

## Summary

Many of the atrocities that took place in various countries around the world occurred before the related countries ratified the conventions on human rights. The Vienna Convention on the Law of Treaties article 28 establishes the non-retroactivity of treaties which provides that treaties do not bind a party in relation to any act or fact which took place before the date of entry into force of the treaty with respect to that party.

However, there are cases in that the events which took place before States ratified the Convention emit effects or violate the rights set forth in the instrument after its ratification. Equally, events that occurred before the human rights bodies exercise jurisdiction over the States and continue after the acceptance of the jurisdiction also raise issues over its jurisdiction *ratione temporis*. Many of the past violations exhibit this characteristic, and they will be one of the focuses of the present thesis.

The non-retroactivity principle does not only apply regarding treaties, but also when it comes to the protections of individuals against injustice. Retroactive criminal law provides penalties for acts which when committed were not prohibited by law and can result in great injustice.

Nevertheless, international criminal law practice has demonstrated that when a clash exists between the necessity of punishing major atrocities which were not regulated by a statute and the respect of the principle of non-retroactivity of law, the latter is sacrificed.

The purpose of this thesis is to examine cases of exceptions to the principle of non-retroactivity of treaties and the exceptions to the principle of *nullum crimen sine lege*, which provides protection to individuals against retroactive laws. Furthermore, it argues that by accepting those exceptions, international human rights bodies and international hybrid courts and criminal courts promote the preservation of the memory of the victims of past violations.

**Kanagawa University  
Graduate School of Law**

**Doctoral Thesis**

**PAST VIOLATIONS AND THE PRINCIPLE OF NON-  
RETROACTIVITY**

**THE PRACTICE IN INTERNATIONAL HUMAN RIGHTS BODIES  
AND INTERNATIONAL CRIMINAL TRIBUNALS**

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## List of Abbreviations

ACHR	American Convention of Human Rights
Appl.no.	Application number
Art.	Article
CEDAW	Committee on the Elimination of Discrimination against Women
Comm.	Communication
ECHR	European Convention on Human Rights and Fundamental Freedoms
EComHR	European Commission Human Rights
ECtHR	European Court of Human Rights
ECCC	Extraordinary Chambers in the Courts of Cambodia
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTFY	International Criminal Tribunal for the Former Yugoslavia
ICJ	International Court of Justice
NCSL	<i>Nullum Crimen Sine Lege</i>
SCSL	Special Court for Sierra Leone
para.	Paragraph
p.	page
pp.	pages
UN	United Nations
UNSC	United Nations Security Council
WWII	World War II

## Preface and Acknowledgements

The idea of this thesis first crossed my mind when JALANA (Japan Association of Lawyers Against Nuclear Arms), through the introduction by Professor Kohki Abe, requested a research on ways to overcome the jurisdiction *ratione temporis* and *ratione loci* for a possible petition to be presented before the Inter-American Commission on Human Rights. The petition, independently of being successful or not, would draw attention to the Hiroshima and Nagasaki victims and the continuous physical disabilities that are still a source of suffering for many people.

The idea at first seemed impracticable since the bombings took place in Hiroshima on August 6, 1945 and in Nagasaki on August 9, 1945 and the Inter-American Commission was established in 1959. It clearly would lack competence *ratione temporis* to examine the facts which occurred before its own existence. However, after furthering my studies I found that the fact of the institution not existing at the time the facts took place might not be an obstacle to prosecution of those responsible in the case of international criminal courts.

In addition, the problem of the jurisdiction *ratione temporis* is not restricted to the establishment of tribunals and institutions after the facts took place. The main problem is when there is no law that provides that certain acts are crimes. In order to overcome this fact, international tribunals have created the concept of continuing violations of human rights. The claim that could be used for a possible petition would be that victims of Hiroshima and Nagasaki are still suffering from residual effects of the atomic bombings. Can physical residual effects be considered as continuing violations? That was the first question that motivated this research.

This thesis could not be written without the help and support of many people. First of all, a special word of thanks has to be made to Prof. Kohki Abe from Kanagawa University who oriented me and whose comments and contributions were indispensable to make this thesis possible. I also would like to thank Mr. Ken-ichi Ohkubo, Secretary general of JALANA (Japan Association of Lawyers against Nuclear Arms) and Mr. Toshinori Yamada, lecturer in international law at Meiji University, for their insightful comments during the early stage of this research. Moreover, reference should be made to Dr. Miguel Esteban, from Waseda University and to Ms. Florence Seow, my dear colleague from Kanagawa University, who kindly revised the text of this thesis. Dr. Esteban, Dr. Masako Inoue, Prof. Koshi Yamazaki, Dr. Takayoshi Kumon and Prof. Yasuo Saito have also played an important role in the development of this research by commenting on the text. I also greatly appreciate the encouragement of Dr. Miho Omi, who has supported me many times when I had doubts about my research. Finally, I am indebted to my parents and closest friends, whose friendship and support means a lot to me.

# Introduction

## 1. Non- retroactivity principle in international treaties

*“Forgetfulness can simply not be imposed on anyone. Legal or institutionalized means of imposing oblivion such as amnesty or prescription utilitarian as they may seem to be appear rather as obstructions of justice (summum jus, summa injuria). The search for investigation of past violations of human rights render the past an eternal present, so as to allow the survivors of the violations to earn their future. It has been contended that the unmasking of the atrocities of the past and of the present corresponds to a true “ethics of the memory”.<sup>1</sup>*

Many of the atrocities in various countries occurred before the related countries ratified the conventions on human rights. The Vienna Convention on the Law of Treaties article 28 establishes the non-retroactivity of treaties:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

However, there are cases in that the events which took place before States ratified the Convention emit effects or violate the rights set forth in the instrument after its ratification. Equally, events that occurred before the human rights bodies exercise jurisdiction over the States and continue after the acceptance of the jurisdiction also raise issues over jurisdiction *ratione temporis*. Many of the past violations have this characteristic.

In these cases, international bodies have been applying the concept of “continuous violation”. In the Inter-American human rights bodies, Inter-American Commission on Human Rights and Inter-American Court on Human Rights, rather than examining the violations that took place before the ratification of the American Convention, these bodies have been analyzed the events which lingered after the ratification, the effects that continued after or whether the states took measures related to past crimes. Therefore, the “continuing violation” does not raise the issue only about the past, but centres on the present lack of investigation, prosecution and punishment of past violations, the lack of

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<sup>1</sup> Individual opinion of Judge Antonio Cancado Trindade. IACHR, *Moiwana v. Surinam*, p.84.



judicial protection and fair trial. This concept is interpreted in the same way Saint Agostine stated that there is only the present and the past has value because and according to the present. The past does not exist isolated, it exists because of the present and it is interpreted according to the present values, in the same way as the future. There are, therefore, the present's past, the present and present's future. The international courts will examine the past violations under the scrutiny of current values enacted by international treaties.

In the American continent massacres and forced disappearances occurred under military dictatorships. This type of crime could be brought to the American Commission or American Court of Human Rights after the democratization of these countries. At the beginning, the American Court of Human Rights would base its decisions on other regional human rights bodies' jurisprudence. However later other human rights bodies, such as European Court on Human Rights, has grounded its decisions on the American jurisprudence, working in the favor of a progressive interpretation which would emphasize the protection of individuals rather than State voluntarism.

It is important to note that, actually, the continuing violations do not deal exclusively with violations that took place before the ratification of the human rights treaties, it can also start after the ratification and when it continues with time. Therefore, the existence of a continuing violation is not necessarily connected to the problem of an exception to the principle of non-retroactivity.

The European Court of Human Rights, the Human Rights bodies of United Nations, such as the Human Rights Committee or Committee on the Elimination of Discrimination against Women, also have examined many cases of continuing violations. Cases that bring issues over past violations have often occurred in ex-communist countries, related to discrimination in the current laws relating to the recovery of expropriated properties by communist governments, permanent restriction of rights, such as political rights or permanent occupation of territories, among others.

There are three patterns of continuing violations: the first one is when the causal act continues, the second one is when the effects of the causal act continue and the third one is when the inaction continues. An example of the first type of continuing violation are forced disappearances and arbitrary arrest. The second case is exemplified by laws that were enacted under a military dictatorship, such as amnesty laws that still emit effects after the ratification of the Convention. The third type of continuing violations is related to those that do not raise issues regarding past violations, but the present lack of investigation, prosecution and punishment of the responsible for the violations still constitutes a continuing violation, i.e., the violations of the right to judicial protection and right to a fair trial.

The exceptions to the principle of non-retroactivity of treaties interpreted in international human rights bodies have as the objective to provide proper remedies for the victims that otherwise would not receive any judicial protection. In certain countries, in many cases, rather than recognizing the past violations the government tries to operate a collective

forgetting of the past which is not always flattering for their history. One clear example is the amnesty law that was enacted in Chile prior to the entrance into force of the Convention, but whose effects were considered a breach by the American Convention on Human Rights.

The duty to prosecute and the problem of time relating to past atrocities also have a different dimension. Courts seek to prosecute determined individuals whose role was essential in grave violations, such as genocide and crimes against humanity. In this case, a question can be raised regarding the principle of legality. When the principle of non-retroactivity operates to protect individuals and not States the principle of *nullum crimen sine lege* operates.

## **2. Principle of non-retroactivity in international criminal law- *nullum crimen sine lege***

The principle of legality in criminal law, the principle of *nullum crimen sine lege*, was introduced and generally accepted on the European continent after the 1789 French Declaration on the Rights of Man, the 1791 French Penal Code and the 1871 German Criminal Code<sup>2</sup>.

However, the *nullum crimen sine lege* was deeply discussed for the first time during the Nuremberg Tribunal. In this occasion, the creation of crimes of aggression *post facto* raised issues regarding the creation of a retroactive law. The defense claimed that there was no specific law established by treaty or otherwise, making it a crime and imposing responsibility on persons, as distinguished from the States for whom they act, for starting wars of aggression. The judgment was that:

It was urged on behalf of the defendants that a fundamental principle of all law- international and domestic- is that there can be no punishment of crime without pre-existing law. *Nullum crimen sine lege, nulla poena sine lege*. It was submitted that *ex post facto* punishment is abhorrent to the law of all civilized nations; that no sovereign power had made aggressive war a crime at the time the alleged criminal acts were committed; that no statute had defined aggressive war, that no penalty had been fixed for its commission and no court had been created to try and punish offenders.

In the first place, it is to be observed that the *maxim nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue for in such circumstances the attacker must know that he

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<sup>2</sup> Ticehurst, Rupert, 'Retroactive criminal law' (1998-1999)9, *King's College Law Journal*, pp.88-108,p.89

is doing wrong. And so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.<sup>3</sup>

Therefore, the principle would not surpass the sovereignty of States. Furthermore, the defense had also claimed that there was no individual responsibility for an act of State at that time. The Tribunal argued that:

It was submitted that international law is concerned with the actions of sovereign states, and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon states has long been recognized. In the recent case of *Ex Parte Quirin* (1942, 317 U.S.1...), before the Supreme Court of the United States, persons were charged during the war with landing in United States for purposes of spying and sabotage. The late Chief Justice Stone, speaking for the Court said: "From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals ...

Many other authorities could be cited, but enough has been said to show that individuals can be punished for violations of international law. **Crimes against international law are committed by men**, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced!<sup>4</sup>(emphasis added)

This sums up the thinking that individuals also should be brought to international courts to receive punishment.

The development of the principle of *nullum crimen sine lege* in international criminal law did develop steadily in the time following the Nuremberg and Tokyo Tribunals. In fact, many years passed until another international tribunal that would deal with war crimes was established.

Currently, the *nullum crimen sine lege* principle is highly valued in many human rights instruments<sup>5</sup>, being recognized as a human rights instrument. It is an essential element of the rule of law<sup>6</sup>. Its development has continued over the years, especially after the

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<sup>3</sup> Mignone, Frederick, 'After Nuremberg, Tokyo', (1947)25 *Texas Law Review*, pp.475-490, p.479

<sup>4</sup> *Ibid*, p.481.

<sup>5</sup> Universal Declaration of Human Rights article 11, International Covenant on civil and political rights article 15, United Nations Convention on the Rights of the Child, art.40, European Convention for the protection of human rights and fundamental freedoms, art.7.

<sup>6</sup> ECtHR, *Kafkaris v. Cyprus*, Judgement 12 February 2008 (Appl.No.21906/04), para.137.

International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda, Mixed Tribunal for Rwanda, Special Court for Sierra Leone and Extraordinary Chambers in the Courts of Cambodia. The development of the principle can also be observed in the International Criminal Court, which was established permanently, and does not allow retroactive application of its statute unless the State makes a declaration accepting the retroactive jurisdiction of the Court<sup>7</sup>.

### 3. Time and law

Decisions ruled by international criminal courts use current standards to examine past violations. The problem of time and law is directly related to the principle of non-retroactivity and legality since it has as an objective the temporal limitation for prosecution of crimes. It means that when a long time has passed since the crimes took place the social interest for punishment disappears. The production of evidence also becomes more difficult after many years pass since the crime takes place. Despite all these problems international human rights bodies and international criminal courts have insisted in analyzing past violations.

By carrying out an examination of past violations international human rights bodies and courts preserve memories and also make history. Cases that would not be examined in domestic courts when brought before international bodies produce memories for the victims. Nora distinguishes memory from history. The former is something in permanent evolution, open to the dialect of remembering and forgetting, vulnerable to manipulation and appropriation. The latter would be the constant and problematic reconstruction of what is not longer. It is the representation of the past. In addition, it is a secular and intellectual production which calls for analysis and criticism. The same thing does not happen with memory, which is collective by nature. Memory has a multiple nature, each group has its own memories. Victims of human rights violations are in the counter-narratives which are subject to forgetting<sup>8</sup> since the governments of their countries refuse to acknowledge the atrocities committed against them.

Human rights tribunals are aware of that and in their decisions have been ordering the construction of memorials and the establishment of commemorative dates to remember those who were murdered in atrocities committed by the governments. Would the international courts be constructing history or memory? If they were not influencing States to remember those who were about to be forgotten it could be stated that they were merely producing a collective memory of those who were victims of atrocities and of their own human rights tribunals. Nevertheless, those tribunals are seeking to influence the historical approach of certain events. They are seeking a government's official

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<sup>7</sup> ICC Statute art.21(3)

<sup>8</sup> Nora, Pierre, 'Between Memory and History: *Les Lieux de Memoire*' (1989)26, *Representations*, pp.7-24, pp.8-9.

recognition that certain facts actually took place. They produce memory for the group of victims, but also promote the production of history in the related States.

Another issue is the moral dilemma of choosing to breach the *nullum crimen sine lege* principle to punish atrocious conducts. It was argued that this could be characterized as a “dirty hands” concept, where to achieve the best ends it is necessary to use the wrong means. This concept, when applied in human rights violations, will be a subject of discussion in the present thesis.

#### **4. Plan of the thesis**

The objective of this thesis is to analyze in what situations the exception to the principle of non-retroactivity for the protection of States and individuals is recognized by international human rights bodies, international hybrid courts and in the International Criminal Court. I argue that these exceptions are necessary to bring accountability to past atrocities, and that this promotes the preservation of the memory of the victims.

The thesis is divided in three parts, and will analyze exceptions to the principle of non-retroactivity of treaties for the protection of States, the exceptions to the principle of *nullum crimen sine lege* for the protection of individuals and the examination of the recognition of the exceptions to these principles.

The first part analyzes the decisions of the Inter-American human rights bodies, European Court of Human Rights and Human Rights Committee. It aims to identify in what violations of rights the continuing violation concept has been applied. In each regional body there are different backgrounds to the cases presented. As an example, we can see numerous cases in the Inter-American Courts of continuing violations due to the lack of remedies of past crimes. Therefore, problems of the judicial bodies are prominent. In the case of the European Court of Human Rights, cases relating to the permanent restraint of rights or failure to pay proper compensation for expropriation are well discussed. The deprivation of property rights is also a recurrent issue in the Human Rights Committee. This body, however, is different from the previous two. It is a quasi-judicial body, and its decisions are not legally binding.

The second part of the research deals with the exceptions to the principle of non-retroactivity used to protect individuals, the *nullum crimen sine lege* principle. The present principle has currently status of international customary law. Nevertheless, originally it was not respected by the Nuremberg and Tokyo Tribunals. At that time there were no crimes against humanity and crimes of aggression. In spite of that, judges of both tribunals applied law *post facto*, meaning that even those crimes which did not exist at the time they occurred were considered as such in the tribunals’ decision. We are going to analyze the Nuremberg and Tokyo tribunals, the International Criminal Tribunal for former Yugoslavia, mixed tribunals, such as East Timor, International Criminal Tribunal for Rwanda, Extraordinary Chambers for Cambodia Special Tribunal for Iraq.

Furthermore, we will also examine cases with international repercussion such as those that bring universal jurisdiction issues. The jurisprudence of Spanish, French and Canadian courts, relating to exceptions to the principle, will also be analyzed.

The third part of the thesis aims to examine the problem of retroactivity in law and State crimes. Furthermore, it also examines the exception to the principle of *nullum crimen sine lege*, the differences between the principle of non-retroactivity when used to protect states and individuals. It also analyzes the specificity of human rights treaties and the relation between its characteristics and the interpretation of the human rights bodies when they accept exceptions to the non-retroactivity principle. When they apply the exception a dilemma appears regarding the necessity to apply it versus the loss incurred by the prosecution and punishment. Memory and history are also produced by the international human rights bodies when they recognize that certain facts occurred. We are going to examine the *nullum crime sine lege* and the development of international criminal law as well as the continuing violations and its rule in the evolution of the human rights.

# PART I

## THE PRINCIPLE OF NON-RETROACTIVITY RELATING TO STATES

### CHAPTER 1

#### 1. Preliminary Issues

##### 1.1. Introduction

When it comes to objections to reparations for historical injustices, the main reason given is the principle of non-retroactivity. Limitations on statutes were created to ensure that claims are connected in time and space to an act which is considered a crime.<sup>9</sup> Many of the crimes committed during past military regimes remain unpunished as many states have enacted amnesty laws as a way to strengthen democratic institutions and avoid provoking the military junta of their countries. It was believed that to look to the future was more important than punishing past acts of a government which no longer exists. Many times these newly-democratised countries justified the Amnesty Laws claiming that to prosecute those responsible for crimes in the regime would destabilize their recently born democracy.

In countries where the military have retained a certain extent of power this could cause confrontations with the civilian government, threatening democratic institutions. Given that many governments have decided not to prosecute the individuals responsible for past violations, some analysts claim that the international community should not press these governments until the transition process is completed.<sup>10</sup> Policy dealing with past human

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<sup>9</sup> Shelton, Dinah, 'The world atonement reparations for historical injustices', (2004)1-2 *Miskolc Journal of International Law*, pp.259-289, p.8.

<sup>10</sup> Orentlicher, Diane. 1991, Settling accounts: the duty to prosecute human rights violations of a prior regime. *Yale Law Journal*, New Haven, v.100, no.8, p. Orentlicher, Diane, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991)100-8 *Yale Law Journal*, pp.2537-2615. p.2541

rights violations should thus have the objective of preventing the recurrence of such abuses and repairing the damage caused by the violations<sup>11</sup>.

In order to deal with violations which have occurred under the reign of dictatorships, the Inter-American Commission (hereinafter, 'IACHR') has developed fact-finding, which are essential activities to the realization of restorative justice. These processes include searching for facts relating to what happened to those who disappeared, whether or not the victims are still alive, or where the remains of the victims are buried. Furthermore, IACHR has dealt with petitions relating to human rights violations of the American Declaration on Human Rights and the American Convention on Human Rights (hereinafter 'ACHR'). Its decisions are based mainly on inter-American instruments and principles of international law. In its activities, the IACHR has examined cases under the procedural limitations of *ratione materiae*, *ratione temporis* and *ratione loci*.

Tolerant interpretations regarding limitations of *ratione loci*, in particular for the extraterritorial application of the American Declaration on Human Rights and *ratione temporis* have raised many questions. However, this research will depart from the extraterritorial application discussion. International and national legal systems often impose statutes of limitations to procedures for determining guilt or innocence (at least in criminal cases). Whenever there is doubt about who is responsible for a certain wrongdoing, it is reasonable to demand that the accusers supply proof. However, in cases where claims about human rights violations are made, there is rarely any doubt about the nature of the crime and the identity of the guilty party. This often is not part of the dispute.<sup>12</sup> In the context of human rights violations examined by the Inter-American Human Rights organs, the non-retroactivity principle would simply ensure that states are not punished for their deeds for the sake of the stability of the country. Nevertheless, the IACHR and Inter-American Court on Human Rights (hereinafter 'IACtHR') have taken a relatively tolerant stance to finding exceptions to the non-retroactivity principle when compared to Human Rights Committee, where the interpretation of the non-retroactivity principle is stricter.

To what extent can the IACHR and the IACtHR rule that it is necessary to look into the past in order to prevent the reoccurrence of human rights violations? And how much time is necessary to leave the past alone? It is clear that denying past horrors is immoral, but to make apologies for the past to whole groups of people might be preposterous at times. One example is that of the Florida-based Lutheran Orient Mission Society, who went on a Reconciliation Walk through the Middle East, tracing the path of the Crusaders from

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<sup>11</sup> Zalaquett, Jose, 1995, Confronting human rights violations committed by former governments: principles applicable and political constraints. In KRITZ, N.J. *Transitional Justice*, Washington, D.C: United States Institute of Peace Press Zalaquett, Jose, 'Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints' in Neil J. Kritz (ed), *Transitional Justice* (1995) pp.3-31,p.5.

<sup>12</sup> Thompson, Janna. *Taking responsibility for the past*. Malden: Polity, 2002 Thompson, Janna, *Taking Responsibility for the Past- Reparation and Historical Justice* (2002),p.78



Cologne to Jerusalem. The 400 apology hikers ended up praying in Jerusalem to mark the 900 years since the Crusaders slaughtered Jews, Muslims and Eastern Rite Christians<sup>13</sup>. It might be too late for apologies in this case. However, in the context of Latin America, the wounds of past violations that are still raw and in many cases the people who have been directly affected might still be alive.

The IACHR when adjudicates facts which took place before the ratification of the American Convention on Human Rights (ACHR) have, on several occasions based their decisions on violations of the American Declaration on Human Rights which was adopted in 1948, many years before the adoption of the ACHR which occurred in 1969. The IACtHR has the [power to examine claims only in countries which have accepted its jurisdiction.<sup>14</sup> The IACtHR has refrained from examining violations which took place before the date on which State accepted its jurisdiction.

The IACtHR has ordered many different kinds of reparations, as is demonstrated by the judgment of *Moiwana Community v. Suriname*, where the delimitation, demarcation and return of land to the victims and their families was a form of reparation. In order to examine this case the Court had to accept an exception to *ratione temporis*, as Suriname had not ratified the ACHR at the time of the facts described in the petition occurred.

The Inter- American Commission and Court have applied the concept of ‘continuing violations’ in order to examine violations which started before the ratification of the Convention by the state-party. Before examining the application of the ‘continuing violations’ concept it is necessary to understand the non- retroactivity principle and the special interpretation of this principle in human rights treaties, which will help us to understand the application of exceptions to statutes of limitation.

## 1.2. Non- retroactivity principle in international law

The concept of non-retroactivity, which establishes that “*unless a different mention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party*”(Vienna Convention on the Law of the Treaties, art.28) is well-established in international law.

There are cases where an act or inaction which occurred before a certain state ratified a convention still has effects after the state ratifies the convention in question. In the same way, a fact which occurred before a certain state accepts the jurisdiction of the

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<sup>13</sup> Moon, Claire, ‘States of acknowledgement: the politics of memory, apology, and therapy’ in Crime, Downes, David *et al* (eds). *Crime, Social Control and Human Rights-from moral panics to states of denial. Essays in honour of Stanley Cohen.* (2007) pp.314-329, p.248.

<sup>14</sup> ACHR, art.62.

international organ to which the petition is presented can still continue to have effects. Many human rights violations fit into this pattern. In both cases, international organizations have referred to these violations as “continuing violations”, when an act is committed in a certain moment in the past, but continues due to the consequences of the original act.

The continuous violation principle has been applied by the Inter-American Human Rights system, the Human Rights Committee and the European Human Rights system in order to hold perpetrators responsible for injustices against victims that otherwise would remain without remedy. An example of the application of the continuing violation principle in the Human Rights Committee and Inter- American Court and Commission on Human Rights is in cases of enforced disappearance.

The issue of retroactivity has been discussed mainly in societies which are undergoing political transition, such as new democratic governments in Latin America, regarding post- war reparations, to seek acknowledgement on colonial and slavery policies and to recognize the violations committed against indigenous people. It was also a crucial issue in the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance which was held in Durban in 2001.

The present principle has its roots in the principle that there is no crime or punishment except in accordance with law. This principle was firstly formulated in Article 8 of the French Declaration of the Rights of Man of 1789 and remains in the French penal code. In 1813 it became part of the Bavarian Code and was set forth in the Weimar Constitution<sup>15</sup>. The European Convention on Human Rights states in its article 7 that no one shall be held guilty of a penal offence made retroactively, and article 15 of the International Covenant on Civil and Political Rights (hereinafter ‘ICCPR’) provides that

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall 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.

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<sup>15</sup> Popple, James.1989.‘ The right to protection from retroactive criminal law.’(1989) 13-4, Criminal Law Journal Canberra. p.3 Available at SSRN <<http://ssrn.com/abstract=1335644>> at Last access on 15 Jun. 2009.

However, there is a crucial difference between the non- retroactivity principle stated in the above-mentioned human rights instruments and the principle which governs the behavior of states. In the former case, the individual is protected from arbitrary actions of their own government while in the latter case, the restrictive application of the principle might operate in favor of the impunity of atrocities committed by the state in question.

### 1.3. Human Rights Treaties

The interpretation of the exceptions to the principle of non- retroactivity in human rights bodies might not be the same as in international bodies where the interests between states are prevalent. Before analyzing how the interpretation of human rights bodies are different from other international bodies is necessary to examine the features of human rights treaties.

The development of human rights law had an impact on international law, which focuses on the rights of individuals in states. Before that the development of human rights law, international law generally regulated the rights and obligations between states. However, not only human rights treaties protect the interest of individuals. For example, the ILO Conventions on labour rights, the 'humanitarian treaties'(the Geneva Conventions and Protocols and the Hague Regulations), and treaties related to diplomatic or consular protection also protect the rights of individuals<sup>16</sup>.

After the Second World War, the international community tended to deal with the promotion of common welfare by restricting the sovereign power of individual states, in an attempt to improve the position of individuals, and establishing rules of humanitarian interest.<sup>17</sup>

The objective of strengthening the position of individuals has led to the establishment of international tribunals which interpret instruments that protect individuals. This approach has weakened the principle of state sovereignty in that a state may now interfere in the internal affairs of another state. Therefore, states no longer have the sovereignty to act with respect to their own nationals without limits: .

Crawford points out that the limitation of the state sovereignty demonstrated by the direct interest of the international society by referring to Allot,

...[t]he nature of a state's so-called sovereignty over its land territory has profoundly changed ... International society, through international law and

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<sup>16</sup> Crave, Matthew, 'Legal Differentiation and the concept of the human rights treaty in international law' (2000) 11-3, European Journal of International Law, EJIL(2000), vol.11, no.3, pp.489-519, p.498.

<sup>17</sup> Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read, Hsu Mo relating to *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide to the Advisory Opinion*, ICJ, 28 May 1951, .p.35, available at <<http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=90&case=12&code=ppcg&p3=4>> at 15 January 2010.

through non legal means, now has a direct interest in all that happens within any state system anywhere (controlled especially through the concepts of human rights and the rule of law and, perhaps now or soon, democracy(...))<sup>18</sup>.

Human rights treaties have special features in relation to other international law treaties, such as the fact they do not work on mutual interests, as is the case in contract law, but they impose *erga omnes* obligations, the duty to report on their implementation, and the duty to enact domestic laws, among other characteristics. The fact that it is a type of treaty that has established individuals as subjects of international law gives the interpretation of human rights treaties some peculiarities that might influence the interpretation of the principle of non- retroactivity.<sup>19</sup> In human rights treaties, parties do not have advantages or disadvantages, but a universal interest, not serving benefits of private interests but for that of the general interest; they impose obligations upon states without granting them rights: other treaties establish duties and rights upon their parties.<sup>20</sup> The rule of interpretation of treaties is stated in Article 31(1) of the Vienna Convention, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Therefore, courts of human rights in applying the law to the facts before them will keep in mind the purpose of the treaty.

Article 28 of the Vienna Convention on the Law of the Treaties, establishes the principle of non-retroactivity. It stipulates that, “Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party”. It is a norm which depends on the intention of the parties, not being a norm of *ius cogens*.<sup>21</sup> Thus, parties can decide that the treaty will be applied retroactively.<sup>22</sup> Thus, the challenge to the courts, is to maintain a balance between the objective of the treaty, the protection of the rights of the individuals and the procedural principle of non-retroactivity, which is not absolute.

This does not mean that the courts apply retroactive justice to situations that ceased to exist before the ratification of treaties. In *Blake’s v. Guatemala*, the State claimed that the

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<sup>18</sup> Allott cited by James Crawford in *The creation of States in International Law* (2006) Oxford, second edition, p.149.

<sup>19</sup> Buyse, Antoine, ‘A lifeline in time- non- retroactivity and continuing violations under the ECHR’(2006)75 *Nordic Journal of international law*, pp.63-88, p.63.

<sup>20</sup> Dissenting Opinion of Judge Alvarez relating the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide to the Advisory Opinion*, ICJ, the advisory opinion of 28 May 1951.

<sup>21</sup> Buyse, Antoine, ‘A lifeline in time- non- retroactivity and continuing violations under the ECHR’(2006)75 *Nordic Journal of international law*, pp.63-68 “ The lifeline in time- Non- retroactive and continuing violations under the ECHR” in *Nordic Journal of International Law*, 4, 2006, p.65.

<sup>22</sup> Sinclair apud Buyse in ‘A lifeline in time- non- retroactivity and continuing violations under the ECHR’(2006)75 *Nordic Journal of international law*“ The lifeline in time- Non- retroactive and continuing violations under the ECHR” in *Nordic Journal of International Law*, 4, 2006, p.65

Inter- American Court did not have competence *ratione temporis* over the case if the victim died before the State accepted the competence of the Court. However, as the relatives in this case had not been informed about the whereabouts of the victim until after the date Guatemala accepted the Court's jurisdiction the IACtHR decided that had jurisdiction on the consequences of his murder, the concealment of the victim's arrest. Human rights treaties have special treatment, such as those concerning the suspension of the operation of treaties: Article 60, para.5 of the same convention establishes that "provisions relating to the protection of the human person contained in treaties of a humanitarian character" cannot be suspended as a counter-measure against a material treaty breach by another party, taking into account the special features of human rights treaties.

In the Advisory Opinion on Namibia,<sup>23</sup> the International Court of Justice (hereinafter ICJ) emphasized the special character of the fundamental human and humanitarian rights and the non-reciprocal character of humanitarian treaties:

With respect to existing bilateral treaties, member States must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active inter-governmental co-operation. With respect to multilateral treaties, however, the same rule cannot be applied to certain general conventions such as those of humanitarian character, the non- performance of which may adversely affect the people of Namibia.

In addition, the ICJ decided the Case concerning the application of the Genocide convention between Bosnia- Herzegovina and Yugoslavia. In this case, Bosnia contended that it had become party to the Genocide Convention by "automatic succession" at the date of its accession to independence. The Court referred to the treatment of its *ratione temporis* jurisdiction:

Yugoslavia, basing its contention on the principle of the non- retroactivity of legal acts, has indeed asserted as a subsidiary argument that, even though the Court might have jurisdiction on the basis of the Convention, it could only deal with events subsequent to the different dates on which the Convention might have become applicable as between the parties.

In this regard, the Court will confine itself to the observation that Genocide Convention- and in particular Article IX- does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction *ratione temporis*, nor did the Parties themselves make any reservation to that end, either to the Convention or on the occasion of the signature of the Dayton- Paris Agreement, The Court thus finds that it has

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<sup>23</sup> ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Advisory Opinion of 21 June 1971)* Rep.,p.16

jurisdiction in this case to give effects to the Genocide Convention with regard to the relevant facts which have occurred since the beginning of the conflict which took place in Bosnia- Herzegovina. This finding is, moreover, in accordance with the object and purpose of the Convention as defined by the Court in 1951 and referred above.<sup>24</sup>

Prior to 1951, Judges Guerrero, McNair, Read, and Hsu Mo said in their Dissenting opinion on the Advisory Opinion on Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, handed down in 1951, that, "it was (an) undeniable fact that the tendency of all international activities in recent times has been towards the promotion of the common welfare of the international community with a corresponding restriction of the sovereign power of individual states". And that "[I]n conclusion, the enormity of the crime of genocide can hardly be exaggerated and any treaty for its repression deserves the most generous interpretation".<sup>25</sup> They stated that as genocide is related to the shocking denial of existence of human groups, the principles of the Convention on Genocide are recognized by civilized nations as binding to States, even if they are not written in a convention.<sup>26</sup>

The European Court has emphasized the special feature of the human rights treaties and its relationship to the wider framework of international law.<sup>27</sup> In the *Loizidou* case it stated that the Convention had a special character as a human rights treaty and that any relevant rules of international law should be taken into account.<sup>28</sup>

The IACtHR has explained this special feature of the human rights instruments with clarity, emphasizing that:

Modern human rights treaties in general and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting states. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the state of their nationality and all other contracting states. In concluding these human rights treaties, the states can be deemed to submit themselves to a legal order within which they, for the common good,

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<sup>24</sup> Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ, *Bosnia- Herzegovina v. Yugoslavia*, Preliminary Objections [1996] para.22-23.

<sup>25</sup> Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read, Hsu Mo relating to *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide to the Advisory Opinion*, ICJ, 28 May 1951, p.36, available at <<http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=90&case=12&code=ppcg&p3=4>> at 15 January 2010.

<sup>26</sup> *Ibid* p.23.

<sup>27</sup> Buyse, above n 13, 67.

<sup>28</sup> ECtHR, *Loizidou v. Turkey*, 18 December 1996 (Appl. No.15318/890), para.43.

assume various obligations, not in relation to other states, but towards all individuals within their jurisdiction<sup>29</sup>.

In this advisory opinion, the IACtHR recognizes the special character of human rights instruments, characterized as the protection of rights of individuals and that assumption of obligations by the state towards all individuals under their jurisdiction.

In the case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the IACtHR explained the concept and the close relationship with the rule of evolutive interpretation:

The terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law. Furthermore, such human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions. [...] no provision may be interpreted as restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a part

#### **1.4. Reservations and Declarations that limit the competence *ratione temporis* of international bodies**

Some state parties of human rights conventions have made declarations restricting the examination of the human rights violations to acts which took place exclusively after the ratification of the treaty in question. There are cases, however, where mass violations of human rights took place before the ratification of the Convention or before the recognition of the Court's jurisdiction by the state party obstructing examination of related violations<sup>30</sup>. Due to these declarations, in some cases the continuing violation

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<sup>29</sup> *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights Arts. 74 and 75 (Advisory Opinion)* [1982] IACtHR OC-2/82, 24 September 1982 (Ser.A) No. 2 .para.29.

<sup>30</sup> For example, the Government of Bolivia made the following declaration: "The Government of Bolivia declares that the norms of unconditionally and indeterminacy shall apply with strict observance to the Constitution of Bolivia, especially with respect to the principles of reciprocity, non retroactivity and judicial autonomy."

Chile made this reservation to the Convention: "The Government of Chile places on record that this recognition of the competence and jurisdiction of the Commission applies to events subsequent to the date of deposit of this instrument of ratification or, in any case, to events which began subsequent to March 11, 1990". Nicaragua's declaration provides that: "The foregoing notwithstanding, the Government of Nicaragua states for the record that its acceptance of the competence of the Inter-American Court of Human Rights is given for an indefinite period, is general in character and grounded in reciprocity, and is subject to the reservation that this recognition of competence applies only to cases arising solely out of

could not be recognized by the Human rights bodies, raising discussion question on what can be deemed to be a fair balance between State voluntarism and the protection of individuals<sup>31</sup>.

Therefore, declarations such as that of Nicaragua, which would limit the jurisdiction *ratione temporis* and thus limit the Court's jurisdiction to examine facts that took place after the acceptance date, would bar the recognition of a continuing violation.

The concept of reservation is established in the Vienna Convention on the Law of Treaties, article 2 (1)(d), "unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to *exclude or to modify the legal effect* of certain provisions of the treaty in their application to that state". Declaration was defined by the International Law Commission in the following way: "a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization *purports to specify or clarify the meaning or scope attributed by the declarant* to a treaty or to certain treaty provisions."<sup>32</sup> The interpretive declarations, therefore, do not intend to change the legal effect of the document.

In the context of the Inter-American Human Rights bodies, reservations to the ACHR are permitted by article 75 of the Convention which states that "[t]his Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969." The Vienna Convention on the Law of Treaties provides in article 19 that:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

In some cases, it remains unclear whether the State had made a declaration or reservation and the IACtHR's interpretations have raised controversies, such as in the case of *The Serrano Cruz sisters v. El Salvador*. In this case, the majority of the Court considered that the El Salvador's limitation was a declaration and not a reservation. The Court could have decided that the limitation was a reservation as it obstructed the recognition of violations of the rights of the Convention. A declaration does not limit the effects of

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events subsequent to, and out of acts which began to be committed after, the date of deposit of this declaration with the Secretary General of the Organization of American States."

<sup>31</sup> IACtHR, *Serrano Cruz sisters v. El Salvador*, 1 March 2005.

<sup>32</sup> Tillson, Jessica., 'Reservations and the future of the Inter-American Justice, (2006) 6, *Chicago-Kent J. Int'l & Comp. Journal of International & Comparative Law*, .2006, pp.82-115, p.93.



Convention rights<sup>33</sup>. In a dissenting opinion, Justice Trindade, strongly criticized the court's decision to accept the preliminary objection of the State and not to recognize the enforced disappearance in the present case. He stated that "States that seek to restrict, *ratione temporis* and *ratione materiae*, the scope of the jurisdiction (*juris dictio*) of an international human rights tribunal such as this Court end up by prejudicing their own people and obstructing the progress of international law - human rights law - with regard to jurisdiction. And the international courts that accede to the excesses of State voluntarism end up by ceasing to exercise fully their function and duty to protect." According to him, the Court "cede[s] to the excess of State voluntarism by accepting a "hybrid limitation *ratione temporis* and *ratione materiae*, which is not authorized by Article 62 of the Convention". (para.54 of the dissenting opinion)

In the European Human rights system, there is a view that a declaration made by a state party under article 25<sup>34</sup> of the European Convention on Human Rights has a retroactive effect to the moment of the ratification of the Convention, unless there is an express limitation defining the temporal scope of the right of the individual petition. Turkey made a declaration stating that matters raised in respect to facts which have occurred prior to 22 January 1990 may not be examined by the European Court of Human Rights<sup>35</sup>. Italy, Spain, United Kingdom and Greece have also made declarations that create similar temporal limitations. The European Court has decided to respect the temporal limitations set forth by the state parties to the European Convention on Human Rights. In *Yagiz v. Turkey*,<sup>36</sup> the applicant alleged that she was tortured by police officers in custody before Turkey recognised the Court's jurisdiction. In spite of the fact that reports confirmed she had suffered from torture while she was in police custody, three officers were acquitted on the ground that the identity of those responsible could not be determined because of the temporal limitation.

The judgement and its upholding by the European Court occurred after the critical date, but the Court did not recognize its competence *ratione temporis* over the case, accepting the government's preliminary objection, which stated that "Turkey first recognized the Court's compulsory jurisdiction on 22 January 1990 with regard to matters raised in

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<sup>33</sup> Ibid.

<sup>34</sup> Article 25."1. The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non- governmental organization or group of individuals claiming to the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions. Those of the High Contracting Parties who t)ve made such a declaration undertake not to hinder in any way the effective exercise of this right.

1. Such declarations may be made for a specific period.
2. The declarations shall be deposited with the Secretary-General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties and publish them.
3. The Commission shall only exercise the powers provided for in this article when at least six High Contracting Parties are bound by declarations made in accordance with the preceding paragraphs."

<sup>35</sup> ECtHR, *Yagci and Sargin v. Turkey*, 8 June 1995.

<sup>36</sup> European Court of Human Rights.

respect of facts, including judgments based on such facts, which had occurred subsequent to" that date. The facts related by the applicant took place between 15 and 16 December 1989, thus it was considered by the Court as outside the jurisdiction *ratione temporis*.

The applicant argued that the date the Turkish declaration took effect was not the date on which the Secretary General of the Council of Europe was notified of the declaration on the temporal limitation, but rather the date the declaration was published in the Turkish Official Gazette, on 27 September 1989. The European Court ruled that the moment of the recognition of the Court's jurisdiction is when it is notified to the Secretary General, and did not accept the applicant's argument. The Court could have considered the application within its competence *ratione temporis*, by virtue of the fact that the procedures to examine the claims of ill-treatment were made after the critical date. Therefore, in this case, the European Court of Human Rights supported state voluntarism.

The Human Rights Committee has decided that claims relating to violations which took place before the ratification of the First Optional Protocol to the International Covenant on Civil and Political Rights, which would enable the examinations of the violations by the Committee do not fall within the *ratione temporis* competence of the Committee. States frequently ratify the First Optional Protocol to the International Covenant on Civil and Political Rights some time after ratifying the Covenant on Civil and Political Rights. Bossuyt and Nowak argue that even if the Optional Protocol and the Covenant were not ratified at the same time, the ratification of the Optional Protocol would have retroactive effect. Thus, the moment in which the states agree to respect the rights of the Covenant would be the decisive factor, not the moment that the Optional Protocol was ratified<sup>37</sup>.

### 1.5. Exceptions to the principle of non-retroactivity and human rights treaties

Treaties, however, may be applied to cases which took place before ratification in three different situations. The first is where there is explicit will by the States. The second is where the treaty is a codification of customary law, and the third one is where the breach of the treaty has an ongoing nature.<sup>38</sup>

The first exception to the principle of non-retroactivity is provided in the Vienna Convention on the Law of the Treaties, article 28, which provides that a treaty may have retroactive effect if such intention is expressed in the treaty.

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<sup>37</sup> Zwart, Tom, *The admissibility of human rights petitions- the case law of the European Commission of human rights and the Human Rights Committee* (1994), p.136.

<sup>38</sup> Chua, Adrian and Hardcastle Rohan, 'Retroactive application of treaties revisited: Bosnia- Herzegovina v. Yugoslavia' (1997)44 *Netherlands International Law Review*, pp.414-420, p.415.

In *Bosnia v. Yugoslavia*<sup>39</sup>, the ICJ applied the Genocide Convention to the case retroactively, on the grounds that the Yugoslavia State did not submit a declaration limiting the application of the Convention to facts which took place before Yugoslavia's secession. After the secession of the Socialist Federal Republic of Yugoslavia, the issue of succession of the Genocide Convention was discussed before the Court.

The automatic succession opinion was defended by Judge Weeramantry in his individual opinion. In this defense of the automatic application, it becomes clear that he implies, among other reasons, that in this case the exception to the principle of non-retroactivity occurred by virtue of the fact that there was a codification of customary law.

The automatic succession to the Genocide Convention was not discussed in detail by the Court, but Judge Weeramantry elucidated the factors which would lead to the interpretation that there was an automatic succession of the Convention, and therefore would not allow the existence of the time lag between the independence of Bosnia-Herzegovina and the entry into force of the Convention. He argues that the Genocide convention, which has a special character of protecting individuals, would not be subjected to restraints applied to other treaties, which deal with the agreement on interests of States. He carefully gives reasons which would favor the view of automatic succession to the Genocide Convention, the first reason being that the treaty is not centered on individual state interests and does not represent an exchange of interests and benefits between contracting States, i.e. the personality of the sovereign is not the essence of such an agreement.

The second reason is that the Genocide Convention transcends concepts of State sovereignty, and regulates interests of universal concern. The concept of human rights is the concern of everyone, everywhere. The third reason given was that the rights the Genocide Convention recognizes do not impose burden on the State, human rights are nothing more than a formal recognition by the sovereign state of rights which already belong to each of that sovereign state's subjects. The fourth reason is that, by virtue of the fact that the obligations imposed by the Convention exist independently of obligations contained in human rights documents, as they are a codification of customary law. The fifth reason given by the Judge is strongly connected to the previous one, being the fact that the Genocide Convention embodies rules of customary international law.

Those rights guaranteed by the Convention continue to be applicable to the individuals, regardless of who the sovereign is. The sixth argument for automatic succession is the fact that that it would constitute a contribution to global stability. The promotion and encouragement of human rights is the reaffirmation of faith in fundamental human rights, distinguishing them from a trading treaty, for example. The seventh reason consists in the undesirability of a hiatus in succession to the Genocide Convention. If we assume there is

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<sup>39</sup> *Bosnia and Herzegovina v. Yugoslavia* (Preliminary Objections) [1996] ICJ Rep 1996 in the decision, the judges would refer to human rights treaties and humanitarian law as treaties which would exist to assure the protection of individuals.

not the automatic succession of the human rights treaties the individuals which were protected under a human rights treaty would be all of sudden deprived of their rights.

This position would be untenable, according to the words of Weeramantry. Furthermore, an anomaly, consisting in the fact that an undesirable result of people protected by these legal guarantees would be deprived of that protection in times when they most need it, i.e., when the situation of the State is unstable, since the break-up of States has often occurred by atrocities of the most brutal and inhuman kind. Thus, to leave a lacuna in the continuity of the law would be fraught with danger. The rights conferred under the Genocide Convention are non-derogable, as they relate to right to life, the most fundamental of human rights which is part of the irreducible core of human rights. Furthermore, the obligation of States is not merely to refrain from committing genocide, but also to prevent and punish acts of genocide.

### **1.6. Six-months rule**

One of the admissibility requirements establishes a deadline for the presentation of a petition before the IACHR. Likewise the European Court of Human Rights also establishes as an admissibility requirement that the applications are submitted within a period of six months from the date on which the final decision was taken.<sup>40</sup> A petition shall be submitted to the Inter- American Commission within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment of the highest domestic court. (Article 46(1)(b) of the ACHR. The rule exists to 'allow for juridical certainty while still providing sufficient time for a potential petitioner to consider her position'<sup>41</sup>.

However, when the applicant is unable to exhaust domestic remedies because of a denial of justice, such as in the case where proceedings have undue delay, the Commission determines admissibility on the basis of whether or not the petition was filed in a 'reasonable time'. Article 38(2) of its Regulations provides that in denial of justice cases:

...the deadline for presentation of a petition to the Commission shall be within a reasonable period of time, in the Commission's judgment, as from the date on which the alleged violation of rights has occurred, considering the circumstances of each specific case.

Nevertheless, the 6 months rule is not valid for violations which have an ongoing nature. For instance, cases relating to disappeared persons in Argentina were presented to the IACHR some time after the persons had disappeared and at the time of the presentation

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<sup>40</sup> ECHR, art. 26.

<sup>41</sup> IACHR, case 11.625, see Jo M. Pasqualucci, *The practice and procedure of the IACtHR* (Inter-American Court of Human Rights, Cambridge, 2003), p.126.

of the petitions, their next-of-kin still had no information as to their whereabouts. The IACHR has also ruled that the petitions of Chilean exiles that did not have access to judicial remedies which filed the petition after the deadline set out in the ACHR, were admissible. Furthermore, the Commission has received a large number of petitions from individuals condemned to death in Jamaica after the six months deadline for the submission of petitions had passed. As the petitions were under the risk of their right to life being violated, the Commission admitted them, but after examining the merits claims the cases were closed<sup>42</sup>.

Pasqualucci points out that in the case of forced disappearances, if the victim disappeared in the distant past, evidence might no longer be available. In these cases, it would be better if the Commission applied the 'reasonable time' test so as not to be forced to examine unreasonably old cases without additional facts and especially where a State has accepted its responsibility in the alleged disappearance.<sup>43</sup> However, it is important to note that even the 'unreasonably old' cases which remain unsolved by the domestic courts deserve attention by the international human bodies and that this is the *raison d'être* of the continuing violations concept. For the next-of-kin of the victims, the unsolvable disappearance of the victim is a current source of suffering and cannot be considered an 'old' claim.

In the case of organs of the ECHR, it is expected that applicants bring the case to the European Court of Human Rights within six months after the date that they realize the investigation carried out by the State is not effective. However, the IACHR has a different approach. In the Greco case,<sup>44</sup> Greco died after suffering serious injury in a fire in a prison cell. According to the petitioners, State agents were to be held responsible for his death. The petitioners presented the petition 3 years after the death of the victim. Even after the 6 months deadline had passed, the Inter-American Commission found that the case was admissible. The case was later settled between the parties.

Conversely, the International Covenant on Civil and Political Rights does not have limitation for presenting the applications under the Optional Protocol. However, even though there is no deadline for the submission of applications, the Human Rights Committee has decided that it has jurisdiction *ratione temporis* over acts, facts that occurred after the ratification of the Optional Protocol and are not retroactive to the ratification of the Covenant.

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<sup>42</sup> Cerna, Cristina. 2004. 'The Inter-American Commission on Human Rights: Its Organization and Examination of Petitions and Communications. In'. in : HARRY, D.avid J.. and LIVINGSTONE, Stephen (eds)D. (Org.). Inter- American System of Human Rights (2004) Oxford: Oxford University Presspp.65-114, p.93.

<sup>43</sup> Pasqualucci, Jo. , 'The practice and procedure of the Inter-American Court of Human Rights.IACtHR' ( 2003), Cambridge university press, p.126.

<sup>44</sup> IACHR, *Juan Greco v. Argentina*, Case No.11.804.

## CHAPTER 2

### 2. Application of the “Continuing Violation” Concept as a Tool to Remember Past Atrocities in the Inter-American System”

#### 2.1. The Inter-American system and the "continuing violation" concept

Exceptions to the principle of non-retroactivity can be found in the application of the concept of continuing violations. Interpretation of this concept is found in the jurisprudence of the International Court of Justice, Human Rights Committee, European Human Rights bodies and Inter-American Human Rights bodies. Fundamentally, the concept of continuing violations in those bodies are not the same as that found in domestic law and the elements of continuous crimes cannot be completely transferred to international law since in international bodies, the continuing violation will focus on the situation of the victim and not in the objective qualification of the act or even the subjective intentions of the State, as occurs in domestic law.<sup>45</sup> Common examples of this in international law are cases of enforced disappearances,<sup>46</sup> the failure of the State to investigate, prosecute and punish the responsible for human rights, laws enacted before the Convention entered into force in the States, but that still emit effects, unlawful occupation of part of the territory of another state, and illegal detention on remand.

The International Law Commission (ILC) defines a continuing act as one which continues unchanged over a given period of time. In other words, an act, which after its occurrence continues to exist as such and not merely in its effects and consequences. However, the ILC definition does not strictly match the interpretation of the Inter-American Human Rights bodies which also consider the effects of violations as a breach of the rights guaranteed by the Convention<sup>47</sup>. Therefore, to find the difference between the mere effects of a violation and continuation of the causal situation is a hard task. An act does not have a continuing character because its consequences extend in time. In the case of pain and suffering caused by earlier acts or effects of expropriation of property continue even after the torture has ceased or title to property has passed. Nevertheless, the

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<sup>45</sup> Pauwelyn, Joost. Paulwelyn, ‘The Concept of a ‘Continuing Violation of an International Obligation: Selected Problems’ (1996.) 66 *British Yearbook of International Law*, pp.415-450, p.421.

<sup>46</sup> IACtHR, *Velasquez Rodriguez v. Honduras*, 29 July 1988; IACtHR, *Blake v. Guatemala*, 2 July 1996; IACtHR, *Goiburú v. Paraguay*, 22 September 2006.

<sup>47</sup> See e.g. that effects of the laws which were enacted before the ratification of the Convention and still have effects after it entered into force for the state are considered as violations of the rights of the Convention. IACHR, *Andres Aylwin Azocar et al. v. Chile*, 27 December 1999 (Report No. 137/99, Case No.11.863)

consequences of these acts will be subject of secondary obligations of reparation such as compensation<sup>48</sup>.

In contrast, an instantaneous act would be an act that does not extend in time, i.e. an act that ends as soon as it is committed; where the breach occurred also automatically ceases to exist<sup>49</sup>, the consummation occurring in a “single blow”<sup>50</sup> (paragraph 9)

A continuing violation according to Joost Pauwelyn is *the breach of an international obligation by an act of a subject of international law extending in time and causing a duration or continuance in time of that breach.*<sup>51</sup>

Judge Trindade explains the reason for the existence of the continuing violation notion is because it contributes to the “effectiveness of the rights of international petition” and it protects individual victims.<sup>52</sup>

The Inter- American Commission of Human Rights and the Inter- American Court of Human Rights have been ruling progressively on the continuing violations concept when compared to other international human rights bodies and mainly distinguish three patterns of continuing violations. The first one is when the causal act continues, the second is when the effects of the causal act continue and third is when the omission or failure to act happens.

Victor Madrigal–Borloz classifies continuing violations based on the actions State parties were supposed to do, and on the various orders issued by the IACtHR. According to his classification, orders can be classified as legislative review where the Inter-American human rights bodies require the harmonization between domestic legislation and the international commitments of the state party, judicial prosecution, related to the requirement to eliminate generalized states of impunity and administrative measures, if the measure of cessation consists of amendment or adoption of administrative practices.<sup>53</sup> In addition, his classification of orders does not deal exclusively or necessarily with cases which raise issues regarding the Vienna Convention on the Law of the Treaties, i.e. with exceptions to the principle of non- retroactivity, art.28, violations which took place before the ratification of the Convention or of the recognition of the Court’s jurisdiction.

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<sup>48</sup> Crawford, James, *The International Law Commission’s Articles on State Responsibility- Introduction, Text and Commentaries* (2007), p.136 [6].

<sup>49</sup> Pauwelyn, above n 37, 419.

<sup>50</sup> *Separate Opinion of Judge Sergio Garcia Ramirez in Relation to the Judgment of the Inter-American Court of Human Rights of August 12 2008 in the Case of Heliodoro- Portugal (Panama) IACtHR*, para.9.

<sup>51</sup> Pauwelyn, above n 37, 415.

<sup>52</sup> *Separate Opinion of Judge A.A. Cançado Trindade in the Case of the Moiwana Community v. Suriname. (Preliminary Objections)*, 15 June 2005 (Series C, No.124), para.55

<sup>53</sup> Madrigal-Borloz, Victor. , ‘Damage and redress in the jurisprudence of the Inter-American Court of Human Rights (1979-2001)’ in George Ulrich and Louise Krabbe Boserup (eds), in *Human Rights in development- reparations: redressing past wrongs* (2003), Kluwer Law International, 2003., pp.211-274, p.242.

His continuing violation concept describes the duties that States should have accomplished and failed to, or a cessation of a situation that raises a violation of the continuing violation,<sup>54</sup> but after the Convention has begun to take effect in the States parties.

Therefore, the classification that focus on the types of continuing violation will be adopted, as it is the main topic of the chapter. The legislative review is equivalent to the continuing violation where the effects of the causal act continues, the judicial prosecution is when there is the omission or failure to act and the administrative measure would also be the equivalent of omission or failure of the State to act. The difference between the judicial prosecution and administrative measure is that the former is the omission by the Judiciary organs and the latter is the omission by the Executive of the state.

The case of when the causal act continues relates to a situation where the causal act happens before the state ratifies the convention and after they ratify it the action is still occurring. Examples of typical cases that fall in this category include those of forced disappearance and arbitrary detention. The second case (effects of the causal act continue) is, for example, when a law violates the Convention, but after its ratification it is still in effect. And the third case typically arises when the state government fails to remedy the crimes that were committed, such as in the cases of lack of investigation or prosecution of those responsible for the crime or crimes.

## **2.2. The application of the continuing violations concept in forced disappearance cases**

The Inter-American Convention on Forced Disappearance of Persons entered into force on 28 March, 1996 and was created to continue the search of those whose next-of-kin had been murdered or had disappeared, or simply to find where their remains are located. The development of the concept of forced disappearances took place several years before the

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<sup>54</sup> See e.g. the legislative review cases, *El Amparo*, judgement of January 18, 1995, *Caballero, Delgado and Santana*, judgement of 29 January 1997, *Loayza Tamayo Reparations*, Judgement of 27 November 1998, *Barrios Altos Case*, interpretation of the judgement on the merits, judgement of 14 March 2001, *Suarez Rosero Case*. Reparations, judgement of 20 January 1999, *The last temptation of Christ case*, judgement of February 2001, *Garrido and Baigorria reparations*, judgement of 27 August 1998, *Benavides Cevallos Case*, Judgement of 19 July 1992, *Trujillo Oroza case*, judgement of 26 January 2000, *Mayagna (Sumo) Awas Tingni Indigenous Community case*, judgement of 31 August 2001. As judicial investigation cases, there are the following cases. *Velasquez Rodriguez merits*, *Neira Alegria et al. Reparations*, judgement 29 August, 1998, *Castillo Paez Merits*, judgment of 3 November 1997, *Paniagua Morales et Al. Merits*, judgement of 8 March, 1998, *Garrido and Baigorria reparations*, judgement of 31 January 1997, *Loayza Tamayo reparations*, judgement 3 June, 1999, *Villagran Morales et al. Merits*, judgement 19 November 1999.



Convention was created and many of the concepts established in the instrument are based in the jurisprudence developed by the Court.

The character of forced disappearance is explained by Judge Sergio Garcia Ramirez in the case *Heliodoro- Portugal v. Panama*<sup>55</sup>, where he states: ‘forced disappearance is an act- or conduct or situation or circumstance- that is prolonged, uninterrupted, over time. While the conduct persists, the violation subsists, without ending its continuity. It is unique and constant.’ (para. 8 of the dissenting opinion)

The preamble of the Inter-American Convention on Forced Disappearance of Persons, declares that forced disappearance constitutes a crime against humanity. Forced disappearance<sup>56</sup> is the act of depriving a person or persons of his or their freedom, is a crime committed by the state or with its acquiescence, where there is a lack of information, refusal to give information of the whereabouts of that person, obstructing the legal remedies and procedural guarantees (Article 2 of the Convention). Article 3 of the Convention establishes the continuous character of the forced disappearance: ‘.....this offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined....’

*Velasquez Rodrigues v. Honduras* is the first case in which the Court drew boundaries on the concept of forced disappearances. The Commission determined the legal nature of the disappearances even before the existence of the Convention. The Court stated that the forced disappearance of human beings is a ‘*multiple and continuous violation of many rights under the Convention that the states parties are obligated to respect and guarantee.*’ The kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of his personal liberty (Article 7 of the Convention), the right to the integrity of the person (Article 5 of the Convention) and violation to the right of life (Article 4).

The testimony of members of the Legislative Assembly of Honduras, Honduran lawyers, persons who were at one time disappeared, and relatives of disappeared persons demonstrated that during the time the events took place, the legal remedies in Honduras were ineffective and the practice of enforced or involuntary disappearances was ordered or tolerated by the Government. In addition, from 1981 to 1984 more than one hundred persons were illegally detained and, in most cases the legal remedies which the Government claimed were available to the victims were ineffective. In the case of *Juarez v. El Salvador*, the Commission pointed out its categorical repudiation of the grave phenomenon of forced disappearance, stating that “this practice is cruel and inhuman...

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<sup>55</sup> IACtHR, *Heliodoro Portugal v. Panama*, 12 August 2008 (Preliminary objections, merits, reparations and Costs)

<sup>56</sup> In the 1994 Convention, the elements of forced disappearances are: 1) deprivation of liberty; 2) irrelevance if this is realized arbitrarily; 3) it can be perpetrated not only by State agents, but also by third parties; 3) refusal to acknowledge this deprivation 4) refusal to provide information of the whereabouts of the person; 5) impediment to exercise the legal remedies and pertinent legal procedures

forced disappearance not only constitutes an arbitrary deprivation of liberty, but also a very severe threat to the personal integrity, security and the very life of the victim”.

In the *Blake v. Guatemala* case, the issue of forced disappearance was examined by the IACtHR, after the petition was presented by the Inter- American Commission. The American Commission on Human Rights had recommended that the State accept the responsibility for the murder of Nicholas Blake, his disappearance and the cover-up of his murder. In addition, the Commission also recommended that the State identify, prosecute and punish those responsible for the death of the victim.<sup>57</sup> As the State did not follow the Commission’s recommendations, the Commission filed an application before the Court.

The ACHR entered into force in Guatemala on 25 May, 1978 and recognized the jurisdiction of the Court on 9 March, 1987. In the present case, the State filed a preliminary objection, citing the incompetence of the IACtHR to try the case as the disappearance and death of the victim occurred before the recognition of the compulsory competence of the Court. However, the Inter-American Commission requested that this objection be dismissed because the application in the case referred to events that took place after that date.

Furthermore, the Commission argued that in cases of continuous crimes, the lack of competence *ratione temporis* did not apply. Blake has been disappeared until June 14, 1992, the date on which his remains were discovered. Accordingly, Blake’s disappearance had been in effect “for a period of time that exceeded by more than five years acceptance of the compulsory jurisdiction of the Court”. The continuous effect of the disappearance was described by the Commission as “the concealment of Mr. Blake’s remains, the cover-up of the perpetrators and accomplices, the authorities’ total indifference and lack of information about the events, and the lasting consequences that this tragic situation has had on Mr. Blake’s family.”

The State claimed that the events of the forced disappearance and murder finished in 1985. On the other hand, the Commission contended that the effects of the disappearance were continuous because the imprisonment and subsequent death of Mr. Blake were discovered many years later and its consequences were still being felt. The Court declared itself “incompetent to decide on Guatemala’s alleged responsibility for the detention and death of Mr. Nicholas Chapman Blake”, inasmuch as the “deprivation of Mr. Blake’s freedom and his murder had indeed occurred in March, 1985”, before Guatemala had accepted the competence of the Court on the judgement of the preliminary objections. According to the Court, Mr. Blake’s deprivation of liberty and his murder were completed in March, 1985 - the murder on March 29 according to the death certificate and that those events could not be considered *per se* to be continuous.

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<sup>57</sup> IACtHR, *Blake v. Guatemala* (Preliminary Objections) 2 July 1996.

However, the Court decided to hear the case in regard to the effects and acts that occurred after the date on which Guatemala accepted the competence of the Court. The Court considered that there were violations of the judicial guarantees set forth in Article 8(1), and that the State of Guatemala violated, to the detriment of the relatives of Blake, the right to humane treatment enshrined in Article 5 set out in the ACHR. The Court explained that:

in accordance with the aforementioned principles of international law which are also embodied in Guatemalan legislation, forced disappearance implies the violation of various human rights recognized in international human rights treaties, including the American Convention, and that the effects of such infringements- even though some may have been completed, as in the instant case- may be prolonged continuously or permanently until such time as the victim's fate or whereabouts are established.<sup>58</sup>

Later, the Inter-American Convention on forced disappearance would provide that the crime of forced disappearance would not be subjected to the statute of limitations (article 7), reaffirming the fact that the enforced disappearance has a continuing character.

In the *Serrano-Cruz Sisters v. El Salvador*, due to the State's reservation to the Convention, the IACtHR did not examine the forced disappearance, the events of which began before the Convention was ratified by the Government. El Salvador ratified the Convention in 1978 and accepted the contentious jurisdiction of the Court on June 6, 1995. Ernestina and Erlinda Serrano Cruz were allegedly captured by the Salvadoran Army during a military operation and taken to various places from May 27 to June 9, 1982. The Commission filed the application claiming violations of Articles 4 (right to life), 7 (right to personal liberty), 18 (right to a name) and 19 (rights of the child) of the American Convention, in relation to article 1(1) (obligation to respect rights) to the detriment of Ernestina and Erlinda Serrano Cruz.

Furthermore, it was alleged violations of articles 5 (right to a humane treatment), 8 (right to a fair trial), 17 (rights of the family) and 25 (judicial protection) of the Convention, in relation to Article 1(1) (obligation to respect rights), to the detriment of Ernestina and Erlinda Serrano Cruz and of their next of kin.

In the preliminary objections, the State objected to the Court's jurisdiction *ratione temporis*, arguing the non-retroactivity of the application of the crime of forced disappearance of persons and lack of jurisdiction owing to terms in which the State recognized the jurisdiction of the Inter- American Court of Human Rights. When the State recognized the Court's jurisdiction it stated that the jurisdiction of the Court was accepted

“for an indefinite term, in conditions of reciprocity and with the express limitation that, in the cases in which it recognizes the Court's jurisdiction,

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<sup>58</sup> IACtHR, *Blake v. Guatemala* (Preliminary objections) 2 July 1996, para.38.

**this is only and exclusively for subsequent juridical facts and acts, or juridical facts and acts which commenced after the date on which the declaration of recognition (of this jurisdiction) was deposited.”**

(Emphasis added)

The State also claimed that the facts in this case referred to continuing violations, but in the international arena there was no development in this regard, and gave as an example the limited jurisdiction of the Rome Statute of International Criminal Court. According to the State, the Court could not consider the alleged failure to investigate, since this also was part of the concept of forced disappearance.

The Commission requested the Court to reject the preliminary objection stating that the violation was renewed in 1995, when the State was obliged by the treaty, to investigate and make reparations to the next of kin. The reservation claimed by the State would create three different situations for the protection of human rights in the Inter-American sphere. The first included violations occurred from 1978 to 1995, over which the Court would not have jurisdiction, “even if their effects continue over time and exceed the critical date of June 6, 1995.”

The second situation included violations subsequent to June 6, 1995, which would be subject to the Inter-American system for the protection of human rights. Even so, the third situation referred to continuing violations, executed before and after the imposed time limit. Furthermore, the representatives of the Commission referred to Article 28 of the 1969 Vienna Convention on the Law of Treaties, in deciding whether or not the court has jurisdiction to hear the case. According to the Commission, the Court should consider acts and facts that occurred after the date of recognition of the Court’s jurisdiction and situations which, at the date of the Commission’s application to the Court, had not ceased to exist.

The Court decided that the temporal limitation made by the State was valid because it was based on Article 62 of the Convention and violations of Articles 4 (right to life), 5 (right to personal integrity) and 7 (right to personal liberty) of the Convention, in relation to Article 1(1) (obligation to respect rights), to the detriment of Ernestina and Erlinda Serrano Cruz, were excluded owing to the limitation on the Court’s jurisdiction established by El Salvador. Thus, the court did not recognize its own jurisdiction to hear facts and acts which occurred before the date on which the State deposited the instrument recognizing the Court’s jurisdiction with the OAS General Secretariat.

However, it recognized its competence to examine the alleged violations of Articles 8 (right to a fair trial) and 25 (judicial protection) of the Convention, in relation to Article 1(1) (obligations to respect rights), which took place after the State accepted the Court’s jurisdiction, considering the violations independent facts from the continuing violations and decided not to consider alleged violations of Articles 4, 8, 17, 18, 19 and 25 of the ACHR because they were related to the alleged forced disappearance.

Therefore, the Court did not consider the alleged crimes related to the forced disappearances due to the temporal limitation that El Salvador made when it ratified the Convention. The Court which has several times made evolutionary interpretations has showed its limits for the protection of individuals in the IACtHR.

In his dissenting opinion of the same judgement, Judge Cançado Trindade considered that the acceptance of the State's claim on the inadmissibility *ratione temporis* of the facts which occurred before the acceptance of the Court's jurisdiction was regressive. He claimed that in the instant case, "the will of the State has unfortunately prevailed over the imperatives of human rights protection."<sup>59</sup> He observed that the acceptance of the Court's jurisdiction made by El Salvador would exceed the condition existent in article 62 of the ACHR "by excluding from its possible consideration facts and acts subsequent to this acceptance that began to be executed prior to it"<sup>60</sup>.

Furthermore, he dissented from the unacceptable capitulation to State voluntarism which cannot be considered sustainable and which militates against the actual process of jurisdictionalization of international law. The Court certainly took a restrictive interpretation of the Convention, and privileged State voluntarism over the protection of the victims in this case. This cannot be considered acceptable since the nature of the international human rights courts is to interpret the international instruments for the protection of individuals, and not for the will of States.

It is important to note that Judge Trindade emphasized the nature of the Inter-American Human Rights Court, stating that the "permissive and voluntarist practice under article 36(2) of the ICJ Statute cannot serve as a model for the actions and decisions of the IACtHR. The law, which is and must be the same for everyone is above the "will" of States."<sup>61</sup> It becomes clear in his statement that the distinctive feature of human rights conventions would not allow the prevalence of state will over the protection of individuals.

Judge Trindade offers, as a solution for not letting the will of States prevail in the Court, compulsory jurisdiction. According to him, there would not be any reason to let a human rights tribunal such as the IACtHR to behave in a similar manner to the Courts which decide disputes between States that express State voluntarism. Therefore, the human rights courts should not deprive individuals from the protection under the ACHR.<sup>62</sup>

The Court's decision on the Serrano Cruz sisters' case suspended the evolution of the protection of the rights of individuals and demonstrated the limits which still obstruct a further protection of the victims of human rights violations.

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<sup>59</sup> Separate Opinion of Judge A.A. Cançado Trindade in the *Case of the Moiwana Community v. Suriname. (Preliminary Objections)*, 15 June 2005 (Series C, No.124), p.5

<sup>60</sup> *Ibid* para.9.

<sup>61</sup> *Ibid* para.62

<sup>62</sup> Separate Opinion of Judge A.A. Cançado Trindade in the *Case of the Moiwana Community v. Suriname. (Preliminary Objections)*, 15 June 2005 (Series C, No.124), para.63

In *Goiburu v. Paraguay*<sup>63</sup>, it becomes clear that forced disappearances as continuing violations have become a more accepted concept even by the State parties of the Convention. In the present case, the Court's lack of jurisdiction *ratione temporis* was not even mentioned by the State. Paraguay ratified the ACHR on August 24, 1989, and accepted the compulsory jurisdiction of the Court on March 26, 1993. The Court has also considered itself competent to examine alleged breaches of the Inter-American Convention on Forced Disappearance of Persons, ratified by Paraguay on November 26, 1996.

The government had acquiesced and accepted that the forced disappearances would constitute continuing violations, thus accepting the compulsory jurisdiction of the Court, in spite of the fact that the violations had started during the military dictatorship that lasted from 1954 to 1989, prior to the State's acceptance of the Court's jurisdiction. They acquiesced breaches of the rights to life, personal liberty and humane treatment, recognizing that the forced disappearance was a continuing violation. The acts were violations of the rights to life, personal liberty and humane treatment, but the State expressly classified them as forced disappearance of persons of a continuing nature.

It was also claimed by the Goiburu that the "grave judicial delay" of proceedings constituted a violation of article 8 (1) (right to fair trial) and article 25 (Judicial Protection). The Court also added that the present violation could be considered a crime against humanity. The facts in the present case took place in the context of Operation Condor, an operation conducted by the military dictatorships of South American countries in order to repress opposition to the government.

The applicants alleged the illegal and arbitrary detention, torture and forced disappearance of the victims and the pointed out that impunity existed by virtue of that the perpetrators remained punished.

In *Heliodoro Portugal v. Panama*<sup>64</sup>, the Court confirmed its view that it cannot have competence *ratione temporis* over instantaneous acts of the State. In the Heliodoro case, the victim was assassinated, according to a report of the Institute of Forensic Medicine, at least 10 years before the critical date for Panama. Nevertheless, relating to the forced disappearance the Court ruled that would have competence *ratione temporis* since the remains of the victim were found in 2000, ten years after the acceptance of the Court's jurisdiction by Panama.

The Court has also considered that claims of torture and ill treatment to be instantaneous acts, thus removing cases from its competence, since the torture or ill treatment would have taken place a long time before the jurisdiction of the Court was effective in the State. As the victim died it can be asserted that torture can be considered an instantaneous act,

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<sup>63</sup> IACtHR, *Goiburu et al. v. Paraguay*, 22 September, 2006 (Series C No.153)

<sup>64</sup> IACtHR, *Heliodoro, Portugal v. Panama* (Preliminary Objections, Merits, Reparation, and Costs) 12 August, 2008 (Series C No.186)

However, we should also consider how the Court would have decided if the victim of the torture was still alive and suffering physical and mental disabilities in consequence of the ill-treatment. Would the Court still consider it an instantaneous violation? So far, physical disabilities have not been considered to be continuing violations by the international human rights bodies, except by the Committee on the Elimination of all Forms of Discrimination Against Women (hereinafter CEDAW) which recognized that the author of a communication suffered an ongoing violation after being sterilized<sup>65</sup> by the State.

Furthermore, the Court recognized the lack of investigation by the State after the Convention on Forced Disappearance entered into force for the State on March 28, 1996. On the point, the Court recognized its competence to examine the alleged violation of article 5 of the ACHR to the detriment of next of kin of Heliodoro Portugal. Regarding the lack of investigation of the ill treatment of the victim, the Court considered itself competent to examine whether the State had conducted effective investigation on this violation from the date the State ratified the Convention against Torture, i.e. September 28, 1991. In this case, since the Inter-American Convention on Forced Disappearances had been ratified, the Court reminded the State of the duty to also define forced disappearances as a crime, adopting the elements of the crime as elucidated in international human rights law.

### **2.3. The application of continuing violations in the context of laws against the rights set out in the Convention**

The Inter- American Commission and Court did not declare that all amnesty laws that were issued in Latin American countries after the end of dictatorships violated the ACHR. Most of states which enacted amnesty laws did not receive declarations of illegality by the Inter-American Commission and IACtHR. However, self-amnesties by dictatorial regimes have been declared null by the Commission. On the other hand, amnesties declared by elected-democratic governments remained without complete condemnation by the Commission and the Court.<sup>66</sup> Nevertheless, the Court finally recognized that amnesty laws are inadmissible in the Case of Barrios Altos in which it was decided that:

this Court considers that all amnesty provisions, 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, extra-legal, summary or arbitrary execution and forced

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<sup>65</sup> CEDAW, *Andrea Szijarto v. Hungary*, 29 August 2006 (Comm. No. 4/2004).

<sup>66</sup> Lutz, Ellen, 'Responses to Amnesties by the Inter-American System for the Protection of Human Rights'. I in David Harry and Stephen Livingstone, (eds), *S. Inter- American System of Human Rights*. (2004)Oxford: Oxford University Press 2004, pp.345-370, p.368.

disappearance, all of them prohibited because they violate non-derogable rights recognized by International Human Rights Law (para.41).

Many amnesty laws were enacted after countries ratified the ACHR, but in the Chilean and Argentine case, they ratified the ACHR after the Amnesty Laws were promulgated, creating questions over the issue of the failure to revoke the laws, which is contrary to should be done under the Convention.

The ACHR, article 2 establishes that:

where the exercise of any of the rights or freedoms is not already ensured by legislative or other provisions, the State parties undertake to adopt, in accordance with their constitutional processes and the provisions of the Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

The Commission has stated that this article “...implies positive action, in that States are obliged to adopt new measures; it also implies negative action, in that States are obliged to abolish those laws that are incompatible with the Convention.”<sup>67</sup> In the same way, the Court has stated that the duty of states under Article 2 of the ACHR implies the adoption of two types of measures. The first is the abolishment of norms and practices that violate the rights provided under the Convention. The second is the promulgation of norms and practices which would lead to effective observance of those rights. (Castillo Petruzzi Merits, para.207)

The coup d'état in Chile that occurred on September 11, 1973 resulted in the fall of the government elected in 1970, the death of President Salvador Allende, and the establishment of a government junta composed of the commanders in chief of the three armed forces and the Director General of the Police, under the presidency of the army Commander in Chief, General Augusto Pinochet. After Pinochet seized power many allegations of violations of human rights were made to the Commission, and to the General Secretariat of the Organization of American States.

In *Garay Hermosilla et al. v. Chile*, the petitioners claimed that they had suffered a violation of the right to justice, as the result of impunity with respect to those responsible for the arrest and disappearance of people between the years 1974 and 1976 existed. The State of Chile ratified the Convention on 21 August 1990. It was put into the question the failure to revoke the Amnesty Decree Law, issued on 19 April 1978 that was issued by the military government, but which remained in force under the commitment to comply with it. In addition, the failure to investigate, to identify the responsible parties and to prosecute the authors of those deeds which began during the military government and has continued during the democratic and constitutional Government was also claimed by the petitioner.

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<sup>67</sup> IACtHR, *Castillo Petruzzi at al.v. Peru*,30 May 1999 (Series C No.52) para.202



The Government also condemned the self-amnesty decree-law, and declared to the Commission that “the constitutional Government cannot but agree with the petitioners on the nature of Decree- Law No. 2191 of April 19 1978, which sought to exonerate responsibility for the most serious crimes committed in our history.” The Government asked the Commission to consider the historical context in which the law was enacted, alleging that there were attempts to revoke the law in question, but those attempts failed since the constitutional rules provided that initiatives relating to the amnesty could only be initiated by the Chilean Senate, where most of the members were not democratically elected.

The Commission admitted violations of Articles 8 (right to a fair trial), 25 (violation of the right to judicial protection) and the failure to fulfill the duty to investigate (based on art.1.1 and 2). In that case, the Commission stated that there was a failure to revoke amnesty law 2191 that was issued by that military regime, even after the State of Chile ratified the Convention. In addition, the Commission decided that there was a failure by the state to fulfill the duty to investigate, identify the responsible parties and to prosecute the authors of the violations of human rights. According to the Commission this failure started during the military government, but continued during the democratic government.

In the case of *Azocar and others v. Chile*<sup>68</sup>, the petitioners alleged that the provision (article 45 of the Constitution) on the granting General Pinochet and others the status of senator-for-life violated the right to equality in vote, being against the popular will, and that it was not in accordance with the democratic framework.

The State contended that the petition referred to a constitutional standard established in 1980, prior to the date of deposit of ratification of the ACHR and that it applied only to events which occurred after that date. In addition, it claimed that the petition was extemporaneous once the norm challenged was published in the Official Gazette of 17 August 1989 and the petition was presented after eight years. Therefore, it did not respect the deadline of six months for presenting the petition. The IACHR stated that violations alleged in the petition, even if they were related to norms issued before the entrance into force of the ACHR for Chile were ongoing and still had effects after it entered into force for the State.

Regarding the fact that the petition was presented many years after the deadline, the Commission accepted the explanation of the petitioners that “time has shown impossibility of repealing the aberrant norms” and that the transition to democracy was being postponed indefinitely. In addition, the appointments of senators who were not directly elected by people which occurred after the Convention ratification characterizes a continuing violation. Therefore, the continuing application of the constitutional norms even during the democratic governments extended to the date of the presentation of the petition and afterward. The IACHR admitted the petition *ratione temporis*.

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<sup>68</sup> IACHR, *Andres Aylwin Azocar et al. v. Chile*, 27 December 1999 (Report No. 137/99, Case No.11.863)

The IACHR recalled that the applicants' complaints related to a continuing situation and in this case the six month period runs from the termination of the situation concerned, adding that article 28 of the Vienna Conference on the Law of the Treaties establishes that "a situation that has not stopped existing at the moment of the ratification is covered by the international obligations incorporated into the treaty that is being ratified".

The Inter-American Commission understood that a Constitution promulgated under the military dictatorship against the popular will and that was still causing effects after the State of Chile ratified the ACHR constituted a continuing violation of political participation and to equality without discrimination (Articles 23 and 24) which is enshrined in the ACHR. They therefore decided that the State of Chile had an obligation to adapt the existing legal order in accordance with its international commitments, so as to ensure the rights established under the Convention, pursuant to Article 2.

In addition, the Commission considered that if the State did not revoke legislation promulgated before the State ratified the Convention, it would violate rights established by the Convention. Therefore, the Commission considered in its jurisdiction *ratione temporis* the continuous effects of an act which occurred before Chile ratified the Convention.

The Human Rights Committee also decided to recognize its jurisdiction *ratione temporis* over a case where the effects of the law were causing human rights violations.

The continuing effect of a law was also considered as a continuing violation by the United Nations Human Rights Committee in *Lovelace v. Canada*. In the present case, the author had married a non- Indian on 23 May 1970 and had consequently lost her status as an Indian under the Indian Act. The Covenant on Civil and Political Rights and the Optional Protocol had entered into force to Canada on 19 August 1976, after the marriage occurred.

The author, thus, had lost her status as Indian before the Covenant entered into force to the State. Nevertheless, the committee considered that the events which started before 19 August 1976 had effects which themselves were a violation of article 27 of the Covenant (Communication No.24/1977). In this case, the effect of the law was preventing the author to have the status of Indian, violation related to her legal status.

The IACtHR has adopted the same approach as the Commission in recognizing the Convention's rights violations raised by the amnesty law which had been enacted before the ratification of the Convention. In the Almonacid- Arellano case, the Commission did not even raise the murder of the victim that took place on September 1973: they claimed the failure of the State to conduct investigation, prosecution and punishment of those responsible for the murder of the victim since March 11, 1990, before the date of the ratification of the Convention by the State.

The Commission concentrated their claims on facts related to the procedures that occurred after the ratification of the Convention, such as the transfer of the proceedings

on December 5, 1996 to the military courts (though they were based on the grounds of ordinary crimes which do not refer to acts committed by the officials that were in duty)). That was a judgment that took place on January 28, 1997 and was rendered by the lower military court which acquitted the alleged person responsible for the death of the victim, and the ratification of the decision made by the Court-Martial on March 25, 1998 which also recognized that the Self-Amnesty Law was applicable.

Furthermore, since the Supreme Court of Justice of Chile did not challenge the constitutionality of the Amnesty Law (Decree Law No.2.191 of 1978), the Commission also claimed that there was a failure by the State. Therefore, all these violations would constitute a failure by the State to comply with its obligations set forth in the ACHR. The IACHR also emphasized the fact that it does not matter when the enactment of the amnesty law occurred, but rather the fact that there is an ongoing effectiveness of the same law. The representatives in a similar way, did not make complaints on the murder itself, but based their claims on the denial of justice in the investigation of the crime.

The Government of Chile argued that since the murder occurred before the ratification of the Convention, the Court would lack the competence *ratione temporis* of the Court.

In addition, the government of Chile argued that the criminal investigation was a single and ongoing unity, permanent in time, being unable to be disassociated, not even materially or formally and has always a single proceeding. Therefore, the judicial actions started by the victim's next-of-kin after 1990 were not 'independent events'. The Court pointed out that neither the Commission nor the representatives requested the Court to examine the death and detention of the victim, facts which took place before the ratification of the Convention. Regarding the claim of the State that the criminal investigation was a single and ongoing act, the Court did not accept the State's claim, stating that during the course of a proceeding there are "separate facts that might occur where there is specific and independent violations" arising from the denial of justice. As independent facts, the Court mentioned the prohibition imposed on counsel for the defense to interview their clients in private, to duly examine the record of the case, and to forward evidence for the defense, among others things.

The Court concluded that it would have jurisdiction *ratione temporis* over the transfer of the case to military courts and on the application of the Amnesty Law, such as the application which took place after August 21, 1990, thus, recognizing the breach of articles 8(1) and 25 of the Convention. Nevertheless, the Court refused to recognize that there was a failure to investigate, prosecute and punish those persons responsible for the murder as the alleged facts were specified neither by the Commission nor by the representatives.

The Court recognized in this case that the situation of the application of the Amnesty Law would constitute violation of the Convention's rights. That is the same approach the Commission had in *Azocar and others v. Chile* and *Garay Hermosilla et al. v. Chile*. The State recognized the Court's jurisdiction on August 21, 1990 under a declaration which stated that it would recognize the Court's jurisdiction over "the events subsequent to the

date on which such Instrument of Ratification was deposited, or in any case, to events which took place after March 11, 1990”.

In the case of Argentina, the amnesty laws were enacted before the State ratified the ACHR. Law no. 23.492, (Full Stop Law) was enacted on December 24, 1986, and established a 60 days deadline to initiate all the criminal proceedings concerning the “dirty war”, forcing courts and human rights organizations race against the deadline. In Law no. 23.521 (Law of Due Obedience) which was enacted on June 8, 1987 all but the most senior officers were presumed *de jure* not to be criminally liable because they acted according to the orders of their superiors. Thus under this law, it would be assumed that the senior officers could not have opposed or resisted the present orders. However, exceptions were made in the cases of rape, abduction of children, and falsification of papers related to their identity among others.<sup>69</sup> In addition, the presidential Decree of Pardon no. 1002, of October 7, 1989 ordered that any proceedings against persons indicted for human rights violations who had not benefited from the earlier laws be stopped.

In *Consuelo v. Argentina*( case 10.147), the petitioners alleged that criminal proceedings for human rights violations, disappearances, summary executions, torture, kidnapping committed by members of the armed forces in 1970s were cancelled or obstructed by the laws and the Decree and that this constituted a violation of rights set out in the Convention. The Convention entered into force for Argentina on September 5, 1984.

The Government claimed that the alleged violations, disappearances, summary executions, torture and unlawful deprivation of freedom occurred in the 1970s, before the Argentine State’s ratification of the Convention and would not be admissible *ratione temporis*. Nevertheless, the Commission understood that the Law No.23,492 which was enacted on December 24, 1986, Law No 23, 521, enacted on June 8, 1987, and Presidential Decree No 1002 enacted on October 7, 1989 were at issue since they paralyzed the judicial inquiry on the crimes committed during the military regime.

The State invoked Article 28 of the Vienna Convention on the Law of Treaties, the jurisprudence on the non-retroactivity principle, to request that the petitions be declared inadmissible *ratione temporis*.

As the articles of the Convention that the petitioners invoked related to events that occurred after Argentina became a State Party to the Convention, the petition was considered admissible *ratione temporis*. The State contended that it had taken these measures in order to accomplish national reconciliation and consolidation of the democratic system.

The petitioners alleged that the State violated, *inter alia*, their right to judicial protection (Article 25) and their right to a fair trial (Article 8) under the Convention. The Argentine

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<sup>69</sup> Zalaquett, Jose, ‘Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints’ in Neil J. Kritz (ed) *Transitional Justice* (1995) pp.3-31, p.25.

government alleged that the facts described in the petition as violations, occurred before the State of Argentina had ratified the ACHR, thus the Commission would not have competence *ratione temporis* over the case.

However, as the laws which harmed the possibility of bringing the violators or stopping the judicial proceedings were promulgated after the ratification of the ACHR, the Commission decided that the petition was admissible and that the laws were incompatible with the Article XVIII (right to a fair trial) of the American Declaration of the Rights and Duties of Man and Articles 1, 8 and 15 of the ACHR.

In spite of the fact that Argentina had accepted the Court's compulsory jurisdiction, the Commission did not refer the case to the Court. Norris argues that the Commission might have been concerned that had it done so, it would have placed the Court in the delicate position of solving the dilemma of barring civilian governments that were intending to make a smooth transition from military rule to democratic governments by granting amnesty. Thus, he assumes that the Commission might have chosen to not risk losing the issue by submitting it for a final determination of the Court. Ellen Lutz adds that the fact that Argentina was one of the newest democracies in the region perhaps also influenced the Commission's decision not to refer these cases to the Court.<sup>70</sup>

#### **2.4. Indigenous rights and "continuing violations"**

Indigenous societies of the Americas, like those in Africa and Asia, have suffered the destruction of their culture and traditions due to colonialism.<sup>71</sup> Indigenous peoples had their culture and way of life systematically assaulted. Colonial powers tried to force assimilation and expand the concept of private property at the expense of the communal holdings of indigenous peoples. European colonists in Latin America, used indigenous labor first as slaves and subsequently as forced wage laborers.<sup>72</sup> In the American continent, approximately 400 indigenous groups of varying sizes remain, numbering more than 30 million people.<sup>73</sup>

Many of the injustices that they have suffered cannot be repaired by any legal means now. There is a discussion centering around the extent to which past injustices committed

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<sup>70</sup> Lutz, Ellen 2004, 'Responses to Amnesties by the Inter-American System for the Protection of Human Rights.' in David Harry and Stephen Livingstone In: HARRY, D. and LIVINGSTONE (eds), S. *Inter-American System of Human Rights*. (2004) pp.345-370, p.360.

<sup>71</sup> Lãm, Maivãn Clech., 2007. 'Remembering the country of their birth - Indigenous people and territoriality.' in, Richard Falk., Elver Hilal and Lisa Hajjar, L.(eds), *Human rights-critical concepts in political science*. (2007),vol.II, pp.424.

<sup>72</sup> Hannum, Hurst, 'The Protection of Indigenous Rights in the Inter- American System. In' in David Harry and Stephen Livingstone (eds) *Inter- American System of Human Rights* (2004), pp. 323-344, p. 323.

<sup>73</sup> Ibid.

against indigenous people can be redressed after many years have passed since the occurrence of the original injustice. For example, the British government broke the Waitangi treaty in which Maori chiefs agreed to cede the governance of New Zealand in return for protection against invaders.<sup>74</sup> However, the treaty was broken by the British Crown. Would it be reasonable to consider that non-Maori New Zealanders who live now can be held to be responsible for the redress of a wrong committed a long time ago? Thompson explains that there is the common sense assumption that reparative entitlements and obligations fade away as time passes. The evidence tends to disappear and memory becomes less reliable as an injustice recedes into the past. However, the same thinking cannot be applied to the case of historical injustice, as in the case of reparative justice in criminal procedures, it is necessary to determine guilt or innocence<sup>75</sup>.

In the injustices committed against the indigenous people there is no doubt of who the perpetrators are. In this case, the passage of time seems irrelevant. This idea might be applied by the international human rights bodies in order to consider the claims made by indigenous peoples.

The continuing violations concept made to protect victims of human rights violations was also applied in the Inter-American Human rights system to preserve the memories and history of indigenous peoples. The outstanding decision of *Moiwana* village by the IACtHR considered that the denial of justice by the Suriname authorities was a continuing violation.

In the *Ovelario Tames v. Brazil* case, the Inter-American Commission also decided that the denial of justice was a continuing violation, making it possible to examine the violations committed in a relatively recent past. The former case has historical significance, as it is connected to an intentional government policy which tried to destroy a community. The latter case is significant because it denounces the negligence of the Brazilian judiciary towards a member of an indigenous group, in spite of the fact that it is not only members of minority groups who face a state of impunity as a result of the Brazilian judiciary's interpretation of the law. However, the failure to realise justice by the Brazilian government is treatment that is not exclusive to members of minority groups, as we will see in *Joao Canuto Oliveira v. Brazil*, a case examined by the Inter-American Commission as Brazil had not accepted the Court's jurisdiction by the time the Commission analyzed it.

The Organization of American States (OAS) adopted only one instrument on the rights of indigenous peoples prior to the adoption of the Draft International American Declaration on the Rights of Indigenous Peoples by the Inter-American Commission on Human Rights in 1995.

Other aspects of indigenous culture were dealt with by the Inter-American Human rights system, such as the right to communal property in the Case of the Mayagna (Sumo)

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<sup>74</sup> Thompson, Janna., Taking responsibility for the past- reparation and historical justice (2002) p.73.

<sup>75</sup> Ibid. 78.

community of *Awás Tingni v. Nicaragua*. Through these decisions, which respect the cultural aspects of indigenous peoples, the inter-American human rights system is seeking to ensure that the tradition and memory of these groups survive the states' attempts to impose foreign values to their communities. The *Awás Tingni v. Nicaragua* was presented before the Inter- American Commission and remitted to the IACtHR. The community of Awás Tingni is comprised of more than six hundred persons, and is an indigenous community of the Mayagna or Sumo ethnic group, located in the Northern Atlantic Autonomous Region (RAAN) of the Atlantic Coast of Nicaragua. They subsist on family farming and communal agriculture, fruit gathering and medicinal plants, hunting and fishing. These activities, as well as the use and enjoyment of the land they inhabit, are carried out in a determined area. The Court ruled that "...among indigenous peoples there is a communitarian tradition regarding a **communal form of collective property of the land** in the sense that ownership is not centered on an individual but rather on the group and its community..."(emphasis added). The Court decided that the State should create an effective mechanism to delimit the territory of the community, abstain from allowing third parties to affect the existence, value, enjoyment of the property where the community lives and allow them to carry out their own activities. In addition, the Court established that reparations should be paid to the community.

The Moiwana Village case examined the question of a massacre of an ethnic group descended from "Bush Negroes" or "Maroons", former slaves who fled enslavement and lived in independent communities. The ACHR entered into force for Suriname on November 12, 1987, and the jurisdiction of the Court was recognised on the same date. On 29 November 1986 the village belonging to the N'djuka community was surrounded, its property burned, and many members of the community were killed, causing the displacement of the survivors to other regions.

The Moiwana massacre occurred before the State of Suriname ratified the ACHR accepted the Court's jurisdiction, a fact which led the State of Suriname to question the competence *ratione temporis* of the Court.

Suriname claimed that the Court lacked jurisdiction *ratione temporis* once the Commission treated it as a Convention State for the entire case, applying the Convention to the State *ex post facto*. Regarding the violations which occurred before the Convention entered into force for Suriname, the Commission recognized the violation of Articles I, VII, IX, XXIII of the American Declaration of the Rights and Duties of Man and violations of a continuing nature, occurring after the Convention entered into force for the State. Suriname claimed that the only continuing violations the Court had had recognized were forced disappearances, which were not at issue in the case.

The Commission replied to the State's claims, contending that Suriname had been treated as a state party to the Convention with respect to the entirety of the claims once the claims directly connected to the attack and related violations were argued to be violations to the Declaration. The representatives then argued that the denial of justice in the case and omission had a continuing nature.

The Court emphasized that in the case of a continuing or permanent violation, which begins before the acceptance and lasts after the acceptance of the Court's jurisdiction, the Tribunal is competent to examine the actions and omissions occurring after the recognition of jurisdiction.

The Court admitted that it did not have jurisdiction to hear the facts related to the attack and death of the victims as they had occurred before the State of Suriname ratified the Convention. Nonetheless, the Court concluded that the failure to investigate, prosecute and punish the people responsible for the massacre constituted ongoing violations to the Articles 8 and 25 of the Convention, right to humane treatment (Article 5), freedom of movement (Article 22), and property (Article 21). In relation to the murder of the victims, the jurisdiction of the Court was not applied. Furthermore, the Court ruled that the failure to investigate the crime in due time constitutes a violation to the right to judicial protection, using an approach similar to that used in the *Serrano- Cruz Sisters v. El Salvador* case.

The IACtHR's judge Antonio Cançado Trindade emitted in his separate opinion of the *Moiwana village v. Suriname* case, among other issues, the projection of human suffering in time. He quoted the U.N. World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, 2001) in his judgment, and also pointed out the salience of par. 98 of the instrument which stresses the “*importance and necessity of teaching about the facts and truth of their history of humankind*”, with a view to achieving a comprehensive and objective cognizance of the tragedies of the past.

The document emphasizes that “*remembering the crimes or wrongs of the past, wherever and whenever they occurred...are essential elements for international reconciliation and the creation of societies based on justice, equality and solidarity*” (par.106)<sup>76</sup>. In addition, Judge Trindade points out that:

forgetfulness can simply not be imposed on anyone. Legal or institutionalized means of imposing oblivion, -such as amnesty or prescription, - utilitarian as they may seem to be appear rather as obstruction to justice. The search for, and investigation of, past violations of human rights render the past an eternal present.<sup>77</sup>

His statement makes us think of the historical dimension of events, a past event is one that has happened and is now lost, a situation that was at hand now and no longer exists. It is an event which continues to have significance for our present, as a piece of past with contemporary effects, such as a historical artifact in a museum remains present-at-hand.

In this sense it can be assumed that the Commission extends the competence *ratione temporis* in order to make governments remember and not repeat the past wrongs in issues that if left exclusively to the involved governments decide would have a high

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<sup>76</sup> Trindade above n 51 para.72

<sup>77</sup> Ibid para.84



probability of being forgotten. The Inter-American Commission and the IACtHR played a historical role in causing state governments to acknowledge their mistakes where, in addition to addressing the victims of the violations, the memory could be preserved even if the whole claim of the petitioners were not accepted.

In *Ovelário Tames v. Brazil*, civil police officers had arrested Mr. Ovelário in October 1988 and he was found dead in his cell next morning. The petitioners alleged a violation of rights guaranteed in Article I (right to life, liberty and personal security) of the American Declaration of the Rights and Duties of Man, and in articles 8 (right to a fair trial) and 25 (right to judicial protection) of the ACHR.

Brazil ratified the Convention on September 25, 1992, but at the time the petition was presented, had not accepted the IACtHR's jurisdiction. The Commission decided that it would not exempt the State for violations of human rights which occurred prior to the ratification of the Convention, because the rights safeguarded in the Declaration have a binding character according to the Commission's decision. The State did not challenge the binding character of the Declaration and argued that domestic remedies had not been exhausted.

In this case, what was put into question was not only the assassination of the victim, but also the ongoing denial of justice by the Brazilian government. The Commission decided that the State of Brazil was responsible for the violation of the rights to life, liberty and personal security (Article 1), to a fair trial (Article 18), and to protection from arbitrary arrest (Article XXV) of the American Declaration on the Rights and Duties of Man, and to a fair trial and judicial protection (Articles. 8 and 25), and of the obligation of the State to respect the rights (namely, Article 1(1) established in the ACHR. The violations occurred in connection with the death of Ovelário Tames as a result of injuries inflicted by members of the civil police force, in addition to the failure to actively investigate, try and punish those responsible, and also for the failure to make reparations to his family and other legitimate claimants.

In this case, what was challenged was not the retroactivity of the Commission's competence over the assassination of the victim, but the lack of judicial response to the case. This approach was the same as that of the Commission in the *João Canuto de Oliveira v. Brazil*, where the victim, who was a labor union leader of rural workers in Brazil had been killed under the plan of local landlords. The Commission based its recommendation on violations of the American Declaration of the Rights and Duties of Man in relation to the events which occurred before September 25, 1992, the date Brazil ratified the ACHR.

Furthermore, the Commission recognized its own competence regarding the facts which took place after Brazil ratified the Convention, as they constituted the "continued denial" of the right to judicial guarantees (Article 8 and 25 of the Convention). The victim was assassinated on December 18, 1985 by gunmen over a land dispute. In spite of the fact that he had reported to the local police that he was being threatened by landlords and politicians, the State authorities failed to take measures to protect him. Nine years after

the crime had occurred, no suspects for the murder of Joao Canuto had been arrested or tried, the investigation also took eight years to be completed, and after its conclusion, the case was still being held up at the time the petition was brought to the Inter-American Commission. The Commission, referring to Article XVIII of the American Declaration, recognized its competence *ratione temporis* to examine the facts occurred before the ratification of the Convention.

It found a violation of Art. XVIII of the American Declaration of Human Rights, which is related to the right to justice. The Commission considered that the unjustified delay in the investigation and procedures conducted by the Office of the Public Prosecutor exonerated the petitioner from his obligation to exhaust domestic legal remedies (para.63).

Therefore, as we can see in the aforementioned case, the delay of procedures would not be targeted exclusively at members of indigenous groups, but in the broader context of the Brazilian judiciary's activities.

Kerem Alt Parmak<sup>78</sup> discusses whether the duty to investigate, prosecute and punish can be applied to the concept of continuing violations. According to his understanding, the duty to investigate, prosecute and punish can be separated from the main event that occurred before the critical date. In addition, the rights-based approach would allow petitions which would be considered as out of time to be considered as admissible.

Following the *Moiwana* case, other decisions were handed down which related to the continuing denial of justice which would enter the classification of Victor Madrigal-Borloz as a lack of executive action. In the following cases the critical date was not discussed, only the lack of action by the state authorities.

In *Yakye Axa case*<sup>79</sup>, the Court analyzed Paraguay's failure to process in due time an indigenous community's claim to regain access to its traditional lands, as it is established in the Constitution. The community had submitted its claim before the national courts in 1993. However, by the time the IACtHR had examined their decision in 2005 the case was still in process. The Court came to the conclusion that Paraguay's delay of more than 12 years was not reasonable. In the meantime, members of the tribe had to live on the side of the road adjacent to its ancestral territory, an area that lacked the most basic amenities such as access to clean water. The Court recognized the close relationship between the indigenous people and the land, and found a violation of right to property (article 21) of the Convention. In addition, the Court also found a violation of articles 1(1), 2, 4, 8, and 25 of the ACHR. The Court also ordered reparations to the community

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<sup>78</sup> Alt Parmak, Kerem, 'The application of the concept of continuing violation to the duty to investigate, prosecute and punish under international human rights law'(1994-2004) *Turkish Yearbook of human rights*.volAvailable at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=926281](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=926281), p.49.

<sup>79</sup> IACtHR, *Yakye Axa Indigenous Community v. Paraguay* (Merits, Reparations and Costs) 17 June 2005 (Series C No.125).

either by ensuring its access to its ancestral lands or identifying alternative land that the state could acquire for that objective.

## 2.5. World War 2 and the “continuing violation”

In *Isamu Carlos Shibayama v. United States*<sup>80</sup>, facts which occurred even before the existence of the Commission were put into the question, but the Commission considered admissible only the facts which occurred after the U.S government committed to the American Declaration of Human Rights.

Shibayama and his family, who were from Japanese descent, were seized by the United States in Peru in 1944, forcibly taken to the United States and held in custody in an internment camp in Texas from March 23, 1944 until September 9, 1946, being denied permanent resident status in the United States until 1956. He was subsequently denied appropriate reparations under the Civil Liberties Act of 1988 and applicable principles of international human rights and humanitarian law. The United States deposited its instrument of ratification of the OAS Charter on June 19, 1951, at which time the American Declaration became a source of legal obligation for the United States, and the State has been subject to the Commission’s jurisdiction since 1959, the year in which the Commission was created.

The petitioners claimed that the initial violations related to the abduction and internment of the victim were connected to a policy that was still ongoing. More specifically, they claimed that the ongoing policy was represented by the current U.S government’s counterterrorism acts and as there are no statutory limitations for war crimes and crimes against humanity the Commission could examine the petition.

The Government disputed the competence *ratione temporis* of the Commission, as the facts alleged occurred before the creation of the Commission and the adoption of the American Declaration. The State argued that for the Commission to assert jurisdiction *ratione temporis* in respect of these claims would cause the Commission to be in clear contravention of established international legal norms. Furthermore, the State claimed that the petitioners could neither prove that there were continuing violations nor the seizure and detention of internees during World War II. According to the State, this policy ended in 1946 and it rejected the contention that the due process rights that internees exercised may have constituted evidence of a continuing policy of seizure and detention.

In addition, the US argued that if the Commission found competence *ratione temporis* in the present case, it would find itself facing a “dangerously slippery slope” without temporal boundaries to claims, such that any alleged historical wrong would be

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<sup>80</sup> IACHR, *Isamu Carlos Shibayama et al v. United States*, Case No.434-03, Report No.26/06.

characterized as a continuing violation. The Government of USA argued that it would not constitute an appropriate use of the limited resources of the Commission.

The Commission found that it had jurisdiction over the case concerning the claim of denial to grant appropriate reparations under the Civil Liberties Act, but not over the facts which occurred during World War II, before the existence of the Declaration. According to the Commission, the Civil Liberties Act of 1988 excluded Shibayama from the rights to receive reparations because they were not considered U.S citizens or permanent residents at the time of their internment, even if they had suffered the same circumstances as other individuals of Japanese descent who were eligible according to the legislation. The Commission admitted the claims under Articles II, XVIII and XXVI of the American Declaration and is currently examining its merits.

The Commission admitted only the part concerning the Civil Liberties Act enacted in 1988, not accepting the claim that there was still a policy of detaining prisoners which started during World War II and continued until the time that the case was brought before it, emphasizing the discriminatory character of the 1988 Civil Acts law.

The ICHR, therefore, preferred to set temporal limits by not accepting claims that related to facts which took place before its existence. However, the situation that pre-existed the establishment of the IACHR, the American policy of internment of Japanese descents was also examined. By this examination, the petitioner was successful in drawing attention to past atrocities the US government was responsible for.

## **2.6. Right to property and continuing violations**

The IACtHR has recognized continuing violations in the case of laws which were enacted before the ratification of the Convention by States in the case of forced disappearances, but in cases of claims regarding property it has not.

In the *Cantos v. Argentina* Case,<sup>81</sup> the petitioner alleged that his property was confiscated by the State before Argentina had ratified the ACHR and had never returned it to the petitioner. The State objected to the case, arguing the fact that the event claimed had occurred before the ratification of the Convention by the State. The State ratified the Convention on September 5, 1984, accepting only the obligatory jurisdiction of the Court for facts which took place after the ratification of the instrument. The Court referred to Article 28 of the Vienna Convention on the Law of Treaties which establishes that “unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the respect to that party” and decided to apply the non-retroactivity principle, and did not recognize its

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<sup>81</sup>IACtHR, *Cantos v. Argentina*, 7 September 2001 (Preliminary Objections).

competence *ratione temporis* to examine the claims relating to facts which occurred before the ratification of the treaty by the State. It also emphasized the fact that the acceptance of the jurisdiction of the Court was optional in the terms of article 62 of the Convention, but that the obligations of the treaty are binding in the same way to States which accepted the jurisdiction of the Court to those who did not.

The IACtHR once again found it more important to respect the will of the State as in the Serrano Cruz sisters case<sup>82</sup>(footnote), where the decision of the Court to consider itself as being without competence *ratione temporis*, and did not allow the examination of the forced disappearance of the victims.

The Court in the Cantos case did not find necessary to go further in explaining the concept of ongoing violations as it restricted itself to an examination of the facts which took place after the ratification of the Convention by the State. There is a clear difference of interpretation of what could be an ongoing violation by the Commission and the Court. The former had alleged that the effects of the deprivation of the petitioner's property continued to the present and it would, thus give rise to continuing violations. By contrast, the Court refused to examine the facts which took place before the ratification of the Convention.

## **2.7. Continuing violations in the Inter-American Commission on Human Rights**

The approach of the Inter-American Commission and IACtHR for continuing violations is the broadest one in international human rights bodies. It recognizes as continuing violations when the causal act continues, when the effects of the causal act continue and when the omission or failure to act happens.

The difference between the approach of the Commission and the Court is that the former can also consider violations related to the Declaration on the Rights and Duties of Man, whereas the Court is confined to considering violations of the Convention.

The Commission, therefore would base its decisions, on the American Declaration of the Rights and Duties of Man for facts which took place before the ratification of the Convention and it would recognize its competence *ratione temporis* over violations of the Convention after the state has ratified the Convention, mainly constituting violation of the right to judicial guarantees, articles 8 and 25 of the Convention<sup>83</sup>.

The Commission adopted the same view in the 42<sup>nd</sup> Police District Parque Sao Lucas case, where the Commission considered itself competent to examine events which took place before September 25, 1992, when Brazil ratified the ACHR as violations of the

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<sup>82</sup> IACtHR, Serrano Cruz sisters v. El Salvador, 23 November 2004 (Preliminary Objections).

<sup>83</sup> IACHR, *Joao Camuto de Oliveira v. Brazil*, Case No.12.287

American Declaration and after the ratification the violation of articles 8 and 25 of the ACHR. The violations were expressed as being the undue delays of the judicial proceedings. In this case, the Commission referred to the European Commission's case which stated:

... in accordance with the generally accepted principles of international law, the Convention is valid for all the Contracting parties only as it pertains to events occurring subsequent to its entry into force for that Party. In the case that those events consist of a series of legal proceedings which extend over several months' time, the date of entry into force of the Convention or the State Party in question serves to divide the period in two parts: the first part falls outside the jurisdiction of the Commission, while the second part cannot be rejected on the basis of those arguments<sup>84</sup>.

The Commission considered acts which had ongoing effects as a continuing violation in the case of laws which were enacted before the ratification of the Convention. In *Azocar and others v. Chile*, it stated that "it clarifies that the violations alleged in the petition, while arising from norms issued prior to Chile's ratification of the ACHR are ongoing, and have standing now post- ratification of the ACHR when the obligation to respect and guarantee the rights established in that Convention is now in effect for the Chilean State ...". In the same case, it emphasized the fact that the article 28 of the Vienna Convention which establishes that a situation that has not stopped existing at the moment of ratification is covered by the international obligations incorporated into the treaty that is being ratified. The Commission has stated that "once the ACHR entered into force (...) the Convention, and not the Declaration, became the source of legal norms for application by the Commission insofar as the petition alleges violations of substantially identical rights set forth in both instruments and those claimed violations do not involve a continuing situation"<sup>85</sup>. Therefore, the Commission has confirmed its competence to examine continuing violations of the rights set forth in the American Declaration.

The concept of continuing violations was applied in a more restricted way in the European Commission on Human Rights. The Commission distinguished instantaneous acts that occurred before the entry into force of the Convention, with lasting effects and continuing violations, such as in the cases of laws which were enacted before the ratification of the Convention, but would emanate effects after the critical period<sup>86</sup>. The European Commission would consider as continuing violations only the latter cases.

As an example of an instantaneous act with ongoing consequences that were not recognized as continuing violations by the European Court on Human Rights is the case

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<sup>84</sup> European Commission on Human Rights Decisions and Reports, Vol. 7, Application No. 7211/75, Decision of October 6, 1976 (Switzerland), p. 107.

<sup>85</sup> IACHR, Tomás Eduardo Cirio, Uruguay, October 16, 2001, para. 36; Report No. 38/99, Victor Saldano, Argentina, March 11, 1999, para. 13.

<sup>86</sup> Buyse, Antoine, 'A lifeline in time- non- retroactivity and continuing violations under the ECHR'(2006)75 *Nordic Journal of international law*, pp.63-88, p.82.

of *Jovanovic v. Croatia*, in which the dismissal from work of the applicant and his civil action before ratification, followed by the Constitutional Court's decision, was considered not to be an ongoing violation.

An example of legislation which violates the Convention is the Becker case, in which the applicant had been condemned to death by a Belgian war tribunal for collaborating with German authorities in Belgium during World War II. The death penalty was commuted to life imprisonment by the Belgium military court and after some time the applicant was released. However, under article 12 of the Belgian Penal code, the applicant was prohibited from exercising the right of citizens to participate in the administration, editing, printing or distribution of a newspaper. The Commission analyzed the applicant's claim and found that the applicant was in an ongoing situation in which he was a victim of a violation of the right to freedom of expression guaranteed by article 10 of the Convention.<sup>87</sup>

Furthermore, in the case of Garay Hermosilla, the Commission recognized that the failure to revoke the amnesty law that was issued by the Chilean military government and the failure to investigate, identify and prosecute the responsible people amounted to an ongoing violation. The Commission also challenged the Chilean Supreme Court's decision, in which it considered that Decree Law no.2191, which established the amnesty, was constitutional. According to the Commission's decision, the judgment violated articles 1.1 and 2 of the American Convention.

## **2.8. Inter-American Court on Human Rights and continuing violations**

The continuing violations concept developed by the Court is limited only by the fact that it cannot recognize violations which occurred before the ratification of the Convention and before the State had recognized the Court's jurisdiction.

In the Moiwana village case, the IACtHR emphasized that where there is a continuing or permanent violation, which begins before the acceptance of the Court's jurisdiction and lasts after that acceptance, the Tribunal is competent to examine the actions and omissions occurring after the recognition of the jurisdiction. However, as the attack and death of civilians had occurred before the ratification of the American Convention, the Court did not recognize its competence *ratione temporis* over these facts. Thus, the Court confined itself to state the violations of articles 8 and 25 of the Convention, which consisted of the failure to investigate, prosecute and punish the responsible people for the massacre.

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<sup>87</sup> Zwart, Tom, *The admissibility of human rights petitions* (1994), p.127.

## 2.9. Protection of the principle of non-retroactivity by the Inter-American system pro individuals

We discussed that bodies in the Inter-American system, with regard to examining the exceptions of the principle of non-retroactivity, recognized the continuing violations concept in order to bring within its competence *ratione temporis* for violations of the rights protected by the Declaration or Convention. Therefore, this interpretation was made to broaden the protection of the individuals under the Inter-American human rights system. However, when it comes to the interpretation of the principle in the context of domestic criminal laws the Commission and the Court might not accept a broader interpretation as it would diminish the protection of the individual before international law. In *Canese v. Paraguay*,<sup>88</sup> the applicant alleged violations of articles 8 (right to a fair trial) 9 (Freedom from *Ex Post Facto* Laws), 13 (Freedom of Thought and Expression) and 22 (Freedom of Movement and Residence) of the ACHR all in relation to Article 1(1) (Obligation to Respect Rights) by virtue of statements that he made when he was a presidential candidate. He was put on trial due to claims made against Juan Carlos Wasmosy, another presidential candidate, and was tried and sentenced for the crime of slander at first instance on March 22, 1994. In the second instance on November 4, 1997, the applicant was sentenced for the offenses of slander to two months' imprisonment and a fine of 2,909,000 guaraníes. Article 9 of the Convention provides that the State has the obligation to apply the most favorable criminal norm to the defendant, even if it is promulgated after the fact or the conviction. It states that:

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

The State, however, did not apply the most favorable norm to the applicant when it condemned him for slander under the 1914 Paraguayan Penal Code that established punishments of 2 to 22 months imprisonment and an additional fine. However, the Penal Code that entered into force in November 1998 established a sanction of up to one year's imprisonment or a fine. Therefore, the later Code was more favorable, reducing the minimum and maximum sanctions and should have been applied according to the *pro reo* principle in criminal law. In addition, the applicant filed appeals in which he requested the retroactive application of the new legislation which was rejected by the Supreme Court of Justice of Paraguay.

The Court has noted that according to the principle of non-retroactivity, the State is prevented from retroactively applying penal laws that would "increase sanctions, establish aggravating circumstances or create aggravated types of offenses. It is also

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<sup>88</sup> IACtHR., *Ricardo Canese v. Paraguay*, 31 August 2004.



designed to prevent a person being penalized for an act that, when it was committed, was not an offense or could not be punished or prosecuted”.

## 2.10. Conclusions

The above mentioned cases refer to past violations committed by States against individuals primarily during the reigns of military dictatorships or newly established democracies. In many cases, the violations occurred before the State had ratified the Convention or recognized the jurisdiction of the Court, which would consider these crimes as being outside the competence *ratione temporis* of the Commission or Court, if interpreted absolutely and without exceptions.

However, the IACHR and IACtHR applied the continuing violations concept in order to establish exceptions for the principle of non- retroactivity. The situations in which the concept of continuing violations was applied were mainly cases of forced disappearances, the failure to investigate, prosecute and punish those responsible for the violations and when laws enacted before the ratification of the Convention contained articles which clashed with the Convention. In determining what constituted continuing violations, the Commission and Court established limits, not examining events or acts, in many cases, which caused the need for such procedures, such as in *Moiwana Village case* and *Serrano- Cruz sisters case*. In the latter, due to the temporal limitation imposed by the state party, the disappearance of the sisters was not considered to be a continuing violation.

Nevertheless, the crime of forced disappearance was interpreted by the Court as a crime against humanity. The problem is that if forced disappearance is a crime against humanity it cannot be subject to temporal limitations. The Court preferred to respect the temporal limitation made by the State and not examine the forced disappearance claim. This decision has demonstrated that state voluntarism, as described by Court’s Judge Trindade still prevails in many cases. In the former, the massacre *per se* could not be examined by the Court, but the denial of justice for the victims and next-of-kin were considered to be violations of the Convention by the Court.

There is a basic difference in the application of the principle of non- retroactivity in the case of human rights treaties.

However, at the same time, the Commission and Court used the fact that procedures which were supposed to start after the violations did not occur properly even after ratification by the State party.

In the *Shibayama case*, the U.S government raised the question about the serious risk of a “dangerously slippery slope” regarding accepting exceptions to temporal jurisdiction ignoring any temporal boundaries to possible claims. The Commission and Court

decisions seek the public acknowledgement of governments for past wrongs which currently still have effects. Justice for indigenous peoples is not simply about the massacre or displacement that they suffered before the ratification of the Convention, but rather about the injustice of not having their basic rights inadequately respected at the present moment. If this judgement had not occurred and in the future they were not a target of discriminatory policies and were completely integrated into society maybe the discussion of past massacres could have been exchanged for a reconciliatory approach. However, that is not the case.

In the Shibayama case, the facts which took place during the World War II were considered outside the competence *ratione temporis* of the Commission. The admissibility of the case was based on the Civil Liberties Act, which discriminated Japanese descents who did not hold American nationality. The Commission decided that it could not examine facts which occurred before the existence of the Declaration and Commission, thereby limiting its retroactivity.

The Application of the concept of continuing violations by the Inter-American Commission and by the IACtHR. The latter is restricted by the fact that states have to recognize the Court's jurisdiction and also that the Court cannot examine facts which occurred before the ratification of the Convention. The Commission can examine facts which took place before the ratification of the Convention, in examining the violations of the rights set out in the American Declaration and also violations of the Convention after its ratification by state parties.

## CHAPTER 3

### 3. Human Rights Committee and Past Violations

#### 3.1. Human Rights Committee and continuing violations

The Human Rights Committee has made recommendations which deal with the issue of continuing violation of human rights. To assess if the act can be considered as a continuing violation the Human Rights Committee must examine whether the act is of continuing nature and its effects violate the Covenant in themselves. It also considers that it is “precluded from considering a communication if the alleged violations occurred before the entry into force of the Optional Protocol, unless the alleged violations continue or have continuing effects which in themselves constitute a violation of the Covenant. A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by clear implication, of previous violations of the State party”.<sup>89</sup>

Therefore, there are two elements that are assessed in order to recognize the continuing violation: there must be an affirmation of a past act and whether or not the alleged violations should continue or have continuing effects which would constitute violations of human rights.

Most States usually ratify the Optional Protocol several years after ratifying the Covenant and the question that this raises is whether the Human Rights Committee could have competence *ratione temporis* to consider whether an alleged violation which took place after the entry into force of the Covenant, but before the entry into force of the Optional Protocol. Many authors support the argument that the Optional Protocol has retroactive effects. Bossuyt claims that if the Optional Protocol and the Covenant have not been ratified at the same time, the ratification of the Optional Protocol has retroactive effect, except in cases where there was a reservation made by the State. Furthermore, Zwart claims that the retroactive effect of jurisdictional clauses of this kind is presumed in international law.<sup>90</sup> The *Mavrommatis Palestine Concessions case* was given as an example. In that case, the Permanent Court of Justice decided that ‘in the cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment...the reservation made in many arbitration treaties regarding disputes arising out of events previous to the conclusion of the treaty seems to prove the necessity

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<sup>89</sup> See e.g., *Nallaratnam Singarasa v. Sri Lanka*, 23 August 2004 (Comm.No.1033/2001); *E. and A. K. v. Hungary*), Decision of 7 April 1994, (Comm. No. 520/1992; *K. V. and C. V. v. Germany*, Decision of 8 April 1994 (Comm. No. 568/1993), *Holland v. Ireland*, Decision of 26 October 1996 (Comm. No. 593/1994),

<sup>90</sup> Zwart, Tom, *The admissibility of human rights petitions- the case law of the European Commission of human rights and the Human Rights Committee* (1994), p.136.

for **an explicit limitation of jurisdiction** and, consequently, the correctness of the rule of interpretation enunciated above.<sup>91</sup> (emphasis added)

However, the Permanent Court of Justice has not always had this approach to facts which occurred before the existence of the treaty law. In the *Ambatielos* case,<sup>92</sup> the Court claimed that there must be a special clause or object to necessitate a retroactive interpretation, respecting the non-retroactivity principle.

The Human Rights Committee has also a different approach to the European Court and Inter-American Human rights bodies since it does not accept its own jurisdiction over cases which occurred before the ratification of the Optional Protocol.

The problem of continuing violations has been examined in the context of post-communist societies concerning the problems of discrimination on the restitution of property,<sup>93</sup> legislation that preceded the existence of the Covenant and was still in force after the Covenant was ratified,<sup>94</sup> detention in incommunicado and ill-treatment,<sup>95</sup> forced disappearances<sup>96</sup> and discriminatory treatment.<sup>97</sup>

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<sup>91</sup> PCIJ. *Mavrommatis Palestine Concessions Case*, 30 August 1924, Series A, No.2 p.35.

<sup>92</sup> ICJ, *Ambatielos case (Greece v. United Kingdom)* 1 July 1952 (preliminary objections).

<sup>93</sup> See e.g., *Ivan Somers v. Hungary*, 29 July 1996 (Comm.No.566/1993); *Josef Frank Adam v. The Czech Republic*, 23 July 1996 (Comm.No.586/1994), *Peter Drobek v.Slovakia*, 14 July 1997 (Comm. No.643/1995); *Jarmila Mazurkiewiczova v. Czech Republic*, 2 August 1999 (Comm.No.724/1996); *Alzbeta Pezoldova v. The Czech Republic*, 25 October 2002 (Comm. No. 757/1997); *Dagmar Brokova v. Czech Republic*, 31 October 2001 (Comm.No. 774/1997); *Ota Koutny v. Czech Republic*, 18 April 2000 (Comm.No.807/1998).

<sup>94</sup> See e.g., *Sandra Lovelace v.Canada*, 30 July 1981 (Comm. No.24/1977); *L.S.N. v. Canada*, 30 March 1984 (Comm.No.94/1981); *Simalae Toala et al. v. New Zealand*, 2 November 2000 (Comm.No.675/1995).

<sup>95</sup> *Luciano Weinberger Weisz v. Uruguay*, 29 October 1980 (Comm.No.28/1978); *Leopoldo Buffo Carballal v.Uruguay*, 27 March 1981 (Comm.No.33/1978); *Noriana Hernandez Valentini de Bazzano v.Uruguay*, 15 August 1979(Comm.No.5/1977); *Esther Soriano de Bouton v.Uruguay*, 27 March 1981 (Comm.No.37/1978); *Alberto Grille Motta v.Uruguay*, 29 July 1980 (Comm.No.11/1977); *Jorge Manera Lluberis v. Uruguay*, 6 April 1984 (Comm.No.123/1982); *Luis Alberto Solorzano v. Venezuela*, 26 March 1986 (Comm.No.156/1983); *Nallarattnam Singarasa v. Sri Lanka*, 23 August 2004 (Comm.No.1033/2001).

<sup>96</sup> *S.E.v.Argentina*, (Comm.No.275/1988); *R.A.V.N. et al.v. Argentina*, (Comm.No.343/1988); *Maria Otilia Vargas v.Chile*, (Comm.No.718/1996); *Acuna Inostroza et al. v.Chile*, (Comm.No.717/1996); *Jegatheeswara Sarma v. Sri Lanka*, (Comm.No.950/2000).

<sup>97</sup> *Ibrahima Gueye et al.v.France*, 3 April 1989 (Comm.No.196/1983), *Mathia Douroke v. France*, 25 April 2000(Comm.No.756/1997).

### 3.2. Restitution of property and discrimination

On determining reparations, there are the criteria of material and personal suffering. With regard to the former, there is the destruction and confiscation of the property. The plight of the French Jews during WWII and Germans who carried out looting of works and furniture are examples of the destruction of property. And as an example of the latter, there is a distinction between slave laborers and forced laborers, such as the Poles and Russians who were incarcerated by the Nazis during World War II.<sup>98</sup> Demands for restitution have an emotional component, and as emotions cool down after a certain time we can expect that as time passes the expectation that restitution will be made becomes less justifiable. Thus, when a generation has passed since the wrongful acquisitions, the new owners are generally allowed to retain their property<sup>99</sup>.

Many cases from the Czech Republic and Hungary were related to the restitution of property in post-communist countries and decisions on these cases were not made in a uniform way. In most cases, the Committee did not recognize<sup>100</sup> continuing violations relating to discriminatory treatment of non-residents and non-citizens of the Czech Republic in violation of article 26 which states that “all persons are equal before the law and are entitled without any discrimination to equal protection of the law”.

In Czechoslovakia, the cutoff point was initially 1994 set to 1948, thus excluding compensation for the expropriation and expulsion of Sudetengermans after World War II and of Jewish property before the war.<sup>101</sup> Can the exclusion of a determined class of people who suffered harms be considered discriminatory in international courts?

One remarkable example where the continuing violations principle was not applied is the case of victims who suffered from residual disabilities caused by human rights violations which occurred before the state party ratified the human rights conventions, with a rare exception in a case examined by CEDAW (Committee on the Elimination of Discrimination against Women).

The claims were rejected because the Committee decided that the violations ceased before the Covenant entered into force for the State party and because the Covenant does not provide a substantive right to property. The authors, in several cases, did not base their claims on discriminatory treatment in domestic courts before bringing the same claim before the Committee. Unless the violation was continuing after the entry into force of the Protocol, the Committee would dismiss the claim *ratione temporis*.

Pauwelyn’s first tool to analyze whether or not there was a continuing violation was to look at the nature and scope of the obligation. The protection set out on art. 26 of the

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<sup>98</sup> Elster, Jon. *Closing the Books- Transitional Justice in Historical Perspective* (2004),p.170

<sup>99</sup> Ibid, p.172.

<sup>100</sup> HRC, *Ivan Somers v. Hungary*, 29 July 1996 (Comm.No.566/1993).

<sup>101</sup> Elster above n.92, 128.

Covenant relates to a situation where it prohibits discrimination and guarantees to all persons equal and effective protection. It has a continuing scope since it is impossible to talk about an instantaneous protection of discriminatory treatment.

The cessation of discrimination would grant a transfer of the property's title or compensation on the value of the property to the claimants who were claiming that they were suffering discrimination.

In the third tool, Pauwelyn questions whether or not the violation creates a legal fiction where the act is repeated in its entirety each day since it has been passed or whether only the effects or consequences of the act remains intact. The situation of not receiving the title or compensation cannot amount to a special status, because this tool not suited to the situation under examination.

International human rights institutions were largely incapable of assessing the legality of the coercive confiscation of property as we can see for the cases of the Human Rights Committee cases. A case where the claims regarding events which took place before the Covenant and were not considered as admissible *ratione temporis* is described in *Ivan Somers v. Hungary*. In this case, the author's parents had their properties and assets confiscated by the local government before the nationalization of private property in Hungary because his father was an influential member of the democratic party. In 1991, the State adopted new legislation regarding the compensation for expropriation during the communist period but those who were expropriated on the basis of political opinion were omitted in the legislation. The International Covenant on Civil and Political Rights does not protect right to property the issue was not the confiscation, but the discriminatory effect of compensation law.

The author had argued that there was discriminatory treatment for the victims of political persecution under the former political regime since the current tenants had the option to buy the property where they were living at low prices while the applicants could not do the same. The State, however, argued that the reason the applicants could not recover their old property is factual, not legal as they were not tenants of any residential property in State or local government ownership.

The difference in the treatment between these two different groups of people, tenants and non-tenants by law is based on objective criteria and is reasonable in the sense that the tenants have contributed financially to the maintenance of their apartments or invested money in those apartments to increase their comfort, according to the State. The State gave the current tenants of former State owned property priority in the privatization sale of such property.

The applicant dismissed the State party's contention that it was fair and reasonable that current tenants should participate in privatization because they had contributed to the maintenance of their apartments. He claimed that it "is tantamount to the State party in fact confirming the violations that continue to affect him and his mother as a result of

political persecution during the communist period, as the sole reason for their not being the tenants or occupants of their apartment...”

On the decision of the merits of the case, the Committee emphasized the fact that the confiscation of private property or failure by the State to pay the compensation for such confiscation could still constitute a breach of the Covenant if the relevant act or omission was based on discrimination grounds in violation of art. 26 of the Covenant. In this context, the main issue was whether the application of Act XXV of 1991 and of Act LXXVIII of 1993 resulted in a violation of their right to equality before the law. The Committee considered the fact that the applicant contended that the laws’ effects confirmed earlier discriminatory confiscation of his father’s property. Also, the Committee pointed out that the confiscation was an issue in the case, but rather the alleged discriminatory effect of the compensation. Furthermore, as the Covenant does not protect the right to property there is no right under the Covenant to have property restituted. Thus, the Committee considered that the compensation criteria in Act XXV was objective and reasonable.

The Committee considered that the applicants failed to show that the actions prior to the entry into force of the Optional Protocol for Hungary had continued to produce effects which in themselves would constitute a violation of any of these rights after the entry into force, rejecting the complaints of the applicants.

The applicants of communication No.586/1994, *Josef Frank Adam v. the Czech Republic* based on article 26 once the tenants have contributed financially to the maintenance of the property to permanent residence in Czech Republic and Czech citizenship. The Committee observed that the Covenant does not protect the right to property, but the Czech Act 87/91 discriminated against persons who were not Czech citizens. The applicant’s father was a Czech citizen, whose property and business were confiscated by Czechoslovak government in 1949. The applicant was residing in Melbourne. The alleged violations took place before the entry into force of the Covenant and the Optional Protocol for the Czech Republic,<sup>102</sup> but the Committee considered that the new legislation excluded claimants who were not citizens had continuing consequences subsequent to the entry into force of the Optional Protocol. The main claim was not based on the facts which occurred in 1949, but was made on the grounds of the legislation enacted in 1991, after the ratification of the Covenant on Civil and Political Rights and the Optional Protocol.

In *Peter Drobek v. Slovakia*, the applicant also claimed to be victim of a violation of article 26 of the Covenant by the Slovak government because it had endorsed the ethnic discrimination committed before the Covenant existed by enacting a law which offers remedies to those who had their lands expropriated for economic ideology, but it did not offer it to those who had their lands expropriated for the reason of their ethnicity. The authors claimed that “the breach committed prior to the entry into force of the Covenant has been repeated by the enacting of discriminatory legislation in 1991 and by the

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<sup>102</sup> The Optional Protocol entered into force for the Czech Republic on 12 June 1991.