The issue of legality was extensively discussed by the justices of the tribunal. Justice Jaranilla from Phillipines argued that although the *nullum crimen sine lege, nullum poena sine lege* is a general principal of law in domestic legal systems, the same principle would not be applicable in international law. President Webb, from Australia, stated that "aggressive war was not universally regarded as a justiciable crime" at the beginning of the Pacific War. Furthermore, he also claimed that the Nuremberg judges were aware of this fact and that is the reason they spared the defendants convicted of conspiracy to make aggressive war from the death penalty.[275]

Justice Roling concluded that aggressive war was not a crime before the enactment of the Nuremberg and Tokyo Charters. Although he recognized the *post facto* creation of the crime of aggression he argued that the Allies could disregard the *nullum crimen sine lege* principle. He stated that:

> if the principle of *nullum crimen sine lege praevia lege* were a principle of justice (...) the Tribunal would be bound to exclude for that very reason every crime created in the Charter *ex post facto*, it being the first duty of the Tribunal to mete out justice. However, this maxim is not a principle of justice but a rule of policy, valid only if expressly adopted, so as to protect citizens against arbitrariness of courts...as well, as the arbitrariness of courts....as well as the arbitrariness of legislators...(T)he prohibition *of ex post facto* law is an expression of political wisdom, not necessarily applicable in present international relations. This maxim of liberty may in circumstances necessitate it, be disregarded even by powers victorious in a war fought for freedom.[276]

Justice Roling admitted the retroactive character of the laws applied in the Tokyo Trial, however, he stated that in the case to which it was applied he does not consider unjust to punish those who were aware of their own hideous behavior. Therefore, according to him, when Germans began their aggression they knew that were violating the Kellogg-Briand Pact, the Pact of Paris of 1928, which outlawed war "as a means of national policy". However, Germans argued that they could not be prosecuted and punished by virtue of the fact that at that time international law did not recognize the crime of aggression. He points out that in 1945 international law did not even know the *nullum crimen sine lege* principle which was developed after at the same time of human rights which protected the principle in human rights instruments.[277]

Justice Bernard of France took a natural law and internationalist approach to write his dissenting opinion. The natural approach is clear when he stated that "there is no doubt in my mind that such a(n aggressive) war is and always has been a crime in the eyes of reason and universal conscience, - expressions of natural law upon which an international

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[275] Gallant, Kenneth. *The principle of legality in international and comparative law* (2009) p.144.

[276] Shaack, Beth Van,'Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals'(2008) 97, *Georgetown Law Journal*,pp.119-192, p.131.

[277] Cassese, Antonio(ed). *The Tokyo trial and beyond-reflections of a peacemonger*- B.V.A. Roling (1993) p.69.

tribunal can and must base itself to judge the conduct of the accused tendered to it." Furthermore, the internationalist approach can be seen in the following statement: "the crimes committed against the peoples of a particular nation are also crimes committed against members of the universal community..."[278]

Gallant points out that these two arguments can be easily rebutted. First, due to the fact that human beings have such a long historical of aggressive wars that it might show that actually there is no violation of natural law.[279] However, the fact that there were always wars in the history of humanity does not mean that it is an acceptable conduct of a State. In the same way that the fact that many crimes take place and this does not mean that it is an acceptable fact according to natural law.

The second criticism refers to the fact that natural law unformulated in any positive law does not give in advance notice to persons that a certain conduct is to be considered as criminal.[280] Nevertheless, arguing that is necessary to have all the acts which violate the natural law need to be formulated in positive law is not always true. In extreme cases that violate moral ethics even before they violate the law, such as killing or raping, it is hard to argue that the actor would not be able to foresee that his act could be considered as crime under natural law, since these facts are in *malum in se*.

Justice Pal, prior to examining the actions of Japan, pointed out the history of Western colonialism in Asia. His dissenting opinion had seven chapters which were: "Preliminary Question of Law", "what is 'aggressive war'", "rules of evidence and procedure", "over-all conspiracy", "scope of Tribunal's jurisdiction", "war crimes *stricto sensu*", and "recommendation".[281] Justice Pal accepted the retrospective creation of the Tribunals. He stated that "under international law as it now stands, a victor nation or a union of nations would have the authority to establish a tribunal for the trial of war criminals, but no authority to legislate and promulgate a new law of war crimes."[282]

He denied that even after the defeat the victorious nations would have sovereign authority over the defeated states. He has also agreed that the rule against retroactive creation of criminal law is not absolute. In spite of that, he stated that the courts should always as far as possible avoid the application of retroactive law.[283]

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[278] Gallant, Kenneth S. *The principle of legality in international and comparative criminal law.* (2009) p.148

[279] Ibid. p.149.

[280] Ibid.

[281] Kei, Ushimura, 'Pal's "Dissentient Judgement" Reconsidered: Some Notes on Postwar Japan's Responses to the Opinion (2007) 19-2, *Japan Review*, pp. 215-224, p.217

[282] Gallant, Kenneth S. *The principle of legality in international and comparative criminal law.* (2009) p.151

[283] Ibid.,p.153.

CHAPTER 6

6. Hybrid Tribunals, International Criminal Courts and Domestic Cases

6.1 International Criminal Tribunal for former Yugoslavia (ICTY)

The International Criminal Tribunal for the former Yugoslavia (ICTY) was set up in 1993 by the United Nations Security Council Resolutions 808 and 827[284], pursuant to chapter VII of the United Nations Charter that provides on the threats to international peace and acts of aggression.

Although international criminal tribunals have contributed to the development of the international criminal justice it is apparent that the case of Yugoslavia and Rwanda might not serve as models for the future since they had not only low impact on the societies in which the crimes occurred, but also they were highly expensive for the UN, taking up more than 10% of the UN regular budget.[285]

In the article 1 of the ICTY Statute it is provided that the Tribunal is competent to prosecute offences committed since 1991. Furthermore, article 8 states that the temporal jurisdiction of the ICTY 'shall extend to a period beginning on 1 January 1991.'[286]

The ICTY statute avoided the problem of *nullum crimen sine lege* by applying customary law. When some of the relevant crimes were committed and such acts could be punished as international crimes this was only done if they were categorized at that time. Therefore, the secretary-general stated that "the application of the principle of *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise."[287]. The treaties that were interpreted as codification of customary law were the Geneva Conventions for the Protection of War Victims of August 12, 1949, the Hague Convention (No. IV) relating to the laws and customs of war on land and annexed

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[284] Meron, Theodor, 'War crimes in Yugoslavia and the Development of International Law (1994)93 *American Journal of InternationalLaw*, pp. 43-, p.1

[285] Stensrud, Ellen Emilie, 'New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leone and Cambodia (2009) 46-1, *Journal of Peace Research*, pp.5-15, p7.

[286] Schabas, William A, *The UN International Criminal Tribunals-The Former Yugoslavia, Rwanda and Sierra Leone* (2006) p.133

[287] Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), UN Doc. S/25704, para.34 (1993)

Regulations of October 18, 1907, the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948 and the Charter of the International Military Tribunal of August 8, 1945.[288]

The Tribunal was established to deal with the war in the Balkans, providing justice to the victims by punishing the guilty, deterring future offenders and contributing to the reconciliation process and long-lasting peace.[289] Since it was the first time that the Security Council established an international criminal tribunal, one defendant, Tadic, even questioned the existence of the Tribunal.[290] The defendant argued that the Security Council exceeded its authority and that since it was not established by law it would not be possible to be tried by the tribunal. The Trial Chamber understood that it would not have authority to analyze that question. However, the Appeal Chamber found that the ability of an arbitral tribunal to analyze its own competence was a major part of its inherent jurisdiction.[291] The Appeal Chamber decided that there had been a threat to the peace in the former Yugoslavia which justified the Security Council's resolution on establishing the international criminal court.

The Statute of the Tribunal gives the Tribunal authority "to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since January 1, 1991. The serious violations can be classified in groups as (1) grave breaches of the 1949 Geneva Conventions (Statute, Article 2), (2) violations of the laws and customs of war (Statute, Article 3); (3) genocide (Statute, Article 4); and (4) crimes against humanity (Statute, Article 5). The Statute of the ICTY does not create new crimes, it lists the crimes that already existed in international conventional and customary laws. These conventions above mentioned and customs existed before the war in the former Yugoslavia, therefore regarding the principle of legality, the defendants were not able to allege violations of the *nullum crimen* principle.[292]

When explaining its own jurisdiction, the Tribunal stated that:

> "the scope of the Tribunal's jurisdiction *ratione materiae* (subject matter jurisdiction) may therefore be said to be determined both by the Statute ... and by customary international law, insofar as the Tribunal's power to

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[288] Meron, Theodor. 'War crimes in Yugoslavia and the Development of International Law'(1994)93 *American Journal of InternationalLaw*, pp. 43, p.2

[289] Ivkovic, Sanja Kuynjak, 'Justice by the International Criminal Tribunal for the former Yugoslavia'(2001) 37, *Stanford Journal of International Law*, pp.255, [255], access on Lexis Nexis.

[290] ICTY, *Prosecutor v. Tadic*, decision on the defence motion on jurisdiction, August 10, 1995 (Case No. IT-94-1)

[291] ICTY, *Prosecutor v.Tadic*, decision on the defence motion for interlocutory appeal on jurisdiction, October 2, 1995 (Case No.IT- 94-1, App.Ch), paras. 18-19, 24-25.

[292] Ivkovic, Sanja Kutnjak., 'Justice by the International Criminal Tribunal for the former Yugoslavia'(2001) 37, *Stanford Journal of International Law*, pp.255, [268].

> convict an accused of any crime listed in the Statute depends upon its existence qua custom at the time this crime was allegedly committed.[293]

The Tribunal considered that article 3 of the Statute which sets forth violations of the laws and customs of war applies to non-international conflicts as well as in the Tadic case. Tadic was accused of committing crimes of rape, unlawful killing, torture and cruel treatment. Those crimes allegedly occurred mainly in the Omarska camp where Bosnian Muslims and Croats were detained by Serb forces. The defendant was indicted under articles 2, 3 and 5 of the Statute. In addition, relating to an accusation that he had raped a woman at Omarska camp he was charged with causing great suffering, under article 2 (c) or cruel treatment under article 3 of the Statute and with rape as crimes against humanity under article 5(g) of the Statute.

The defendant argued that articles 2 and 3 of the Statute referred only to acts which occurred in international armed conflicts. According to the defendant, the Geneva Conventions and violations of the laws or customs of war were limited to international conflicts.

Regarding the crimes against humanity charges, the defendant argued that article 5 of the Statute expressly referred to crimes linked to international armed conflicts. Rebutting this claim, the prosecutor claimed that the war in Yugoslavia was an international conflict. The reasoning of the prosecutor was that since the Security Council called in its resolutions for the parties to respect the Geneva Conventions, this characterized the conflict as international as it involved the federal Yugoslav army to a great extent. Furthermore, the Prosecutor also claimed that the Tribunal's jurisdiction regarding war crimes and crimes against humanity was not restricted to acts taking place in an international armed conflict. He claimed that the laws and customs of war referred to in Article 3 of the Statute had to be taken to include all the customary international law regarding armed conflict.

The Trial Chamber decided that the existence of an international armed conflict was not a requirement for the exercise of jurisdiction under Article 2, 3 or 5 of the Statute. However, regarding article 2, the Trial Chamber did not discuss in depth the character of the conflict, if it was international or not, it held simply that the present article provides the codification of customary law, being a declarative article.
The Trial Chamber convicted the defendant for violations of the laws and customs of war, but acquitted him from the violation of article 2 that provides on the grave breaches of international law.

Eventually, the Trial chamber determined that there were clear indications that the conflict was international.[294]

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[293] Milutnovic, Decision o Dragoljub Ojdanic's Motion challenging jurisdiction, in Gallant, Kenneth S. *The principle of legality in international and comparative criminal law* (2009) p.313.

The Appeals Chamber ruled that article 3 of the ICTY Statute applied to international and non-international armed conflicts. It reached this conclusion after examining the scope of the Security Council to promulgate the ICTY Statute that was to bring "to justice persons responsible for serious violations of international humanitarian law in the former Yugoslavia, thereby deterring future violations and contributing to the re-establishment of peace and security in the region".[295] The Appeals Chamber had also referred to the fact that the Security Council would not classify the conflict as internal or international as the main objective was the punishment of the atrocities.[296]Although the Appeals Chamber has emphasized that there was not a "full and mechanical" transplant of rules governing international armed conflict to the body of law governing non-international conflict, customary rules were developed to protect civilians from indiscriminate attacks, the protection of civilian objects, in particular cultural property, protection of those who do not take active part in hostilities as prohibition of means of warfare which are proscribed in international armed conflicts laws.[297]

The Appeals Chamber has pointed out that the objective of legality is to protect persons from later prosecution for acts that they reasonably believed were lawful.[298] If the acts were prohibited by domestic law the defendant can hardly claim that he thought that his conduct was lawful.

The Trial Chamber has the view that article 2 of the Statute regarding the violations of the 1949 Geneva Conventions is also applied in non-international conflicts. Nevertheless, the Appeals Chamber decided on the contrary, stating that grave breaches from Article 2 of the Statute refer only to international armed conflicts. It also did not recognize that the conflict in the Republic of Bosnia and Herzegovina was an international armed conflict.[299]
Issues regarding legality that were discussed in the ICTY include the application of *nullum poena sine lege* as was discussed in the *Erdemovic* case. *Erdemovic* was a low rank soldier in the Bosnian Serb Army who participated in the killing of Muslim civilians, between 17 and 60 from Srebrenica[300]. The defendant admitted his involvement in these

[294] Greenwood. Christopher, 'International humanitarian law and the Tadic case' (1996) 17, *European Journal of international law*,pp. 265-283available at http://207.57.19.226/journal/Vol7/No2/art8.html#P20_2341, access on 16 June 2010,

[295] ICTY, *Prosecutor v. Tadic,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1992 (Case No. IT-94-1-AR92), para.77.

[296] Ibid.para.74.

[297] Ibid., para.127.

[298] Meron, Theodor, 'Revival of customary humanitarian law' (2005)99-4 *American Journal of International Law*,pp. 817-834, p.4, access at LexisNexis.

[299] ICTY, *Prosecutor v.Tadic*, decision on the defence motion on jurisdiction, 10 August 1995 (Case No. IT-94-1 , Tr.Ch)

[300] ICTY, *Prosecutor v. Erdemovic*, Sentencing Judgment, 29 November 1996(Case No. IT-96-22, Tr.Ch.) par. 2.

crimes, but insisted that he was forced to do so under threat of death to himself and his family. Article 24 of the ICTY statute and Article 23 of the ICTY sets forth that "The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of (the former Yugoslavia). "Article 24 (1) states that penalties 'shall be limited' to imprisonment. Therefore, the ICTY would not be able to impose death penalty. In the *Erdemovic case*, the problem raised was that the Yugoslavian domestic law provided the death penalty for genocide and war crimes committed against civilian population[301] while the ICTY were not authorized to impose such a punishment.

The penalty established for the crimes the defendant was accused of (genocide and war crimes) was a minimum of five years and a maximum of 15 years or a death sentence. The Trial Chamber pointed out that domestic jurisprudence should have been examined before they reached a conclusion of whether the domestic legislation should be applied in the present case. There were two main cases of genocide in the former Yugoslavia. The first one was in 1946 after World War II against Mikhailovic and others. In this case, the majority of defendants were convicted and condemned to death and executed. The second one was that of Artukovic in 1986 also sentenced to death.[302]

The Trial Chamber reasoned that: "It might be argued that the reference to the general practice regarding prison sentences is required by the principle *nullum crimen nulla poena sine lege.* Justifying the reference to this practice by that principle, however, would mean not recognizing the criminal nature universally attached to crimes against humanity or, at best, would render such a reference superfluous. The Trial Chamber has, in fact, demonstrated that crimes against humanity are a well established part of the international legal order and have incurred the severest penalties. It would therefore be a mistake to interpret this reference by the principle of legality codified *inter alia* in paragraph 1 of Article 15 of the International Covenant on Civil and Political Rights, according to which,

> [n]o one shall be held guilty of any criminal offence on account of any act or omissions which did not constitute a criminal offence, under national or international law, at the time when it was committed ...

Moreover, paragraph 2 of that same article states that:

> nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was

[301] Chapter sixteen of the formal code, criminal acts against humanity and international law, articles 141-156, available at <http://pbosnia.kentlaw.edu/resources/legal/bosnia/criminalcode_fry.htm#chap_16>

[302] Dana, Shahram, 'Beyond Retroactivity to Realizing Justice: a Theory on the Principle of Legality in International Criminal Law Sentencing' (2009) 99-4, *Journal of Criminal Law and Criminology*, Northwestern university school of law, p.26.

> committed, was criminal according to the general principles of law recognized by the community of nations.[303]

Dana pointed out that the Trial Chamber's analysis was misplaced since it claims the problem is on the punishability of the conduct rather than the determination of the penalty itself.[304] The matter which was supposed to be discussed was of *nullum poena*, but the Court argued on the *nullum crimen*. In other words, the problem was not whether the defendant could not be punished, but rather what should be his punishment.

The Court used the analogy between article 5 of its Statute, crimes against humanity and genocide and war crimes committed against civilian populations under the SRFY's criminal code. Nevertheless, the Trial Chamber did not apply the penalties established by the laws that served as the analogous legislation. The Court, therefore has chosen the application of international law for the penalty instead of using the penalty existent in the domestic law of former Yugoslavia.

The Trial Chamber stated that there was a lack of meaningful national judicial precedents and considered that the practice of the domestic courts relating to prison sentences in the Courts of the former Yugoslavia would be used for guidance, but were not binding. The Trial Chamber also grounded their argument by quoting the Secretary-General of the United Nations who claimed that "in determining the term of imprisonment, the Trial Chambers should have recourse to the general practice of prison sentences applicable in the courts of the former Yugoslavia".[305]

The Trial Chamber added that they would review the practices of the former Yugoslavia but would not be bound in "any way by those practices in the penalties it establishes and the sentences it imposes for the crimes falling within its jurisdiction".[306]

In the *Marijacic case*,[307] the Appeals Chamber condemned journalists of contempt, regarding the release of confidential information regarding a proceeding. However, what could be questioned is whether the Appeal Chamber could exercise its jurisdiction over matter or people that do not have connection to the Tribunal. Journalists were not part of the procedures, such as the defendants, lawyers and witnesses as Gallant points out.[308]Nevertheless, the Court has also brought to court other journalists in later cases as

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[303] ICTY, *Prosecutor v. Erdemovic*, Sentencing Judgment, 29 November 1996(Case No. IT-96-22, Tr.Ch.) para. 38

[304] Dana, Shahram., 'Beyond Retroactivity to Realizing Justice: a Theory on the Principle of Legality in International Criminal Law Sentencing' (2009) 99-4, *Journal of Criminal Law and Criminology*, Northwestern university school of law, p.

[305] UNSC, Res.827, 25 May 1993, paragraph 111

[306] ICTY, *Prosecutor v. Erdemovic*, Sentencing Judgment, 29 November 1996(Case No. IT-96-22, Tr.Ch.) , para.39

[307] ICTY, *Prosecutor v. Marijacic*, judgement, 30 August 2006, (Case No.IT-95-14-R77.2, Tr.Ch.)

[308] Gallant, Kenneth S. *The principle of legality in international and comparative criminal law*, (2008,) p.311

can be seen in Margetic case.[309] In this case the defendant, who was a freelance journalist and citizen of Croatia, was accused of contempt by publishing a list of witnesses in the case of *Prosecutor v. Blaskic* case (Case no.95-14) on his website. He was indicted under the Rules of Procedure and Evidence, art. 77(A). [310] The defendant argued that the Tribunal did not have jurisdiction to hear the case and that the jurisdiction of the Tribunal was limited to "severe violations of humanitarian law in the ex-Yugoslavia".[311] Prior to this decision, another journalist, Josip Jovic had been condemned by the same crime of contempt for publishing the transcripts of a witness to the tribunal in a newspaper. The defendant was brought under violation of Rule 77(A) and Rule 77(A)(ii) of the Rules of Procedure and Evidence. The defence in this case argued that although the Tribunal had ordered him not to publish the transcript he believed that he was not bound by the Tribunal's orders. Nevertheless, the Trial Chamber stressed that an error in law was no answer to the charge.[312] The Trial Chamber condemned the defendant to pay a fine of 20,000 Euros and the Appeals Chamber upheld this decision.

In fact, the opening to the public of information that should not be disclosed to the public, such as for preserving the identity of the witnesses, can threaten the security of those who are cooperating with the procedures. Nevertheless, it is dubious whether the Court could really impose its jurisdiction to persons that are not supposed to be under it.

Stanislav Galic was considered guilty of violations of the laws or customs of war for acts of violence with the objective of spreading terror among the civilian population, in violation of Article 51 of the Additional Protocol I to the Geneva Conventions of 1949 and under Article 3 of the ICTY Statute. In addition, he was found guilty of crimes against humanity under article 5(a) of the ICTY Statute and crimes against humanity relating to inhumane acts under Article 5(i) of the ICTY Statute.[313]

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[309] ICTY, *Prosecutor v. Margetic*, judgement, 7 February 2007 (Case No. IT-95-14-R776, Tr.Ch)

[310] Art. 77.The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who

(i) being a witness before a Chamber, contumaciously refuses or fails to answer a question;

(ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber;

(iii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber;

(iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness; or

(v) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber.

[311] Para.18

[312] ICTY, *Prosecutor v. Jovic*, judgement, 15 March 2007 (Case No.IT 95-14 & 14/2 R77, App.Ch)

[313] American Society of International law, International Law Brief, available at< http://www.asil.org/ilib0622.cfm#j2> at 26 March 2010.

The defence in this case had argued unsuccessfully that the International Tribunal had no jurisdiction over the crime of acts or threats of violence where the primary purpose is to spread terror among the civilian population as "there exists no crime of terror". Moreover, the defence submitted that the Trial Chamber made a mistake in finding that the 22 May 1992 Agreement that reproduced the prohibitions in article 51 of Additional Protocol I on the protection of the civilian population, including the prohibition of "acts or threats of violence the primary purpose of which is to spread terror among the civilian population, [314] binding upon the parties to the conflict." He also argued that the Trial Chamber was not able to prove that the acts of "sniping" and "shelling" were committed with the objective of spreading terror among civilians.

The Trial Chamber has referred to the Secretary General statement which says that only acts which are considered as crimes under customary law were to be examined by the Tribunal.[315]

The Trial Chamber has pointed out that in many situations the treaty provisions will provide for the "prohibition of a certain conduct, not for its criminalization, or the treaty provisions itself will not sufficiently define the elements of the prohibition they criminalise and customary international law must be looked at for the definition of these elements".[316] Therefore, even if the treaty provides that a certain act is wrong or prohibited, this does not mean the act automatically can be considered as criminal. The Trial Chamber gave as example the Kordic and Cerkez case which stated that it had jurisdiction over violations which were prohibited by international treaties, but it had to base itself on customary international law to determine the conduct that would give rise to liability for individuals.[317] In this case, the Trial Chamber and the Appeals Chamber applied a treaty, but also applied international customary law to establish individual criminal responsibility.

Furthermore, apart from applying the customary law to give rise to individual liability, the Trial Chamber has also applied customary law to find the elements of the crime as can be seen in Stavic, in which the Trial Chamber established joint criminal enterprise while the Appeals Chamber referred to customary law to determine elements of the crime of extermination and deportation.[318]

The Appeals Chamber has rejected the defendant's claim that International Tribunal's jurisdiction for crimes under Article 3 of the Statute can only be based on customary law.[319]

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[314] Kashoven, Frits. The respective roles of custom and principle in the international law of armed conflict- the second Friedrich Martens Memorial Lecture access at http://acta.martens.ee/article/viewDownloadInterstitial/288/49, access on 20 September 2010.

[315] ICTY, *Prosecutor v. Galic*, judgement, 30 November 2006 (Case No. IT-98-29-A, App.Ch), para.81.

[316] Ibid.para.83.

[317] Ibid.

[318] Ibid,, para.84.

[319] Ibid., para.85.

On the appeal, Galic challenged that the 22 May Agreement was binding to the parties and even if binding did not give rise to individual criminal responsibility on the part of the parties. The Appeals Chamber did not analyze this argument, rather, it addressed that the prohibition of terror against civilians provided by article 51(2) of the Additional Protocol I and Article 13(2) of Additional Protocol II was a part of customary international law from the time of its inclusion in those treaties.[320] However, Judge Nieto-Navia, in his separate and partially dissenting opinion has stated that the mere signing of the May Agreement would not be enough to satisfy "the jurisdictional requirement that the Trial Chamber may only consider offences which are reflected in international customary law".[321] According to him, the Chamber could not prove the existence of the crime of terror under customary international law under article 3 of the Statute. Kravitz points out, however, that the Secretary-General statement which says that "the application of *nullum crimen sine lege* requires that the international tribunal should apply rules which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise"[322]and the Secretary-General statement was quoted by the dissenting judge and had the meaning of not exceeding limits of international law and not create new law. Therefore, it has as the intention to observe the principle of *nullum crimen sine lege*. In the Tadic case, the Appeals Chamber had established that the Tribunal was "authorized to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law."[323]. Therefore, according to the Appeals Chamber criteria it would be necessary to have either customary international law or a Convention that was in force to the parts. Following this, the Appeals Chamber stated that article 51 (2) of API conventional law was the legal basis of the crime of terror. Thus, it would not be necessary to prove that there is an international customary crime of terror.[324]

In Aleksovski's case, the role of the previous decisions of the Court was discussed. The defendant claimed that precedent of the ICTY could not be considered as precedents due to the fact that the decision would necessarily have been taken after the commission of the crimes. Therefore, it would not follow the principle of legality. The Appeals Chamber held that in the interests of certainty and predictability the Appeals Chambers should follow its previous decisions. However, it should be free to depart from them for cogent reasons in the interests of justice.

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[320] ICTY, *Prosecutor v. Galic*, judgement, 30 November 2006 (Case No. IT-98-29-A, App.Ch) para.86

[321] ICTY, Separate and Partially Dissenting opinion of Judge Nieto-Navia , ICTY, *Prosecutor v. Galic*, judgement, 5 December 2003 (Case No. IT-98-29-A, Tr.Ch)para.113.

[322] Report of the Secretary-General Pursuant to Paragraph 2 of the Security council Resolution 808 (1993), para.34

[323] ICTY, *Prosecutor v. Dusko Tadic*, Decision o the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (Case No.IT-94-I-AR72) para.143

[324] Kravetz, Daniela, 'The protection of civilians in war: the ICTY's Galic case' (2004) 17, *Leiden Journal of International Law*, pp.521-536, p.527.

In reasoning its decision, the Appeals Chamber argued the jurisprudence of common law and civil law countries, concluding that domestic courts follow past decisions except when there is a clear injustice. In addition, the Appeals Chamber determined that the Tribunal's Statute did not manifest itself on the question of the binding force of precedents. The Appeals Chamber held that its decisions were binding on Trial Chambers. Nevertheless, Appeals Chambers held that Trial chambers decisions are not reciprocally binding.[325] Therefore, it is established that it should have a respect for a higher instance decisions and that those would be binding to tribunals.

Another remarkable aspect of *Aleksoviski case* is that the Appeals Chamber distinguished between the interpretation and clarification of customary law and the creation of a new law that then would violate *ex post facto* prohibition:

> 126. There is nothing in that principle that prohibits the interpretation of the law through decisions of a court and the reliance on those decisions in subsequent cases in appropriate circumstances. The principle of legality is reflected in Article 15 of the ICCPR. What this principle requires is that a person may only be found guilty of a crime in respect of acts which constituted a violation of the law at the time of their commission. In the instant case, the acts in respect of which the accused was indicted, all constituted crimes under international law at the time of their commission. Inhuman treatment and willfully causing grave suffering or serious injury to body or health under article 2 of the Statute were violations of the grave breaches provisions of Geneva Conventions, and outrages against personal dignity under Article 3 of the Statute constituted a violation of the laws or customs of war, at the time of the commission of the crimes.
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> 127. There is, therefore, no breach of the principle of *nullum crimen sine lege*. That principle does not prevent a court, either at the national or international level, from determining an issue through a **process of interpretation and clarification** as to the elements of a particular crime; nor does it prevent a court from relying on previous decisions which reflect an interpretation as to the meaning to be ascribed to particular ingredients of a crime.[326](emphasis added).

The Appeals Chamber in *Celebici case* has referred to Aleksovski's decision:

> the Appeals Chamber is similarly unconvinced by the appellants' argument that such an interpretation of common Article 3 violates the principle of legality. The scope of this principle was discussed in the Aleksovski Appeal Judgement, which held that the principle of *nullum crimen sine lege* does not prevent a court from interpreting

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[325]ICTY, Prosecutor v. Aleksovski, judgement 24 March 2000(Case No. IT-95-14/1-A, App.Ch), relying on *Human Rights Brief*, vol.8, issue 1http://www.wcl.american.edu/hrbrief/08/1tribunals.cfm

[326] ICTY, *Prosecutor v. Aleksovski*, judgement, 24 March 2000 (Case No. IT-95-14/1-A, App.Ch) para.126-127.

> and clarifying the elements of a particular crime. It is universally acknowledged that the acts enumerated in common Article 3 are wrongful and shock the conscience of civilized people, and thus are, in the language of Article 15(2) of the ICCPR, "criminal according to the general principles of law recognized by civilized nations.[327]

In addition, the Appeals Chamber pointed out that the Trial Chamber's position regarding the principle of legality is the same taken by the Appeals Chamber. The Trial Chamber referenced article 15 of the ICCPR and to the Criminal Code of the SFRY which was adopted by Bosnia and Herzegovina and concluded that: "It is undeniable that acts such as murder, torture, rape and inhuman treatment are criminal according to "general principles of law" recognised by all legal systems." Hence the caveat contained in Article 15, paragraph 2, of the ICCPR should be taken into account when considering the application of the principle of *nullum crimen sine lege* in the present case.

The purpose of this principle is to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission. It strains credibility to contend that the accused would not recognise the criminal nature of the acts alleged in the Indictment. The fact that they could not foresee the creation of an International Tribunal which would be the forum for prosecution is of no consequence.[328]

In *Dario Kordic case* and *Mario Cerkez case*, the Trial Chamber had erroneously applied legal categories, such as "international armed conflict" and wrongly applied the overall control test. According to Kordic, the Trial Chamber had violated the *nullum crimen sine lege* principle since it applied the "overall control" test when determining that an international armed conflict existed, as the application of this test instead of the effective control test that had been applied in the Nicaragua Case by the International Court of Justice.[329]

Cerkez had argued that the "overall control" test used by the Trial Chamber was broader than the test of "effective control" that was applied in the Nicaragua case. He also argued that the Trial Chamber does not have authority to interpret the definitions of the crimes extensively or to resort to analogy by applying new standards. Kordic also claimed that the "effective control" test would create *ex post facto* law" and it would violate the principle of legality. He referenced Tadic's case in which it was established that the conflict was international and argues that it would be impossible for him to predict that the conflict would be considered as international after a few years. The prosecution rebutted by stating that the Appeals Chamber in Tadic found that the "overall control

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[327] ICTY, *Prosecutor v.Celebici,*judgement, 20 February 2001 (Case No. IT-96-21-A,App.Ch) para.173.

[328]Ibid.para.179.

[329] ICTY, *Prosecutor v Kordic and Cerkez*, Appeal Judgement, 17 December 2004 (Case No,-95-14/2, App.Ch) para.297.

test" was not a novelty or replacement of a pre-existing test, but a accurate interpretation of the same information existent in the "effective control" test.[330]

The Appeals Chamber stated that "the *nullum crimen sine lege* principle does not require that an accused knew the specific legal definition of each element of a crime he committed. It suffices that he was aware of the factual circumstances, e.g. that a foreign state was involved in the armed conflict. It is this not required that Kordic could make a correct legal evaluation as to the international character of the armed conflict. Consequently, it is irrelevant whether Kordic believed that the "effective control" test constituted international customary law."[331]

Another claim submitted by the Trial Chamber is that the Geneva Convention IV interpretation violated the *nullum crimen sine lege* principle since article 4 of the Geneva Convention IV required different nationalities between the perpetrator and his victim. However, the Appeals Chamber argued that article 4 of Geneva Convention IV could not be interpreted in a way that would exclude victims from protected person status merely based on their common nationality with their perpetrator.[332]

In fact, deciding that the article applies only if the victims and the perpetrators had the same nationality would be contrary to the protection of persons in the current stage of international human rights law where the protection from discrimination is set forth in many human rights instruments.(such provided in Art.26 of International Covenant on Civil and Political Rights.)

Vasiljevic's case[333] reemphasized that the principle *nullum crimen sine lege* "does not prevent a court from interpreting and clarifying the elements of a particular crime", that was stated in Aleksoviski's appeal judgement. Furthermore, it stated that the Trial Chamber must further be satisfied that this offence was defined with sufficient clarity for it to have been foreseeable and accessible, taking into account the specificity of customary international law.[334]

The Trial Chamber explained how the crime could be recognized as such under the customary law. It would be either by the fact that many countries have considered the conduct as a crime or by virtue of a treaty provision which provides for a criminal punishment.[335]

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[330] ICTY, *Prosecutor v Dario Kordic and Mario Cerkez* para.304

[331] ICTY, *Prosecutor v Kordic and Cerkez*, Appeal Judgement, 17 December 2004 (Case No,-95-14/2, App.Ch) para.311

[332] Ibid.para.329.

[333] *Prosecutor v. Vasiljevic*, Trial Judgement, 29 November 2002 (Case No.It-98-32-Tr. Ch)

[334] Ibid. para.198.

[335] Ibid. para.199.

The *nullum crimen* issue was also raised when the court considered oral sex as rape. The Court has pointed out that when international criminal rules do not define a notion of criminal law, reliance on national legislation is necessary but, reminding that:

> unless indicated by an international rule, reference should not be made to the national legal system only, say that of common-law or that of civil-law States. Rather, international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world. This presupposes a process of identification of the common denominators in these legal systems so as to pinpoint the basic notions they share: since "international trials exhibit a number of features that differentiate them from national criminal proceedings", account must be taken of the specificity of international criminal proceedings when utilizing national law notions.[336]

As the offense in question of "violence to life and person" which was provided in the Statute through article 3 does not necessarily reflect customary law and it would not provide a clear definition of a crime.[337]

6.2. Internationalised Domestic Tribunals and the *nullum crimen sine lege* and *nulla poena sine lege* principle

6.2.1. The Extraordinary Chambers in Cambodia

It took many years for the international community to start analyzing a way to bring to justice the major responsibles for the massacre that took place during the rule of Khmer Rouge in Cambodia, which started on 17 April 1975 and ended on 8 January 1979. On 21 June 1997 the Cambodian government sought the assistance of the United Nations to deal with the atrocities[338]. A group of specialists assessed that the domestic judiciary had serious problems of corruption and political influence and that it would not be able to have prosecutions up to international standards of due process and respect for the rule of law. It was recommended that an international tribunal was established. Nevertheless, the national government of Cambodia did not agree with this idea and the United Nations

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[336] ICTY, *Prosecutor v. Furundzija*, Judgement, 10 December 1998 (Case No. IT-95-17/1-T (ICTY Tr.Ch.,) para.178

[337]ICTY,*Prosecutor v. Vasiljevic*, Trial Judgement, 29 November 2002 (Case No.It-98-32-Tr. Ch), para.203.

[338] Linton, Suzannah, '*Cambodia, East Timor and Sierra Leone: Experiments in International Justice*' (2001) 12, *Criminal Law Forum* pp.185-246, pp..187-188

eventually agreed to the establishment of a tribunal under Cambodian law controlled by Cambodians, but with international participation.[339]

An agreement made between United Nations and the government of Cambodia was signed on 6 June 2003 and that entered into force on 29 April 2005 established the Extraordinary Chambers of Cambodia.[340] The matters to be covered by the Tribunal are genocide, crimes against humanity, grave breaches of the Geneva Conventions, violations of the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict and crimes against internationally protected persons pursuant to the Vienna Convention on Diplomatic Relations of 1961. Furthermore, homicide, torture and religious persecution also could be prosecuted under the 1956 Cambodian Penal Code[341]. In the agreement, article 12 (2)[342] establishes that articles 14 and 15 of the International Covenant on Civil and Political rights have to be respected by the Court since Cambodia had ratified this Convention. Article 15 of the Covenant sets forth that:

> 1 . no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
> 2. nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Therefore, the Chambers have introduced the *nullum crimen* principle in its statute. This establishment defines that the Chambers have to determine whether a given act was in fact a crime under applicable law when the conduct took place. Cambodia has been part of human rights treaties which are directly enforceable in domestic legal system by virtue of article 31 of the 1993 Constitution which provides that Cambodia "shall recognize and

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[339] Linton, Suzannah,, '*Cambodia, East Timor and Sierra Leone: Experiments in International Justice*' (2001) 12, *Criminal Law Forum* pp.185-246, p.188-189.

[340] UN General Assembly Resolution 57/222 B approved the draft agreement.

[341] Linton, Suzannah. Cambodia, '*Cambodia, East Timor and Sierra Leone: Experiments in International Justice*' (2001) 12, *Criminal Law Forum* pp.185-246, p.190.

[342] Article 12. (2). "The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 15 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party. in the interest of securing a fair and public hearing and credibility of the procedure, it is understood that representatives of Member States of the United Nations, of the Secretary-General, of the media and of national and international non- governmental organizations will at all times have access to the proceedings before the Extraordinary Chambers. Any exclusion from such proceedings in accordance with the provisions of article 14 of the Covenant shall only be to the extent strictly necessary in the opinion of the Chamber concerned and where publicity would prejudice the interests of justice."

respect human rights as stipulated in the....covenants and conventions related to human rights....'[343]

The violations of *nullum crimen sine lege* were discussed in Case No.1[344] analyzed by the Extraordinary Chambers of Cambodia. The joint criminal enterprise according to the defence was not recognized as a rule of international customary law in 1975-1979 and even currently it is not accepted as such. The Co-prosecutors responded that joint criminal enterprise has been established since the Nuremberg Tribunal consisting in a valid mode of liability in the Extraordinary Chambers.

The Extraordinary Chamber applied article 29 to ground its decision stating that although the present article does not expressly refer to Joint Criminal Enterprise, "any suspect who planned, instigated, ordered, aided and abetted or committed any of the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime."

Furthermore, the Extraordinary Chambers referred to Tadic'a Appeal Judgement at the ICTY which defined three categories of Joint Criminal Enterprise. Different categories of JCE were defined according to different degrees of *mens rea*. When it referred to the principle of legality the Extraordinary Chambers had also referred to the ICTY and to article 15 of the 1966 International Covenant on Civil and Political Rights. The test of foreseeability and accessibility would rely on the fact of whether there is foreseeability and accessibility of criminal norms as in the nature and gravity of the alleged acts themselves. In addition, the acts have to be a crime under national or international law. Thus, the judges found that there was a basis under international law for applying Joint criminal enterprise under articles 14-17.[345]

The Extraordinary Chambers have asked *amicus curiae* to Professor Antonio Cassese, Professor Kai Ambos and McGill Center for Human Rights to analyse whether there was a violation of *nullum crimen sine lege* principle when there is recognition of criminal liability for Joint Criminal Enterprise. All of them affirmed that there was not a violation of the present principle.

Cassese stated that there was an international criminal customary law in recognizing the Joint criminal enterprise and that was established for the first time in the Nuremberg Charters and Control Council no.10 of 1945, exemplifying cases that had implemented it.[346] They made a distinction of the three types of joint criminal enterprise. The first one,

[343] Sluiter, Goran, 'Due process and criminal procedures in the Cambodian Extraordinary Chambers' (2006)4-2, *Journal of International Criminal Justice*, pp.314-326, p.314.

[344] ECCC, *Prosecutor v. Kaing Guek Eav*, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009 (Case No.1)

[345] ECCC, Order on the Application at the ECCC of the Form of Liability known as joint criminal enterprise, 8 December 2009, paras. 12-21.

[346] Cassese, Antonio. Amicus Curiae brief of professor Antonio Casses and members of the *Journal of International Criminal Justice* on joint criminal enterprise doctrine, 27 October 2008, filed to Pre-Trial

referred to as the "basic" one consists of all participants that acted pursuant to a common design of the crime, even if each participant executed a different role in the crime. The second one is the "systemic" one, which consists of a variant of the first category applicable to detention and concentration camps, in this type, the *mens rea* is not necessary, even those who were responsible for administrative functions, such as serving meals, making lists of the prisoners would also contribute for the crime. The third type is called "extended" form[347] and occurs when the participants agree with the main goal of the common criminal design (such as expulsion of civilians of a determined territory), but one or more members of the group ends up killing or committing crimes incidentally. In this third type of crime it is essential to analyze the *dolus eventualis* that is he or she "willingly took of the risk"[348] although there is not the intention of committing that determined crime. As an example, those who agreed with the expulsion of civilians from an occupied territory did not share the intent of killing, but they accepted the possibility that the civilians would be killed.

When analyzing the existence of customary law of the criminal liability of the joint criminal enterprise, Cassese mentioned Marten's clause, which is provided in the preamble of the 1899 Hague Convention and later taken up in several treaties, including the 1949 Geneva Conventions. The present clause makes a possibility for the customary law, usually based on state practice, treaties and other international instruments, United Nations resolutions, international and national decisions for extending the form of customary law by "social and moral need for observance of rules and the expression of legal views by a number of states or international entities about the binding value of the principle or rule". Therefore, there is the possibility of recognizing the customary law even without the practice of States.[349]

The conclusion that professor Cassese reached was that in the period of 1975-1979 there were customary laws in international criminal law providing for 3 distinct modes of joint criminal responsibility liability and that those rules were applicable to Cambodia.[350]

In the *Case Chea Nuon*[351], the defence for Ieng Sary submitted its request that the co-investigating judges declared joint criminal enterprise to be inapplicable before the ECCC by virtue of the fact that it would constitute violation of the principle of *nullum crimen sine lege*. They claimed that this form of criminal liability could not be considered as customary international law in 1975-1979.

Chamber, available at http://www.eccc.gov.kh/english/cabinet/courtDoc/163/D99_3_24_EN_Cassese.p para.20

[347] Ibid para.20

[348] Cassese, Antonio. Amicus Curiae brief of professor Antonio Casses and members of the *Journal of International Criminal Justice* on joint criminal enterprise doctrine, 27 October 2008, filed to Pre-Trial Chamber, available at http://www.eccc.gov.kh/english/cabinet/courtDoc/163/D99_3_24_EN_Cassese.p para.27

[349] Ibid, para.43.

[350]Ibid, para. 85.

[351]ECCC, *Prosecutor v. Nuon Chea* 19 September 2007 (Case No.2)

The investigating judges referred to Tadic's appeal judgment at the ICTY which defined the three categories of JCE, pointing out the common elements of the three categories of the joint criminal enterprise which are plurality of persons, existence of a common purpose (or plan) which amounts to or involves the commission of a crime within the law and that the accused must contribute to the common plan.[352]

The Extraordinary Chamber emphasized that article 33 of the Extraordinary Chambers in Cambodia Law sets out the principle of legality referring to the provisions of Article 15 of the 1966 International Covenant on Civil and Political Rights (ICCPR). In addition, other factors that were examined regarded the foreseeability and accessibility when the alleged activity was criminalized under national or international law at the particular period. The co-investigating judges stated that the joint criminal enterprise could not be considered as a form of liability under domestic law. They stated that the 1956 Cambodian Penal Code was inspired in the French Law and,

> [u]nder French law, international crimes such as those falling under the jurisdiction of the ECCC constitute specific categories of crimes under autonomous legal regimes, distinct from domestic criminal law and characterized by a set of rules of procedure and substance.[353]

6.2.2. East Timor Panels

On August 30 1999, East Timorese voters decided to turn down the Indonesia government proposal on autonomy. Before this "popular consultation" organized by United Nations was held, Indonesian army-backed militia and local police promoted a terrorization of the independence supporters.[354]

East Timor became independent in 20 May 2002, after 24 years of Indonesian occupation and 500 years of Portuguese colonization.[355]

On 25 October 1999, the United Nations, by Resolution 1272/99 of Security Council, started its role as transitional administrator as the United Nations Transitional

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[352] ECCC, *Prosecutor v. Chea Nuon*, Order on the application at the ECCC of the form of liability known as joint criminal enterprise, 19 September 2007 (Case No.2) para. 13-14.

[353] Ibid.para.22.

[354] Human Rights Watch, *Human Rights Watch World Report 2000 - Indonesia and East Timor*, 1 December 1999, available at: http://www.unhcr.org/refworld/docid/3ae6a8c610.html [accessed 24 May 2010]

[355] Linton, Suzannah and Reiger, Caitlin, 'The evolving jurisprudence and practice of East Timor's special panels for serious crimes on admissions of guilty, duress and superior orders' (2001) 4,*Yearbook of International Humanitarian Law*, pp.1-48, p.1

Administration in East Timor (UNTAET). It had a mandate to exercise legislative and executive authority, with the administration of justice, security, maintenance of law and order, establishment of an effective administration, support of capacity-building for self-government and assistance in the establishment of conditions for sustainable development.[356] Penalties for crimes are those that exist under East Timor Law. By Regulation 2000/15, adopted by UNTAET, Panels which would treat serious criminal offences exclusively were established.[357]

The Regulations set forth the prosecution of genocide, war crimes, crimes against humanity, murder, sexual offences and torture[358]. The Tribunal has jurisdiction for crimes which occurred between 1 January 1999 and 25 October 1999 in the case of murder, sexual offences and torture.[359] The Special Panels for serious crimes have been holding trials since January 2001 and since May 2002 the works have been going on as part of the independent East Timor.[360]

The Regulation 2000/15 provides *nullum crimen sine lege* and *nulla poena sine lege*, stating that "a person shall not be criminally responsible under the present regulation unless the conduct in question constitutes, at the time it takes place, a crime under international law or the laws of East Timor".[361] Moreover, it also sets forth that a definition of crime should neither be construed nor extended by analogy.[362] It also states that crimes of genocide, war crimes, crimes against humanity and torture are not subjected to statute of limitations.[363]

The most polemic decision in the East Timor Courts was the one in which the Court of Appeal handed down the Special Court's decision. In Armando dos Santos[364] case, the defendant was charged with three accounts of murder as a crime against humanity, being convicted of murder under the Indonesian Penal Code.

The Court of Appeal decided that the UNTAET Regulation 2000/15 that provides the serious criminal offences in terms with the International Criminal Court could not be applied to acts which took place before the Regulation entered into force. This would breach section 31 of the East Timor Constitution which sets forth that "no-one shall be tried and convicted for an act that does not qualify in law as a criminal offence at the time it was committed". In addition, it also states that "criminal law shall not be enforced

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[356] UNSC , Res.1272, 25 October 1999.

[357] UNTAET Regulation on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, 6 June 2000.

[358] UNTAET Regulation 2000/11, Sec.10 (1)

[359] UNTAET/Reg./2000/11, Sec.10(2)

[360] Bertodano, Sylvia, 'Current Developments in International Courts- East Timor- Justice Denied in *Journal of International Criminal Justice* (2004),2-3, pp.910- p.1 extracted from Lexis Nexis.

[361] UNTAET/ Reg./2000/15, Sec. 12 (1)

[362] UNTAET/ Reg./2000/15, Sec. 12 (1)

[363] UNTAET/ Reg./2000/15, Sec.

[364] East Timor Panels, *Prosecutor v. Armando dos Santos*, July 15, 2003 (Case No. 16/2001)

retroactively, except if it is in favor of the accused". Moreover, the Court of Appeal argued the subsidiary law was not the Indonesian one since the occupation by Indonesia of East Timor was in violation of international law. Therefore, the laws to be applied were the Portuguese ones, deciding against all the previous jurisprudence applied by the Special Panels that were applying the Indonesian Penal Code. The Court of Appeal decided that the defendant was guilty of three crimes of murder and 'a crime against humanity in the form of genocide'.[365]

However, this decision was not unanimous as Judge Jacinta found that UNTAET had a clear intention to nominate Indonesian law as the applicable subsidiary law and that the Portuguese law should not be considered as the applicable law.[366] The same point of view was showed by Bertodano[367] who states the UNTAET Regulation 1999/1 did not question the legality of the Indonesian invasion of Timor Leste. She claims that if UNTAET intended to state that a law different from the one which had been applied since 1974 was to be applied it would have been clearly stated in this way. She adds as part of her argument that Hansjoerg Strohmeyer, principal legal advisor to UNTAET stated that:

> by Regulation No 1999/1, UNTAET had, in effect, decided that the laws applied in East Timor prior to the adoption of Security Council Resolution 1272 (i.e., the Indonesian laws) would apply *mutatis mutandis*, in so far as they were consistent with internationally recognized human rights standards, and in so far as they did no conflict with the mandate given to the mission by the Security council, or with any other subsequent regulation promulgated by the mission. This decision was made solely for practical reasons: first, to avoid a legal vacuum in the initial phase of the transitional administration, and second, to avoid a situation in which local lawyers, virtually all of whom had obtained their law degrees at domestic universities, had to be introduced to an entirely foreign legal system.[368]

The National Parliament after that decision examined the question and has decided that Indonesian law would continue to be applied as subsidiary law. Nevertheless, the Armando dos Santos ruling was not overturned.[369]

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[365]Special Panels for Serious Crimes, *Prosecutor v. Armando dos Santo,* decisions, 15 July 2003 (Case No.16/2001,Court of Appeal). Available at, access on 26 May, 2010
http://www.jsmp.minihub.org/Judgements/courtofappeal/Ct_of_App-dos_Santos_English22703.pdf

[366] The Court of Appeal on the Decision on the applicable subsidiary law in Timor Leste
http://www.jsmp.minihub.org/Reports/jsmpreports/Applicable%20Law%202003/Applicable%20subsidiary%20law%202003(e).pdf

[367] Bertodano, Sylvia de, 'Current Developments in International Courts- East Timor- Justice Denied in *Journal of International Criminal Justice* (2004),2-3, pp.910-, p.6

[368] Bertodano apud Strohmeyer., Current Developments in International Courts- East Timor- Justice Denied in *Journal of International Criminal Justice* (2004),2-3, pp.910-, p.6

[369] International Center for Transitional Justice, the serious crimes process in Timor-Leste: in retrospect, March 2006, p.30, available at <http://www.ictj.org/static/Prosecutions/Timor.study.pdf>, access on 25 May, 2010.

Regarding the applicability of UNTAET Regulations, we agree with Bertodano who points out that the Court of Appeal failed to consider that Regulation 2000/15 was a mere codification of customary international law that was valid when the crimes were committed. In the case of genocide, crimes against humanity and war crimes had been accepted as crimes under customary law for decades. According to her view, the Court of Appeal made a mistake when they overlooked the customary law issue in the retroactivity issue.[370]

The Court of Appeal's interpretation was not followed in following decisions as we can see in *Public Prosecutor v. Sarmento*. In this case the Dili Special Court for Serious Crimes held that the acts were criminal under customary international law and under general principles of law before they were committed and that they could be prosecuted in the East Timor Courts. The Court referred to the *nullum crimen* principle as a human right, provided in the International Covenant on Civil and Political Rights, art.15 (1) and (2) and Section 9.1 of the Constitution that sets forth that "the legal system of East Timor shall adopt the general or customary principles of international law". Furthermore, the Court has also referred to Celebici's case, examined before the ICTY, in which it was recognized that under international customary law crimes against humanity are criminal under the general principles of law, constituting an exception to the principle of non-retroactivity.[371]

Gallant observes that in spite of the fact that some language would appear to reject legality, what was actually being rejected was the civil law legality version that states that the statute implementing international criminal law must have been in place before the act. Instead, the legality principle set forth in the International Covenant on Civil and Political rights which provides that the act must have been criminal under some applicable law was accepted.[372]

6.2.3. The Special Court for Sierra Leone

Sierra Leone gained independency from British rule in 1961. After that, the country passed through 14 coup-d'états, with the military playing an important role in the regime of the country. Civil war started in 1991 when the Revolutionary United Front (RUF) began a campaign to finish the 23-year rule of the exclusive All People's Congress (APC) party. This campaign achieved a military coup that made Valentine Strasser the leader of the country. His government lasted for four years. In 1996, military officers ousted the NPRC government and scheduled presidential and legislative elections. In order to deter the democratic elections, government soldiers and local militias committed atrocities

[370] Bertodano, Sylvia de.,'Current Developments in International Courts- East Timor- Justice Denied in *Journal of International Criminal Justice* (2004),2-3, pp.910-, p.7.

[371] Special Panels for Serious Crimes, *Public Prosecutor v. Sarmento*, 24 July 2003 (Case No.18,Dili District Special Court for Serious Crimes). para.20.

[372] Gallant, Kenneth, *The principle of legality in international and comparative criminal law*(2009) p.327.

against civilians, cutting off hands, arms, ears, and lips of civilians[373]. Sexual violence was much more widespread than amputations. The conflict lasted from 1991 to 2002.[374]

Tackling the past atrocities of the war was a difficult task that was exercised by two mechanisms, the Special Court for Sierra Leone and the Truth and Reconciliation Commission (TRC). The former deals with the adjudication of those accused to have great responsibilities for war crimes and crimes against humanity and the latter intends to create an impartial, historical record of the conflict.[375]

The Special Court was established by a United Nations Security Council Resolution[376], but it is a result of an agreement between the United Nations and the Government of Sierra Leone. Although the conflict started from 1991, the Secretary-General proposed the jurisdiction of the Court to start from 30 November 1996, the date of the failed Abidjan Agreement on peace.[377] Therefore, the temporal jurisdiction of the Special Court partially covers the conflict. The reason for that relies on the fact that if it covered the whole conflict it would create too much burden for the prosecution and court. The Secretary General claimed that the choice behind the date to start the jurisdiction is that it puts the conflict in perspective and ensures that the most serious crimes committed by the parties fall under the Court's jurisdiction.[378] Linton points out that it is difficult to see how the Special Court can contribute to end impunity if it covers only a certain period within the continuing conflict.

The Special Court for Sierra Leone has jurisdiction over crimes under Sierra Leone law and international humanitarian law.[379]

A case which dealt with the non-retroactivity principle was that of the *Prosecutor v. Norman.*[380] In this case, the defendant claimed that the Court would not have jurisdiction over the case since the crime of recruitment of child soldiers was not considered as crime under the customary international law (Article 4(c) of the Statute). The defendant also

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373 United States Bureau of Citizenship and Immigration Services, *Sierra Leone: Background information on the Republic of Sierra Leone Military Force (RSLMF) and the conflict in Sierra Leone in general*, 22 December 1999, SLE00001.HKC, available at: <http://www.unhcr.org/refworld/docid/3dee45d14.html> [accessed 7 June 2010]

374 Human Rights Watch, *Justice in Motion: The Trial Phase of the Special Court for Sierra Leone*, 2 November 2005, A1714, available at:<http://www.unhcr.org/refworld/docid/45d45b222.html> [accessed 7 June 2010]

375 International Crisis Group (ICG), *Sierra Leone's Truth and Reconciliation Commission: A Fresh Start?*, 20 December 2002, available at: http://www.unhcr.org/refworld/docid/3efde4504.html [accessed 7 June 2010], p.1

376 UNSC, Res.1315, 14 August 2000.

377 Schabas, William A. *The UN International Criminal Tribunals- the former Yugoslavia, Rwanda and Sierra Leone* (2006) p.135.

378 Linton, Suzannah, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice' (2001) 12, *Criminal Law Forum* pp.185-246, p.238.

379 Special Court for Sierra Leone art.5.

380 SCSL, *Prosecutor v. Norman* - Decision on Preliminary Motion Based on Lack of Jurisdiction, 31 May 2004 *(Child Recruitment)*, Case No.2004-14-AR72(E)

mentioned the Geneva Conventions of 1977 and the Convention on the Rights of the Child of 1990 that established the obligation of States to refrain from recruiting child soldiers and the 1998 Rome Statute of the International Criminal Court which criminalizes child recruitment. However, according to the defendant's argument these two instruments do not codify customary international law.

The prosecution rebutted claiming that child recruitment was prohibited in customary international law at the time the acts occurred. The Geneva Conventions set forth the protection of children, making the practice illegal under their domestic law and the subsequent international conventions addressing child recruitment demonstrated the existence of this customary international law. The ICC Statute has also codified customary law. Furthermore, according to the prosecution, individual criminal responsibility can exist even in the case of lack of treaty provisions. The act considered as abhorrent should not suffer a strict application of the principle *nullum crimen sine lege*. The point that should be examined is whether there was foreseeable and accessible possibility of the perpetrator knowing his conduct could be considered as criminal.

The intervener considered that there was not enough practice to consider that there was the crime of recruiting children soldier under international customary law, contrary to the opinion submitted by the University of Toronto International Human Rights law Clinic which concluded that the recruitment of child soldiers could be considered as a crime under the customary law since State practice provided evidence of this custom in that most of states with military forces prohibit child recruitment under 15. In addition, international resolutions and instruments expressing outrage at the practice of child recruitment since 1996 demonstrated acceptance of the prohibition as binding, the children's recruitment prohibition is set forth in the "Fundamental Guarantees" of Additional Protocol II and the judgments of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, which provides that there was the existence of the crime under international customary law. Finally, it was argued by the *Amicus curiae* that the principle of *nullum crimen sine lege* was meant to protect the innocent who has good faith and believes his acts are lawful, which was not the case of the defendant.

The Court referred to article 38(1) of the Statute of the International Court of Justice which establishes that among the sources of law there are the international conventions and international customs as evidence of a general practice accepted as law. Regarding the conventions, the Court examined the Fourth Geneva Convention of 1949, art.14 and 24, and 51, additional protocols I and II of 1977, Convention on the Rights of the Child of 1989, art.38 and 4 in order to establish that the State was bound by the Convention. Regarding the customary international law, the Court pointed out that the formation of custom requires State practice and the sense of a pre-existing obligation. The Court considered the fact that almost all States prohibit the recruitment of children under age of 15, and have done so for a long time. Treaties that protect children include the Geneva Conventions, ratified by 185 states and the Additional Protocol II ratified by 133 states. Therefore, the Court concluded that since there were a high number of ratifications it could be asserted that many of the rights established by the Protocol II could be interpreted as customary law by 1996.

Regarding the principle *of nullum crimen sine lege*, *nullum crimen sine poena*, the Court referred to the jurisprudence of the ICTY stating that is necessary that there were foreseeability and accessibility so that the conduct was punishable.

The Court referred to the *Prosecutor v. Tadic* case of the ICTY regarding to the requirements that must be met for an offence to be subject to prosecution before the International Tribunal under article 3 of the ICTY statute:

> (i) the violation must constitute an infringement of a rule of international humanitarian law;
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required
> conditions must be met;
> (iii) the violation must be "serious", that is to say, it must constitute a breach of a
> rule protecting important values, and the breach must involve grave consequences
> for the victim [...];
> (iv) the violation of the rule must entail, under customary or conventional law, the
> individual criminal responsibility of the person breaching the rule

The Court considered that all the requirements were fulfilled and that by 2001, and in most cases prior to the Rome Statute, 108 states explicitly prohibited child recruitment, one example dating as far back as 1902, and emphasizing the fact that regarding the fact that before 1996 there were different approaches taken by States to the issue of punishment of child recruitment and quoting professor Cassese which stated that:

> it is common knowledge that in many States, particularly in those of civil law tradition, it is considered necessary to lay down in law a tariff relating to sentences for each crime [...] 'This principle is not applicable at the international level, where these tariffs do not exist. Indeed States have not yet agreed upon a scale of penalties, due to widely differing views about the gravity of the various crimes, the seriousness of guilt for each criminal offence and the consequent harshness of punishment. It follows that courts enjoy much greater judicial discretion in punishing persons found guilty of international crimes.

Justice Robertson presented his dissenting opinion to the case, claiming that the court's decision was creating punishment without law. According to him, the principle of legality: "especially in relation to conduct which is abhorrent or grotesque, but which parliament has not thought to legislate against". According to him, the temptation that judges suffer for criminalizing conducts which they regard as immoral or anti-social, but according to him,

> [i]t is precisely when the acts are abhorrent and deeply shocking that the principle of legality must be most stringently applied, to ensure that a defendant is not convicted out of disgust rather than evidence, or of a non-existent crime.

In other developments, the special court has also recognized forced marriage as a crime against humanity.[381] However, it did not raise issues on the legality principle since it was considered as crime against humanity falling in the 'other inhumane acts' category. The U.N. Special Rappourteur on the Elimination of Violence against Women, Radhika Coomaraswamy estimated that 72% of Sierra Leonean women and girls suffered human rights violations and 50% of them were victims of sexual violence.[382] Yet, sexual violence had been an invisible crime[383] in the mass atrocities and the Sierra Leonean court decision had helped to change this approach. The Special Court's statute enlists "rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence" when committed as part of a widespread or systematic attack against civilians. (arts.2, 3)

Forced marriage is prohibited by human rights instruments, such as article 16 of the UDHR and article 23(3) of the International Covenant on Civil and Political Rights (which) sets forth that 'no marriage shall be entered into without the free and full consent of the intending spouses'. The Convention on the elimination of all forms of discrimination against women (CEDAW) article 16[384] also provides a rule prohibiting forced marriage.

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[381] SCSL, Kamara and Kanu, Appeal, 22 February 2008. (Case No.2004-16-A, App.Ch.)

[382] Nowrojee, Binaifer, 'Making the invisible war crime visible: post-conflict justice for Sierra Leone's rape victims'(2005) 18 *Harvard Human Rights Journal*, p.86.

[383] Nowrojee, Binaifer, 'Making the invisible war crime visible: post-conflict justice for Sierra Leone's rape victims'(2005) 18 *Harvard Human Rights Journal* p.90.

[384] 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

a. the same right to enter into marriage;

b. the same right freely to choose a spouse and to enter into marriage only with their free and full consent;

c. the same rights and responsibilities during marriage and at its dissolution;

d. the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

e. the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

f. the same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

g. the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

h. the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

The crime of forced marriage as a crime against humanity, therefore did not raise issues of violation of the *nullum crimen sine lege*.

6.2.4 The Rwandan Case

The genocide which occurred in Rwanda after 6 April 1994 was a source of human suffering and slaughter and had as a target mainly Tutsi civilians and Hutus who were considered as sympathetic to the Tutsi-led Rwandan Patriotic Front (RPF). The outburst of the conflict started when on 6 April 1994 President Habyarimana was assassinated in a plane crash. After that, during the first 72 hours after the death of the President organized killings by the Rwandan military took place.[385] From April to July 1994, approximately one million Tutsi and moderate Hutu, or up to one-eighth of the Rwandan population, were killed.[386] Different jurisdictions examined cases relating to the Rwandan genocide. The International Criminal Tribunal for Rwanda (ICTR), national tribunals in Rwanda and national tribunals abroad. Switzerland and Belgium also brought to their courts those accused of genocide. Moreover, as there were a high number of cases to be examined the Rwandan authorities also decided to establish the Gacaca Courts which also had to deal with the issue of non-retroactivity.

6.2.4.1. ICTR (International Criminal Tribunal for Rwanda)

In the Statute of Rwanda, article 7, it is provided that "the temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994".[387] The statute of the ad hoc tribunal for Rwanda established that prison terms should occur according to the national practice where the crimes occurred. However, Rwanda did not have particular legislation to deal with international crimes falling within the subject matter jurisdiction of the Tribunal. Although the country had ratified the Geneva Conventions, the 1977 Protocols and the Genocide Convention there was not law which would implement those treaties domestically.[388] The background of the conflict lays on the disparity of power due to the

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[385] ICTR, *The Prosecutor v. Bagosora,* judgement and sentence, 18 December 2008 (Case No.98-41-T), pp.11-13.

[386] Thelle, Ellen Hvidt, 'The Gacaca Jurisdictions: a solution to the challenge of Rwandan juridical settlement? in Ulrich, George and Boserup, Louise K. (eds) *Human Rights in Development- Reparations : Redressing Past Wrongs* (2003), pp.73-108,p.75.

[387] Schabas, William A, *The UN International Criminal Tribunals- the former Yugoslavia, Rwanda and Sierra Leone* (2006) p. 134.

[388] Schabas, William A, 'Perverse effects of the nulla poena principle: national practice and the Ad hoc tribunals' (2000) 11 European Journal of International Law , pp. 526-527.

fact that institutions of government were essentially in the hands of the Tutsi minority. Furthermore, other factors such as control of natural resources, overpopulation and land shortage also boosted animosity among the Hutu population.[389]

Decisions regarding *nullum crimen sine* principle dealt with new categories of crime. Akayesu[390] was pioneer decision on trying and convicting an individual for genocide and international crimes of sexual violence. The defendant, who was a bourgmestre,[391] was a leader of the Taba commune and from 7 April to the end of June 1994 he ordered and boosted the killing of the Tutsi population.[392] He was found guilty of genocide for the beatings, killings and rapes of Tutsis in some instances. Akayesu was convicted of crimes against humanity and genocide for aiding, abetting, ordering, or encouraging more than two dozen rapes and other sexual assaults at the bureau communal where he could have prevented them. In this case, the Chamber understood that rape and sexual violence constituted genocide with the intention of destroying, in whole or in part a particular group targeted as such. The Court also stated that sexual violence would actually constitute one of the worst ways of physical and psychological destruction of Tutsi women and their families and communities

In fact, the charge of rape was not initially presented by the prosecutor. After witnesses related the sexual violence Judge Pillay and human rights groups pressured the panel to amend the initial indictment.[393] The Court also held that rape which was also charged as a crime against humanity was "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[394]

In *Prosecutor v. Karemera*, the defendants claimed that the ICTR did not have jurisdiction to prosecute persons for committing crime through joint criminal enterprise

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[389] Huttenbach, Henry R,'More than Genocide: Rwanda revisited (before and after 1994)' in Frey, Robert S.(ed) *The genocidal temptation: Auschwitz, Hiroshima, Rwanda, and Beyond* (2004)pp.57-66,, p.59

[390]ICTR, *Prosecutor v. Akayesu*. Judgement 2 September 1998 (Case No.-96-4,Ch)

[391]Ibid. para.59.

"bourgmestre was the representative of the central government in the commune but embodied at the same time the commune as a semi-autonomous unit. In that capacity, he would, for example, arrange contracts or represent the commune in court. He also had the authority to allocate the resources of the commune, including the land. He had the sole responsibility and authority over the communal police and could call upon the national gendarmerie to restore order. In addition, he was a judicial officer. Moreover, as the trusted representative of the President, he had a series of unofficial powers and duties, to such an extent that he was the central person in the daily life of the ordinary people. Citizens needed his protection in order to function in society. The bourgmestre held considerable sway over the communal council. Although an elected body, the council was less a representative body of the interest of the population than it was simply a channel for passing orders down to the people"

[392] para.26

[393] Amann, Diane Marie, '*Prosecutor v. Akayesu*, Case ICTR-96-4-T' International Criminal Tribunal for Rwanda, international decisions in the *American Journal of International Law*, January 1991, p.2.

[394] para.688

during an internal conflict.[395] The defence submitted that the Tribunal could prosecute individuals only where:
(1) the form was provided for in the Statute, explicitly or implicitly;
(2) the form existed under customary international law at the relevant time;
(3) the law providing for that form of liability was sufficiently accessible at the relevant time; and
(4) the defendant would have been able to foresee that he could be held criminally liable for his actions if apprehended.[396]

The defence has argued that the liability for joint criminal enterprise was not customary international law and the extended application would be a violation of the principle of *nullum crimen sine lege.*

The Prosecutor has pointed out that the concept of joint criminal enterprise is embodied in the wording of Article 6(1) of the Statute and that the extended form of joint criminal enterprise is recognized as a form of liability under customary international law for crimes committed in internal armed conflicts. Furthermore, the domestic law of Rwanda provided a functional equivalent. Thus, the liability of joint criminal enterprise would not violate the principle of *nullum crimen sine lege.*[397]

The Trial Chamber decided that Joint Criminal Enterprise liability was one of the forms of criminal responsibility under article 6(1) of the Statute and that this provision was applicable to international or internal armed conflicts.[398]The Chamber examined the requirements of the principle of legality, i.e., the existence of the law when the crime was committed and the possibility of the defendants to foresee it. The Chamber then concluded that join criminal enterprise was applicable to internal armed conflict under customary international law and referred to the judgement of ICTY Celebici case which stated that the of principle *nullum crimen sine lege*:

> whereas the criminalization process in a national criminal justice system depends upon legislation which dictates the time when the conduct is prohibited and the content of such prohibition, the international criminal justice system attains the same objective through treaties or conventions, or after a customary practice of the unilateral enforcement of a prohibition by States. It could be postulated, therefore, that the principle of legality in international criminal law are different from their related national legal systems with respect to their applications and standards. They appear to be distinctive, in the obvious objective of maintaining balance between the

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[395]ICTR, *Prosecutor v. Karemera*, Decision on Defense's Preliminary Motions Challenging Jurisdiction: Joint Criminal Enterprise, 18 May 2006 (Case No.98-44-T, Tr.Ch.) para.3.
[396]Ibid para.2
[397]Ibid. paras.8-9.
[398]ICTR *Prosecutor v. Karemera*, para. 33

preservation of justice and fairness towards the accused and taking into account the preservation of world order.[399]

6.2.4.2. Gacaca Courts

After experiencing the various problems of bringing many cases to the ordinary justice system the Rwandan authorities decided to establish the Gacaca courts in order to be able to examine the numerous cases related to the genocide. Originally, the Gacaca courts were a traditional system of conflict resolution in Rwanda. It was not a permanent institution. Another conflict resolution system was the Mwami in which the king would try the serious criminal matters, for instance murder or serious thefts while the Gacaca courts would deal with civil matters, such as family disputes, dowry issues or violations of social obligations.[400] The Gacaca based its decisions on socially accepted norms and not State laws. The essence of the Gacaca was to find a solution to the conflict that would restore social order between the opposite parties and within the community.[401]

The law applied in the Gacaca courts also arose issues of non-retroactivity since the national laws did not introduce to the national legislation the Convention on the Prevention and Punishment of the Crime of Genocide, ratified by Rwanda in 1975 and there was no repression of genocide or crimes against humanity. The Rwandan legislative power enacted Organic law no. 08/96 of 30 August, 1996 order to prosecute the offences that were characterized as genocide and crimes against humanity committed since 1 October 1990. However, the implementation of the law occurred in a slow pace and since the number of perpetrators was extremely high it was understood that it would take decades to try all the defendants.[402]

The establishment of the Gacaca courts is set forth in the Organic Law no.40/2000 of 26 January 2001 and established that the crimes occurred between 1 October 1990 and 31 December 1994. The implementation of the law faced many problems and it was replaced by Organic Law no.16/2004 of 19 June 2004 which set forth the competence, organization and functioning of the court.[403]

Gacaca courts have competence over crimes of category two.. Category one crimes include rapists, but exclude persons who abuse their authority at the sectoral and cell

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[399] Ibid. para.42

[400] Thelle, Ellen Hvidt, 'The Gacaca Jurisdictions: a solution to the challenge of Rwandan juridical settlement? in Ulrich, George and Boserup, Louise K. (eds) *Human Rights in Development- Reparations : Redressing Past Wrongs* (2003), pp.73-108, p.83

[401] Ibid p.83

[402] Fierens, Jacques, 'Gacaca courts: between fantasy and reality'(2005)3-4, *Journal of International Criminal Justice*, p.3 accessed in Lexis Nexis

[403] Ibid, p.3.

levels. In category two are placed murderers and those who seriously wounded victims with the intention of killing them. Category three includes those who are responsible for serious criminal acts or were accomplices to serious attacks, without intending to kill their victims. Those who are included in category one have to be brought before the ordinary justice system in Rwanda since they risk to be convicted to life imprisonment and death penalty.[404]

The Organic law which established the Gacaca courts was enacted after the genocide that occurred in the country. So, was there a violation of the principle of non-retroactivity? As above mentioned the country had ratified the Genocide Convention before the 1994 events occurred, but it would not provide punishment for the crime. Rwanda had also ratified the Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity of 26 November 1968. However, the ratification of the Convention did not incorporate crimes against humanity in the domestic law.

Organic law no.08/96 of 30 August 1996 established that the conduct should be prohibited in the penal code of Rwanda and the Organic law, which would refer to international law. It was alleged that the 1977 penal code incriminated the equivalent conduct of genocide and crimes against humanity. Therefore, as the acts were already considered as crimes they would not incur in the tribunals applying a retroactive law. Fierens points out that this argument is clearly weak since the Code does not provide that same acts can be considered as crimes. Genocide and crimes against humanity have an exceptional gravity, and that is the reason they are specially created .[405]

Gacaca courts have strongly been criticized on the basis that these courts which are conducted by laypersons are unsuitable for these serious crimes and that they do not provide the due process guaranteed by the African Charter.[406]

6.2.5. Special Tribunal for Lebanon

The origin of the present tribunal lies on popular protests that made the Lebanese government request the UN to establish the court to bring to the Tribunal those who were suspects of the assassination of former Lebanese Prime Minister Rafiq Hariri.[407]

The United Nations Security Council established a Special Tribunal for Lebanon (STL) in 2007[408] in order. In article 6 of its Statute it provides that the Tribunal will have jurisdiction over crimes set forth in Lebanese law.

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[404] Thelle, above n 179, 85.

[405] Fierens, above n 78, para. 384

[406] Golash, Deirdre, 'The justification of punishment in the International context,'in Larry May and Zachary Hoskins (eds) *International Criminal law and philosophy* (2010), pp.201-223, p.207.

[407] Serra, Gianluca, 'Special Tribunal for Lebanon- a commentary on its major legal aspects'(2008)18-3, *International Criminal Justice Review*, pp.344-355, p.344

[408] UNSC, Res.1757, 30 May 2007.

The Resolution established a mixed Tribunal to prosecute the perpetrators of the terrorist explosion that killed former Lebanese Prime Minister Hariri and other connected attacks. However, it exercises jurisdiction only over domestic crimes.[409] The competence also applies on attacks committed in Lebanon between 1 October 2004 and 12 December 2005, and attacks committed at any later date if the Government of Lebanon, the United Nations and the Security Council agreed. The competence is going to be extended if such attacks are connected to the 14 February 2005 event and if the gravity or nature of the attack is similar to that of the 14 February 2005 attack. (article 1 of the Statute)

The elements of crimes against humanity include acts of murder, persecution, extermination or other inhumane acts when committed as part of widespread or systematic attack directed against any civilian population. The possibility of including crimes against humanity in the Statute was discussed, though since there was a lack of support for including the crime in the Charter it was not provided there. Jurdi points out that the inclusion of crimes against humanity in the Statute was unfortunate by virtue to the fact that it would solve to a certain extent the contentious issues such as the immunity of heads of state or senior officials. Furthermore, it would give the tribunal an extensive jurisprudence on crimes against humanity, not making them depend solely on the Lebanon's jurisprudence.[410]

6.2.6. International Criminal Court

The statute of the Court provides that it does not have jurisdiction over crimes which were committed before the entry into force of the statute. The Court may exercise jurisdiction only with respect to a crime committed after the statute has entered into force for the State in question, as can be read in article 11. However, the State can make a declaration accepting the retroactive jurisdiction of the Court. Therefore, the principle of non-retroactivity is not absolute, opening to the possibility of exceptions. Furthermore, the Statute in its article 21 (3) includes customary international human rights as one the sources of law.

> Article 11 Jurisdiction *ratione temporis*
>
> 1. The Court shall have jurisdiction only with respect to crimes committed after the entry into force of this Statute.
> 2. If a State becomes 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

[409] Jurdi, Nidal Nabil, 'The subject-matter jurisdiction of the Special Tribunal for Lebanon'(2007) 5-5, *Journal of International Criminal Justice*, pp.1125-1138,p.2
[410] *Ibid, p.2*

made a declaration under article 12, paragraph 3 (related to retroactive acceptance of jurisdiction by that State)

Part 3. General Principles of Criminal Law

Article 22 *Nullum crimen sine lege*
1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted, or convicted.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 23 *Nulla poena sine lege*
A person convicted by the Court may be punished only in accordance with this Statute.

Article 24 Non- retroactivity *ratione personae*
1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of this Statute.
2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

The Statute addresses the issues of specificity which is lacking in international criminal law. It defines "international crimes", such as genocide (article 6); crimes against humanity (article 7) and war crimes (article 8). Regarding the crime of aggression, it is provided that it will eventually fall under the jurisdiction of the Court after a provision for it is adopted (article 5(2)).

One of the cases in which the defense alleged that the legality was violated was in the Dyilo case.[411] Dyilo was a national of the Democratic Republic of Congo (DRC) and served as a commander-in-chief of its armed military wing, the *Forces patriotiques pour la liberation du Congo* (FLPC). The defendant has claimed that according to the principle of legality, which is provided by article 22(1) of the Rome Statute, a person shall not be criminally responsible under the Statute unless the conduct constitutes a crime within the jurisdiction of the Court at the time it takes place and that Dyilo would not have been aware that his conduct was a crime since neither Uganda nor the DRC had ratified the Rome Statute and due to the fact that the crime of conscription or enlistment of child soldiers is not provided in the Additional Protocol I or II to the Geneva Conventions or in the Convention on the Rights of the Child the conduct, and hence could not be predicted

[411] ICC, *Prosecutor v. Thomas Lubanga Dyilo*, PreTrial Chamber I.

as criminal by the defendant. According to the defense, the Chamber had an obligation to verify if the defendant had known at the time he committed the acts that they were criminal.

The Chamber rejected the argument stating that when a norm had been approved by the States party to the Rome Statute, and defined and codified in that Statute, there could be no violation of the principle of legality. Moreover, it claimed that in fact the defense was not invoking a legality defense, but a mistake of law under article 32 (1) of the Rome Statute. That article provides that a mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court may be a ground for excluding criminal responsibility only if it negates the mental state required by such a crime. In response to this claim, the Chamber rejected the possibility pointing out that the Rome Statute Article 32(2) states that "(a) mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility".[412]

6.2.7. The Iraqi Special Tribunal

The Iraqi Special Tribunal was set up according to statute no. (1) of December 10, 2003 enacted by the Iraqi Governing Council during the occupation of Iraq by U.S and Great Britain. Its temporal jurisdiction covers events from July 17, 1968, which is the date that the *coup d'état* established the Ba'ath party regime in Iraq, to May 1, 2003 when former president Bush made the major hostilities' declaration.[413] The establishment of the Tribunal raised opposition from many countries and international organizations since it was one of consequences of an invasion that they claimed to be unlawful.[414] In addition, the Tribunal would apply the death penalty, which goes contrary to the development of human rights instruments. It was created to try any Iraqi nationals for war crimes, crimes against humanity, genocide or specified crimes.[415]

The problem of retroactivity relies on the fact that many of the crimes provided in the Iraqi Special Tribunal for Crimes against humanity Statute were consolidated at international level in the 1990s after the jurisprudence of ICTY, ITR and the ICC developed. Nevertheless, the IST statute does not address the issue of retroactivity. Shany

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[412] relying on Jason Morgan Foster, CC Confirms Charges against DRC Militia Leader, March 9, 2007, Vol.11, issue 6 access on http://www.asil.org/insights070309.cfm

[413] Shany, Yuval, 'Does one size fit all ?- Reading the Jurisdictional Provisions of the new Iraqi Special Tribunal Statute in the Light of the Statutes of International Criminal Tribunals' (2004)2-2 *Journal of International Criminal Justice*, pp.338-346,p.2

[414] Scharf, Michael P. Scharf, 'Saddan Hussein on Trial : What Went Awry ? The Iraqi High Tribunal- A Viable Experiment in International Justice' (2007)5-2, *Journal of International Criminal Justice*, pp.258-263,p.2

[415] Ralby, Ian M. Joint criminal enterprise in the Iraqi High Tribunal in *Boston University International Law Journal*, vol.28:281, pp. 282-340. p. 310

argues that the Tribunal could have some leeway applying article 17(c) which provides the interpretation of defences against criminal responsibility in the light of international obligations or through general principles of Iraqi criminal law.[416]

Zolo has also pointed out that the Statute of the Tribunal had many anomalies and violated many principles which were essential to the rule of law. Article 24[417] of the Statute provides that judges of the trial chambers could fix the punishment on their own in which they would take into account the seriousness of the crime, individual characteristics of the accused and international case law when crimes set forth in articles 11, 12, and 13 of the Statute had no counterpart in the Iraqi penal code.

Therefore, according to Zolo the principle which prohibits retroactive penal law contemplating the crime of genocide, crimes against humanity and war crimes cover criminal offences not present in Iraqi criminal law.[418]

Allegations of the violation of the principle of non-retroactivity were brought in during the Dujail Trial.[419] The trial examined the facts that took place in 1982 in which the defendants, including the former president of Iraq, Saddam Hussein were accused of attacking the inhabitants of Dujail by helicopter gunships, destroying the town's farmland, water supply and arresting and torturing 300 residents, where around one-third of them died. Furthermore, they were also accused of interning families at a remote desert camp for four years.[420]

The defense alleged that the Tribunal's Law of 2003 and that of 2006 which implements provisions that criminalize and establish punishment for ethnic cleansing crimes, crimes against humanity and war crimes violated the principle of non-retroactivity due to the fact the law was set forth after the 1982 events.

Nevertheless, the objection was rejected since the Tribunal ruled that the criminalization of these acts was established before the enactment of the Tribunal's Law in 2003. According to the Tribunal, these prohibitions already existed in international customary law and by international treaties which were acceded by Iraq. In addition, Baghdad Penal

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[416]Shany, Yuval, 'Does one size fit all ?- Reading the Jurisdictional Provisions of the new Iraqi Special Tribunal Statute in the Light of the Statutes of International Criminal Tribunals' (2004)2-2 *Journal of International Criminal Justice*, pp.338-346 , p.4

[417] article 24, para. e, "the penalty for any crimes under arts. 11 to 13 which do not have a counterpart under Iraqi law shall be determined by the Trial Chambers taking into account such factors as the gravity of the crime, the individual circumstances of the convicted person and relevant international precedents'.

[418]Zolo, Danilo, 'The Iraqi Special Tribunal- back to the Nuremberg Paradigm? Editorial comments on the Iraqi Court for war crimes' (2004) 2, *Journal of International Criminal Justice*, pp.313-318, p.315.

[419]Iraqi High Tribunal, Judgement of the Dujial Trial, 3 November 2006 (Case no. 1/9 First/2005) available at <www.hrw.org/pub/2007/ij/dujail_judgement_web.pdf>

[420] Scharf, Michael P. and Newton, Michael A. The Iraqi High Tribunal's Dujail Trial Opinion, Asil insights, December 18, 2006, Volume 10, Issue 34, available at <http://www.asil.org/insights061218.cfm#author>

Code, the Penal Code No.111 of 1969, the Military Penal Code No.13 of 1940 was also criminalizing the conduct committed by the defendants. Therefore, the legislation enacted in 2003 and 2005 merely had transferred those crimes from the international arena to national legislation.[421] The Tribunal concluded that the criminal acts were committed when the international law already provided the criminal character for the conduct.[422]

The Trial was remarkably criticized for inaccurately applying the concept of joint criminal enterprise. Bhuta points out that the Iraqi High Tribunal inappropriately applied "concentration camp" joint criminal enterprise, type 2, to facts that would not cause this kind of liability. This type of JCE is the one applied to create criminal liability to crimes that took place in concentration camps, but the Tribunal applied this type of criminality for criminalizing membership in the Ba'ath party and the leadership of Iraqi government. However, the membership *per se* did not constitute crimes under international or Iraqi law at the time of the Al Dujail incident. In this point, it is argued that the principle of *nullum crimen sine lege* was violated.[423] Applying mistakenly the joint criminal enterprise type 2 *per se* does not incur in violation of the principle of the *nullum crimen sine lege*. Nevertheless, in applying wrongly the category two of JCE, the Tribunal in fact would criminalize membership in the Ba'ath party membership at the time that such membership was not considered criminal under international law. Therefore, the tribunal held the defendants accountable for the basis of organization liability that did not exist by the time the acts were committed. In this way, it would cause a violation of the principle of *nullum crimen sine lege*, according to Ralby.[424]

6.2.8. African Court of Human and People's Rights

The first case brought to the African court was filed by Michelot Yogogombaye[425] who requested the Court to suspend ongoing proceedings initiated by Senegal against former Chadian dictator Hissene Habre, who has lived in exile since being deposed in 1990.

The petition claimed that the case against Habre was politically motivated referring to the 2008 amendment of the Constitution by Senegal that permits retroactive application of the Senegalese criminal law, after international community's pressure to prosecute Habre.

In fact, seven alleged victims of torture during the government of Hissene Habre brought the case in January 2000 before the Dean of investigating magistrates of the Dakar

[421]Iraqi High Tribunal, Judgement of the Dujial Trial, 3 November 2006 (Case no. 1/9 First/2005) , p.42

[422] Judgement of the Dujial Trial, 3 November 2006 (Case no. 1/9 First/2005) p.44.

[423] Ralby, Ian M., 'Joint criminal enterprise in the Iraqi High Tribunal' (2010)28-281 *Boston University International Law Journal,* pp. 282-340. p.336.

[424] Ibid, pp.335-336.

[425]African Court on Human and Peoples' Rights, *Michelot Yogogombaye v. Republic of Senegal*, , 15 December 2009, available at: http://www.unhcr.org/refworld/docid/4bab8bd02.html [accessed 21 July 2010]

regional Tribunal.[426] The ex-dictator was indicted for torture and crimes against humanity, however the Appeal Court of Dakar quashed the indictment since crimes against humanity were not set forth in the criminal law of Senegal, acts of torture when committed abroad by a non-national of Senegal were not prosecutable in the country and the Supreme Court had also rejected the appeal of the victims.[427] After this case, Senegal made amendments on the Penal Code and in the Constitution to make possible the prosecution of Hissene Habre. It was a change with a determined objective to trial Habre.

Yogogombaye argued that the amendments on the Senegalese constitution that would make possible the application of retroactive law in order to indict the ex-president was a violation of article 7(2) of the African Charter on Human and People's rights.[428]

Senegal amended its domestic penal code in a law which was enacted in January 2007, including articles criminalizing genocide, crimes against humanity and war crimes on which the ICC (of which the country is part of) exercises jurisdiction.[429] If the penal code was applied to the crimes committed by Habre it would have a retroactive effect due to the fact the crimes committed by the ex-dictator took place from 1982-1990. Therefore, it provided an exception to the non- retroactivity principle, as acts recognized as criminal under the general principles of law, recognized by all nations were punishable. After this amendment of the Penal Code another amendment on the Constitution was made since it provided the principle of non-retroactivity in article 9. A paraphrase of the International Covenant on Civil and Political Rights was added, stating that "nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to international law pertaining to genocide, crimes against humanity, and war crimes". [430]

Senegal claimed that for the Court to deal with applications brought by individuals the respondent State should have recognized the Court's jurisdiction to accept this type of applications. The Court considered that since the State had not made any declaration accepting the jurisdiction set forth on article 34(6) of the Protocol establishing the Court to deal with the applications made by individuals it would not have jurisdiction to examine an application that was considered inadmissible.[431]

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[426] Niang, Mandiaye, The Senegalese legal framework for the prosecution of international crimes. In *Journal of InternationalCriminalJustice* 7(2009), pp.1047-1062, p.1047

[427] Ibid. p.1048.

[428] Michelot Yogogombaye *v. Republic of Senegal*, African Court on Human and Peoples' Rights, 15 December 2009, available at: <http://www.unhcr.org/refworld/docid/4bab8bd02.html> [accessed 21 July 2010], para.20

[429] Niang, Mandiaye. The Senegalese legal framework for the prosecution of international crimes. In *Journal of InternationalCriminalJustice 7(*2009), pp.1047-1062, p.1048-1049

[430]Ibid., p.1054.

[431] Michelot Yogogombaye *v. Republic of Senegal*, African Court on Human and Peoples' Rights, 15 December 2009, available at: <http://www.unhcr.org/refworld/docid/4bab8bd02.html> [accessed 21 July 2010], para 25.

6.3. Cases of violations of the principle of *nullum crimen sine lege* in domestic courts

The application of retroactive laws for crimes against humanity was also discussed thoroughly in several countries, in general, relating to crimes which took place in old regimes and situations of war.

The Barbie trial which took place in France raised questions relating to retroactivity in the French Courts. Barbie was the head of Gestapo in Lyons and he had among his tasks the suppression of the French resistance, communist and Jews. Historians estimated that more than 4,000 people were executed on his orders during the last two years of Occupation. Furthermore, he was called as the "Butcher of Lyons", having the routine practice of torturing respected Resistance members and Jews.[432] Barbie was well known in France for two main acts. He was the one who murdered Jean Moulin, the greatest martyr of the French Resistance, who was tortured to death by him and the fact he sent forty-four children from a children's home in Izieux to death in camps.[433]

During the occupation, crimes against humanity were not a crime provided by the French law. France joined the London Agreement which would confer retroactive jurisdiction upon the Nuremberg Tribunal to prosecute "crimes against humanity" committed by agents of Axis powers. The Office of Public Prosecutions and affirmed by France's Highest court was that "incrimination of crimes against humanity is in accordance with the general principles of law recognized by the civilized nations...as such these crimes escape the principle of retroactivity." Therefore, it was argued that the London Agreement had not created liability for crimes against humanity, instead it recognized the liability that already existed in customary international law. United Nations Resolution 95(I) affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgement of the Tribunal." Since France signed the London Agreement it also accepted the principles of this law concept.[434]

Although the French Constitution prohibits retroactive punishment in its preamble[435] that adopts the Declaration of the Rights of Man and provides the prohibition of retroactive

[432]Binder, Guyora. 'Representing Nazism: advocacy and identity at the trial of Klaus Barbie' (1989) 98 *Yale Law Journal*, pp.1321-1383,p.3

[433] Kaplan, Alice Y. On Alain Finkiekkratut's Remembering in Vain: The Klaus Barbie Trial and Crimes against Humanity (1992) 19, Critical Inquiry, pp.70-86,p.79.

[434] Bindner,above n.204, 6.

[435]"The French people hereby solemnly proclaim their dedication to the Rights of Man and the principle of national sovereignty as defined by the Declaration of 1789, reaffirmed and complemented by the Preamble to the 1946 Constitution..."

laws in art.8[436] the French Highest Court has also applied a 1964 law that established that crimes against humanity were by its nature imprescriptible.[437]

In *R v. Finta*, the Supreme Court of Canada had to examine whether amendments of the penal code made in 1987 on crimes against humanity and war crimes that took place outside Canada could be brought to facts and events which occurred fifty years before the amendments were made. The defendant was a captain in the Royal Hungarian Gendarmerie when 8,617 Jewish persons were detained in the brickyard and deported under dreadful conditions to concentration camps organized by the Nazi regime.[438]

The Supreme Court had to decide whether the amended sections of the penal code were violating the constitutional rule of non-retroactivity. The Canadian Court understood that the amended sections were creating two new crimes in Canada, i.e. crimes against humanity and war crimes. The Court, referring to Kelsen's article "Will the judgement in the Nuremberg Trial constitute a precedent in international law?", established that actually even whether the law was enacted after the facts took place there was no violation of the principle of non- retroactivity. Kelsen states that,

> [a] retroactive law providing individual punishment for acts which were illegal through not criminal at the time they were committed, seems also to be an exception to the rule against *ex post facto* laws.[439]

Furthermore, the Court pointed out that even if the average citizen is not expected to know details of the law of crimes against humanity it is likely the defendant knew the acts were inherently wrong and that they could not be tolerated, as the acts were so repulsive that it would not be possible to claim that he did not have fair notice of that.[440]

Adolfo Scilingo was a former navy captain in Argentina and was accused of being involved in deaths during Argentina's military rule from 1976 to 1983 in which people who were considered to be subversive to the government were thrown out of airplanes. In addition he was also allegedly involved in forced disappearances, kidnappings, torture

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[436] "*Article 8*--The Law must prescribe only the punishments that are strictly and evidently necessary; and no one may be punished except by virtue of a Law drawn up and promulgated before the offense is committed, and legally applied."

[437] Bindner, Guyora, 'Representing Nazism: Advocacy and Identity at the trial of Klaus Barbie', 98 *Yale Law Journal.*1321(1989), p.6.

[438] Supreme Court of Canada, *R. v. Finta* [1994]1S.C.R.701 March 24, 1994, available at http://csc.lexum.umontreal.ca/en/1994/1994scr1-701/1994scr1-701.html

[439] Kelsen, Hans, 'Will the judgement in the Nuremberg Trial constitute a precedent in international law?' (1947) 153, *International Law Quarterly*, p.165

[440] Supreme Court of Canada, *R. v. Finta* [1994]1S.C.R.701 March 24, 1994, available at http://csc.lexum.umontreal.ca/en/1994/1994scr1-701/1994scr1-701.html

and other crimes.[441] Scilingo was arrested in Spain in 1997, and his case was taken before Spain's Audiencia National, a national court of first instance with special jurisdiction over international crimes, has discussed the existence of the crimes against humanity in Spain at the time the conduct occurred.

In spite of the fact that he was charged with terrorism, torture and genocide (three crimes that existed in the Spanish Penal Code and were subject to universal jurisdiction), the Audiencia convicted him for crimes against humanity, which was implemented in domestic law in 2004 after the crimes occurred.[442]

The conviction by the judgement of Audiencia Nacional 16/2005 which dated 19 April 2005 constituted the first conviction for crimes against humanity. The main problem was that the decision did not respect the *nullum crimen sine lege* principle and ignored Spanish constitutional provisions as well. Article 25 of the Spanish Constitution provides that "nobody may be sentenced or fined for actions or omissions that at the time of occurrence were not a crime, misdemeanor or administrative offence pursuant to valid legislation in effect at that time (...)

Article 9.3 of the Spanish Constitution states:

> the Constitution guarantees the principle of legality, the hierarchy of regulations, the public nature of rules, the non-retroactivity of non-favourable or restrictive sanctioning dispositions of individual rights, the certainty of law, the responsibility of public authorities' arbitrariness.

Moreover, the Spanish Penal Code also provides the principle of non- retroactivity in article 2 stating that:

> 1. a crime or misdemeanor shall not be punished with a penalty not included in the Law prior to the perpetration thereof. Laws establishing safety measures shall likewise not be of a retroactive nature.
>
> 2. Notwithstanding the above, Laws favorable to the accused shall be retroactive, even if at the time they come into force there is a final judgement beyond appeal and the subject is serving the sentence ...[443]

The Spanish legal system, therefore, has a strict principle of legality and precludes criminal tribunals from directly applying customary international law. Thus, it is not possible to rely upon pre-existing international customary law to justify the retroactive

[441] American society of international law, international law in brief available at <http://www.asil.org/ilib050426.cfm#_top>

[442] Gil, Alicia, 'The flaws of the Scilingo judgement' (2005) 3-5, *Journal of International Criminal Justice*, pp.1082-1091,p.2.

[443]Ibid, p.3

use of a legislative provision. Therefore, the customary law as applied in international criminal tribunals could not be applied in Spanish Courts.[444]

Although the defence has claimed that the prosecution was *ex post facto* reasoning that crimes against humanity were prohibited by customary international law, the Court decided that customary international law had *a jus cogens* and *erga omnes* nature of the customary international law and that could be directly applicable in the Spanish domestic system.[445] Gil points out that the Audiencia Nacional ignored the fact that no sanction was provided by domestic courts for crimes against humanity and this fact proves the lack of self-executing character of the norm. By overlooking this point, the Court had violated two principles. The first was the requirement of specificity, which derives from *nullum crimen* principle, typical of the Spanish legal system in which customary international law cannot be applied and the second was the requirement of *nulla poena* principle.[446] The Audiencia Nacional argued that the *nullum crimen* principle should be relaxed in international law as the rules expressed in customary law and general principles of law were sufficient. The Audiencia Nacional admitted that customary rules of international criminal law did not meet the requirements of certainty and specificity that are normally called for in domestic legal systems. The Court, nevertheless, argued that the importance of international law should be applied *nullum crimen sine iure* instead of *nullum crimen sine lege*. [447]Nevertheless, Gil considered that these arguments could not be accepted in a State which recognized the rule of law and the relaxation of the principles should be valid only for formal aspects and not substantive contents.[448]

On the other hand, Pinzauti argues that if it is taken into consideration the fact Spain ratified the European Convention on Human Rights and the Covenant for Civil and Political Rights the application of the customary international law would be possible since article 7 of the European Convention, which is similar to Article 15 of the Covenant on Civil and Political Rights, sets forth that an offence may be punished by courts if at the time of the Commission it was criminalized in either national or international law. Therefore, it would be sufficient for a conduct to be regarded as criminal under international law. She notes, however, that the application would be problematic when there is no equivalent in domestic law when it comes to applying punishment to the related crimes. She suggests that it could be applied in addition to the customary rules for penalty legally contemplated at the national level for the underlying offence such as rape and murder when there is a broader view of the notion of *nulla poena*. However, if the domestic legal system only accepts the strict notion of *nulla poena* the international law

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[444] Ibid.

[445] Schaak, Beth van, 'Crimen sine lege: judicial lawmaking at the intersection of law and morals' (2008)97 *Georgetown Law Journal*, pp.119-192,p.164.

[446] Gil, Alicia, 'The flaws of the Scilingo judgement' (2005) 3-5, *Journal of International Criminal Justice*, pp.1082-1091, p.4

[447] Pinzauti, Giulia, 'An instance of reasonable universality- the Scilingo case' (2005)3-5, *Journal of international criminal justice*, pp.1092-1105, p.4.

[448] Gil, Alicia, 'The flaws of the Scilingo judgement' (2005) 3-5, *Journal of International Criminal Justice*, pp.1082-1091, p.4.

remains inapplicable.[449] Pinzauti then relies on judgements of the European Court of Human Rights, who in the Cantoni[450] case held that the notion that the law established by article 7 of the European Convention also relies on customary law. In addition, when the Court assessed the foreseeability and accessibility in situations where the offence was not in statutory law such as in the case of *C.R v. UK.*[451] Therefore, since in the case of Scilingo the criminality of his conduct was foreseeable and predictable his acts (murder, torture and illegal detention) would be criminally liable.[452] Eventually, she concludes that the Spanish courts should take into account that the Spanish Constitution intend to bring to the national legal system the fundamental values of the international community and therefore national principles could be made to be "somewhat flexible" in order to take into account the values related to human rights. Furthermore, it also should be noted that the need for adaptation would be necessary to end the impunity for the most serious crimes since the crimes committed by Scilingo are reprehensible in the domestic legislation of most countries in the world.[453]

However, the Tribunal Supremo maintained the Audiencia Nacional decision, but rebutted the reasoning, stating that in spite of the fact the defendant committed crimes against humanity as they are defined in international law, customary international law was not directly applicable within the Spanish system and could not create a complete criminal offence prosecutable in Spanish Courts. The Tribunal Supremo decided to convict the criminals for murder and illegal detention instead. Therefore, the Tribunal Supremo sentenced Scilingo based upon the Spanish penal code. [454] The Tribunal Supremo did not apply the dualist approach in which the international customary rules are incorporated into the national legal system. It does not mean that the conduct of Scilingo was not condemnable in the time it took place, but the Tribunal Supremo chose to apply the strict legality in that case.

The Argentinean Federal Tribunal faced the non-retroactivity principle problem when it condemned General Luciano Benjamin Menendez and four of his subordinates for kidnapping, torture and murder of opposition party members. Menendez was convicted for unlawful deprivation of liberty, torture and aggravated murder. Nevertheless, since these crimes are subjected to statute of limitations, barring the action after 15 years of the commission of the acts, the tribunal grounded their decisions on international criminal law in order to overcome the temporal limitation.[455] They found that under international

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[449] Pinzauti, Giulia, 'An instance of reasonable universality- the Scilingo case' (2005)3-5, *Journal of international criminal justice*, pp.1092-1105, pp.4-5.

[450] ECHR, *Cantoni v. France*, 15 November 1996 (Appl.No.17862/91)

[451] ECtHR, *C.R. v. United Kingdom,* 22 November 1995 (Appl.No.20190/92)

[452] Pinzauti, Giulia, 'An instance of reasonable universality- the Scilingo case' (2005)3-5, *Journal of international criminal justice*, pp.1092-1105,p.5.

[453] Ibid.p.5.

[454] Gil, Alicia, 'The flaws of the Scilingo judgement' (2005) 3-5, *Journal of International Criminal Justice,* pp.1082-1091, p.4.

[455] Tafur, Gabriel Chavez, 'Using international law to by-pass domestic legal hurdles', (2008) 6-5, *Journal of International Criminal Justice*, pp.1061-1075, p.2

law those acts were crimes against humanity and by virtue of that they would not be subjected to the statute of limitations. In addition, the Tribunal claimed that crimes against humanity had a 'continuous nature' and would not fall under the statute of limitations. The Tribunal cited the Miras case in which the Supreme Court claimed that "an exception to statutes of limitations is found in crimes against humanity, as they are acts that societies as a whole continue to experience due to their magnitude and significance. Thus, the crime maintains its continuous character not only for national societies but also for the international community as a whole (...)". It is an innovation for the concept of continuous crimes that at the beginning would be more related to forced disappearances as we could see in the first part of the present thesis. What would be considered as continuous violation is the acceptance, mourning and closure of the process to coming to terms with the past.[456]

Furthermore, the Tribunal interpreted that international crimes are not subject to statutes of limitations because such limitations are prohibited by *jus cogens* rules, making it possible to apply the Convention on Statutory Limitations retroactively in spite of the fact that the Convention became binding on Argentina on its ratification in 2003. Nevertheless, the Courts held that the present convention was mandatory by article 53 of the 1969 Vienna Convention on the Law of Treaties which was incorporated into Argentinean domestic law in 1973. The judges argued that:

> if Argentina could not legally enter into international treaties that violated the *jus cogens* norms contained in the principle of the non- applicability of statutes of limitations for crimes against humanity found in the Convention on Statutory Limitations, then it follows that one of the branches of a state, namely the Judiciary, would also not be able to accept that such crimes have indeed fallen under the statute of limitations, as that would mean a clear and flagrant violation of the *jus cogens* norm. In sum, to not accept that crimes against humanity do not fall under statutes of limitations would go against article 53 of the Vienna Convention, part of our domestic law before the offences were committed.[457]

On the other hand, decisions that did not accept the violation of the principle of *nullum crime* can be seen in the remarkable case in which Spain requested the extradition of general Pinochet from the United Kingdom. Pinochet became president of Chile after a right-wing coup took power from President Allende on September 11, 1973. Pinochet remained in power until 11 March 1990. During his regime torture, murder and forced disappearances were widespread. In 1998 Senator Pinochet went to the United Kingdom in order to receive medical treatment, opening an opportunity for Spain to request his extradition.[458]

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[456] Tafur, Gabriel Chavez, 'Using international law to by-pass domestic legal hurdles', (2008) 6-5, *Journal of International Criminal Justice*, pp.1061-1075, p.2.

[457] Ibid.p.6.

[458] House of Lords, *Regina v. Bartle* (*Pinochet*) and the commissioner of police for the Metropolis and others (Appellants) ex parte Pinochet (respondent), Regina v. Evans and another and the commissioner of

The charges relied on facts which occurred prior to September 28, 1988, when the United Kingdom through section 134 of the Criminal Justice Act of 1988 introduced it to domestic law and enabled the courts to examine crimes which were committed not only in British territory, but also overseas.

One of the requirements to concede the extradition is that the crime the accused allegedly committed has to be enacted in the legal system of the country which is requiring the extradition and the country from which the extradition is being requested. This was regulated by the Extradition Act of 1989.

The crime the Spanish government accused Pinochet of was the international crime of torture that was incorporated in Spanish domestic law and the High Court had to determine if it could also be considered as a crime under British law. The High Court determined that since the section 134 of the Criminal Justice Act of 1988, which incorporated the international crime of torture into United Kingdom law did not enter into force prior to September 29, 1988 and the crimes were committed before that it would not constitute crime under the British law, not being possible to extradite the accused. Therefore, the High Court considered that the Criminal Justice Act of 1988 could not be applied retroactively to this case[459].

The George Boudarel case charged the accused of committing crimes against humanity in North Vietnam between October 1952 and August 1954. The investigating judge understood that the acts would constitute crimes against humanity set forth in article 69(c) of the Charter of the International Military Tribunal of Nuremberg annexed to the London Agreement of August 8, 1945. Furthermore, the judge interpreted that the crime would not be under the French Amnesty Law of June 18, 1966 since there was a supremacy of international norms over national laws. Nevertheless, the Chamber D'accusation decided that the alleged crimes were still covered by the amnesty law.

An appeal to the Cour de Cassation requested the ruling to be changed and the present High Court decided that the Nuremberg Charter annexed to the London Agreement of August 8, 1945 were confined to the actions of the Axis during the war and consequently the actions of the defendant could not be considered as crimes against humanity.[460]

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police for the Metropolis and others (appellants) ex parte Pinochet (respondent) (on appeal from a divisional court of the queen's bench division), 24 March 1999.

[459] Cour de cassation, chamber criminelle-audience publique 1 April, 1993 no de pouvoi: 92-82273 available at http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007065738&fastReqId=1564516193&fastPos=1

[460]Qu'en effet, les dispositions de la loi du 26 décembre 1964, et du statut du Tribunal militaire international de Nuremberg, annexé à l'accord de Londres du 8 août 1945, ne concernent que les faits commis pour le compte des pays européens de l'Axe ; que, par ailleurs, la Charte du Tribunal militaire international de Tokyo, qui n'a été ni ratifiée, ni publiée en France et qui n'est pas entrée dans les prévisions de la loi du 26 décembre 1964, ou de la résolution des Nations Unies du 13 février 1946, ne vise, en son article 5, que les

6.4. Principle of *nullum crimen sine lege* in the European Human rights system

The European Court on Human Rights examined the application and exceptions to the principle of non-retroactivity pro States. The acceptance of these exceptions has increased the protection of individuals in different situations. We are going to analyze how the same principle, but used to protect individuals *nullum crimen sine lege* was treated before the European Court of Human Rights. In cases of crimes committed prior to the existence of national laws criminalizing those acts, the European Court of Human Rights applied the "crimes against humanity" concept, bringing the case within its competence *ratione temporis*. The methodology the Court used does not demand a strict legality. Rather than that, the crime in question has to keep the essence of existing crimes and that any innovation would have been foreseeable to the defendant in the circumstances.[461]

The principle of prohibition on retroactive application of the criminal law in the European Convention is set forth in art. 7, paragraph 1 which states that "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed". The article's scope is to provide effective safeguards against arbitrary prosecution, conviction and punishment.[462] The present article is a non-derogable clause, not being avoidable in case of national emergency.[463]Although the article is an essential element for the rule of law[464] Murphy[465] points out the fact that the number of cases referring to the present article is still low when compared to article 6 of the European Convention on Human Rights. Citing a research made by Greer, he stated that only nine breaches of article 7 had been brought to the Court in the years 1999-2005 while over 2,000 breaches of article 6 of the European Convention on Human Rights were found in the same years.[466]

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exactions commises par les criminels de guerre japonais ou leurs complices ; qu'ainsi, les faits dénoncés par les parties civiles, postérieurs à la seconde guerre mondiale, n'étaient pas susceptibles de recevoir la qualification de crimes contre l'humanité au sens des textes précités

[461] Schaak, Beth van, 'Crimen sine lege: judicial lawmaking at the intersection of law and morals' (2008)97 *Georgetown Law Journal*, pp.119-192, p.148.

[462] ECtHR, *S.W. v. the United Kingdom*, 22 November 1995 (Appl.No.20166/92), para. 34.

[463] Article 15 of the European Convention on Human Rights.

[464] ECtHR, *Kafkaris v. Cyprus*, 12 February 2008 (Appl. No.21906/04) para.137.

[465] Murphy, Cian C, 'The principle of legality in criminal law under the ECHR' (2010) 2, European Human Rights Law Review, pp. 192-207, available at http://ssrn.com/abstract=1513623, p.1

[466] Murphy, Cian C, 'The principle of legality in criminal law under the ECHR' (2010) 2, European Human Rights Law Review, pp. 192-207, available at http://ssrn.com/abstract=1513623 pp.1-2.

The article also embraces the prohibition of analogy as it was stated in *Kokkinakis v. Greece.*[467] In this case, the Court held that article 7 was not restricted to the retrospective application of the criminal law. It would also include the principle that only the law can define a crime and prescribe a penalty and that the principle that crimes cannot be determined by analogy. Therefore, the offense has to be defined in law and it represents the prohibition on retrospective criminal law. The Court decided that Article 7(1) of the European Court of Human Rights "is not confined to prohibiting the retrospective application of the criminal law to the accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that criminal law must not be extensively construed to the accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law."[468]

The European Court found that the condemnation by the extension of the definition of a crime given by the law is incompatible with the principle *nulla poena sine lege* in *Okçuoglu v. Turkey*. In this case, the Turkish Prevention of Terrorism Act of April 1991, section stated that the publisher of the periodical who commits the crime of propaganda should pay a fine, whereas the editors should pay a fine and sentenced to not less than six months. The applicant argued that he was received a punishment that corresponded to the editor even if he was a publisher. The European Court considered that the Turkish court operated an extensive construction, by analogy, of the rule in the same sub-section on the sentencing the editors.

6.5. Foreseeability

The law which considers as a crime certain acts has to be clear. According to the European Court, "an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision (art.7) and, if need be, with the assistance of the court's interpretation of it, what acts and omissions will make him criminally liable".[469] In *S.W. v. United Kingdom*, the applicant claimed that he had been convicted of the rape of his wife, a conduct that would not breach the general common law principle applied by the time the act was committed.

He referred to section 1, paragraph 1, of the Sexual offences act 1976 which states that "for the purposes of Section 1 of the Sexual Offences Act 1959 a man commits rape if (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it (...)".The domestic courts found that the word "unlawful" was just a redundancy. However, the applicant claimed that since the Court of Appeal and the

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[467] ECtHR, *Kokkinakis v. Greece.*, 25 May 1993 (Appl.No.14307/88)

[468] ECtHR, *Kokkinakis v. Greece.*, 25 May 1993 (Appl.No.14307/88), para.52

[469] ECtHR, *S.W. v. the United Kingdom*, 22 November 1995 (Appl.No.20166/92),

House of Lords had not established a new offence or changed the elements of the crime of rape, they interpreted the Act in a way that was unforeseeable to the applicant, as the intention of the Act was to exclude the marital rape from the criminal frame.

Nevertheless, the Court considered that there had been no violation of article 7 of the Convention. The Court understood that "the decisions of the Court of Appeal and then the House of Lords did no more than continue a perceptible line of case-law development dismantling the immunity of a husband from prosecution for rape upon his wife". The foreseeability issue is treated in this case, but also it becomes clear that when the societal rule changes the Courts also have to accompany the evolution.

In spite of the fact that in a previous judgement of the ICTY, in the case of *Prosecutor v. Krstic*, the Court has applied a narrow concept of genocide in which it restricted it to acts aimed at the physical or biological destruction of a group, German Courts decided to apply a broader concept in which considered the acts of the defendant as genocide. The German Courts have reached this conclusion due to the fact that the applicant intended to destroy a group as a social unit and not merely to expel it. The Court used the "accessibility" and "foreseeability" concepts to examine whether the applicant had been a victim of the breach of the principle of *nullum crimen, nulla poena sine lege*. The Court alleged that even if the ICTY had decided for a restricted interpretation of genocide, other courts had applied a wider interpretation as well therefore the applicant would be able to predict that his acts could be charged as genocide.

In the Border guard case, the European Court of Human Rights has decided the conduct of the applicants at the time the material facts occurred were in violation to international law and the national law of German Democratic Republic (GDR). Three of the applicants were high profile figures of the Politburo and were convicted for participating indirectly on the killings of people who were trying to pass the border between East and West Germany between 1971 and 1989 due to the policy they were responsible to create. One of the applicants was a soldier that shot to death one of the persons who were trying to cross the border.

Due to these facts, the applicants were convicted by the German Courts after the unification in 1990. The applicants alleged violation of article 7 paragraph I which protects the *nullum crimen sine lege*, stating that their acts were not considered as crimes by the German law at the time they took place and that those acts were a acceptable conduct by the policies of the government of the time. The Court pointed out that by the time the material facts occurred the GDR constitution, People's Police Act and State Borders Act protected the right to life. In addition, by the time the material facts took place, the right to life was already a supreme value guaranteed by human rights. The Court considered that a State which violated human rights and the right to life could not be covered by the protection of article 7 paragraph 1 of the Convention. Therefore, the Court has solved the clash between the claim of violation of the principle of non-retroactivity and the right to life in the most reasonable way, prioritizing the right to life. Judge Loucaides claimed that the conduct of the applicants could be classified as "crime against humanity" noting that by the time the material facts had occurred the present

crime was already considered as part of general principles of customary international law. This fact became indisputable after Resolution 3074 of the United Nations General Assembly of 3 December 1973, which proclaimed the need for international cooperation in the detention, extradition and punishment of persons guilty of war crimes and crimes against humanity.

In *Kononov v. Latvia*, the Court had to examine whether the victims who were killed were classified as civilians or combatants. The Latvian Court has decided that they could be considered as civilians relying on article 50 of the First Additional Protocol of 1977 which states that whoever is not a combatant is a civilian and if there is any doubt about the status of the person it should be presumed that he or she is a civilian. The problem is that the conduct occurred in 1944 and therefore, the European Court of Human Rights decided that would be an application of *ex post facto* law, not recognizing that the concept of civilians and non combatants were a customary law before the existence of the First Additional Protocol. According to the European Court of Human Rights, the Latvian Court had unduly applied retroactively the 1977 Protocol. Pinzauti[470] points out that the European Court of Human Rights should have made a distinction between the retroactive application of law that would be unacceptable and the reference to instruments which were enacted later in time to clarify a notion that already existed at the time when the facts occurred. She notes that the notion of distinction between civilians and combatants is one of the core principles of international humanitarian law. Therefore, the use of the 1977 Protocol was a mere clarification of an already existent concept in international humanitarian law.

In Kolk and Kislyiy v Estonia[471], the applicants had participated in the deportation of Estonian civilians in the time Soviet Union was occupying the country in March 1949. They prepared and executed the deportation. On 10 October 2003, they were convicted of crimes against humanity in the domestic court and were sentenced to eight years. The Court of Appeal in Tallinn upheld the conviction in 2004 stating that under article 7(2) of the European Convention it was admissible to punish persons for conduct criminalized at the time of the commission of acts under the general principles of law recognized by civilized nations. Thus, the applicant's prosecution would not be contrary to the principle of non-retroactivity.

The applicants brought the case before the European Court of Human Rights had claimed they were punished on the grounds of a retroactive law since the Criminal Code of Estonia, which had been enacted in 1946, did not set forth crimes against humanity as a crime. This crime was enacted by an amendment made in 1994. Furthermore, the applicants have also argued that "the Nuremberg Charter proscribed only crimes against

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[470] Pinzauti, Giulia, 'The European Court of Human Rights' incidental application of International Criminal Law and Humanitarian Law: A Critical Discussion of Kononov v. Latvia (2008) *Journal of International Criminal Justice*, pp.1043-1060.

[471] ECtHR, *Kolk and Kislyiy v. Estonia* 17 January 2006 (Appl.Nos.23052/04, 24018/04).

humanity carried out in execution of or in connection with any crime against peace or any war crime" while in their case their acts were committed in time of peace.

The Court in its decision argued that the Nuremberg Principles as affirmed by the UN General Assembly in 1946 had 'universal validity'. Thus, the 'crimes against humanity' could not be limited only to the time of World War 2. Furthermore, the crimes that the applicants were being accused of would not fall under the statute of limitations since Estonia ratified to the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes against Humanity of 1968 and this Convention applies to crimes perpetrated after 1968 and after the adoption of the Convention, having retroactive force. The Court has also pointed out that the rule that 'crimes against humanity' could not suffer statute limitations was set forth by the Charter and kept by the European Court's judgements such as in *Papon v. France* (15 December 2001).

The Court argued that art.7(2) which states that "shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according the general principles of law recognized by civilized nations" could be applied in this case. In the last point, the Court has emphasized the fact that the Soviet Union was a party to the London Agreement and was aware of the adoption of the Nuremberg Principles. Therefore, the applicants' claim that they could not be aware of the criminal nature of their actions had to be dismissed. The Court preferably has applied an interpretation that is not favorable to strict legality in this case since "crimes against humanity" were enacted as domestic legislation just in 1994.

In *Jorgic v. Germany*, the applicant, who had been convicted of the crime of genocide in Germany, alleged that his conviction constituted violation of article 7 paragraph 1 of the European Convention by virtue that the German Courts applied a wide concept of genocide crime which had grounds neither in international law nor in German law. Article 7, paragraph 1 states that:

> no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed..

Cassese examines the clash between the *nullum crimen* and the prevalence of international law. According to his explanation, there is the doctrine of substantive justice in which any conduct that causes danger to the society should be prohibited and suffer punishment even if it was not criminalized yet. On the other hand, there is the strict legality theory which states that the person can be held criminally responsible only when the conduct is specifically criminalized by law. The clash of values occurring between the accessibility and foreseeability of criminal rules versus the pre-eminence of international criminal rules. As a result of this conflict between two values the latter one would prevail when the perpetrator is prosecuted by an international court or even in its own national

court, after a change of legislation or regime. Therefore, international rules that support human dignity would prevail over national legislation.[472]

In Kafkaris' case, the issue of the "quality of law" was raised for the first time in the European Court. The applicant had been convicted by virtue of planting explosives in the car of a public figure in Cyprus which resulted in the death of the target and of his two children.[473] The Limassol Assize Court had to give the meaning of "life sentence" which was written in the document citing his release date as June 2002. The prosecution had asked the Court to give the answer to the question whether imprisonment of the convicted person would be for the rest of his life or just for a period of twenty years as it was set forth in the General Regulation of 1981 and the Prison (General) (Amending) Regulations of 1987 adopted under section 4 of the Prison Discipline Law.[474] The Assize Court determined that the "life imprisonment" term set forth in the sentence had the meaning of imprisonment for the rest of the life of the applicant.

The Applicant had appealed to the Supreme Court contesting the sentence of mandatory life imprisonment. Later on the regulations were changed and the applicant was informed that he would be incarcerated for the remainder of his life unless he provided the name of the person who asked him to murder the victim. The European Court analyzed the Cypriot criminal law governing the applicant's sentence of life imprisonment and determined that when he committed the crime prison regulations, based on the Prison Discipline Law that had repealed, allowed prisoners to apply for a reduction of their sentence in the case of good conduct on their part. The period of the imprisonment would thus be reduced to 20 years.

The European Court of Human Rights determined that:

> at the time the applicant committed the offence, the relevant Cypriot law taken as a whole was not formulated with sufficient precision as to enable the applicant to discern, even with appropriate advice, to a degree what was reasonable in the circumstances, the scope of the penalty of life imprisonment and the manner of its execution.[475]

Therefore, the Court ruled that the quality of law was harmed, not recognizing the violation of article 7 related to the no punishment without law in respect to the retrospective imposition of a heavier penalty. However, it recognized that there was violation of article 7 concerning the quality of law applicable at the time Mr. Kafkaris committed the offence.

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[472] Cassese, Antonio, 'Balancing the Prosecution of Crimes Against Humanity and non- Retroactivity of Criminal Law- the Kolk and Kislyiy v. Estonia case before the ECHR' (2006) 4-2 *Journal of International Criminal Justice*, 4 2, pp.410-418, p.4.

[473]ECtHR *Kafkaris v. Cyprus*, 12 February 2008 (Appl.No. 21906/04), para.12.

[474]Ibid. para.13.

[475] Ibid.para.150.

Nevertheless, the European Court decided that any issues relating to the implementation of and the underlying reasons behind the release had to be decided at the national level. As Murphy pointed out, the decision of the Court was not satisfying since the main concern was that the applicant was made to believe that by a form specifying a potential release date, he would serve a twenty-year term. Therefore, the Court's difficulty was not with the law *per se*, but with the way the State was implementing it.[476]

6.6. Continuous offences and non- retroactivity

Article 7 of the European Convention on human Rights permits the retroactive application of laws when they are favourable to the accused. In *Ecer and Zeyrek v. Turkey*[477], the Court established the requirements which the national authorities must take in regard to continuous offences in charges and judgments. The applicants claimed they received the application of a law of 1991 for offences committed in 1988 and 1989, suffering a violation of article 7 of the Convention.

Although the government stated that the applicant's offence was continuing after the law in question was promulgated, the Court did not share the same point of view. The Court pointed out that a "continuing offence" was a type of crime committed over a period of time. Since the Chief Public Prosecutor in his indictment mentioned offences committed "between 1988 and 1989"and the State Security Court also stated that the applicants were convicted by virtue of acts which took place "in 1988 and 1989", the European Court understood that the years 1988 and 1989 could not be taken to be the commencement dates of the offence at issue and that the applicants were subjected to the imposition of a heavier sentence under the 1991 Act than the sentence to which they were exposed at the time of the commission.

6.7. Conclusion

Nullum crimen sine lege when applied in international criminal law and human rights law follows more the substantive justice approach rather than strict legality. The application of a broader concept is possible for the lack of presence of a *law maxima*, like a constitution present in domestic law. However, this initial expansive interpretation might not occur frequently in the future since there is a movement towards the codification of

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[476] Murphy, Cian C, 'The principle of legality in criminal law under the ECHR' (2010) 2, European Human Rights Law Review, pp. 192-207. available at http://ssrn.com/abstract=1513623pp.11-12.

[477]ECtHR, *Ecer and Zeyrek v. Turkey*, 27 February 2001 (Appl.Nos.29295/95 and 29363/95).

international crimes and principles in international treaties, so that the gaps will be filled steadily. The certainty of law in international criminal law achieved its maximum exponent in the International Criminal Court. The ICC Statute act as a legislative body and the Statute is the positive law. Articles 22, 23 and 24 of the Rome Statute expressly refer to the different manifestations of the legality principle in criminal law as guiding principles of the new international criminal system.

The fact that international courts apply the concept of international customary law demonstrates that in the field of international criminal law, common law has great influence and that the strictly legality defended by civil law systems does not have the same influence in the field. If there was a strict obedience to the civil law traditions, the punishment of many atrocities would not occur since there is not a complete codification of the all conducts in the current international instruments. Therefore, the use of the strict legalism would bar the progress of the field, leaving space for the defendants to avoid punishment due to the fact that their acts were not codified by specific international instrument at the time they occurred.

Although in the Nuremberg and Tokyo Tribunals there was application of laws retrospectively, at that moment crimes against humanity and crimes of aggression were created. Those crimes, currently, are more than established in international criminal law.

Legality cannot be claimed when the defendant could predict that their own conduct was punishable under domestic law as it was decided by the ICTY in Tadic case. The same tribunal also has faced the problem of applying punishment that opposes current developments of human rights such as in the case of death penalty. Since the ICTY Statute limits the punishment to imprisonment and the domestic law of former Yugoslavia established death penalty, ICTY had to decide over the case of which punishment should be applied in the Erdemovic case. The Tribunal has decided that domestic decisions did not provide extensive jurisprudence and did not apply the capital punishment in the case, following current human rights development.

The fact that there is no general international legislative body makes some critics oppose the international criminal law as being inconsistent with the principle of *nullum crimen, nulla poena sine praevia lege scripta*. They even suggest the use of *nullum crimen, nulla poena sine iure* instead.[478] Due to the lack of a central legislative power, possibilities are open for the creation of "new crimes" under the grounds of the "general principle of law".

In civil law countries, the strict legality tradition might conflict with the idea of the application of crimes developed under international law. This occurs since in these systems the existence of crimes are restricted to domestic penal laws and also the principle of *nullum crimen sine lege* is a major guarantee set forth in the Constitution. In these countries, it is less likely that international customary law will be accepted as directly applicable in domestic law. In the Scilingo case, examined under the Spanish

[478] Gallant, Kenneth S. *The principle of legality in international and comparative criminal law.* (2009) p.374

Courts, even if the courts could have been ruled over crimes against humanity in a more flexible interpretation they preferred to respect strict legality.

Example of changes to the elements of crime in common law tradition could be seen in the case of *C.R. v. United Kingdom*. Inter-marital rape was not previously recognized as a crime, but has gained new nuances after the decision of the House of Lords. The conduct is not to be accepted nowadays.

The creation of international criminal tribunals *ad hoc* occurred always after the atrocities in various countries took place and it does not raise any discussion of the legitimacy of those tribunals. It is generally accepted that it is legitimate to establish tribunals *post facto*. International community might accept that international intervention is justified if states fail to protect or they violate the human rights of their own citizens. Between the choice of not establishing any tribunal to punish the atrocities and let the facts to be forgotten without any consequences for their authors and the *post facto* establishment of tribunals it is essential to reconstruct these states institutions.

Using the foreseeability and predictability tools to assess whether there was any violation of the non-retroactivity principle was the rule that has been used in international criminal law. When judges in international tribunals had the strong belief that there had been hideous acts that should be considered as crimes, they applied a progressive interpretation. They would argue that under the "general principles of law" certain acts are to be prosecuted and punished.

The danger of applying punishment to acts that were not considered as crimes at the time they occurred is that in the spur of the moment arbitrary power prevails over an unbiased justice. Such example can be seen in the Special Tribunal for Iraq where the death punishment was applied. If the current development of human rights standards were to be respected Saddam Hussein would be spared from the capital punishment. The use of death penalty has restrictions that provided by article 6 of the International Covenant on Civil and Political Rights and the Second Optional Protocol to the Covenant and in various regional instruments. Nevertheless, many states which are "western", such as some states of United States and Japan still applies capital punishment.

International trials raise doubts about their unbiased justice when they bring to the court only defendants from the defeated side. It raises suspicions that in fact they are being prosecuted not by virtue of their misdeeds, but rather due to the fact they belong to the losing side in a conflict. Nevertheless, due to these international decisions, international criminal law has been able to evolve and increase the number of conducts that are condemnable.

This evolution of international law is clearly limited when the atrocities are committed by the victorious side during a war. That is the example of the bombing of Hiroshima and Nagasaki, where the use of nuclear weapons was not considered as crime against humanity. Even if the atrocities are not justifiable and are to be punished there is a clear hierarchical order when it is decided what acts are to be punished by international law.

International tribunals are established in countries where the international community's interference could have stopped the atrocious conduct of those who were in power. It works as a late justice, a form of trying to abolish the culpability of the international community in not interfering at the right time. At least, that was the case of Rwanda and former Yugoslavia.

Non respect to the principle of *nullum crimen sine lege* before international courts or mixed tribunals does not occur when the judges consider that the conduct was in *malum in se* and not in *malum prohibita* because the defendants would be able to predict that their conduct was wrong before any legislation was enacted in the country in question. In addition, international courts apply the international custom reasoning to rule over acts that are to become condemnable. Evolution can be clearly noticed relating to sexual crimes. Ignored in the Nuremberg and Tokyo Tribunals, sexual crimes were extensively discussed in the ICTY, SCSR and ICTR. Recognition of forced marriage and oral sex as crimes against humanity is a sign of this development.

The principle of non-retroactivity when applied to States shows that examining past violations with current standards, the value of the past existing based on current values occurs explicitly in the international tribunals and human rights bodies. Nevertheless, for what objective the strict legality is being put aside is not clear. Punishing the responsible for past violations does not necessarily improve the State's political situation.

International tribunals can be perceived as interfering in domestic issues, even when the State had accepted to concede part of its sovereignty and subject itself to the decisions of the international tribunal. Can the international tribunals cooperate in preserving memory of those victims? Tribunal archives are also a historical source. Specially in transitional times. When international tribunals decide over the recognition of the violations of the rights of victims an international memory over the case is created. In these decisions the courts also establish that monuments over the specific group that should be built in order to preserve the memory of the facts, such as in Moiwana village case.[479] In this case, the memory that belonged to a determined group achieves international recognition and subsequently imposes this internationally recognized memory to become acknowledged facts by the national governments which *ab initio* refused to recognize it. That can be seen in Moiwana village case which brought to international tribunals discussion over the massacre in the Maroon village, in the cases of families which had their relatives as victims of enforced disappearances, arbitrary detention, among others.

Justice in the international sphere is necessarily selective and the process of choosing certain events in certain places over others can raise doubts of the justice practiced by those tribunals. Nevertheless, it would be impossible to exert jurisdiction and bring to the court all those responsible for atrocities around the world. Claims that justice should be

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

applied over those responsible for serious atrocities are specially heard in countries where international intervention is applied. Developing countries with a corrupt judiciary system, lack of personnel, undue delay where it is not possible to guarantee due process are prone to receive international interference. The control of justice therefore occurs from top to the bottom. Foreign tribunals are in those countries and will be part of the tools to save the victims of the violations from the lack of punishment for those responsible for the rights' violations.

PART III

MEMORIES AND THE PRINCIPLE OF NON-RETROACTIVITY

CHAPTER 7

7. Morality of the Application of the Principle of Non-Retroactivity

7.1. The problem of retroactivity in law and State crimes

When the international human rights commissions, committees or tribunals analyze cases regarding human rights violations, the applicability problem they find is regarded to violations which took place before the human rights treaties entered into force for the respective violator States. This is the problem of retroactive justice through the application of ex post facto laws. It would put into doubt whether the interpretation of the continuing violations concept could be considered as application of *ex post facto* laws, which would harm the rule of law.

In situations where countries had to face the principle of *nulla poena sine lege*, there were two issues that appeared: if it would be possible to punish people from actions which could not be considered as crimes at the time they occurred and if the actions that were criminal when committed could be punished more severely than what was established by a previous law. Many countries have adopted retroactive laws to deal with the past violations.[480] In this situation there is the conflict between laws which were incongruent morals and the break of the principle of non-retroactivity.

These facts were considered as legitimate policy and in many times were not punished because of self-amnesty laws enacted in States which were under military regime. *Ex post facto* laws breach the established principle of *nullum crimen, nulla poena sine lege* in the criminal process, but could we state that it works in the same way when the violators are States and not individuals?. In this chapter we are going to analyse how in certain situations retroactivity may operate for good of the judicial system when it seeks to punish past atrocities, examine the characteristics of human rights treaties in order to understand the pro individual interpretation in order to claim that the interpretation of the non-retroactivity principle is not applied in the same way when it protects the State than when it protects individuals. Makoto Usami characterizes the problem of *ex post facto*

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

laws as a problem of reconciling the need for prosecution and punishment with the *nulla poena* principle, using the concept of dirty hands, in order to achieve best ends it is necessary to use wrong means, in this case the non-respect to the non-retroactivity principle. Rather than applying wrong means to achieve best ends we are going to argue that it is a question of balancing two evils, that of allowing a person to go unpunished and sacrificing the principle of law. Hart claims that in relation to offences committed during Nazi Germany, retroactivity is the lesser evil.[481]

7.2. Ex post facto laws

Laws are made to regulate future myriads of situations and this can be considered as a central part of it.[482] The regulation of a coming situation is a characteristic of the law, but when it retroacts does it mean that the law itself has lost its essence?

The principle of legality was declared as a general principle of justice during the Nuremberg Judgement, but the principle would not limit the sovereignty of states. By that time, this claim would imply that judges could and should ignore principles of justice in the name of the sovereign powers.[483] It was clear that *the nullum crimen sine lege, nullum poena sine lege* was not an absolute principle, and could be sacrificed in the sake of the States that created the court by that time. Statutes of limitations are deemed to promote efficiency and certainty, ensuring claims are fresh and connected in time and space to a particular act. What happens when the judiciary decides to bring cases which are outside the scope of the statutes of limitations?

In another context, the *ex post facto* laws could be applied in countries where the transitional justice is in discussion. The question whether acts that were not considered as crimes during the time in which they occurred, such as the killings and torture committed by military or police officers, can be brought to the court is the problem in this case. All past revolutions have turned out to create new law, and such law is necessary to 'rectify' past injustice and its effects on the present.[484]

Ex post facto laws violate the rule of law and the principle of *nullum crimen nulla poena sine lege* in the criminal process. Human rights experts solve this problem by claiming that the abuses violate customary law and that international law imposes on a successive

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[481] Ticehurst, Rupert. Retroactive Criminal Law (1998-1999) 9, *King's College Law Journal*, pp. 88-108, p.99.

[482] Douzinas, Costas. "Theses on law, history and time".(2006) *Melbourne Journal of InternationalLaw*, 13 7(1) in <http://www.austlii.edu.au/au/journals/MelbJIL/2006/2.html>, access on 24 Jan.2010

[483] Gallant, Kenneth S., *The principle of legality in international and comparative criminal law*. (2009), p.1

[484] Fritsch, Matthias, *The promise of memory- history and politics in Marx, Benjamin, and Derrida*.(2005) p.169

government an affirmative obligation to prosecute and punish human rights violations conducted under its predecessor. In Makoto Usami's opinion the international law scope is more limited than what experts claim. He claims that experts do not solve the problem of retroactive justice and that the concept of obligation to prosecute has to be examined from the legal and practical point.[485]

Usami[486] characterizes this problem as one of dirty hands. To reconcile the need for prosecution and punishment with the *nulla poena* principle brings the circumstance in which one needs to use the wrong means to achieve the best ends most effectively. Thus, in the present case, in order to assure that the past violations are investigated, prosecuted and punished, human rights committees or tribunals should get their hands dirty by breaching the principle of *nullum crimen, nulla poena sine lege*. We are going to argue that the "dirty hands" concept is not suitable to his claim when the State is the violator, as it is not morally wrong to breach the principle in this case as the "dirty hands" concept requires. It occurs because the human rights bodies and tribunals have as the main scope the protection of individuals against the violations made by their own governments. (during the Nuremberg trials the principle could accept exceptions in the name of the sovereignty of States, but currently we could say the principle can accept exceptions in the name of the protection of individuals and not to protect State voluntarism. It is not morally wrong to accept an exception to punish violators of human rights since the scope of the state is the protection and not oppression of the individuals. However, the possible side effect would be to have States refraining from accepting the international human rights bodies' jurisdiction.

Dirty hands is a political concept which assumes that every political choice ought to be made solely in terms of particular and immediate circumstances taking into consideration reasonable alternatives and likely consequences. Therefore, even if a man lies and tortures his hands will be clean because he has done what he should have done. Furthermore, this concept assumes that moral life is a social phenomenon and it constituted at least in part by rules, the knowing of which we share with our fellows.

If we consider the *nullum crimen sine lege* of substantive justice, i.e. that it is unfair to punish individuals for acts which they had an at least minimum expectation of being legitimate at the time they committed. In this way it is useful to distinguish between the *delicts mala in se* and *mala prohibita*. Offences *mala in se* are those that attract extreme reprobation such as the case of murder. *Delict in mala prohibita* is the one that does not attract moral reprobation even if it is considered as wrong by virtue of the law, such as in the case of overspeeding. Using this distinction between these two types demonstrates

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[485] Shelton, Dinah, 'The world atonement reparations for historical injustices', (2004)1-2 *Miskolc Journal of International Law*, pp.259-289, p.8.

[486] Usami, Makoto. Retroactive justice: trials for human rights violations under a prior regime Burton M.Leiser and Tom D. Campbell (eds.), *Human Rights in Philosophy and Practice*. Ashgate. pp. 423-442. 2001.

that the retroactivity would be less reproved in the case of the *delicts in mala in se.*[487] In general, in international human rights bodies what is brought to discussion is the *delict in mala in se.*

Natural law and the positivist philosophy of law hold identical views on the existence of laws and regulations with retroactive effect. The natural law claim is that this problem does not exist once practically. There is not retroactivity because the governing and valid natural law prevailed earlier as far as back as the time when the question was controlled, which is different from the point of view of positive law. This idea is expressed by Gustav Radbruch, who, in the critical period of trials in the wake of World War II stated that "there are, then, legal axioms, stronger than any postulate of law, so any law contrary to them are devoid of validity. These axioms are called of nature or reason". This so-called law of the nature would override the validity of the positive law. Therefore, instead of having retroactivity we have a permanent validity of natural law, which is independent of positive law.[488]

Justice Bernard from France also claimed during the Tokyo trial that natural law was not a retroactive law. The law of the IMTFE and the crimes against peace were claimed as being created *post facto*. Justice Bernard claimed in his dissenting opinion that:

> there is no doubt in my mind that such a(n aggressive) war is and always has been a crime in the eyes of the reason and universal conscience, - expressions of natural law upon which an international tribunal can and must base itself to judge the conduct of the accused tendered to it.

If these arguments were to be accepted it would not have violation of the principle of non- retroactivity of the laws.[489]

The principle of non-retroactivity is a protection against the arbitrary use of executive power, being considered as an instrument to guarantee the justice of the procedures. However, the natural law concept is difficult to define. Acts which were not crimes previously could be considered as such in later times. This point can be exemplified in the case of a marital rape. In *C.R. v. United Kingdom*[490], a man who was convicted of attempting to rape his wife, from whom he had been separated for some time, alleged that applying this new rule to him violated the legality principle in the ECHR. The European Court of Human Rights (ECHR) claimed that due to the fact the case law in the United Kingdom eroded the so-called marital defense to rape together with changes in societal

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[487] Ticehurst, Rupert, 'Retroactive Criminal Law' (1998-1999) 9, *King's College Law Journal*, pp. 88-108, p.98

[488] Peschka, Vilmos, 'The retroactive validity of legal norms' (1999) 4, *Acta Juridica Hungarica*, pp.1-17, p.10

[489] Gallant, Kenneth S, *The principle of legality in international and comparative criminal law* (2009), p.149.

[490] ECtHR *C.R. v. United Kingdom*, 22 November 1995 (Appl.No.20190/92)

attitudes might have led him to conclude that the former law was to be abolished. The Court stated that:

> ... the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilized concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.

In another case of marital rape in the United Kingdom, *R.v.R.*[491], the house of Lords decided that the rule that a husband cannot be criminally liable for raping his wife if he has intercourse with her without her consent was not the law of England anymore. The husband who was convicted complained to the European Court of Human Rights[492] that the United Kingdom had violated article 7 of the European Convention. The European Court said that criminal law could be applied retrospectively, provided that the development of criminal liability was foreseeable. In this case, "there was a strong view within society that the offence concerned was so repugnant that it should long since have been classified as a crime, and that change is on horizon".[493] Can the non- respect to the principle of non- retroactivity in this case be considered as a "dirty hands" issue?

The acts of border guards in East Germany before the Berlin wall collapsed also were not considered as crimes at the time they occurred, but after years the German courts considered them as crimes. They would have been acting criminally at the time they acted, if they had not have claimed in their defense that they were following government policy to kill persons attempting to cross the wall illegally. After the unification German courts found that it would be "unjust and unfair" to allow this defense and convicted a number of persons for the acts. The convictions were upheld by the ECHR on the ground that the acts were illegal under East German Law of the time: the law against deliberate killing had not been abolished or modified by the government's policies.[494]

Hans Kelsen, a legal positivist, advocates the retroactivity of legal norms arguing that since the scope of validity of legal norms, inclusive of temporal validity, is a substantive element of legal norms it is determined by the lawmaker and that in spite of the fact legal norms in general apply to future behavior -that is they are retroactive- because "in this respect the law is similar to king Midas, turning into gold whatever he touches. In the same way, whatever the law touches it would gain a legal character.[495] He also in 1947 summarized his thoughts on retroactivity stating that the London Agreement was

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[491] *R.v.R.* [1992] 1 A.C.599, House of Lords

[492] ECtHR, *S.W.v. The United Kingdom*, 22 November 1995 (Appl.No.20166/92)

[493] Higgins, Rosalyn, 'Time and the law: international perspectives on an old problem' (1997) 46, *International and Comparative Law Quarterly*, pp. 501-520, p.508.

[494] Gallant, Kenneth S, *The principle of legality in international and comparative criminal law* (2009), p.221.

[495] Peschka, Vilmos, 'The retroactive validity of legal norms' (1999) 4, *Acta Juridica Hungarica*, pp.1-17 p.10

'retroactive only in so far it established individual criminal responsibility for acts which at the time they were committed constituted violations of existing international law, but for which this law has provided only collective responsibility'. Furthermore, he demonstrates his substantive justice adherence in stating that the rule against retroactive legislation is a principle of justice but justice also requires the punishment of those 'who morally responsible for the international crime of the Second World War' and that this higher postulate must prevail.[496]Therefore, according to his understanding in the collision of two rules, the non retroactivity principle and the punishment of individuals responsible for international crimes during World War II, the latter should be considered as more important. This opinion was also shared by Hart who stated that retroactive criminal laws were odious. However, when balancing the two evils of allowing the person to go unpunished and sacrificing "a precious principle of morality endorsed by most legal systems" (referring to the principle of non-retroactivity), he considers that in order to punish the nazi offences retroactivity was the lesser evil.[497]

According to Martin P. Golding, retroactive law may be the best way for a successor government to clean up a mess left by the predecessor government when the society needs to show a moral judgement on its past and it outweighs the concern of harming legal expectations[498]. However, it is important to note that transitional justice also can be used by arbitrary successor governments. In debates of the draft of the International Covenant on Civil and Political Rights (ICCPR), both the Spanish regime of Francisco Franco and the Cuban regime of Fidel Castro mentioned the possibility of retroactive criminal law in transitional periods.[499]

What would be the difference between the application of an ex post facto law by a democratic regime and a totalitarian regime? The non-respect of the non-retroactivity principle occurs in both cases. The Nazis used a retroactive statute to cure past irregularities. In the incident which is called as "Roehm purge", on July 3, 1934, there was an intraparty shooting where over seventy Nazis were killed. After the incident, Hitler enacted a law confirming measures taken between June 30 and July 1, 1934 and later Hitler stated that during the Roehm purge "the supreme court of the German people ... consisted of myself ...". The Act conferred retroactive legality on the measures which were taken. However, the non-retroactivity principle was not the only item to be

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[496]Gattini, Andrea, 'Symposium on Contributions to the History of International Criminal Justice- Kelsen's Contribution to International Criminal Law' (2004) 2-3 *Journal of International Criminal Justice*, pp.795-809, p.801.

[497]Ticehurst, Rupert, 'Retroactive Criminal Law' (1998-1999) 9, *King's College Law Journal*, pp. 88-108,p.99

[498] Usami, Makoto. Retroactive justice: trials for human rights violations under a prior regime Burton M.Leiser and Tom D. Campbell (eds.), *Human Rights in Philosophy and Practice*. Ashgate. pp. 423-442. 2001.

[499] Gallant, Kenneth S, The principle of legality in international and comparative criminal law (2009) p.39.

ignored by the Nazi dominated government and courts. Nazi courts would also not apply the law enacted by Nazi government if it did not suit their convenience.[500]

Fuller states that when a law system has a general disregard of the laws they were supposed to apply and when this system heals its irregularities by retroactive laws it is not hard to deny to it the name of law.[501]

In this way, a new democratic government which uses the same method to punish acts which were not considered as crimes at the time they occurred or when an international human rights organ applies the treaty law to a fact which took place before the treaty entered into force for a certain State, can it be considered as having the same moral problem as the Nazi government? If we claim as Diane F.Orentlicher that an obligation to prosecute and punish atrocities is imposed both by several human rights treaties and by customary norms this argument assumes that an international obligation to prosecute overrides the respect to the rule of law.

We could deny the legitimacy of the laws enacted by a totalitarian government and claim that a democratic regime law has legitimacy over it. Professor Greenwood claims that the principle of *nullum crimen sine lege*,

> [d]oes not preclude all development of criminal law through jurisprudence of courts and tribunals, so long as those developments do not criminalize conduct which, at the time it was committed, could reasonably have been regarded as legitimate, that principle is not infringed where the conduct in question would universally acknowledged as wrongful and there was a doubt only in respect of whether it constituted a crime under a particular system of law.[502]

According to this point of view, the exception to the principle is fair whether the conduct was considered as illegitimate in other legal systems. Following this claim, the dirty hands would only be applicable whether the conduct practiced by the individual was considered as legitimate by universal standards. The point is that this situation usually does not occur in the case of violation of human rights due to the fact that the State could not consider as legitimate the conduct of killing, torturing or making forced disappearance of its own population.

The enactment of *post facto* laws when are enacted to punish past atrocities demands analysis of the relationship between law and morals since it can be argued that the exception to the principle of non- retroactivity can cause injustice to those who could not

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[500] Fuller, Lon F., 'Positivism and Fidelity to Law- A Reply to Professor Hart' (1957), *Harvard Law Review*, pp.630-672.

[501] Ibid, p.660.

[502] Greenwod apud Ticehurst, Rupert, 'Retroactive Criminal Law' (1998-1999) 9, *King's College Law Journal*, pp. 88-108, p.104.

predict their acts could be considered as crimes. We are going to analyze the problem of morality and law in the next section.

7.3. Morality and law

Morality could be considered as an inner voice of conscience, notions of right and wrong based on religious belief, common conceptions of decency and fair play, conditioned prejudices heading of "morality" and which are excluded from the domain of law.[503]

The congruence between morality and law is also exposed by any reflection on the history of injustice where there are penal codes sanctioning an inappropriate punishment, the barring of religious and ethnic minorities from certain professions, and the denial of civil rights to women which have all been opposed primarily through pressure for legal reform. The Nuremberg law and the apartheid laws in South Africa are amongst some examples of this.[504] However, in many of these cases, these laws would be congruent with the morality of the day. The antagonism appears when we analyze those laws with the morals of the present day rather than those of the time when they were signed.

Moral relativists tend to argue that with the advance of civilization, the law will unavoidably enter into conflict with moral norms and those practices will be considered as to be wrong.[505]

The application of retroactive laws also concerns legal loss, once the principle seeks to secure legal predictability, especially in criminal law. The rule of law quintessence is to hold individuals responsible for acts which they could reasonably have expected were banned and punishable under the law they acted.[506] Many international law scholars have argued that the obligations to protect human rights which are incumbent upon all states derive from customary law. The idea of customary human rights law concerns substantive law opposed to procedural law. Usami calls the proponents of this idea as substantialist internationalists. However, Bruno Simma and Philip Alston point out that these claims are controversial. First, because even in States that have signed human rights treaties torture and arbitrary killings are still happening. Customary law requires a general, uniform, consistent and settled practice. However, just because torture is still occurring does not mean that there is a general, uniform and consistent practice. The

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[503] Fuller, Lon F., 'Positivism and Fidelity to Law- A Reply to Professor Hart' (1957), *Harvard Law Review*, pp.630-672,p.634.

[504] Tebbit, Mark, *Philosophy of Law- An Introduction* (2nd Ed., 2005 p.5.

[505] Tebbit, Mark, *Philosophy of Law- An Introduction* (2nd Ed., 2005), p.5

[506] Usami, Makoto. Retroactive justice: trials for human rights violations under a prior regime Burton M.Leiser and Tom D. Campbell (eds.), *Human Rights in Philosophy and Practice*. Ashgate. pp. 423-442. 2001.