custom in international law requires the existence of national laws which prohibit the practice of torture. Furthermore, the practice of torture is condemned by the *opinion juris*, which is a requirement to admit customary law.

In addition, the legal loss in the application of retroactive law might not be a proper argument when we see the theories applied to the Nuremberg Tribunal in the case of retroactivity. In this occasion, there were three views regarding the discussion of legality. The first one says that aggressive war was morally and for States legally wrong before World War II and therefore it would be acceptable to make an individual crime. The second one says that crimes against humanity brought to international law acts which were already considered criminal under national law and that could be punished internationally without violating the *nullum crimen* principle. The third view was that crimes against humanity were already war crimes under international criminal law and the designation of the crime could be changed without violating the principle of *nullum crimen.*[507]

Settled practice has to start from some point where the society is ready to change. In this situation, the offence is so repugnant that it should long since have been classified as a crime and the change is welcome. As an example there is *R.v.R*, the marital rape case that was brought to the House of Lords. The Lordships held the rule that a husband could not be criminally liable for raping his wife if he had intercourse with her without her consent was no longer the law of England. The husband, then, brought the case to the European Court of Human Rights claiming that United Kingdom violated article 7 of the European Convention. However, the European Court said that criminal law could be applied retrospectively, provided that the development of criminal liability was foreseeable. At the time the sexual acts were committed the principle of marital immunity was still valid, but the Law Commission had recommended its abolition.[508]

When there is a clash between the morality of the day and the law, a breach of the non-retroactivity principle secures the evolution of the law. In human rights treaties and international criminal treaties the breach of the principle generates more discussions since it involves directly the morality problem and the protection of individuals. We are going to examine if the character of human rights treaties can influence on the expansive interpretation of continuing violations of human rights.

---

[507] Gallant, Kenneth S, *The principle of legality in international and comparative criminal law* (2009)pp.41-42

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

7.4. Human rights law

Are there any features of human rights that makes it excusable the application of the exception of the non-retroactivity principle? In the practice of international courts and organizations it had occurred through the application of the continuing violation concept. Would it be possible to say that the exception to the principle of non-retroactivity works differently when related to human rights treaties? It is necessary to examine the characteristics the human rights treaties have and if these would help to interpret the principle of non-retroactivity differently from how they are applied to treaties which are not human rights related.

Sir Robert Jennings claimed that "a new kind of international law which directly concerns individuals and entities other than States" has grown rapidly. According to him, the development of human rights law brought "a radical change from the traditional law which protected individuals only in the capacity of aliens, and only then in terms of the injury done not to the individual but to the State of his nationality".[509]

One of the claims of human rights is that it applies to everyone no matter the societal and legal rights may be within States.[510] Human rights are part of the development of international law which was initially regulated to determine relations between States and not between individuals and States. Thus, before the existence of human rights the traditional right-holders and players in the international field were only States.

What is known now as international human rights law has its origins in the Charter of the UN in 1947 and its Universal Declaration of Human Rights (1948).

Oscar Schachter has written that:

> the fact that increasingly treaties in the economic and social fields as well as in the area of the law of war recognize the well-being of individuals as their reason d'être is further evidence that international law is moving away from its State-centered orientation.[511]

The Vienna Convention mentions human rights in its preamble: "Having in mind the principles of international law embodied in the Charter of the United Nations, such as (...) universal respect for and observance of, human rights treaties." Article 60(5) refers to "provisions relating to the protection of the human person contained in treaties of a humanitarian character."

---

[509] Quoted in Meron, Theodor, *The Humanization of International Law* (2006), p.314.

[510] Campbell, Tom, *Rights- A Critical Introduction* (2006), p.103.

[511] Quoted in Meron, Theodor. *The humanization of international law*.(2006) p.188.

Provost examines the features of the international human rights and humanitarian law.[512] In describing the human rights features he analyzes in different points the differences between human rights law and humanitarian law. We are going to refrain from describing the humanitarian law characteristics as it is not part of the scope of this study.

Human rights violations offenders are usually the States of nationality of the victims. The holder of rights in human rights law are the individuals or in some cases a group of people, independent of their nationality. Human rights are rights that belong to every person, and do not depend on the specifics of the individual or the relationship between the right-holder and the right-grantor. Human rights can be seen also as moral, pre-legal rights.[513]

There are exceptions to the universality when there is exclusion from the benefit of some rights or granting of supplementary rights to special classes of persons. An example of this exception is related to political rights, where nationals have the exclusivity on participating in the democratic process.[514]However, this reality is changing since in the European Union, European citizens are allowed to vote in local elections.

Human rights law has brought changes of the individual's position towards the State. They are not in the position of accepting their violations of rights and currently they are able to bring cases against their own governments before international courts. In addition, there is a general acceptance that some human rights are protected by customary law.[515] It has been argued that customary human rights law has been formed through treaties, such as the International Covenant on Civil and Political Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms, American Convention on Human Rights, Convention on the Prevention and the Punishment of the Crime of Genocide, among other treaties, national constitutions and laws, statements by national officials denouncing human rights violations.[516]

In human rights, States have an obligation to enforce and protect the rights granted to individuals by that law. In many cases, the State has also the duty to adopt domestic legislation to enforce the rights set out in international human rights treaties. There is also the question of whether human rights also impose duties on individuals. By customary international law the prohibitions of piracy, slave trade, breach of blockade and war contraband are examples of duties imposed on individuals.[517] However, in general, the

---

[512] Provost, Rene, *International Human Rights and Humanitarian Law*. (2002)

[513] Gavison, Ruth. On the relationships between civil and political roghts, and social and economic rights in The globalization of human rights, Coicaud, Jean-Marc,, Doyle, Michael W. and Gardner, Anne-Marie, (2003) p.25.

[514] art. 21(1), Universal Declaration of Human Rights; Art. 25, International Covenant on Civil and Political Rightsl art.16, European Convention on Human Rights; Art. 23, American Convention on Human Rights; Art.13, African Charter on Human and People's Rights.

[515] Provost, René. International Human Rights and Humanitarian Law (2002) p.55

[516] Usami, Makoto. Retroactive Justice: trials for human rights violations under a prior regime. p.9

[517] Provost, Rene. International Human Rights and Humanitarian Law.(2002) p.62.

normative framework of human rights is about granting rights to individuals and the imposition of obligations on the State. One fact that backs this claim is that universal and regional bodies, such as Human Rights Committee, Inter-American Commission on Human rights, Inter-American Court on Human Rights, European Court of Human Rights focus on the State violations of individual's rights.[518]

Therefore, the human rights conventions did not consist of the reciprocal exchange of State rights and obligations, but a series of duties undertaken by States to respect human rights.[519]

Christine J. Walley describes the accepted postulates of human rights.[520] The first postulate is that human rights represent individual and group demands against institutions and persons impending the realization of these values and capabilities. Human rights essentially curb the State's sovereignty and power. The second postulate is that human rights refer to a "fundamental" claims or "goods". The third postulate range from the most justiciable to the most aspirational. Human rights partake of both the legal and moral orders and they are expressive of both the "is" and the "ought" in human affairs. The fourth assertion consists of the fact that the limitation of the rights of individuals or groups in particular instances are restricted as much as is necessary to secure the comparable rights of others and the aggregate common interest. And the fifth assertion is that a human right is understood as universal and equally possessed by all human beings everywhere. However these postulates raise many questions. Would human rights also qualify in addition to State power the private power? What is a fundamental right? Is the existence of universal human rights incompatible with the notion of national sovereignty?[521]

Human rights treaties and its respective universal and regional bodies have as the main purpose the protection of individuals, even not establishing as many duties to individuals as those it establishes to States.[522] Therefore, it seems natural that the interpretation of these treaties tends to protect the rights of individuals sacrificing the principle of non-retroactivity which would benefit the State parties to the human rights treaties. This argument could be grounded on the fact that the State did not keep its function of protecting individuals under its jurisdiction. The state has a fiduciary nature in its public authority in which it represents sovereign powers, discretionary powers of an administrative nature that private parties are not entitled to exercise. The minimal content of the State's obligation is to govern under the rule of law. The State in the role of fiduciary of people has authority to announce and enforce law only if it respects the rule

---

[518] Provost, Rene. International Human Rights and Humanitarian Law.(2002) p.74

[519] Ibid. p.135.

[520] Walley, Christine J., 'Searching for "voices"- feminism, anthropology, and the global debate over female genital operations' (1997) 12 *Cultural Anthropology*, p. 405-438, p.2

[521] Ibid.

of law that restrains its own exercise of power.[523] However, the State that breaches the rule of law also harms the fiduciary authorization and by all means end up undermining its authority to announce and enforce law.[524]

It is possible to claim, therefore, that the application of the non-retroactivity principle when it is meant to protect individuals in criminal law must be respected in all circumstances, when it is not a crime considered as such under the international criminal customary law, but when it comes to protect States from being condemned of violations of human rights which occurred before the treaties entered into force for the respective States the same principle would accept exceptions due to the fact that the human rights treaties scope is the protection of the human person.

Nevertheless, the fact that States currently are under the jurisdiction of international human rights bodies is in general a sign that they are willing to change their relationship with their own population. Therefore, it is likely that they are trying to restore its own authority and respect to the rule of law. The question is whether it is necessary, then, to forget past violations or insist on remembering the past facts which took place before the State's ratification of the human rights treaties. To construct a new society what form of justice is desirable?

7.5. Necessity versus loss incurred by prosecution and punishment

The transitional societies face the problem of not being able to bring all the cases to the courts, selective prosecutions will address only some wrongs and parsimony is unavoidable in these cases.[525] In the border-guard cases, the guards were accused of shooting East Germans fleeing across the border claimed that they were executing a legal duty[526]. The courts were asked to decide to what extent the law of the previous regime provided a defense, but the courts recognized in spite of the fact those laws were formally valid, they were not substantively right, thus allowing the prosecutions to proceed. In this case, the transformative potential of the law prevailed over its formal duties of legality, predictability and fair warning.[527] Many observers also criticized the prosecution for retroactivity, for seeking to punish soldiers for what had not been understood as illegal when committed.[528] After 1945 there had been a flowering of natural law thinking,

---

[523] Decent, Evan F,. 'Is the rule of law really indifferent to human rights?'(2008) 27 *Law and Philosophy*, pp.533-581, p.542

[524] Ibid. p.542.

[525] Gray, David, 'An excuse-centered approach to transitional justice' (2006)74, *Fordham Law Review*, pp.2621-2695, p.2628.

[526]Ibid p.2637..

[527]Ibid.

[528] Minow, Martha. Between vengeance and forgiveness (1998) p.43

subsequently superseded again by traditional German positivism. West German politicians were willing to stress that they intend to establish political trials.

In the first trial of the border guards, two defendants were convicted based on natural law arguments. The trials opted for an uneasy compromise between *nullum crimen sine lege* and a strong underlying of natural thinking. In the appeals, the highest civil and criminal Federal Court held that under DDR law the actions of border guards and their superiors had been illegal. In a further ruling, the Constitutional Court reverted to natural law, arguing that the undemocratic nature of the DDR and its leniency in protecting human rights made DDR law less reliable. Thus, the shooting in the border has caused an enormous 'injustice". Eventually, most of the border guards were convicted, but were given suspended sentences.[529]

Usami states that there is a permanent normative loss if the *ex post facto* laws are applied in trials of official perpetrators. The necessity consists of the effectual measure to prevent human rights violations in the future. In this situation, the trials' preventive function would be classified in three different ones. The first one would be to prevent those who were punished to commit the same violations again. The second has a deterrent effect over the whole society and the third one consists of that the trials would work as a hindrance of human rights abuses in some other countries.[530] In addition, the trials can foster democratic culture since they provide the opportunity of public discussion.

The loss incurred by prosecution and punishment can be seen in a distinction between legal loss and political loss. The legal loss exist since citizens must have reasonable chances to know the law so they will know which acts will be punished and which will not.[531]David Gray points out that the principle of legality might appear to imply that law is the one limited to the black-letter law, without regard to the natural right. In addition, it is the respect to the rule of law that is a main aspiration in the transitional societies. In the context of transitions to democracy, then, rejecting legality and the rule of law has the risk of threatening the morality of the transitional regime.[532]However, observers of the American legal system emphasize that law can never be entirely separated from politics.[533]Politically speaking, new democracies face difficulties in implementing justice:

---

[529] Muller, Jan- Werner. East Germany: incorporation, tainted truth, and the double division in The politics of memory-transitional justice in democratizing societies, Oxford university press, p. 258

[530]Orentlicher, Diane, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991)100-8 *Yale Law Journal,* pp.2537-2615,p.3

[531] Gray, David, 'An excuse-centered approach to transitional justice'(2006)74, *Fordham Law Review*, pp.2621-2695, p.2638.

[532] Ibid p.2641.

[533] Minow, Martha, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (1998), p.40.

the fear of the reaction of those who are going to be brought to the court, impossibility of bringing all those responsible for violations and compensating all the victims.[534]

There is political loss when some of the officials involved in past abuses retain their office in the subsequent government and in this case the government's attempts will face objections.

Usami points out human rights violations can be prevented to a lesser degree by truth commissions and purgation. Truth commission is another way of establishing the historical facts and preventing the abuses from take place again.

Charles Krauthammer even claims that truth reports should be written but no trials should take place. Relating to Bosnia, some observers also have suggested that truth commissions should be established, but that the trials should not be held. Their justification for this claim is that truth-commissions would bring reconciliation and trials would foster vindictive feelings in the population.[535]

However, in the human rights community, the truth phase is merely the first phase in transitional justice. Stanley Cohen[536] classifies five debates and sometimes when they appear in sequence he calls them as phases. The debates are named as knowledge, accountability, impunity, expiation, reconciliation and reconstruction.

The first debate is on knowledge. Is only the debate of knowledge through the truth commissions enough to prevent future violations? The knowledge phase consists of facing the truth, confronting the past. It can be seen as an objective in itself to be achieved, like a "Truth Commission". However, in this phase he points out the fact that at the individual level lie complex mechanisms which make us forget unpleasant information. This kind of forgetting is a denial of the past, a personal amnesia which prevents the individual from recalling disturbing incidents. In addition to the individual forgetting there is the collective forgetting where the society in an organized way try to separate itself from a terrible past record. This process is deliberate, a re-writing of the history. The nearest example of this is the official denial by Turkish government of the 1915-1917 genocide against Armenians. There is also a standard rhetoric of official government responses to allegations of human rights violations. This rhetoric contains three elements: the first one says that "nothing happened", a complete denial where the

---

[534] Jelin, Elizabeth, 'The politics of memory- the human rights movement and the construction of democracy in Argentina' in Falk, Richard, Elver Hilal and Hajjar, Lisa (eds) *Human Rights (Critical Concepts in Political Concept)* (2007)Vol.III,.pp.217-237, p.230.

[535] Mendez, Juan E. 'Accountability for past abuses' (Working Paper No.233, Notre Damme University, 1996), access at <http://www.nd.edu/~kellogg/publications/workingpapers/WPS/233.pdf> Kellogg Institute for international studies working papers series n. 233, p.11.

[536] Cohen, Stanley, 'State crimes of previous regimes- knowledge, accountability, and the policing of the past'. in in Falk, Richard, Elver Hilal and Hajjar, Lisa (eds) *Human Rights (Critical Concepts in Political Concept)* (2007) VolIII(2007),pp.174-216.

government claims that there was no massacre, no one was tortured. The second rhetoric is one that admits that something happened, but this was not exactly as the evidence demonstrates. They use euphemisms such as "transfer of population", not "genocide", "collateral damage", not killing civilians and so on. And the third one is that the fact which happened was justified for moral, noble reasons: to protect democracy, in the name of Islam and so on. In some cases, truth-telling is more urgent than the demand of justice. It is necessary that everybody knows the truth.[537]

The fact that truth commissions bring the identity of individual perpetrators to light can lead to a kind of punishment. As an example, Dickinson refers to Ntsebeza who argued that in the South African case, when perpetrators came forward to admit their role in the atrocities they received amnesty from criminal punishment, but they were punished in other ways, such as enduring shame among their families and friends or losing their jobs.[538]

There is also the question whether the truth-finding is enough to deter violations or it can be considered as the second best, as the first option would be to actually prosecute the individuals concerned. Most commentators believe that criminal prosecutions would be the best option as a response to the atrocities and truth commissions should be used as an alternative to that.[539]

The second phase consists of accountability. It is also referred as the "justice phase" and the pressure to seek for justice comes in three different ways. The first one is the punishment in the criminal law model, the second way is through compensation for victims and the third one is through lustration where there is mass removal from government jobs. Cohen reminds that justice has to respect due process and legality which were denied during oppressive regimes. But, he does not go further to explain whether the principle of non-retroactivity should accept exceptions to prosecute and punish the past violations. Dickinson, referring to Douglas, points out that trials not only have the objective of rendering justice, they also establish history and a narrative about the past. Furthermore, these trials may help to develop the norms. For example, the decisions of the International Tribunals for the former Yugoslavia and Rwanda created a body of important legal interpretations of international criminal law, the law of armed conflict and human rights law.[540]

Due process implies adversarial and public hearings, the right to choose one's own lawyer, the right to appeal, no retroactive legislation or retroactive application of the law,

---

[537] Cohen, Stanley, 'State crimes of previous regimes- knowledge, accountability, and the policing of the past'. in in Falk, Richard, Elver Hilal and Hajjar, Lisa (eds) *Human Rights (Critical Concepts in Political Concept)* (2007) VolIII(2007),pp.174-216.,p. 184.

[538] Dickinson, Laura, 'Terrorism and the limits of law: a view from transitional justice' in Austin Sarat, Lawrence Douglas, Martha Me. Umphrey (eds) *The limits of law* (2005),pp. 21-74, p.34.

[539] Minow, Martha, *Between vengeance and forgiveness* (1998), p.58.

[540]Dickinson, Laura, 'Terrorism and the limits of law: a view from transitional justice' in Austin Sarat, Lawrence Douglas, Martha Me. Umphrey (eds) *The limits of law* (2005),pp. 21-74 , p.36

respect for statutes of limitations, determination of individual guilty, a presumption of innocence that places the burden of proof on the prosecution, the right to a speedy hearing and the right to due deliberation. However, in the transitional justice these requirements are violated. When many of these requirements are violated legal justice is replaced by political justice.[541]

The legal punishment demands the individual or collective responsibility in assembling the evidence, organizing the civilian trial and implementation of suitable punishment. The forms of punishment, though, are the removal or demotion from office for convicted police, soldiers, judges or the deprivation of voting rights, among others.[542]

Compensation consists of demanding material compensation and restoration of the dignity of the victims and their families. Financial reparations might be paid to families and torture victims can be helped to receive treatment and rehabilitation.

Lustration was applied in the postcommunist regimes of Eastern Europe. In Czechoslavakia, the Lustration Law enacted on October 1991 banned categories of people with various degrees of involvement from certain types of employment. The law set out the rules for mass purifications and leaked publications of lists of about 20,000 names including former secret police agents and their informers, and it also have barred for a five-year period former members of these groups from any high- level government position, among other measures.[543]

However, the human rights community has strongly criticized the process due to the fact people were punished for association, bringing a collective punishment, and it violated the right of freedom of expression where a new law defined it as a crime to propagate ideologies such as fascism and communism. Furthermore, it contravened all standards of due process with no independent tribunal, no opportunity to confront evidence, no right to legal counsel or to appeal.[544]

On the issue of impunity Cohen discusses how, among other issues,[545] the time lag on the nature of political responsibility for the actions of a previous regime. A government could assert that it has no moral responsibility for its predecessor's actions. According to him, the new government should be eager to demonstrate its good faith and its distance from the previous regime. Other two temporal problems pointed out by him were that accountability should go how long far back in time and that for many people the

---

[541] Elster, Jon. Closing the books- transitional justice in historical perspective. Cambridge university press, 2004, p.88.

[542] Cohen, Stanley, 'State crimes of previous regimes- knowledge, accountability, and the policing of the past'. in in Falk, Richard, Elver Hilal and Hajjar, Lisa (eds) *Human Rights (Critical Concepts in Political Concept)* (2007) VolIII(2007),pp.174-216) p. 188

[543] Ibid.p.191.

[544] Ibid.

[545] authority and obedience, degrees of involvement, regime stability and preserving democracy, reconciliation and reconstruction

prosecution of crimes which took place decades ago are unjust. The first problem is related to the point of questioning facts which occurred 5 to 10 years ago being brought for accountability.[546]

When the injustices have taken place long time ago the claims are historical and common sense is necessary. Usually more recent injustices take precedence over past injustices[547]. The United Nations Conference on Racism, held in Durban in 2001, discussed the issue of reparations for slavery and colonialism. In addition, recent or current claims refer to Native Americans in the United States and Canada, aboriginal peoples in Australia and New Zealand, amongst others.[548]

The second problem is over the pursuit of fugitives from more than a generation ago. As an example of this there is the Barbie trial, which took place between 11 May and 4 July 1987 for facts which occurred during World War II. Klaus Barbie was caught in Bolivia in 1983. At the end of World War II he fled Europe and went to South America, where he lived under the name of Klaus Altmann.[549] Barbie was the head of the Gestapo in Lyon and worked to suppress the Resistance, communists and Jews. His trial in France was designed to show what the meaning of Nazism was. The French judiciary faced legal obstacles to do that. Among these obstacles there was the fact he was already convicted by the French High Court in 1952 and 1954 on "murders, arsons, pillages and arbitrary sequestrations". Thus, Barbie could not have been tried for offenses based on the same acts without violating the principle of double jeopardy. In addition, he could not be prosecuted for other acts of murder, arson and wrongful imprisonment because France's statute of limitations voids liability to ten years after the commission of such felonies.[550] Therefore, Barbie was prosecuted for crimes he was not prosecuted before. The only crime which was imprescriptible by French law is that of "crimes against humanity". In 1945, France joined the London Agreement conferred retroactive jurisdiction upon the Nuremberg Tribunal to prosecute "crimes against humanity" committed by the Axis powers.[551]

This famous case also raises the question of selectivity in prosecution, the difficult question of justifying why some people are prosecuted and others are not. The problem is

---

[546] Cohen, Stanley, 'State crimes of previous regimes- knowledge, accountability, and the policing of the past'. in in Falk, Richard, Elver Hilal and Hajjar, Lisa (eds) *Human Rights (Critical Concepts in Political Concept)* (2007) VolIII(2007),pp.174-216) p.195

[547] Thompson, Janna, *Taking Responsibility for the Past- Reparation and Historical Justice* (2002),p.70.

[548] Shelton, Dinah, 'The world atonement reparations for historical injustices', (2004)1-2 *Miskolc Journal of International Law*, pp.259-289, p.260.

[549] 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.73.

[550] Binder, Guyora. 'Representing Nazism: advocacy and identity at the trial of Klaus Barbie' (1989) 98 *Yale Law Journal*, pp.1321-1383, p.1327.

[551] Ibid.p.1329.

to define whether the selection was just a matter of arbitrariness.[552] This problem is related to the fact that the rule of law does not allow collective punishment of people. In addition, the individual responsibility for atrocities stems from a recognition of individual duties to international norms.[553] However, the selectivity problem is not exclusive of prosecutions, as it also happens in Truth Commissions once they have to overcome institutional constraints in the selective construction of history.[554]

Impunity also can happen when amnesty laws are enacted in the context of authority and obedience, as was pointed out by Stanley Cohen. He uses as case studies the Argentine story due to the balance among political forces, legal proceedings and public debate. In the Decree Law 158 of December 1983, the government annulled the military's self-amnesty National Pacification Law of April 1983 and provided for prosecution of the commanders-in-chief of the armed forces and military juntas. Those who had obeyed orders would not be liable to prosecution.[555] He emphasizes the fact that when high level officials were accused, the public in general had tolerated or approved the trials. But, when mid-level officials were indicted the public support weakened. Mid-level officials acted following orders of their superiors. Cohen believes that in order to combat a system that dehumanized humanity it would be essential to restore responsibility to all levels of violators.

The degree of involvement topic brings the discussion on how morally different are acts such as those who participated in death-squad executions and low-level government clerks signing documents relating to a discriminatory system such as the apartheid. The human rights community classifies those immoral systems that would be impossible to prosecute and the ones which could be held accountable, such as 1) those who ordered the violations under their responsibility 2) those actions categorized as gross violations and prohibited by international law 3) those actions which were also illegal under the domestic law of the determined country. Cohen remarks that the deepest grievances of most people are untranslatable into the criminal model.

The question of regime stability and preserving democracy discusses whether a prosecution and punishment of the security, police, armed forces will cause a coup and reverse all the gains of a fragile new democracy.

The expiation occurs when perpetrators make amends for previous sins. However, the perpetrators usually see themselves forced by circumstances, and thus do not express any regret. Cohen explains that dealing not only with the perpetrators, but also with

---

[552] Minow, Martha, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (1998), p.40.

[553] Minow, Martha. Between vengeance and forgiveness: facing history after genocide and mass violence. Beacon Press, 1998, p.40

[554] Savelsberg, Joachim J. and King, Ryan D. in Law and collective memory in *Annual.Review.Law Social,Sciences*, 2007, 3:189-211.p.197

[555] Brito, Alexandra Barahona. Truth, Justice, Memory and Democratization in the Southern Cone, in The politics of memory-transitional justice in democratizing societies, Oxford university press, 2002, p.121

individual rituals can be made to clean names of people who were unfairly blamed. In the case of political prisoners, for example, they could be rehabilitated by simple public declarations and victims' names could be cleared from the police files. These acts would be a certain form of acknowledgement, but victims want more than that, they also seek remorse from the perpetrators of past actions. He gives as example of genuine acknowledgement when a previous president of Chile, Aylwin, expressed atonement publicly on television on behalf of the State. He concludes by claiming that even if rituals of expiation take place it does not necessarily mean that it would eradicate gross abuses in the past. Thus, according to him the process of democratization should be more forward-looking in order to address the whole base of the emergent society.

Reconciliation and reconstruction is presented as the opposite to "backward-looking" forms of accountability. According to this approach, the best way of acknowledging the past would be to look towards to the future. It is important to note that this discourse can be self-serving for perpetrators from the old regime, when they try to avoid the issue of accountability.

Appeals for reconciliation or reconstruction do not require forgetting the past. That simply occurs because victims and survivors should know what they are forgiving. The truth phase needs completion before such pardoning and reconciliation can be attempted. When reconciliation is used as an alternative to criminal justice, it occurs in the wider social sense. Students of torture have applied the idea of reconstruction to the dismantling of the entire "torture regime." In this case, if a regime had a widespread practice of torture it becomes impossible to ask for the accountability of every single perpetrator. Cohen suggests a reeducation where the reconstruction could be based on the survivors and on what they would represent. The victims demand for acknowledgement calls not simply for factual or legal recording but for replacing their physical pain and loss with political dignity. In some cases, survivors might be satisfied with truth-telling, shaming and political testimony, but others will require the punishment. To work on that, it means that those in favor of accountability would support punishment even if the victims and democratic will of the wider public are against it.[556]

7.6. Memory and History in international human rights bodies

Costas Douzinas starts his essay on "Theses on Law, History and Time" with the following statement: "Law constructs time as linear, turns history into legal procedure and uses it to create the authorized record of the past, to legitimize the present and

[556] Cohen, Stanley, 'State crimes of previous regimes- knowledge, accountability, and the policing of the past'. in in Falk, Richard, Elver Hilal and Hajjar, Lisa (eds) *Human Rights (Critical Concepts in Political Concept)* (2007) VolIII(2007),pp.174-216, p.204.

prevent radical change in the future".[557] It can be implied that this argument also includes not only the law itself, but how the bodies which are to apply it use its hermeneutics to register the authorized history. If the law is used as a tool to prevent radical change in the future the only way to cause a great change would be by not obeying the law. The operation of this revolution occurs when the tribunals also interpret that determined laws, such as amnesty laws or discriminatory laws which violate the basic rights of applicants who bring their claims to international human rights bodies. Therefore, international human rights bodies operate in order to promote a certain type of revolution which will benefit individuals that would have their own claims ignored if they could not bring individual petitions to those institutions.

The international human rights law and international criminal law, then would not suit to the definition of Douzinas since they can operate major changes in states where there are municipal laws that clash with international law treaties. The Human Rights Committee recognized that the Canadian Indian Act was discriminatory[558] due to the fact that it established the loss of indigenous status only to women who got married to non-Indian men while an indigenous man who married a non- Indian woman would not lose their status. The Indian Act was recognized as discriminatory, a breach of article 27 of the Covenant on Civil and Political Rights. International human rights law, therefore, promotes major changes in municipal laws.

Municipal laws in certain cases seek to create the authorized record of the past or which implies selecting what facts are worth of being remembered. When the state decides to enact Amnesty Laws it is deciding that in order to move on a better future is necessary to impose forgetting of incidents which occurred under a determined regime. This measure, however, ignores the victims which always think they need to find justice.

International human rights bodies have been intervening to the production of memories since they can also considerate as illegitimate those amnesty laws. That was the case in *Garay Hermosilla et al v. Chile*[559]when petitioners claimed violations of the right to justice and for the situation of impunity with respect to those responsible for the arrest and disappearance of people between the years of 1974 and 1976. The government emphasized the fact that the political situation would not allow the revocation of the law.

The Inter-American Commission on Human Rights declared that there was a failure to revoke amnesty law that was issued by the military regime even after the State of Chile ratified the Convention. The focus moved from the importance to forget to provide justice to the victims of the regime, making clear that human rights bodies consider as the most important value the individuals rather than states policies.

---

[557] Douzinas, Costas: Theses on law, history and time. *Melbourne Journal of International Law* (2006)7(1), http://www.austlii.edu.au/au/journals/MelbJIL/2006/2.html, access on 24 Jan.2010

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

[559] IACHR, *Hermosilla et al. v. Chile*, 15 October 1996 (Report No.36/96, Case No.10,843).

The fact that law also turns history into legal procedure can be seen by the creation of post facto laws in Nuremberg and Tokyo Tribunals.

The exceptions on the principle of the non-retroactivity allow cases that would have been left outside the scope of the jurisdiction *ratione temporis* of international human rights bodies to be examined by international human rights bodies. When these bodies recognize their own jurisdiction to examine these issues, it becomes possible to have an official recognition of the facts which occurred to individuals and that were being denied by their own governments. Should supranational bodies and procedures have power over national bodies in order to preserve the memories of those who were forgotten before national courts?

One way of establishing the forgetting in States is the enactment of amnesty laws. Amnesty has the objective of instrumentalized amnesia. It would mean the repudiation of the past and that would harm our capacity to distinguish between false values and ideals and those worth remembering. Opposing amnesty we could see forgiveness, which instead of promoting forgetting would recollect memories of the injustice. It requires the recall of the injury to be forgiven and re-inscribes it as modified memory. International human rights bodies have condemned the automatic, unconditional amnesties that aimed to prevent the investigation on the violations of human rights since those courts could not consider more individualized, conditional amnesties that aim to promote peace and reconciliation.[560]

In examining the cases and emitting decisions, international human rights bodies ensure that the memories of the victims do not vanish without being archived. It is a way to maintain the memories of the victims in history. In this sense, law also is part of memorial consciousness. Law's memorial sites have principles, rules and procedures that have normative significance. In these sites, however, the law treats history as a set of facts and memories that are to be proved by evidence. Thus, memory in law has to be proved by the evidence of the truth of alleged past actions.[561] Savelsberg argues that law and enforcement from a Durkheimian perspective become tools to confront the past, reestablish moral boundaries and provide an institution where the public can express their feelings of what is right and what is wrong.[562]

Are memory and history synonymous? Should international human rights bodies write history or merely memory? Pierre Nora[563] makes a distinction between the two terms. Nora defines memory as something which is in permanent evolution, open to the dialectic

---

[560] Mallinder, Louise, 'Can Amnesties and International Justice be Reconciled' (2007)1, *International Journal of Transitional Justice*, pp.208-230, p.228.

[561] Macklem, Patrick, 'Rybná 9, Praha 1: Restitution and Memory in International Human Rights Law'(2005) 16-1, European Journal of International Law, pp.1-23,p.14

[562] Savelsberg, Joachim J. and King, Ryan D, 'Law and collective memory' (2007) 3 *Annual. Review.Law Social Sciences*, pp.189-211, p. 202.

[563] Nora, Pierre, 'Between Memory and History: *Les Lieux de Memoire'* (1989)26, *Representations*, pp.7-24, p.8.

of remembering and forgetting, unconscious of its successive deformations, vulnerable to manipulation and appropriation. History would be "the reconstruction, always problematic and incomplete, of what is no longer. Memory is a perpetual actual phenomenon and history would be a representation of the past. History is a secular and intellectual production, which calls for analysis and criticism. In addition, memory has a multiple nature, each group having its own memories.[564] The idea of multiple memories is described by Maurice Halbwachs. According to him, there are as many collective memories as there are groups and institutions in a society. Social classes, families, associations, armies, corporations have distinctive memories that their members have constructed. In addition, Halbwachs goes further on making a distinction between historical and autobiographical memory. The former can reach the social actor through written records, but it can be kept alive through commemorations or festive enactments. Each celebration reinforces the memory of the events. The latter is the memory of the events which the individual experienced. It can be reinforced through wedding anniversaries or college reunions. However, this type of memory usually fades when people do not keep in touch with those who shared the same experiences. Only group members remember and this memory nears extinction if they do not get together.[565] The historical memory is remembered through reading or listening to the commemorative and festive occasions when people gather to remember in common the deeds and accomplishments.[566] Human rights tribunals have conscience that history is learned through memorizing dates, facts, events, holidays and by memorial places. Costas Douzinas argues that when memory and identity become legal concerns, law takes over when history fragments defended by "the right by nationalist myths and of the left by various subaltern counter-narratives" reject a unified history. Therefore, the law would become a cure for a failed memory. Minority groups and victims of human rights violations under dictatorships belong to the latter group. Being in the counter-narrative side means that that their own memories are less likely to be remembered as history by the official government.

The Inter-American Court on the *Moiwana village case*[567] established that in the non-monetary reparations the Suriname government should build in a suitable public location a monument honouring the victims of the massacre executed by military officials. This demonstrates the Durkheimian concept that "Law is no longer mainly an expression of the collective consciousness. It must somehow negotiate the diverse beliefs and understanding of diverse groups"[568] in the modern society.

---

[564] Nora, Pierre, 'Between Memory and History: *Les Lieux de Memoire'* (1989)26, *Representations*, pp.7-24, p.8.

[565] Halbwachs, Maurice, *On Collective Memory* (Lewis A.Coser trans,ed 1992 ed) [trans of: *Les Cadres Sociaux de la Mémoire* et *La Topographie légendaire des évangiles en terre sainte*], p.24.

[566] Halbwachs, Maurice, *On Collective Memory* (Lewis A.Coser trans,ed 1992 ed) [trans of: *Les Cadres Sociaux de la Mémoire* et *La Topographie légendaire des évangiles en terre sainte*],p.24

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

[568] Misztal, Barbara A., 'Durkheim,on collective memory' (2003) 3-2 *Journal of Classical Sociology*, 2003, pp.123-143, p.10.

When judges in international courts take decisions they might play a similar role as historians, as they act as impartial people in the process to select what it is going to remain as a recognized fact.[569] Historians play the impartial third part when it comes to selecting facts to preserve memories of a group in a determined period of time.

In addition, governments that can arbitrarily censor historical books, educators will transfer knowledge and even citizens under the veil of ignorance[570] also play the impartial part.[571]

Educators will be able to pass the information to new generations in educational institutions, but their role can be also limited by what kind of textbooks is approved by governments. It is far from being rare the discussion over what has been omitted in textbooks in polemic issues, such as the rape of Nanking which is briefly described in textbooks and strongly denied by politicians and not extensively taught in schools. Main reasons for Japanese people not knowing about the Nanking massacre is that teachers do not teach about the incident in detail, the mass media avoids coverage on the matter and pro-imperial revisionists make an extensive campaign denying the existence of the massacre.[572]

When there is a lack of will by parties that should play a crucial role to remember certain facts, there is the possibility of another third-party to play the impartial part role. One point that differs the case of massacre of Nanking and the atrocities examined by the human rights bodies, such as the Inter-American Human rights Commission on Human Rights and Inter-American Court on Human Rights is that in this case, the attempts to preserve the memories of the victims such as in the Moiwana village case is coming from an international or external third party. The fact that they are really external might give them an extra credibility regarding the impartiality or can be regarded as illegitimate by the interested parties, being ignored by governments ending up being lost in question of time. In this case the memory produced by international courts would not have enough strength at the point of changing how the condemned state will choose to manage their history.

Historians in their own countries suffer pressure from governments or political parties to refrain from dealing with dark sides of the memories of an event. In the case of Nanking massacre the polemic resides on the differences between the Chinese and Japanese historical points of view and how they are going to transmit the information of this

---

[569] Ricouer, Paul, *Memory, History, Forgetting* (Kathleen Blamey & David Pellauer trans, 2006 ed) [trans of: *Mémoire, l'histoire, l'oubli*], p.314.

[570] John Rawl's "veil of ignorance" is described in his Theory of Justice. Under this veil nobody would be able to know which role it would play in the society. Nobody would be able to assess its level of intelligence, fortune what would make people think in an unbiased way.

[571] Ricouer, Paul, *Memory, History, Forgetting* (Kathleen Blamey & David Pellauer trans, 2006 ed) [trans of: *Mémoire, l'histoire, l'oubli*], p. 314

[572] Kasahara, Tokushi, Reconciling narratives of the Nanjing Massacre in Japanese and Chinese textbooks. In <http://www.usip.org/files/file/kasahara.pdf>, p.4, access on September, 12 2010.

incident to the next generations. Moreover, the victims are foreign citizens and not national of the violator country.

In the case of violations analyzed by human rights bodies, there is not a clash between two countries' different interpretations of the same fact and the victims of the atrocities are the country's own nationals in the vast majority of the cases. What is in issue in the tribunals is the lack of will of a government to recognize the rights of the victims or their relatives. In this case, when the international bodies recognize the violation of the victims' rights they are playing an essential role to preserve memories of the victims.
What could be argued is about at what extent the memories produced by an international court can make a substantial difference for a nation?

In each human rights bodies examined in the present work the context of the violations were particular. The recognition by these bodies of exceptions to the principle of non-retroactivity demonstrates the will of providing remedies to those who were denied or ignored their rights. A violation of a right whose examination would be barred by the principle puts into conflict the respect to the legal principle and the necessity of punishing the violations. The Inter-American human rights bodies have clearly made the choice of choosing the exception to the principle in order to examine the violations which were ignored by the states. Mass violations took place in these countries under the military dictatorship and due to the lack of a judiciary system that could answer the needs of the victims, such as fair trial, investigation and punishment the international bodies found necessary to accept the exception and apply the continuing violation concept.

Inter-American human rights bodies had to deal with issues relating to death, torture and disappearance of the victims. The fact that the violations were extreme maybe influenced in the more flexible interpretation of the exceptions to the principle of non- retroactivity of treaties. It interpreted in a more flexible way, e.g. the forced disappearance when compared to the Human Rights Committee which initially would not recognize its competence *ratione temporis* to analyze case of forced disappearances which took place before the ratification of the Covenant on Civil and Political Rights

Judiciary members are supposed to erect barriers in order not to get influenced by the prejudices of the plaintiffs. They wear their own costume, the apparatus of the tribunals indicate the distance that separates the group of judges from all others, the communication between judges and plaintiffs does not take a place in the form of a conversation, but through notaries and lawyers. Judges have memories related to their work.[573]

Ricoeur describes the structural difference between the way that a historian and a judge acquire information. The historian gets his source of information from archives and the judge from the courts. However, the linguistic structure involved is the same one that of testimony, from its rootedness in declarative memory to its oral phase, and continuing up

---

[573] Halbwachs, Maurice, *On Collective Memory* (Lewis A.Coser trans,ed 1992 ed) [trans of: *Les Cadres Sociaux de la Mémoire* et *La Topographie légendaire des évangiles en terre sainte*], p.140.

to its inscription in the mass of documents preserved in the framework of the archive. The testimony when used by both historians and judges has common features, such as the concern with proof and the critical examination of the credibility of witnesses.[574] The limitation of the trial is that it will describe facts constrained to the rule of the law. The acts which would not imply in the violations of rights remain outside of the discussion in tribunals. Statute of limitations impose that certain facts which occurred before the ratification of a treaty by a State or acts which would not be considered as against the law would remain outside the discussion in tribunals. In the judicial power, past acts are represented solely in terms of the nature of charges selected prior to the actual trial. Ricoueur emphasizes the fact that trials are representations in the present within the horizon of the future social effect of the verdict. The presence of scenes played on the plane of discourse, constituting a "response to time's wearing away of all types of traces-material, affective, social".[575]

Ricoueur refers to Todorov when is studying the work of a historian. The latter describes it as,

> [l]ike every work on the past never consists solely in establishing the facts but also in choosing certain among them as being more salient and more significant than others, then placing them in relation to one another; now this work of selecting and combining is necessarily guided by search, not for truth, but for good.[576]

Simpson describes how some trials would fail as history, but also some trials fail as law and for Douglas, war crime trials when undertaken with vigilance and honesty can provide telling, instructive and just outcomes. In addition he argues that the law as many lawyers and judges have approached mass atrocity with a sensitivity to the requirements of a historical record.[577]

Judges, being the main character in trials when acting in an international forum, also end up focusing on a few elite actors and can therefore contribute to remove from collective memory those larger social mechanisms which involve broader segments of the population.[578]

Juridical approach and historical approach to the same events has an obvious difference in that the juridical approach can be challenged by popular opinion, but due to the principle of *non bis idem* cannot be tried again. Furthermore, if the trials happen with undue delay it is considered an additional harm to the victim. After the judgement in

---

[574] Ricouer, Paul, *Memory, History, Forgetting* (Kathleen Blamey & David Pellauer trans, 2006 ed) [trans of: *Mémoire, l'histoire, l'oubli*], p.316.

[575] Ibid.,p.318.

[576] Ibid.p.86.

[577] Simpson, Gerry J. 'Law, war and crime: war crimes trials and the reinvention of international law' (2007) p.88.

[578] Savelsberg, Joachim J. and King, Ryan D. 'Law and collective memory' (2007) 3 *Annual. Review.Law Social. Science*, pp.189-211, p.194.

several cases the victim can see a new horizon. Judges have to come to a conclusion. However, Professor Owen Fiss claims that the interpretation of the law and facts made by a judge is authoritative because it can use force against those who refuse to accept or otherwise give effect to the meaning embodied in that interpretation. In addition, it is not only about merely state power, but also an ethical claim to obedience because the judge is part of a structure that is thought as good to preserve.[579]

On the other hand, historians cannot achieve a conclusion. Even if they try to do that, other historians would criticize the point of view of another historian and this is the main characteristic of history. It is the process of eternal rewriting.[580]

Some trials are remarkable for history, but historians can criticize the results of the trials, interpreting the facts according to the values existent when the History is being written. That is the perspective of collective memory historians. They suppose that if memory is provisional it can always change to a good effect. But, collective memory arises in frameworks that emphasizes current and future priorities.[581]

International human rights bodies also help victims of governments that are not willing to recognize their claims and past atrocities to preserve their group memories. Thus, it is established a relation between the international bodies and local people where the State violator is supposed to recognize its own past mistakes. However, the national memory will accept a judgement from an international body? Collecting some memories does not necessarily turn them into collective memories.

It is also true that each body of judges will interpret cases in a different way. An example of a progressive interpretation of the continuing violations concept can be seen in the Inter-American Court on Human Rights, where most of the judges have an academic background. These bodies have a distinct character of memory, the memory that protects those who belong to the counter-narrative of their countries.

7.7. Application of the non-retroactivity principle to States

The principle of legality serves to ensure the predictability of actions for individuals. In the international arena, States also receive the same protection as it is provided by article 28 of Vienna Convention on the law of Treaties. However, would it be possible to claim that States should receive the same protection of predictability and foreseeability when

---

[579] Minow. Martha, Ryan, Michael and Sarat, Austin (eds), *Narrative, Violence and the Law- The Essays of Robert Cover* (1996), p.143.

[580] Ricouer, Paul, *Memory, History, Forgetting* (Kathleen Blamey & David Pellauer trans, 2006 ed) [trans of: *Mémoire, l'histoire, l'oubli*], p.320.

[581] Douzinas, Costas, 'Theses on Law, History and Time'. (2006) *Melbourne Journal of International Law* 7(1) in http://www.austlii.edu.au/au/journals/MelbJIL/2006/2.html access on 24 Jan.2010.

the past actions were evil to their own citizens? Would it be possible to apply the same requirements of predictability and foreseeability used in criminal law to protect individuals from arbitrarity to regulate the conduct of states under the international human rights law?

Could States claim that they would not be able to foresee that their own actions were contrary to the law? If we think that in a past not too distant States had exclusive sovereignty to act in the way they wanted in relation to its own population under its power, it is possible to claim that States could not foresee that their own acts would be liable before international human rights bodies. Predictability is related to the clear language of the law. The law must be sufficiently clear for its subjects to act accordingly. By the time States committed the violations there were no binding treaty to regulate the way they should treat their own citizens.

Foreseeability requires that developments in law must be predictable. However, during the time when a country is governed by a military dictatorship it is hard to claim that the government in power would be able to foresee that eventually they would lose power and instead democracy would create a background that would allow the ratification of human rights treaties. On the other hand, it could be argued by human rights bodies that under the general principles of law accepted by most of countries, States would never be able to violate the basic rights of its own citizens.

International human rights treaties, when ratified, impose duties to the States, and in old regimes where violations were widespread they intend to assure that past violations would not occur in the future, having a deterrent effect. Another point which can be made is the choice that international human rights bodies exercise when holding accountable facts which occurred before the ratification of the treaty. If international human rights bodies choose to give admissibility *ratione temporis* over past violations, it means that violations could be considered condemnable acts by the governments. Trindade also argued that there are States crimes.[582]

If those states are not well established democracies it could cause a destabilization of the political situation of the State and probably be detrimental to a peaceful political situation, and hence it is not the best approach to deal with past violations in the name of justice. The past has a meaning when it is in accordance to the present needs in a society. Moreover, there are other ways to deal with past crimes that are well studied in transitional justice studies.

Would an exception of the non-retroactivity principle be considered more acceptable when applied to States and not to individuals? Human rights bodies have as their main scope the protection of individuals. The time when the sovereignty of States was considered as absolute is finished. In the Nuremberg judgement it could be observed that "The maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice." which implies that judges could overlook principles of justice if it

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

served the victorious States which established the court.[583] In a different context of human rights violations could the international bodies also waive the principle no longer in the name of States, but in order to protect individuals? The solution found by tribunals was the continuing violation concept that is applied at different levels in different international human rights bodies.

Human rights bodies have as their main scope the protection of individuals, thus it sounds natural that the interpretation of instruments will favor individuals who suffered past violations and not States which ignored their scope of serving people under their jurisdiction. In order to change the absolute sovereignty power to an anthropocentric approach of international law, in which individuals have international personality, even if limited, the procedural principle sometimes had to be waived.

But, predictability is important to protect individuals from the arbitrarity that may be committed by States. The objective of a State should be the protection of individuals under its jurisdiction and not their oppression. It is unacceptable to claim that States did not have duties to protect people under their jurisdiction before the ratification of human rights treaties.

There are two values in contrast in this case. Is the duty to hold the State to accountability of crimes opposed to having the risk of states withdrawing from the treaties? Can the discussion relating to the non-retroactivity principle in the national context be applied to international bodies? The prosecution of individuals responsible in the national courts raises the fear of having retaliation or causing a backward step in fragile democratic societies.

When it comes to decisions taken by international human rights bodies the risk of having political backwards due to the trials on past violations is not so evident once States accept human rights jurisdiction after experiencing democratization.

The States being held responsible for violations of human rights and individuals are also accountable for the crimes they committed during their mandate. In the framework of human rights bodies States as legal persons in international law can be judged by their own misgivings and bad treatment of their citizens and people under their power.

The principle of *nullum crimen sine lege* that does not have such a long history either, being created with the rise of revolutionary liberalism in 18th and 19th century in Europe with the introduction of the 1879 French Declaration on the Rights of Man, the 1791 French Penal Code and the 1871 German Criminal Code.[584] It was made to guarantee that individuals do not suffer punishment arbitrarily. All individuals receive this protection and it has been assured in international human rights treaties after World War II.

---

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

Ironically those who committed major atrocities were not considered to have the right to such protection since their acts were too evil not to receive punishment due to the fact they were not regulated by international law at the time. That was the example of crimes of aggression and even crimes against humanity.

In the current international framework, therefore, States are accountable for violations against its population, and ex leaders are accountable due to violations before the international criminal courts. In the former case the recognition of the violations is connected to the State's structure of justice, if the judiciary is working effectively to assure due process to the victims. The latter is related to the fight against impunity. It seeks for retributive justice in extreme cases such as crimes against humanity and genocide.

In the case of the exception to non-retroactivity principle of the treaties there the values of holding to accountability State crimes clashes with the risk of having States withdrawing the Treaties of human rights. The risk of having political backwards in the past violations in international trials exists, but less than in domestic trials since the States accept human rights treaties after the democratization process. Furthermore, another point that could be discussed is to what extent international decisions can really influence in the collective memories of a certain country?

7.8. *Nullum crimen sine lege* and the development of international criminal law

Innovations in international law that were created without respecting the strict legality in Nuremberg ended up establishing principles of law that are currently applicable in international courts such as the crime of aggression and crimes against humanity that were clear retroactive crimes and at the moment are enacted in international instruments.

The Nuremberg and Tokyo tribunals were part of the Victor's justice since only the conduct of the defeated part was considered as crimes against humanity. Allied acts such as the bombing of Hiroshima and Nagasaki could be perfectly qualified as crimes against humanity and it was recognized as such by the Tokyo District Court in the Shimoda case. This conduct could be considered as crimes against humanity not only by the number of victims, but also due to the continuing consequences of the residual effects on the victims and their descendants.

However, this is a claim that can be rebutted by stating that not all *malum in se* actions can be enacted as crimes in the legal system. It is simply the limitation of the law. Therefore, even the defeated part had some conducts that were not raised during the Trials such as the case of "comfort women". Crimes against "comfort women" were not prosecuted in Tokyo Tribunal. Furthermore, the issue of biological and chemical weapons experiments was not brought to the tribunal since US prosecutors granted immunity to those involved with Unit 731 and the Japanese use of biological and

chemical weapons was exempted from prosecution.[585] The sexual crimes by the time of Tokyo and Nuremberg Tribunals did not draw attention by the allied powers, but later in the ICTY and SCSL they were considered as crimes against humanity.

There are acts that by a certain time of history were not regulated as crimes but which were according to the morals of that certain period of time. It is the case, for example, of the slavery system, which was not considered as immoral for many years. The evolution of law depends on the breaching of the strict legalism in the case of international courts.

The legitimacy to declare what should be criminally liable without a previous law is diminished in some *ad hoc* tribunals in which only the victor's side is able to establish what is a crime and convict the defeated part.

The Nuremberg Tribunal and Tokyo Tribunal are examples of victor's justice. Therefore, acts committed by the Allied Forces were not examined as crimes against humanity. The bombing of Hiroshima and Nagasaki were not accountable before any international tribunal. The fact that those events could not be recognized as crimes can raise a certain skepticism over international substantive justice since the fact that certain acts are not considered as criminal by virtue of luck. This luck of losing or winning a war would determine which acts were to be considered crimes by the international community. It does not mean that those acts committed by the defeated part should not be judged as crimes. Acts that are in *malum in se* must be criminally liable. It might be part of the evolution of the law. However, this evolution depends on the luck of events, of certain acts being committed by the winning part or by the defeated one. If both parts commits the same act only the defeated part's acts will be held to account. Nevertheless, in this case it might not affect the evolution of the substantive justice since one of the part's acts is going to be accountable. In this case, it might not affect the evolution of the substantive justice since at least one of the sides will be held accountable for a determined conduct.

The problem appears when the victor's side's conduct is different from the defeated side. This conduct will not be considered as a crime and therefore is less likely to be criminalized.

The problem of bringing to court only the defeated side is that it creates the idea that punishing war crimes appeal to the idea that such punishment only embody 'victor's justice rather than real justice. This would bring a suspicion that those who are guilty of war crimes are not being punished for the atrocities but just because they were in the losing side.[586]In fact, it would make us think that those who are being punished are being punished for the wrong reasons. Just because they were in the defeated side.

---

[585]Wanhong, Zhang, 'The Nuremberg trials: a reappraisal and their legacy: from Nuremberg to Tokyo: some reflections on the Tokyo trial' (2006) 27, *Cardozo Law Review*, pp.1673-1682, p.2.

[586] Wringe, Bill, Why Punish War Crimes? Victor's Justice and Expressive Justifications of Punishment (2006) 25-1, *Law and Philosophy*, pp.159-191, p.164.

The principle of non-retroactivity is not absolute. When directed to States it accepts exceptions. When it was agreed by the State parts is one of the exceptions. In international human rights bodies another exception can be observed in continuing violations cases in which the act or conduct started before the ratification of the treaty and continues after the State's accession to the instrument. In this case, past violations committed against individuals by the State party can be held to account.

The creation of crimes against humanity and crimes of aggression occurred in the Nuremberg and Tokyo Tribunals. However, the fact that these tribunals were made to show the power of the victor's on the defeated side could undermine the origins of those crimes and their application in subsequent trials, such as the ICTY and ICTR, and even in the Iraqi Tribunal later. The arbitrary character of the Nuremberg Tribunal can be seen in the language of justice Harlan Fiske Stone who stated that:

> so far as the Nuremberg trial is an attempt to justify the application of the power of the victor to the vanquished because the vanquished made the aggressive war, (...) I dislike extremely to see it dressed up with a false façade of legality. The best that can be said for it is that it is political act of the victorious States which may be morally right (...) It would not disturb me greatly (...) if that power were openly and frankly used to punish the German leaders for being a bad lot, but it disturbs me some to have it dressed up in the habiliments of the common law and the Constitutional safeguards to those charged with crime (...) Jackson (Robert H. Jackson, chief prosecutor at Nuremberg) is away conducting his high-grade lynching party in Nuremberg (...) I don't mind what he does to the Nazis, but I hate to see the pretense that he is running a court and proceeding according to common law. This is a little too sanctimonious a fraud to meet my old-fashioned ideas.[587]

Another point is whether the fact that in domestic courts the principle of legality usually is used to protect the individuals that did not kill a high number of people such as in the cases brought to international courts. It would make us assume that actually the fact that being responsible for killing millions of people or only a few would make a difference when we examine exceptions to the *nullum crimen sine lege* principle. This raises the question whether the dictators brought to international courts could be treated in the same way as criminals in domestic courts responsible for the murder of one person.

Originally the principle of *nullum crimen* was created to protect citizens from the arbitrarity of states. However, when it is applied to protect States in a strict way it has the opposite effect of depriving those who suffered violations of the possibility of having access to remedies. However, it is necessary to assure that there is predictability for

---

[587] Mutua, Makau, 'Never again: questioning the Yugoslav and Rwanda' (1997) 11 *Temple International and Comparative Law Journal,* pp.167-187, p.171.

States of which conduct can be examined by international human rights bodies. The acceptance of exceptions to the principle cannot be considered as a wrong means to achieve best ends since when applied to States it is difficult to argue that is morally wrong to break the principle of justice (when applied to individuals), but cannot be interpreted in the same way when it comes to the application of it to protect States from criticism and conviction by international human rights bodies.

7.9. Application of the exception to the principle of non-retroactivity to certain States and groups

Human rights bodies in many cases examined cases originally from developing countries. Even whether many remarkable atrocities in history occurred in States that were not European, such as the enslavement of Africans with its barbaric and genocidal characteristics, the colonization of Asians, Africans and Latin Americans, slaughtering of indigenous populations in the colonized, those events were not enough to create a human rights framework. The human rights movement appeared due to the extermination of a European white population, which started the universalization of human rights.[588]

However, with the passage of time human rights have passed to be not only the protection of white people living in Europe, but also in other continents, especially in developing countries. Mutua points out that the face of a prototypical victim is non-white. Apart from the wars and atrocities committed in the former Yugoslavia and in Northern Ireland the most enduring faces of human rights victims are black, brown or yellow skinned. Even in Bosnia and Kosovo the victims were of Muslim origin and not Christian or "typical" white Westerners.[589]

The attention on human rights issues is directed to the Third World Nations in Latin America, Africa and Asia. The cases examined in the research by the human rights bodies related to past atrocities occurred also in these countries and ex-communist countries in Europe. The Inter-American Court on Human Rights has not been ruling on the cases that took place before the ratification on the American Convention on Human Rights, but it is examining the past through the examination of the lack of efficiency of the domestic institutions to investigate, prosecute and punish those responsible for the crimes.

In international criminal courts justice is claimed to be universal, however the right to administer it is got on the showing oneself to not be neutral, but the just party as Anderson points out.[590] He states that the "appeal to the rule of law does not offer

---

[588] Mutua, Makau, 'Savages, victims and saviors' in Falk, Richard, Elver Hilal and Hajjar, Lisa (eds) *Human Rights (Critical Concepts in Political Concept)* (2007) Vol.I):204-254, p.206.

[589] Ibid.p.225.

[590] Anderson, Kenneth, 'The Rise of International Criminal Law: Intended and Unintended Consequences' (2009)20-2, *European Journal of International Law*, pp.331-358, p.338.

international criminal law quite the blanket moral independence from the conditions under which it is administered that it sometimes seems to think.".[591] He argued that the international community cannot merely bring to the courts the heads of state that committed atrocities, they are not exempted from intervening during the occurrence of the violations. According to his logic, it could be questioned whether the courts that did not intervene have a moral basis to conduct trials.

CONCLUSIONS

Law is made so that it can regulate future activities; its effectiveness lies in its application to all the myriad cases that are always still to come[592]

This sentence sums up what law essentially is. Law regulates situations which are to happen in the future.

Nevertheless, international tribunals have decided that this is not always the only way of applying the law. Law also can serve as a tool to remember past situations that could not find proper remedies in countries where the rule of law does not work efficiently or where governments do not have the will to remember the past.

The initial motivation to start this research was the doubt about whether physical disabilities with permanent effects could be considered as continuing violations before international human rights bodies. Since the case of Hiroshima and Nagasaki was never brought to international bodies this research would be useful to study the possibility of bringing the *hibakusha* (victims of the Hiroshima and Nagasaki bombings) case before the Inter-American Commission on Human Rights.

The first problem was to overcome the fact that the bombing of Hiroshima and Nagasaki took place before the existence of the Inter-American Commission on Human Rights, which was established in 1959, as well as the problem that the Inter-American Declaration on Human Rights was created in 1948.

Finding a way to overcome the essential principle of non-retroactivity seemed an impossible task as well as the possibility of presenting the petition before the Inter-American Commission on Human Rights relating to the *hibakusha.*

---

[591],Anderson, Kenneth, 'The Rise of International Criminal Law: Intended and Unintended Consequences' (2009)20-2, *European Journal of International Law*, pp.331-358, p.338.

[592] Douzinas, Costas. Theses on law, history and time, 2006 MelbJIL 2; (2006) 7(1) Melbourne Journal of International Law 13, p.3

It was found that exceptions to the principle of non-retroactivity of treaties provided by article 28 of Vienna Convention on the Law of Treaties were manifested by the "continuing violations" of human rights. In the case of *hibakusha* the claim that could be used was that the victims suffered from residual disabilities, and these could be considered as a continuing violation.

Physical disabilities caused by facts which took place before ratification of international treaties could not be examined by international human rights bodies due to the lack of jurisdiction *ratione temporis*. International bodies have chosen to not involve themselves with questions relating to national compensations. An exception to this pattern was found in the Committee to Eliminate Discrimination against Women, in which it was recognized that forced sterilization was still having effects on the applicants.

Therefore, physical disabilities were not recognized as continuing violations and are interpreted as mere consequences which are prolonged. Therefore, the pain and suffering caused by earlier acts of torture or effects of expropriation of property are not considered as continuing violations.

When human rights bodies recognize their competence *ratione temporis* to adjudicate expropriations which took place before the entry into force of the Convention, it is to examine whether there was discrimination to provide reparations to those who lost their properties, as it was examined by the European Court of Human Rights and Human Rights Committee.

This research had the objective to investigate in what situations the international human rights bodies recognized exceptions to the principle of non-retroactivity when the protection is directed to States and when it is directed to individuals. In the former form of protection, human rights treaties and their interpretation was at the core of the investigation. In the latter, international criminal law and domestic criminal law were the objects of examination.

There is also a link between law, memory and history and the fact international courts choose certain situations to be continuing violations, therefore, being under their jurisdiction *ratione temporis,* and how this shapes the memories of determined groups which had their claims recognized before those courts.

In addition, another important point is whether the recognition of exceptions to the principle of non-retroactivity or the principle *nullum crimen sine lege* are morally wrong. In whose interests the principle has to be respected?

1. Exception to the non-retroactivity of treaties

In human rights bodies the exception to the principle of non-retroactivity are provided by the concept of continuing violations. A continuing violation, though, is not necessarily related to the problem of the non-retroactivity of treaties. Pauwelyn defines the continuing violations as "the breach of an international obligation by an act or a subject of international law extending in time and causing a duration or continuance in time of that breach".

Human rights bodies admitted exceptions to the principle of non-retroactivity of treaties in three different forms.

The first exception is when a causal act continues, such as forced disappearances and arbitrary detention. Courts have stated that forced disappearance of persons is a multiple and continuous violations of many rights under the Convention that the States parties are obligated to respect and guarantee[593].

The second exception consists of when the effects of the causal act continue, such as a legislation which was enacted before the ratification of the treaty and even if it is contrary to determined articles of the treaty is still emitting effects after it enters into force for the State in question. Nevertheless, this type of interpretation is controversial since the International Law Commission's Articles on State Responsibility, Article 14 (1) states that "the breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue". Nevertheless, if we stated that the law *per se* is continuing and not only its effects this controversy would not exist.

The third form of continuing violation is when there is an omission by the State party to provide remedies to the violations committed before the ratification of the treaty, where there is an omission by the State to investigate, prosecute and punish those responsible for past violations.

The Inter-American Human Rights Bodies did not hesitate to recognize continuing violations which took place under a military regime in countries where there is the necessity to restitute the confidence on juridical institutions. The continuing violation principle was applied mainly in situations such as the forced disappearances, the failure to investigate, prosecute and punish the responsible for the violations and when the laws enacted before the ratification of the Convention had collisions with the rights set forth in the American Convention on Human Rights.

The recognition of exceptions to the principle of non-retroactivity of treaties is accepted when the parties agree that the violations are still continuing *per se* or when there is an absence of action by States to punish certain crimes. It is the case when the State fails to investigate, prosecute and punish human rights violations.

---

[593] Inter-American Court on Human Rights. Velasquez v. Honduras., Judgement of July 29, 1988.

Cases relating to *ratione temporis* issues as well as continuing violations brought before the Human Rights Committee concerned restitutions of property in ex-communist countries, arbitrary detention, forced disappearances and deprivation of personal rights.

On determining reparations, there are the criteria of material suffering and personal suffering. On the former, there is the destruction and confiscation of the property which was extensively examined before the Human Rights Committee. As examples of the latter there are the distinction between slave laborers and forced laborers, such as Poles and Russians who were incarcerated by the Nazis during World War II.

Claims relating to the right to property claimed before the Human Rights Committee were grounded on discriminatory laws of restitution, since the Covenant on Civil and Political Rights does not provide the right to property.

The decisions of the Human Rights Committee that are not legally binding are not unified, and in certain cases the discriminatory character of the restitution laws was recognized, such as *Josef Frank v. Czech Republic*[594], in which the law established that only Czech nationals could benefit from restitution. In that case, the Committee recognized that denial of restitution based on the fact the claimants were not Czech citizens constituted a violation of the right to equality.

Conversely, in other cases the Human Rights Committee understood that the law effects ceased before the entry into the force of the Covenant for the related State, as well as due to the fact the Covenant did not protect the right to property.

At the beginning, the Human Rights Committee also had refused to accept its jurisdiction *ratione temporis* over forced disappearances. Since the disappearances took place before the ratification of the Covenant by the State the Committee did not recognize its jurisdiction *ratione temporis* over the cases[595].

Nevertheless, in cases where there was a new fact after the ratification of the Covenant, such as a certain judicial decision, the Committee recognized its competence *ratione temporis*[596].

The Committee's point of view regarding the forced disappearances has changed in later times. The Committee, in a more recent case, recognized that the suffering caused to the applicant's family by the disappearance of his son and "continuing suffering" was a violation of rights of the family[597].

---

[594] HRC, Josef Frank v. Czech Republic, communication no.586/1994.

[595] HRC, S.E v. Argentina, communication no. 275/1988, R.A.V.N e at. v. Argentina,

[596] Maria Ortilia Vargas v.Chile, communication no.718/1996

[597] HRC, S.Jegatheeswara Sarma v. Sri Lanka, communication no.950/2000.

The European Court had set its standards initially to respect strictly the non-retroactivity principle. It would separate the material facts from the duty to investigate and punish crimes which took place before the ratification of the European Convention in an approach opposite to that of the Inter-American human rights bodies.

This approach, however, has changed following the *Silih v.Slovenia*[598] case, in which the European Court has followed the same interpretation as the Inter-American human rights recognizing the continuous character of the enforced disappearances.

The European Court on Human Rights has recognized the continuing violation on cases in which there was a continuing deprivation of personal rights when the character of the right could not be separated from the applicant, such as the deprivation of political rights.

Deprivation of ownership or of another right *in rem* is in principle an instantaneous act and does not produce a continuing situation of "deprivation of rights"[599]. Furthermore, the Court has also interpreted the death of victims as instantaneous acts which would not produce a continuing situation.

The European Court has also recognized the effects of legislation which was enacted prior to the entry into force of the Convention and continues its validity after the critical date as a continuing violation.

The Human Rights bodies, although working for the protection of individuals who could not find remedies to their rights in domestic courts, had in the beginning refrained from breaching the principle of non- retroactivity when the States had made a declaration limiting the jurisdiction *ratione temporis* to facts which took place after the ratification of the Conventions. It demonstrates that there is still emphasis on State voluntarism in spite of the efforts to fight the failure to punish past atrocities.

2. Exceptions to the principle of non- retroactivity to individuals

Post facto laws which are applied by international courts, therefore, have the function to innovate and widen the range of acts which are to be considered as crimes.

The prohibition on retroactivity has the objective to protect individuals from punishment for acts which they reasonably believed to be lawful at the time they were committed.

Nullum crimen sine lege, when applied in international criminal law and human rights law, follows substantive justice rather than strict legality. The application of a broader concept is possible in the absence of a law *maxima*, such as a constitution, usually present

---

[598] ECtHR, application no. 71463/01

[599] ECtHR, Malhous v. Czech Republic, no.3307/96, European Court on Human Rights, Almeida Garret, Mascarenhas Falcao & Others v. Portugal, judgment 11 February, 2000

in domestic law. However, this might not occur frequently in the future since there is a movement towards the codification of international crimes and its principles in international treaties and the gaps will probably be steadily filled in the future. The certainty of law in international criminal law achieved its *maximum* exponent in the International Criminal Court. The ICC Statute acted as a legislative body and its statute is positive law.

The fact that the international courts apply the concept of international customary law demonstrates that in the field of international law, common law has great influence on the arena and that the strict legality defended by civil law systems does not have the same strength as its common law counterparts. 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 all conducts in international instruments. Therefore, the use of strict legalism would bar the progress of this field, leaving space for the defendants to avoid punishment due to the fact that their acts were not codified by any international instrument at the time they occurred.

Although in the Nuremberg and Tokyo Tribunals there was a retrospective application of laws, as crimes against humanity and crimes of aggression were created by these courts, currently those crimes are more than established in international criminal law and the principle of legality is established as a customary rule due to its presence in many human rights instruments. The retroactive application of these laws, however, avoided a greater injustice of having the perpetrators of atrocities committed during World War II go unpunished.

Legality cannot be claimed when the defendant could predict that their own conduct was punishable under domestic law, as it was decided by the International Criminal Tribunal for the former Yugoslavia in the 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. This occurred, for example, in the Erdemovic case, as the ICTY statute did not establish death penalty, and this clashed with the domestic legislation that provided it. The International Criminal Tribunal for former Yugoslavia decided that domestic decisions did not provide extensive jurisprudence and did not apply the capital punishment in the case.

The fact that a general international legislative body does not exist has led some critics to oppose the international criminal law as being inconsistent with the principle *nullum crimen, nulla poena sine praevia lege scripta*. They would even suggest the use of *nullum crimen, nulla poena sine iure* instead [600].

In civil law countries, the strict legality tradition might conflict with the idea of application of crimes developed under international law. This occurs since in those

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

systems the existence of crimes are restricted to domestic penal laws and also the principle of *nullum crimen sine lege* is typically a major guarantee set forth in the Constitution. In those 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 Courts, even if the courts could have been ruled over crimes against humanity and provided a more flexible interpretation of them, they preferred to respect strict legality.

An example of change in the elements of crime in a common law tradition could be seen in the case of *C.R. v. United Kingdom*. The inter-marital rape, that was not previously recognized as a crime, has gained new nuances after the decision of the House of Lords. The conclusion reached is that certain kind of conducts, which run contrary to current social values, will not be accepted as lawful.

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.

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

International trials raise suspicions regarding the quality of justice they provide when they bring to court only defendants from the defeated side. This arises suspicion that in fact they are prosecuting not by virtue of the misdeeds of those facing trial, but rather due to the fact they belong to the defeated side. Nevertheless, due to these international decisions, international criminal law has been able to evolve and increase the number of conducts that are condemnable.

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 form of late justice, of trying to abolish the international community's own culpability of not interfering on 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 and 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 regardless of the existence of legislation in their countries. In addition, international courts apply international custom reasoning to rule over acts that are to become condemnable. Evolution can be clearly noticed in relation to sexual crimes. Ignored in Nuremberg and Tokyo Tribunals, sexual crimes were extensively discussed in

the ICTY, SCSR, ICTR. Recognition of forced marriage and oral sex as crimes against humanity is a sign of this development.

Nevertheless, for what objective strict legality is being put aside is not clear. Punishing those responsible for past violations does not necessarily improve a State's political situation and stability.

International tribunals can be perceived as interference in domestic issues, even when a State has accepted to give away part of its sovereignty and accept those decisions. Can the international tribunals cooperate in preserving the memory of those victims? When international tribunals decide over the recognition of the violations of the rights of victims an international memory over the case is created. In their decisions the courts also establish that monuments about the specific group should be built in order to preserve the memory of the facts. In this case, the memory that belonged to a determined group achieved international recognition and subsequently imposed this internationally recognized memory to become acknowledged facts by the national governments which *ab initio* refused to recognize them.

This demonstrates that certain groups were supposed to be excluded from memories of their states, but were not due to the decision of international bodies. International human rights bodies work for preserving the history of dominated, excluded, subaltern groups, local histories that would challenge national myths[601].

The assumption that international tribunals get their hands dirty by breaching the principle *nullum crimen sine lege* is acceptable only if there is recognition that there is a substantive real breach of the principle. The problem is who decides if there is a breach or not? International Tribunals have been claiming that in fact there is no breach of the rule when the conduct was considered as a crime under the customary law or there is an equivalent conduct that is considered as crime under the domestic criminal law. Furthermore, international tribunals adjudicate crimes which could be predicted as such by the individuals, i.e. the act *mala in se*.

Therefore, regarding conducts in *malum in se*, it is extremely difficult for defendants to declare they did not know the criminal character of their conduct, but they could claim that they did not expect there was an individual liability for the acts practiced by them.

The concept of dirty hands could not only be applied to the international tribunals and international human rights bodies which allegedly breached the principle, but also for those who are establishing the tribunals. 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 applied over

---

[601] Douzinas, Costas, Theses on Law, History and Time, (2006) 2MelbJIL 2;

those responsible for serious atrocities are specially heard in countries where international intervention is applied. Developing countries with corrupted judiciary system, lack of personnel, undue delay where it is not possible to guarantee due process are prone to international interference. The control of Justice, therefore, occurs from top to the bottom. Foreign justices are seen in those countries as saviors to rescue the victims of the violations.

The *post facto* laws were created in Nuremberg and Tokyo Tribunals in order to punish the defeated side. If domestic courts would have applied the *post facto* laws it would be considered as a lack of respect to the principle of legality.

Innovations in law, however, operate by breaking established rules and after a certain time these new rules legitimate themselves by being repeated in different legislations along time. That is the case of the crime against humanity which was applied retroactively by the Nuremberg and Tokyo Tribunals, but that currently occupies unquestionable status of crime as it has been applied in more recent international and national criminal tribunals.

In domestic laws the retroactivity in penal law occurs when it is to benefit the defendant. In international courts the occasion on which it occurred was to a certain extent due to the arbitrarily application of justice by the allied powers at the end of World War II. The creation of the crime which once was arbitrary has an accepted status as such in customary law and many international instruments.

The exceptions to the principle of non-retroactivity regarding States and to the *nullum crimen sine lege* regarding the protection of individuals have the same scope of improving the mechanisms of protections of individuals who are not to be the subject of the unlimited arbitrary behavior of States. Human rights bodies have sought for the creation of responsibilities for States whereas hybrid courts and international criminal courts intend for the punishment of individuals who worked for the States. Therefore, as an overall framework the improvement of the protection of individuals will bring a more extensive advance of human rights.

Several points in this thesis could not be discussed, but would serve as further developments of this research. The statute of limitations deals directly with the issue of time and law since the doctrine of prescription implies forgiving and forgetting. In addition, I also did not develop the topic of *nullum poena sine lege*, concentrating my efforts on the *nullum crimen sine lege*. Also the legality of the institutions which were established after the atrocities took place was not questioned in the present research, i.e., the legitimacy of a wanted outcome.

Bibliography

Articles/ Books/ Reports

Alt Parmak, Kerem, 'The application of the concept of continuing violation to the duty to investigate, prosecute and punish under international human rights law'(1994-2004) *Turkish Yearbook of human rights*. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=926281

Amann, Diane Marie, 'International decisions: Prosecutor v. Akayesu'. Case ICTR-96-4-T International Criminal Tribunal for Rwanda (1998)93-1 *American Journal of International Law,* pp.195-199.

Ambos, Kai, Wirth Steffen, 'The current law of crimes against humanity: an analysis of Untaet regulation 15/2000', (2002) 13, 1 *Criminal Law Forum*. pp.1-90.

Anderson, Kenneth, 'The Rise of International Criminal Law: Intended and Unintended Consequences' (2009)20-2, *European Journal of International Law*, pp.331-358.

Aolain Ni, Fionnuala and Campbell, Colm, 'The Paradox of Transition in conflicted democracies'(2005) 27 *Human Rights Quarterly* pp.172-213.

Arriaza, Roht, Naomi and Gibson, Lauren, 'The developing jurisprudence on amnesty' (1998)20, *Human rights Quarterly,* pp. 843-885.

Arsanjani Mahnoush H., 'Developments in international criminal law: the Rome Statute of the International Criminal Court'(1999) 93, *American Journal of International Law*, pp.22-43.

Bakker, Christine A.E, 'Notes and Comments-A Full Stop to Amnesty in Argentina- the Simon Case' (2005) 3-5, *Journal of International Criminal Justice*, pp.1106-1120.

Bekou, Olympia, Shah, Sangeeta, 'Realising the potential of the International Criminal Court: the African experience' (2006)6-3 *Human Rights Law Review*, pp.499-544.

Bertodano, Sylvia de, 'Current developments in internationalized courts- East Timor-Justice denied' (2004) 2-3, *Journal of International Criminal Justice*, pp.910-926.

Bertodano, Sylvia de, 'Problems Arising from the Mixed Composition and Structure of the Cambodian Extraordinary Chambers' (2006) 4-2, *Journal of International Criminal Justice*, pp.285-293.

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

Bhuta, Nehal, 'Fatal errors- The trial and appeal judgements in the Dujail Case' (2008)6-1, *Journal of International Criminal Justice*, pp.39-68.

Boed, Roman, 'Individual criminal responsibility for violations of article 3 common to the Geneva conventions of 1949 and of additional protocol II thereto in the case law of the International Criminal Tribunal for Rwanda' (2002) 13-3, *Criminal Law Forum*, pp.293-322.

Bohlander, Michael, 'Can the Iraqi special tribunal sentence Saddam Hussein to death?'(2005)3-2, *Journal of International Criminal Justice*, pp.463-468.

Bohlander, Michael, 'Prosecutor v. Dusko Tadic: waiting to exhale' (2000) 11-2 *Criminal Law Forum,* p.217-248.

Braithwaite, John, 'Setting Standards for Restorative Justice' (2002) 42, *British Journal of Criminology,* pp.563-577.

Brito, Alexandra B.de, Enríquez, Carmen Gonzaléz and Aguilar, Paloma (eds), *The Politics of Memory-Transitional Justice in Democratizing Societies* (2002).

Burchard, Christopher, 'The Nuremberg Trial and its Impact on Germany' (2006) 4-4. *Journal of International Criminal Justice*. pp.800-829.

Bush, Jonathan A, 'The Supreme Crime and its Origins: the Lost Legislative History of the Crime of Aggressive War (2002) 102, *Columbia Law Review*, pp.2324- 2424.

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

Buyse, Antoine. *Post-Conflict housing restitution-the European human rights perspective, with a case study on Bosnia and Herzegovina* (2008).

Campbell, Tom, *Rights- A Critical Introduction* (2006).

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.

Cassese, Antonio (ed), *The Tokyo Trial and Beyond- reflections of a peacemonger*- B.V.A.Röling (1993)

Clark, Roger S., 'Nuremberg and the Crime Against Peace' (2007) *Washington University Global Studies Review*, pp.527-550.

Cross, Matthew E., Sarah Williams, 'Recent Developments at the ICC' (2009), *Human Rights Law Review*, pp.267-287.

Harry, David and Livingstone, Stephen (eds) *The Inter-American Commission on Human Rights: Its Organization and Examination of Petitions and Communications* (2004).

Cohen, Stanley, 'Human Rights and Crimes of the State: The Culture of Denial' (1993)26, *Australian and New Zealand Society of Criminology*, pp.97-115.

Cohen, Stanley, 'State crimes of previous regimes- knowledge, accountability, and the policing of the past'. in Falk, Richard, Elver Hilal and Hajjar, Lisa (eds) *Human Rights (Critical Concepts in Political Concept)* (2007) VolIII(2007),pp.174-216

Costas, Douzinas, 'Theses on law, history and time, *Melbourne Journal of International Law* (2006) 7(1), available at , <http://www.austlii.edu.au/au/journals/MelbJIL/2006/2.html>

Chayes, Sarah, Exorcising Vichy: The Trial of Paul Touvier for Crimes against Humanity (1995) 36-3, *Massaschusetts Review: a Quarterly of Literature, the Arts and Public Affairs*, pp.425-439.

Chinkin, Christine M., 'Women's international tribunal on Japanese Military Sexual Slavery' (2001)95 *American Journal of International Law*, pp.335-341.

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

Cockayne, James, 'The Special Tribunal for Lebanon-A Cripple from Birth?'(2007) 5-5, *Journal of International Criminal Justice,* pp.1061-1064.

Crave, Matthew, 'Legal Differentiation and the concept of the human rights treaty in international law' (2000) 11-3, European Journal of International Law, pp.489-519.

Crawford, James, *The Creation of States in International Law* (2nd Edition, 2006).

Crawford, James, *The International Law Commission's Articles on State Responsibility- Introduction, Text and Commentaries* (2007)

DeGuzman, Margaret M., 'The Road from Rome: The Developing Law of Crimes against Humanity'(2000) 22, *Human Rights Quarterly*, pp.335-403.

Devereux, Annemarie, Anderson, Catherine, 'Reporting under International Human Rights Treaties: perspectives from Timor Leste's Experiences of the Reformed Process' (2008) 8-1, *Human Rights Law Review*, pp.69-104

Dickinson, Laura A. The promise of Hybrid Courts. *American Journal of International Law*, April 2003, 97 A,J.I.L.295

Djkistra, Petra and others. Enforced disappearances as continuous violations, *Amsterdam international law clinic*, 2002, available at http://www1.jur.uva.nl/ailc/Enforced%20disappearances%20as%20continuing%20violations.pdf

Downe D. et al (eds) *Crime, Social Control and Human Rights-from moral panics to states of denial- essays in honor of Stanley Cohen* (2007)

Drumbl, Mark A, ' Prosecution of genocide v. the Fair trial principle – comments on *Brown and others v. the Government of Rwanda and the UK Secretary of State for the Home Department'*(2010)8-1, *Journal of International Criminal Justice*, pp.289-309.

Drumbl, Mark A. international decision: prosecutor v. Thomas Lubanga Dyilo: international criminal court decision confirming war crimes charges for conscriptingm enlisting, and using child soldiers in the *American Journal of International law*, October, 2007, 101 A.J.i.L.841

Dutertre. Gilles. *Key case- law extracts-European Court of Human rights*. (2003).

Elster, Jon, Closing the Books- *Transitional Justice in Historical Perspective* (2004).

Falk, Richard A. The Shimoda case: a legal appraisal of the atomic attacks upon Hiroshima and Nagasaki. In *American Journal of International Law*, vol.59, 1965, pp.759-793

Falk, Richard, Elver Hilal and Hajjar, Lisa (eds) *Human Rights (Critical Concepts in Political Concept)* (2007).

Fierens, Jacques, 'Gacaca Courts: between fantasy and reality' (2005) 3-4, *Journal of International Criminal Justice,* pp.896-919.

Fischer- Lelieur, Juliette, 'Prosecuting the crimes against humanity committed during the Algerian war:. an impossible endeavour? The 2003 Decision of the French Court of Cassation in Aussaresses'(2004)2-1, *Journal of International Criminal Justice*, pp.231-244.

Forsythe, David P.(ed), *Human Rights and Comparative Foreign Policy* (2000).

Francesco, De Giovannangelo, 'Formula de Radbruch e diritto penale. Note sulla punizione dei 'delitti di Stato' nella Germania postnazista e nella Germania postcomunista -The Radbruch Formula and Criminal Law. Notes on the punishment of crimes of State in post-nazi and post-communist Germany' (2003) 1, *Journal of International Criminal Justice*, pp.728-736.

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

Frey, Robert S (ed), *The Genocidal Temptation: Auschwitz, Hiroshima, Rwanda, and Beyond* (2004).

Frulli, Micaela, 'The special court for Sierra Leone recognizes forced marriage as a 'new'crime against humanity'(2008)6-5, *Journal of International Criminal Justice*,pp.1033-1042.

Futamura, Madoka, *War Crimes Tribunals and Transitional Justice-the Tokyo Trial and the Nuremberg Legacy* (2008)

Gallant, Kenneth S, *The principle of legality in international and comparative criminal law* (2009)

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.

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

Goodrich, Peter et al. (eds) *Derrida and Legal Philosophy* (2008)

Gray, David, 'An excuse-centered approach to transitional justice'(2006)74, *Fordham Law Review*, pp.2621-2695.

Hart, H.L.A, 'Positivism and the Separation of Law and Morals' (1958) 71-4, *Harvard Law Review*, pp.593-629.

Halbwachs, Maurice, *On Collective Memory* (Lewis A.Coser trans,ed 1992 ed) [trans of: *Les Cadres Sociaux de la Mémoire* et *La Topographie légendaire des évangiles en terre sainte*].

Harris, David. J. and Livingstone, Stephen (eds,), *The Inter-American System of Human Rights* (2004).

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

Ivkovic, Sanja Kutnjak, 'Justice by the International Criminal Tribunal for the former Yugoslavia' (2001) 37, *Stanford Journal of International Law*, p,255-346.

Jescheck, Hans- Heinrich, 'The general principles of International Criminal Law set out in Nuremberg, as mirrored in the ICC Statute' (2004)2-1, *Journal of International Criminal Justice*, pp.38-55.

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

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.

Klip, Andre and Sluiter Göran (eds) *Annotated leading cases of international criminal tribunals- the international criminal tribunals. The international criminal tribunal for the former Yugoslavia 2001-2002* (2005).

Kok, Ruth A. *Statutory limitations in international criminal law* (2007).

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

Lasok, D., 'The Eichmann Trial' (1962) 11, *International and Comparative Law Quarterly*, pp.355-374.

Leebaw, Bronwyn A., 'The Irreconcilable Goals of Transitional Justice' (2008)30, *Human Rights Quarterly*, pp.95-118.

Lejmi, Mohamed A., 'Prosecuting Cambodian Genocide'(2006) 4-2, *Journal of International Criminal Justice*, pp.300-306

Linton, Suzannah, 'Cambodia, East Timor and Sierra Leone: experiments in international justice' (2001) 12, *Criminal Law Forum* pp.185-246.

Liszt, Franz von, 'The rationale for the Nullum Crimen principle'(2007)5-4, *Journal of International Criminal Law,* pp.1009-1013.

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

Lukashuk, Igor I., 'The Nuremberg and Tokyo Trials: 50 Years Later' (1994)20-2, *Review of Central and East European Law*, pp.207-216.

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

Malekian, Farhad, 'Milosevic & Hussein on Trial: Panel 1: Global or Local Justice: Who Should Try Ousted Leaders? Emasculating the Philosophy of International Criminal Justice in the Iraqi Special Tribunal' (2005)38, *Cornell International Law Journal,* pp.673-720.

Mallinder, Louise, 'Can Amnesties and International Justice be Reconciled' (2007)1, *International Journal of Transitional Justice*, pp.208-230.

Manning, Jason, 'Note: On Power, Participation and Authority: The International Criminal Courts Initial Appellate Jurisprudence' (2007)38, *Georgetown Journal of International Law,* pp.803-

Martin, Claudia, 'Catching up with the past: recent decisions of the inter-American Court of Human Rights addressing gross human rights violations perpetrated during the 1970-1980s'(2007)7-4, *Human Rights Law Review*, pp.774-792.

Martin, Claudia, 'The Moiwana village case: a new trend in approaching the rights of ethnic groups in the Inter- American system' (2006)19, *Leiden Journal of InternationalLaw*, pp. 491-504.

May, Larry, Hoskins, Zachary. *International Criminal Law and Philosophy*, Cambridge university press, 2010.

Mettraux, Guenael, 'The 2005 Revisions of the Statute of the Iraqi Special Tribunal', (2007) 5-2, *Journal of International Criminal Justice,* pp287-293.

Mignone, Frederick, 'After Nuremberg, Tokyo' (1947) 25, *Texas Law Review*, pp.475-490.

Misztal, Barbara A., 'Durkheim,on collective memory' (2003) 3-2 *Journal of Classical Sociology*, 2003, pp.123-143.

Mujuzi, Jamil D., 'Issues Surrounding Life Imprisonment after the Abolition of the Death Penalty in Rwanda'(2009), *Human Rights Law Review*, pp.329-338.

Mutua, Makau, 'Never again: questioning the Yugoslav and Rwanda' (1997) 11 *Temple International and Comparative Law Journal,* pp.167-187.

Mutua, Makau, 'Savages, victims and saviors' in Falk, Richard, Elver Hilal and Hajjar, Lisa (eds) *Human Rights (Critical Concepts in Political Concept)* (2007) Vol.I):204-254.

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

Ohlin, Jens David, 'Applying the death penalty to crimes of genocide' (2005)99 *American Journal of International Law*, pp.747-777.

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

Pasqualucci, Jo M. *The Practice and Procedure of the Inter-American Court of Human Rights* (2003).

Penrose, Mary Margaret. It's good to be the king!: Prosecuting heads of State and former heads of State under international law. in *Columbia Journal of Transnational law*, 2000, 39 Colum. J. Transnat"L.193.

Pillai, Priya, ' 'A call to arms': A gender sensitive approach to the plight of female child soldiers in International Law', (2009) 15, *Human Rights Brief*, pp.23-27.

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

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.

Plessis, Max du, 'South's Africa's Implementation of the ICC Statute: An African Example' (2007) 5 *Journal of International Criminal Justice*, pp.460-479.

Pocar, Fausto, 'The Proliferation of International Criminal Courts and Tribunals- A Necessity in the Current International Community' (2004) 2-2, Journal of International Criminal Justice, pp.304-308.

Rivello, Pier Paolo, 'The prosecution of war crimes committed by Nazi forces in Italy' (2005) 3-2, *International Criminal Justice*, pp.422-433.

Robinson, Darryl, 'Developments in international criminal law: defining "crimes against humanity at the Rome Conference' (1999) 93, *American Journal of International Law*, pp.43-57.

Rodley, Nigel S, Çali Basak, 'Kosovo Revisited: Humanitarian Intervetion on the Fault Lines of International Law'(2007) 7-2, *Human Rights Law Review*, pp.275-297.

Roth, Michael S., 'Remembering Forgetting: Maladies de la Mémoire in Nineteenth-Century France' (1989)26, *Representations*, pp.49-68.

Sader, Choucri, 'A Lebanese perspective on the Special Tribunal for Lebanon. Hopes and Disillusions' (2007) 5-5, *Journal of International Criminal Justice*, pp.1083-1089.

Sarat, Austin, Douglas, Lawrence and Umphrey, Martha M.(eds), *The Limits of Law* (2005).

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

Schaak, Beth van, 'The definition of crimes against humanity: resolving the incoherence' (1997) 37 *Columbia Journal of Transnational Law*, pp.787-850.

Schabas, William A. The UN International Criminal Tribunals- the former Yugoslavia, Rwanda and Sierra Leone. Cambridge university press, 2006

Scharf, Michael P, 'Saddam Hussein on Trial: what went awry? The Iraqi High Tribunal. a viable experiment in international justice?'(2007)5, *Journal of International Criminal Justice*, pp.258-263.

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

Shelton, Dinah, (2004) Reparations in the Inter-American system in The Inter-American System of Human Rights edts (David J. Harris and Stephen Livingstone) Clarendon Press, Oxford

Shelton, Dinah, 'Righting wrongs: Reparations in the Articles on State Responsibility' (2002) 96, *American Journal of International Law,* pp 833-856.

Sluiter, Goran, 'Due Process and Criminal Procedures in the Cambodian Extraordinary Chambers' (2006) 4-2, Journal of International Criminal Justice, pp.314-326.

Stenrud, 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.

Tebbit, Mark, *Philosophy of Law- An Introduction* (2nd Ed., 2005).

Tillson, Jessica, 'Reservations and the future of the Inter-American Justice'(2006) 6, Chicago-Kent Journal of International & Comparative Law, pp.82-115.

Todorov, Tzvetan, 'Memory as Remedy for Evil' (2009) 7-3, *Journal of International Criminal Justice*, pp.447-462.

Ormachea Pablo A. Moiwana village: the Inter-American Court and the "continuing violation" doctrine in *Harvard Human Rights Journal*, vol.19, 2006.

Camponovo, Christopher N, 'Disaster in Durban: the United Nations World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance' (2003)34, *Georgetown Washington International Law Review,* pp.659-710.

Decent, Evan F., 'Is the Rule of Law Really Indifferent to Human Rights?' (2008) 27 *Law and Philosophy*, pp.533-581.

Dickinson, Laura, 'Terrorism and the limits of law: a view from transitional justice' in Austin Sarat, Lawrence Douglas, Martha Me. Umphrey (eds) *The limits of law* (2005),pp. 21-74

Dutertre, Gilles, *Key case-law extracts-European Court of Human Rights* (2003)

Falk, Richard A., 'The Shimoda Case: a Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki'(1965) 59, *American Journal of International Law*, pp.759-793.

Fallon, Richard H. Jr. and Meltzer, Daniel J.: New law, Non- Retroactivity, and Constitutional Remedies, 104 *Harvard.Law.Review*. 1733, 1991.

Fletcher, George P, 'Editorial Comments- against Universal Jurisdiction' (2003)1-3, *Journal of International Criminal Justice,* p.580-584.

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

Gibney, Mark, 'Genocide and State responsibility'(2007)7-4, *Human Rights Law Review*, pp.760-773.

Glaser, Stefan, 'Nullum Crimen sine Lege' (1942)24-1 *Journal of Comparative Legislation and International Law*, pp. 29-37.

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

Young, James E.,*The texture of memory: Holocaust memorials and meanings* (1993)

Kasahara, Tokushi, Reconciling narratives of the Nanjing Massacre in Japanese and Chinese textbooks. In <http://www.usip.org/files/file/kasahara.pdf>, p.4, access on September, 12 2010.

Kopelman, Elizabeth S, 'Ideology and international law: the dissent of the Indian justice at the Tokyo War Crimes Trial' (1991)23, *International Law and Politics*, pp.373-441.

Lasok. D. The Eichmann Trial in *International and Comparative Law Quarterly*, vol.11, April 1962, pp.355-374

Lonnberg, Eloise, The Legality of *ad hoc* Tribunals- proper justice or politicized peace? (Master Thesis, Göteborgs universitet, 2007).

Mantovani, Ferrando, 'The General Principles of International Criminal Law: the viewpoint of a National Criminal Lawyer'(2003)1-1, *Journal of International Criminal Justice*, pp.26-38.

McLure, Roger, *The Philosophy of Time- Time before Times* (2005).

Mendez, Juan E. 'Accountability for past abuses' (Working Paper No.233, Notre Damme University, 1996), access at <http://www.nd.edu/~kellogg/publications/workingpapers/WPS/233.pdf> Kellogg Institute for international studies working papers series n. 233

Mendez, Juan E., 'Accountability for past abuses' (1997)19, Human Rights Quarterly, pp.255-282.

Meron, Theodor, *The Humanization of International Law* (2006).

Meron, heodor, 'Centennial essay: reflections on the prosecution of war crimes by international tribunals'(2006) 100, *American Journal of International Law*, pp.551-579.

Meron, Theodor. Editorial comment: revival of customary humanitarian law, October 2005, *American Journal of International Law*, 99 A.J.I.L.817

Meron, Theodor, 'Editorial Comment: Revival of Customary Humanitarian Law' (2005) 99, *American Journal of International Law*, pp.817-834.

Meron, Theodor, 'War Crimes in Yugoslavia and the Development of International Law' (1944) 88-1, *American Journal of International Law*, pp.78-87.

Mettraux, Guenael, 'The 2005 Revision of the Statute of the Iraqi Special Tribunal' (2007) 5-2, *Journal of International Criminal Justice,* pp.287-293.

Minow, Martha, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (1998).

Minow. Martha, Ryan, Michael and Sarat, Austin (eds), *Narrative, Violence and the Law- The Essays of Robert Cover* (1996)

Mokhtar, Aly, 'Nullum Crimen, Nulla Poena Sine Lege: aspects and prospects' (2005)26, *Statute Law Review*, pp.41-55.

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>

Murphy, Sean D., 'Developments in international criminal law: progress and jurisprudence of the international criminal tribunal for the former Yugoslavia' (1999)93, *American Journal of International Law*, pp.57-97.

Niang, Mandiaye, 'The Senegalese Legal Framework for the prosecution of international crimes' (2009) 7, *Journal of International Criminal Justice*, pp.1047-1062

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

Orentlicher, Diane, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991)100-8 *Yale Law Journal,* pp.2537-2615.

Orentlicher, Diane F., 'Swapping amnesty for peace and the duty to prosecute human rights crimes' (1997)3, *Journal of International and Comparative Law*, pp. 713-717.

Penrose, Mary M. 'It's Good to Be the King !: Prosecuting Heads of State and Former Heads of State Under International Law' (2000)39, Columbia Journal of Transnational Law, pp.193- 220.

Pritchard, John R., 'The International Military Tribunal for the Far East and its Contemporary Resonances' (1995) 149, *Military Law Review*, pp.25-36.

Provost, René, *International Human Rights and Humanitarian Law* (2002).

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

Savelsberg, Joachim J. and King, Ryan D. 'Law and collective memory' (2007) 3 *Annual. Review.Law Social. Science*, pp.189-211, p.194

Schabas, William A. *The UN International Criminal Tribunals- The former Yugoslavia, Rwanda and Sierra Leone* (2006)
Scharf, Michael, 'Saddam 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.

Seyla, Benhabib, 'Identity, Perspective and Narrative in Hannah Arendt's Eichmann in Jerusalem' (1996) 8, *History and Memory,* pp.35-59.

Simma, Bruno, Paulus, Andreas L., 'Symposium on method in international law : the responsibility of individuals for Human Rights Abuses in international conflicts : a positivist view' (1999)93, *American Journal of International Law*, pp.302-316.

Shahabuddeen, Mohamed, 'Does the principle of legality stand in the way of progressive development of law ?'(2004) 2-4, *Journal of International Criminal Justice*, pp.1007-1017.

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.

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.

Stensrud, Ellen Emilie, New dilemmas in transitional justice : lessons from the Mixed Courts in Sierra Leone and Cambodia, *Journal of Peace Research*, vol.46, no.1, pp.5-15.

Sundberg, Ulrika, 'Durban : The Third World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance' (2002)73, *International Review of Penal Law,* pp.301-317.

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

Than, de Claire and Shorts, Edwin. *International Criminal Law and Human Rights* (2009).

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

Thompson, Janna, *Taking Responsibility for the Past- Reparation and Historical Justice* (2002).

Tomuschat, Christian, 'The Scilingo case an its implications- issues of universal jurisdiction in the Scilingo case'(2005) 3-5, *Journal of International Criminal Justice*, pp.1074-1081.

Torpey, John, *Making Whole What Has Been Smashed-on Reparation Politics* (2006)

Ulrich, George and Boserup, Louise K. (eds) *Human Rights in Development-Reparations : Redressing Past Wrongs* (2003).

Van Coufoudakis, 'Cyprus and the European Convention on Human Rights: The Law and Politics of Cyprus v. Turkey' (1982) 4-4, *Human Rights Quarterl*, pp.450-473.

Vazquez, Carlos M, 'Altmann v. Austria and the Retroactivity of the Foreign Sovereign Immunities Act' (2005) 3, *Journal of International Criminal Justice* , pp.207-223.

Zemach, Ariel, 'Fairness and Moral Judgements in International Criminal Law : The Settlement Provision in the Rome Statute' (2003) 41, *Columbia Journal of Transnational Law*, pp. 895-922.

ZylSmit, Dirk van, 'Punishment and human rights in international criminal justice'(2002)2-1, *Human Rights Law Review*, pp.1-17.

Zwart, Tom, *The admissibility of human rights petitions- the case law of the European Commission of human rights and the Human Rights Committee* (1994).

Walley, Christine J., 'Searching for "voices"- feminism, anthropology, and the global debate over female genital operations' (1997) 12 *Cultural Anthropology*, p. 405-438

Wexler, Leila S._Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes against Humanity in France (1995) 20, *Law and Social Inquiry*, pp.191-221.

Wringe, Bill, Why Punish War Crimes? Victor's Justice and Expressive Justifications of Punishment (2006) 25-1, *Law and Philosophy*, pp.159-191.

Wood, Nancy, 'Memory on Trial in Contemporary France: The Case of Maurice Papon' (1999) 11-1, History and Memory, pp.41-76.

Zalaquett, Jose, 'The Mathew O. Tobriner Memorial Lecture: Balancing ethical imperatives and political constraints: the dilemma of new democracies confronting past human rights violations' (1992)43 *Hastings Law Journal*, pp.1425-1438.

Zalaquett, Jose, 'Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints' in Neil J. Kritz (ed), *Transitional Justice* (1995) pp.3-31.

ZylSmit, Dirk van. Punishment and human rights in international criminal justice. in *Human Rights Law Review*-vol.2, number 1-2002

Joost Paulwelyn, 'The Concept of a 'Continuing Violation of an International Obligation: Selected Problems' (1996) 66 *British Yearbook of International Law*, pp.415-450.

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

Popple, James.'The right to protection from retroactive criminal law'(1989) 13-4, Criminal Law Journal <http://ssrn.com/abstract=1335644> at 15 Jun. 2009.

Ralby, Ian M. Joint Criminal Enterprise in the Iraqi High Tribunal

Ricouer, Paul, *Memory, History, Forgetting* (Kathleen Blamey & David Pellauer trans, 2006 ed) [trans of: *Mémoire, l'histoire, l'oubli*]

Vazquez, Carlos M. Altmann v. Austria and the retroactivity of the foreign sovereign immunities Act. *Journal of International Criminal Justice*. ICJ 3.1 (207), March 2005

Vierdag, E.W., 'Some Remarks about Special Features of Human Rights Treaties' (1994)25 Netherlands Yearbook of International Law, pp.119-142.

Thalmann, Vanessa, 'French Justice's endeavours to substitute for the ICTR' (2008)6-5 *Journal of International Criminal Justice*, pp.995-1002.

Simpson, Gerry J. 'Law, war and crime: war crimes trials and the reinvention of international law' (2007) p.88.

Tomuschat, Christian, The Legacy of Nuremberg in Oxford *Journal of International Criminal Justice*, Vol.4, no.4 pp830-844

Usami, Makoto, Retroactive Justice: Trials for Human Rights Violations under a Prior Regime in http://www.civdialogue.asef.org/documents/usami.pdf

Ushimura, Kei, 'Pal's "dissentient judgement" reconsidered: some notes on postwar Japan's responses to the opinion' (2007) 19, *Japan Review*, pp.215-224.

Weiss, Friedl, 'Time limits for the prosecution of crimes against international law' (1982) British Yearbook of International Law, pp.163-195.

Wanhong, Zhang, 'The Nuremberg trials: a reappraisal and their legacy: from Nuremberg to Tokyo: some reflections on the Tokyo trial' (2006) 27, *Cardozo Law Review*, pp.1673-1682.

Williams, Sarah, 'Amnesties in International Law: the Experience of the Special Court for Sierra Leone' (2005) 5-2, *Human Rights Law Review*, pp.271-309.

Zoglin, Katie, 'The future of war crimes prosecutions in the former Yugoslavia: accountability or junk justice?' (2005)27, *Human Rights Quarterly*, pp. 41-77.

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.

Case Law

Committee on the Elimination of Discrimination against Women

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

CEDAW, *Ms. A. T. v. Hungary*, 26 January 2005 (Comm. No. 2/2003).

CEDAW, *Rahime Kayham v.Turkey*,27 January 2006 (Comm.No. No.8/2005).

European Commission of Human Rights

ECHR, *August Szechenyi v. Hungary*, 30 June 1993 (App.No.21344/93)

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

ECHR, *Chojak v. Poland*, 23 April 1998 (App.No. 32220/96)

ECHR, *Cyprus v. Turkey*, 4 June 1999 (App.No.25781/94)

ECHR, *De Becker v. Belgium*, 6 June 1958 (App. No. 214/56)

ECHR, *Firma "Brauereo Feldschlosschen Ferdinand Geidel KG et al.v.Germany*, 24 February 1997 (App.No.199918/92)

ECHR, *X v. France*, 13 December 1982 (App.n.9587/81)

ECHR, X v. Ireland, 17 May 1984 (App. No. 10416/83)

ECHR, *Kevin McDaid and Others v. United Kingdom* (App. No.25681/94)

ECHR, *Malhous v. Czech Republic* (App. No.33701/906)

ECHR, *X v. Belgium*, 3 December 1979 (App. No. 8701/79)

ECHR, *Montion v. France*, 14 May 1987 (App. No. 11192/84)

ECHR, *X v. Netherlands*, 18 September 1961 (App.No.846/60)

ECHR, X v. Netherlands, 19 July 1968 (App.No.. 2648/65)

ECHR, *Oda Kremer- Viereck and Helge Viereck v. Germany*, 21 May 1998 (App No. 34197/96)

ECHR, *X and Y v. Portugal*, 3 July 1979 (App No. 8560/79 and 8613/79)

ECHR, *X. v. Switzerland*, 12 July 1976 (App. No. 7031/75)

ECHR, *X v. United Kingdom*, 29 September 1976 (App No. 7202/75)

European Court of Human Rights

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

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

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

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

ECtHR *De Becker v. Belgium*, 27 March 1962 (Appl.No.214/56).

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

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

ECtHR *Dudgeon v. United Kingdom*, 22 October 1981 (Appl.No.7525/76).

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

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

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

ECtHR, *Jecius v. Lithuania*, 31 July 2000.

ECtHR *Jovanovic v. Croatia*, 28 February 2002 (Appl.No. 59109/00).

EctHR,*Kadikis v. Latvia*, 29 June 2000 (Appl. No. 47634/99).

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

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

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

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

ECtHR *Loizidou v. Turkey*, 18 December 1996 (Appl.No. 15318/89).

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

ECtHR *Kefalas and Others v. Greece*, 8 June 1995 (Appl.No.14726/89).

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

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

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

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

ECtHR, *Kopecky v. Slovakia*, 28 September 2004 (Appl.No.44912/98).

ECtHR, *Mitap and Muftuoglu v. Turkey*, 25 March 1996

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

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

ECtHR *Papamichaloupoulos and Others v. Greece,*24 June 1993 (Appl.No14556/89).

ECtHR *Phocas v. France*, 23 April 1996 (Appl.No.17869/91).

ECtHR, *Rahko v. Finland*, 24 September 2002 (App. No. 27824/95)

ECtHR, *Shanaghan v. UK*, 4 April 2000 (Appl.No.37715/97)

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

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

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

ECtHR, *Streletz, Kessler & Krenz v. Germany*, 22 March 2001 (Appl.Nos. 34044/96, 35532/97, 44801/98).

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

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

ECtHR, *Vasilescu v. Romania*, 22 May 1998

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

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

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

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

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

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

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

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

Human Rights Committee

HRC, *A. K. v. Hungary*, 7 April 1994 (Comm. No. 520/1992).

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

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

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

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

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

HRC, *Carballal v. Uruguay*, 30 May 1978 (Comm. No. 33/1978).

HRC, *Dagmar Brokova v. Czech Republic,* 31 October 2001 (Comm.No. 774/1997).

HRC, *Drake v. New Zealand*, 3 April 1997 (Comm. No.601/1994)

HRC *Gobin v. Mauritius*, 25 November 1996 (Comm. No. 787/1997) (25 Nov 1996)

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

HRC, *E. and A. Konye v. Hungary*, 7 April 1994 (Comm.No. 520/1992)

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

HRC , *Esther Soriano de Bouton v.Uruguay*, 27 March 1981 (Comm.No.37/1978).

HRC, *Holland v. Ireland*, 26 October 1996 (Comm. No. 593/1994).

HRC , *Ibrahima Gueye et al.v.France*, 3 April 1989 (Comm.No.196/1983).

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

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

HRC, *J.K v. Canada*, 26 October 1984 (Comm.. n. 174/1984)

HRC , *Jorge Manera Lluberas v. Uruguay*, 6 April 1984 (Comm.No.123/1982).

HRC, *armila Mazurkiewiczova v. Czech Republic*, 2 August 1999 (Comm.No.724/1996).

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

HRC, *Keun- Tae Kim v. Republic of Korea*, 4 January 1994 (Comm. No. 574/1994)

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

HRC, *K. V. and C. V. v. Germany*, 8 April 1994 (Comm. No. 568/1993).

HRC , *Leopoldo Buffo Carballal v.Uruguay*, 27 March 1981 (Comm.No.33/1978).

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

HRC, *L.S.N. v. Canada*,, 30 March 1984 (Comm.No.94/1981)

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

HRC , *Luis Alberto Solorzano v. Venezuela*, 26 March 1986 (Comm.No.156/1983).

HRC, *M.A. v. Italy*, 21 September 1981 (Comm No 117/1981)

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

HRC, *Mathia Douroke v. France*, 25 April 2000 (Comm. No.756/1997).

HRC, *Noriana Hernandez Valentini de Bazzano v.Uruguay*, 15 August 1979 (Comm.No.5/1977).

HRC, *Ota Koutny v. Czech Republic* 18 April 2000 (Comm.No.807/1998).

HRC, *Paraga v.Croatia*, 16 April 1996 (Comm. No. 727/1996)

HRC, Patrick Holland v. Ireland, 22 November 1996 (Comm.No. 593/1994).

HRC, *Peter Drobek v.Slovakia*, 14 July 1997 (Comm.No.643/1995).

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

HRC, *Rodriguez v. Uruguay*, 9 August 1988 (Comm.No.322/1988)

HRC, *R.A.V.N. et al.v. Argentina*, 26 March 1990 (Comm.No.343/1988)

HRC, *S.E.v.Argentina*, 26 March 1990 (Comm.No.275/1988)

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

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

HRC, *Simunek .v. the Czech Republic*,19 July 1995 (Comm.no.516/1992).

HRC, *Singarasa v. Sri Lanka*, 23 August 2004 (Comm. No.1033/2001).

HRC, *Vladimir Kulomin v. Hungary*, 1 August 1996 (Comm. No. 521/1992)

Inter-American Commission of Human Rights

IACHR, *Reyes and others v. Chile*, 15 October 1996 (Case No.11.228, 11.229, 11.231 and 11282)

IACHR, *Maritime and river workers v. Peru*, 10 October 2001 (Case No.12.319)

IACHR, *Anibal Miranda v. Paraguay*, 10 October 2001 (Case No.12.000)

IACHR, *Andres Aylwin Azocar and otros v. Chile* (Report No. 137/99, Case No.11.863)

IACHR, *Joao Canuto de Oliveira v. Brazil*, 7 April 1998 (Report No. 24/98, Case 11.287).

IACHR, *Juan Angel Greco v. Argentina*, 10 October 2001 (Report No.72/01, Case No.11.804).

IACHR, *Tomás Eduardo Cirio v. Uruguay*, 16 October 2001 (Report No. 38/99, Case No.11.500).

IACHR, *Victor Saldano v. Argentina*, 11 March 1999 (Report No. 38/99, Case No.38/99).

Inter-American Court of Human Rights

IACtHR, *Aloeboetoe et al.v. Suriname* (Merits), 4 December 1991 (Series C No.11)

IACtHR, *Barrios Altos (Chumbipuma Aguirre et al. v. Peru)* (Merits), 14 March 200 (Series C No.75).

IACtHR, *Benavides Cevallos v. Ecuador* (Merits), 19 June 1998 (Series C No.38).

IACtHR, *Blake and Guatemala* (Preliminary Objections), 2 July 1996 (Series C No.27).

IACtHR, *Blake and Guatemala* (Merits) 24 January 1998 (Series C No.36).

IACtHR, *Blake and Guatemala*, Interpretation of Judgement on Reparations), 1 October 1999 (Series C No.48).

IACtHR, *Caballero, Delgado and Santana*, judgement of 29 January 1997 (Reparations) 29 January 1997 (Series C No.31).

IACtHR, *Cantos v. Argentina* (Preliminary Objections), 7 September 2001 (Series C No.85)

IACtHR, *Cantos v. Argentina* (Merits), 28 November 2002 (Series C No. 97)

IACtHR, *Castillo Paez v. Peru* (Merits), 3 November 1997 (Series C No.34).

IACtHR, *Castillo Petruzzi at al.* (Merits), 30 May 1999 (Series C No.52).

IACtHR, *El Amparo v. Venezuela* (Merits), 18 January 1995 (Series C No.19).

IACtHR, *Gangaram Panday v. Suriname* (Preliminary Objections), 4 December 1991 (Series C No.12).

IACtHR, *Garrido and Baigorria v. Argentina* (Reparations), 27 August 1998 (Series C No.39).

IACtHR, *Heliodoro Portugal v. Panama* (Preliminary Objections, Merits, Reparations and Costs), 12 August 2008 (Series C No.186).

IACtHR, *Goiburu et al. v. Paraguay* ,.Merits, Reparations and Costs, 22 September 2006 (Series C No.153).

IACtHR, *Mayagna (Sumo) Awas Tingni Indigenous Community v. Nicaragua* (Merits), 31 August 2001 (Series C No.79).

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

IACtHR, *Neira Alegria et al.v. Peru* (Merits) 11 December 1991 (Series C No.13).

IACtHR, 'The Last Temptation of Christ', *Olmedo-Bustos et al. v. Chile* (Merits, Reparations and Costs), 5 February 2001 (Series C No.73).

IACtHR, *Paniagua Morales et Al v. Guatemala* (Merits), 8 March 1998 (Series C No.37).

IACtHR, Ricardo Canese v. Paraguay, (Merits, Reparations and Costs), August 31, 2004 (Series C No.111).

IACtHR, *Serrano Cruz sisters v.El Salvador* (Merits) 1 March 2005 (Series C No.120)

IACtHR, *Serrano Cruz sisters v.El Salvador* (Preliminary Objections) 23 November 2004 (Series C No.118).

IACtHR, *Suarez Rosero v. Ecuador* (Reparations) 20 January 1999 (Series C No.44).

IACtHR, *Trujillo Oroza v. Bolivia* (Merits) 26 January 2000 (Series C No.64).

IACtHR,*Velasquez Rodriguez v. Honduras* 29 July 1988 (Series C No.4).

IACtHR, *Villagran Morales et al. v. Guatemala* (Merits) 19 November 1999.(Series C No.63).

IACtHR, Yakye Axa Indigenous Community v. Paraguay (Merits, Reparations and Costs) 17 June 2005 (Series C No.125).

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

International Court of Justice

ICJ, *Ambatielos* Case, (*Greece v. United Kingdom*) 1 July 1952 (Preliminary Objections)

ICJ, *Bosnia and Herzegovina v. Yugoslavia* (Preliminary Objections) [1996] ICJ Rep 1996

ICJ *Certain Phosphate Lands in Nauru*, Rep. 1992, 240.

ICJ, Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read, Hsu Mo relating to *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* , 28 May 1951.

Permanent Court of International Justice

PCIJ, Italy v. France, Series A/B n. 74.

PCIJ, Mavrommatis Palestine Concessions Case, 30 August 1924, Series A, No.2

PCIJ, Phosphates in Morocco. ICJ, P.C.I.J. Ser.A/B, N.74,p.10

International Criminal Court

ICC, *Procureur v. Dyilo*, 29 January 2007 No.ICC-01/04-01/06. Décisions sur la confirmation des charges (Version publique) (La Chamber Préliminaire I, 29 January 2007).

International Criminal Tribunal for Rwanda

ICTR, *Prosecutor v. Bagosora*, 18 December 2008 (Case No. ICTR-98-41-T).

ICTR, *Prosecutor v.Akayesu*, Judgement, 2 September 1998 (Case No.ICTR-96-4-T, Tr.Ch.)

ICTR *Prosecutor v. Akayesu*, Sentencing Judgement, 2 October 1998 (ICTR Tr.Ch)

ICTR *Prosecutor v. Kanyabashi*, Decision on the Defence Motion on Jurisdiction of 18 June 1997, ICTR, Case No. ICTR-96-15- T (ICTR Tr. Ch., 18 June 1997).

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.)

ICTR, *Prosecutor v. Kayishema*, Judgement (Reasons), Case No.95-1-A 9ICTR App. Ch., 1 June 2001).

ICTR, *Prosecutor v. Serugashago*, Case No.ICTR 98-39-A (ICTR App. Ch., 6 April 2000).

International Criminal Tribunal for the Former Yugoslavia

ICTY, *Prosecutor v. Aleksovski*, Appeals Judgement, 24 March 2000 (Case No.IT-95-14/1,App.Ch.).

ICTY, *Prosecutor V. Aleksovski,* Judgment on Appeal by Nobilo against Finding of Contempt, 30 May 2001 (Case No. IT-95-14/1-AR77, App.Ch.)

ICTY, *Prosecutor v. Blaskic*, Case IT-95-14-AR102bis, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial chamber II of 18 July 1997 (ICTY App.Ch., 29 October 1997).

ICTY, *Prosecutor v. Blaskic*, Appeals Judgment, 29 July 2004 (Case No.IT-95-14-A (ICTY App.Ch).

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

ICTY, *Prosecutor v.Delalic*, Appeals Judgment, Case Bo. IT-96-21 (ICTY App.Ch, 20 February 2001), Case No. IT-95-14/1 (ICTY App.Ch., 24 March 2000).

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

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

ICTY, *Prosecutor v.Galic*, Judgment, 5 December 2003 (Case No.It-98-29, Tr.Ch)

ICTY, *Prosecutor v. Galic*, judgement, 30 November 2006 (Case No. IT-98-29-A, App.Ch

ICTY, *Prosecutor v. Hadzihasanovic*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 (Case No.IT-01-47-AR72App.Ch.).

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

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

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

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

ICTY, *Prosecutor v. Milosevic*, Indictment, 24 May 1999 9ICTY No. IT-02-54 ().

ICTY, *Prosecutor v. Milutinovic*, Decision on Dragojub Ojdanic's Motion Challenging Jurisdiction: Joint Criminal Enterprise, Case No.IT-99-37-AR72 (ICTY App. Ch., 21 May 2003).

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

ICTY, *Prosecutor v. Tadic*, decision on the defence motion for interlocutory appeal on jurisdiction, October 2, 1995 (Case No.IT- 94-1, App.Ch.)

ICTY, *Prosecutor v. Tadic*, Decision on the Defence Motion for.Interlocutory Appeal on Jurisdiction, Case No.IT-94-1 [-A] (ICTY App. Ch., 2 October 1995).

ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Judgment (ICTY App.Ch., 15 July 1999).

ICTY, *Prosecutor v. Tadic* (Appeal of Vujin), Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin, Case No. It-94-1-A-R77 (ICTY App.Ch., 27 February 2001)

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

Special Court for Sierra Leone

SCSL, *Prosecutor v. Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction, Case No.SCSL 04-14-AR72 (E) (SCSL App.Ch., 31 May 2004).

SCSL, Prosecutor v. Brima, Kamara and Kanu, Appeal, 22 February 2008 (Case No.2004-16-A ,App. Ch.)

East Timor Panels

Prosecutor v. dos Santos, Applicable Subsidiary Law Decision, Case No. 16/2001 (Timor-Leste, Court of Appeal, 15 July 2003).

Prosecutor v. Sarmento, Decision on the Defense (Domingos Mendonca) motion of the Court to order the Public Prosecutor to amend the indictment, Case No. 18a/2001 (Timor-Leste, Dili District Special Court for Serious Crimes, 24 July 2003).

Extraordinary Chambers in the Courts of Cambodia

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)

ECCC, Order on the Application at the ECCC of the Form of Liability known as joint criminal enterprise, 8 December 2009

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)

Iraq High Tribunal

Judgement of the Dujial Trial, 3 November 2006 (Case no. 1/9 First/2005)

African Court on Human and People's Rights

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]

National

Canada

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

United Kingdom

Court of App., Criminal Division *R. V.U.K.* Crown Court, Judgement, 30 July 1990, [1991] 1, 14 March 1991.

U.K House of Lords, *Regina v. Bartle* (Pinochet), 24 March 1999.
Pinochet

Stubbings and Others v. United Kingdom, Case n.36-37/1995, Times Human Rights Law Report, 24 Oct.1996.

Resolutions

UNSC, Res.827, 25 May 1993.

UNSC , Res.1272, 25 October 1999.

UNSC, Res. 1757, 30 May 2007

UNTAET Regulation 2000/11

UNSC, Res.1315, 14 August 2000.

Treaties

ICCPR International Covenant on Civil and Political Rights

American Convention on Human Rights

American Declaration on Human Rights

Websites

European Court of Human Rights HUDOC database
<http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/>

Extraordinary Chambers in the Courts of Cambodia
< http://www.eccc.gov.kh/>

Inter-American Commission on Human Rights
<www.cidh.org/>

Inter-American Court on Human Rights
<http://www.corteidh.or.cr/>

International Court of Justice
<http://www.icj-cij.org/homepage/index.php>

International Criminal Tribunal for the Former Yugoslavia
< http://www.icty.org/>

Special Court for Sierra Leone
http://www.sc-sl.org/