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Schabas, William A. ORCID logoORCID: <https://orcid.org/0000-0002-7462-4284> (2016) Article 29. Non-applicability of statute of limitations. In: Rome Statute of the International Criminal Court: A Commentary. Triffterer, Otto and Ambos, Kai, eds. C.H. Beck | Hart | Nomos, Munich, Oxford, Baden Baden, pp. 1107-1110. ISBN 9783406648540, ISBN 9781849469951, ISBN 9783848722631, e-ISBN 9781849469982. [Book Section] (doi:10.5040/9781849469982.part-003)

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Article 29 Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Literature: Van den Wyngaert, C. and Dugard, J., 'Non-applicability of Statute of Limitations', in: A. Cassese, P. Gaeta and J. R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 873; Henckaerts, J.-M. and Doswald Beck, L., *Customary International Humanitarian Law, Vol. I: Rules* (2005) 614.

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A. Introduction/General remarks

The *Rome Statute* declares that the crimes within the Court's jurisdiction are not subject to a statute of limitations. None of the preceding international instruments concerned with international prosecution of atrocities, from the *Charter of the International Military Tribunal* to the statutes of the *ad hoc* Tribunals, has contained anything similar. This is only logical, because in the absence of texts within the instruments creating a time bar, silence was all that was required. On the other hand, *Control Council Law No. 10* stated that '[I]n any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect of the period from 30 January 1933 to 1 July 1945'¹. Because *Control Council Law No. 10* was applicable to national prosecutions within Germany, the provision was required in order to neutralize any alleged time bar to trials for Nazi-era crimes.

Many domestic criminal law systems provide for statutory limitation of crimes, even the most serious². Under French law, for example, prosecutions for murder are time barred after ten years³. Codes derived from the Napoleonic model generally have similar provisions. At trial, Eichmann pleaded that prosecution was time barred, but the argument was dismissed. Eichmann invoked a fifteen-year limitation period in force in Argentina. The District Court of Jerusalem ruled that Argentine norms could not apply, adding a reference to applicable Israeli legislation declaring that 'the rules of prescription ... shall not apply to offences under this Law'⁴. During the 1960s, as the application of statutory limitations in national penal codes to Nazi war criminals began to appear possible, there was a movement to amend rules by which such prosecutions could be time barred. Accordingly, there were changes to domestic legislation⁵. On an international level, these developments took the form of

¹ *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, 20 Dec. 1945, Official Gazette Of The Control Council For Germany, No. 3, Berlin, 31 Jan. 1946, 50-55, article II (5).

² See: LaRosa, *Dictionnaire de Droit International Pénal: Termes Choisis* (1998) 50-52.

³ *Penal Code* (France), Article 7.

⁴ *A. G. Israel v. Eichmann*, (1968) 36 ILR 18 (District Court), para. 53.

⁵ Germany seems to have had a twenty-year limitation period on Nazi crimes not contemplated by *Control Council Law No. 10*. On 25 Mar. 1965 the Bundestag extended the limitation date for murder to 31 Dec. 1969, which was the twentieth anniversary of establishment of the German Federal Republic. But this was inadequate and the date was again extended until 31 Dec. 1979. On 3 July 1979 the Bundestag voted to eliminate any limitation date for murder. See: de Mildt, *In the Name of the People: Perpetrators of Genocide in the*

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General Assembly resolutions⁶, and treaties within both the United Nations system⁷ and that of the Council of Europe⁸. Both instruments refer to the crime of genocide and to crimes against humanity as offences for which there shall be no statutory limitation.

- 3 The treaties have not been a great success in terms of signature and ratification; the United Nations instrument still has only forty-five States Parties. The low rate of adhesion to the United Nations *Convention* has led some academics to contest the suggestion that this is a customary norm⁹. However, the French Cour de Cassation determined, in the *Barbie* case, that the prohibition on statutory limitations for crimes against humanity is now part of customary law¹⁰. Although the debates surrounding adoption of article 29 of the *Rome Statute* revealed a lack of unanimity on the subject, the final result is a clear demonstration of the *Statute's* contribution to the progressive development of international law.

B. Analysis and interpretation of elements

- 4 There was no reference to statutory limitation in the ILC Draft Statute that was submitted to the General Assembly in 1994¹¹. In the *Ad Hoc* Committee sessions of 1995, it became clear that the principle of the impermissibility of statutory limitations for crimes such as genocide and crimes against humanity was not universally accepted. Some delegations urged that the question be considered 'bearing in mind the importance of the legal principle involved, which reflected the decreasing social importance of bringing criminals to justice and the increasing difficulties in ensuring a fair trial as time elapsed'¹². In the first sessions of the Preparatory Committee, delegations expressed concern about the fairness of 'stale' prosecutions. The possibility that statutory limitations could apply to crimes that are less serious than the core offences of genocide and crimes against humanity was also evoked¹³. According to the 1996 report to the General Assembly, '[s]ome delegations suggested that, instead of establishing a rigid rule, the Prosecutor or the President should be given flexible power to make a determination on a case-by-case basis, taking into account the right of the accused to due process. It was suggested that an accused should be allowed to apply to the Court to terminate the proceedings on the basis of fairness, if there was lack of evidence owing to the passage of many years'¹⁴. One of the issues involved in addressing the matter was the general question of complementarity, in that States with statutory limitations on some or all of the crimes would find themselves 'unable' to prosecute after time had elapsed. A number of formal proposals before the Preparatory Committee contemplated some form of statutory limitation, either for certain specified treaty crimes or for the subject-matter

Reflection of Their Post-War Prosecution in West Germany (1996) 29–30; I. Müller, *Hitler's Justice, the Courts of the Third Reich* (1991) 243–249; Monson (1982) 30 *AJIL* 605; Triffterer (1980) *NJW* 2049 *et seq.*

⁶ GA Res. 3 (I); GA Res. 170 (II); GA Res. 2583 (XXIV); GA Res. 2712 (XXV); GA Res. 2840 (XXVI); GA Res. 3020 (XXVII); GA Res. 3074 (XXVIII).

⁷ *Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 754 UNTS 73 (1970). See: Miller (1971) 65 *AJIL* 476.

⁸ *European Convention on the Non Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes of January 25, 1974*, ETS 82.

⁹ Ratner and Abrams, *Accountability for Human Rights Atrocities in International Law, Beyond the Nuremberg Legacy* (1997) 126.

¹⁰ *Fédération nationale des déportés et internés résistants et patriotes et al. v. Barbie*, (1984) 78 I.L.R. 125, 135. Also: France, Assemblée nationale, *Rapport d'information déposé en application de l'article 145 du Règlement par la Mission d'information de la Commission de la défense nationale et des forces armées et de la Commission des affaires étrangères, sur les opérations militaires menées par la France, d'autres pays et l'ONU au Rwanda entre 1990 et 1994*, p. 286 (1999).

¹¹ 1994 ILC Draft Statute.

¹² *Ad Hoc* Committee Report, para. 127, p. 29.

¹³ 1996 Preparatory Committee I, paras. 195–196, p. 45.

¹⁴ *Ibid.*, para. 196.

jurisdiction of the Court as a whole¹⁵. France argued for statutory limitation of ten or twenty years in the case of war crimes¹⁶. Interestingly, of the several draft proposals, non suggested that the statute simply be silent on the subject.

At the Rome Conference, the Working Group on General Principles opted for a text 5 declaring the impermissibility of statutory limitation¹⁷. Testifying to the difficulty with the concept for some delegations, its report included a footnote:

“Two delegations were of the view that there should be a statute of limitations for war crimes. One delegation agreed to the above text in a show of flexibility, but stressed that there should be a possibility not to proceed if, due to the time that has passed, a fair trial cannot be guaranteed. The question of statute of limitations will need to be revisited if treaty crimes are included. There must also be a special regime for crimes against the integrity of the Court. The absence of a statute of limitations for the Court raises an issue regarding the principle of complementarity given the possibility that a statute of limitations under national law may bar action by the national courts after the expiration of a certain time period, whereas the ICC would still be able to exercise jurisdiction¹⁸.”

But the delegations did not object to the text being sent to the Drafting Committee¹⁹, and 6 it was adopted unchanged in the final version.

C. Special remarks

In sentencing proceedings before the *ad hoc* tribunals it has been argued that the lapse of 7 time between commission of the offence and imposition of penalty should be treated as a mitigating factor. In rejecting the argument, judges have referred to the prohibition on statutory limitation. For example, Trial Chamber 1 of the International Criminal Tribunal for the former Yugoslavia wrote: ‘For crimes of a seriousness justifying their exclusion from statutory limitation, the Trial Chamber considers that a lapse of time of almost twelve years between the commission of the crimes and sentencing proceedings is not so long as to be considered a factor for mitigation²⁰.’

The *ad hoc* tribunals have been required to consider statutory limitations as part of the process of referring cases to national courts, pursuant to Rule 11*bis* of the Rules of Procedure and Evidence. For example, in referring a case to the court of Serbia, a Referral Bench of the International Criminal Tribunal for the former Yugoslavia noted that article 95 para. 1, 1 (1) of the Criminal Code of the Socialist Federal Republic of Yugoslavia barred prosecution after twenty-five years. Accordingly, in the case under consideration, of which the alleged acts took place in December 1991, the offence would be time barred in 2016, a situation that the Referral Bench considered acceptable given the prospect of prompt trial within Serbia²¹.

Article 29 as adopted by the Rome Conference is unnecessary, at least to the extent it would be applied to trials before the Court for offences listed in article 5. Obviously, in the absence of a provision actually establishing statutory limitations, the silence of the *Statute* can only mean that there are no statutory limitations. This does not mean that article 29 is superfluous. Its role would appear to be part of the complex relationship between national and international judicial systems. The issue of statutory limitation arose when France was contemplating ratification of the Rome Statute. The French *Conseil constitutionnel* consid-

¹⁵ 1996 Preparatory Committee II, pp. 88–89. Also: Preparatory Committee Decisions Feb. 1997, pp. 24–26; Zutphen Draft, pp. 57–58; ‘Draft Statute for the International Criminal Court’, UN Doc. A/CONF.183/2/Add.2, pp. 62–64.

¹⁶ UN Doc. A/CONF.183/C.1/SR.2, para. 47.

¹⁷ *Ibid.*, paras. 45–74.

¹⁸ UN Doc. A/CONF.183/C.1/WGGP/L.4, p. 4, fn. 7; UN Doc. A/CONF.183/C.1/WGGP/L.4/Corr. 1, fn. 7.

¹⁹ UN Doc. A/CONF.183/C.1/SR.8, paras. 76, 82.

²⁰ *Prosecutor v. Mrđa*, IT-02-59-S, Sentencing Judgment, 31 Mar. 2004, para. 104.

²¹ *Prosecutor v. Kovačević*, IT-01-42/2-I, Decision on Referral of Case Pursuant to Rule 11*bis*, 17 Nov. 2006, paras. 39, 42. Similarly, in a referral to Bosnia and Herzegovina: *Prosecutor v. Stanković*, IT-96-23/2-PT, Decision on Referral of Case Under Rule 11*bis*, 17 May 2005, para. 41.

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ered that the complementarity provisions of the Rome Statute were incompatible with the French Constitution because they covered crimes that were subject to statutory limitation. According to the *Conseil constitutionnel*, 'under the Statute, the International Criminal Court could be validly seized on the grounds of an amnesty statute or internal rules on limitation; in such a case, France, even if a State were neither unwell not unable to act, might be required to arrest and surrender to the Court a person accused of conduct covered by an amnesty or limitation period in French law...' ²². The result was an amendment to the Constitution: 'La République peut reconnaître la juridiction de la Cour pénale internationale dans les conditions prévues par le traité signé le 18 juillet 1998' ²³.

- 8 There is ample precedent for States refusing to extradite offenders where crimes are time barred under their own legislation. Many extradition treaties provide explicitly for such an exception. This issue was certainly a live one in the preparatory discussions of the *Rome Statute* ²⁴. Consequently, at the very least article 29 operates as an answer to any argument from a State Party whereby extradition might be refused because of a statutory limitation in its own domestic penal code.

A literal reading of article 29 leads to an intriguing result, although one that does not appear in the published record of the *travaux préparatoires* and may not have been contemplated by the drafters. To the extent that the *Statute* does more than simply create a court, and actually imposes obligations on States, can it not be sustained that article 29 in effect constitutes a prohibition in the law of the States Parties on statutory limitations of genocide, crimes against humanity, war crimes and aggression? A State Party to the *Statute* whose legislation allowed prosecutions of these crimes to become time barred would be in breach of the instrument. Certainly on a purely practical level, statutory limitations in national law will be unable to shelter offenders. Should the national courts grant exceptions based on statutory limitation, the complementarity provisions of the *Statute* will grant the ICC jurisdiction. A State Party which allowed such an obstacle to a prosecution would, in effect, concede jurisdiction to the ICC. When States undertake revisions of their legislation as part of the process of accession to or ratification of the *Statute*, they should be advised to eliminate provisions that are incompatible with article 29. In most States, judges might even apply article 29 directly in order to supersede contrary penal legislation.

²² Décision n° 98-408 DC du 22 janvier 1999, para. 34. Translation available on the website of the *Conseil constitutionnel* at <http://www.conseil-constitutionnel.fr/langues/anglais/a98408dc.pdf>, cited in Barrat, in: Lee (ed.), *State's Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (2005) 60.

²³ Loi constitutionnelle n°99-568 du 8 juillet 1999 (article 52 para. 2).

²⁴ 1996 Preparatory Committee I, note 13, para. 324, p. 68.