



Contents

Abbreviations and Terminology	xii
Introduction	1
CHAPTER I: General Aspects of Transitional Justice	4
Introduction	4
A. General Aspects of Transitional Justice.....	5
1. The concept of Transitional Justice.....	6
2. Goals of Transitional Justice.....	9
2.1. Ensuring accountability	10
2.2. Serving justice.....	11
2.3. Achieving reconciliation.....	12
3. Justice-Peace Balance	14
3.1. Narrow and broad notions of justice and peace.....	14
3.2. The test of proportionality and the rights of victims.....	18
4. Characteristics of Transitional Justice	20
4.1. Transitional Justice is immersed within the transitional process	20
4.2. Transitional Justice is a specific form of justice	21
4.3. Transitional Justice is primarily focused on the future	22
4.4. Transitional Justice contributes to the prevention of impunity	23
B. Transitional justice mechanisms.....	24
1. Criminal prosecution	24
1.1. National criminal prosecution.....	24
1.2. International criminal prosecution.....	25
1.3. The principle of complementarity	28
a) General aspects	28
b) Admissibility according to Art. 17 Rome Statute.....	29
aa) Sufficient gravity.....	30
bb) Test of complementarity stricto sensu.....	31
i) Inadmissibility before the passing of a sentence	32
ii) Inadmissibility after the passing of a sentence	36
2. Amnesty	37
2.1. Admissibility of amnesties according to international law.....	38
2.2. Blanket and conditional amnesties	42
a) Blanket amnesty	42
b) Conditional Amnesty	43
aa) Negative conditions	44
bb) Positive conditions	44
3. Lustration	45
4. Truth and Reconciliation Commissions	46
4.1. General aspects	46
4.2. Goals of TRC	47
4.3. Competences and restrictions of TRC.....	48
5. Reparation	50
5.1. Concept of reparation	50
5.2. Classification of reparation measures.....	51
a) Judicial and administrative reparations	51
b) Individual and collective reparations	52
aa) Individual dimension	52
i) Restitution.....	52
ii) Compensation	54

iii) Rehabilitation.....	54
bb) Collective dimension	54
i) Satisfaction measures	55
ii) Guarantees of non-repetition.....	56
C. Victim's rights.....	57
1. The notion of victim and his rights	57
2. Victims'rights in particular.....	59
2.1. Right to truth	61
a) Definition.....	61
b) Objectives of the right to truth	63
aa) The truth constitutes a means to avoid the repetition of human rights' violations	64
bb) The truth represents an important reparation instrument for victims	64
cc) The truth is a mechanism to legitimize the political decisions adopted during the transition	64
c) Legal and extra legal truth	65
d) Essentiality of the right to truth in the context of TJ.....	66
2.2. Right of access to justice	67
a) Definition.....	67
b) State duties derived from the right to justice.....	68
aa) The granting of an effective legal means to the victims	68
bb) Obligation to investigate and prosecute	69
cc) Obligation to observe the rules of due process	71
dd) Obligation to punish	71
ee) Obligation to impose proportional punishment.....	72
c) Enforceability of the right to access justice in the context of TJ.....	72
2.3. Right to Reparation	73
a) General aspects	73
b) State duty to repair	74
c) Requirements of reparation	76
d) Enforceability of the right to reparation in the context of TJ	77
3. Interlinking these three rights	78
Preliminary conclusions	79
CHAPTER II: The Chilean Transition.....	84
Introduction	84
A. The years before the coup d'état (1970-1973).....	85
B. The years of the military regime (1973-1990)	87
C. The Chilean transition	93
1. Political setting of the transition.....	93
1.1. The beginning of the Chilean transition.....	93
1.2. The end of the Chilean Transition	94
1.3. Overview of the political measures adopted during the transition	95
1.4. General balance of victims of the dictatorship according to official figures	98
2. Criminal prosecutions during transition.....	99
3. From amnesty to statute of limitations	103
Preliminary conclusions	105
CHAPTER III: The statute of limitations within the framework of transitional justice.....	107
Introduction	107
A. The statute of limitations in national law	107
1. Definition.....	108
2. Historical overview of the statute of limitations	108



3. Characteristics of the statute of limitations.....	111
3.1. Statute of limitations is a legal institution.....	112
3.2. Statute of limitations is an institution of public order.....	112
3.3. Statute of limitations cannot be submitted to any condition.....	112
3.4. Statute of limitations extinguishes the individual's responsibility but not responsibility from the offence	112
4. Foundations of the statute of limitations.....	112
4.1. Non-necessity of punishment.....	113
4.2. State resignation of <i>ius puniendi</i>	115
4.3. Evidentiary difficulties.....	116
4.4. Legal certainty	117
4.5. Multiple foundations.....	118
5. Nature of the statute of limitations	118
6. My stance regarding the foundation and nature of statutory limitation.....	121
B. The Statutory Limitation in international law	123
1. Core crimes.....	123
1.1. Genocide	125
1.2. Crime against humanity	127
1.3. War crimes	128
1.4. Crimes of aggression	129
2. Foundation of the non-applicability of the statute of limitations with regards to core crimes	131
3. The non-applicability of statutory limitations according to the sources of international criminal law	135
3.1. The non-applicability of statutory limitations according to international conventions in matters of human rights.....	136
a) Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity.....	137
b) European Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity	138
c) Inter-American Convention on Forced Disappearance of Persons.....	138
d) Rome Statute	139
3.2. The non-applicability of statutory limitation as a customary law norm.....	140
a) General aspects of customary law	140
aa) State practice	140
bb) Opinio juris	141
b) Prohibition of application of statutory limitations with regards to core crimes as an international customary norm	142
3.3. The non-applicability of statutory limitation as a general principle of law.....	144
a) General aspects of general principles of law	144
aa) General principles of international law	145
bb) General principles of law common to the major legal systems of the world	145
b) Prohibition of application of statutory limitations with regards to core crimes as a general principle of law.....	146
3.4. A State's international duty to follow a prohibition of application of statutory limitation with regards to core crimes	146
C. The International principle of legality and statutory limitation	147
1. International principle of legality	147
1.1. Lex scripta.....	151
1.2. Lex certa	151
1.3. Lex stricta	152
1.4. Lex praevia	153
2. Statutory limitation is not included in the guarantee of the principle of legality	154
3. Principle of non-retroactivity and statute of limitations	155
Preliminary Conclusions.....	157



CHAPTER IV: The statute of limitations in the Chilean legal order.....	160
Introduction	160
A. Statute of limitations in the Chilean Penal Code	160
1. Periods of limitation to the Penal Code	161
2. Commencement of the limitation period of criminal action.....	162
2.1. Criterion of the fulfillment of the action or manifestation of will:.....	162
2.2. Criterion of consummation or of the result:	162
2.3. Criterion of knowledge of the offence	164
3. Interruption of the statutory limitation.....	164
4. Suspension of the statutory limitation	165
5. Nature and foundation of the statute of limitations in Chile.....	166
B. The non-applicability of statutory limitation of core crimes in the Chilean legal order	167
1. Crimes committed during the military regime as core crimes.....	168
2. Reception of international human rights law into Chilean law	172
2.1. International treaties.....	172
2.2. Hierarchy of international treaties on matters of human rights.....	173
2.3. International customary law and general principles of law	174
3. Chilean legislation on matters of the non-applicability of statutory limitation.....	174
3.1. Article 250 Code of Criminal Procedure.....	175
3.2. Article 40 Law N° 20.357	175
4. Stances on matters of statutory limitation.....	175
4.1. Application of statutory limitation	176
a) Crimes are prescribed.....	176
b) Crimes are not prescribed	177
aa) Statute of limitations and permanent crime	177
bb) Statute of limitations and impunity crimes.....	179
4.2. Recognition of the non-applicability of statutory limitation.....	180
a) Argument based on international law	180
aa) International conventions	180
bb) Customary and ius cogens norms.....	182
b) Argument based on national law	183
5. The so-called <i>media prescripción</i> (gradual statutory limitation)	183
6. The non-applicability of statutory limitation and the prohibition of retroactivity.....	186
Preliminary conclusions	188
CHAPTER V: Assessment of the Chilean statute of limitations according to the victims' perspective	190
Introduction	190
A. Statute of limitations and justice	191
B. Statute of limitations and truth	193
C. Statute of limitations and reparation.....	195
Preliminary conclusions	197
CONCLUSION.....	199
Bibliography.....	203
Books and Monographs	203
Articles and Contribution to collected work.....	213
Documents and legislation.....	231
International and foreign documents and legislation	231
Chilean documents and legislation	236



Other Sources.....	238
Table of cases	240
International and foreign case law.....	240
Chilean case law.....	243