

NO DÉDOUBLEMENT FONCTIONNEL?
ELUDING *AVANT-GARDE* INTERNATIONAL
HUMAN RIGHTS LAW IN SPAIN: STRATEGIES
AND JUDICIAL PARALLELISMS

*¿SIN DESDOBLAMIENTO FUNCIONAL? LA
ELUSIÓN DEL DERECHO INTERNACIONAL
DE LOS DERECHOS HUMANOS DE
VANGUARDIA EN ESPAÑA: ESTRATEGIAS
Y PARALELISMOS JUDICIALES*

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ABSTRACT

According to the decision of the Supreme Court rendered in Garzón-Memoria Histórica, Francoist crimes cannot be prosecuted in Spain. The judgment offered the unusual example of a national criminal court reluctant to apply avant-garde human rights reasoning, but at the same time having to elaborate in detail on the legal underpinnings of judge Garzón's "progressive" constructions. From a juridical point of view, the ruling is most interesting due to the use of four judicial strategies in order to avoid the application of avant-garde human rights reasoning: "closure", "chronological circumvention", "misinterpretation" and "partial recognition". A comparative approach to the use of these strategies that considers similar decisions with transitional relevance—mostly from Latin American courts—can shed light on the methodology employed by national judges as regards the assessment of international law sources. At this point, it must be said that, notwithstanding its demerits, the judgment cannot be merely qualified as "parochial": it underlines the limits of horizontal trans-judicial communication in matters of international criminal law and hints at some uncertainties accompanying avant-garde human rights constructions.

Keywords author: "progressive" human rights law, trans-judicial communication, amnesties, principle of criminal legality, domestic legal systems.

Keywords plus: human rights law, international criminal law, amnesty, *nullum crimen sine lege*, relationship between international, domestic law.

RESUMEN

De acuerdo con la decisión del Tribunal Supremo en el caso Garzón-Memoria Histórica, los crímenes del franquismo no pueden ser investigados en España. La sentencia ofreció el ejemplo inusual de una jurisdicción penal nacional poco receptiva al Derecho Internacional de los Derechos Humanos de vanguardia, que se vio forzada a pronunciarse en detalle sobre las construcciones progresistas del juez Garzón. Desde un punto de vista jurídico, la decisión es sumamente interesante debido al uso de cuatro estrategias judiciales que permitieron sortear todo tipo de razonamiento vanguardista: cierre, circunvención cronológica, interpretación errónea y reconocimiento parcial. Una aproximación comparativa de la utilización de estas estrategias que, a su vez, considere decisiones similares con relevancia transicional –principalmente de cortes nacionales latinoamericanas– puede ofrecer luz sobre la metodología empleada por los jueces nacionales en lo que respecta a la evaluación de las fuentes de Derecho Internacional. En este punto debe afirmarse que, a pesar de sus deméritos, la sentencia no puede calificarse meramente como chauvinista: subraya los límites inherentes a la comunicación transjudicial en materia de derecho penal internacional y apunta a una serie de incertidumbres que acompañan al Derecho Internacional de los Derechos Humanos de vanguardia.

Palabras clave autor: *derechos humanos progresivos, comunicación transjudicial, amnistías, principio de legalidad penal, derecho interno de los Estados.*

Palabras clave descriptor: *derecho internacional de los derechos humanos, derecho penal internacional, amnistía, nullum crimen sine lege, relación entre derecho internacional y derecho interno de los Estados.*

SUMMARY

INTRODUCTION.- I. BACKGROUND TO THE CASE.- II. FIRST STRATEGY: CLOSURE.- A. *The Vertical Dimension: nullum crimen sine lege. Saint Thomas at Madrid.*- B. *The horizontal dimension.*- III. SECOND STRATEGY: CHRONOLOGICAL CIRCUMVENTION. THE JUDICIAL POLITICS OF TIME.- IV. THIRD STRATEGY: MISINTERPRETATION.- A. *A Problematic Application of the Case-law of the ECHR.*- B. *No Separation of Sources in International Law.*- V. FOURTH STRATEGY: PARTIAL RECOGNITION. -VI. CONCLUSION.- BIBLIOGRAPHY.

INTRODUCTION

Avant-garde international human rights law (HRL) –to use an adjective employed by a former judge at the Inter-American Court of Human Rights (IACtHR)¹–has spilled over the realms of regionalism and searches for its expansion in other receptive legal contexts. Dressing the clothes of a universalistic discourse on the international society, it connects an idealistic utopian view of the human being to legal functionalism², taking shape through specific legal institutions, mainly *ius cogens*, obligations *erga omnes* and crimes of State. To take one significant example, the procedure leading to the ICJ judgment in the *Immunities* case has delivered noteworthy discussions on the limits to the application of *avant-garde* HRL to the European realm, although it is known that eventually the Italian “*progressive*” arguments where (mostly) embraced by the Dissenting Opinion of judge Cançado Trindade³.

Probably the most distinctive bedrock of this approach is the intimate nexus established between HRL and international criminal law (ICL) through the duty to prosecute and punish gross human rights violations. Drafted with creativity in subsequent judgments, this component of *avant-garde* HRL has been moved by the IACtHR from the uncertain status of the duty to respect human rights to the more concrete right to the realization of *material* justice ex articles 8 and 25 Inter-American Convention on Human Rights (IACHR)⁴. As a result, any kind of amnesty law (whether validated by a democratic constituency or not, and whatever the political complexities of the transitional context)

1 See the reasoned opinion of judge Cançado Trindade in *Masacre de Pueblo Bello vs. Colombia* (IACtHR). Merits and Reparations. Serie C-14059, § 59 (judgment of January 31, 2006).

2 M. Koskenniemi, *Projects of World Community in Realizing Utopia. The Future of International Law*, 3-13, 11 (A. Cassese, Ed., Oxford University Press, New York, 2012).

3 ICJ, *Jurisdictional Immunities of the State (Germany vs. Italy, Greece intervening)* (February 3, 2012).

4 See above all *Goiburú & others vs. Uruguay*. Merits, Reparations and Costs. Series C-153. IACtHR (September 22, 2007) 131 (the first decision of the IACtHR to declare access to justice as *ius cogens*) and *La Cantuta vs. Perú*. Merits, Reparations and Costs. Series C-162. IACtHR (November 29, 2006) 157.

has been declared to be not only illegal, but also deprived of any legal effect⁵. If we consider these elements together with the judge-made extension of the supervisory role of the Court of Costa Rica over national criminal procedures, it is easy to understand why it has become a “*quasi-criminal jurisdiction*”, as underlined by a recent work⁶.

Having said that a rigorous deconstruction of the term *avant-garde* HRL poses immediate questions on the exact meaning of such an expression. Indeed, regionalism may not be the most defining attribute of “*progressive*” conceptions of HRL. The emphasis made on human dignity as the ultimate source of a “*status conscientiae*” that nourishes a particular conception of justice in international law –without much care to technical constraints⁷ finds evident historical traces in Nuremberg, in article 227 of the Treaty of Versailles, or even in Vitoria’s *Relectiones*, where punishment for the King was already accepted, even though with certain conditions⁸. Not to say that other pejorative terms have also been framed to designate quite the same thing⁹.

Accordingly, conceptual accuracy may discredit *avant-garde* HRL as a presumptuous expression preempting a positive connotation on the satisfactoriness of a particular doctrine on the foundations of international law. This is of course not the intention of this paper. On the contrary, our more modest purpose

5 Barrios Altos vs. Perú. Merits. Series C-75. IACtHR (March 14, 2001) 44; La Cantuta vs. Perú. Merits, Reparations and Costs. Series C-162. IACtHR (November 29, 2006) 169; Almonacid Arellano vs. Chile. Preliminary exceptions. Merits, Reparations and Costs. Series C-154. IACtHR (September 26, 2006); Gomes Lund & others vs. Brazil. Preliminary Exceptions. Merits, Reparations and Costs. Series C-219. IACtHR (November 24, 2010) 174; Gelman vs. Uruguay. Merits and Reparations. Series C-221. IACtHR (February 24, 2011) 238.

6 A. Hunneus, *International Criminal Law by Other Means: the Quasi-Criminal Jurisdictions of Human Rights*, 107 *American Journal of International Law*, 1, 1-54 (2013).

7 See the works of the most influential exponent of this approach, A. Cançado Trindade, *International Law for Humankind: towards a New jus gentium* (Martinus Nijhoff Publishers, The Hague, 2010).

8 F. de Vitoria, *De jure belli*, p. 59. English version in E. Nys, *De Indis et de iure belli relectiones*, 186 (Carnegie Institution, Washington, 1917). See with more detail on this point: A. Truyol y Serra, *Crímenes de guerra y derecho natural*, I *Revista Española de Derecho Internacional*, 45-73, 52-53(1948).

9 A. Pellet, *Droit-de-l’homisme et droit international*. Conférence commémorative Gilberto Amado (July 18, 2000). <http://untreaty.un.org/ilc/sessions/52/french/amado.pdf>.

will be to benefit from the *dynamic* connotations of the term for two main reasons. On the one hand, because they characterize certain tendencies in the legal status of the right of access to justice and the sharp effects derived from its peremptory nature. On the other hand, because they stress the particularities of the *ius naturalist* underpinnings that identify the jurisprudence of the IACTHR –and the national courts following it– in the vast panorama of international decisions and resolutions on the duty to prosecute gross human rights violations¹⁰.

Curiously enough, a few weeks after the ICJ rendered its judgment in the *Immunities* case, a national criminal court adopted a controversial decision also concerning what, *in gross terms*, may be qualified as *avant-garde* HRL—in this case, in the context of the prosecution of Francoist crimes in Spain—¹¹. Of course, the legal background here was totally different and the (simplistic) dichotomy between the progressive and the conservative accounts only for a part of the legal solution offered. Thus, the decision of the Criminal Law Chamber of Supreme Court (“*the Supreme Court*”) in the *Garzón-Memoria Histórica* case can also be explained through the prisms of the role of national courts in transitional or post-transitional periods (the old “*peace vs. justice*”)¹² or the doctrinal discrepancies between criminal and

10 To offer but a non-exhaustive list of examples of decisions or documents in other systems of protection, see: *Report of the Working Group on Enforced and Involuntary Disappearances*. UN Doc. E/CN. 4/2006/56 (December 27, 2005); *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (Report of the Secretary General). UN Doc. S/2004/616 (August 23, 2004); *Rule of Law Tools for Post-Conflict Societies* (Office of the UNHCHR). UN Doc. HR/PUB/09/1; *Question of the Impunity of Perpetrators of Human Rights Violators* (Report Louis Joinet). UN Doc. E/CN. 4/Sub. 2/1997/20/Rev 1 (October 2, 2007), HRC, Hugo Rodríguez vs. Uruguay 322/1988 UN Doc CCPR/C/51/D/322/1988 (August 9, 1994) 12.3-12.4; Committee against Torture, *General Comment No 2. Implementation of article 2 by States Parties* UN Doc. CAT/C/GC/2 (January 24, 2008) 5; African Commission Human and People’s Rights, *Zimbabwe Human Rights NGO Forum vs. Zimbabwe*, Com. 245/02 (May 21, 2006) 211 and 215.

11 Criminal Law Chamber of the Supreme Court & others vs. Garzón Real. Appeal judgment. Supreme Court Judgment/101/2012; International Law in Domestic Courts (ILDC) 1855 (ES 2012). Where possible, reference will be made there to the English version available at ILDC instead of the original decision.

12 To put but two recent comprehensive studies, see J. Almqvist & C. Expósito (Eds.), *The Role of Courts in Transitional Justice. Reports from Latin America and Spain* (Routledge, New York, 2012); F. Lessa & L. Payne (Eds.), *Amnesty in the Age of Human Rights Accountability* (University Press, Cambridge, 2012).

international human rights lawyers. Even more, if we look further, the analysis may descend to the infra-legal level¹³, focusing on the political and sociological dynamics behind the receptiveness of national courts towards *avant-garde* HRL in the context of transitional periods¹⁴.

The present works will deal with this decision of the Supreme Court through the third suggested narrative, which in the end is no more than a specific branch of the general discussion on the role of national courts in applying international law. Consequently, the thread of the analysis will be delineated by the strict legalist assessment made by the Supreme Court (in the end, a national criminal court) of the *avant-garde* interpretation of the international legal obligations alleged by the instructing judge (the renowned-albeit-controversial judge Garzón) to be binding on Spain. At this point, the emphasis will be put on the various strategies followed in order to avoid compliance with *avant-garde* HRL, termed here “*closure*”, “*chronological circumvention*”, “*misinterpretation*” and “*partial recognition*”. The aim is to shed light on the ways reluctant criminal courts conceive their role as “[non-] coordinators between highly interdependent criminal legal orders”¹⁵,—or to use more classical terms, as principal actors in the phenomenon of *dédoublement fonctionnel*¹⁶, so as to illustrate on possible legal explanations and approaches to be adopted in similar instances.

13 G. Abi-Saab, *Cours général de droit international public*, 207 *Recueil des Cours*, III, 9-464, 33 (1987).

14 A classical example of this approach is C. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: the Case of Argentina*, 100 *Yale Law Journal*, 2619-2640 (1991). In the Spanish context, see more recently: P. Aguilar, *Authoritarian Repression, Judicial System and Transitional Justice: the Spanish Case in Comparative Perspective* (Estudio. Working Paper 2011/263, December, 2011). <http://dialnet.unirioja.es/servlet/articulo?codigo=3855881>

15 In the expression of A. Nollkaemper, *National Courts and the International Rule of Law*, 13 (Oxford University Press, New York, 2010). For an express recognition of this role, see the judgment of the Peruvian Constitutional Court, *Martín Rivas vs. Constitutional and Social Chamber of the Supreme Court* (“Martín Rivas”). Appeal judgment, C-679-2005-PA/TC; Oxford Reports on International Law in Domestic Courts (ILDC) 960 (PE 2007) 35-37.

16 G. Scelle, *Le phénomène du dédoublement fonctionnel*, in *Rechtfragen der Internationalen Organization*, 324-342 (H. Weberg, Dir., Franckfurt am Main, 1956).

This conceptual framework is particularly useful for three reasons. The first one lies in the existence of comparable decisions by other national courts often invoked during the initial pre-trial proceedings, that is, national judgments dealing with amnesties for gross human rights violations where *avant-garde* approaches to HRL are assessed. Reference will be made here to many of them. The second one stems from the variety of the strategies followed in only one decision. The third one is that, similar to what happened in the *Immunities* case, the decision of the Supreme Court has provided “certainty” on the limits to the right of access to justice in Spain¹⁷.

We caution the readers that we will (mostly) remain neutral on the reasonableness of judge Garzón’s legal constructions because that would engage us in other kind of discussion¹⁸. The relevant point is that, as avowed at the beginning, *avant-garde* HRL forms part of the international *lex lata* in some regions and countries, not to say of a relevant part of HRL scholarly works.

17 A. Bianchi, *On Certainty*. *EJIL Talk!* <http://www.ejiltalk.org/on-certainty> (February 16, 2012).

18 Critical comments on Garzón’s decisions (favourable or not) can be found *inter alia* in: P. Burbidge, *Waking the Death of the Spanish Civil War*, 9 *Journal of International Criminal Justice*, 753-781 (2011); J. Chinchón & L. Vicente, *La investigación de los crímenes cometidos en la Guerra Civil y en el franquismo como delito de prevaricación*, 19 *Revista Electrónica de Estudios Internacionales* (2010). <http://www.reei.org>; A. Gil Gil, *La justicia de transición en España: de la amnistía a la memoria histórica*, 157 (Atelier, Barcelona, 2009). Comments on those positions of the case law of inter-american organs influencing judge Garzón can be found in F. Basch, *The Doctrine of the Inter-American Court of Human Rights Regarding States’ Duty to Punish Human Rights Violations and its Dangers*, 23 *American University International Law Review*, 1, 195-229 (2007); E. Malarino, *Activismo judicial, punitivización y nacionalización. Tendencias antidemocráticas y antiliberales de la Corte Interamericana de Derechos Humanos in Sistema Interamericano de Protección de los Derechos Humanos y Derecho Penal Internacional*, 25-62 (K. Ambos, E. Malarino & G. Elsner, Eds., Fundación Konrad-Adenauer, Oficina Uruguay, 2010); F. Carvalho Vecoso & A. Do Amaral Jr., *The Inter-American System as a New Grossraum? Assessing the Case Law of the Inter-American Court of Human Rights* (ESIL. Conference Paper Series 3/2011, 2011). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1967666. More supportive views are found in : L. Burgorgue-Larsen, *Le bannissement de l’impunité: décryptage de la politique jurisprudentielle de la Cour Interaméricaine des Droits de l’Homme*, 89 *Révue Trimestrielle des Droits de l’Homme*, 3, 3-42, 2012; D. Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 *Law & Contemporary Problems*, 4, 197-230 (1997); L. Hennebel & H. Tigroudja (Eds.), *Le particularisme interaméricain des Droits de l’Homme* (Pedone, Paris, 2009); O. Parra Vera, *La jurisprudencia de la Corte Interamericana respecto a la lucha contra la impunidad: algunos avances y debates*, 13 *Revista Jurídica de la Universidad de Palermo*, 1, 5-50 (1997).

I. BACKGROUND TO THE CASE

The considerable media attention given to this trial reflects the political controversies provoked by the figure of (former) judge Baltasar Garzón (“judge Garzón” or “the instructing judge”). Indeed, the international critics arisen as a consequence of the initiation of a criminal procedure against the first judge opening a real “*post-transitional*”¹⁹ process in Spain encouraged some NGO’s and other organizations to be active during the trial. What is more, this case formed part of a set of three parallel criminal procedures instructed by the Supreme Court against the same person, one of which eventually lead to his condemnation for corruption in the discharge of judicial duties (*prevaricación judicial*). Nevertheless, the *Garzón-Memoria Histórica* case is the only one relevant from the point of view of international criminal justice and eventually lead to his acquittal.

Let us firstly explain the legal background, focusing only in the relevant parts of this highly complex procedure. On December 14th 2006, a number of private criminal complaints (*querellas*) were submitted before the Central Criminal Court (*Audiencia Nacional*) by direct relatives and civil associations representing victims of Francoist repression. They argued that they had the right to know the circumstances of death and the whereabouts of burial of their relatives, all disappeared during the Spanish civil war (1936-1939) and the early years of the Franco dictatorship.

The main disposition invoked was article 607*bis* of the Criminal Code²⁰. Since a reform operated in 2003 in order to accommodate the Spanish criminal system to the ICC Statute, this article included crimes against humanity as a distinct criminal offence, listing the specific conduct of “*illegal detention without admitting this misconduct or explaining the circumstances or*

19 For more accurate details (in english) on the Spanish transitional process, P. Aguilar, *Memory and Amnesia: the Role of the Spanish Civil War in the Transition to Democracy* (Berghahn Books, New York, 2002). For a more brief account, see: J. Tamarit, *Transition, Historical Memory and Criminal Justice in Spain*, 9 JICJ, 3, 729-752 (2011).

20 Criminal Code, Organic Act 10/1995, November 23, 1995.

whereabouts of the arrested person". In short, it was alleged that this article could embrace the systematic practices of forced disappearance and murder committed by the Franco régime between 1936 and 1952 (according to the claimants, already condemned by international law in 1936).

Judge Garzón (Pre-Trial Proceedings Central Court N° 5, *Juzgado Central de Instrucción N° 5*) did not formally assume the competence to investigate the facts until an Order (*Auto*) was issued on October 16th 2008 ("*the 2008 Order*")²¹. It is important to explain his reasoning in detail because it encapsulates a great part of the judicial responses offered by the final Supreme Court decision.

The 2008 Order accepted the reasoning of the claimants related to the application of article 607*bis* of the Criminal Code. In this sense, it referred to several international treaties and documents in order to justify the existence of crimes against humanity already in 1936: the Statute of the Military Courts of Nuremberg and Tokyo²², the Nuremberg principles²³, Law 10 of the Allied Control Council²⁴, or the 1899 and 1907 Hague Conventions (the former containing the so called "*Martens clause*")²⁵. Assuming that the alleged offence was already illegal under international law, the 2008 Order faced the objection that the Criminal Code contained no penalty for crimes against humanity before the 2003 reform.

At this point judge Garzón made a reference to a former decision of the Supreme Court rendered in another controversial

21 Pre-Trial Proceedings Central Court/5, Order of 16 October 2008, D. P. 399/2006 V.

22 Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 for the Prosecution and Punishment of Major War Criminals of the European Axis, 82 UNTS 279. On the Tokyo Charter, see: N. Boilster & R. Cryer, *Documents on the Tokyo International Military Tribunal Charter, Indictment and Judgments* (OUP, New York, 2008).

23 *Formulation of the Principles Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal* ("Nuremberg principles"), GA Res/177 (II), November 21, 1947.

24 Control Council Law/10: *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, *Amtsblatt of the Control Council in Germany*, 3, January 31, 1946, at 50.

25 Hague Convention (IV) *Respecting the Laws and Customs of War on Land*, 1907, Preamble.

affaire: the *Scilingo* judgment²⁶. The legal context there was slightly different, as arguments of legality were related to the exercise by Spain of universal jurisdiction. Nevertheless, the instructing judge saw no impediment to apply the reasoning developed therein to the circumstances of the case. We will briefly summarize the main findings of that ruling.

Even though the specific disposition for assuming universal jurisdiction contained no reference to crimes against humanity, the Supreme Court had followed in *Scilingo* a two-tiered reasoning. On the one hand, it had accepted an extension of the *jurisdiction* of the Central Criminal Court by applying an analogical international of the Act on the Power of the Judiciary²⁷: if crimes of genocide and crimes of war enabled the Central Criminal Court to exercise universal jurisdiction, *a fortiori* should Spanish courts be able to be competent for prosecuting crimes against humanity, even though they were not specifically mentioned in that norm. On the other hand, it had *condemned* Mr. Scilingo, not for crimes against humanity but for the common crimes of killing and illegal detention, because the former had not been introduced in the Criminal Code before 2003.

In this sense, it only used the prohibition of crimes against humanity in customary law as an element of “*context*” in order to apply the highest penalty provided in the Criminal Code for those common crimes. This reasoning was based on the thesis that the procedural is different from the material and cannot affect the scope of the *nullum crimen* principle.

Two were the major differences between *Scilingo* and the present case. Firstly, the nature of the crimes discussed by the 2008 Order (forced disappearances) did not fit any of the conducts regulated by the 1932 Criminal Code (in force at the time

26 This case had discussed the condemnation by the Central Criminal Court of a former member of the Argentinean military forces, Adolfo Scilingo, as the responsible of certain crimes committed in 1976 in Argentina, in the context of the infamous *Operación Cóndor*. See: Supreme Court, *Scilingo Manzorro*. Judgment on appeal/798, October 1st, 2007.

27 At the time of the 2008 Order, this disposition only enabled Spanish courts to exercise universal jurisdiction (*inter alia*) on the following crimes: genocide, terrorism, piracy and “*any other that, according to the international treaties, must be prosecuted in Spain*” (*Organic Act on the Power of the Judiciary* [OAPJ] 6/1985, July 1st, 1985).

the alleged facts were committed). Secondly, crimes had already prescribed according to national law. The 2008 Order tried to avoid both objections by using international instruments as an element of “context” in order to apply to the existing crime (“*illegal detention without admitting this misconduct or explaining the circumstances or whereabouts of the arrested person*”), one of the main consequences of crimes against humanity: the imprescriptibility. This means that it formally applied a conduct that was illegal already in 1932 –according to the instructing judge– but attached to it one of the consequences of the international crime. The reasoning was supported with numerous references to the case-law of the European Court of Human Rights (ECTHR) with a double purpose: to justify its application *ratione temporis* to certain facts occurred before the entry into force of the European Convention on Human Rights (ECHR)²⁸ and to link the forced disappearances with the positive obligations under article 5 ECHR²⁹.

The other major obstacle faced by the instructing judge was the 1977 Amnesty Act whose article 1(a) amnesties to all political acts committed before December 15th 1976³⁰. Here he invoked the illegality under international law of any amnesty for crimes against humanity, quoting relevant decisions from international and national courts and other international organs³¹. More decisively, he concluded that any amnesty act precluding the exercise of criminal jurisdiction for crimes against humanity is *void* and should never be applied by the judge.

28 Broniowski vs. Poland. App/31443/96 (ECHR, June 22, 2004), where the disputed facts had been committed in 1944; Ilascu & others vs. Moldavia & Russia. App/48787/99 (ECHR, July 8, 2004), where they had been committed before the entry into force of the ECHR for Russia on May 5, 1998.

29 2008 Order 9-10. See *inter alia*: Chyprus vs. Turkey. App/25781/94 (ECHR, May 10, 2001) 135 and 142-151; Çakici vs. Turke. App/23657/94 (ECHR, July 8, 1999) 100-107; Orhan vs. Turkey. App/25656/94 (ECHR, June 18, 2004) 365-375.

30 Law 46/1977, 15 October, *BOE* 248, 17/10/1977.

31 2008 Order 11. The references are *inter alia* the following: Barrios Altos vs. Perú. Merits; Masacre de Mapiripán vs. Colombia. Merits and Reparations. Serie C-122 (IACtHR, September 5, 2005); Caso Turco Julián, judgment of 11 August 2006. Criminal Federal Court No. 5 (Argentina), causes 1056 and 1207; Azanian Peoples Organization & others vs. President of South Africa & others. Constitutional Court, CCT 17/96; 1996 (4) SA 671 (CC), July 25, 1996.

The instructing judge's reasoning was a bold one, but it soon arose controversy. On January 26th 2009 two right-wing civil associations submitted before the Supreme Court a private criminal complaint against judge Garzón (*acción popular*). According to the complainants, the irregularities of the procedure just described made judge Garzón responsible for an offence of corruption in the discharge of judicial duties (*prevaricación*) regulated in article 446 of the Criminal Code. They argued basically that the instructing judge had ignored the prohibitions enshrined in the Amnesty law and the principles of legality and non-retroactivity protected by article 25(1) of the Constitution.

II. FIRST STRATEGY: CLOSURE

As regards the appraisal of *avant-garde* HRL, the Supreme Court was fairly exhaustive albeit not necessarily convincing. As explained at the introduction, its reluctance to prosecute Francoist crimes responded to a set of legal strategies that can be classified in the following: closure, chronological circumvention, misinterpretation and partial recognition. The present section will deal with the assessment made of the first one.

The most evident legal technique to avoid *avant-garde* HRL is the closure of the legal order to “*mistrusted*” normative prescriptions considered to be alien to the national system of values. Closure can, on the one hand, be *explicit* (where the judge considers applicable international law but rejects its application arguing that there is a collision with national standards) and on the other *implicit* (where international law is simply disregarded without any reference or discussion). In this last case we could find at least two possibilities: *real* or *improper* closure. The first one would arise where the national judge ignores applicable international law (as the Brazilian Supreme Court did in the ADFP 153), the second where the Court declares its lack of competence to deal

with the case (as the Constitutional Chamber of the Supreme Court of Justice of El Salvador held in *Ellacuría Beascochea*)³².

Particularly during the last twenty years, legal literature has increasingly emphasized the interdependence of the national and the international judicial realms, envisaging different structural proposals in order to understand the relationship between constitutional law and international law (particularly in the context of European integration)³³. Nevertheless, and unlike what other Chambers of the Supreme Court usually do, unsophisticated hierarchical conceptions still account for the way the Criminal Law Chamber conceives the reception of international criminal law in Spain. In order to correctly explain this, we will separate here two dimensions of closure: the vertical and the horizontal one. The first one refers to the reception of applicable sources of international law and the interpretation provided by international courts; the second to judicial decisions on international law provided by other national courts.

A. The Vertical Dimension: nullum crimen sine lege. Saint Thomas at Madrid

Even though there was nothing especially innovative in the assessment of non-written sources of international law, the final judgment of the Supreme Court underlined the perplexing contrast existent between those situations such as *Scilingo*, where crimes against humanity were used as a matter of *jurisdiction*, and those –such as this one– where the principle of legality prevented any use of the same crime as a matter of *incrimination*. In any case, *Scilingo* was a particular situation that fell out of the general rule of strict applicability of the principle of legality protected by article 25(1) of the Constitution, as interpreted by the Supreme Court. This means that, regarding customary

32 *Ellacuría Beascochea & others vs. President of El Salvador and others*. Writ of Amparo, case N674-2001; ILDC 1455 (SV 2003).

33 The list of works on the subject is overwhelming. Suffice it to refer here to P. Craig & G. De Búrca, *EU Law. Text, cases and materials*, 256 (5th ed., OUP, New York, 2012) and the references contained therein.

law and general principles of law as sources of incrimination, the Spanish legal system reflects what in the context of the *Pinochet* case was described as the “*syndrome of Saint Thomas*”: if the judge does not find an applicable written national norm, he will not be able to incriminate a certain conduct as an international crime³⁴.

This is of course comprehensible in a legal system such as the Spanish, imbued as it is with the civil law tradition (in fact, Spain is not the only country locking its criminal law to international customary law in order to avoid judicial revisions of controversial past crimes³⁵). More surprising did it seem in the context of the House of Lords decisions regarding the extradition of Augusto Pinochet to Spain for the crimes of genocide, torture and terrorism. The obvious explanation is that, in the end, national highest jurisdictions always want to stay as the watchdogs of their legal territory, and the Spanish Supreme Court is no exception in this regard. Still, a deeper legal analysis leaves some questions unresolved.

The bulk of the reasoning of the Supreme Court can be summarized in the following quotation:

“[i]n order to apply international criminal law, a precise transposition operated by international law is necessary, at least in those legal systems as the Spanish one that do not allow for the direct effect of international norms. In this sense, the Spanish Constitution regulates in articles 93 and ff. the form of incorporation into national law of the International Treaties in order to deploy the plenitude of effects granted by article 10(2) of the *Charta Magna* [the Constitution]”³⁶.

The reader unfamiliar with the reception of international law in the Spanish order has to be informed that the Spanish Constitution consolidates a “*moderately monist*” system whereby

34 A. Remiro, *El caso Pinochet. Los límites de la impunidad*, 87 (Política Exterior, Madrid, 1999).

35 See e.g. the decision of the French Cour de Cassation in *Mouvement Against Racism and for People's Friendship vs. Aussaresses* (MARPE). Appeal judgment. N02-80719; Decision N122; ILDC775 (FR 2003) at 17 ff.

36 Garzón-Memoria Histórica, 3.1. All translations from the Spanish are mine.

the only condition for its incorporation into the national legal system is the publication of the relevant treaties in the Official Journal (*Boletín Oficial del Estado*)³⁷. As far as customary law is concerned, nothing is indicated neither by the Constitution nor by the Civil Code. Nevertheless, the most authoritative handbooks elaborated by Spanish scholarship admit that the reception of non-written sources is implicit in the Constitution and becomes effective when the customary rule crystallizes. Moreover, and unlike what the quoted extract seems to suggest, direct effect is admitted for those international norms having the requisites of clarity and unconditionality³⁸.

In addition, a concise reference should be made to article 10(2) of the Constitution. This disposition establishes an innovative mechanism of reception of international human rights law that *obligates* national judges to recur to norms and case-law related to this particular branch of international law in order to interpret any of the fundamental rights protected by the constitutional text. The only condition is that Spain is a party to the relevant treaties. This imperative marks a difference between the Spanish legal system and others where *avant-garde* HRL was rejected in transitional justice-related cases (such as those of El Salvador³⁹ or Brazil⁴⁰) but can be found in the same terms in the Peruvian Constitution or *mutatis mutandis* in the Chilean Constitution⁴¹ (both States where the doctrine of the IACTHR on amnesties has been closely followed).

37 See Arts. 96(1) of the Constitution and 1(5) of the Civil Code (July, 1889).

38 A. Mangas, *La recepción del derecho internacional por los ordenamientos internos*, in *Instituciones de Derecho Internacional Público*, 247-248 (17th Ed., M. Díez de Velasco, Ed., Tecnos, Madrid, 2009); J. Pastor Ridruejo, *Curso de derecho internacional público y organizaciones internacionales*, 175-177 (13th Ed., Tecnos, Madrid, 2010); A. Remiro et ál., *Derecho internacional. Curso general*, 347 (TloB, Valencia, 2010).

39 There is no disposition in the 1983 Salvadorian Constitution providing for a special treatment for human rights treaties.

40 See: Federal Council of the Brazilian Bar Association vs. President of the Republic & National Congress. Plea of breach of fundamental precept. Supreme Court decision 153; ILDC 1495 (BR 2010). The concrete status of international human rights law in the country is a matter under discussion as the negative language of art. 5(1) of the 1988 Brazilian Constitution does not provide much detail on the matter (for more details, see the references in note 80).

41 Forth Final Disposition of the Peruvian Constitution (1993); art. 5 of the Chilean Constitution (as reformed in 2005).

The application of the doctrine of the Supreme Court to the particular field of international criminal law may lead to a final conclusion that resembles narrowly the *Scilingo* thesis defended in the passage quoted above, but following a different construction.

Clearly, most of the instruments mentioned by the 2008 Order to support the illegality of forced disappearances as crimes against humanity already in 1936 (or later, in 1945) cannot be accommodated to the stringent conditions of *lexprevia*, *lexcerta*, *lexstricta* and *lexscripta* required by the Supreme Court. However, nothing prevents that an evolution of international criminal law eventually provides for precise and unconditional legal standards that can bear direct effect on national legal orders, however improbable this may be at this moment⁴². In that case, it would be the protection of the principle of legality as interpreted by the Supreme Court *and not the lack of direct effect* that would impede any Spanish criminal judge to condemn a person on the sole basis of the international standard, as international law could never take precedence over a superior value of Spanish law such as a fundamental right protected by article 25(1) of the Constitution⁴³.

It is of course possible to criticize the doctrine of strict legality adopted by the Court by defending a softer approach more akin to the deficiencies of the processes of standardization of international criminal law. Serious reasons related to the protection of the interests of substantive justice are not lacking, at least since the judicial and doctrinal efforts made during the Nuremberg trials⁴⁴.

42 As defended *inter alia* in D. Scalia, *Du principe de légalité des peines en droit international pénal* (Bruylant, Bruxelles, 2011).

43 To put another parallelism with EU Law, even the ECJ, reluctant as it is to recur to customary law in its rulings, has admitted that individuals can directly invoke before national courts a customary rule contrary to a Directive. However, acknowledging the “*lack of precision*” of this source of law, the Court limits its role to an assessment of the existence of a “*manifest error of appreciation*” by the EU institutions adopting the Directive (See Case 98/78. *Racke vs. Hauptzollamt Mainz* [1979] ECR 69, 52; more recently, Case 366/10. *Air Transport Association*, pending, 107-110).

44 H. Donnedieu de Vabres, *The Nuremberg Trial and the Modern Principles of International Criminal Law*, in *Perspectives on the Nuremberg Trial*, 213 (G. Mettraux, Ed., OUP, New

One may, for instance, use the technique used in 1998 by a Belgian instructing judge to support that the prohibition of crimes against humanity in the legal order of that country in relation to the extradition of *Pinochet* to Belgium⁴⁵.

Similarly, it has also been argued, in the context of the ECOWAS Court of Justice decision in the *Hissène Habré* case, that there is no violation of the prohibition of *ex post facto* laws if the international crime has not been incorporated into national law before a crime is committed, but at the same time there is an analogous conduct regulated in national law that fills in the gap (thesis very similar to the one defended by the Supreme Court in *Scilingo*)⁴⁶.

Another (more radical) possibility is to consider judges obliged to disregard rules and legal institutions – democratic or not – whose application in the benefit of former dictators and members of military *juntas* would cause an extreme deviation from basic considerations of justice⁴⁷.

The fact is, however, that the strictest positivist approach is what the Spanish judiciary (and doctrine) has been defending for years⁴⁸. Certainly, at least since 1945 national law is no excuse for the international responsibility of individuals for international crimes⁴⁹. But the legal reality –awkwardly reminded by

York, 2008); S. Glaser, *Le principe de légalité en matière pénale, notamment en droit codifié et en droit coutumier*, 46 *Revue de Droit Pénal et de Criminologie*, 889 (1966); H. Kelsen, *The Rule against Ex Post Facto and the Prosecution of the Axis War Criminals*, *The Judge Advocate Journal*, 2(1944) 8; A. Quintano Ripollés, *Tratado de derecho penal internacional e internacional penal*, 87 (CSIC, Madrid, 1955).

45 Judgment of 6 November of 1998, *Journal des Tribunaux* (1999) at 310 (note Verhoeven); E. David, *Éléments de droit pénal international et européen*, 1311-1313 (Bruylant, Bruxelles, 2009). The instructing judge admitted that the offence of crimes against humanity did not exist in Belgian criminal law, so he interpreted the relevant national offences in the light of the customary norm.

46 V. Spiga, *Non-Retroactivity of Criminal Law. A New Chapter on the Hissène Habré Saga*, 9 *JICJ*, 1, 5-23 (2011).

47 For a moral reasoning, see: C. Nino, *La validez del Derecho*, 103 (Astrea, Buenos Aires, 1985). For a legal reasoning, Claudio Abdón Lecaros (Chile). Supreme Court of Justice. No. 3302.2009, Res/16689 and 16699 (May 18, 2010) 3.

48 In fact, an authoritative Spanish scholar had argued already in 1979 that art. 7(2) ECHR raises serious questions of compatibility with the Spanish Constitution, recommending the government to reserve it when acceding to the Convention. See: E. García de Enterría, *El Sistema Europeo de Protección de los Derechos Humanos*, 83 (Civitas, Madrid, 1979).

49 See *Nuremberg principles*, II.

the US Supreme Court in the *Medellin* case— is that it behooves to national legal orders to determine the conditions of openness towards international law⁵⁰. We are well aware that it is impossible to dispatch in these few lines of the perennial controversy on the relations between legal orders. This is why we will limit ourselves to remember that, even in European law, subsystem of international law where the doctrine of direct effect has been best refined⁵¹, conflicts with national standards on criminal legality are avoided by accepting the *nullum crimen* principle as a necessary limit on the direct effect of Directives in national law⁵². In other words, in this highly developed branch of law it is the *superior* rule the one who sacrifices.

But hierarchical solutions only account for a part of the problem. Almost a century ago, Professor Romano's institutionalism theory provided visionary ideas on the way we tend to conceive relationships between legal orders today: as coordination between autonomous or semi-autonomous legal orders⁵³. More recently, in the early nineties, decisions of Swiss courts concerning surrender of individuals to Security Council Criminal Tribunals gave us early examples of *Solange* approaches to international cooperation in the prosecution of international crimes, even in contexts where codified criminal legal standards were manifestly deficient⁵⁴. Even the Spanish Constitutional

50 *Medellin vs. Texas*, 555 US 922 (2008). Critical comments in G. De Búrca, *The European Court of Justice and the International Legal Order after Kadi*, 51 *HILJ*, 1, 2(2010); J. Weiler, *Editorial comments*, 19 *EJIL*, 5, 893 (2008).

51 Regardless of the opinion one may hold on the constitutional nature of this legal order. See *inter alia*: B. De Witte, *The Continuous Significance of Van Gend en Loos*, in *The Past and Future of EU Law*, 10 (M. Poyares & L. Azoulai, Eds., Oxford and Portland, New York, 2010); P. Dupuy, *L'unité de l'ordre juridique international. Cours général de droit international public*, 297 *Recueil des Cours*, 9-496, 438 (2002).

52 See e.g. cases C-387, 391 & 403/02. Criminal Procedures against Berlusconi and others (2005) ECR I-3565, 74-78; case C-550/09. Criminal Procedures against E and F, unpublished, 50.

53 S. Romano, *El ordenamiento jurídico*, 253 (Instituto de Estudios Políticos, Madrid, 1963) (The original Italian version, *Il ordinamento giuridico*, dates back from 1917). An analysis of Romano's theories in the context of present international and transnational law is found in F. Fontanelli, *Santi Romano and L'ordinamento giuridico: the Relevance of a Forgotten Masterpiece for Contemporary International, Transnational and Global Relations*, 2 *Transnational Legal Theory*, 1, 67 (2011).

54 *X vs. Office Fédérale de la Police*. BGE 123 II 175 (April 28, 1997) 28; *Rukundo vs. Federal Office of Justice*. Appeal Judgment, cases 1A.129/2001 and 1A.130/2001; ILDC 348 (CH

Court has shown more openness in a 2011 case arisen in a case of compliance of European arrest warrant issued by Italy, where a person claimed by an Italian Court had been condemned *in absentia* without any possibility of reviewing the case (essential guarantee under Spanish constitutional law). Here, the Constitutional Court submitted her first reference for a preliminary ruling to the European Court of Justice, posing direct questions on how to harmonize incompatible legal standards⁵⁵.

These contradictions between extradition and pure “*inner*” cases such as the prosecution of Francoist crimes suggest that strict legalist views are slowly becoming untenable in today’s world of criminal exchanges between legal orders. Other more flexible solutions rather than mere praetorian distinctions between substantive and procedural criminal law are needed. Otherwise, increasingly thorny situations may arise. We might venture to suggest two: “*Horizontal complementarity*” (Argentinean criminal courts eventually decide to exercise universal jurisdiction over Francoist crimes)⁵⁶; a person claimed by the International Criminal Court –whose catalogue of penalties is not absolutely strict– is arrested in Spanish territory⁵⁷. In both cases, another *Scilingo* solution would not silence the voices claiming for a more coherent approach⁵⁸.

2001) 3.b. See also *Naletilic vs. Croatia* (inadmissibility). App 51891/99 (ECHR, May 4, 2000) 1b; *Galic vs. Netherlands* (inadmissibility). App No 22617/07 (ECHR, June 9, 2009). Further discussion in J. D’Aspremont & C. Bröhlmann, *Challenging International Criminal Tribunals before Domestic Courts*, in *Challenging Acts of International Organizations Before National Courts*, 111-136 (A. Reinisch, Ed., OUP, New York, 2010).

55 Constitutional Court, Order of 9 June 2011, 86/2011. The reference of this case is C-399/11 Criminal Proceedings against Stefano Melloni. Judgment of 26 February, 2013.

56 C. Ryngaert, *Horizontal complementarity in The International Criminal Court and Complementarity. From theory to practice*, II, 27 (C. Stahn & M. El Zeidy, Eds., CUP, Cambridge, 2011). A synthetic exposition of some judicial steps adopted in this sense can be found in J. Chinchón, *El tratamiento judicial de los crímenes de la Guerra Civil y el Franquismo. Una visión de conjunto desde el Derecho Internacional*, 67 *Cuadernos Deusto de Derechos Humanos*, 91(2012).

57 For a brief discussion on legality in extradition cases, see: B. García, *La extradición en el ordenamiento interno español, internacional y comunitario*, 399 (Comares, Madrid, 2005).

58 See *inter alia*: C. Fernández Liesa, *La aplicabilidad de la costumbre internacional en el derecho penal español in Justicia de transición, justicia penal y justicia universal*, 73 (J. Tamarit Sumalla, Ed., Atelier, Barcelona, 2010).

B. The Horizontal Dimension

When one reads carefully the legal argumentation developed by judge Garzón in his 2008 Order one comes to the conclusion that at least two of his numerous references to comparable judicial decisions on amnesties needed further consideration. On the one hand, the judgment of the South African Constitutional Court in *Azanian Peoples Organization and ors v President and others* was far from supporting his proposals on the nullity of amnesties under international law⁵⁹. On the other hand, the ruling of the Appeal Chamber of the Special Court for Sierra Leone in *Kallon and Kamara*, albeit rejecting the claims of the defendants based on a possible amnesty granted by the Lomé Agreement signed under the auspices of the United Nations, had held that there was a “*crystallizing international norm that a government cannot grant amnesty for serious violations of crimes under international law*”⁶⁰ (emphasis added). As a consequence, the Court had disregarded the amnesty claims only by refraining to interfere in the direction of emerging –but not completed- customary norms, but nothing else.

However, his frequent references throughout the whole procedure to decisions from Inter-American supervisory organs and the Argentinean Supreme Court pose interesting questions on the limits of “*horizontal trans-judicial communication*”⁶¹ in a context of normative “*criminal pluralism*”⁶². In fact, this point did not pass unnoticed to the only dissident opinion to the final

59 In fact, this judgment supported the opposite view in many regards. For example, it is to be remembered that the South African Supreme Court relied there on art. 6(5) of Additional Protocol II to the Geneva Conventions in order to justify amnesties for international crimes.

60 Prosecutor vs. Kallon & Kamara (Challenge to Jurisdiction), case scsl-2004-15-ART2(E) (Special Court for Sierra Leone, March 13, 2004) 84. Critical comments on this point in: S. Meisenberg, *Legality of Amnesties in International Humanitarian Law. The Lomé Amnesty Decision of the Special Court of Sierra Leone*, 856 *International Review of the Red Cross*, 848 (2004).

61 A. Slaughter, *A Typology of Trans-Judicial Communication*, 29 *University of Richmond Law Review*, 99-137, 103 (1994-1995).

62 C. Stahn & L. van den Herik, *Fragmentation, Diversification and '3D' Legal Pluralism: International Criminal Law as the Jack-in-the-Box?* in *The Diversification and Fragmentation of International Criminal Law*, 21(C. Stahn & L. van den Herik, Eds., Martinus Nijhoff Publishers, The Hague, 2012).

Supreme Court decision. Judge Maza Martín, when considering the *actus reus* of the crime of “judicial corruption”:

“If [the crime] refers to the incorrect application of the law, it refers exclusively to Spanish law, binding in our country, which the national judges have to apply, including, of course, the law which emanates from the letter of the international covenants subscribed by Spain, or the courts or organs charged with interpreting these texts that is embraced by our legal order according to the Constitution and the laws. And that’s enough”.

The final ruling of the Supreme Court settled the issue in formal terms, closing horizontally the Spanish criminal order with an obvious allusion to the lack of binding force of the national decisions invoked. Something very similar was said of the relevant decisions of the HRC, an argument not unusual in Madrid courts⁶³.

One should not be surprised by this reaction. If we consider that one of the main characteristics of all forms of trans-judicial communication is precisely the lack of “any formal relationship”⁶⁴ with the quoted national court, it is tempting to conclude that there is something in the nature of criminal law that resists most forms of horizontal trans-judicial communication *as a matter of principle*, be they “soft” (in the form of a mere reference to the ruling of another high court of justice) or “hard” (in the form of a strong discussion or judicial dialogue *strictu sensu* with a court with which there is some kind of formal relationship⁶⁵). To put it in *a fortiori* terms, if some national criminal courts already show

63 The Spanish judiciary still holds a long-term quarrel with the Human Rights Committee on the legality *ex ICCPR* of the Spanish system of criminal review procedures. The “*right to disagree*” is based precisely on the argument that the HRC is an advisory organ without the authority to dictate definitive rulings on the interpretation of the Covenant. The most relevant case is José Luis PM vs. Criminal Chamber of the Supreme Court. Constitutional appeal (recurso de amparo). Judgment of the Constitutional Court, ILC 1794 (ES 2002) (April 3, 2002). For further details, see: C. Fernández de Casadevante, *España y los órganos internacionales de control en materia de derechos humanos*, 72 (Dilex, Madrid, 2010).

64 *A Typology of Trans-Judicial Communication*, 29 *University of Richmond Law Review*, 62 (1994-1995).

65 On this difference, R. Bustos Gisbert, *XV Propositiones Generales para una Teoría de los Diálogos Judiciales*, 95 *Revista Española de Derecho Constitucional*, 29 (2012); G. de Vergottini, *Más allá del diálogo entre tribunales: comparación y relación entre jurisdicciones*, 40 (Civitas, Madrid, 2010).

reluctance to apply customary criminal law –binding in the end on the State organs, written or not–, unenthusiastic reactions to horizontal trans-judicial communication on international law are all the more to be expected in the future. In this context, one might even venture to propose two “*multiplier factors of aversion*” by national criminal courts to *avant-garde* HRL: the legal consequences of the case-law invoked by the parties and the formally binding character of the instrument behind the judgment applied. Both elements operate in opposite directions: in the first one, it can be said that the more compelling the effects of the invoked jurisprudence, the more resistance the resistant national court will show to operate changes in national criminal law. In the second case, the principle can be formulated as follows: more *relative* the *normativity* of the instrument invoked by the national judicial counterpart⁶⁶, the less probable its application in hostile legal atmospheres.

This said a caveat must be made on the merits of judicial horizontal extension of *avant-garde* HRL. Whether one shares or not the final Supreme Courts findings, it is our view that judge Garzón’s international legal constructions need respect at least for one reason related to the content of the available case law on amnesties.

It is a fact that there is an increasing array of national rulings on amnesties applying the *avant-garde* solutions of Inter-American organs, coming mostly from Argentina⁶⁷, Uruguay⁶⁸, Chile⁶⁹ and Perú⁷⁰. The last case is particularly eloquent, as the Constitutional Court ruled in 2007 that the Peruvian judge

66 P. Weil, *Towards Normative Relativity In International Law*, 77 *AJIL*, 413-442 (1983).

67 Simón and others vs. Office of the Public Prosecutor. *Appeal Judgment*, S. 1767. XXXVIII; ILDC 579 (AR 2005); Mazzeo and others vs. Office of the Public Prosecutor. Recourse of cassation and unconstitutionality, M 2333 XLII; ILDC 1084 (AR 2007).

68 Nibia Sabalsagaray. Exception of unconstitutionality. Supreme Court of Justice, 365/2009 (October 19, 2009).

69 Villa Grimaldi (Re Pinochet). Supreme Court, case 2.707-06 (October 3, 2006) 10 (anticipating the doctrine of the universal juridical conscience so characteristic in the case law of the IACTHR). More details on the developments and inconsistencies in the Chilean case-law on amnesties in M. Requa, *A Human Rights Triumph? Dictatorship-era Crimes and the Chilean Supreme Court*, 12 *Human Rights Law Review*, 79 (2012)

70 Martín Rivas (Perú), 35.

“cannot assume a dualist thesis on the primacy of international law over international law and vice versa but an integrationist judge-made solution on the matter of the relationship between the Inter-American system and national constitutional law”⁷¹. Besides, in the Colombian case, the Constitutional Court has offered a restrictive interpretation of the effects of the *Ley de Justicia y Paz* in order to accommodate to the stringent conditions of arts. 8 and 25 IACHR as interpreted by the IACTHR⁷². Even more, in the European context, the ECTHR has very recently underscored in *El-Masri vs. Macedonia* how the right to the truth qualifies claims under article 3 ECHR, not only from the point of view of the applicants and their families, but also from that of “the general public”⁷³.

Still, on the other side, one cannot neglect the existence of other national decisions hinting at the opposite direction. Such proposals can be found mostly in decisions coming from Brazil⁷⁴, Côte d’Ivoire⁷⁵, France⁷⁶, Uganda⁷⁷ or El Salvador⁷⁸. The Brazilian decision may be taken as a reference here as it insisted on the need to interpret the Amnesty Act of 1979 in the light of the law and the political circumstances of the moment⁷⁹.

71 *Óp. cit.*, p. 56.

72 *Ley de Justicia y Paz/975* (July 25, 2005). See also: caso Masacre de Segovia. Supreme Court, Acta 1 56 (May 13, 2010) 68-71. Moreover, in Guatemala, it is known that “the amnesty law has not been the fundamental factor impeding prosecution” (as it could be already appreciated already in Danilo Rodríguez and others vs. Guatemala. Plea of unconstitutionality. Constitutional Court, 8-97 y 20-97 (October 7, 1997).

73 *El-Masri vs. Macedonia*. App 39630/09 (ECHR, December 13, 2012) 191, in the context of the extraordinary rendition of a German citizen from Macedonia to Afghanistan.

74 ADPF 153.

75 *Conformity of the Rome Statute of the International Criminal Court to the Constitution*. Decision of the Constitutional Council, Decision CC 002/CC/SG; ILDC 907 (CI 2003) 9.

76 See the judgment of the Cour de Cassation in MARPF.

77 *Kwoyelo alias Latoni vs. Uganda*. Constitutional reference 136/2011 (Arising out of High Court-001-ICD Case 02/2010); ILDC 1781 (UG 2011) 68.

78 *Re General Amnesty Act for the Consolidation of Peace*, Castro Duarte. Application for constitutional review, 24-97/21-98; ILDC 1458 (SV 2000) 102-104; Ellacuría Beascochea.

79 *Federal Council of the Brazilian Bar Association vs. President of the Republic & National Congress*. Plea of breach of fundamental precept. Supreme Court, Decision 153; ILDC 1495 (BR 2010). Critical comments on this ruling can be found in P. Abrão & M. Torelly, *Resistance to Change. Brazil’s Persistent Amnesty and its Alternatives for Truth and Justice*, in F. Lessa & L. Payne, note 12, 152; L. Flávio Gomes & V. de Oliveira Mazzuoli, *Crimes da ditadura militar e o caso “Araguaia”*: aplicação do direito internacional dos direitos humanos pelos juizes e tribunais brasileiros, 4 *Revista Anistia Política e Justiça de Transição*, 156 (2011); D. Ventura, *A interpretação judicial da Lei de Anistia brasileira*

This divergence of solutions may lead one to contend that judge Garzón's constructions were but an exercise of wishful legal thinking rather than an objective description of the present state of international law. Our view is that they should not be discredited too early because a great part of these decisions could be identified by a systematic use of two of the strategies discussed in this paper: closure of the national legal order or circumvention. In other words, they are not *expressly* "atheist" with regard to *avant-garde* HRL, but simply "agnostic". This means that they avoid exhaustive discussion on the emergence of a prohibition of amnesties in international law –a Salvadorian ruling being a model in this regard⁸⁰–and that in the few cases that they do, such as the Ugandan decision in *Kwoyelo alias Latoni vs. Uganda*, there is a certain unwillingness to declare the state of the law⁸¹.

What is more, from our point of view, the most challenging arguments against the far-reaching effects of *avant-garde* HRL on amnesties can be found in the dissenting opinions of judge Fayt of the Argentinean Supreme Court (whose majority opinion was favorable to *ius cogens* arguments). This judge has argued persistently that the retroactive application of *ius cogens* violates the prohibition of *ex post facto* laws not only in the light of the Argentinean criminal standards, but also in the light of the IACTHR ones⁸². He has also criticized the extensive notion of *ius cogens* applied by the Argentinean Supreme Court –and at this point his *démarche* can be assimilated *mutatis mutandis* to the German intent to "deconstruct" *ius cogens* in the *Immunities* case–. To our knowledge, no other "pro-amnesty" judge or court

e o direito internacional, in *A anistia na era da responsabilização: o Brasil em perspectiva internacional e comparada*, I, 308 (L. Payne, P. Abrão & M. Torelly, Eds., Comissão de Anistia/OUP, Brasil-New York, 2011).

80 See *Re General Amnesty Act for the Consolidation of Peace*, where the Supreme Court of Justice concluded that it lacked competence to determine the incompatibility between the Amnesty Act and the relevant dispositions of international law.

81 As the Constitutional Court simply argued that "we have not come across any uniform international standards or practices which prohibit states from granting amnesty", even though reference was made to an indictment by the International Criminal Court of Ugandan top war criminals. *Kwoyelo alias Latoni vs. Uganda*, 68.

82 See *inter alia*: his dissenting opinion in *Simón and others*, 43 and 62. A comment on this decision can be found in C. Bakker, *A Full Stop to Amnesty in Argentina. The Simón case*, 3 *JICJ*, 1106-1120 (2005).

(even the Brazilian one) had ever reasoned against *avant-garde* HRL in such a straight way.

Thus, coming back to our case at hand, the instructing judge's comparative proposals are not wholly lacking merit. This does not mean that we find the monist thesis on the *ius cogens* nullity of amnesties as brushing aside the more general controversy on the relationship between international and national orders. In fact, the questions posed are much the same and are not resolved by his mere declaration of nullity⁸³. To give an example, the same Spanish Supreme Court had expressed its doubts in these words:

*“The prohibition of an amnesty provided by custom [referring to ius cogens], subsequently introduced in an international covenant, would pose a new problem, that of the possibility for a national judge to annul an Amnesty Act as contrary to the Law (...) Judges subjected to the principle of legality cannot, in any case, derogate laws whose abrogation is the exclusive competence of the legislative power”*⁸⁴.

III. SECOND STRATEGY: CHRONOLOGICAL CIRCUMVENTION. THE JUDICIAL POLITICS OF TIME

Chronological circumvention may be described as a particular form of *closure* needed of consideration *per se* in the field of international criminal law in general, and more specifically when it is applied by means of *avant-garde* HRL. In this sense it could be assimilated to a form of implicit closure where the temporal factor allows the deployment of a set of mechanisms or principles allowing the avoidance of human rights obligations. A preliminary list would include solutions ranging from lack

83 As a US Court of Appeals rightly pointed: “If (...) Congress and the President violate a *peremptory norm* (or *jus cogens*), the domestic legal consequences are unclear” (Committee of US Citizens Living in Nicaragua and others vs. Reagan and others. Appeal judgment, 859 F2d 929 (DC Cir 1988); ILDC 1685 (US 1988) 19). The specific European context provides interesting examples again. Here the only regional judge ever decreeing the invalidity of national laws contrary to an international treaty was the ECJ in the well-known *Simmenthal Sp A*. But even in this case, this same Court later retreated in IN.CO.GE'90 and others from this legal reasoning (case 106/77 Amministrazione delle Finanze dello Stato vs. Simmenthal SpA, 1978 ECR 629 17; cases C-10-22/97 Ministero delle Finanze vs. IN.CO.GE'90 Srl[1998] ECR I-6307 21).

84 Garzón-Memoria Histórica 3.3. See also: A. Nollkaemper, note 15, 22.

of competence *ratione temporis*, the application of the *nullum crimen principle* in its temporal dimension or the prescription of crimes (considered together with the non-retroactive application of treaties) to regressive interpretations of the law based on a literal reading of its provisions and the *travaux préparatoires* (to the detriment of more evolutionary considerations). The common idea is always that the judicial management of time provides legal arguments to the national court in order to impede the prosecution of national crimes.

This does not mean that the judge operates *mala fides* when applying these legal hurdles. What is important is that, from the point of view of *avant-garde* HRL (with its dogmatic insistence on right of access to justice as the supreme value of international law), there is a clear intention by the national judge to prioritize other legal considerations, mostly related to the under development of human rights law (or national criminal law) at the time in which facts took place. For reasons of space, this section will engage in a contextual discussion of only one form of chronological circumvention present in the *Garzón-Memoria Histórica* decision: the prescription of the crimes. Other time-related difficulties present in other parts of the judgment will not be considered here⁸⁵.

The 2008 Order had tried to avoid the rule of prescription contained in articles 131 ff of the Criminal Code by linking it to the crime of illegal detention sanctioned by articles 474-476 of the 1932 Criminal Code. The decisive component of this reasoning was the attachment of the contextual element of crimes against humanity to the illegal detentions at issue, together with the *actus reus* component of “*refusal to provide information about the whereabouts*”. In the end, this meant that the *dies a quo* began to count “*at most*” since the approval of the Spanish Constitution in 1978.

85 Thus, other aspects such the qualification of the relevant facts as crimes against humanity will not be discussed here. More precise comments on Garzón’s position will be found in: A. Gil Gil note 18, 157.

This creative elaboration was not accepted by the Supreme Court since the 1932 Code had precisely eliminated the aggravating circumstance of not providing information on the whereabouts of the person disappeared. As this element was not reintroduced in the Criminal Code until the 1944 reform, the national judge could not consider all forced disappearances committed between those dates. The reason is that the specific rules on the prescription of forced disappearances could not be applied retroactively because the consolidated case law of the Supreme and the Constitutional Court considers prescription as a substantive penal standard covered by the *nullum crimen* principle⁸⁶.

So far, the reasoning follows the logic of the rest of the Supreme Court decision. One may argue that the changes operated by the 1944 reform may have altered the perspective, so that all disappearances committed between 1944 and 1952 were not affected by the rule of prescription. Nevertheless, the Supreme Court rejected this possibility. Among other arguments, it explained that it is contrary to “*legal logic*” that a person arrested in 1936 could reasonably stay under detention twenty years later. According to the Court, such a legal construction would imply that the crime of forced disappearance escapes the rules of prescription⁸⁷.

This affirmation may be supported by a dogmatic interpretation of article 132 of the Criminal Code, but its final consequences seem to have not been correctly estimated. Firstly, article 17(2) of the *Declaration on the protection of all persons against forced disappearance* clearly states that “[w]hen the remedies provided for in article 2 of the *International Covenant on Civil and Political Rights* are no longer effective, the statute of limitations relating to acts of enforced disappearance shall be suspended until these remedies are re-established”⁸⁸. Article VII of the Inter-Ameri-

86 Garzón-Memoria Histórica, 3.2.

87 *Óp. cit.*

88 GA Res. 47/133, December 18, 1992.

can counterpart takes a similar position⁸⁹. Conversely, the final 2006 Convention for the protection of all persons from forced disappearance limits the constraining level of the obligation to the proportionality of the delay of criminal prescription⁹⁰.

Moreover, it has been said that international law is more akin to the perspective of civil law –rather than that of criminal law– in matters concerning state responsibility for continuous obligations⁹¹. Thus, when dealing with forced disappearances, the chain of responsibility established by HRL can extend its links to the time before the entry into force of the relevant treaty through the combined intervention of two factors: the continuous nature of the violation and the positive obligation for the State to investigate and prosecute⁹². Clearly, however long the chain may be, it must be broken somewhere in order to avoid state's responsibility for forced disappearances committed decades –or centuries– before the entry into force of the relevant treaty. This is, for example, what the ECHR contended later in *Gutiérrez Dorado vs. Spain* when it argued, in the context of a forced disappearance taking place at the beginning of the civil war, that

*“There must exist a genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed by Article 2 to come into effect (...) In practice, this means that a significant proportion of the procedural steps required by this provision have been, or should have been, carried out after the critical date (...) In the present case, it is difficult to conclude that there is a genuine connection between the death of the applicants’ relative (1936) and the entry into force of the Convention in respect of Spain (1979)”*⁹³.

89 Articles III and VII of the *Interamerican Convention on the Forced Disappearance of Persons*, June 9, 1994, 33 ILM 1529 (1994).

90 Art. 8(1)(a). For the text of the Convention, see UN. Doc.A/61/488. C. N.737.2008. Treaties-12, (October 2, 2008). For more details on the legislative history of this disposition, see : O. De Frouville, *La Convention des Nations Unies pour la Protection de Toutes les Personnes contre les Disparitions Forcées: les enjeux juridiques d’une négociation exemplaire*, 6 *Droits Fondamentaux*, 38 (2006). <http://droits.fondamentaux.org>

91 G. Di Stefano, *Fait continu, fait composé et fait complexe dans le droit de la responsabilité internationale*, LII *Annuaire Français de Droit International*, 1-54, 10 (2006).

92 The most complete elaboration of this doctrine is found in *Silic vs. Slovenia*. App 71463/01 (ECHR, April 9, 2009) 159-163.

93 *Gutiérrez Dorado and Dorado Ortiz vs. Spain*. App 30141/09 (ECHR, March 27, 2012) 35-36. Critical comments in Chinchón note 56, p. 130. But see the recent Janowiec and others

And finally, as it has been said before, there are other forms of chronological circumvention. To give just two examples, a regard to national decisions in Switzerland and Argentina offers appealing discussions on the non-retroactive application of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity⁹⁴ or the lack of retroactive effects of the Interamerican Convention on the Forced Disappearance of Persons⁹⁵.

Accordingly, the Supreme Court could have reasoned either that the most protective rules on prescription of forced disappearances were not applicable to Spain at the relevant time, or that they constitute a relatively recent development of international human rights law not applicable retroactively to the Francoist crimes as a matter of national criminal law. But to qualify *a contrario* such developments as “*illogical*”, is tantamount to ignore that it is precisely this kind of reasoning what has acted as a catalyzing element for the development of international law in this field⁹⁶. Insofar as it disregards the temporal logic underlying the polyhedral crimes of forced disappearances, this reasoning of the Supreme Court can only exacerbate the contentions of parochialism that it tried to avoid in other parts of the judgment with multiple references to *avant-garde* HRL.

vs. Russia. The Court applied the subsidiary, exceptional and somehow discretionary test of “*the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner*” with the aim to declare its competence *ratione temporis*. The case concerned the assassination of a number of Polish officers in the infamous Katyn forest massacre in 1940 operated by Soviet forces. The exceptionality of this case –the Russian authorities had classified thirty-six volumes of the case file as “*top secret*” and the Russian courts had considered to applicant’s relatives to be “*disappeared*” – warn against an impulsive extension of this doctrine to other “*pre- ECHR*” massacres. Apps 55508/07 and 29520/09 (ECHR, April 16, 2012) 139). The judgment has been referred to the Grand Chamber.

94 See Chile vs. Arancibia Clavel. Appeal Judgment, case 259, A 533 XXXVIII; ILDC 1082 (AR 2004) 28, where the prohibition of statutory limitations on crimes against humanity was applied as a matter of customary law and *jus cogens*-; *Gypsy International Recognition and Compensation Action vs. International Business Machines Corp.* Final Appeal Judgment, 4c 113/2006; ILDC 352 (CH 2006) 4.4.1, where the opposite conclusion was held.

95 Simon & others (Argentina). Dissenting opinion of judge Fayt, 39-42.

96 See for instance: J. Chinchón note 56, 111; M. Capellá, *Las “desapariciones forzadas” en España durante la Guerra Civil: crímenes y violaciones del Derecho Internacional sin castigo ni reparación*, in *Conflictos y protección de derechos humanos en el orden internacional. Curso de Derechos Humanos de Donostia-San Sebastián*, 265-302, 266 (J. Soroeta, Ed., UPV, Donostia-San Sebastián, 2006).

IV. THIRD STRATEGY: MISINTERPRETATION

As done with chronological circumvention, “*misinterpretation*” must be nuanced as a kind of “*strategy*” to avoid *avant-garde* HRL. Obviously, if understood as a *mala fides* normative exegesis, it could be qualified as an offence of corruption of the exercise of judicial functions under Spanish criminal law, precisely the kind of conduct invoked against judge Garzón (obviously not our intention). Thus, this section departs from the personal intentions of the judges sitting at the Supreme Court, considering “*misinterpretation*” in an objective way, *as a matter of fact*: a deductible assessment based on the scrutiny of the judgment in the light of the relevant HRL obligations.

Identified in this way, two parts of the judgment will merit consideration here: the interpretation made of *Kolk and Kislyiy* judgment of the ECTHR and a controversial passage alluding to the binding force for Spain of the Nuremberg principles. The aim is to illustrate how (alleged) ambiguities in the reception of international criminal law standards can become a weapon *against* internal prosecution.

A. A Problematic Application of the Case-law of the ECTHR

Even though *Kolk* is not a good example of *avant-garde* HRL (as it simply *allowed* for national prosecution without unconditionally enhancing State’s obligation to prosecute)⁹⁷, the fact that French courts had previously ignored article 7(2) ECHR when rejecting the prosecution of French crimes committed in Algeria advises to consider this ruling with important consequences for the prosecution of international criminals in Europe (for crimes

97 On the contrast on the obligation to prosecute gross human rights violations in the case law of the ECTHR and the IACTHR, see: K. Ambos & M. Böhm, *Tribunal Europeo de Derechos Humanos y Corte Interamericana de Derechos Humanos. ¿Tribunal tímido y tribunal audaz?* in *Sistema Interamericano de Protección de los Derechos Humanos y Derecho Penal Internacional*, 43-70 (K. Ambos & E. Malarino, Eds., Konrad Adenauer Stiftung, Oficina Uruguay, 2011).

committed in European soil)⁹⁸. Indeed, this decision of the ECTHR was one of the cornerstones in the reasoning of judge Garzón's *avant-garde* construction⁹⁹.

The Spanish Supreme Court rejected the applicability of this ruling of ECTHR on the following grounds:

“[w]hile it [the ECTHR] certainly declares legal the condemnation against Russian nationals participants in crimes against humanity during the Soviet occupation, the Court does it by taking as a premise the Russian participation in the drafting of the Nuremberg principles as a victorious power, as well as its membership to the United Nations that approved them, thus knowing their binding force and being able to accommodate their conduct to the conditions imposed by the mentioned principle of legality”¹⁰⁰.

In our view, this interpretation of the *Kolk* decision of the ECTHR must be appraised with an utmost care. It is true that the Strasbourg Court had used the Soviet participation in the 1945 London Agreements (as well as its membership to the United Nations) to defend that the principles of international law criminalizing the commission of crimes against humanity were known to the Soviet authorities. The ECTHR had discarded in this way the possible violation of the *nullum crimen* principle by the Estonian Courts in case the alleged acts were lawful under Soviet law at the material time. Nonetheless, it had done so after reiterating in unequivocal terms the “*universal* validity of the principles concerning crimes against humanity subsequently confirmed by, *inter alia*, resolution 95 of the United Nations General Assembly”¹⁰¹. Thus the ECTHR had remembered that, from the point of view of international law, crimes against humanity committed in 1949 were “*universally*” unlawful under international law. The Russian participation had been more an

98 See: MARPF, p. 18.

99 *Kolk and Kislyiy vs. Estonia*. App. 23052/04 and 24018/04 (ECHR, January 17, 2006). The case concerned the application submitted by two Russian nationals convicted by a County Court for crimes against humanity committed in 1949, due to their participation in the deportation of the civilian population from the occupied Republic of Estonia.

100 Garzón-Memoria Histórica, 3.1. The same construction can be found in L. Green, *De l'Influence des nouveaux Etats sur le droit international*, 74 *RGDIP*, 80 (1970).

101 *Kolk and Kislyiy vs. Estonia* 8 (first and second emphasis added). See also J. Chinchón, note 56, 104.

a fortiori argument than *a premise*: it could not introduce a requirement of knowledge as a decisive test, whose *only* means of proof would be the state participation in the Nuremberg Charter and its membership to the United Nations.

Surely, no doubt can arise as to the importance of knowledge as an intrinsic element of the *nullum crimen* principle¹⁰². Without leaving Strasbourg, this mental element was also implicit in *Korbely vs. Hungary*, where the ECTHR dealt with the condemnation of a Hungarian military officer for certain killings committed during the October 1956 revolution in the country. The Hungarian Supreme Court basically had used common article 3 to the Geneva Conventions to support the applicant's conviction for crimes against humanity. The analysis of the ECTHR, after considering the correct incorporation of the Geneva Conventions into Hungarian law, concluded that the principle of accessibility of the national law required by article 7(1) ECHR had been respected¹⁰³.

As some authors have explained, what the ECTHR tried to do in these cases is to temper a fundamental guarantee in a *Rechtsstaat* such as the principle of criminal legality with the no less important right of access to justice for the victims of international crimes¹⁰⁴. In our view, such a difficult balance between two rights has tempted the Supreme Court in *Garzón-Memoria Histórica* with linking “accessibility” and “foreseeability” with “written law”, or even worse, to over emphasize positivistic approaches to the prosecution of crimes in the internal sphere. In this way, certain ambiguities in ECHR standards have been used as an instrument *against* internal prosecution. This misapprehension

102 See for all: H. Kelsen, note 44, 9.

103 In the particular case, however, the assessment made by the Hungarian Supreme Court of common article 3 as containing the offence of crimes against humanity had been dismissed by the Strasbourg Court, as it did not comply with the requirement of “foreseeability” of the law. See *Korbely vs. Hungary*. App 9174/02 (ECHR, September 19, 2008) 73-95.

104 A. Cassese, *Balancing the Prosecution of Crimes Against Humanity and Non-Retroactivity of Criminal Law*, 4 *JICJ*, 410-418 (2006); H. Tigroudja, *Crimes de droit international et principe de légalité des délits et des peines*, 10 (Working Series Papers, November 15, 2010). <http://ssrn.com/abstract=1720422>

of the relevant case law of the ECTHR needs to be appraised in the light of the following considerations.

Primo, as a point of departure, the ECTHR cannot guide a national court on how to deal with the reception of general international law into its legal system because the opposite would be contrary to its subsidiary role and would approach its judicial role to that of a *cour de cassation*¹⁰⁵. As the same ECTHR admitted in *Kolk*, “[t]he interpretation and application of domestic law falls in principle within the jurisdiction of the national courts (...) This also applies where domestic law refers to rules of general international law or international agreements. The Court’s role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention”¹⁰⁶.

Thus, the incidental role of the Court when evaluating the reception of international law into a particular national legal order *ex* article 7(1) ECHR is only possible due to the existence of an express *renvoie* inside this disposition¹⁰⁷.

Secundo, insofar as the interpretation of the Supreme Court would require the state to be a party to the relevant treaties (or organization) in order to be able to displace national criminal law by applying customary law or general principles, this strict requisite of knowledge would limit respect to the principle of legality only to those cases where the national court has any available conventional rule at hand. In our opinion, this construction would deprive article 7(2) ECHR of a great part of its *effet utile*, because national criminal courts do not need to resort directly to general principles of law or custom in case, the state

105 See: *mutatis mutandis* (in the context of art. 6 ECHR) *Pérez vs. France*. App 47287/99 (ECHR, February 12, 2004) 82. For a particular exception to this rule, see: *Duraulans vs. France*. App. 34553/97 (ECHR, March 21, 2000) 34.

106 *Kolk & Kislyiy vs. Estonia* 9, emphasis added.

107 G. Pinzauti, *The European Court of Human Rights’ Incidental Application of International Criminal Law and Humanitarian Law*, 6 *JICJ*, 1049 (2008). In the end, however, it is very difficult (if not impossible) to reconcile both objectives. The Court will have to consider the approach of national law to the reception of international law in order to evaluate whether a concrete condemnation respected the *nullum crimen* principle, thus requiring some kind of assessment of national implementation in order to satisfy the criteria of “accessibility” and/or “foreseeability” (See also: *Kononov vs. Latvia*. App 36376/04 (ECHR, May 17, 2010) 236 and 241.

is a party to a relevant agreement containing the proscribed conducts in written terms.

Tertio, such a reading of *Kolk* would subtly entail that the *nullum crimen* principle prevents the applicability of the doctrine of the separation of sources to international criminal law (at least in regard to applicable legal standards). The link established between conventional law and general international law would impede any separate application of the three sources listed in article 38(1) of the Statute of the ICJ. If we consider that this is precisely what the ICTY and the ICTR, one finds serious reasons to infer that the Supreme Court did not correctly assess the original intention of the ECTHR in *Kolk*¹⁰⁸.

Moreover, the Supreme Court insisted in the *Garzón-Memoria Histórica* case that article 7(2) ECHR does not have the last say as regards the *nullum crimen* principle¹⁰⁹. In theory, the negative language of the article hints at this direction. Even more, should there still be any uncertainty about this interpretation, the *de minimis* clause incorporated in article 53 ECHR removes all doubts by stating that “*nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party*”.

As a consequence, under the ECHR (and the ICCPR)¹¹⁰ it might be possible for a national court to hold a stricter standard of legality. Nevertheless, it cannot be ignored that the national judge will have to scrutinize this approach through the limita-

108 *Bosphorus vs. Ireland*. App 45036/98 (ECHR, June 30, 2005). According to Cassese, it is more correct to presume that knowledge refers to the *primacy* of international law proscribing a crime, and not on discretionary elements such as the concrete participation of a country in the drafting of a document evidencing the customary status of a crime (A. Cassese, note 104, 416).

109 *Scilingo Manzorro* (Spain) 6.4. See: A. Gil Gil, *Principio de legalidad y crímenes internacionales. Luces y sombras en la sentencia del Tribunal Supremo en el caso Scilingo en Nuevos desafíos del derecho penal internacional. Terrorismo, crímenes internacionales y derechos fundamentales*, 391-410, 400 (A. Cuerda & F. Jiménez, Eds., Tecnos, Madrid, 2009).

110 See: art. 15(2) ICCPR. See: M. Bossuyt, *Guide to the travaux préparatoires of the International Covenant on Civil and Political Rights*, 330 (Martinus Nijhoff Publisher, The Hague, 1987).

tion clauses of other rights protected by the Convention, namely those of articles 2, 3, 5, 6 or 13 ECHR, dispositions protecting in some cases *ius cogens* rules¹¹¹: *de minimis* clauses in human rights instruments too often veil hidden balances of values that will have to be considered by national judges¹¹², or even worse, present as “*real*” conflict of rights what in the end are only “*imagined conflicts*” between a dispositive clause (here, article 7(2) ECHR) and a non-derogable right (articles 2 and 3 ECHR)¹¹³. It is true that, in the particular case of the Francoist crimes committed between 1936 and 1952, the Strasbourg Court has already excluded the applicability *ratione temporis* of the Convention since the decision *Gutiérrez Dorado vs. Spain*¹¹⁴. Still, the Spanish Supreme Court is not the only national court to have misinterpreted the terms of article 7(2) ECHR to the detriment of its obligations to prosecute gross human rights violations¹¹⁵.

B. No Separation of Sources in International Law

Another paragraph of the *Garzón-Memoria Histórica* judgment reflecting a “*protectionist*” misinterpretation of *avant-garde* HRL is the one where this organ refers to the vague terms of the Martens clause and the legal status of the Nuremberg principles at the time of the commission of the crimes. Here the Court dismantled the “*progressive*” construction drafted by the judge Garzón in

111 As regards the prohibition of torture, see the judgment of the ECtHR in *Al-Adsani vs. United Kingdom*. App. 35763/97 (ECHR, November 21, 2001) 59-60. In connection with the former, see also the recent *El-Masri vs. Macedonia*, 191.

112 J. Weiler & N. Lockhart, *Taking Rights Seriously Seriously: the European Court of Justice and its Fundamental Rights Jurisprudence*. Part II, 32 *Common Market Law Review*, 585(1995).

113 O. De Schutter & F. Tulkens, *Rights in Conflict: the European Court of Human Rights as a Pragmatic Institution*, in *Conflicts between Fundamental Rights*, 169-216, 174 (E. Brems, Ed., Intersentia-Hart, Oxford, 2008).

114 *Gutiérrez Dorado vs. Spain* (admissibility). App 30441/09 (ECHR, March 27, 2012). More recently, the application in *Canales Bermejo* was dismissed on November 8, 2012 (see the relevant information in http://ris.hrahead.org/casos_/caso-canales-bermejo-c-espana-tedh/documentacion-del-caso). For a contrary opinion, arguing that one thing is inadmissibility and another applicability *ratione temporis*, see: J. Chinchón, note 56, 119.

115 MARPF (France) 18.

order to declare his competence to prosecute Francoist repressive policies as crimes against humanity:

“The Nuremberg principles, as the [2008] Order reasons, were incorporated into our legal system through the ratification by Spain of the Vienna Conventions [sic] in 1952, when the period of investigation delimited by the preliminary investigation had already concluded. Moreover, the same Order indicates that when ratifying the Covenant in August 1952, Spain excluded customary law from the consideration of norm [sic], which was left without any effects in a posterior ratification on 31 July 1979”¹¹⁶.

Clearly, whether the Martens clause is a direct source of international criminal law, it is matter of discussion¹¹⁷. What seems to be more arguable is that a customary norm cannot have an independent existence of its own, and thus binding force for those states not yet part to the relevant treaty. In our view, this is the reasoning behind this passage on the binding force of the Nuremberg principles for Spain.

The Spanish reservation stated that the international law “*in force at the time when the said act was committed*” (in the terms of article 99 3rd GC) excluded both non-conventional law and the law elaborated by “*those Organisms to which Spain is not a party*”. Thus, the Supreme Court seemed to treat a reservation to a concrete disposition (on penalties for prisoners of war!) included in a particular treaty as the definitive evidence of the non-binding character of crimes against humanity for Spain until 1979. One has the impression here that the Court projected over the international sphere the deficient legal effects of the customary norm under national law.

Determining the law applicable at the moment of proposing the 1952 reservation is not an easy task for a national criminal judge, even more when a rigorous assessment implied dealing such complex issues as persistent objection, the effect of reservations on the development of a customary rule or the interaction

¹¹⁶ Garzón-Memoria Histórica, 3.1.

¹¹⁷ A. Cassese, *The Martens Clause: Half a Loaf of Simply Pie in the Sky?*, 11 *EJIL*, 1, 187-216 (2000); T. Meron, *The Martens Clause, Principles of Humanity and Dictates of Public Conscience*, 94 *AJIL*, 1, 78-89 (2000).

between custom and GA resolutions codifying elementary rules of international law. Hence, one should not presume that the Spanish Supreme Court had these subtleties in mind when accepting the *ipso iure* legal effects of the Spanish reservation. On the contrary, one finds it more sensible to suspect that the judges sitting at Madrid just accepted its validity without seriously considering whether it vouched for Spain's persistent objection on a consolidated customary rule¹¹⁸.

V. FOURTH STRATEGY: PARTIAL RECOGNITION

So far, our analysis has considered the *negative* side of the Supreme Court decision with respect to the reception of *avant-garde* HRL: strategies and instruments to *avoid* its application. But our assessment would be incomplete without one of the specific characteristics of the Spanish solution: partial recognition. Unlike other national decisions mentioned above, the Supreme Court judgment did not disregard the international repercussions of a decision that has put the Spanish judiciary in the spotlight of the human rights movement. This is why the February 2012 judgment tried to offer legal empathy to the relatives of the victims of Francoist crimes¹¹⁹. By doing so the Supreme Court revealed certain inconsistencies on matters of principle vehemently defended in other parts of the 2012 ruling.

118 It should be noted, in any case, that it is common opinion that the Nuremberg principles crystallized the customary status of the crimes contained therein (see for all: R. Kolb, *Droit international pénal*, 41 (Helbing-Lichtenhahn/Bruylant, Bâle-Bruxelles, 2008). Later, resolution 3074 (XXVIII) of the UN General Assembly confirmed the customary status of the Nuremberg Principles (GA Res/3074 (XXVIII), December 3, 1973).

119 Another posterior decision on conflict of jurisdictions adopted by the same Supreme Court has left the door of criminal courts open (of course, not that of the Central Criminal Court). Recalling that the search for the disappeared is one of the means of satisfaction included in the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, the Court has concluded that the Spanish legal order can offer procedural mechanisms capable of channeling the duties of satisfaction claimed by the victim if given a particular interpretation. Whether this decision has *really* opened the door of criminal procedures in Spain is a matter still to be seen. Supreme Court, judgment of March 28, 2012, 20380/2009. Updated information can be found in: <http://ris.hrahead.org/areas-de-trabajo/guerra-civil-y-franquismo>

The Supreme Court could have limited itself to rejecting as overly excessive the proposals of the instructing judge on the nullity of the Amnesty Act. However, it engaged in extensive discussion on the role of criminal judges in Spain and on the relevance of the Amnesty Act as a democratic “*peace-making*” instrument in a highly delicate political context. It certainly began by recalling that “*truth trials*” are not possible in Spanish criminal law, as their main object is not to bring down “*social reproach*” (*reproche social*) on those responsible for a crime (only task of criminal judges). But later the Court did not deny that international law had developed in the sense of proscribing amnesty acts for international crimes. While making a reference to the horrors of the civil war and the testimonies of the witnesses to the case, it admitted that the offences qualified by the 2008 Order would constitute crimes against humanity under today’s international law (even without engaging in concrete discussion on the criteria required by this offence).

Moreover, it recognized the evident limits of the Spanish transitional process by defining it as a model of “*absolute impunity with partial reparations for the victims*”. Finally, by acknowledging that the search for the truth (and the disappeared) is a task corresponding to other *State* organs, it also echoed “[l]’*idée générale selon laquelle, en cas d’atteinte grave ou massive à la vie ou à l’intégrité, l’initiative, ne serait-ce que pour informer les victimes ou les requérants, appartient largement à l’Etat*”¹²⁰.

Which lesson can be obtained from the picture just described? In order to reply to this question, a preliminary observation must be done: finally the Supreme Court *did* engage in different parts of the decision in the kind of historical discussion considered to be out of the role of criminal judges at the beginning of the judgment. This becomes clearer when one reads the passages where the Supreme Court heralded the kind of socio-political defense of the Amnesty Act –with cursory references to Germany and South-Africa– that characterizes the approach of

120 See: H. Trigroudja, note 104, 997.

the Brazilian Supreme Court in the *ADPF 153* decision, although without reaching the same level of historical detail. In this way, the Court showed, once again, how difficult it is for criminal judges to follow a strict “*prosecutorial*” approach in transitional procedures –that is, only focused in punishment, as Hannah Arendt defended in the context of the *Eichmann decision*¹²¹, and to handle the paradox between truth and criminal trials commented some time ago by Professor Koskeniemi¹²².

We will propose here two explanations for this apparent exercise of self-contradiction. The first one is that the *Garzón-Memoria Histórica* decision was intended to prevent once and for all any judicial tentative of opening any criminal procedure against Francoist personalities in the way this had been done in Chile. Thus, conscious of the importance of the moment, it adopted a solemn message intended to moderate the foreseeable disappointment of the human rights movement with the main message of the judgment (*i.e.*, the *collective*¹²³ responsibility of the Francoist regime for the disappearances of so many Republicans cannot be ascertained by means of a criminal procedure). The other one is that, once freed of the uncomfortable burden of the strict obligation to prosecute, the Supreme Court has tried to keep up with that legal discourse –so widespread in Latin American countries– that deems the obligation to prosecute and punish as a non-negotiable legal instrument to be used in any transitional context. One should not forget in this regard that the Spanish judiciary had been for years a leading reference in the application of universal jurisdiction for the prosecution of international crimes.

Whichever explanation one chooses, one will come in the end to the same conclusion: a strong “*non dédoublement fonctionnel*”

121 H. Arendt, *Eichmann in Jerusalem. A Report on the Banality of Evil*, 251 (The Viking Press, New York, 1963).

122 M. Koskeniemi, *Between Impunity and Show Trials*, 6 *Max Planck Yearbook of UN Law*, 1-35, 34 (2002). See also: M. Wildt, *Verités différentes. Historians et procureurs face aux crimes nazis*, 34 *Genèses*, 104 (1999).

123 This *collective* dimension can be appreciated in the *list* of Francoist high authorities included in the dispositive part of the 2008 Order. All of the persons listed were known to be dead.

solution is slowly becoming unsustainable in today's transitional judicial sphere; vertical and horizontal trans-judicial communication are acting as a catalyst for the internationalization of transitional judicial procedures. In order to better illustrate this point, we will quote the following arguments discussed by judges sitting at Brazilian and Uruguayan courts. The first one raises the following debate:

*“In recent days, we are assisting **in the international sphere** to the grave crisis that is facing the Spanish judiciary with judge Baltasar Garzón, provisionally suspended from his functions in Spain for investigating amnestied crimes. Somehow, this is the debate that is proposed: whether when investigating former Francoist crimes, he had disregarded his duties as judge”*¹²⁴.

As the Brazilian Supreme Court finally argued that it was not the role of Brazilian judges to investigate crimes committed during the dictatorship (1964-1985), the quoted passage contained an implicit assertion: judge Garzón had exceeded his powers. The relevance of this statement cannot be emphasized in too a strong a way: a foreign judge suggests in a constitutionally relevant judgment what the solution should be in a criminal case arisen in another country.

On the other hand, we have the Uruguayan quotation going in the opposite direction. It is well known that, like in the Spanish case, the *Ley de Caducidad* 154848 had not been the unwanted heritage of a dictatorial regime but the result of the democratic expression of the will of the people. However, the reaction provided by the Supreme Court differed substantially from the Spanish and the Brazilian approaches as a matter of the limiting role of *avant-garde* HRL in transitional contexts: “[n]ow it is not possible to invoke the classical theory of sovereignty in order to defend the national power to limit the legal protection of human rights (...) nowadays it is not possible to depart from an unlimited sovereign authority for the State **in his role of constituent** [power]”¹²⁵.

124 ADPF 153 559, emphasis added.

125 Nibia Sabalsagaray (Uruguay) 49, emphasis added.

VI. CONCLUSION

It has become topical to affirm that criminal lawyers come from Mars and international lawyers from Venus¹²⁶. The Spanish *Garzón-Memoria Histórica* decision put both sides together in the same ruling: because the criminal offence invoked against judge Garzón was related to his assessment of the law during the pre-trial proceeding, the Spanish Supreme Court had to engage in extensive discussion on the *avant-garde* construction developed by judge Garzón in order to declare his competence to open pre-trial proceedings.

Through the main example of the *Memoria-Histórica* decision (but considering rulings adopted by other national courts), the present work has tried to illustrate on the different strategies that national judges can follow in order to avoid arguments based on an unconditional duty to prosecute. From the whole discussion presented above, the following conclusion is proposed.

Despite its “*universalist*” aspirations, *avant-garde* HRL is an emerging construction with an unclear future in general international law, as the ICJ decision in the *Immunities* case showed¹²⁷. It is thus foreseeable that reluctant national judges still try to avoid its legal imperatives by recurring to strategic solutions such as those discussed here: closure—being vertical or horizontal—, chronological circumvention or misinterpretation (this does not mean, of course, that we necessarily support their findings). However, in our opinion national judges become more credible when they engage in overt discussion on the flaw points of the doctrine and undertake a *sincere* assessment of the

126 L. Arbour, *L'inaccessible étoile* in *The Human Dimension of International Law. Selected papers Antonio Cassese*, xlv (OUP, New York, 2008).

127 See also A. Cassese, *For an Enhanced Role of Jus Cogens* in A. Cassese (Ed.) note 2, 158; C. Maia, *Le jus cogens dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme* in L. Hennebel & H. Tigroudja, note 18, 311. A contrary opinion is that of R. Kolb, *Théorie du ius cogens international: essai de relecture du concept* (Puf, Paris, 2001), whose restrictive position on what he considers to be a mere “*technique*” of protection of normative integrity against derogation (without any hierarchical connotations) is well known.

international legal sources and comparable judicial decisions¹²⁸. As any construction based on *ius cogens* and teleological interpretations of human rights treaties, *avant-garde* HRL is not *more geometrico* and poses complex dilemmas of inter-temporal law without easy solution. Moreover, trans-judicial communication processes –so common in matters related to amnesty laws–do not necessarily need to end in a uniform solution and, as avowed in section 3, may not fit with the strict legality requirements of certain national criminal law systems. This is why we understand that the “*non dédoublement fonctionnel*” solution, if articulated through a meticulous discussion of the international sources, is not a necessary synonym with “*parochialism*” or “*short-sightism*”. In this regard the reasoning of the Spanish Supreme Court in *Garzón-Memoria Histórica*, notwithstanding the numerous demerits commented here, at least deserves more deference than other comparable decisions with the same transitional relevance.

128 This matches the fact that, as avowed by Dupuy, national judges are increasingly aware of the modern tendencies in international law (P. Dupuy, *Unity in the Application of International Law at the Global Level and the Responsibility of Judges at the National Level: Reviewing Georges Scelle's Role Splitting theory*, 2 *EJLS*, 1, 1 (2007)).

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