Statutory Limitations in Argentina's Criminal Law

di Julio E. Chiappini

Abstract: The author presents a panoramic view of the statute of limitations' functioning in the Argentine criminal law. To that end, its nature, rationale, and general provisions are studied, including the causes for the limitations period to be interrupted or tolled. After distinguishing it from similar legal figures such as justifications or the right to a speedy trial, the essay explores the practical application of statutory limitations to different cases, ranging from international crimes to various common offences. Matters of procedure are also discussed, as well as comparative notes regarding the Italian, and different Latin American legislations. The essay ends with some conclusions about balancing conflicting values surrounding the issue of statutory limitations.

Keywords: Argentina; criminal law; statute of limitations; due process; speedy trial; international crimes.

1. Classification and legal provisions

Statutory limitations are contained in Argentina's Criminal Code, thus making them applicable throughout the country. Substantial issues are deemed to be sanctioned by the national government under Argentina's federal system (art. 75.12 of the Constitution), while matters of procedure are regulated by the individual states. Little attention has been paid in Argentina to the discussion regarding the statute of limitations' substantial, procedural, or mixed character. It has been traditionally considered that it is substantial in nature, while its effects are procedural[1]: it extinguishes the state's *punitive power* (*ius puniendi*), one of the conditions of its exercise being the criminal action[2], thus "it does not cancel the crime itself, but only the state's punitive pretension"[3].

1 O. Breglia Arias and O. Gauna, *Código Penal comentado*, Buenos Aires, 2007, v. 1, 596.

2 J. F. Argibay Molina, L. T. A. Damianovich, J. R. Moras Mom and E. R. Vergara, *Derecho penal. Parte general*, Buenos Aires, 1972, v. 2, 417. Argentina's first Criminal Code, the *Código Tejedor* (1866), referred to it as "the right to accuse".

3 R. A. M. Terán Lomas, *Derecho penal. Parte general*, Buenos Aires, 1980, v. 2, 102. Therefore art. 117, Uruguayan Criminal Code, employs a deficient vocabulary when it declares that "crimes prescribe". What actually prescribes are the actions arising from crimes.

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The Criminal Code lists in article 59[4] a broad statute of limitations and abatement under which *criminal actions expire*, including *a prescription period* established in section 3 of said article. Its effect consists in "the impossibility of starting a criminal action, or of proceeding with the one that has already started"[5].

Article 62 sets up different prescription periods depending on the magnitude and duration of the punishment for the relevant crime[6]. Those terms range between fifteen years for crimes punished with life imprisonment (art. 62.1), and one year for crimes penalized with occupational disqualifications or interdictions (art. 62.4). As a general rule, the maximum possible confinement term for each crime serves as its statutory limitation period (art. 62.2; cc. art. 157, Italian Criminal Code). Legal actions arising from crimes punished solely with a fine expire after two years (art. 62.5). Under article 63 (cc. art. 158, Italian Penal Code), those periods are calculated starting at midnight of the day the crime was perpetrated[7], or the day the crime ceased to be committed in the case of *continuous* or *permanent crimes* (e.g., kidnapping), thus adopting the *criminal occurrence* and excluding the *discovery rule* system: "the prescription period must be calculated starting from the day when the crime was perpetrated, even if its existence remained hidden or ignored"[8]. In the case of crimes by omission, the limitation period is to be counted from the moment when the duty to act has ceased.

If the crime was only attempted, the period is calculated starting from the last inchoate act of the *iter criminis*. While some authors have previously held that the prescription period in these cases is to be determined considering the punishment for the accomplished offence[9], it is now commonly accepted that it shall be reduced according to the general rules of inchoate crimes (art. 44; cc. art. 56, Italian Penal Code). Thus, "the prescription period for inchoate crimes equals the maximum punishment that can be pronounced for the specific crime in this grade of completion"[10].

When applying the aforementioned general provisions to individual crimes, we get for instance that criminal actions in cases of murder (art.

4 Unless specified otherwise, all legal references are to the Argentine Criminal Code.

5 C. Creus, *Síntesis de derecho penal. Parte general*, Santa Fe, 2002, 200.

6 Art. 81 of the Peruvian Criminal Code, with a singular approach, reduces by a half the prescription period for defendants who were under 21 or over 75 years of age at the time of the crime.

7 This replaces, as *lex specialis*, the general rule of art. 77 that "periods of time are to be calculated in accordance with the Civil Code". Thus, art. 6 of the Civil and Commercial Code regulating "how to count legal intervals" is inapplicable for the purposes of statutory limitations. Against this view, Breglia Arias and Gauna, 606.

8 Tucumán Sup. Ct., *La Ley*, 51-137.

9 O. N. Vera Barros, *La prescripción penal en el Código Penal*, Córdoba, 1960, 93.

10 National Crim. Cass. Ct., Sess. 1, *La Ley*, 2005-E-168.

80) expire fifteen years after the crime was carried out; twelve years in cases of armed robbery (art. 166.2); six years for fraud (art. 172); and two years for anti-competitive practices (art. 159).

According to Moreno, the code's main author, the entire system for Argentina's statute of limitations is based upon the rules for extinction of criminal actions (*estinzione dell'azione penale*) contained in Italy's Criminal Code of 1889 (art. 91 of the *Codice Zanardelli*)[11].

Unlike other legal systems (e.g., arts. 157, Italian Penal Code; 85, Colombian Criminal Code), the benefits provided by the statute of limitations cannot be renounced, since its enforcement "is mandatory, and the judge must declare it even if the defendant does not request it"[12]. Furthermore, the prescription must be declared "even against the defendant's will"[13], "because it is not primarily directed to benefit the defendant, but as a matter of public interest"[14]. Although some authors have assessed that "if the defendant considers that a criminal decision might be beneficial to them, they should have the right to require a substantial decision"[15].

2. Rationale behind the statute of limitations

Several reasons have been put forward in order to explain the existence and functioning of statutory limitations.

Moreno explains that "the foundation of any statute of limitations is a human feature: oblivion. Facts produce emotions and consequences that get slowly erased from the people's awareness. (…) The judgement of everything that has ever happened would make social life impossible"[16]. He then lists three specific reasons that give grounds for statutory limitations: lack of social interest in prosecuting someone who has improved his ways by not committing a new crime; lack or insufficient evidence about a crime committed long time ago; in order to upheld legal certainty about a person's rights and liabilities.

Most authors have accepted and replicated those arguments, sometimes adding small variations or placing greater emphasis in one of them. Núñez finds that "the moral effects of crime on society are deleted over time. Social alarm, and its correlative demand for repression, get extinguished. (...) This is a scientific reason, because it consults the

11 R. Moreno, *El Código Penal y sus antecedentes*, Buenos Aires, 1923, v. 3, 166.
12 C. Fontán Balestra, *Tratado de derecho penal. Parte general*, Buenos Aires, 1980, v. 3, 487; J. de la Rúa and A. Tarditti, *Derecho penal. Parte general*, Buenos Aires, 2014, v. 2, 432.
13 Breglia Arias and Gauna, 599.
14 Córdoba Corr. Ct. App., *La Ley*, 20-339; Río Cuarto Crim. Ct. App., *La Ley*, 32-414.
15 O. L. Vignale and M. A. Mandolesi, *La situación del imputado ante la declaración de extinción de la acción penal por prescripción*, in *Doctrina Judicial*, 25/8/2010, 2271.
16 Moreno, 171.

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foundations of punishment, that is, social alarm and the necessity of punishment as a way to bring social order and peace"[17]. Similarly, it has been argued that "if no other crime was committed (since that would interrupt the prescription period), there is no need for special prevention against the author"[18]; and "it is absurd to deprive a person of certain rights to submit them to a resocialization process, when their conduct after the crime, during a certain period proportional to the gravity of the offence, makes it obvious that there is no need for resocialization"[19].

In line with those tenets, the Supreme Court stated that after the prescription period has expired, "the law supposes that the reasons for society's defensive reaction have disappeared because the culprit has modified their conduct and therefore ceased to be dangerous"[20]. Meanwhile, Breglia Arias and Gauna come up with a rather befitting illustration of the concept: if a punishment could still be applied long after the crime was committed, "it might then be applied to a person very different to the one responsible for the crime"[21]. This idea probably derives from Gabriel Tarde's doctrine of "modification of the personal identity".

As a comparative curiosity, it should be noted that art. 103 of the Chilean Criminal Code mitigates the convictions eventually passed against defendants whose trials started after half of the prescription period had already elapsed. This legislative solution probably follows the aforementioned assumption of correction through time.

In a classic study about the subject, it is also -and quite uniquely- argued that the statute of limitations is a "punishment to the authorities' inaction"[22]. This may relate to the difficulties to substantiate evidence in a criminal trial long after the crime was committed, because either witnesses forget what they saw, clues are lost, evidence is hidden or destroyed, or other strains brought over time, which frequently make it impossible to reliably reconstruct the past. Gaetano Filangeri was the first jurist to expose this reason. The Supreme Court has poetically expressed that "for any criminal trial, time elapsing equals to the truth escaping"[23]. And "under those circumstances, the judgement of such crimes might conduct to a miscarriage of justice"[24]. Nevertheless, "new investigative methods such as DNA analysis and the use of luminol have allowed the

17 R. C. Núñez, *Tratado de derecho penal. Parte general*, Córdoba, 1978, v. 2, 169.
18 De la Rúa and Tarditti, 432.
19 E. R. Zaffaroni, *Tratado de derecho penal. Parte general*, Buenos Aires, 1983, v. 5, 26.
20 CSJN, *La Ley*, 13-490. This decision dates from 1938, which explains the positivist terminology. For the purposes of the following quotations, *CSJN* stands for *Corte Suprema de Justicia de la Nación*.
21 Breglia Arias and Gauna, 588.
22 Vera Barros, 44.
23 CSJN, *Fallos*, 327-4815.
24 E. Novoa Monreal, *Curso de derecho penal chileno. Parte general*, Santiago de Chile, 2019, v. 2, 402.

identification of people responsible for heinous crimes. Particularly in the cases of serial killers, these tools have proven their responsibility long after the murders were perpetrated"[25].

The most decisive argument for the existence of a statute of limitations, in our view, is legal certitude. No person can develop a calm life, even improve their ways, while in fear of being prosecuted at any time for a crime committed in the remote past. After a certain period, the law must provide certainty about a person's legal status. The statute of limitations thus provides "a guarantee of freedom and stability of rights"[26]. The vicissitudes of living in constant danger of prosecution for past crimes were masterfully displayed in the character of Jean Valjean in Victor Hugo's *Les Misérables*.

It has been said accordingly that statutory limitations act as a "procedural guarantee related to due process, acting as a limit to the state's powers to prosecute, so that the individual is not left at mercy of a criminal trial for an undefined period of time"[27]. Argentina's Supreme Court seems to share this opinion, as it considered that "the statute of limitations fulfills an important role in the preservation of due process, because otherwise the defendants would have to argue in court about matters of fact already obscured over the course of time, thus minimizing the dangers of state punishment for actions incurred in a distant past"[28].

3. Interruption and tolling of the limitation period

a) Interruption. Art. 67 *in fine* establishes different circumstances that cause the prescription period to be *interrupted*.

The period for the statute of limitations to come into effect for certain crime is interrupted by the commission of a new offence. This renewed criminality must be declared by a claim-preclusive conviction, but the interruption is set at the moment when the second crime was effectuated, and not when it was sentenced; e.g. a crime with a 2-year prescription period was committed; 23 months later, the same person incurs in a different crime, for which they are convicted a year later. The limitation period for the first offence is then interrupted and reset to the time when the second violation was carried out, meaning that it can still be prosecuted more than 3 years after it happened. It is irrelevant if the new crime was completed or merely inchoate, or if the culprit was the author or an accessory to it. The conviction for an offence committed abroad, even if pronounced by a foreign court, has the same effects as a conviction decided by a domestic court, "as long as the same crime is punished by Argentine

25 Breglia Arias Gauna, 628.
26 Argibay Molina *et al.*, 423.
27 De la Rúa and Tarditti, 433.
28 CSJN, *Jurisprudencia Argentina*, 1993-III-267.

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law, and the trial abided by the rules of due process"[29]. Similarly, the Supreme Court has decided that the request for the extradition of a defendant interrupts the prescription period related to the crime committed abroad[30].

In addition to the commission of a new offence, certain prosecution activities interrupt the interval required for the statute of limitations to operate (cc. art. 160, Italian Penal Code). Among others, they are: the first inquiry of the defendant (*declaración indagatoria*); the district attorney's request for the matter to be heard in trial (*requerimiento acusatorio de elevación a juicio*); a conviction, even if it has not yet become *res iudicata* (*sentencia condenatoria, aunque no se encuentre firme*). These proceedings are deemed state acts directed towards the crime's prosecution and punishment, evidencing its will not to leave it untrialed, and therefore interrupting the statute of limitations terms. Procedural activity that is subsequently nullified loses its potential to interrupt the prescription period[31].

When any of those events interrupt the period for the statute of limitations to take effect, the time count shall be restarted "as it had just begun again"[32]; e.g., if a suspect is called to a preliminary hearing fourteen years after a murder, the time elapsed for the statute of limitations to operate resets. After the hearing, another 15 years shall pass before the defendant can claim protection under it.

b) Tolling. There are several reasons that cause the *suspension* of the time count.

The limitation period is paused as long as a *preceding judicial decision* is necessary for the criminal prosecution to start (art. 67, par. 1; cc. art. 159, Italian Penal Code). This encompasses a wide variety of legal proceedings, e.g., the declarations of bankruptcy by a commercial court[33], or of bigamy by a family court[34]; the impeachment by Congress of high-ranking officials such as the President, etc.

Also, when a *public official* has acted as author or accessory to a crime, the period for which that person remains in office shall not be counted towards the statute of limitations[35]. It is irrelevant if the defendant holds

29 Resistencia Fed. Ct. App., *La Ley*, 53-744 and *Jurisprudencia Argentina*, 1948-IV-176. Art. 121 of the Uruguayan Criminal Code adopts this solution, excluding only "political and negligent crimes" committed abroad from being able to interrupt the prescription period for a previous crime.

30 CSJN, *La Ley*, 2005-C-583.

31 Y. Di Blasio, *¿Puede un acto nulo interrumpir la prescripción de la acción penal?*, in *La Ley*, 2019-F-404.

32 S. Soler, *Derecho penal argentino*, Buenos Aires, 1992, v. 2, 542.

33 National Criminal Court of Appeals, Sess. 3, *La Ley*, 125-653.

34 Breglia Arias and Gauna, 625.

35 Other Latin American legislations contain similar provisions that intend to thwart the running out of statutory limitations in relation to public officials; e.g., art. 83.6 of the Colombian Criminal Code, increments the prescription period for such

only one position, or a succession of different offices: the tolling comprehends the entire period in which any public position is held. It is generally accepted that "this provision is a response to the difficulties of discovering and investigating crimes committed by public servants, who often may take advantage of their positions to obstruct criminal proceedings against them"[36]. This affects any accomplices who might have participated in the unlawful act, and the count is likewise suspended (art. 67, par. 2) as long as one of them holds a public position. This is an exception to the general rule that "prescription periods are counted, get interrupted or suspended, separately for each crime and for each participant" (art. 67, last paragraph; contrary to art. 161, Italian Penal Code).

In some instances of crimes against the *constitutional order and democratic life* (arts. 226 and 227bis), the counting period for the statute of limitations is also suspended as long as the *de facto* government is still in place. Nevertheless, this provision is mostly redundant since art. 36, paragraph 3 of the Constitution excludes those crimes from the benefits of any statute of limitations.

For certain *crimes against minors* (e.g., sexual offences), the count is suspended until the victim reaches the legal age of majority (18 years, art. 25 of the Civil and Commercial Code), and inchoates or ratifies the respective criminal procedure (art. 67, par. 4). This provision leaves the statute of limitation's effectiveness (or lack thereof) entirely at the victim's discretion, because "the adults on whom they depend during childhood might not press criminal charges because of public shame, honour, or even because they feel affection for the crime's author"[37]. Whereas if the minor's death was caused as a result of the aforementioned crimes, the time count will start when the victim would have come of age.

Moreover, the limitation period is suspended for as long as the defendant is subjected to *probationary measures* (art. 76ter, par. 2). If the defendant fulfills the probationary obligations, the criminal action expires; in the opposite case, the trial can resume and the probationary period is not considered for purposes of the prescription period.

In any of those cases, the time already elapsed is counted towards the statute of limitations, but gets suspended as long as the cause for it remains. The time count resumes once the cause for the suspension has ended. The cause for the suspension does not reset it, but acts merely as a parenthesis as long as it lasts.

The reasons established by law both for the interruption, and for tolling of the limitation period, are *numerus clausus* and cannot be expanded

crimes by a half.

36 Fed. Crim. Ct. App., Sess. 2, 17/5/2005, quoted by P. Ziffer and H. J. Romero Villanueva (eds.), *Summa penal*, Buenos Aires, 2013, v. 5, 4829.

37 De la Rúa and Tarditti, 445.

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by the courts[38]. Consequently it has been decided, in a case of supervening mental inability, that the trial's suspension founded in the defendant's mental incapacity does not toll the period for the statute of limitations to expire, since it is not listed under art. 67 among the reasons that suspend its terms[39] (contrary to art. 159.3, Italian Penal Code). It is also irrelevant if the defendant is or has been declared a fugitive from justice, unlike other legislations that contain provisions addressing the situation; e.g., art. 100, Chilean Criminal Code, sets the time count in one day for every two real days elapsed for defendants residing abroad, thus duplicating the prescription period.

4. Statute of limitations and similar legal figures

Although the statute of limitations is a topic deeply imbricated into procedural problems, its inclusion within the Criminal Code as a substantial subject makes it important to distinguish it from other substantial issues.

In relation to *justifications* or *legal defenses*, Soler states that "they affect the very existence of the crime. When there is a justification, the subject *was never punishable*; when there is a statute of limitations in action, the subject *might have been* punishable"[40]. A justification (e.g., self-defense, necessity) prevents a crime from taking shape in full, because it excludes the conduct's contradiction with the totality of the legal system (*antigiuridicità*). On the contrary, statutory limitations do not modify the conditions under which a conduct might be considered a crime, but merely impede any criminal proceedings towards its investigation and judgement.

There is also a *prescription period for criminal convictions* which is different to the *prescription period for criminal actions* or statute of limitations *stricto sensu*. After a final conviction has been passed as *res iudicata*, if the penalty is not effectively applied to the convicted party (e.g., a runaway) within a certain period varying between 20 to 2 years according to the crime, the conviction expires (art. 65, cc. arts. 172 and 173, Italian Penal Code). This form of expiration (*prescripción de la pena*) affects the conviction and presupposes that a legal trial had been conducted until a final decision was passed, in contrast to the statute of limitations (*prescripción de la acción*), which sets a time limit for the criminal trial to begin. Thus "if the action expires, it is impossible to reach a conviction; if the conviction expires, that presupposes that a definitive conviction has been pronounced"[41].

38 Rosario Crim. Ct. App., *Juris*, 15-54. Nevertheless, as already noted, the CSJN, *La Ley*, 2013-C-94, decided that an extradition request by a foreign country interrupts the prescription period, although it is not listed among the legal reasons.
39 Fed. Financial-Criminal Ct. Apps., Sess. B, *Doctrina Judicial*, 2003-2-1015,
40 Soler, 537.
41 Fontán Balestra, 475.

Another related figure is the right to trial within reasonable time, which is understood within the right to a fair trial (art. 7.5, American Convention on Human Rights), and more specifically included in art. 8.1 of said Convention: "Every person has the right to a hearing, with due guarantees and within a reasonable time". Meanwhile, art. 14.3.c of the International Covenant on Civil and Political Rights: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality... To be tried without undue delay"[42].

As early as in 1968, Argentina's Supreme Court declared, not the prescription, but the "non-subsistence" of the state's punitive pretension if, once the criminal trial has started, "the defendant's right to a judicial decision to establish their legal situation and liability is not reached within a reasonable time". And that "the constitutional guarantee of due process includes the right of every defendant to obtain a decision that defines their position in respect to the law in the shortest period possible, in order to avoid the situation of uncertainty and restriction to freedom that any criminal process entails"[43].

The right to a speedy trial is still an elastic concept, as currently only the statute of limitations sets a clear time frame. Several courts have decided that trials lasting for too long, even if the prescription period was repeatedly interrupted by procedural activities, do expire in favour of the defendant, though concepts and time frames for this vary considerably from court to court. It has been correctly assessed that there is no *identification*, but *correlation* between both[44]: although the right to a speedy trial and the statute of limitations are certainly related, neighbouring concepts, they differ in that the right to a speedy trial might be infringed without the limitations period running out. By the same token, the

42 These provisions, and the principle of speedy trial not only benefit the defendant, but are also an effective tool regarding the special prevention of punishment: "The more immediately after the commission of a crime a punishment is inflicted, the more just and useful it will be. An immediate punishment is more useful; because the smaller the interval of time between the punishment and the crime, the stronger and more lasting will be the association of the two ideas of crime and punishment; so that they may be considered, one as the cause, and the other as the unavoidable and necessary effect. It is, then, of the greatest importance that the punishment should succeed the crime as immediately as possible, if we intend that, in the rude minds of the multitude, the seducing picture of the advantage arising from the crime should instantly awake the attendant idea of punishment" (C. Beccaria, *De los delitos y de las penas*, Buenos Aires, 1958, 173, § XIX).

43 CSJN, *Fallos*, 272-188. This came only two years after the USSC had set the main precedent about the right to a speedy trial in *United States v. Ewell*. Argentina's Supreme Court has steadily followed that doctrine: *Fallos*, 297-486; 298-50; 298-312; 300-224; 300-1102; 305-1701; 306-1705; 307-1030; 272-188, etc. The principle is also known to the ECHR: *Terranova v. Italy* (1995); *Phocas v. France* (1996); *Süssman v. Germany* (1996).

44 R. A. Grisetti, *Suspensión de la prescripción. Un pronunciamiento hermético. Lo que se dice y lo que no se dice*, *Doctrina Judicial*, 2/12/2009, 3409.

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Supreme Court has decided that "even if the limitations period has not expired, a criminal trial lasting for more than two decades ostensibly violates the defendant's right to be tried within reasonable time"[45]. This is generally due to multiple (and excessive) reasons accepted by the law that cause the prescription period to be interrupted or tolled, a problematic matter we pay particular attention to in the conclusions.

5. Statute of limitations and international crimes

A classic principle in criminal law affirmed that all legal actions related to any crimes are subjected to a prescription period[46], and "although there's no constitutional right to a statute of limitations, it's an adequate and convenient tool of criminal policy which is at the base of our legal system"[47]. However, the rule recognizes at present multiple exceptions, one of them being the so-called international crimes, particularly war crimes and crimes against humanity[48].

Argentina ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity in 1995 by law 25.584, and gave it constitutional status in 2003 by law 25.778. Article I of said convention establishes that "no statutory limitation shall apply" to certain international crimes "irrespective of the date of their commission". This was interpreted by the Supreme Court as allowing retroactive application of the Convention[49].

Furthermore, the crimes of genocide, crimes against humanity, and war crimes as contained in the Rome Statute, as well as certain crimes established in Protocol I to the Geneva Conventions, have been excluded from the benefits of any statute of limitations in 2007 by law 26.200, art. 11.

Even before some of those legal provisions were sanctioned, the Supreme Court had retroactively denied the right to statutory limitations for international crimes, even when its prescriptive period had long run out

45 CSJN, *Fallos*, 327-4815.

46 Núñez, 167. Nevertheless, thinkers as early as Bentham advocated against statutory limitations for certain cases.

47 C. J. Rubianes, *El Código Penal y su interpretación jurisprudencial*, Buenos Aires, 1971, v. 1, 351. In accordance to that, it had been decided that "since art. 62 of the Criminal Code applies to all crimes without distinction, there are no offences that are not susceptible to a statute of limitations", but "statutory limitations do not acknowledge a constitutional source, and must be established by Congress. Judges cannot provide a particular statute of limitations without a legal source": Córdoba Super. Ct., *La Ley*, 32-410.

48 Art. 64.1.5 of the Cuban Criminal Code excludes from statutory limitations not only crimes against humanity, but also any crime punished by death penalty.

49 CSJN, *Fallos*, 330-3248. Although there was a minority opinion within the Supreme Court against this ruling, "because the constitutional guarantee of non-retroactivity holds a rank superior to the one of the treaty, while it is also consistent with the *pro homine* standard".

in favour of the defendants. To that end, the Supreme Court invoked rules of customary international law and *ius cogens*. The precedents *Priebke* (1995, extradition to Italy)[50], and *Arancibia Clavel* (2004, extradition to Chile)[51] constitute domestic leading cases in that regard, which are also in accordance with the standard set by the Inter-American Court of Human Rights in the case *Barrios Altos vs. Peru* (2001), § 41: "This Court considers that all (...) provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law". The IACHR also decided in *Moiwana Community v. Suriname* (2005), § 199, that "the State must adopt legislative and other measures to ensure that (...) any statute of limitations that may presently apply to the Moiwana massacre in domestic law be declared inapplicable".

Meanwhile, the Supreme Court has ruled that internal laws regulating the statute of limitations are not applicable to a process being heard by the IACHR[52].

6. Criminal rules regarding the statute of limitations

a) Complex crimes. The statute of limitations operating in relation to a certain crime does not prevent it from being considered as an element of a different crime[53] (cc. art. 84, Italian Penal Code); e.g., if the legal action arising from a theft (art. 162) is overdue, the defendants can still be tried for being members of a criminal association (art. 210) aimed at committing thefts[54].

b) Criminal action and criminal result. In relation to crimes qualified by its *result*, the prescription period starts when the result has occurred, "even if it happened a long time after the criminal action had taken place"[55]; e.g., if the assaulted person dies from the wounds inflicted by the assailant, the starting point for the prescription period in relation to the homicide is the moment of the death, not when the assault took place (cc. § 78a, German Criminal Code).

c) Private accusation. In cases of criminal trials that proceed exclusively due to private accusation (art. 73), the accusatory activity developed by the offended party interrupts the prescription period just like

50 CSJN, *Fallos*, 318-2148.
51 CSJN, *Fallos*, 327-3312.
52 CSJN, *Doctrina Judicial*, 2005-I-508.
53 Soler, 538.
54 Capital Federal Crim. Ct. App., *La Ley*, 6-575.
55 De la Rúa and Tarditti, 443.

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similar acts of the public prosecutor would do[56].

d) Written defamation. Regarding the crime of *slander* (arts. 109 and 110; cc. 595, Italian Penal Code), "if the insulting libel contains only the month and year of publication, and no other proof about its exact date has been submitted, the prescription period must start on the first day of said month"[57].

e) Stolen goods. If it cannot be established when the stolen goods were effectively removed, the prescription period must be computed starting from the day when a judicial inspection verified their absence[58].

f) Perjury. In cases of perjury by witnesses, experts, or translators (arts. 275; cc. 372 and 373, Italian Penal Code) who lay their testimony, expert opinion, or translation in writing (e.g., art. 143.2, Italian Code of Criminal Procedure), the prescription period does not start when the false statement is written, but when it is presented to the judicial authority[59].

g) Tax evasion. The prescription period for tax crimes starts when the tax declaration was filed, or at midnight of the last possible day for submitting it, if the defendant failed to lodge it in time[60].

h) Corruption-related crimes. The highest criminal court of Argentina has repeatedly decided that the prosecution of corruption-related offences is not subjected to any statute of limitations. For that purpose, the court invoked art. 36 of the Constitution, whose fifth paragraph states that "any person who, procuring personal enrichment, incurs in serious fraudulent offense against the Nation shall also attempt against the democratic system"[61].

i) Concurrence of offences. In cases of *concurrence of offences*, if they are accumulated in a formal or ideal concurrence (art. 54; cc. art. 81, Italian Penal Code), the prescription period for all of them is calculated considering only the crime that is most severely punished. On the other hand, if the concurrence is real or material (art. 55; cc. art. 71 ff., Italian Penal Code), that is, when several crimes were committed by the same person, the penalties for the various transgressions are not simply added as it is the rule for convictions (*theory of cumulation*), but the limitation period is calculated separately for each individual crime (*theory of parallelism*). The latter doctrine had been accepted by most authors and courts[62] before it received legal recognition by law 25.990 (2004), which added the already mentioned last paragraph of art. 67 of the Criminal Code (cc., art. 80, Peruvian Criminal Code). The solution is not without criticism: "it is

56 CSJN, 326-769; 326-3069.
57 Capital Federal Crim. Ct. App., *Fallos*, 5-352.
58 Capital Federal Crim. Ct. App., *La Ley*, 53-183.
59 CSJN, *Fallos*, 196-473.
60 National Financial-Criminal Ct. App., Sess. A, *La Ley*, 2010-E-21.
61 Fed. Crim. Ct. App., Sess. 4, *Centro de Información Judicial*, 29/8/2008; and Sess. 2, *Centro de Información Judicial*, 7/10/2016.
62 CSJN, *Fallos*, 312-1351; 323-3699.

untenable that 20 different thefts committed on the same day have a statute of limitations of two years, when considering that as long as they are materially concurrent, they can be punished with up to 25 years in prison"[63].

j) Alternative, or conjoint punishments. If a crime is sanctioned with alternative (e.g., art. 169 about blackmail, punishes the culprit with prison *or* confinement), or conjoint punishments (e.g., art. 173.1 repressive of trade fraud punishes the fraudster with prison, to which a fine can be added in accordance with art. 22bis), the statute of limitations is to be calculated taking the most severe penalty into account[64].

k) Criminal statute of limitations and administrative law. The criminal provisions regarding the statute of limitations shall not be analogically applied to administrative transgressions and sanctions, because both branches of law respond to different values, ends and specific rules[65].

l) Matter of previous consideration. If it is argued whether the period for the statute of limitations to operate in favour of the defendant has already been fulfilled, the courts must decide on this defense before any other consideration, "because there is no point in examining the defendant's guilt or criminal responsibility, when the crime itself cannot still be prosecuted"[66]. Therefore, "once the statute of limitations runs out, there shall be no criminal judgement or statement related to the commission (or not) of the crime"[67].

m) Civil lawsuit. If the criminal court considers the statute of limitations has run out in favour of the defendant, it shall also not pass judgement on the civil suit or due compensation in relation to the crime[68]. In consequence, for that matter a separate action shall be taken to a civil court.

n) *In dubio pro reo*. If the accusation has provided insufficient evidence about the crime, while the defendant claims they have committed a less severely punished felony, for the statute of limitations' purposes courts must consider the prescription period most beneficial to the defendant[69].

o) Retroactivity of the less severe criminal laws. The principle that the less harsh criminal law must be applied retroactively includes the provisions regarding the statute of limitations[70] (cc. art. 16, Uruguayan Criminal Code, expressly states this principle).

63 Argibay Molina *et al*., 426.
64 Argibay Molina *et al*., 426.
65 CSJN, *Fallos*, 310-795.
66 CSJN, *La Ley*, 1997-A-532.
67 Entre Ríos Super. Ct., *Rep. La Ley*, IX-909-306.
68 Capital Federal Crim. Ct. App., *Jurisprudencia Argentina*, 54-553.
69 Tucumán Sup. Ct., *Jurisprudencia Argentina*, 75-90 and *La Ley*, 23-176.
70 Buenos Aires Sup. Ct., *La Ley Buenos Aires*, 2008-383.

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p) ***Non bis in idem.*** The judicial declaration that the prescription period has expired in relation to a certain fact, prevents the defendant from being trialed for that fact again, even if the prosecution applies a different legal description or qualification to it[71].

7. Some conclusions

After examining the technical aspects of statutory limitations in the Argentine criminal legislation, it might be convenient to formulate some conclusions *de iure condendo*.

With respect to any statute of limitations, there are at least two colliding values: society's interest in punishing past crimes, and the individual right not to be penalized for actions committed in a distant past. In our view, Argentina's law has been progressively choosing the former in a way excessively detrimental to the latter.

This has been explained by referencing the deficiencies of the judicial system[72], the traditional solution for which was the lengthening of the limitations period[73]. More recently, the usual policy consists in adding various causes for the interruption, or tolling of the limitations terms. Thus, the calculation for the statute of limitations to expire is reset, or suspended generally for reasons beyond the defendant's control (with the exception of the commission of a new crime).

Perhaps the most criticized of these measures is the introduction of procedural interruptions, that is, the resetting of the limitations period due to acts of the prosecution. This contravenes the main rationale for the statute of limitations, which is the assumption that the culprit has amended their ways when no other crime was committed for a certain period after the original one.

The procedural interruptions date back from the French *Code d'instruction criminelle* of 1808[74], and has also been implemented in detail in different countries, such as Italy (art. 160 of the *Codice Penale*). The interruption of the limitations period for that reason has been described by many classical and liberal criminologists as an act of *Napoleonic tyranny*. According to Rivarola, who met Francesco Carrara and brought his ideas back to Argentina, the professor of Pisa (although he taught more at the University of Lucca) described it as "irrational and barbaric to give the prosecution the power to interrupt the limitations period with their own

71 National Cass. Ct. Apps., Sess. 4, 19/02/2001, quoted by P. Ziffer and H. J. Romero Villanueva, 4839.

72 Argibay Molina *et al.*, 435.

73 Núñez, 174; Vera Barros, 201; Argibay Molina *et al.*, 425.

74 Art. 637: "S'il a été fait, dans cet intervalle, des actes d'instruction ou de poursuite non suivis de jugement, l'action publique et l'action civile ne se prescriront qu'après dix années révolues, à compter du dernier acte, à l'égard même des personnes qui ne seraient pas impliquées dans cet acte d'instruction ou de poursuite".

acts. This is a novelty of the 19th century invented by the French, unknown to the Romans, and that is founded in a false analogy with the prescription period for civil cases. This cruelty only works for those who want to transform the criminal law into a weapon in the hands of a party controlling the officials in charge of the prosecution"[75]. It probably refers to a dissertation by Carrara in which he asserts that "the prescription period cannot be interrupted by procedural acts"[76]. He illustrates the *thesis* with an example of three different people separately committing the same crime on the very same day. A public official in charge of the prosecution might manipulate the acts of procedure in order to benefit some of them, and harm others. For the public official's friend, the period is not interrupted and thus the statute of limitations expires for them; but regarding the others, he spaces each step of the procedure in order to extend it unlimitedly. These defendants are subject to "a perpetual prescription term" that "resets whenever the prosecutor wishes". Equality before the law is therefore infringed.

Likewise, it has been argued that "the inclusion of a wide variety of procedural acts that interrupt and reset the prescription period can multiply the time needed for it to run out. This legal addition has clearly not taken into consideration the right to a speedy trial, directly damaging all principles of legal certainty and the right to due process"[77].

Thus, it has been proposed that "the real solution would be to equip the judicial system with adequate human and material resources"[78], so as to avoid the limitations time to expire and also to provide a speedy trial to those involved in a criminal case. It has also been suggested that harder penalties should be applied to judges or district attorneys who, due to their negligence, let the prescription period run out in cases under their jurisdiction[79]. Though certainly that road seems more arduous than simply creating increasingly vast causes that interrupt, toll, or in any way prolong the prescription term before it runs out, irrespective of all notions that inform the very existence of statutory limitations: legal certainty, and the resocializing changes that the defendant might have experienced in a prescription period that already might last for many decades for certain crimes. That is a significant portion of a person's life under the possibility of being prosecuted for a past offence.

The dilemma, once again, involves choosing between an easier, merely legislative solution, or advance down the road of a more efficient,

75 R. Rivarola, *Exposición y crítica del Código Penal*, Buenos Aires, 1890, v. 1, 605.

76 F. Carrara, *Interrupción de la prescripción penal*, in *Opúsculos de derecho criminal*, Bogotá, 1974, v. 2, 53, transl. by J. J. Ortega Torres and J. Guerrero.

77 M. Flores, *Extinción de la acción penal por efecto del tiempo*, in *La Ley*, 2009-F-860.

78 Argibay Molina *et al.*, 435.

79 A. Díaz Lacoste, *La prescripción de la acción penal como causal de impericia, negligencia, omisión de deberes y/o mal desempeño en el ejercicio de un cargo jurisdiccional*, in *La Ley*, 2007-C-707.

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competent, and humane criminal justice service.

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