court of Canada 1 (1994), 701 in ILR 104 (1997) & Ontario Court of Appeal, judgement of 29 April 1992, in ILR 98 (1994), 520 *et seq.*

6.2.5 Czech Republic

Decision on the Act on the ilegality of the Communist Regime, Constitutional Court, 21 December 1993.

6.2.6 Chile,

Molco de Choshuenco (Paulino Flores Rivas y otros), Supreme Court, judgment of 13 December 2006

6.2.7 Estonia

Paulov *Case,* Supreme Court (2000)
Kolk and Kislyiy *Case,* Saare County Court (2003)
Kolk and Kislyiy *Case,* Tallinn Court of Appeal (2004)

6.2.8 Former German Democratic Republic

Hans Globke, Oberstes Gericht der DDR, judgement of 23 July 1963, Neue Justiz 1963, 449, 507 *et seq.*
Horst Fischer, Oberstes Gericht der DDR, judgement of 25 March 1966, Neue Justiz 1966, 193, 203 *et seq.*

Hungary

Decisions No. 2086/A/1991/15, 41/1993, 42/1993 and 53/1993,Constitutional Court (1992-1993)
Decision No. 36/1996, Constitutional Court (1996)

6.2.9 Israel

D.C. (T.A.), Attorney-General of the State of Israel v. **Enigster**, 13(B)(5), 1952.
District Court of Jerusalem, Adolf **Eichmann**, judgement of 12 Dec 1961, ILR 36 (1968), 18 *et seq.* and Supreme Court of Israel, 29 May 1962

6.2.10 Lithuania

Baranauskas Case, Case No. 1A-498, Appeal Court of Lithuania (2001)
Misiūnas Case, Case No. 1-119, Vilnius Regional Court, (2002) and Appeal Court of Lithuania, 26 March 2003
Vilčinskas Case, Case No. 1-91, Vilnius Regional Court, 2005)

6.2.11 Mexico

Raúl Alvarez Garín et al case, Supreme Court of Justice, amparo en revisión 968/1999

Ricardo Miguel Cavallo, Supreme Court of Justice, Amparo en revisión 140/2002

Los Halcones case, Supreme Court of Justice, solicitud de facultad de atracción 8/2004

Radilla Pacheco case, Supreme Court of Justice, Consulta a trámite. Varios 912/2010

6.2.12 Netherlands

Supreme Court of the Netherlands, **Menten**, 13 January 1981, ILR 75 (1987), 362 *et seq.*

6.2.13 Peru

Ernesto Rafael Castillo Páez, Sala Penal Nacional, Judgment of 20 March 2006

6.2.14 Spain

Pinochet Case, Audencia Nacional Madrid,18 December 1998

6.2.15 Uruguay

Caso"Plan Cóndor" (José Nino Gavazzo Pereira et al)*,* judgment issued by the Criminal judge 19º Turno, 26 March 2009

6.2.16 Follow-up cases of Nuremberg

U.S. v. Friedrich Flick and five others, United States Minilitary Tribunal, Nuremberg, case No. 48, 20 April-22 December 1947, in Law reports of Trials of War Criminals/selected and prepared by the United Nations War Crimes Commission, London, Stationary Office, vol. IX, 1949.

U.S. v. Josef Altstötter and others, United States Military Tribunal, Nuremberg, 17 February- 4 December, 1947, in Law reports of Trials of War Criminals/selected and prepared by the United Nations War Crimes Commission, London, Stationary Office, vol. VI, 1949.