decisions of the Slovak Courts of 1993 and 1995". The Optional Protocol entered into force for Czechoslovakia on 12 June 1991. After the dissolution of the Czech and Slovak Republic, the latter notified its succession to the Covenant and Protocol on 1 January 1993. After the communist regime collapsed, the State enacted law No. 87/1991, adopted on 19 July 1995 and No.586/1994, adopted on 23 July 1996. In addition, the government established a policy of restitution of properties which were taken under the communist regime.

The applicant claimed that the 1991 law violated his rights under articles 2 and 26. On the decision on admissibility, the Committee pointed out that the law entered into force for Slovakia in 1991, before Slovakia's succession to the Covenant and Optional Protocol in January 1993. However, as Slovakia continued to apply the law the Committee did not admit its competence *ratione temporis* over the present case. Would it be a continuing violation or an instantaneous violation with continuing effects? If we use Pauwelyn's tools in this case, the continuing violation would require examinations of the scope and nature of the obligation of non-discrimination, which refers to a situation, and its cessation would provide the authors compensation.

However, the Committee decided that not every distinction amounts to a discriminatory situation and the fact that the government provided compensation for those who lost property under the economic regime and not for reasons of ethnicity does not mean there was violation of articles 2 and 26 of the Covenant. In their individual opinions, Judges Cecilia Medina Quiroga and Eckart Klein disagreed with the inadmissibility of the communication. They believed that the applicant gave adequate grounds for a claim of discrimination arguing that the enactment of Law 87/ 1991 proved that Slovakia maintained the discrimination against Germans after the end of the World War II. Furthermore, article 26 establishes that the Covenant must be respected by all States parties, and these legislative acts must meet its requirements.

In communication No.757/1997, *Dagmar Brokova v. the Czech Republic*, the Czech restitution of property law conditioned the restitution of the property to permanent residence in Czech Republic when the property was subjected to confiscation in 1940s and the communication was inadmissible *ratione temporis* since only on 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol [103]. However, the Committee noted that the communication's claim was considered in the 1995 and 1996 domestic decisions and not because of prior judicial issues.

An important issue in this case is that the principle of subsidiarity was broken with regard to the rule of non-exhaustion of domestic remedies. As Ms. Christine Chanet observed in her individual opinion, the only question that was raised in domestic courts was on the right to property. The applicant had not submitted the claims of discrimination previously, thus Committee had the opportunity decide on the matter at first instance.

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[103] The Czech and Slovak Federal Republic ratified the Optional Protocol in March 1991, but on 31 December 1992 the Czech and Slovak Federal Republic ceased to exist

In the present case, the Committee recognized that there was discriminatory treatment of the applicant, compared to those individuals whose property was confiscated by Nazi authorities without being subjected to Czech nationalization, which would benefit from the laws No. 87/1991 and No. 116/1994. There was discriminatory treatment between those whose property was confiscated by the Nazi authorities and then nationalized immediately after the war and property owners whose property was confiscated by the Nazis but not nationalized after the war. The Committee asked the Czech government to transfer the title to Mrs. Brokova or compensate her for the value of the property.

Conversely, in *Jarmila Mazurkiewicz v. Czech Republic*[104] the Committee respected the principle of subsidiarity as the applicant had not invoked specific articles of the Covenant and also because the applicant did not bring claims of discrimination related to article 26 of the Covenant to the Constitutional Court, in order to raise these issues in the Committee. The author was a Czech citizen who submitted the communication in the name of her father, Jaroslav Jakes. She claimed to be a victim of human rights violations by the Czech Republic and her case was regarding the confiscation of her father's hotel which occurred on 17 January 1950 under presidential decree No.108/1945. The State claimed that the communication was inadmissible *ratione temporis*, as the act affecting her father's rights to property dated from before the entry into force of the Covenant for the State. The Committee decided that the communication was inadmissible also because the Covenant does not protect property rights.

The Committee, even after not admitting its own competence *ratione temporis* in its examination of the merits, went on to a detailed consideration of the another applicant's claims and stated that she had been denied relevant documents which were crucial for the correct decision of the *Alzbeta Pezoldova v. Czech Republic*.[105] In this communication, a Czech resident claimed that there was an arbitrary and unfair discrimination between herself and other victims of confiscations of property under the Benes' Decrees of 1945 because such victims were eligible for restitution under certain decrees and under Law No.87/1991 and Law No.229/1991.

Furthermore, she claimed that there was a denial of an effective remedy for the arbitrary, illegal, unfair and discriminatory taking of her property, and that this constituted unconstitutional discriminatory treatment of the author by the public authorities. The Committee in spite of the fact that it did not admit its competence *ratione temporis* over this claim, analysed an effective remedy for the author. Judge Nisuke Ando emphasized that the Committee acted as a court of fourth instance because while the Czech courts had decided that the properties in question were transferred to the State before 25 February 1948, the Committee recognized that the applicant could not have had access to documents which were crucial for the correct decision of her case.

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[104] HRC, *Jarmila Mazurkiewiczova v. Czech Republic*, 2 August 1999 (Comm. No. 724/1996).

[105] HRC, *Alzbeta Pezoldova v. The Czech Republic,* 25 October 2002 (Comm. No. 757/1997)

A different decision on the claim of discrimination was taken in a case brought in the context of the Portuguese decolonization of Angola[106]. The authors were Portuguese citizens who lost their property in Angola and had not received compensation for that loss. They claimed that they were victims of a violation of article 26 of the Covenant. The Covenant entered into force on 15 September 1978 and no.80/77 was discriminatory according to the authors since the Portuguese nationals were treated differently with respect to the grant of compensation, as such a grant depended on whether property was located in Portugal or in the former Portuguese colonies, such as Angola. The Committee decided that the discrimination arising from Act No.80/77 of 26 October 1977 occurred before the ratification by the State party of the Covenant on 15 September 1978 and the Optional Protocol on 3 August 1983. The Committee did not consider exclusively the effects of the law as an ongoing violation, even though the effects constituted violations of the rights set forth in the Covenant on Civil and Political Rights. In this case, however, the Committee could have considered the effects of the law as a continuing violation.

In *Aurel Blaga and Lucia Blaga v. Romania*[107], in addition to the violation of the right to equality set out in article 26, there was also the claim that article 12 regarding the freedom of movement was breached. The applicant's claimed that the expropriation of their property without compensation or justification, and was designed to punish the authors for leaving the country. On 27 May 1992, the authors brought their case to the Bucharest district court seeking restitution of their property. The Court rejected their application and their appeal was also rejected by the Bucharest City Court.

However, the Court of Appeal of Bucharest ordered the restitution of the applicant's property because the expropriation was a breach of article 13 of the Universal Declaration of Human Rights on freedom of movement and constituted "abusive regulation" rather than being for "public authority". On 8 May 1996, the Supreme Court quashed the Court of Appeal's decision in the author's case holding that it had exceeded its judicial competence and violated the principle of separation of powers. The judgment of the Court of Appeal and the Supreme Court's decision occurred after the entry into force of the Optional Protocol for the State party.

The Covenant entered into force for the State party on 23 March 1976 and the Optional Protocol on 20 October 1993. In this case, the Committee decided that the decision confirmed the validity of the earlier measures, admitting its own competence to examine the case. The decision that the claim was admissible *ratione temporis* was a result of the 1996 decision which occurred after the State ratified the Covenant and the Optional Protocol. Apparently, the Court requires a new fact after the ratification of the related instruments in order to recognize the existence of a continuing violation. The legal rule set out on article 26 of the right to not suffer discrimination has a continuing character and the cessation of discrimination would restitute the applicants their property or grant reparation of the same value.

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[106] HRC, *Abel da Silva Queiroz et al.v. Portugal,* 16 April 2000 (Comm.No.969/2001)
Comm.No.969/2001, Abel da Silva Queiroz et al.v. Portugal

[107] HRC,*Aurel Blaga and Lucia Blaga v.Romania,* 30 March 2006 (Comm.No.1158/2003)

In *Josef Frank v. Czech Republic*, the Committee recognized that there was discrimination between citizens and non- citizens of the State in question. The author of the communication was an Australian citizen who was born in Australia to Czech parents residing in Melbourne, Australia. He claimed that they were victims of violation of article 26 of the International Covenant on Civil and Political Rights by the Czech Republic. The author's father was a Czech citizen, whose property and business were confiscated by the Czechoslovak government in 1949. In 1991, the Czech and Slovak Republic enacted a law, rehabilitating Czech citizens and providing for restitution of their property or compensation for the loss. The author had applied for restitution, but had his claim rejected on the grounds that requirements for the application of Act 87/91 were that applicants have Czech citizenship and be permanent residents in the Czech Republic.

The Committee considered that the denial of restitution to the author and his brothers due to their citizenship was unreasonable and recognized a violation of article 26. According to the Committee in spite of the fact the confiscations had taken place before the entry into force of the Covenant and of the Optional Protocol for the Czech Republic, the new legislation that excluded non-citizens had "continuing consequences" subsequent to the entry into force of the Optional Protocol for the Czech Republic. The Committee also encouraged the State party to reform the legislation in order to eliminate the discriminatory character of it. However, in his individual opinion, Judge Nisuke Ando emphasized the fact that it was not impossible for a State to establish limitations on ownership of immovable properties in its territory to its nationals or citizens, thereby precluding their wives or children of different nationality from inheriting it. For him, the difference of treatment between the nationals and non- nationals to receive the compensation does not amount necessarily to discrimination as it respects rules of private international law.

Certainly, descendants of those who had their properties confiscated cannot claim that it still played an essential role in their lives. This is particularly true if they live in another country, as in the case described above. The property now plays an important role in the life of others, those who currently live in the houses. It seems that the latter claims have a stronger argument. When justice deals with what the descendants would have inherited if they were not dispossessed of the properties, it does not question whether the people originally deprived of the property would have disposed of their possessions in some other way, making a wrong investment, given to someone else, or used them for their own projects. Therefore, the further the injustice goes back in time, the more choices the ascendants could have made with their properties.[108] It recalls the problem that arises when the victim refuses to be compensated on the basis of what the average person in his/her position would have achieved. For example, even if very few members of my social circle go to college, I might want to receive compensation for being denied the opportunity to do so[109]. Similarly, in cases regarding claims to property, the applicants

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[108]Thompson, Janna, *Taking Responsibility for the Past- Reparation and Historical Justice* (2002),pp.11-112.

[109] Elster, Jon, Closing the Books- *Transitional Justice in Historical Perspective* (2004),p.167.

would like to receive the compensation as if the ascendants had kept their properties, and not as if they had lost it.

3.3. Cases relating to legislation which pre-existed the Covenant

The Committee had the opportunity to deal with cases where it was recognized that the violation of the Covenant's rights by a pre-existent legislation of a state party. The effects of the legislation were considered as continuing violation of human rights by the Committee.

In *Sandra Lovelace v. Canada*[110], the applicant who was a Canadian citizen of Indian origin, married a non-Indian and lost her status of Maliseet Indian under the Indian Act. However, Indigenous men who married non-Indian women did not lose their Indian status, but Indigenous women who did so would lose it. The author claimed that the Act was discriminatory on the ground of sex and contrary to article 27 of the Covenant. The Covenant and the Optional Protocol had entered into force in respect to Canada on 19 August 1976, several years after her marriage. In this case, the Committee considered that the Act was still causing effects which constituted violations. The essence of the complaint was the continuing effect of the Indian Act.

A similar communication was presented where the author who was of Indian origin, lost her Canadian citizenship. She stated that she found herself in the same situation as Sandra Lovelace, including the fact that her date of marriage was prior to the entry into force of the Covenant for Canada. The Committee decided that the communication was also admissible, but at its 26th session it closed the examination after receiving a letter from the author withdrawing the communication in view of the abrogation of article (1)(b) of the Indian Act. Pauwelyn's tools would be useful in this case, due to the fact that the violations of article 26 create an issue of reparation and also creates a specific legal status of no longer being considered indigenous.

In *Simala Toala et al. v. New Zealand*[111], the 1982 Act has created a situation of mass denationalization of about 100,000 Samoans, in violation of articles 12, paragraph 4 and 26 of the Covenant and denied them their lawful New Zealand citizenship. The applicants were about to be deported from New Zealand to Western Samoa. The State party contended that the communication should be declared inadmissible *ratione temporis* since the Optional Protocol came into force for New Zealand in 1989 and the events complained of by the authors occurred in 1982. The authors claimed that despite the fact that the 1982 Act stripped them of their New Zealand citizenship, the legislation in

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[110]HRC, *Lovelace v. Canada*, 30 July 1981 (Comm.no.24/1977).

[111]HRC, *Simala Toala et al. v. New Zealand*, 2 November 2000 (Comm.No.675/1995)

question was enacted in 1982 after New Zealand had ratified the International Covenant on Civil and Political Rights, but before the International Covenant on Civil and Political Rights and Optional Protocol was ratified in 1989.

The Committee considered that the legislation had continuing effects which in themselves would constitute a violation under article 12, paragraph 4 of the Covenant. Therefore, the Committee considered it was not precluded *ratione temporis* from declaring the communication admissible. The State claimed that the legislation's effects were not continuing. In this case, the legislation was enacted before the Optional Protocol entered into force, but it was still emitting effects that the Committee found itself competent to examine. However, the claims did not reveal a breach of the articles of the Covenant, according to the Committee, because the applicants had no connection with New Zealand by reason of birth, did not descend from any New Zealanders, or had ties with New Zealand or residence in New Zealand.

This approach was different from what the Court took on *Abel da Silva Queiroz et al. v. Portugal,* in which the Committee considered that the effects of the legislation regulating compensation for expropriation was not a continuing violation.

3.4. Arbitrary detention

Arbitrary detention has also been considered to be continuing violation, if it began before the ratification by the State of the Optional Protocol and lasted after ratification. Most of the communications relating to arbitrary detention were from Uruguay. In 1973, President Bordarberry ceded control of the government to the military, which was the catalyst for an effective military rule that lasted for 11 years.

The military regime involved the armed forces who committed atrocious human rights violations, including prolonged imprisonment, under harsh conditions and widespread use of torture of thousands of political opponents. Some 164 Uruguayans "disappeared" after arrest, between 1973 and 1982, most of them in Argentina. The ones who "disappeared" in Uruguay were presumed to have died as a consequence of torture. A systematic practice of "disappearances" as in Argentina, or, on a lesser scale in Chile, was not part of the Uruguayan military's repressive methodology. [112] After the proclamation of the "state of internal war "in Uruguay on April 15, 1972, the Inter-American Commission on Human Rights began to receive denunciations of arbitrary detentions by the authorities.

The denunciations increased and came from many sources, mainly from the relatives of the detained and citizens residing in the country and individuals and organization in

[112] 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.2

foreign countries. The total number of individuals who were submitted to detention was approximately 6,000. The government of Uruguay acknowledged that as of August 15, 1977, 2,366 individuals were under detention. Furthermore, the government of Uruguay did not admit that the prisoners were arbitrarily deprived of their freedom, claiming that they were arrested due to the "state of internal war" or of the "Prompt Security measures".[113]

The military lost a referendum to ratify a new constitution in 1980 and this is seen as the antecedent which led to an aperture program. In 1985 Julio Maria Sanguinetti was elected as the president of Uruguay. He initially adopted a *laissez-faire* attitude to truth and justice: Sanguinetti stated that he would not undertake any official apologies to ensure justice, but he also stated that he would not prevent people from presenting their cases to the Court. The president has chosen the pacification discourse.[114] Law No.15.737, of National Pacification, was passed on March 8, 1985. It determined amnesty to all remaining political prisoners except some 60 who were accused of homicide. Their cases were to be reviewed by civil courts. However, police and military personnel were found guilty of torture and of "disappearances" of prisoners and public officials were excluded.[115]

In *Luciano Weinberger Weisz v. Uruguay*[116], the author of the petition was allegedly arrested at his home without any warrant of arrest, being held incommunicado for more than 100 days and could be visited by family members only 10 months after his arrest. The State party objected to the communication on the ground that the victim was arrested on 18 January 1976 which preceded the date of the entry into force for Uruguay of the Covenant and the Optional Protocol (23 March 1976). The Committee considered it was not barred from considering the case in spite of the fact the arrest of the victim preceded the date of the entry into force for Uruguay of the Covenant and Optional Protocol, since the alleged violations continued after that date.

The Human Rights Committee is of the view that the facts which occurred after 23 March 1976, disclose violations of the Covenant, in particular of articles 7 and 10(1), because of the severe treatment which the victim received during the first 10 months of his detention, article 9(3) because he was not brought before a judge or other authorized by law to exercise judicial power and he was not tried in reasonable time, article 9(4), because recourse to habeas corpus was not available to him, article 14(1), because he had no fair and public hearing and because the judgement rendered against him was not made public, article 14(3), due to the fact he did not have access to legal assistance during months of

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[113] IACHR, Report on the situation of human rights in Uruguay, 31 January, 1978. Available at <http://www.cidh.oas.org/countryrep/Uruguay78eng/chap.4.htm> at 1 November, 2009.

[114] Brito, Alexandra Barahona de, 'Truth, Justice,Memory and Democratization in the Southern Cone' in Alexandra Barahona de Brito, Carmen Gonzalez-Enriquez and Paloma Aguiar (eds), *The politics of memory- transitional justice in democratizing societies* (2002) p.119-160, p.127.

[115] 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.29.

[116] HRC, *Luciano Weinberger Weisz v. Uruguay*, 29 October 1980 (Comm.No.28/1978).

detention, article 15(1) because the penal law was applied retroactively against him and Article 25 because he was barred from being elected for 15 years.

In *Leopoldo Buffo Carballal v. Uruguay*, the imprisonment which occurred before the ratification of the Optional Protocol and extended after it was considered as a continuing violation. The author was also arrested without a warrant, subjected to torture and forced to sign a statement saying he had not suffered any abuses. On 28 July 1976 he was brought before a court to be notified that his release had been ordered. Nevertheless, he was still detained until 26 January 1977. Later on, he was granted asylum in the Mexican embassy in Montevideo on 4 March 1977. The State claimed that the alleged violation took place on 4 January 1976 prior to the entry into force of the Covenant for Uruguay and made the general observation that every person in the national territory had free access to the courts and to public administrative authorities.

The Committee decided that in spite of the fact that the date of arrest was prior to the entry into force of the covenant for Uruguay, the alleged violations continued after that date and that the communication was admissible. The Committee acknowledged that the facts occurred before the ratification of the Covenant by the State party and continued and had effects which themselves constituted a violation after that date, violating articles 7 and 10(1), because of the conditions in which Mr. Carballal was held during his detention, article 9(1) due to the fact he was not released until six or seven months later after the order of release, article 9(2) because he was not informed of the charges brought against him and article 9 (4) because the recourse to habeas corpus was not available to him, article 14(3) because of the conditions of his detention barred him from legal assistance.

In *Alberto Grille Motta v. Uruguay*[117], the author claimed he was arrested on 7 February 1976 and during a period of approximately 50 days he and his fellow detainees were subjected to severe torture and were brought before a military judge without having the opportunity to see a lawyer beforehand. The applicant and three other fellow prisoners escaped to the Venezuelan embassy where they were granted "diplomatic" asylum. The Committee found that facts took place after 23 March 1976 and disclosed violations of the Covenant of articles 7 and 10(1) due to the evidence of torture and inhuman treatment, article 9(3) because Mr. Grille Motta was not brought before a judge to exercise judicial power and article 9(4) due to the in ability to have recourse to habeas corpus.

In *El-Megreisi v. Libyan Arab Jamahiriya*[118], the applicant submitted the communication on behalf of his brother, who was arrested by Mukhabarat, the Libyan security police. The author stated that regarding domestic remedies, the Libyan authorities denied that they had arrested his brother. The Optional Protocol entered into force for the Libyan Arab Jamahiriya on 16 August 1989. The Committee found that it was not precluded

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[117]HRC, *Alberto Grille Motta v.Uruguay*, 29 July 1980 (Comm.No.11/1977).

[118]HRC, *El-Megreisi v. Libyan Arab Jamahiriya* 23 March 1994 (Comm.No. 440/1990).

from considering the communication since the events the applicant complained about continued after 16 August 1989.

The State did not provide any information in respect of the substance of the author's allegations, state of health and conditions of detention. Thus, the Committee based its assessment on the undisputed facts that the victim was arrested in January 1989 and that no charges were or had been brought against him. In the opinion of the Committee the victim was subjected to arbitrary arrest and detention. The Committee urged the State to secure the immediate release of the victim, to compensate him for the torture and cruel treatment and to ensure that these violations did not occur in the future.

In certain cases relating to arbitrary arrest, applicants describe their suffering as continuous, however, the Committee did not necessarily interprets it as continuing violations in spite of the fact the communication can be admitted *ratione temporis* as we can see below.

In *Quinteros et al v. Uruguay*[119], the applicant, the mother of the victim, describes the violations of her daughter's human rights as a crucial factor to the violation of her own rights and the government. According to her statement:

> ...Quite clearly, my daughter remains under Uruguayan jurisdiction and her rights continue to be violated daily by the Government of Uruguay. Since the continued violation of my daughter's human rights constitutes the crucial factor of the violation of my own rights, the Government cannot, in my view, in any way evade its responsibility towards me. **I continue to suffer day and night because of the lack of information concerning my dear daughter**, and I therefore believe that from the moment when my daughter was arrested, was, and I continue to be, the victim of a violation of articles 7 and 17 of the Covenant.(paragraph 7.3) (emphasis added)

In this statement it becomes clear how for victims and their next-of-kin, the violations of rights can keep them in an ongoing state of uncertainty. The Committee urged the State to establish what had happened to the victim since her arrest and to secure her release, to bring to justice those responsible for her disappearance and ill- treatment, to pay compensation for the wrongs suffered and to guarantee that similar violations would not occur in the future.

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[119] HRC, *Quinteros et al v. Uruguay,* 21 July 1983 (Comm.. No.107/1981)

3.5. Forced disappearances

Forced disappearance cases were not always recognized as continuing violations by the Committee. In the context of Latin American countries which were under the military regime in the late 1960s and early 1970s had a key common aim: to eliminate internal left-wing and establish order[120]. Widespread torture, enforced disappearances, exiles, and arbitrary imprisonments occurred as a result. During the transition to democracy occurred, opposition groups demanded accountability and newly elected democratic governments had to deal with the past abuses, searching for a balance between 'national reconciliation' and a process of reconciliation[121].

Countries where widespread forced disappearances took place include Guatemala with a policy which started in the late 1960s, Chile and Argentina in 1970s. Also in this group are Uruguay, Democratic Kampuchea (Cambodia) and Uganda. Death squad killings by groups connected to the governments are Guatemala, El Salvador, Sri Lanka, South Africa and the Philippines.[122]

By using forced disappearances, the governments intended to get rid of actual and potential opponents without the publicity of a public trial or the risk of creating martyrs through the imposition of death sentences. This sort of action punishes not only the victims, but also the victim's relatives. The operation happened sometimes through a centralized government agency which planned the executions and in other cases it was the military high command that took the decision to engage in disappearances and killings, with the planning and execution being carried out by the intelligence sections of each military regiment or battalion. [123]

The Committee had to deal with the dictatorship's human rights violations during dictatorships mainly in the case of enforced disappearances and arbitrary detention. However, it did not always consider the disappearance as continuing violations[124], as we are going to examine below.

By the end of 1982, Argentina was in an economic crisis, the military regime was discredited due to the loss of the war of the Malvinas and because of denunciations of horrendous stories of human denigration. The regime was collapsing and had to call for

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[120] Brito, Alexandra Barahona de, 'Truth, Justice,Memory and Democratization in the Southern Cone' in Alexandra Barahona de Brito, Carmen Gonzalez-Enriquez and Paloma Aguiar (eds), *The politics of memory- transitional justice in democratizing societies* (2002) p.119-160 , p.119.

[121] Ibid.p.120.

[122] Roht- Arriaza, Naomi, 'Comment: State responsibility to investigate and prosecute grave human rights violations in international law' (1990) 78-2 *California Law Review*, pp.449-513, p.3.

[123] Roht- Arriaza, Naomi, 'Comment: State responsibility to investigate and prosecute grave human rights violations in international law' (1990) 78-2 *California Law Review*, pp.449-513, p.3.

[124] 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.133.

open and free elections. Raul Afonsin won the elections and promised to investigate human rights violations and to bring to trial both military chiefs who presumably gave orders to abduct, torture, and kill people.[125]However, the government proclaimed Law No.23, 492, the so-called "Finality Act" (Punto Final Law) on 24 December 1986 which established a deadline of 60 days for commencing new criminal investigations with regard to the events of the so-called "dirty war".

In *S.E v.Argentina*, the author alleged that her three children were abducted by persons associated with the police and security forces. They were allegedly detained on 4 November/December 1976 at a detention camp in Argentina. Their whereabouts have been unknown ever since. The author of the communication claimed the commission of constituted violations by the State of article 2 "to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the Covenant.

Furthermore, it requested that the inquiries regarding the disappearance of her three children were reopened. The Covenant and the Protocol entered into force for Argentina on 8 November 1986. The State pointed out that the disappearances took place in 1976 during the period of the military government, 10 years prior to the entry into force of the Covenant and of the Optional Protocol for Argentina. The Committee considered that the Covenant and Optional Protocol entered into force on 8 November 1986 and decided that the Covenant could not be applied retroactively and that the Committee was precluded *ratione temporis* from examining alleged violations that occurred prior to the entry into force of the Covenant for the State party concerned.

Thus, the Committee did not recognize the enforced disappearance as a continuing violation. It referred to the jurisprudence of the Permanent Court of International Justice (Series A/B, No.4, 24) and the International Court of Justice (I.C.J. Reports 1952, 40) which says that a treaty has to be considered as having a "retroactive effect only when this intention is explicitly stated in the treaty or may be clearly inferred from its provisions".

The validity of the principle of non- retroactivity of treaties was enshrined in the 1969 Vienna Convention on the Law of the Treaties, article 28 of which codifies this rule of customary international law: "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".

In *R.A.V.N et.al. v. Argentina*, the Committee once again did not interpret the forced disappearances as continuing violations. The authors of the communication were Argentine citizens writing on behalf of their disappeared relatives who disappeared in 1976 before the Covenant and the Optional Protocol entered into force for Argentina on 8 November 1986. It was claimed that law No.23,521 (Due obedience law) was

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[125] Nino, Carlos S, 'The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina' (1991)100, *Yale Law Journal*, pp.2619-2640, p.261.

incompatible with Argentina's obligations under the Covenant. The law presumed that persons who held military ranks at the time of the crimes were acting under superior orders and that the law exempted them from punishment. By adopting this law the applicants claimed that the government violated its obligations under the Covenant. As the events of disappearance and death, which could have constituted violations of several articles of the Covenant occurred prior to the entry into force of the Covenant and of the Optional Protocol for Argentina the Committee decided that it could not consider the communication.

Thousands of people were killed by the military in Chile after the *coup d'état* in 1973. In April 1990, President Aylwin created a National Commission of Truth and Reconciliation to investigate alleged human rights violations under the prior regime and to recommend compensation for victims of their families.[126]

In *Maria Otilia Vargas v. Chile*[127], the victim disappeared in 1973 and was later confirmed to have been killed in 1973. The mother of the victim filed the petition. The Covenant entered into force for Chile on 23 March 1976. The communication was considered inadmissible because of the lack of competence *ratione temporis* from the Committee. Furthermore, as the author did not point out which of her rights under the Covenant had been violated, the Committee understood that she did not sufficiently substantiated her case for the purposes of admissibility.

Although the Committee did not examine the declaration made by Chile upon the accession to the Optional Protocol, however, it admitted that the events Mrs. Vargas complained of occurred prior into force of the Optional Protocol for Chile. Nevertheless, it admitted the communication since the facts challenged by her were related to the judgement of the Supreme Court of Chile of October 1995, acts which occurred after the entry into force of the Optional Protocol for the State party.

A Court decision which was taken after the entry into force of the Covenant for the State party not always was considered as a reason to recognize the *ratione temporis* competence of the Committee. In *Acuna Inostroza et al v. Chile*[128], the communication was presented on behalf of Carlos Maximiliano Acuna Inostroza and 17 other individuals, all Chilean citizens who were executed in 1973. Although the events complained of took place prior to 11 March 1990, the decisions challenged by the present communication were judgements of the Supreme Court in October 1995. The Committee stated that "(...) The Supreme Court judgement of 1995 cannot be regarded as a new event that could affect the rights of a person who was killed in 1973.

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[126] Roht- Arriaza, Naomi, 'Comment: State responsibility to investigate and prosecute grave human rights violations in international law' (1990) 78-2 *California Law Review*, pp.449-513 , p.6

[127] HRC, *Maria Otilia Vargas v.Chile*, 26 July 1999 (Comm.No.718/1996).

[128] HRC, *Acuna Inostroza et al. v.Chile*, 23 July 1999 (Comm.No.717/1996).

Consequently, the communication was inadmissible under article 1 of the Optional Protocol". It is not clear why the Committee did not have an uniform opinion on the previous two cases which had a similar claim. There were two dissenting opinions in the present communication. Hipolito Solari Yrigoyen stated that the applicants' claim regarding article 16 of the Covenant alleged violation of the author's rights to recognition as a person before the law due to the lack of investigation of his whereabouts or location of the body and regarding the claim that the applicant and the Committee should have considered the communication admissible *ratione temporis*.

Christine Chanet also challenged the Committee's decision where it dismissed two communications *ratione temporis* due to the *ratione temporis* reservation made by Chile at the time of its accession to the Optional Protocol. In Chanet's opinion, as the judicial decisions taken by the State party were adopted after the date it had specified in its reservation and the issue brought relating to article 16 of the Covenant had "long-term consequences".

Therefore, the lack of investigation of the crime by the State party could have been considered as an ongoing violation. In another case where the author claimed the lack of remedies by the State party as ongoing violations, the Committee also dismissed the claim as inadmissible *ratione temporis*. In *K.L.B v. Australia*[129], the author was an Australian citizen and claimed that she suffered sexual abuse and was assaulted by the nurses in the hospital where she was taken when she was pregnant.

The author claimed that the failure of the New South Wales government to provide an adequate remedy for the maltreatment she suffered constituted an ongoing violation by Australia. Nevertheless, the Committee recalled that the Optional Protocol entered into force for Australia on 25 December 1991. It observed that the Optional Protocol could not be applied retroactively and that the Committee was precluded *ratione temporis* from examining events that occurred prior to 25 December 1991.

The lack of investigation, prosecution and punishment was also brought to the Inter-American Commission and IACtHR with different interpretations regarding this issue.[130]

The Committee recognized its competence *ratione temporis* in the *Eduardo Bleier v. Uruguay*[131]as it related to facts which have allegedly continued or took place after 23 March 1976, date of the entry into force of the Covenant and Optional Protocol.

Eduardo Bleier was detained without a court order in Montevideo at the end of October 1975. He was held incommunicado and suffered torture and ill treatment due to his Jewish origin. In this case, the Committee urged the Uruguayan government to reconsider its position in this case and to take effective steps to find what occurred to Eduardo Bleier since October 1975 and punish those responsible for his death, ill- treatment, and pay

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[129] HRC, *K.L.B.-W v. Australia* , 30 March 1993 (Comm.No.499/1992)

[130] IACtHR, *Moiwana village v. Suriname*, 15 June 2005, (Series C., No.145).

[131]HRC, *Eduardo Bleier v.Uruguay,* 29 March 1982 (Comm.No.7/30).

compensation to his next-of-kin and ensure that similar violations does not happen in the future.

However, the Committee recognized enforced disappearance as a continuing violation in *S. Jegatheeswara Sarma v. Sri Lanka*[132]. The author of the communication was the father of the victim and he claimed that his son and another 3 people were removed by army members from their family residence and handed over to other members of the military at another location. In spite of the fact that the disappearance of the author's son occurred before the entry into force of the Optional Protocol for the State party, the Committee considered that the alleged violations of the Covenant continued after the entry into force of the Optional Protocol.

The Covenant and the Optional Protocol to the Covenant entered into force for the State Party respectively on 11 June and 3 October 1997. Sri Lanka made a declaration restricting the Committee's competence to events following the entry into force for the Optional Protocol. However, the Committee stated that in spite that the disappearance of the author's son had occurred before the entry into force of the Optional Protocol the violations of the Covenant continued after the entry into force of the Protocol. In the merits, the Committee recognized the suffering caused to the author's family by the disappearance of his son and "continuing suffering", revealing a violation of article 7 of the Covenant.

3.6. Residual Physical Effects cases

The second type of suffering the victims suffer is that of personal suffering. People who suffered damage to health and body might need compensation not only for the past suffering but also for reduced earning capacities and also the reduced capacity for enjoying life. The problem is that as a victim, they do not want to be compensated on the basis of what the average person might have achieved. They expect to be compensated as if they could have achieved the top with their lives, something which happens to only a minority probably[133]. The international human rights bodies, therefore, should be able to adjust the compensation in the middle term, i.e., between the probability of the applicant achieving the top and not being able to achieve anything at all.

Residual physical effects might be a continuing violation to those who suffer daily even after many years had passed since they suffered the violations that are in most of times not recognized by the committee.

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[132]HRC, *Jegatheeswara Sarma v. Sri Lanka*, 16 July 2003 (Comm.No.950/2000).

[133]Elster, Jon, Closing the Books- *Transitional Justice in Historical Perspective* (2004),p.167.

The Committee has failed to consider residual effects as continuing violations of human rights in the context of the post war communications brought by veterans of war and citizens who were incarcerated during World War II.

In *Atkinson v. Canada*, the authors were veterans of war who were sent to Hong Kong by the Canadian government in 1941 to fight Japanese troops. After returning to Canada, the authors continued to suffer from severe physical, mental and psychological problems as a direct consequence of imprisonment and slave labor imposed on them by the Japanese. The authors submitted a study by the Canadian Pension Commission in 1966 which concluded that the health problems of Hong Kong veterans were a direct consequence of their sufferings in the internment camps.

The applicants claimed that they received pension from the government through the Prisoners of War Legislation, but this legislation did not refer to any form of compensation for the slave labor and the violations they suffered. The prisoners of the Japanese government claimed that these continuing effects of the violations suffered by them constituted violations of the Covenant on and after 19 August 1976, the date of the entry into force of the Covenant and Optional Protocol for Canada.

The State contested the competence *ratione temporis* of the Committee since the mistreatment suffered by the authors took place between 1941 and 1945 at the hands of the Japanese, and that this treatment was not continuing. Furthermore, the 1952 Peace Treaty was also concluded before the entry into force of the Covenant and the Optional Protocol. The authors claimed the State could not waive the rights of the Hong Kong veterans of the specific right to a remedy for the gross violations committed by the Japanese. Hence, the State's failure to provide appropriate financial assistance would have resulted in a continuing and ongoing violation of their right to a remedy and resulted in a violation of article 26 of the Covenant.

The Committee considered itself precluded from examining violations which occurred before the entry into force of the Covenant and understood that the authors had not shown any acts done by Canada in affirmation of the Peace Treaty after the entry into force of the Covenant by the State. The Committee also pointed out that the authors failed to indicate what concrete steps they had taken to challenge the alleged discrimination against them before the Canadian Courts as would be possible under the Canadian Charter. The Committee decided that the communication was therefore inadmissible.

The Committee had a similar approach in *Evan Julian et Al. v. New Zealand.* The authors were New Zealand citizens who were incarcerated during World War II by the Japanese, and the widows and children of those citizens. They claimed to be victims of a violation by New Zealand of articles 2, paragraph 3(a) and 26 of the International Covenant. After the surrender of the Dutch East Indies, the New Zealand veterans were incarcerated by the Japanese and claimed that maltreatment and torture took place regularly.

They also were forced to slave labor in tropical heat without protection against the sun. They suffered from the lack of housing, food and medical supplies, which led to diseases

and deaths. After being released, the prisoners were in bad physical conditions, suffering from malnutrition, beri-beri and pellagra, malaria and other tropical diseases, tuberculosis and effects of physical ill- treatment. A Peace Treaty was signed between Japan and New Zealand in 1952 but resulted in nominal indemnification for the New Zealand veterans and did not include appropriate compensation for the slave labor.

The authors claimed that they still suffered substantial physical, mental and psychological disability and incapacity caused by their incarceration. The State party referred to the Committee's jurisprudence regarding how it would only be competent to consider alleged violations which occurred on or after the date of entry into force of the Optional Protocol for the State party. The Covenant and the Optional Protocol entered into force respectively on 28 March 1979 and on 26 August 1989.

In addition, the authors also claimed the treaty was still in force emitting continuing effects. This claim related to the distinction said to have been made between civilian and war veterans and between military personnel who were prisoners of the Japanese and those who were prisoners of the Germans. The purpose of the Act was to provide pension entitlements for disability and death of those who were in overseas service of New Zealand during wartime overseas, not to provide compensation for incarceration or for human rights violations. Therefore, objective and reasonable criteria to make distinction does not constitute discrimination as a violation of article 26 according to the Committee's understanding on the matter. Furthermore, the authors claimed that those who were in war service were victims of a violation of article 26 of the Covenant because of the narrow class of disability for which pensions were made available, but the authors have failed to provide information as to how this affected their personal situation.

The Committee decided that the authors failed to demonstrate that after the entrance into force of the Covenant there was any act in affirmation of the Peace treaty that would have effects which could constitute violations of the Covenant by New Zealand. The author also had claimed being victims of discrimination because ex-service personnel who had been incarcerated in German concentration camps during the Second World War received ex-gratia payment by New Zealand in 1988, and on the other hand the authors did not, though the Committee notes that although the Covenant entered into force for New Zealand in 1979, the Optional Protocol entered into force only in 1989. The Committee considered itself precluded from examining the author's claim on the merits.

The Committee did not recognize the residual physical effects as a continuing violation. Residual effects were considered as ongoing violations in the case of sterilization according to CEDAW in *Andrea Szijjarto v. Hungary*[134]. In the present communication, the author of the communication was allegedly submitted to a coerced sterilization by the medical staff at a Hungarian hospital. CEDAW recognized that the sterilization is intended to be irreversible and the success rate of the surgery to reverse sterilization is

[134]CEDAW, *Andrea Szijjarto v. Hungary*, 29 August 2006 (Comm. No.4/2004).

low and depends on many factors, reaching the conclusion that the author of the communication had suffered an ongoing violation.[135]

Past suffering or present and future need is the most relevant ground for compensation. In the example given by Elster, there are two types of victims. One suffered terribly in the past, nevertheless he/she is recovered and is currently in a normal mental and physical state for his or her age and can get a normal income to live. The other suffered less in the past but could not get over for the damage suffered in the past[136]. We would give priority to the former case if we were to compensate for the past suffering. In the Human Rights Committee interpretation, none of the claims provided by the authors have demonstrated ongoing violations. Normally, as time passes, the connection between present harms and historical injustices is likely to become more and more tenuous. As an injustice recedes to a distant past, it will become increasingly implausible to blame it for any conditions that exist in the present.[137]

The amount of responsibility that can be attributed tends to diminish with time as effects become attributable to other causes. [138]Following this, could we imagine that the effects of a mistreatment which occurred many years ago are caused by other reasons? It seems the answer is negative once a cause-effect relation was clear according to medical reports.

Some ancient injustices cannot find remedies in human rights institutions due to the principle of non-retroactivity of the law. The only way some injustices which took place before the ratification of the Covenant and Optional Protocol were ratified is through the continuing violation concept. People suffer not merely by the events themselves, but by the ideas they get into their heads relating to these events[139]. The victims who can feel in daily life the effects of the violence which took place after many years might still feel resentment.

To the victims of human rights violations the violations are continuing since they cannot forget the traumatic situations they had to face.

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[135] Other continuing violations recognized by CEDAW include domestic violence(Communication No.: 2/2003, *Ms. A. T. v. Hungary*) and effects of the loss of job (Communication No.8/2005, *Rahime Kayham v.Turkey*

[136]Elster, Jon, Closing the Books- *Transitional Justice in Historical Perspective* (2004), p.177.

[137] Thompson, Janna, *Taking Responsibility for the Past- Reparation and Historical Justice* (2002),p.78.

[138] Ibid. p.80.

[139]Ibid p.84.

3.7. Conclusions

The Covenant on Civil and Political Rights does not have a statute of limitation for bringing petitions as it is provided in the European Convention on Human Rights and the ACHR. That might be the reason why the Committee decided to limit its own jurisdiction to cases which describe facts and acts that took place after the ratification of the Optional Protocol by the States.

The practice of the Committee in several cases is not well founded and overlooks discriminatory situations that in other human rights bodies could have been recognized as a continuing violation. That is the case of decisions relating to enforced disappearances were the Committee does not always have well-founded reasons to deny the claims or recognized others that were exclusively brought before it and not to domestic courts, therefore not respecting the principle of subsidiarity.

Residual effects on the victims' bodies were denied as continuing violations even if the victims can still feel currently the effects of the causal facts. In this point, remains clear the limitation of the Committee to respond to the victims' claims in clear. Not all claims can be considered human rights violations, or more specifically in this case, as continuing violations. For the victims of the residual effects, or those whose next-of-kin still has not been found, the violation is still going on. Nevertheless, the Committee has to set its own limits as it is impossible to recognize all the claims that are brought before it. By choosing certain criteria to recognize it or not, the Committee is establishing certain memories to be remembered in the history of each respective country concerned.

CHAPTER 4

4. European Commission of Human Rights and European Court of Human Rights "continuing situations"

4.1. Introduction

The context of the cases brought before the European Human Rights bodies regarding continuous violations, unlike the Inter-American system and the Human Rights Committee, are not mostly composed by political transitional regimes context, but sparsely regarding to length of procedures, deprivation of the personal rights of the applicants, property rights, failure to pay compensation for expropriation among others.

The first inter-state case that was brought to the European Commission and that was also well known to bring numerous recognitions of continuing violations was that of *Cyprus v. Turkey*[140]. The European Commission of Human Rights (hereinafter EComHR) and the European Court of Human Rights (hereinafter ECtHR) refer to the continuing violations as continuing situations that interfere with the rights set forth in the Convention.

As in other cases brought before the Human Rights Committee, the ECtHR has also examined cases of deprivation of property in ex-communist states which after change of regime established discriminatory criteria to provide compensation to those who lost their properties during the communist regimes. Furthermore, it also analyzed the cases of States that ratified the European Convention after the end of conflicts, such as in the case of former Yugoslav Republics[141]. The problem in this case would be of the possibility of applying the European Convention retroactively or not. Unless there is a cause for an exception, such as the intention of the parties where the State parties declare that they accept the retroactive validity of the treaty, a continuing situation, or the treaty is a codification of customary law a treaty cannot be applied retroactively. Not only the ECtHR, but also the International Court of Justice examined a case regarding the former Yugoslavia's cases. Responding to Yugoslavia's claim that Bosnia-Herzegovina had no standing under the Genocide Convention on the grounds that its independence was illegal and hence that is was not a State and that it could not have succeeded to the Convention. In *Bosnia-Herzegovina v. Y*ugoslavia[142], the International Court of Justice has applied an

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[140] ECtHR, *Cyprus v. Turkey*, 10 May 2001 (Appl.no.25781/94).

[141] Slovenia (28 June 1994), Croatia (5 November 1997), Bosnia and Herzegovina (12 July 2002) and Serbia- Montenegro (3 March 2004) Macedonia (10 April 1997) in Buyse, Antoine, 'A lifeline in time-non- retroactivity and continuing violations under the ECHR' (2006) *Nordic Journal of International Law*, pp.63-88, p.64.

[142] ICJ, *Bosnia-Herzegovina v. Yugoslavia* 2 February 2003 (Preliminary Objections).

exception to the principle of non-retroactivity, arguing that if the treaty contains a jurisdictional clause and the parties do not intend the Court to have a jurisdiction over the facts which took place prior to the treaty's entry into force, the parties must provide that the Court's jurisdiction *ratione temporis* is limited[143].

4.2. The European Human Rights System

Protocol 11 which came into effect on (1 November 1998) changed the human rights supervisory system of the European Convention on Human Rights. According to it, the EComHR and ECtHR were merged into a new Court. States that ratify the Convention automatically accept the jurisdiction of the Court and the right of individual petition. Therefore, under the present Protocol, the entry into force of the Convention and the date of the beginning of the jurisdiction occur at the same time[144].

In previous cases, the entry into force of the Convention and the temporal jurisdiction of the ECtHR would occur at different times. The EComHR has considered that it had jurisdiction over cases since the Convention entered into force for State parties[145], unless the State party makes a temporal limitation under article 25 of the Convention, which expressly would accept only petitions related to acts arising after the date of the deposit of the declaration.

Therefore, in the absence of an express limitation, the EComHR would consider itself competent *ratione temporis* to analyse events which occurred after the ratification of the Convention. This can be clearly seen in *X v. France*[146], in which the events under examination took place after the ratification by France of the Convention on 3 May 1974, but prior to the deposit of the French declaration accepting the right of individual petition under article 25, which occurred on 2 October 1981. According to the French declaration, the State would recognize the EComHR jurisdiction for a period of five years subsequent to the date of the declaration. The ECtHR referred to the case law of the EComHR pointed out the principle of non-retroactivity, and stated that "under the principle that treaties and conventions do not have retrospective effect, the Convention regulates only events occurring after its entry into force in respect of each Contracting Party". Furthermore, it pointed out that the states would have a discretionary power to limit the jurisdiction *ratione temporis* of the EComHR as was done by the United Kingdom, Italy

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[143] Chua, Adrian and Hardcastle Rohan, 'Retroactive application of treaties revisited: Bosnia- Herzegovina v. Yugoslavia' (1997)44 *Netherlands International Law Review*, pp.414-420, p.419.

[144] 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.81.

[145] Higgins, Rosalyn, 'Time and the law: international perspectives on an old problem' (1997) 46, *International and Comparative Law Quarterly*, pp. 501-520, p.503.

[146] ECtHR, *X v. France*, 13 December 1982 (Appl.No. 9587/81)

and Spain. Therefore, in the absence of an express limitation, the EComHR would consider that it was competent *ratione temporis* to deal with the complaints.

Italy has submitted a temporal limitation to the EComHR 's competence *ratione temporis,* recognizing the competence of the EComHR to receive individual petitions "in relations to any act or decision or any facts or events arising subsequently to the 31 of July 1973, by any person claiming, in relation to any act or decision occurring or any facts or events arising subsequently to that date, to be the victim of a violation of the rights set forth in the Convention". Greece has also made a similar declaration stating that: "(...) the Government of Greece recognizes, for the period beginning on 20 November 1985 and ending on 19 November 1988, the competence of the EComHR to receive petitions addressed to the Secretary General of the Council of Europe, (after 19 November 1985) by any person, non- governmental organization or group of individuals claiming, in relation to any act, decision, facts or events subsequent to this date, to be the victim of a violation of the rights set forth in the Convention and in the Additional Protocol(...)"[147]. Spain has made a temporal declaration recognizing the jurisdiction of the EComHR as results of the violation of the Convention after 1 July 1981[148]. The United Kingdom has also made a similar declaration to exclude from the EComHR 's examination of facts or events prior to a certain date (13 January 1966)[149].

Conversely, the Human Rights Committee has decided that the acceptance of the Optional Protocol does not have retrospective effects to the entry of the Covenant on Civil and Political Rights[150]and it does not make it necessary for the existence of a declaration in order to take this view.

The EComHR has decided that when it does not have competence *ratione temporis* on cases, because the facts or acts occurred before the ratification of the Convention by a State, it would have competence to examine human rights violations under the American Declaration on the Rights and Duties of Man. However, the Inter- American Court has decided that its jurisdiction *ratione temporis* extends only when the State parties to the Convention recognize the ECtHR 's jurisdiction.[151]

In the Inter-American human rights system and the European human rights system, there is the 6 months rule to file the petitions. The Article 25(1) of the ECtHR establishes that "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision taken". Before the Protocol No.11, article 26 of the European Convention on Human Rights set forth a similar rule. The *ratio legis* of this rule was justified as being important to prevent past

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[147] ECtHR, *Kefalas and Others v. Greece* (Appl.No 14726/89)

[148]ECtHR, *Barbera, Messegue and Jabardo v. Spain*, 6 December 1988 (Appl.No.10590/83)

[149]ECtHR, *X v. Italy*, 4 March 1976 (Appl.No. 6323/73).

[150] Higgins, Rosalyn, 'Time and the Law: international perspectives on an old problem' (1997)46,. *International and Comparative Law Quarterly*, pp.501-520, p.503.

[151] IACtHR, *Moiwana village v. Suriname*, 15 June, 2005.

judgements being constantly called into question[152]. The Human Rights Committee system does not establish the same time limit.

The European Human Rights system has not been showing a uniform interpretation of its competence *ratione temporis*. This fact becomes clear in two different cases relating to the death of a victim which took place before the ratification of the Convention and the investigations related to the death that took place after the entry into force of the Convention. In *Kholodov and Kholodova v. Russia*[153], the ECtHR declined temporal jurisdiction by virtue to the fact that the substantive violations occurred before the ratification of the Convention. Conversely, in *Silih v. Slovenia*[154] in which the applicants alleged that their son had died by virtue of medical negligence, in spite of the fact the death had taken place before the entry into force of the Convention, the Court admitted its competence *ratione temporis*.

4.3. European Commission of Human Rights and European Court of Human Rights decisions

The EComHR used to distinguish between two kinds of continuity: instantaneous acts (occurring before the entry into force of the Convention for the State concerned) with lasting effects and continuing violations, which include the existence of legislation contrary to Convention[155]. The example of the former can be seen in a case where the German applicant who was living in Switzerland and had married to a Swiss national received a deportation order after losing his job. Although the EComHR pointed out that the material facts occurred before 28 November 1974, the critical date for the entrance of the Convention in relation to Switzerland, the EComHR found that it retained competence *ratione temporis* over the case regarding facts which took place after the critical date and that the applicant was in a continuing situation of not being able to enter Switzerland[156]. The latter case can be seen as an example of a case where the application of an anachronistic legislation would constitute a breach to the Convention's rights.

Before the extinction of the EComHR, the organ had decided in several cases about the existence of a continuing situation, sharing the ECrtHR's conclusion on the existence of a continuing situation that was interfering in the rights of the applicants. Such is the case of *Agrotexim Hellas S.A and others v. Greece* in which the ECrtHR has also concluded that there was a continuing situation in the series of measures taken by the Municipality of

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[152] ECtHR, *X v. France*, 13 December 1982,(Appl. No. 9587/81), paragraph 13.

[153] ECtHR, *Kholodov and Kholodova v. Russia*, , 14 September 2006 (Appl. No.30651/05)

[154] ECtHR, *Silih v. Slovenia*, , 9 April 2009 (Appl.No.71463/01)

[155] 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.

[156] EComHR, *X v. United Kingdom*, 29 September 1976 (Appl. No.7202/75).

Athens that would interfere in the right to a peaceful enjoyment of their possessions, contrary to article 1 of Protocol No.1. Although they started the measures before Greece accepted the EComHR' s jurisdiction on 20 November 1985, the government submitted that the measures that would allegedly be contrary to the rights of the Convention, such as the declarations made by the Major of Athens relating to the intention to expropriate the Syngrou Avenue and the Patission street sites, the putting up of signs and the planting of the trees were instantaneous acts, therefore outside the jurisdiction of the EComHR Furthermore, it also argued that the petition did not observe the six months rule. However, both the ECrtHR and the EComHR concluded that the measures which were taken by the Municipality of Athens would constitute a continuing situation.

The EComHR stated that, unless specified in the declaration, it had jurisdiction over disputes starting from the date when the State became party to the European Convention on Human Rights (ECHR) rather than the date it recognized the right to individual application. Nevertheless, the ECrtHR and the EComHR have declared that if a State inserts a clause into its declaration which limits the jurisdiction of these bodies to the acts and omissions which occurred after a certain time- e.g. the date of the declaration- incidents that took place before this time fall outside their jurisdiction[157], as was mentioned in the previous section.

In *Stamoulakatos v. Greece*[158], the applicant claimed that he had been convicted by default on a number of occasions by Greek courts in 1979 and 1980, before the acceptance of the right of individual petition entered into force for Greece on 20 November 1985. However, the decisions regarding the appeals occurred after the critical date. The EComHR interpreted that it was the subsequent remedy that did not afford the opportunity to the applicant submit his defence. However, the ECrtHR did not share the same opinion. The ECrtHR emphasized the fact that the appeals were strongly connected to the proceedings that took place prior to the critical date. Therefore, the appeals could not be divorced from the events which gave rise to them and the ECrtHR understood that it would not have jurisdiction *ratione temporis* over the case.

In *Sporrong and Lonnroth v. Sweden*[159], the ECrtHR decided over the recognition of the continuing situation, contrary to the decision of the EComHR that did not recognize a continuing situation. The applicants submitted that as the result of long-term expropriation permits they lost their security in possession, in particular their possibility of assessing the value of investments, by being held in suspense for 23 years and 12 years, respectively. In addition, they claimed that the "public interest" no longer applied and the continued use of the expropriation permit was a restriction of their rights for alien aims, which is contrary to article 18 of the Convention. Although there was an expropriation

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[157] 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*.vol, pp.3-4. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=926281

[158] ECtHR, *Stamoulakatos v. Greece*, 26 October 1993 (Appl.No.12806/87).

[159] ECtHR, *Sporrong and Lonnroth v. Sweden,* 23 September 1982 (Appl.No.7151/75, 7152/75)

order, the expropriation did not actually occur. Thus, the applicants were not formally "deprived" of their possessions.

Although the government argued that the application was filed without observing the six-months rule (the time limit set forth in article 26 of the Convention), the EComHR stated that in spite of the fact that the rule set forth is justified by the wish of the High Contracting Parties to prevent past judgements being called into the question, in this case there was a continuing situation. The alleged continuing situation was constituted of the renewed delays of expropriation combined with the prohibition of construction, which affected the applicants as property owners. The EComHR admitted its competence *ratione temporis* over the case, however, in analyzing the merits, it has not recognized the breach alleged as a continuing situation. In order to analyze whether there was a continuing situation the ECrtHR had to examine the right which had been put into the question. Pauwelyn's tool for the analysis of the scope of the right was extensively used in this case. Article 1 of Protocol no.1 which protects the right to a peaceful enjoyment of the properties, was put into the question. The EComHR assessed whether the prolonged existence of restrictions amounted to an interference which could becomes unjustified as going beyond or being disproportionate to their legitimate purpose. It found that the applicants attempted very few times to sell their property, which would not show how the value of their properties went down. Relating to restrictions on construction, the EComHR considered that those were not absolute. The EComHR also balanced the public interest with the restrictions imposed on the applicants and concluded that the length of time in which the applicants' properties were subject to expropriation permits and the prohibitions on construction were justified due to the complexity of planning in central Stockholm. In the EComHR's view, it could not be established that the inconveniences suffered by the applicants with regard to their properties were of such severity that could not be expected to be carried by them, not recognizing the violation of the article in question.

Conversely, the ECrtHR has decided to recognize the violation of article 1 of Protocol no. 1.

It considered that a fair balance between the demands of the general interest of the community and the requirements of the protection of the individuals' rights was broken. The full enjoyment of the applicants' rights of property was obstructed and the measures raised a situation which caused an unfair balance, imposing a heavy burden on the applicants. Therefore, the ECrtHR decided that there was a violation of article 1 of Protocol no. 1.

4.4. Right to enjoyment of the property and continuing situations

The European Human Rights system would not accept the claims of the right to property as continuing violations of human rights, in particular those regarding the deprivation of the right to the property. According to the EComHR and ECrtHR decisions, the right to

property can be separated from the person and would not incur to a continuing violation in most of the cases. In the cases related to the right to property where the EComHR recognized the continuing situation where the owners of the properties had not lost the rights to the property, i.e. they were not exactly deprived from their rights to property, but mainly were deprived from fully enjoying their rights. Therefore, the ECrtHR has considered that the deprivation of an individual's home or property is in principle an "instantaneous act" and does not produce a continuing situation of "deprivation" of these rights, such as in *Malhous v. Czech Republic*[160], which will be discussed later.

However, in cases where there was a continuous denial of access to the applicant's property continuing violations were recognized. That is the case of *Loizidou v. Turkey*[161], in which a Greek Cypriot woman continuously tried to get access to her property in the north of the island, but the Turkish occupation of Northern Cyprus prevented from enjoying her property. The applicant claimed that the denial of access to her lands constituted a continuing violation of the Convention and Article 1 of Protocol No.1. The Turkish government alleged that the author of the petition had lost the property due to Article 159 of the "TRNC" (Turkish Republic of Northern Cyprus) Constitution of 7 May 1985. Nevertheless, the Court referred to the United Nations Security Council Resolution 541(1983) which considered the proclamation of the "TRNC" as legally invalid and asked other States not to recognize any Cypriot State other than the Republic of Cyprus. In addition, it also mentioned that the Ministers of the Council of Europe, in a Resolution in 24 November 1983, also condemned the proclamation of statehood by the TRNC.

The Court considered that the continuous denial of the applicant's right to her property was amounting to a violation of article 1 of the Convention. Furthermore, the Court has also assessed the EComHR's decision admitting that her complaint as set out in the application form to the EComHR constituted a continuing violation of article 1, the right to a peaceful enjoyment of the land.

The Court concluded that this would amount to a continuing violation of Article 1 of Protocol 1 (peaceful enjoyment of possessions), as the land was still Loizidou's property. Later, the Court would determine various continuing violations in the case of *Cyprus v. Turkey*[162].

In *Papamichalopoulos and others v. Greece*[163], although the Greek government had made a declaration limiting the competence *ratione temporis* of the EComHR for the facts which took place after the acceptance of the jurisdiction of the Court, it was recognized that the continuing violation had started before the government recognized the Court's jurisdiction. In this case, the government transferred to the Navy fund an area of land in Attica by an Act of 20 August 1967. In 1968 three of the applicants obtained orders for the return of their properties, but the Navy retained the whole area. After many attempts

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[160] EComHR, *Malhous v. Czech Republic*, application no.33701/906, ECHR 2000-XII

[161] ECtHR, *Loizidou v. Turkey*, 18 December 1996 (App.No 15318/89).

[162] ECtHR, *Cyprus v. Turkey*, 10 May 2001. (Appl.No.25781/94).

[163]ECtHR, *Papamichaloupoulos and Others v. Greece*, 24 June 1993 (Appl.No. 14556/89).

by the applicants to obtain their lands back they send their case to the EComHR. The applicants alleged that the unlawful occupation of their property constituted a violation of article 1 Protocol No.1. In spite of the fact that the domestic courts were recognized by the domestic authorities they could not use their properties for a long period of time. The alleged violations started in 1967 and Greece had already ratified the Convention and Protocol No.1 by that time. However, the government did not recognize the EComHR's competence to receive individual petitions until 20 November 1985, and it did so only in relation to acts, decisions, facts or events subsequent to that date. Nevertheless, the government did not raise any preliminary objection in that regard. The Court recognized there was a continuing situation, where there was a clear interference with the applicant's exercise of their right to peaceful enjoyment of their possessions, with the occupation of their lands constituting a continuing violation of article 1 of protocol No.1 of the Court. This would amount to the enjoyment of the property and not only to the deprivation of property rights, in this case.

In *Iatridis v. Greece*[164] , the limitation *ratione temporis* of the EComHR's jurisdiction was not brought into issue. The government, in this case, claimed the applicant has not respected the six-months rule. The applicant operated an open-air cinema in Athens, where the ownership of the land on which the cinema was built was in dispute between the heirs of one K.N and the Greek State. The authorities ordered the eviction of the applicant claiming that he was retaining State property. In 1989 the Athens Court of first instance quashed the eviction order. The applicant sustained that the authorities' failure to return the cinema to him was an infringement of the right to the peaceful enjoyment of his possessions as guaranteed by article 1 of Protocol No.1 of his right to respect for his home under Article 8 of the Convention. The government had raised the preliminary objection that the applicants did not observe the six-months time-limit since the Athens Court of First instance gave its judgement quashing the eviction order. Nevertheless, the EComHR concluded that the Minister of Finance's refusal to comply with the decision of the Court of First Instance had brought a continuing situation, thus the six- months rule would not apply in this case. The Court followed the EComHR's view on this point.

In other cases, as was previously mentioned, where there was a deprivation of the rights to property, the EComHR and the European Court of Human Rights were of the opinion that in this case there had been an instantaneous act which would not raise a continuing situation. This approach can be seen in *Malhous v. the Czech Republic*[165]. In this case, the applicant father's property was expropriated by the Czechoslovak New Land Reform Act No.46/1948 without receiving any compensation. After the fall of the Communist regime the Land Ownership Act entered into force on 24 June 1991, which provides that the 1948 Act was no longer applicable and that under certain conditions the properties confiscated under the 1948 Act could be returned to its former owners or their heirs if it was still in the possession of the State or of a legal person. However, if such property had been transferred into the possession of natural persons, the owners or their heirs could claim the assignment of other equivalent property or financial restitution. In the case of

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[164]ECtHR, *Iatridis V. Greece*, 25 March 1999 (Appl.No. 31107/96).

[165] ECHR, *Malhous v. the Czech Republic*, 12 July 2001 (Appl.No.3307/96)

the applicant, the property which once belonged to his father was in the possession of natural persons. The applicant died and his nephew pursued the application. The claims of the original applicant remounted to the violation of his property rights secured by Article 1 of Protocol No.1[166] of the Convention. The applicant claimed that the Czech authorities did not decide on the unlawfulness or nullity of the application of the 1948 Act in his case. The government argued that the Article 1 of the Protocol secured the peaceful enjoyment of the existing property, but not the right to have a property restored. As the property of the applicant was confiscated under the 1948 Act, it did not emit effects any longer. Therefore, as the effects of the mentioned Act had already ceased to exist, the government considered that the Court was not competent *ratione temporis* to decide on the compatibility with the Convention. The applicant claimed that the right of the legitimate owner to claim the restitution of their property is included in article 1 of the Protocol No.1 to the Convention. The Court observed that the property of the applicant's father was expropriated in June 1949 and assigned to other natural persons in 1957, before the Convention entered into force in the Czech Republic (18 March 1992). Thus, the Court considered itself not competent *ratione temporis* to examine the circumstances of the expropriation and its continuous effects. It also emphasized that it "confirms the EComHR's established case-law according to which deprivation of ownership or of another right *in rem* is in principle an instantaneous act and does not produce a continuing situation of "deprivation of a right" (p.16). Nevertheless, the Court considered itself competent *ratione temporis* to examine the proceedings the applicant started under the Land Ownership Act for the recovery of his father's land after the entry into force of the Convention to the State by virtue that the proceedings ended in November 1995, date in which the Convention was already emitting its effects to the State. In addition, the Court also examined whether Mr. Malhous could have any "legitimate expectation" of the expression present in Article 1 of the Protocol 1. The applicant was returned some plots of land which were in possession of legal persons. However, the plots of land which were in possession of natural persons were not returned following the Land Ownership Law section 32(3). The Court did not find that the national authorities' conclusion was arbitrary or contrary to the provisions of the national law. In addition, the Court examined claims of violations of the right to a fair and public hearing (article 6 paragraph 1), which was a claim considered admissible by the Court.

The Court kept the same opinion regarding expropriation being an instantaneous act when examined *Almeida Garrett, Mascarenhas Falcao & Others v. Portugal*[167]. This case referred to expropriations of the applicants' property which took place in 1975 before the ratification of the Convention and Protocol No.1 by Portugal on 9 November 1978, accepting the argument of the Government that the deprivation of property was an

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[166] Article 1 of Protocol No. 1, Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[167] ECtHR, *Garrett, Falcao and others v. Portugal*, 11 January 2000 (Appl.Nos 29813/96 and 30229/96)

instantaneous act and would not constitute a continuing violation. The applicants, on the other hand, pointed out that in fact the compensation for the expropriation was still due by the Government. The Court noted that the government had recognized the right to compensation by the applicants. Therefore, the applicant's complaints did not concern the deprivation of property, but the failure by the State to pay them the compensation for it. The continuing omission by the State to pay the compensation was considered as a violation of article 1 of Protocol no.1. The Court pointed out that the mentioned article protects pecuniary assets, such as debts and it noted that domestic legislation would provide the applicants a right to compensation for loss of their property. In this way, the Court observed that the interference of the applicant's right to enjoyment of their possessions constituted a "continuing failure". The admissibility in the present case was also possible due to the fact the legislation which established the criteria for assessing the value of nationalized or expropriated property was enacted after the ratification of the Convention (Legislative Decree no.199/88).

In *Gratzinger and Gratzingerova v. Czech Republic*, the European Court of Human Rights complained that they were unable to recover their former property on the ground that they no longer had Czech nationality. Many similar cases were filed before the Human Rights Committee under the article 26 of the Covenant on Civil and Political Rights, which provides that "all persons are equal before the law and are entitled without any discrimination to equal protection of the law" [168] . For instance, in *Josef Frank V. Czech Republic*[169], the Human Rights Committee recognized that there was discrimination between citizens and non-citizens of Czech Republic. The Committee stated that in spite of the fact the confiscations occurred before the entry into force of the Covenant and of the Optional Protocol for Czech Republic, the new legislation excluded the non-citizens and hence had "continuing consequences". Setting requirements of citizenship to provide restitution is a practice that could be seen in many European countries, such as Bulgaria, which enacted a law in December 20, 1990 stipulating that former owners who were foreign citizens or Bulgarian citizens who were living abroad permanently would not be able to receive in-kind restitution. In Romania, the law of 1994 also limited the compensation to Romanian citizens who were residing in the country[170].

In *Gratzinger and Gratzingerova v. Czech Republic*, the applicants argued that it was impossible for them to recover their property. They claimed that the Extrajudicial Rehabilitation Act which set forth that only Czech nationals could get restitution would constitute a breach of the Convention, also mentioning article 26 of the Covenant on Civil and Political Rights. The Court examined the claim under article 14[171] of the

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[168] HRC, *Josef Frank Adam v. The Czech Republic,* 23 July 1996 (Comm.No.586/1994)

[170]Elster, Jon, Closing the Books- *Transitional Justice in Historical Perspective* (2004), p.175.

[171] Article 14"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Convention with Article 1 of Protocol No.1. The applicant made the claim that the Court should reach the same conclusion as the United Nations Human Rights Committee which decided that the requirement on possessing Czech nationality for individuals filing restitution claims was unreasonable, therefore, recognizing that there was a violation of article 26 of the International Covenant on Civil and Political Rights.

The article of Protocol No.1 provides that:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of these possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

The Court, on interpreting Article 1, noted that the "possessions" had the meaning of either "existing possessions" or a "legitimate expectation" that they will be realized. The Court decided that the applicants did not have the legitimate expectation of the properties in virtue that the Court noted that at the time when they brought their action for restitution, the Extrajudicial Rehabilitation Act provided that only those rehabilitated by the courts who had Czech nationality were entitled to make restitution claims. The Court found that the applicants could not prove that the claim was sufficiently established to be enforceable and thus, they could not argue that they had a "possession" within the meaning of Article 1 of Protocol No.1. Macklem notes that it is surprising the Court did not recognize the claims of the applicants, as the European Convention also protects the right to property, in contrast with the International Covenant on Civil and Political Rights. He interprets the denial of the European Court of Human Rights to recognize the discrimination suffered by the applicant as a way to repudiate Europe's 'burden of the past'[172]. The denial of the past by the Court occurred when the applicants lost their properties due to policies certain previous regimes, but if they still had had the right to property and suffered a continuous obstruction of their rights, the Court would recognize their historical importance to be reminded as victims of a certain policy. Historically, properties which were expropriated and have new owners are not likely to be returned to the old owners and this possibility becomes even more difficult when the time lapse is considerable. Elster quotes John Stuart Mill statement regarding this issue:

> Possession which has not been legally questioned within a moderate number of years ought to be, as by the laws of all nations it is, a complete title. Even when the acquisition was wrongful, the dispossession, after a generation has elapsed, of the probably bona fide possessors, would generally be a greater injustice, and almost always a greater private and

[172] Macklem, Patrick, 'Rybná 9, Praha 1: Restitution and Memory in International Human Rights Law' (2005) 16-1, European Journal of International Law, pp.1-23, p.20.

> public mischief, than leaving the original wrong without atonement. It may seem hard, that a claim, originally just, should be defeated by mere lapse of time; but there is a time after which, (even looking at the individual case, and without regard to the general effect on the security of persons) the balance of hardship turns the other way. With the injustices of men, as with the convulsions and disasters of nature, the longer they remain unrepaired, the greater become the obstacles to repairing them, arising from the aftergrowths which would have torn up or broken through[173].

The ECrtHR 's decisions on the expropriation follow this reason since they interpret that deprivations of the property are instantaneous acts and in many of these cases the right to them were challenged by the second generation of those who lost their properties. Macklem made a suitable reasoning saying that in part the ECrtHR has denied a certain past by not accepting the right to restitution of ownership by the applicants, however it is important to note that this practice of considering the destitution of property as a right that weakens with the lapse of time is a common characteristic that can be seen in different times and countries, such as in the French Restoration and in the former GDR after 1990, when the unification treaty determined that an exception to the return of confiscated property would occur when the new owners had acquired it "in an honest manner". Another example can be seen in a decision which was taken in Athens in 403 B.C, allowing confiscated goods remain in the hands of the new owners[174]. Therefore, between the interests of those who lost their properties and the ones who currently hold the ownership, it is the latter ones who will be protected.

In *Phocas v. France*[175], the applicant complained of a violation of his right of property (Article 1 of Protocol No.1)(P1-1) and of the slowness of the proceedings in the French administrative courts. The EComHR considered the application admissible on 29 November 1993 and decided there had been a breach of article 1 of Protocol No.1 (P1-1).

The applicant was suffering restrictions on his right to property due to the scheme for improving the crossroad where his property was situated since 1962. When he believed that expropriation of his land was imminent he transferred his business to another location. In addition, the applicant was planning to build apartments on his own land close to the crossroads. The government claimed that the events took place before France ratified Protocol no.1 on 3 May 1974 and therefore these facts would be outside the competence *ratione temporis* and did not concern a "continuous situation". Furthermore, as the interference of the government had ended in the middle of 1973, when the expropriations judge would have fixed the purchase price whether Mr. Phocas had applied to him the statutory time-limit. However, the EComHR claimed that the events which had affected the enjoyment of the applicant's possessions before 3 May 1974 could be considered, as they affected the situation in which the applicant found himself.

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[173] Elster, Jon, Closing the Books- *Transitional Justice in Historical Perspective* (2004) p.174.

[174] Elster, Jon, Closing the Books- *Transitional Justice in Historical Perspective* (2004).p.172.

[175] ECtHR, *Phocas v. France*, 23 April 1996 (Appl.bo.17869/91).

His application for planning permission was adjourned on the ground that it would "likely jeopardize" the improvement of the crossroads. On 22 January 1982 finally the Expropriations Division of the Court of Appeal decided the expropriation compensation and that the crossroads scheme was an obstacle to the development of the applicant's property. In this case, as Buyse points out, there was a "necessary continuity"[176].

Therefore, the ECrtHR was able to take into account events that occurred before France ratified Protocol No.1. The ECrtHR emphasized that the applicant was not complaining about specific measures which had constrained the use of his property, but he was complaining more about the infringement of his right to property caused by the "general conduct" of the authorities. The EComHR emphasized the fact that before 3 May 1974, when France ratified Protocol No.1, the applicant could not secure planning permission or sell his property to the authorities pursuant to his right of abandonment. This situation continued after the entry into force of the Protocol. Furthermore, the EComHR also determined that the undue delay of the proceedings by the French authorities led to instability in the applicant's right to property. The ECrtHR had a different opinion, and it did not recognize the breach of article 1 of Protocol no.1. According to the ECrtHR, the applicant exceeded the three-years time-limit after not having response from the authorities to bring the application to the expropriation judge and did not accept the offer made by the authorities to purchase his property.

Regarding the violation of article 6 of the European Convention which sets forth that everyone has the right to be heard in a reasonable time by tribunals, the ECrtHR rejected the government's objection that the application exceeded the 6 months-rule.

In this case, there were different proceedings brought by the applicant to the administrative authorities and later to the judicial authorities in France. Nevertheless, the ECrtHR determined that there was a unity of the situation, a continuing situation that would not allow the applicant to enjoy his right to the property.

In another case where the ECrtHR refused to accept the right to a legitimate expectation of the applicant, the type of property was movable and the ECrtHR did not recognize the right of the applicant to get it back.

The EComHR in this case, confirms its approach of considering a measure taken by a government that would obstruct the right to property as causing a continuous situation. In case 14807/89, the applicants argued that the Municipal Council of Athens designated an area of property of the company to be transformed into public parks. The State party submitted that the measures the applicants complained of were taken before 20 November 1985, date the State accepted the competence *ratione temporis* of the Commission. In spite of the fact that the measures that would not allow the complete enjoyment of the properties had been taken before the Commission's competence, it

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[176] 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.85

noted that the measures continued after 20 November 1985. In this case, the Commission also recognized its competence *ratione temporis*.

Properties are divided between real properties and personal properties. The first ones are the immovable ones and the latter ones are constituted of physical objects or financial assets. Most of the cases relating the transitional regimes deal with real properties, but, in *Kopecky v. Slovakia* the right to a personal property was examined. In this case, the ECrtHR confirmed that deprivation of ownership or of another right *in rem* is in principle an instantaneous act and does not produce a continuing situation of "deprivation of a right", in the same way as the judgement emitted in *Malhous v. Czech Republic*. In this case, the applicant claimed the restitution of his father's coins, under the Extra-Judicial Rehabilitations Act 1991. The applicant failed to indicate the place where the coins were located, one of the requirements of the restitution law and due to this reason he could not have his father's coins restituted. The ECrtHR considered the Convention did not set forth the obligation on the States parties of the Convention to provide redress for wrongs or damage caused prior to their ratification of the Convention. In addition, it also interpreted Article 1 of the Protocol no 1 in order to assess if the applicant had the "possession" within the meaning of the provision. As the applicant could not claim that he was vested of property rights his complain was considered inadmissible. The ECrtHR did not recognize that there was a legitimate expectation by the applicant of receiving his property back. The concept of "legitimate expectation" provided by article 1 of Protocol No. 1 was discussed in the dissenting opinion of judges Ress, Steiner and Borrego. They argued that there was a legitimate expectation that the property would be returned once there was an annulment of the confiscation decision. In their opinion, the mere annulment of the confiscation would already create a property right. The annulment was a legal act which in every respect fulfils the condition which the ECrtHR had laid down for recognition of the existence of a legitimate expectation. Furthermore, Judge Straznicka also presented similar arguments concerning the "legitimate expectation" term. He pointed out that the legislation on restitution was adopted with the clear intention of remedying injustices committed in the period between 25 February 1948 and 1 January 1990.

In the context of the reparations for the loss of property in ex-communist countries, the ECrtHR has a different approach from the Human Rights Committee. In the latter case, in spite of the fact that the right to the property is not set forth in the Covenant on Civil and Political rights, the Committee under the article 26, right not to suffer discrimination, has recognized the "memorial of wrongs" connected to the communist rule[177]. On the other hand, the ECrtHR, by not recognizing the restitution claims of those who were descendants of the ones who lost their properties in the Communist regime, denied these facts to be in the hall of memorial of wrongs committed by the past regimes.

[177] Macklem, Patrick, 'Rybná 9, Praha 1: Restitution and Memory in International Human Rights Law' (2005) 16-1, European Journal of International Law, pp.1-23.p.15.

4.5. Fair trial and continuing violations

In *Belziuk v. Poland*[178], in spite of the facts which originated the procedures in the domestic courts had taken place before the critical date for Poland, the Court accepted its jurisdiction *ratione temporis*. The applicant was arrested on 31 May 1992 on suspicion of attempting to steal a car on 2 June 1992 and remained in custody. On 25 November 1992 the District Court convicted the applicant for 3 years imprisonment. The applicant claimed breach of article 6, paragraph 1 together with article 6 paragraph 3 (c) of the Convention and to award him just satisfaction under article 50 of the Convention. Poland recognized the compulsory jurisdiction of the ECrtHR on 1 May 1993. However, the ECrtHR considered that the main fact giving rise to the applicant's complaint was not the decision of the District court decision, but the appeal hearing held on 10 May 1993, in which the public prosecutor was present but not the applicant, which would constitute the alleged violation, accepting its jurisdiction *ratione temporis* over the case. The ECrtHR took into account the facts and the scope of the Convention of the right. However, the moment at the interference occurs requires a careful examination and also has raised many objections, such as in *Veeber v. Estonia*[179] in which the ECrtHR has decided that the moment of the interference was when a lower instance ECrtHR emitted its decision and not when the Constitutional Court, the highest instance court, has emitted its decision, as will analyse later.

4.6. Permanent restraint of rights

The permanent restraint of a person's rights is a clear example of a continuing violation of human rights, such as the deprivation of the right to free speech or to work in a certain kind of job. In the cases of Strasbourg Court the alleged violations occurred before the critical date, but continued to affect the person's rights after that. In De Becker case[180], the applicant had been condemned to death by the Brussels War Council for collaborating with the German authorities in Belgium. Later, the death penalty was commuted to life imprisonment and sometime after the applicant was set free from prison.

He had suffered the forfeiture of the rights set out in Article 123 sexies of the Belgian Penal Code which set forth that, among many restrictions, he would be deprived for life of the rights to vote and the right to be elected, right to have a proprietary interest in or to take part in any capacity in the administration, editing, printing or distribution of a

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[178] ECtHR, *Belziuk v. Poland*, 25 March 1998 (Appl.No. 23103/93).

[179] ECtHR, *Veeber v. Estonia*, 7 November 2003 (Appl.No.37571/97).

[180] ECtHR, *De Becker v. Belgium*, 27 March 1962 (Appl.No.214/56). Similar application was EComHR 3 December 1979 (Appl.No.8701/79). In this case, the applicant lodged the application, claiming that he was permanently deprived of the right to vote contrary to article 3 of the First Protocol. The applicant still was deprived of the right to vote at the time of the complaint. The decision was taken in 1948, but a continuing situation was installed, according to the Commission.

newspaper or any other publication, right to take part in organizing or managing any cultural, philanthropic or sporting activity or any public entertainment and the right to be a leader of a political association. The applicant complained that the restrictions he was suffering under the article 123 of the Belgian Penal Code were an infringement of article 7, which establishes that crimes and offences must be defined by legislation, however, article 123 had been introduced by retroactive decree and violation of article 10 which safeguards the right to freedom of expression because it would not allow the applicant to work as a journalist and writer. The Commission recognized that in regard to the competence *ratione temporis* the applicant found himself in a continuing situation of forfeiture of rights which had no doubt originated before the entry into force of the Convention in Belgium (14th June 1955), but which had continued after that date, since the forfeitures in question had been imposed "for life". In this case, the continuing situation regards the violation of the applicant's right to freedom.

In certain cases, the continuing application of a law, which was emitting effects before the critical date, would affect the life of the applicant after the Convention entered into force. In the Inter-American human rights bodies issues related to the pre-critical period of an enacted law were mainly concerned with amnesties that would prevent the punishment of the crimes of previous regimes.

That reasoning was followed in *Dudgeon v. the United Kingdom* [181], where the government did not raise a *ratione temporis* objection, in spite that century legislation was examined. The legislation incriminated homosexual acts, and was a continuing interference on the rights of the individual, constituting violation of Article 8 (1). It stated that "the very existence of this legislation continuously and directly affects his private life either he respects the law and refrains from engaging (...) in prohibited sexual acts (...)" Thus, the legislation which was not suited to the contemporary society was found to be violating continuously the rights of the applicant.

In the Strasbourg Court, violations related to a person's rights were examined in the case of *Modinos v. Cyprus*. The applicant had complained about the suffering of having apprehension and fear of prosecution by reason of the legal provisions which criminalize certain homosexual acts. The criminal code of Cyprus, which was enacted before the Constitution, would punish with imprisonment acts "against the order of nature"[182]. In this case, the applicant complained that the prohibition on male homosexual activity was a breach of article 8 of the Convention, which relates to the respect for private life. The applicant complained of a "continuing interference" on his private life. He claimed that the violation of the aforementioned article would happen due to the omission of the State to formally abolish the Criminal Code, due to the statements made by the three successive Ministers of Justice declaring that they would not initiate any legislation to abolish the crime of maintaining homosexual acts and in virtue of police investigations into homosexual acts between consenting adults.

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[181] ECtHR, *Dudgeon v. United Kingdom*, 23 September 1981 (Appl. No.7525/76)

[182] art.171, 172 and 173 of the Penal Code

In fact, the Constitution of Cyprus was proclaimed when the country declared itself as independent in 1960. In the Constitution guarantees for fundamental rights and liberties of the individual were provided. The colonial laws should then be reconciled with the Constitution by a legitimate process of modification, and the task of adjusting the colonial legislation to the Constitution belonged to the judiciary. Even if the attorney general has changed the policy of prosecuting those who were accused of committing homosexual acts this decision of not prosecuting did not constitute a certain assurance for respect of his right set forth in article 8[183]. In this case, an application of strict legality would be in conflict with social change. Thus, a law that was enacted before the independence of the country was to be abolished to adapt to changes of customs in the society. The problem of the values of the society with an anachronistic law can be seen also in *R v. R*, the case of marital rape that was analyzed by the House of Lords in 1991. In this case, it was decided that the rule in which the husband could not be criminally responsible for raping his wife was not the rule of England any longer. They emphasized that a husband and a wife were to be considered as equal partners in the marriage and that having a sexual intercourse without the wife's permission was unacceptable[184].

Thus, the fact that the articles which would criminalize homosexual acts was still emitting effects would violate the right under article 8 which sets forth:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." It was not discussed the *ratione temporis* competence of the Court, since there was not any preliminary objections in this point.

The ECrtHR determined that the fact the Penal code was still in force, being a continuous prohibition, was affecting the applicant's life, recognizing the violation of article 8 of the European Convention. In the present case, the use of the first and second of Pauwelyn's tools is useful. If we focus on the legal rule, in this case article 8, which provides that the right to private and family life rules must be respected on a continuing situation and not in an instantaneous act. The second tool of Pauwelyn is also useful in this situation due to the fact that the cessation of the effects of the law would be a remedy for the case. However, the third tool is not suitable because it does not create a specific status for the applicant.

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[183] Paragraph 3 of Dissenting opinion of judge Pikis.

[184] House of Lords, *R v. R* (1992) 1 A.C. 599. in Higgins, Rosalyn. Time and the law: international perspectives on an old problem in International and Comparative Law Quarterly, vol. 46, p.508

The present case deals with an anachronistic law whose application would violate the human rights of the applicant, a law that does not suit the current values of the society. Conversely, the R. v. R. case, examined by the House of Lords deals with a fact that was allowed in customary law of England, but whose application would generate a conflict with the current social value of equal partnership between men and women in the marriage.

4.7. *Cyprus v. Turkey*: recognition of various continuing violations

In *Cyprus v. Turkey*[185], which was an inter-State case, the facts described by the applicants remounted to the Turkish military operation in northern Cyprus in July and August 1974 and the continuing division of the territory of Cyprus, an issue that was raised previously in the *Loizidou v. Turkey*. The continuing violations found in this case related to the Turkish policy of separating the Greek-Cypriot and Turkish-Cypriot communities. Approximately half of the population of Cyprus was uprooted, around 4,000 Greek Cypriots were killed and 2,100 people disappeared. Furthermore, rape, murder, torture and looting were widespread[186].

The ECrtHR determined that violations of rights of the Karpas Greek Cypriot community occurred simply because they belonged to a certain class of people. The finding of a continuing violation of Article 8 took place for not allowing the return of any Greek-

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[185] ECtHR, *Cyprus v.Turkey*, 10 May 2001 (Appl. No. 25781/94)

[186] Many resolutions were adopted condemning the occupation of Cyprus by the Turkish authorities. Resolution 361 (1974) Adopted by the Security Council on 30 August 1974, Resolution 550(1984), Adopted by the Security Council on 11 May 1984, Resolutions of the General Assembly, Resolution 3212(XXIX), adopted on 1 November 1974, Resolution 3395 (XXX), adopted on 20th November 1975, Resolution 33/15(1978), adopted on 9 November 1978, Resolution 34/30(1979), adopted on November 20, 1979, Resolution 37/253 (1983), adopted on May 13, 1983, Resolution of the UN General Assembly on missing persons, Resolution 3450 (XXX), adopted on 9 December 1975, Resolution 32/128, adopted on 16 December 1977, Resolution 33/172, adopted on 20 December 1978, Resolution 36/164, adopted on 16 December 1981, Resolution 37/181, adopted on 17 December 1982. Resolutions adopted by the Commission on Human Rights on the question of human rights in Cyprus, Resolution 4 (XXXI) of the Commission on Human Rights, adopted on 13 February 1975, Resolution 4 (XXXII) of the Commission on Human Rights, adopted on 27 February 1976, Resolution 17 (XXXIV) of the Commission on Human Rights, adopted on 7 March 1978, Resolution 1987/50 of the Commission on Human Rights, adopted on 11 March 1987, Resolution of the sub-commission on prevention of discrimination and protection of minorities, adopted on 2nd September 1987, Resolutions adopted by the Commission on Human Rights on the question of human rights in Cyprus resolution 4 (XXXI) of the Commission on Human Rights, adopted on 13 February 1975, Resolution 4 (XXXII) of the Commission on Human Rights, adopted on 27 February 1976, Resolution 17 (XXXIV) of the Commission on Human Rights, adopted on 7 March 1978, Resolution 1987/50 of the Commission on Human Rights, adopted on 11 March 1987.

Cypriot displaced persons to their homes in northern Cyprus. The displacement also affects the right to cultural identity which, in the saying of Antonio Cancado Trindade, "conforms the material or substantive content of the right to life *lato sensu* itself"[187]. A continuing violation of article 1 of protocol no.1 took place due to the fact that Greek-Cypriot owners of property were refused access and enjoyment of their right to property, as in the case of the aforementioned Loizidou case. The ECrtHR also recognized a continuing violation of article 2 of the Convention on account of the Turkish authorities' failure to effectively investigate the whereabouts of missing people that disappeared who were claimed to be under Turkish custody. The ECrtHR finally recognized the continuing violation of Article 3 of the Convention by virtue of the suffering caused by the missing of their next-of-kin. As Loucaides[188] points out it was the first time in the history of the ECtHR that it was determined that such a high number of violations took place, involving a large number of people over a prolonged period of time. The fact the ECtHR intervened in a case that would involve political issues rather than simply in a case of individual violation of human rights was questioned by Judge Fuad, who disagreed with the conclusions of the ECtHR relating to the violations of the rights of Greek Cypriots and of the violations on account of the functioning of military courts. He quoted judges Bernhardt, Pettiti and Golcuklu, who had dissented in Loizidou case. The establishment of the border in 1974 by the Turkish authorities and its presence cannot be assumed as illegal. The situation of Cyprus was complex and it would require an on-site investigation. The whole problem would have been more connected to politics and diplomacy than the scrutiny of the ECtHR. They argued that the problem of Cyprus was beyond a lawsuit case and that it would be unrealistic to determine the immediate right to resume possession of his or her property, wherever situated[189]. The same line of thought was kept in *Xenides- Arestis v. Turkey*[190]. In this case, the applicant was a Greek-Cypriot that alleged she owned a plot of land in Northern Cyprus and was preventing from living in her property since August 1974 as a result of continuing division since the Turkish military occupied the island in 1974. The applicant complained of a continuing breach of her rights under article 8 of the Convention (right to respect her home) and Article 1 of Protocol No.1 (protection of property) to the Convention. The ECtHR decided, in the same way as in Loizidou, to recognize the continuing violation of rights of the applicant since she was prevented from the use, enjoyment of property rights. As she was trying to recover the ownership it means that for the applicants there is a continuing violation, as she expected to recover the properties.

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[187] In his separate opinion in Moiwana village case, judge Trindade describing the situation of uprootedness of the members of the community quoted J-M. Domenach who observed that "it would not be possible to deny the roots of the human spirit itself, as the very form of acquisition of knowledge, on the part of each human being, - and consequently of his perception of the world, - was to a large extent conditioned to factors such as the place of birth, the mother-tongue, the cults, the family and the culture ;

[188] Loucaides, Loukis G., 'The Judgment of the European Court of Human Rights in the Case of Cyprus v. Turkey' (2002)15, *Leiden Journal of International Law*, pp.225-236, p., p.226

[189] Ibid.p.232.

[190] ECtHR, *Xenides-Arestis v. Turkey*, 22 December 2005 (Appl. No.46347/99)

The ECtHR had chosen to make a political statement when recognising the violations by the Turkish government of the free enjoyment of the properties. Although judges Bernhardt and the others stated that the problem was connected to diplomacy and that the presence of the Turkish authorities could not be considered as illegal, many resolutions of the General Assembly would support the sovereignty, independence, territorial integrity and non-alignment of the Republic of Cyprus and call for the cessation of all foreign interference. The ECtHR following the United Nations criticism over the Turkish invasion of Cyprus through the recognition of the violation of the rights of the applicants who could not have access to their properties, protected the individuals from total impunity as domestic courts would not be able to accomplish this task.

4.8. Enforced disappearances

In *Varnava and Others v. Turkey*[191], the Court did not follow the same interpretation of other recent cases such as *Blecic v. Croatia*[192], *Kholodov and Kholodova v. Russia*, in which the ECtHR understood that it lacked the jurisdiction *ratione temporis* since the alleged obligation derived from material facts whose compatibility with the Convention could not be examined. The present case also occurred on the background of the Turkish military occupation of Cyprus and it was originated in nine applications.

The government, in its preliminary objections, had raised the objection *ratione temporis*. Turkey recognized the competence of the ECtHR on 28 January 1987, with a declaration which would limit the competence to facts which took place after the acceptance of the ECtHR's competence. The government claimed that the applications were based on instantaneous acts which took place before the State accepted the ECtHR's competence.

The ECtHR understood that it would not have competence to examine the deaths of the victims which took place long time before the acceptance of the competence of the ECtHR to examine the case, but admitted its jurisdiction *ratione temporis* to examine the violations that continued since the date of ratification of the Convention. The State argued that the applicants have waited too long for bringing the case to the ECtHR and that the application should be rejected as out of time. This same argument was accepted in previous cases such as *Baybora and Karabardak*[193], in which the relatives of the disappeared persons lodged a petition related to an inter-communal strife in the 1960s. In this case, the ECtHR stated that the applicants "had unduly delayed in introducing their complaints before the Court". Thus, the applications were rejected under article 35 for being lodged out of time. In *Varnava and Others v. Turkey*, the applicants argued that there was a continuing obligation of an effective investigation of the fate of disappeared people. Surprisingly, the ECtHR decided that it had competence *ratione temporis* over the case and that the duty of investigation would raise a continuing violation.

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[191] ECtHR, *Varnava and Others v. Turkey* (10 January 2008 (Appl.Nos. 16064/90 ; 16065/90 ; 16066/90 ; 16068/90 ; 16069/90 ; 16070/90 ; 16071/90 ; 16072/90 ; 16073/90).

[192] ECtHR, *Blecic v. Croatia*, 3 March 2006 (Appl. No.59532/00).

[193] ECtHR, 77116/01 and 76575/01, 22 October 2002.

4.9. Pending proceedings or detention

In cases where the proceedings in domestic courts had started before the ECtHR had jurisdiction over the State, the ECtHR recognized its competence *ratione temporis* over the period subsequent to the critical date. In *Klyakhin v. Russia*[194], the applicant brought complains about the length of his detention on remand which started before the critical date to Russia, claiming that he did not have access to procedures which would challenge his detention, that he was denied effective remedies and that the proceedings did not respect a reasonable length of criminal proceedings. The Russian government argued that facts occurred before 5 May 1998, date in which the Convention entered into force for Russia, and hence that the ECtHR would not have the competence *ratione temporis*. The applicant requested that in spite of the fact the imprisonment occurred prior to the critical date, the ECtHR should take into account the fact he had been in detention on remand for eight months already.

When the proceedings started before the State made a declaration regarding the acceptance of the jurisdiction of the Commission, the ECtHR would consider the length of the petitions for the period subsequent to valid declaration. In *Yorgiyadis v. Turkey*, [195] the applicant requested the ECtHR to recognize the violation of article 6, paragraph 1 of the Convention related to the respect to the reasonable time of the proceedings. The civil proceedings were initiated on 17 May 1983 and ended on 15 November 1998, lasting almost fifteen years and six months. Nevertheless, the ECtHR considered within its jurisdiction *ratione temporis* only the period after 28 January 1987, the date of Turkey's declaration which would recognise the right of individual petition before the European Commission of Human Rights, declaring the petition admissible *ratione temporis*.

In cases where the material facts occurred before the ratification of the ECtHR and the applicants are claiming that it should have competence *ratione temporis* to the lack of effective investigation, the ECtHR did not separate the duty to investigate from the material facts, denying its own competence *ratione temporis* over the case. The ECtHR tends not to accept the separation of the duties imposed on the country after the ratification of the Convention and the material facts which would be outside the competence *ratione temporis* of the ECtHR . This happens not only on matters of duty to investigate, but also regarding to proceedings caused by an act which took place before the ratification of the Convention. In *Aliyeva v. Azerbaijan*[196], the applicant was dismissed from work before the Convention entered into force for Azerbaijan, however, the proceedings related to the regularity of the dismissal and the final decision took place after that date. The ECtHR has stated that its competence *ratione temporis* is to be determined in relation to "the facts constitutive of the alleged interference. In cases where the alleged interference pre-dates ratification while the refusal to remedy it post-dates

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[194] ECtHR, *Klyakhin v. Russia*, 30 November 2004 (Appl.No. 46082/99).

[195] ECtHR, *Yorgiyadis v. Turkey*, 19 October 2004 (Appl.No. 48057/99).

[196] ECtHR, *Aliyeva v. Azerbaijan*, 23 May 2006 (Appl.No.272/03).

ratification, to retain the date of the latter act in determining the ECtHR's temporal jurisdiction would result in the Convention being binding for that State in relation to a fact that had taken place before the Convention entered into force in respect of that State". In addition, the ECtHR did not recognize the dismissal of the work as a continuing violation, but rather as an instantaneous act.

In *Yagci and Sargin v. Turkey*[197], the applicants, who belonged to the United Communist Party of Turkey, had decided to return to Turkey after a long absence. They were arrested on disembarking from the plane on 16 November 1987, kept in police custody until 5 December and held in pre-trial detention for about two years and five and a half months.

In this case, the government argued that the ECtHR would lack jurisdiction *ratione temporis* in virtue that on 22 January 1990 Turkey recognized the ECtHR's compulsory jurisdiction over "matters raised in respect of facts, including judgments which are based on such facts which have occurred subsequent to" that date, Furthermore, the government emphasized the fact that the ECtHR's jurisdiction would not include the facts which were "merely extensions of the ones occurring" before 22 January 1990. para.37)

The ECtHR assessed that according to the declaration Turkey made under Article 46 of the Convention, the ECtHR considered that it could not entertain complaints about events which occurred before 22 January 1990 and that its jurisdiction *ratione temporis* covered only the period after that date. Nevertheless, when examining the complaints regarding Articles 5-3 and 6-1 ECHR, it took account of the state of the proceedings at the time when the declaration was deposited. The ECtHR then did not accept that facts subsequent to 22 January 1990 were excluded from its jurisdiction where they are merely extensions of an already existing situation. In the view of the ECtHR, the State has to respect the articles in the Convention after the critical date, being subject of review to the Convention's institutions. After the critical period, the Ankara National Security Court considered the question of the applicants' continued detention three times. The Court held that the applicant's continued detention would constitute a breach of article 5-3.

In the same way, the ECtHR approached the *Kalashnikov v. Russia*[198] case. In this case, the applicant complained about his ill-treatment by special forces while he was in a detention on remand. In spite of the fact the detention had occurred before the critical date to Russia and having been extended after that, the ECtHR decided that it would consider the period as a whole. In this sense, the ECtHR noted that "The Convention entered into force in respect of Russia on 5 May 1998. However, in assessing the effect on the applicant of his conditions of detention, which were generally the same throughout his period of detention, both on remand and following his conviction, the **Court may also have regard to the overall period during which he was detained, including the period prior to 5 May 1998.**[199]"(emphasis added). After considering it, the Court found that the conditions of the prison, relating to overcrowding and unsanitary conditions

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[197] ECtHR, *Yagci and Sargin v. Turkey*, 8 June 1995 (Appl.Nos.16419/90; 16426/90).

[198] ECtHR *Kalashnikov v. Russia,* 15 July 2002 (Appl. No.47095/99).

[199] ECtHR, *Kalashnikov v. Russia*, 15 July 2002 (Appl.No. 47095/99) paragraph.96

would constitute degrading treatment, thus violation of article 3[200] of the Convention. Furthermore, the ECtHR recognized that its jurisdiction *ratione temporis* would relate to facts which took place after 5 May 1998, but it pointed out that it would "take into account the state of the proceedings existing that date"[201].

Another procedure where it was considered as a whole can be seen in *Barbera, Messegue and Jabardo v. Spain*[202]. As the State had made a declaration in which it does not accept the jurisdiction *ratione temporis* before 1 July 1981, the Commission found that it could have competence *ratione temporis* after that. The applicants argued they suffered from torture and maltreatment by the police when they were in custody. Furthermore, the applicants complained of the fact they did not receive a fair trial before an independent and impartial tribunal. They argued they made confessions after being tortured. As the applicants in this case were arrested on 14 October 1980 and were held in custody until 23 October 1980, the Commission did not take into account the part of the complaints which referred to facts occurring before the critical date, though the application was considered admissible in virtue of other claims.

However, the ECtHR took a different approach from the Commission when it had to decide on matters related to ill treatment and torture before the critical date. It did not recognize the procedure as a whole in *Yagiz v. Turkey*. The Commission, in this case, recognized violation of Article 3 of the European Convention[203], in which the applicant alleged being tortured by police officers while in custody before Turkey recognised the ECtHR'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. The judgment and its upholding by the ECtHR occurred after the critical date, but the ECtHR did not recognize its competence *ratione temporis* over the case, accepting the government preliminary objection which stated that "Turkey first recognized the ECtHR's compulsory jurisdiction on 22 January 1990, with regard to matters raised in 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, and thus it was considered by the ECtHR as outside the jurisdiction *ratione temporis*. The applicant argued that the date the Turkish declaration took effect was not the date on which it was notified to the Secretary General of the Council of Europe, but rather when it was published in the Turkish Official Gazette, on 27 September 1989. The ECtHR alleged that the moment of the recognition of the ECtHR's jurisdiction is when it is notified to the Secretary General, not accepting the applicant's argument. The ECtHR could have considered the application within its competence *ratione temporis*, in virtue of the fact the procedures to examine the claims of ill-treatment took place after the critical date.

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[200] Article 3: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

[201] ECtHR, *Kalashnikov v. Russia*, 15 July 2002 (Appl.No. 47095/99) para.124.

[202] ECtHR, *Barbera, Messegue and Jabardo v. Spain*, 6 December 1988 (Appl.No.10590/83)

[203] European Convention on Human Rights article 3 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

In *Kerojarvi v. Finland,*[204] the Commission held that in relation to a series of legal proceedings it would examine only the part of proceedings which occurred after the date of the entry into force for the contracting state. Thus, in this case, where the judgement before the Insurance Court occurred on 19 October 1989, events before the date of entry into force of the Convention (10 May 1990) would not fall within the competence *ratione temporis* of the Court. On the other hand as the proceedings before the Supreme Court reached final decision on 7 June 1990, the Court considered this part of the complaint as within its competence *ratione temporis*.

4.10. Effective investigation

In *Moldovan and Others and Rostas and Others v. Romania*[205], the applicants argued they had their houses destroyed and that afterwards they were forced to live in poor conditions, constituting a violation of article 3 of the Convention. The applicants alleged that their property was destroyed and that the authorities did not conduct an investigation to punish those responsible for it. In 1993 a row broke between three Roma men and another villager that led to the death of the latter's son, who had tried to intervene. After that their house was set on fire and a crowd pursued and killed two of them, while another died in the building which was on fire. The applicants claimed the police, instead of protecting them, encouraged the crowd to destroy the property of the Roma. The applicants also complained that the failure of the authorities to investigate and convict all the individuals responsible has obstructed their application for civil action for damages, constituting a violation of article 6 of the Convention. The applicants also complained that under Article 8 of the Convention, in virtue of the incident, most of them cannot live in their houses.

The applicants claimed violations under Articles 3, 8 and 6, which are related to the length of proceedings, which had a continuous nature. The ECtHR noted that the killings occurred in September 1993 before the entry into force of the Convention, which happened on 20 June 1994 and argued that according to generally recognised rules of international law, the Convention would apply in respect of each contracting party to facts subsequent to its coming into force for that party. The ECtHR, however, considered that the duty of the State to conduct the investigation could not be considered as separate from the material facts and alleged that the "effective investigation capable of leading to the identification and punishment of all individuals responsible for the deaths of the applicants' relatives is derived from the aforementioned killings whose compatibility with the Convention cannot be examined by the Court". In the same way, it decided that it did not have competence *ratione temporis* relating to the destruction of properties

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[204] ECtHR, *Kerojarvi v. Finland,* 19 July 1995 (Appl.No.17506/90).

[205] ECtHR, *Moldovan and Others and Rostas and Others v. Romania,* 13 March 2001, (Appl.Nos. 41138/98 and 64320/01).

which took place before the ratification of the Convention. The applicants also had claimed violation of Article 1 of Protocol no. 1 to the Convention in virtue that their homes and personal possessions were destroyed and under article 13 due to the fact they had been denied an effective remedy for ill- treatment. The ECtHR denied the admissibility of all of the claims. This is clearly a different approach of what was taken by the Inter-American Human rights bodies, who would consider the duty to investigate and punish independent from the material facts which occurred before the critical date. In the *Blake case*[206], for instance, the victim was murdered before the critical date for Guatemala. Nevertheless, the Inter-American Court found itself competent *ratione temporis* to examine the omission which occurred after the critical date, concerning the investigation of the murder of the victim.

In *Kholodov and Kholodova v. Russia*[207], the ECtHR had maintained the point of view that the duty to investigate does not exist independently from the material facts. In this case, the applicants claimed that their son had been assassinated and that the Russian authorities did not conduct an effective investigation to punish those responsible for the crime. The applicants based their complaints under articles 2, 13, 6 and 10 of the Convention. The Convention entered into force in respect of the Russian Federation on 5 May 1998, but the applicants' son was murdered in 1994 before the Convention entered into force for Russia. The ECtHR argued that according to the "generally recognised rules of international law", the Convention only applies in respect of each Contracting party to facts subsequent to its coming into force for that Party. Relating to the lack of effective investigation which continued after the ratification of the Convention, the ECtHR argued that the ECtHR's temporal jurisdiction is to be "determined in relation to the facts constitutive of the alleged interference". Therefore, the subsequent failure of remedies aimed at redressing that interference could not bring it within its temporal jurisdiction and the ECtHR is prevented *ratione temporis* from examining the applicant's assertions relating to the events in 1994, and thus would not be able to examine whether the investigation relating to the crime was effective or not.

This ECtHR's approach is completely different from that taken by the Inter-American Human rights bodies. The Inter-American Court does not have the view that the material facts cannot be separated from the duties to investigate, prosecute and punish those responsible for the violations of human rights. That can be seen in Moiwana village case,[208] in which there was an omission by the State to investigate the violations which took place before the ratification of the American Convention. Nevertheless, the ECtHR considered the duty to investigate, prosecute and punish independently from the material facts. The Inter-American Court approach is preferable by virtue of the fact that the human rights instruments have the scope of the protection of individuals and if the ECtHR had not recognised its competence *ratione temporis* over these cases the facts would have been remained unpunished.

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[206] IACtHR, *Blake v. Guatemala*, 2 July 1996 (Preliminary Objections), paragraphs.33-40.

[207] ECtHR, *Kholodov and Kholodova v. Russia*, , 14 September 2006 (Appl. No.30651/05)

[208] IACtHR, judgement 15 June 2005.

Recently, the ECtHR has adopted the same posture of the Inter-American Court of Human rights in *Silih v. Slovenia*[209], deciding that the procedures to investigate the reasons of a death which occurred before the ratification of the Convention by the State give rise to an autonomous obligation independent from the death of the victim. In that case, the applicants complained that their son died due to medical negligence and that the Slovenian judiciary was unable to establish responsibility for his death. Instead of stating the death as the material fact that cannot be separated from the procedures that were started after the ratification of the Convention by Slovenia, the Chamber stated that the State's obligation to provide an effective judiciary system for establishing the responsibility for the death of the victim has an autonomous scope. Therefore, the ECtHR decided that the criminal and civil proceedings which started after the date of ratification of the Convention on 28 June 1994, were within its competence *ratione temporis*. The government argued that the Chamber has not respected the general principles of international law on the non-retroactivity of treaties.

The government claimed that the event of the death of the applicants' son could not be separated from the procedure. However, the ECtHR, referring to Blecic judgement where the ECtHR had understood that the procedural obligation to carry out an effective investigation under Article 2 has evolved into a "separate and autonomous duty". (paragraph 88 of Blecic case), rejected the government's claim. The ECtHR concluded that article 2 could be considered as a detachable obligation binding the State even when the death took place before the critical date. The ECtHR referred to the Human Rights Committee and Inter-American Court of Human Rights which accepted jurisdiction *ratione temporis* over the procedural complaints relating to deaths which had taken place outside their temporal jurisdiction. The ECtHR also took note that Slovenia's declaration on the acceptance of the ECtHR's temporal jurisdiction did not have further limitations and that with the exception of the preliminary investigation all the criminal and civil proceedings were initiated and conducted after that date. Therefore, the procedural complaint which occurred after the entry into force of the Convention would be in the temporal jurisdiction of the ECtHR .

The ECtHR considers itself as competent *ratione temporis* when the judgment of the domestic courts takes place after the entry into force of the Convention. That was the case in *Zana v. Turkey*[210]. In that case, the applicant, who had to answer proceedings based on the criminal code due to his declarations to a local newspaper dated 19 November 1987, complained about the length of the criminal proceedings, infringement of his rights to a fair trial about not being able to defend himself in his mother tongue (Kurdish) and on the interference of his freedom of expression. Turkey recognized the ECtHR's compulsory jurisdiction on 22 January 1990, including judgements which were based on facts which occurred subsequent to that date. Without further explanations, the ECtHR considered that the principal fact was not the material fact related to Mr. Zana's statement to the journalists in 1987, but rather that of the Diyarbakir National Security Court's judgement that was dated 26 March 1991. The judgement was upheld by the Court of Cassation on

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[209] ECtHR, *Silih v. Slovenia* 9 April 2009 (Appl. No.71463/01)

[210] ECtHR, *Zana v. Turkey*, 25 November 1997 (Appl.No.18954/91).

26 June 1991. Thus, the Court understood that the material fact that gave rise to the judgement was not the main issue of the application brought to the ECtHR. However, the ECtHR's interpretation gave rise to controversy, as judges Matscher and Golcuklu pointed out. According to them, the Turkish declaration of 22 January 1990, which stated: "This Declaration (...) extends to matters raised in respect of facts, including judgements which are based on such facts which have occurred subsequent to the date of deposit of the present Declaration" has the meaning that the State wanted to give. They stated that the ECtHR's decision to consider as the principal fact the Diyabarkir National Security Court's judgement of 26 March 1991 was "artificial" and "unsustainable". Therefore, the ECtHR did not give further explanations on the reasons to consider why the main fact was the judicial decision and not the material fact .

However, when the judicial decision occurs before the entry into force of the Convention or the declaration, even if there are effects that last after the entry into force, the Commission has not considered itself competent to examine the case[211]. The Commission and the Court, therefore, has not classified a judicial decision as a continuing violation, as it has done with the legislation. The effects of the legislation would be considered as a continuing violation in certain cases. Regarding the judicial decisions, the ECtHR would use as a tool to assert its jurisdiction *ratione temporis* or not in the moment of the interference of the rights of the victim. In cases where the causal facts or material facts occurred before the entry into force of the Convention, the ECtHR has alleged that its temporal jurisdiction had to be determined in relation to the facts which were constitutive of the alleged interference. Furthermore, the subsequent failure of remedies to redress the interference could not be brought within the ECtHR's jurisdiction[212].

The alleged interference in the case of judicial decisions would occur at the moment of the *res judicata*. If the *res judicata* occurred before the ratification of the Convention, the ECtHR would not recognize its competence *ratione temporis*. However, even in cases where that the final domestic decision was taken after the ratification of the Convention, but having the material facts taking place prior to the ratification of the Convention, the ECtHR would not accept it competence *ratione temporis*. Likewise in cases in which the procedural duty of investigation was put into question, but the causal acts occurred before the critical date, the ECtHR has held that it could not accept its own competence *ratione temporis*. This becomes clear in *Voroshilov v. Russia*[213], in which the ECtHR assessed it could not evaluate the alleged facts of ill treatment of the victim as these were outside its competence *ratione temporis,* and hence it would also not be able to examine whether the Russian authorities would have obligation to conduct an effective investigation. Therefore, the ECtHR decided that the alleged failure to investigate could not be a "continuous situation" as the ECtHR could not conclude that such obligation existed.

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[211] 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.423.

[212] ECtHR, *Mrkic v. Croatia*, 8 June 2006 (Appl.No. 7118/03).

[213] ECtHR, *Voroshilov v. Russia*, 8 December 2005 (Appl.No.21501/02).

In the case of ineffective investigation prior to the critical date, the Commission did not accept the exception to the six months rule, as we can see in *McDaid and Others v. the United Kingdom*[214]. The critical date was not in question in this case, with the applicants claiming that they were victims of a continuing violation, under article 2 of the Convention, due to the fact the deceased were killed in what was later known as the "Bloody Sunday". They claimed that the State had the duty to protect the right to life and that the UK had failed to do so. In addition, they claimed that the authorities had failed to conduct an effective investigation. Nevertheless, the Commission pointed out the fact that the complaints had as their source specific events which took place on identifiable dates and could not be considered as a "continuing situation" for the purposes of the six month rule while the Commission did not doubt that the events continue to have serious repercussions. However, it could not be considered as a case of continuing violation.

In this case, the Widgery Report which was related to the "Bloody Sunday" incidents alleged that the State overlooked important points of the circumstances of the deaths and failed to start criminal proceedings against those who were responsible. In addition, the applicants had also claimed that fresh information was found and that the application was within the *ratione temporis* of the Commission, as there was a fresh refusal by the State to hold a fresh inquiry. Kerem Parmak has noted that it was the duty of the State to evaluate the new evidence and that the Commission also had to analyse the evidence as an affirmation of previous violation. In addition, he states that if the State had refused to reinvestigate the case even if there was convincing evidence, the State's omission could be considered as a new fact[215]. In this case, the IAComHR interpreted the material events with a specific date and did not accept that investigations on fresh facts were independent from the causal acts, interpreting the results as "serious repercussions" on the applicant's lives.

4.11. Subsequent proceedings within the competence *ratione temporis*

The ECtHR does not have a clear reference of the exact time of the interference in the rights of the applicants, not defining clearly when it would consider the *res judicata* to admit its competence *ratione temporis*. In *Blecic v. Croatia*[216], the applicant complained violations under Article 8 of the Convention, the right to respect for home and under article 1 of Protocol No.1, her right to property was violated because she was deprived of a possibility to buy the flat in favourable conditions.

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[214] EComHR *Kevin McDaid and Others v. United Kingdom*, 9 April 1996 (App. No.25681/94).

[215] 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=926281Alt Parmak, p.46

[216] ECtHR *Blecic v. Croatia*, 3 March 2006 (Appl.No.59532/00).

The ECtHR had to examine if when the facts occurred the termination of the applicant's tenancy had been constitutive of the alleged interference. According to the ECtHR the interference on the rights of the applicant took place on 15 February 1996 when the Supreme Court reversed the judgement of the County Court. As Croatia ratified the Convention on 5 November 1997, it considered itself not competent *ratione temporis* to assess the case. Nevertheless, in their dissenting opinion, judge Loucaides joined by judges Rozakis, Zupancic, Cabral Barreto, Pavlovschi and Bjorgvinsson, observing that under the domestic law of Croatia, the protected tenancy could only be terminated by a civil action by the provider of the flat finishing in a judgment upholding the claim. In this case, the final decision upholding the Supreme Court's decision was made by the Constitutional Court, dated 8 November 1999.

The ECtHR to base this inadmissibility decision, also has mentioned the *Stamoulakatos v. Greece* case, in which the applicant had appealed against convictions which were dismissed after the critical date. The Court decided that, in spite of the fact those appeals were made after the critical date, they were closely connected to the proceedings that led to his conviction. Thus in *Veeber v. Estonia*, separating the appeals from the events which gave rise to them would render the government's declaration nugatory. In addition, the ECtHR referred to other cases in which the ECtHR had considered the main events closely linked to the proceedings and that consequently were not admitted *ratione temporis*[217]. Nevertheless, in his dissenting opinion Loucaides noted that those cases and the present case had different characteristic as "in those cases the "interference was complete and effective before any judicial proceedings were issued". Conversely, in the present case the interference to the right of the Convention occurred only after the proceedings were finished once the domestic law provides that a specially protected tenancy could only be terminated by a civil action by the provider of the flat resulting in a judgment upholding the claim. They went on explaining that in this case they were not dealing with "an interference with a right under the Convention which had a legal effect independently of any ensuing judicial proceedings issued with the exclusive object of remedying the interference". In addition, they pointed out that "the interference was the result of a series of judicial proceedings ending with the decision of the Constitutional Court, which was the only final, irreversible judicial decision in these proceedings". In the dissenting opinion, therefore, the interference with the right of the Convention would be constituted only after the Constitutional Court's decision.

The lack of consistency of the Court in the present case has become even clearer once in the dissenting opinions, and judge Zupancic joined by judge Cabral Barreto, commenting the exception of the judgement which states: "It follows that the alleged interference with the applicant's rights lies in the Supreme Court's judgment of 15 February 1996. The subsequent Constitutional Court decision only resulted in *allowing the interference* allegedly caused by that judgment – a definitive act which was by itself

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[217] See e.g., ECtHR, *Stamoulakatos v. Greece*, 26 October 1993 (Appl.No.12806/87); ECtHR,*Kadikis v. Latvia*, 29 June 2000 (Appl. No.47634/99), ECtHR, *Moldovan and Others and Rostas and Others v. Romania*, 13 March 2001 (Appl. Nos. 41138/98 and 64320/01); ECtHR ,*Jovanovic v. Croatia*, 28 February 2002 (Appl.No.59109/00); *Zana v. Turkey*, 25 November 1997 (Appl.No. 18954/91).

capable of violating the applicant's rights – *to subsist*. That decision, as it stood, did not constitute the interference. Having regard to the date of the Supreme Court's judgment, the interference falls outside the Court's temporal jurisdiction." (emphasis added in the dissenting opinion). Therefore, in this case the Tribunal argued that in fact, the violation occurred with the decision of the Supreme Court and that the Constitutional Court merely allowed the decision to subsist. Judge Zupancic pointed out that this criteria lacks transparency and then, if the Court understands that the violation can be still characterized as an instance that can be reverted eventually, the examining of the criteria of six months rule would also be compromised. He, then, asks whether the deadline after the exhaustion of domestic remedies could be counted from the decision of a lower court that could have its decision reverted or from the highest instance's decision.

This decision had an opposite understanding of the Commission approach to decisions taken after the critical date. In Case no. 6916/75[218], the applicants complained that the Swiss Federal Court did not hear their case in public, breaching the article 6(1) of the Convention. However, the State party argued that the application was outside the competence *ratione temporis* by virtue that most of the proceedings took place before the ratification of the Convention by the State. The decision was taken after the critical date. The Commission found itself with competence *ratione temporis* over the case.

In the case of a series of procedures in domestic courts which partially occurred after the critical date for the State, the Court accepted its jurisdiction *ratione temporis*, such as in the case of *Kerimov v. Azerbaijan*[219]. In this case, the applicant was the editor of the newspaper Femida, which had published an article criticizing the prosecutor T.K, as an incompetent and unprofessional prosecutor who was able to hold high-ranking posts in the prosecution authorities merely due to his connections and not because of his competence. T.K. brought a case against the newspaper for defamation, asking the domestic court to close the newspaper.

The Government submitted that the complaint was not within the competence *ratione temporis* of the Court as the order to terminate the production of the newspaper has been executed before 15 April 2002, the critical date for the State. The Court noted that when the interference occurs prior to the ratification while the refusal to remedy it post-dates the ratification, to retain the date of the latter act in determining the Court's temporal jurisdiction would constitute a retroactive application of the Convention, being contrary to the general principles of the law. The interference in question consisted of the date in which the Court of Appeal upheld the first-instance court's order to finish the distribution of the newspaper, which took place on 6 December 2001. The Court considered that the interference moment took place before the ratification of the Convention by the State party, therefore not having competence *ratione temporis* over it. The applicant though had appealed in the Supreme Court after the Convention entered into force for the State. However, as the applicant did not bring any evidence of unfairness in the proceedings the

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[218] 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.124.

[219] ECtHR, *Kerimov v. Azerbaijan*, 28 September 2006 (Appl.No.151/03).

Court had considered the application inadmissible. It stated that "it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of the rights or freedoms protected by the Convention".

In *Litovchenko v. Russia*[220], even though the exhaustion of the domestic courts proceedings took place after the critical date, the Court did not admit its competence *ratione temporis*. The applicant had alleged that she was forced to receive blood transfusion against her will, due to religious reasons, in July 1996 and that the domestic proceedings terminated on 21 September 2000, by the Khabarovsk Regional Court. The Court noted that the Convention came into force for the State on 5 May 1998. Nevertheless, the Court considered that separating the domestic courts decisions from the causal effects would bring as a consequence the retroactive application of the Convention. In this way, the Court did not consider itself competent *ratione temporis*.

The Court has not considered the search and seizure of documents as continuing violation in the case of *Veeber v. Estonia*[221]. In this case, the applicant was investigated by the police in virtue of allegedly abusing his position in contracting a loan with the Ministry of Finance for reconstructing the city's heat supply in an amount higher than what was approved by the City Council. The police searched the company on 15 and 20 November 1995 and carried away files of documents with the company's records. The applicant alleged violation of article 8 of the Convention which states that:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Convention entered into force for Estonia on 16 April 1996, after the seizure of documents occurred. The applicant claimed that the violation of article 8 was of continuing nature since many documents had not been returned , harming the activities of company. However, the Court did not consider that the seizure of the documents were instantaneous acts, with ensuing effects, which would not give any possible continuous situation of violation of article 8. Thus, the Court considered itself not competent *ratione temporis* to analyze the above mentioned violation.

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[220] ECtHR, *Litovchenko v. Russia*, 18 April 2002 (Appl.No. 69580/01).

[221] ECtHR, *Veeber v. Estonia*, 7 November 2003 (Appl.No. 37571/97).

4.12. Conclusions

The European Court of Human Rights has set its standards to admit its competence *ratione temporis* over the years. Initially, the European bodies strictly respected the non-retroactivity principle and would not accept the duty to investigate and punish crimes which took place before the ratification of the European Convention to be separated from the material facts. This approach has clearly changed in *Silih v. Slovenia* in which the European Court of Human rights has followed the same interpretation as the Inter-American human rights bodies and the Human Rights Committee regarding enforced disappearances. In this case, the Court has recognized that the duty to investigate disappearances could be autonomous from the material facts. Nevertheless, it is still unclear whether the Court's approach will change after this decision, as the Court's decisions are not uniform.

The recognition of exceptions to the non-retroactivity principle occurs when there is a continuing violation. European human rights bodies have recognized continuing violation in cases where there was a continuing deprivation of personal rights, when the character of the right could not be separated from the applicant. In addition, the violation of the right has to take place before the critical date and continue after that. The continuation can occur in the form of a new violation, such as when the assassination was committed before the critical date, but the State has failed to accomplish its duty to accomplish an effective investigation, prosecution and punishment of the responsible people or when the causal action still continues as in the case of detention incommunicado.

The Court has interpreted the death of the victims and the deprivation of property as instantaneous acts which would not produce a continuing situation. However, when the applicant had not lost their title to the property but had their rights to it restricted European bodies have recognized the continuing violation.

In a similar manner as in the Inter-American human rights bodies and the Human Rights Committee, European Human Rights bodies have also recognized the effects of legislation which was enacted prior to the entry into force of the Convention but that continued its validity after the critical date as a continuing violation. The context of the violations in each of the human rights body differs, though. In the *Dudgeon v. the United Kingdom*, case decided by the European Court of Human Rights, the legislation of Offences against the Person Act 1861 ('the 1861 Act'), the Criminal Law Amendment Act 1885 ('the 1885 Act') and the common law were in clear disharmony with the current development of the society values. An anachronistic legislation was violating the private life of the applicant. In the context of the cases in the Inter-American human rights bodies, the legislation that was considered as a continuing violation was related to the State's attempt to keep amnesty laws concerning crimes that took place during military dictatorships. Therefore, it is related to the transition of a military dictatorship to a new born democracy.

In the context of the Human Rights Committee, the recognition of the continuing violations due to the effects of a law enacted before the critical date occurred by virtue of discrimination of a female Indian who lost her status as an indigenous person due to her marriage to a non-indigenous person.

The European Commission of Human Rights and the European Court of Human Rights is far from having a uniform approach to the continuing situations. In some decisions it decided that the six-months rule should have been respected in order to consider the application admissible, in others it had accepted the reasoning submitted by the applicants stating that there was a continuing situation. Conversely, the Inter-American Human Rights system has been presenting a stable and progressive approach searching to maximize the protection provided by the American Convention on Human Rights.

The clash between the principle of strict legality, represented by the principle of non-retroactivity of the treaties (art. 28 of the Vienna Convention on the Law of the Law of the Treaties) in the case of violations of human rights committed by States and the necessity to punish the State's actions which took place before the ratification raised the theory of the continuing violation, or as the European Commission of Human Rights and the European Court of Human Rights define, a continuing situation is a way not to let the actions against citizens be forgotten, privileging substantive justice more than the strict legality.

The question is whether the recognition of those past mistakes that were not recognized by domestic courts, but only by international human rights bodies, has enough public notoriety to make it a nation memory. To what extent an international human rights body decision can create a memory or history of people of a determined country is the following point, which will be discussed in the next chapters.

Furthermore, the problem of time and law is present in human rights treaties as well as in international criminal law, recognized as *nullum crimen sine lege*. In order to analyze to what extent there is a progressive interpretation of the exception of the principle of non-retroactivity we are going to examine the principle exceptions applied to individuals. The international bodies that are going to be under examination are the Nuremberg Tribunal, Tokyo Tribunal, International Criminal Tribunal for the former Yugoslavia, Special Court for Sierra Leone and Mixed Tribunals of for East Timor and Cambodia.

PART II

EXCEPTIONS TO THE PRINCIPLE OF NON-RETROACTIVITY IN THE CASE OF PROTECTION TO INDIVIDUALS (*NULLUM CRIMEN SINE LEGE*)

In the first part we analyzed the exceptions to the principle of non-retroactivity of treaties in order to protect individuals who suffered from violations that occurred prior the State's ratification of the Convention. As aforementioned, the principle of non- retroactivity of treaties is not absolute. Its exceptions can be agreed by the State parties and in the case of continuing violations. The later has been applied to various situations in order not to leave certain conducts without punishment. That is due to the nature of the human rights treaties where the main scope is the protection of the individual before international law. It is a principle that protects the States from retroactive application of laws. The exceptions applied in international human rights jurisprudence are related to military dictatorships, ex-communist states, illegal occupation, lack of due investigation, prosecution and punishment of those responsible people in the states.

In the second part we are going to deal with the issue of time and law, but related to the principle of *nullum crimen sine lege*, in particular on the field of international criminal and human rights law, where the principle of non-retroactivity protects individuals from the retroactive application of laws. We are going to analyze in which situations an exception to the principle is accepted and in what circumstances and under what requirements the international human rights bodies and international criminal tribunals accept exceptions as in the case of the exceptions of the non- retroactivity principle to states. Is there a difference in reasoning between the application of the principle of non-retroactivity to States and the same principle to individuals? The principle of non-retroactivity, which protects individuals and not States, is called the principle of legality. In the case of the domestic legal system, the substantive dimension of the legality principle in criminal law and its manifestations provide that prohibited acts and penalties must be pre-established by norms that can be considered "laws" in formal terms and that have to be enacted by the Legislative Power, not accepting that non-written sources of law like custom or the general principle of law which offer lesser safeguards from the perspective of specificity and foreseeability is excluded[222]. International tribunals have been relying on customary law, general principles of law and *opinio juris* to justify the lack of treaty provisions condemning the conducts that would be considered as crimes in

[222] Olasolo, Hector. 'A note on the evolution of the principle of legality in international criminal law'(2007) 18, *Criminal Law Forum* , 301-319, p.302

the international courts. In the genesis of the discussion of the principle of legality, the application of *ex post facto* laws in the case of crimes of aggression and crimes against humanity was clear due to political circumstances. We are going to claim that the application of the *nullum crimen sine lege* in international courts is not applied with the same rigor as we can see in domestic courts since it will depend on the international community's political decisions to judge whether it would be possible to punish crimes which were committed even before the respective tribunals were established.

One of the questions that could be discussed relates to the creation of new jurisdictions retrospectively. In the case of the criminal tribunals that examined bone-chilling atrocities, namely the Nuremberg and Tokyo tribunals, International Criminal Tribunal for former Yugoslavia, International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone were created after the events had occurred. The same is the case for the East Timor panels, the Iraqi Special tribunal and the Extraordinary Chambers in Cambodia. The creation of new jurisdictions to try crimes which were defined previously is accepted in international criminal law.[223] The only exception is the International Criminal Court that states that it would not have jurisdiction over cases which occurred before its creation.[224]

The prohibition of retroactive law in international law was introduced after the development of human rights instruments, the Universal Declaration of Human Rights sets forth that "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed." Other human rights instruments such as the Covenant on Civil and Political rights, Charter of African Rights, American Convention on Human Rights, and European Convention on Human Rights establish the principle of *nullum crimen sine lege* as we are going to analyze later.

These instruments try not to limit the application of the principle stating that in cases of acts that were considered as "general principles of law recognized by the community of nations", as it is provided by the Covenants of 1966 and the European Convention on Human Rights of 1950 does not amount to the violation of the principle of legality.

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[223] Gallant, Kenneth S. *The principle of legality in international and comparative criminal law.* In Cambridge university press, (2009), p.319

[224] Article 11: Jurisdiction ratione temporis 1.The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute. 2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3. of the Rome Statute of the International Criminal Court

CHAPTER 5

5. *Nullum crimen sine lege* (principle of non-retroactivity in the case of protection to individuals and its first exceptions in international law)

5.1. Principle of *Nullum Crimen Sine Lege*

The origins of the *nullum crimen sine lege* as the basis for criminal law are controversial. It is argued that the principle originates from the 4th century B.C in which ancient Greeks in the case of Timokrates and the Athenian Ambassadors held that the law was invalid by the fact it was retroactive. The ambassadors allegedly had withheld money owed to the city- state and were condemned to pay twice the amount. Timokrates succeeded in securing the enactment of a law to relieve the ambassadors of this penalty. Nevertheless, Demosthenes invalidated the present law because of its retroactivity.[225]

The principle *Nullum Crimen Sine Lege* expressed in Latin suggests Roman origins although this assumption is not always agreed. Roling argues that although the principle is enunciated in Latin it does not originate from Roman law. He states that Feurbach enunciated the maxim with the meaning of "no crime without law, no punishment without law."[226] However, in ancient Roman law, the Corpus Iuris Civilis speaks of retroactivity and non- retroactivity. The former is provided in the constitution of Constantine (306-337 A.D.), Anastasius (491-518 A.D.) and Justinian (527-565 A.D); the latter in the constitutions and Novellae of Justinian.[227]

The principle of *Nullum Crimen Sine Lege* provides protection of the individual against arbitrarities committed by the State. However, since Ancient Roman Law would not safeguard rights of individuals before the State the claim that *Nullum crimen sine lege* was provided by that time is hindered.[228]

As a legislative measure the present principle was first adopted by the Austrian law of 1787 of Joseph II. In addition, it was also provided in the Constitution of United States of

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[225] Mokhtar, Aly, '*Nullum Crimen,, Nulla Poena Sine Lege*: Aspects and Prospects' (2005) 26, *Statute Law Review*, pp.41-55, para.5.

[226] Schaak, Beth van. 'Crimen sine lege: judicial lawmaking at the intersection of law and morals' (2008), 97, *Georgetown Law Journal*, pp.119-192, p.121.

[227] Mokhtar above n.225, para.6.

[228] Ibid.para.8.

4 March 1789 which set forth the prohibition of retroactive laws[229]. Nevertheless, some writers regard the principle on constitutional and criminal side during the French Revolution.[230]

Thus, the principle as it exists currently, was introduced in the eighteenth century to bar the arbitrary power of the State towards its own population. It was established to secure that individuals are punished according to laws that exist prior to the commitment of the offence. If the criminal code does not establish the present principle it opens up the possibility that States could impose an arbitrary punishment on the individuals.[231]

The scope of this principle is to guarantee that a person should never be convicted or punished unless the conduct in question was a declared offence at the time of the commission. The principle imposes limitations to the legislature which is obliged to create laws prospectively as well as it imposes limits to the courts with regard to the applicable law.

The principle of *Nullum Crimen Sine Lege* has a recognized exception. It is the retroactivity of the 'lighter penalty'. This exception is provided by Article 15 (1) of the ICCPR and in Article 9 of ACHR.

However, what happens when the crime is continuous? 'Continuous crimes' in criminal law are those crimes in which the *mens rea* and the *actus rea* persist over an extended period of time. Mokhtar gives the following hypothetical situation in which 'if X began committing a continuous crime and while this crime continued the law aggravated the punishment which law should be applied?'. He does not decide between the two possibilities of answer which are:

> one could argue that since the *men rea* and the *actus rea* of the crime continued to take place after the punishment was aggravated, in some stages the crime was committed under the law aggravating the punishment, thus, this law should be applied. On the other hand one could counter argue that this would be a clear violation of the principle of *nullum crimen, nulla poena sine lege,* which prohibits the application of a law that aggravates the punishment retroactively.[232]

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[229] Mokhtar, Aly, '*Nullum Crimen,, Nulla Poena Sine Lege*: Aspects and Prospects' (2005) 26, *Statute Law Review*, pp.41-55, para.18.

[230] B.V.A.Roling; Cassese, Antonio. *The Tokyo Trial and Beyond- reflections of a peacemorger*. Polity Press, 1993, p.68.

[231] Ticehurst, Rupert, 'Retroactive criminal law'(1998-1999), 9, *The King's College Law Journal*, pp.87-108, p..89

[232] Mokhtar, Aly, '*Nullum Crimen,, Nulla Poena Sine Lege*: Aspects and Prospects' (2005) 26, *Statute Law Review*, pp.41-55, para.32.

This author believes that the application of aggravating penalties to later stages of the continuing crime would violate the principle of application of 'lighter penalty' and therefore if the law is aggravating it should not be applied in the case of continuous violations.

5.2. Nuremberg Tribunal

Although Nuremberg could be considered as "a patchwork of political convenience, the arrogance of military victory over defeat, and the ascendancy of American, Anglo-Saxon hegemony over the globe" [233] it has paradoxically helped the development of the international criminal law in order to punish atrocities that before that would not bring criminal liability to the perpetrators. In addition, it also embraced a way of avoiding the summary execution of those responsible and not letting only it as a form of political decision. In the London Conference[234] the issue of legality and non-retroactivity were extensively discussed by the Allied Countries.

In this Tribunal, customary law played an essential role since the Geneva Prisoner of War Convention of 1929 was not applicable and the Fourth Hague Convention was challenged on the ground that the situation of the belligerents did not conform with its *si omnes* clause as not all of them were party to it.[235] The Nuremberg Tribunal without further explanations took for granted that the violations of the substantive provisions of Hague and Geneva Convention were criminal. According to the Tribunal, the treaties were declaratory of customary law since they had an adequate ground to create individual responsibility. Neither the Geneva Conventions nor the Fourth Hague Convention provided penal provisions, but these treaties were accepted as the ground for prosecutions by the Tribunal.[236]

The violation of the principle of legality was extensively discussed in the Nuremberg Tribunal. The defendants claimed that the charges of crime against humanity and crimes against peace would be violating the principle of legality since these acts were not considered as criminal when they occurred.[237] The main question would be whether the

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[233] Mutua, Makau, 'Never again: questioning the Yugoslav and Rwanda Tribunals. *Temple International and Comparative Law Journa*l',(1997)11,pp.167-187, p.170

[234] Nuremberg Charter was finalized in this Conference held by Great Britain, The Soviet Union, the United States, and the Provisional Government of France from 26 June to 8 August 1945.

[235] Meron, Theodor, 'Reflections on the Prosecution of War Crimes by International Tribunals, *American Journal of International Law* (2006) 100-3, pp.551-579, in Lexis Nexis, [575].

[236] Ibid.[572].

[237] Dana, Shahram, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', *Journal of Criminal Law and Criminology* Northwestern University, (2009)99-4, pp 857-928, p..22

offenders would have been in notice that their conduct could make them face criminal liability.[238]

It was argued that article 6 of the Charter of the International Military Tribunal (IMT) was a "mere regulation of competence", and that the tribunal were not to accept the crimes set forth in the article since they were not crimes applying to the defendants at the time of the defendant's acts. Moreover, the article should be interpreted respecting the principle of *in dubio pro re*.[239]

It was also argued that the prohibition of criminal retroactivity was both a customary international law and a general principle of law.[240]

Although the establishment of crimes against humanity was the "Nuremberg Charter's most revolutionary contribution to international law[241]", since it established international criminal responsibility for violations, it cannot be denied that it established a potentially retroactive law. And *ex post facto* law raises the doubt of the fairness and legality of the trial by virtue that the principle of legality is extremely important to domestic and international law. Prior to that the atrocities committed by a State against its own citizens and acts before the war did not constitute war crimes, and were ignored by international law.[242]

Article 6 (c) stated that crimes against humanity are "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated". [243]

The indictment used crimes against peace, war crimes and crimes against humanity for the prosecution. In each crime the indictment alleged a violation of the charter and a violation of other substantive law that the indictment claimed existed in the time the crimes were committed.[244] Although the Tribunal failed to explain the reason why the 1929 Geneva Prisoner of War Convention and the 1907 Fourth Hague Convention could be considered as customary law, Meron argues that the general approach of the tribunal was appropriate since murder, torture, and enslavement were without any doubts

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[238] Meron, Theodor, 'Reflections on the Prosecution of War Crimes by International Tribunals, *American Journal of International Law* (2006) 100-3, pp.551-579, in Lexis Nexis, [572].

[239] Otto Pannenbecker, for defendant Wilhelm Frick in Gallant, Kenneth S. *The principle of legality in international and comparative criminal law* (2009) p.100.

[240] Ibid. p.101.

[241] Meron, Theodor, *The humanization of international law* (2006) p.95

[242] Futamura, Madoka. *War crimes tribunals and transitional justice.* (2008) p.33

[243] Nuremberg Charter, <http://www.icrc.org/ihl.nsf/FULL/350?OpenDocument>, access on 4 June, 2010.

[244] Gallant, Kenneth S. *The principle of legality in international and comparative law* (2009) p.91

considered as crimes in all domestic legal systems and therefore the defendants could not argue that criminal liability was unpredictable.[245]

Kelsen made a comment on the London Agreement in which he doubted the existence of a rule of non-retroactivity in international law[246]. According to his positive theory, a norm is characterized by the notion of sanction, however since the non- retroactivity principle does not have it could not be considered as an absolute principle. What is more, the principle is valid only for legislation and not for custom and judicial decisions that according to Kelsen are naturally retroactive. A treaty establishing a rule with retroactive effect, as the London Agreement, is not against the non-retroactivity principle unless it is showed that the violation of the principle is against the general principle of law and that these principles exist in international law. Kelsen argued that the acts committed by the Germans were 'almost all ordinary crimes according to the municipal law of the persons to be accused, valid at the moment they were committed'. Kelsen concluded that the London agreement was only retroactive regarding the established individual criminal responsibility for acts which at the time they were committed constituted violations of international law but that set forth only collective responsibility.[247]

Regardless of whether the Tribunal was a victor's justice instrument to show the power of the Allies over the defeated countries it clearly contributed to the development of the international criminal law by virtue that it brought individuals' liability for war atrocities and was the starting point to the other international criminal courts to exert their jurisdiction over conduct that in the past would not bring liability to the perpetrators.
The three types of crimes that raised the issue of non-retroactivity were the crimes against humanity, crimes against peace (aggressive war) and war crimes, which we are going to examine in the next sections.

5.2.1 Crimes against humanity

Crimes against humanity were not considered as retroactive law since the Nuremberg Tribunal argued that they were existent as "principles of international law". The Tribunal interpreted the crimes against humanity as prohibited by the customary law of war.[248] Crimes against humanity was made to overcome the limitations of Hague and Geneva Conventions which protect nationals of opposing or occupying states and not civilians of the same country which is committing the violations.

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[245] Meron, Theodor, 'Reflections on the Prosecution of War Crimes by International Tribunals, *American Journal of International Law* (2006) 100-3, pp.551-579, in Lexis Nexis, [572

[246] Gattini, Andrea, 'Symposium on the contributions to the history of international criminal justice-Kelsen's contribution to international criminal law' (2004) 2-3, *Journal of International Criminal Justice*, September 2004, pp.795-809. pp.3, access at Lexis Nexis

[247] Ibid., pp.3-4.

[248] Binder, Guyora, 'Representing Nazism: advocacy and identity at the trial of Klaus Barbie' (1989) 98 *Yale Law Journal*, pp.1321-1383 [1331] access on Lexis Nexis

That is clearly stated by judge Li in the Tadic case of the International Criminal Tribunal for the Former Yugoslavia (ICTY). According to him, crimes against humanity were introduced to prosecute atrocities by Germany against its own nationals, particularly Jews and other minorities, anti-Nazi German politicians and intellectuals.[249]According to him, the atrocities that did not constitute war crimes and could not be within the jurisdiction of the Tribunal at Nuremberg, but were examined under the name of crimes against humanity by virtue of the fact that they were so shocking to the conscience of the mankind that the Allied Governments were determined to punish the offenders. In this sentence it becomes clear that that conduct was not covered by international criminal customary or treaty law. Bohlander points out that these acts were so shocking that would justify an intrusion to the once sacred State sovereignty and stretch the concept of nulla poena sine lege, even as it is understood in the common law and international context.[250]

The expression of "crimes against humanity" was mentioned for the first time in a 1915 declaration of the governments of Great Britain, France and Russia describing the massacre of Armenians by the Turkish which stated "crimes against humanity and civilization[251]". The Turkish government perceived Armenians as a threat since their historical and ethnic background did not fit in with the political ideology. The Turkish then, started a policy of systematic annihilation and deportation of the Armenians.[252]

Precursors of the crimes against humanity are pointed to be the Martens Clause which is established in 1907 Hague Convention Respecting the Laws and Customs of War on Land and subsequent humanitarian law conventions. This clause provides that:

> until a more complete code of laws of war has been issued the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the laws of nations, as they result from the usages established among civilized peoples, from the laws of humanity and dictates of the public conscience. [253]

After that, the term appeared in post World War I in a report presented to the Preliminary Peace Conference which proposed criminal prosecution of those "guilty of offenses against the laws and customs of war or the laws of humanity".[254]However, it was in the Nuremberg charter that it was finally codified. According to art.6(c) crimes against humanity are:

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[249] Bohlander, Michael, '*Prosecutor v.Dusko Tadic*: waiting to exhale' (2000) 11-2, *Criminal Law Forum*, Dordrecht: 2000, pp.217- 248, access at ProQuest, p.18

[250] Ibid.

[251] Than, Claire de and Shorts, Edwin. *International Criminal Law and Human Rights* (2009), p.87

[252] Ibid. p.87.

[253] Preamble of Hague Convention Respecting the Laws and Customs of War

[254] deGuzman, Margaret McAuliffe, 'The road from Rome: The developing law of crimes against humanity' (2000) 22-2, *Human Rights Quarterly*, pp.335-403, p.344

> namely, murder, extermination, enslavement, deportation, and other inhumane acts[255] committed against any civilian population, before or during war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated

According to the Allies, crimes against humanity were an important development of international law as well as grounded in the general principles of law and therefore did not violate the principle of legality.[256] However, the Tribunal did not give clear explanations on the crimes against humanity. The Tribunal stated that charges relating to the inhumane acts which were committed after the beginning of the war did not constitute war crimes "were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity."[257]

The treatment of the crimes against humanity by the Nuremberg tribunal was also limited to acts perpetrated after World War II had been officially declared. Therefore, the Nuremberg Tribunal held that the majority of inhumane acts perpetrated prior to the formal declaration of war did not constitute crimes against humanity in that it had not been proven that they satisfied the requirements of the war nexus in the Charter.[258]

5.2.2 Crimes against peace (aggressive war)

Regarding crimes of aggression the Tribunal included the Pact of Paris (Kellog- Briand Pact) of 1928, article 227 of the Treaty of Versailles (28 June 1919) that provided that the Kaiser would be tried "for a supreme Offense against international morality and the sanctity of treaties" and the Protocol for the Pacific Settlement of International Disputes that had not been ratified. Among these treaties the treaty of Versailles is the only one which criminalizes the act of planning or waging aggressive war for any individual.[259]

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[255] Rape was considered as a crime against humanity in more recent developments in the ICTY and ICTR. It is also provided in the Control Council Law 10 that served as the jurisdictional basis for later proceedings in Nuremberg. Therefore, even if rape was widespread its prosecution was not the drafter's priority. in Niarchos, Catherine N. Women, War, and Rape: Challenges facing the International Tribunal for the former Yugoslavia. *Human Rights Quarterly*, vol.17, No.4 (Nov.1995), pp.649-690, pp.676-677.

[256] deGusman, Margaret McAuliffe, 'The road from Rome: The developing law of crimes against humanity' (2000) 22-2, *Human Rights Quarterly*, pp.335-403, p.345.

[257] Ibid, p.347.

[258] Schaack, Beth Van, 'The Definition of Crimes against Humanity' (1999) 37, Columbia Journal of Transnational Law, pp.787-850, [803].

[259] Gallant, Kenneth S, *The principle of legality in international and comparative criminal law* (2009) p.115

The Tribunal referred to the articles 1 and 2 of the Kellogg-Briand Pact which state:

> article 1. The High Contracting Parties solemnly declare in the name of the respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations to one another.
>
> article 2. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or whatever origin they may be, which may arise among them, shall never be sought except by pacific means.
> Although that was the language of the State responsibility, the Tribunal sought an interpretation that would switch the State responsibility to individual responsibility by stating that "in the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences are committing a crime in so doing.[260]

The Tribunal used as a precedent of individual criminal liability the Treaty of Versailles, article 227 that provides for the creation of a special Tribunal to try the former German Kaiser "for a supreme offense against international morality and the sanctity of treaties." Furthermore, article 228 set forth that the Allied Powers had the "right to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war". This article was not applied and the Tribunal stated that "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...[261].

It was claimed by German scholars that the prohibition to wage aggressive war was proscribed by the norms of natural law and that the Pact of Paris had brought this prohibition into codified law. Therefore it would constitute positivised natural law.[262] Furthermore, Professor Henri Donnedieu de Vabres, a French judge in Nuremberg Tribunal, has claimed the criminality of aggressive war before World War II. According to him, aggressive war was a crime and stated that individual criminal liability should not be avoided if the head of state begun an unjust war.[263]

However, German academia manifested a different point of view showing an agreement that bringing individual's criminal liability for war of aggression was violating the *nullum crimen sine* principle. Some commentators would ask if such violation was acceptable or

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[260] Clark, Roger S, 'Nuremberg and the crime against peace' (2007) 6, *Washington University Global Studies Law Review*, pp.527-550, p.540.

[261] Ibid, p.542.

[262] Arajarvi, Noora, 'The role of the international criminal judge in the formation of customary international law'(2007) 1-2 , *European Journal of Legal Studies* , pp. p.7.

[263] Gallant, Kenneth S. *The principle of legality in international and comparative criminal law* (2009) p.117.

not, and others would consider acceptable to violate the principle in order to punish the atrocities of war. However, others would claim that *nullum crimen* achieved too much of a crucial role in the jurisdiction to be easily ignored.[264]

The Tribunal thus made an analogy of the Kellog- Briand Pact and the Hague Conventions. The Hague Conventions had outlawed violations of the laws and customs of war, but it did not provide clearly individual criminal responsibility. Authors such as Alfred Verdross had the same opinion as Kelsen that it was wrong to derive individual criminal liability from State responsibility.[265]

5.3 Control Council Law no.10

The Allied powers enacted in 20 December 1945 a different version of the Charter of the International Military Tribunal, the Control Council Law No.10. This law was applied by the Allies in the prosecutions by German Courts and by military tribunals. The law, however, differently from the Nuremberg Charter did not make a necessary connection between the crime and state of war which enabled the tribunals to examine cases which occurred before the World War II started.[266]

Trials under the Control Council Law were held in the post-war-zones of military control and less senior members were brought to trial. The law did not require the connection of war crimes against humanity and crimes against humanity or war crimes. Therefore, prosecution based on this law could include acts that took place even prior to the World War II. In the Justice Case[267], the United Military Court stated that the *ex post facto* law is not specifically prohibited in international law. The Court stated that:

> it would be sheer absurdity to suggest that the *ex post facto* rule....could be applied to a treaty, a custom, or a common law decision of an international tribunal...To have attempted to apply the *ex post facto* principle to judicial decisions of common international law would have been to strangle law at birth.[268]

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[264] Burchard, Christoph, 'The Nuremberg Trial and its impact on Germany' (2006) 4-4 *Journal of International Criminal Justice*, pp.800-829, p.5, access at LexisNexis.

[265] Ibid, p.6.

[266] Schabas, William A, *An Introduction to the International Criminal Court* (2001) p.7.

[267] The "Justice Case" was officially designated United States of America v. Josef Altstoetter, et al. Of the sixteen defendants indicted, nine were officials in the Reich ministry of Justice. available at http://www.mazal.org/archive/nmt/03/NMT03-T0003.htm, access on 20 September, 2010

[268] Ticehurst, Rupert, 'Retroactive criminal law' (1998-1999), 9, *The King's College Law Journal*, pp.87-108, p.100.

The Court emphasized the importance of customary law to the development of international law.[269]

5.4. Tokyo Tribunal

The Tokyo Tribunal was formally named as the International Military Tribunal for the Far East (IMTFE) and was established by the Allies with the intention to "retain and punish the aggression of Japan", being announced as early as 1 December 1943 in the Cairo Declaration.[270] Its creation was not based on an agreement such as what occurred with the Nuremberg Tribunal, which was established by the London Agreement. The Tokyo Tribunal was created by a special declaration of General Douglas MacArthur, on the grounds of the terms of surrender, granted to the supreme commander for the Allied powers in the Instrument of Surrender signed by Japan.[271]

Two main approaches have been taken to interpret the Tokyo Tribunals. One is the international law point and the other one is the modern history approach. Both of them have contributed to understand Tokyo Tribunal such as Richard Minear's work "Victors' Justice" (1971) which claimed that the present trial occurred in a clear abuse of law and legal procedures.[272]

Five justices wrote separate opinions and most of the separate opinions were written by justices from countries other than the four Allied ones[273], including the President of the tribunal Sir William Webb who was from Australia. Justice Radhabinod Pal, from India, Justice B. V.A. Roling, from Netherlands and justice Henri Bernard, from France also expressed dissenting opinions.

The majority judgment of the Tokyo Tribunal shared the same approach of the Nuremberg Judgment regarding the *nullum crimen sine lege* topic. It was, therefore, argued that the Charter of the IMTFE was binding and that the law of the charter reflected international law at the time of World War II.[274]

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[269] Ticehurst, Rupert, 'Retroactive criminal law'(1998-1999), 9, *The King's College Law Journal*, pp.87-108, p.100

[270] Futamura, Madoka, *War crimes tribunals and transitional justice- the Tokyo Trial and the Nuremberg legacy.* (2008) p.52.

[271] Gallant, Kenneth S. *The principle of legality in international and comparative criminal law.*(2009) pp.139-140.

[272] Ushimura, Kei, 'Pal's "Dissentient Judgement"reconsidered: Some Notes on Postwar Japan's Responses to the Opinion' (2007)19, *Japan Review*, pp. 215-224, p.216.

[273] Gallant, Kenneth. *The principle of legality in international and comparative law* (2009) p.143.

[274] Ibid.,p.142.