

The subsumption in the international criminal law: the role of Latin American Supreme Courts

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Abstract: The analysis that follows presupposes an inevitable selection of judgments, conducted essentially on the basis of their particular contribution to the interpretation of the structure typical of international crimes, namely crimes of genocide, forced disappearance, torture and crimes against humanity as a whole. It should be clarified, as a preliminary point, that it will not be limited to some countries of the Latin American continent, nor is it intended to understand them all, as it is beyond the scope of this work to provide a systematic and exhaustive description of the jurisprudence by virtue of a geographical criterion. Instead, we will focus on the various judgments of Supreme Courts which, in dealing with international crimes, offer a particularly significant contribution to their interpretation and definition.

Key words: subsumption, international criminal justice, Latin American supreme courts, human rights, international jurisprudence.

1. PREMISE AND ANALYSIS GRID

The Latin American supreme courts have in fact been particularly prolific, in

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recent years, of decisions having as their subject constitutive of international crimes, and have provided a significant contribution to the definition and determination of the essential discipline of these criminal categories.

In referring to the jurisprudence of "supreme courts", then, we adopt this formula in an intentionally vague and broad way, in order to include both those bodies that act as judges of last resort, and those that perform the function of constitutional control of laws². Skills, functions and methods of these two types of judicial bodies are obviously different, and this inevitably affects the process object and the direct effects of the respective sentences. However, both of these bodies have proven to contribute, each according to their own instruments, objectives and effects, to the configuration of international criminal cases.

To this we must add that in some Latin American countries a diffused-desconcentration constitutional control is applied, according to which every judge, even of the first instance, can declare a norm unconstitutional and consequently disapply it in the concrete case of judgment³. Well, even in these systems the decisions of the Supreme Court-here understood as a last resort body with criminal jurisdiction-, when they declare the unconstitutionality of a rule, enjoy greater authority for the lower jurisdictions and therefore this is of a particular relevance⁴. We will not dwell on a series of judgments that, although they play an undoubted role in the configuration and development of international criminal law⁵, do not directly imply an interpretation of the typicality of the crime attributed to the accused, focusing instead on other issues, such as the validity of amnesty and indults laws⁶. The common denominator of all the judgments that we will examine is, as we said, the space that they dedicate to the interpretation of the international criminal offense⁷ that they consider applicable to the facts they have as their object. Without

²The control of constitutional legitimacy can be entrusted to the same Supreme Court of Justice (as in Argentina, Brazil, Honduras Mexico, Panama, Uruguay and Venezuela), or to a special Constitutional Hall established within the Supreme Court (for example in Paraguay, Costa Rica and El Salvador), or even by an autonomous Court or Constitutional Court and separated from the Supreme Court, which can be placed within the judicial power (as in Colombia, Guatemala, Bolivia and Ecuador) or outside it (so in Peru). In Chile there is also a constitutional review by the Corte Suprema de Justicia by means of an incidental appeal and another exercised by the Tribunal Constitucional, which can be initiated through direct action. See, BREWER CARÍAS, A.R., "La jurisdicción constitucional en América Latina", in GARCÍA- BELAUNDE, D., FERNÁNDEZ SEGADO F., (eds.), *La jurisdicción constitucional en Iberoamérica*, ed. Dykinson, Madrid, 1997, pp. 117-161.

³A mechanism of control of widespread constitutionality in the pure state-on the US model- was adopted in Argentina, starting from the judgment of the Supreme Court of Justice of the Argentine Nacional (from now on CSJN) in the Sojo case in 1887, but many other countries on the continent have a mixed or integrated model, which combines widespread control and different forms of direct constitutional action before the Supreme Court or the Tribunal Constitucional: this is what happens in Bolivia, Brasil, Colombia, Ecuador, Guatemala, México, Peru and Venezuela. "Pure" concentrated systems, on the other hand, are found in Costa Rica, El Salvador, Honduras, Paraguay and Uruguay. A.R. BREWER CARÍAS, "La jurisdicción constitucional en América Latina", op. cit.,

⁴Constitutional Court of Peru: Demanda de amparo promovida por Santiago Enrique Martín Rivas, exp.te n. 679-2005-PA/TC, 2.03.2007, which expressly states that amnesty laws can not benefit those responsible for crimes against humanity.

⁵AMBOS, K., *Treatise on international criminal law. Volume I: Foundations and general part*, Oxford University Press, Oxford, 2013, pp. 97ss.

⁶Constitutional Court of Peru (exp.te 2488-2002- HC/TC), stating that the objectives pursued by the Commission do not overlap with those of criminal judgments.

⁷CASSESE, A., *International criminal law*, Oxford University Press, Oxford, 2008, pp. 182ss. STUCKENBERG, C.F., Multiplicity of offences, concursus delictorum, in FISCHER, H., KRESS, C., LÜDER S.R., (a cura di), *International and national prosecution of crimes under international law. Current developments*, ed. Nomos, Berlin, 2001, pp. 588ss, which is noted that: "(...) the lex specialis rule can be said to be part of international criminal law (...)". See also: JEUTNER, V., *Irresolvable norm conflicts in International Law. The concept of a legal dilemma*, Oxford University Press, Oxford, 2017, pp. 57ss. LINDROOS, A., "Addressing norm conflicts in a fragmented legal system: The doctrine of lex specialis", in *Nordic Journal of International Law*, 74, 2005, pp. 38ss. MILANOVIC, M., "The lost origins of lex specialis: Rethinking the

disregarding the specifics of each individual case and the corresponding judicial solution, it is possible to group all these pronunciations into two jurisprudential macro-trends, which we will use as classification paradigms for the purposes of our analysis.

The majority tendency interprets international crimes expansively, extending their applicative scope in a diachronic perspective-in order to qualify these facts as committed before the enacting norm in question came into force-or in relation to the more typically typical dimension, thanks to a reading of the elements of the case in question that allows for the re-integration of conducts *per se* not covered by the law. However, there is also a macro-trend of exactly opposite sign, universal jurisdiction⁸, relations between criminal trials and Truth Commissions. The reductive tendency responds to the need to circumscribe, or at least to clarify, legislative choices that, in typing international crimes, deviate from the definition adopted by international standards. However, there are cases in which the legislator and judges act in synergy, cooperating in legitimizing incriminating choices that place a *quid pluris* with respect to the internationally recognized definition of the case.

At the same time, the two macro-trends manifested by the Supreme Courts do not always correspond to the orientation followed by lower-ranking tribunals, since they often intervene precisely to bring into line with the international norms and constitutional principles specific interpretations proposed in the sentences previous degrees of judgment. The higher courts sometimes move in the opposite direction, supporting an extensive interpretation of the scope of the international criminal offenses⁹, placing themselves in continuity with the solution adopted by the lower courts - or, on the contrary, annulling judgments which instead had been strictly anchored to regulatory and constitutional limits.

The two macro-trends proposed here also correspond to two types of effects with regard to the recipients of the applicative field of international criminal types, by exploiting their specificity with respect to common crimes. This second tendency sometimes translates into tracing the interpretation of the norm within the tracks traced by the literal dictates of international standard, in the face of undue expansion matured internally; on the other hand, it is manifested in the more precise definition of the typical structure, to complete and clarify the international definition.

The large number of dissenting votes that usually accompany the judgments demonstrates precisely how the issues touched upon are extremely complex, and not susceptible to a univocal solution, but open to a plurality of different and even opposing interpretations on the basis of equally valid legal arguments. Furthermore, the frequent presence of several conforming votes demonstrates that the same interpretative outcome can be reached through different paths and therefore the argumentative activity of the judge is a constitutive part of the construction of penal norms.

2.INTERPRETATION OF CRIMINAL CASES IN AN EXPANSIVE MANNER

The first macro-trend, we have identified, intervenes on the scope of international criminal offenses by extending it in a double direction. In a first manifestation, aiming to subsume in the category of crimes against humanity, to

relationship between human rights and international humanitarian law", in OHLIN J.D., (a cura di), *Theoretical boundaries of armed conflict and human rights*, Cambridge University Press, Cambridge, 2016, pp. 30ss. PAUWELYN, J., *Conflict of norms in public international law*, Cambridge University Press, Cambridge, 2003, pp. 385ss. CONWAY, G., "Conflicts of competence norms in EU Law and the legal reasoning of the ECJ", in *German Law Journal*, 11, 2010, pp. 985ss. See also the case: ICTY, Prosecutor v. Kunarac et al., Appeals Judgment, TC, IT-96-23-T, 22 February 2001, par. 170-171.

⁸Court de Constitucionalidad guatemalteca, apelación de amparo promovido por Ángel Aníbal Guevara Rodríguez y otros, exp.te 3380-2007, 12.12.2007.

⁹ESQUIROL, J.L., "The turn to legal interpretation in Latin America", in *American University International Law Review*, 26 (4), 2011, pp. 1032ss.

subsume the facts in these criminal categories¹⁰, and the tendency in some cases to expand the Latin American tribunals with regard to their scope, have more to do with the interpretation of their typical elements and especially of the corresponding element of context-respectively, the existence of a non-international armed conflict and the list of human groups protected by the norm¹¹.

This qualification depends, as we have seen, on the applicability of the special regime of international crimes, which provides, *inter alia*, the imprescriptibility and the impossibility of benefiting the authors with amnesties or indults. The relevance of these consequences explains the importance of the subsumption¹² of concrete facts in international criminal cases, as key to allow the persecution and punishment for behaviors that, according to the ordinary penal norms, would be prescribed or covered by the amnesty¹³.

In order to achieve this result, the courts have to remedy the problem that, in almost all cases subject to judgment, the typification of international crimes in the internal legal system took place at a time after the commission. The judicial bodies therefore react, in these cases, to the inactivity-or late intervention-of the legislator in the adaptation of the internal legal system to international obligations¹⁴ imposed both by the international conventions for the protection of human rights and the Rome Statute¹⁵.

This jurisprudential solution therefore translates into a widening of international criminal cases in the temporal, or rather diachronic, level, aimed at backdating the application of these criminal figures to a time before their formal provision in state legislation.

In order to achieve this result, the jurisprudence undertakes different argumentative paths: it enhances the international-conventional and customary norms, in addition to international jurisprudence and in particular interamerican-as direct sources of indictment, or recurs to an original double subsumption of facts in criminal cases international and internal at the same time. With reference to the forced disappearances of people, the Latin American jurisprudence¹⁶ has then elaborated a path that leverages the peculiarities of this criminal figure, making it possible to derive from its nature of permanent crime the impossibility of calculating the course of time to the effects of the prescription until discover the fate suffered by the missing victim¹⁷. All these interpretative solutions involve an important modification in the system of sources of law, which opens up, in different measures and in different ways, to international standards.

¹⁰DÍAZ SOTO, J.M., "Una aproximación al concepto de crímenes contra la humanidad", in *Revista Derecho Penal y Criminología*, n. 95, 2015, pp. 123ss.

¹¹Constitutional Court of Colombia, sentencia T-352/16 of 6 July 2016: "(...) en cuenta los elementos presentados que demuestran las graves violaciones a los derechos humanos por un acto de lesa humanidad cometido por las fuerzas armadas (...)".

¹²Let us clarify now that in this chapter the term "subsumption" is used as a synonym for the operation of reconditioning the facts subject to judgment to a specific case, or, to resume the Hassemerian definition, as an "approach between fact and case".

¹³KAYUTANA, E., "Domestic amnesty for international crimes and the ICC Prosecutor: When to exercise restraint in the "interest of justice"?", in *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 9 (2), 2018, pp. 180ss.

¹⁴SAGÜES, N.P., "Obligaciones Internacionales y Control de Convencionalidad", in *Estudios constitucionales*, 8, 2010, pp. 118ss.

¹⁵HERNÁNDEZ BALMACEDA, P., "Aplicación directa de los tipos penales del ECPI en el derecho interno", in AMBOS, K., MALARINO, E., WOISCHNIK J., (eds.), *Temas actuales de derecho penal internacional. Contribuciones de América Latina, Alemania y España*, Fundación Konrad Adenaur, Berlin-Montevideo, 2005, pp. 135ss, the author admits that this adaptation can be achieved not only through ordinary legislation but also through national jurisprudence.

¹⁶HELMKE RIOS, G., FIGUEROA, J., *Courts in Latin America*, Cambridge University Press, Cambridge, 2011.

¹⁷PARENTI, P.E., *La inaplicabilidad de normas de prescripción en la jurisprudencia de la Corte Interamericana de Derechos Humanos*, in Sistema interamericano de protección de los derechos humanos y derecho penal internacional, ed. Foundation Konrad Adenaur, Berlin, 2010, pp. 214ss.

A further interpretative mechanism that some judgments apply to overcome the obstacle of the prescription is based on the nature of the state of exception of the dictatorial regimes during which mass crimes were committed, claiming that for the duration of this situation the course of the prescription it must be considered suspended. Even if this solution does not imply a real interpretation of the typicality of international crimes, we will mention it because it is probably the best proposal to ensure the persecution and sanction of those responsible for state crimes and at the same time respect for fundamental principles in criminal matters¹⁸.

A second modality of the expansive tendency is then manifested on the specifically typical plane, and in turn can take two different forms: it can result in the subsumption of facts, by the courts with criminal jurisdiction, in an international criminal case on the basis of a broad interpretation of its contextual element or its typical conduct¹⁹. Or, it can be manifested in the invalidation of constituent elements that the national legislator has introduced during the typification of international crimes in order to limit the scope of such cases or to establish a minimum threshold for the relevance of the conduct. In the latter case, the judicial re-expansion of the international criminal offense²⁰ passes through the constitutional review of the provision in question.

The hypothesis that we intend to demonstrate is that in both cases the classification of the facts as international crimes serves the courts as a "picklock" to achieve the application of the special regime that international law attaches to this criminal category.

3.THE FOUNDATION OF THE RULE OF IMPRESCRIPTIBILITY

The friction points that the application of international rules creates with the fundamental principles of national criminal law are manifested not only with reference to the typical definition of crimes, but also with respect to the rule of imprescriptibility. This rule, like the others that characterize the special regime of international crimes, was part of the international custom existing at the time of the events. This interpretation allows us to remedy the problem that the Convention on the impracticability of war crimes and against humanity (Convention of 1968), which expressly establishes this rule, has been ratified in most Latin American States at a later point in time. Also in this case, the obstacle posed by the prohibition of retroactivity is circumvented considering this Convention a mere crystallization of a *jus cogens* norm already in force. This reading, also taken from the jurisprudence²¹ of the confirmation, as noted by the judge Boggiano in the *Simón* judgment²², in the preparatory works of the 1968 Convention itself.

This argumentative path can be contrasted by the same objections that we have raised in relation to the use of custom as a directly incriminating rule and its incompatibility with the principle of penal legality. On this consideration is then grafted the wider debate around the need to bring into the scope of the aforementioned principle also the rules that do not base the indictment, but which are limited to setting the criminal law. In a sense contrary to this view judge Argibay

¹⁸OLÁSOLO, H., *Ensayos de derecho penal y procesal internacional*, ed. Diké, Bogotá. 2011.

¹⁹SCHRAMM, E., *Internationales Strafrecht*, C.H. Beck, München, 2018. ZAKERHOSSEIN, M.H., *Situation selection regime at the International Criminal Court*, ed. Intersentia, Antwerp, Oxford, 2018.

²⁰AHLBRECHT, H., BÖHMEER, K.M., *Internationales Strafrecht*, C.F. Müller, Heidelberg, 2018.

²¹PARENTI, P., "La inaplicabilidad de normas de prescripción en la jurisprudencia de la Corte Interamericana de Derechos Humanos", in AMBOS, K., MALARINO, E., ELSNER G., (eds.), *Sistema interamericano de protección de los derechos humanos y derecho penal internacional*, op. cit., pp. 211ss.

²²Juzgado Nacional en los Criminal y Correccional n. 4 de Buenos Aires, giudice Cavallo, Simón, Julio, Del Cerro, Juan Antonio s/sustracción de menores de 10 años, causa n° 8686/2000, decision of 06.03.2001, par. IV.B.

expresses himself in his particular vote in the *Simón* case²³. On the contrary judge Fayt, in his dissenting vote in the same case²⁴.

The position taken by this last judge seems to us to be the most shareable, since it is more in keeping with the rationale behind the principle of legality: even the relevant changes to the penal discipline, which result in the production of detrimental effects for the offender and without doubt provisions that introduce the imprescriptibility or inapplicability of amnesties and indults are-must be known ex ante by the subject and compatible with the principle of favor that informs the entire system²⁵.

It can be said that recourse to international law, both customary and conventional-where the Conventions have entered into force after the commission of facts-, as a direct source of incrimination or discipline with effects *in pejus*, raises moments of strong tension with the principles foundations of the penal system, in particular with the principle of legality in its various dimensions. This friction is exacerbated by the fact that the object of protection of both systems belongs to the same core of fundamental human rights: on the one hand, the rights of the victim and the interest of society as a whole to combat impunity²⁶, from the other, the rights of defense and the guarantees that the penal system places to protect every defendant. It is therefore necessary to make a balance between interests. This complex tension can not be overcome simply by putting aside the principle of legality, which is in turn, as Judge Fayt points out in *Simón*²⁷, an essential guarantee of every democratic penal system²⁸ who enjoy the same rank and share the same inspiring ratio.

4.THE "JUDICIAL TYPIFICATION" OF THE ASSOCIATION CRIME: THE ARANCIBIA CLAVEL CASE

In the *Arancibia Clavel* case²⁹, effectively, modifying the indictment confirmed in the two previous degrees of judgment, which had condemned the accused for illicit association, it is stated that, being the association of which the accused was part destined to the commission of crimes against humanity-as a means of eliminating political opponents-the mere participation in this association can also be qualified as a crime against humanity³⁰. The Court develops an argument in two passages: first, it must demonstrate that the crimes attributed to the association of which the accused was a member constitute crimes against humanity³¹.

But in this ruling the Supreme Court of Justice of the Argentine Nation (CSJN)

²³Juzgado Nacional en los Criminal y Correccional n. 4 de Buenos Aires, giudice Cavallo, Simón, Julio, Del Cerro, Juan Antonio s/sustracción de menores de 10 años, op. cit.,

²⁴Suprema de Justicia de la Nación (CSJN argentina, Simón, Julio Héctor y otros s/privación ilegítima de la libertad, causa n° 17.768 (S.1767.XXXVIII), sentence of 14.06.2005.

²⁵Supreme Court of Chile, Sala Penal, caso Molco (Vásquez Martínez y Superby Jeldres), rol n. 559-2004, 13.12.2006, considerando 13.

²⁶DONDÉ MATUTE, J., "International criminal law before the Supreme Court of Mexico", in *International Criminal Law Review*, 10, 2010, pp. 577-578.

²⁷Juzgado Nacional en los Criminal y Correccional n. 4 de Buenos Aires, giudice Cavallo, Simón, Julio, Del Cerro, Juan Antonio s/sustracción de menores de 10 años, causa n° 8686/2000.

²⁸Dissenting opinion of judge Fayt in sentence *Simón*, op. cit., considerando 48-49.

²⁹CSJN argentina, Arancibia Clavel, Lautaro s/ homicidio calificado y asociación ilícita y otros - causa n° 259, sentence of 24.08.2004, par. 32. PATRICE MCSCHERRY, J., *Preditory States: Operation Condor and covert war in Latin America*, Rowman & Littlefield Publishers, New York, 2012, pp. 182ss.

³⁰SARRABAYROUSE, E.C., El caso "Arancibia Clavel": el paso del tiempo, los delitos imprescriptibles y la indeterminación de la acusación: los temores se hicieron realidad? in PASTOR D.R., (dir.), *Neopunitivismo y neoinquisición. Un análisis de políticas y prácticas penales violatorias de los Derechos fundamentales del imputado*, editorial Ad-Hoc, Buenos Aires, 2008, pp. 414ss.

³¹RENZO, M., "Crimes against humanity and the limits of international criminal law", in *Law and Philosophy*, 31, 2012, pp. 444ss.

takes a further step, since, after having qualified the crimes-purpose of the association as crimes against humanity, it causes the character of crime against humanity also of mere participation in the association. Such conduct constitutes, in the words of the Court, a "punitive preparatory acto", a form of atypical participation sanctioned pursuant to art. 25 sub-par. 3 lett. d) of the Statute of ICC (StICC). In reality, the assimilation-which the Supreme Court proposes-of the crime of unlawful association to conspiracy is the result of an error³², since while the former is an independent crime, the second is a form of contribution to a crime committed with the persons, and requires the presence of both a volitional element-the agreement of will between the various competitors and the intention to participate-and of an objective element constituted by the causal contribution to the fact. Moreover, between the two only conspiracy is covered by law. It may also be noted that the Court confines itself to this statement, without dwelling on motivating it or analyzing its compatibility with the system of sources of Argentine law. Therefore, as a foundation of this interpretation, we find once again the international custom, which is considered an integral part of national law through the filter offered by art. 118 CN.

Finally, the Court quotes art. II of the Convention on Imprescriptibility. The Argentine Court limits itself to mentioning some relevant international instruments on the subject, none of which, however, clearly states the punishment of this type of preparatory acts with regard to international crimes. Moreover, the interpretative solution thus reached is based on the subversive conversion of a preparatory act in the form of participation in the crime, an operation that exempts from proving the material or objective element of participation, the causal contribution and the typical result, and the fact that at least one of the main authors committed the crime at least in the stage of the attempt³³. Judge Belluscio, for example, clarifies that admitting the rule of non-applicability of international crimes, to which Argentina has acceded with the ratification of the 1968 Convention, does not automatically translate into the legitimacy of the retroactive application of this Convention, unless not wanting to violate one of the fundamental corollaries of the principle of criminal law. The judge departs from the majority vote emphasizing the prevalence of the principle of non-retroactivity of the penal law (unfavorable) enshrined in the Constitution by art. 18, "preciada conquest de la civilización jurídica y política"³⁴ since the French Revolution, and whose exemption is not admissible even in the face of events of special gravity such as international crimes. Furthermore, Judge Belluscio criticizes the appeal to art. 118 of the Constitution to establish the binding nature of a presumed jus cogens rule³⁵, noting that this constitutional precept represents only a jurisdiction rule³⁶. On the other hand, the denial of the existence, at the time of the facts, of a customary norm that established it.

5.INTER-AMERICAN JURISPRUDENCE

³²JACKSON, M., "A conspiracy to commit genocide. Anti-fertility research in apartheid's chemical and biological weapons programme", in *Journal of International Criminal Justice*, 13, 2015, pp. 933-950. AMENGE OKOTH, J.R., *The crime of conspiracy in international criminal law*, ed. Springer, 2014.

³³See also from Argentina the next cases: Decision of the Federal Criminal and Correctional Chamber of the Federal Capital of September 1, 2003, in Case No. 761 "E.S.M.A., Facts reported that allegedly took place in the Naval Engineering School"; Supreme Court of Justice of the Nation. Case of Suárez Mason, Carlos Guillermo. Judgments 321:2031 of August 13, 1998, and Supreme Court of Justice of the Nation. Case of the Naval Engineering School. Judgment 311:401 of March 29, 1988

³⁴According to judge Belluscio, par. 3: "el instituto de la prescripción de la acción penal está estrechamente ligado al principio de legalidad, por lo tanto no sería susceptible de aplicación una ley ex post facto que alterase su operatividad en perjuicio del imputado".

³⁵DIXON, R., GINSBURG, T., *Comparative constitutional law in Latin America*, Edward Elgar Publishing, Cheltenham, UK, 2017.

³⁶A.A.V.V., *Jurisdiccion universal. Sobre crímenes internacionales*, ed. Comares, Granada, 2013.

Within the interpretative line that seeks support in international law in order to subsume the crimes perpetrated by dictatorial governments in the category of international crimes and to apply the corresponding special regime to them, a special role is played by the jurisprudence of the inter-American bodies for the protection of human rights³⁷. The relevance of the latter in the internal legal system depends partly on structural reasons, given that the States that have chosen to become part of the San José de Costa Rica Pact are obliged to ensure compliance with its rules and the rights it recognizes, and accepting the jurisdiction of the bodies established by it, they are committed to observing and executing their sentences.

But on the basis of the importance of this jurisprudence there are also contingent reasons: the Commission and the IACtHR³⁸, in fact, have shown in the last decades a particularly intense commitment in the fight against impunity³⁹ and progressively elaborated, on the basis of an evolutionary interpretation of the CAHR, a series of principles and rules that helped to shape the definition and discipline of international crimes. The obligation to investigate, prosecute and punish those responsible for the serious violations of human rights⁴⁰, the impossibility of benefiting them with amnesties and indults⁴¹, the imprescriptibility⁴², the affirmation of the corresponding rights of victims to the truth, justice and reparation, are principles that the IACtHR has been progressively affirming⁴³, and that have contributed to delineating the current configuration of the discipline reserved to international crimes⁴⁴, influencing not only the national legal systems committed to responding to these crimes, but also the international criminal tribunals.

A direct testimony of the prominent prominence of the Inter-American jurisprudence in the response to state crime developed on the continent is provided by the judge Petracchi's concurring vote in the *Simón* judgment: joining the majority decision declaring the invalidity of the Argentinian impunity laws on the basis of the so-called Doctrine Barrios Altos⁴⁵, elaborated precisely by the IACtHR, states that it is deviating from its previous vote in the *Priebke* case⁴⁶, in which it had denied the applicability of the Convention on Imprescriptibility to facts committed before its entry into force and the possibility of applying the rule of the imprescriptibility

³⁷NASH ROJAS, C., *La concepción de derechos fundamentales en Latinoamérica. Tendencias jurisprudenciales*, Editorial Fontamara, México, 2010.

³⁸HENNABEL, L., "The inter-American Court of human rights: The Ambassador of universalism", in *Quebec Journal of International Law*, 57, 2011, pp. 58ss. QUISPE-REMÓN, D.J.L., *El debido proceso en el derecho internacional y en el sistema interamericano*, ed. Tirant lo Blanc, Valencia, 2010.

³⁹DONDE MATUTE, J., El concepto de impunidad: Leyes de amnistia y otras formas estudiadas por la Corte Interamericana de Derechos Humanos, in *Sistema interamericano de protección de los derechos humanos y derecho penal internacional*, ed. Foundation Konrad Adenaur, Berlin, 2010, pp. 268ss.

⁴⁰IACtHR, Velásquez Rodríguez, op. cit., cit., parr. 166 e 174.

⁴¹IACtHR, Barrios Altos v. Perú, sentencia de fondo, 14.03.2001, parr. 41-44.

⁴²IACtHR, Bulacio v. Argentina, sentencia de fondo, reparaciones y costas, 18.09.2003, parr. 106-108; Almonacid Arellano v. Chile, 26.09.2006, parr. 152-153.

⁴³GONZALEZ MORALES, E., *El Sistema Interamericano de Derechos Humanos*, ed. Tirant Lo Blanch, Valencia, 2013. SCHONSTEINER, J., "Hacia mayor seguridad jurídica en la protección regional de los derechos humanos: reformas procesales en el sistema interamericano", in *Anuario de Derecho Público*, 1, 2010.

⁴⁴MEDELLÍN URQUIAGA, X., "The normative impact of the inter-American Court of Human Rights on Latin-America national prosecution of mass atrocities", in *Israel Law Review*, 46 (3), 2013, pp. 410ss.

⁴⁵VON BOGDANDY, A., VENZKE, I., *International judicial law making*, ed. Springer, New York, London, 2012. FERRER MAC-GREGOR, A.E., "Conventionality control and the new doctrine of the inter-American Court of Human Rights", in *American Journal of International Law Unbound*, 109, 2015, pp. 95ss.

⁴⁶CSJN argentina, Priebke, Erich s/solicitud de extradición, causa n° 16.063/94, decision of 02.11.1995.

dictated by international law to internal criminal offenses⁴⁷.

This sudden change in the judge's position is due to the fact that the Argentine law has undergone fundamental changes that require the revision of what was established on that occasion. The statement by the Argentine judge thus reveals the special importance that this source assumes in the persecution-even-national of the serious violations of human rights⁴⁸.

Inter-American jurisprudence is constantly cited by the internal courts of Latin American countries that carry out criminal proceedings for crimes committed during dictatorships. The national courts, on the basis that they constitute international crimes and/or serious violations of human rights derive from the precedents of the IACtHR rules and principles relating to their persecution⁴⁹, which substantially coincide with the special regime reserved for this criminal category. These precedents have exerted a strong influence both on the internal legislations, when they explicitly typed the forced disappearance of people. On the other hand, it is given an independent value, sufficient in itself to support the existence of a certain norm also valid in the internal order: in this hypothesis the norm thus obtained is characterized by a "doubly judicial" origin, it is affirmed by the interamerican jurisprudence-usually well beyond the normative dictate of the ACHR, and subsequently implemented by the national courts, without necessarily intervening the legislator⁵⁰.

The citation of inter-American jurisprudence⁵¹ as a basis for qualifying facts as international crimes, and/or for determining the discipline applicable to them, despite being an instrument frequently used in the prosecution of serious violations of human rights, raises some concerns, which we could divide into problems of value or validity-of the pronouncements of the inter-American bodies within the national legal systems-and problems of content. As for the former, the national courts, in citing Inter-American jurisprudence, attribute different values and validities: some define it as an "unavoidable criterion for interpretation" or "model relevant to interpretation", others recognize it as an equal value to that of the doctrine. A paradigmatic example of this last vision is the sentence of the Argentine CSJN in the *Simón* case, which bases the declaration of unconstitutionality of the laws of

⁴⁷HUNEEUS, A., "Courts resisting courts: Lessons from the Inter-American Court's struggle to enforce human rights", in *Cornell International Law Journal*, 44, 2011, pp. 520ss.

⁴⁸Supreme Court of Chile, Sala Penal, caso Molco (Vásquez Martínez y Superby Jeldres), rol n. 559- 2004, 13.12.2006, parr. 18-20.

⁴⁹DE PAUW, M., "The inter-American Court of human rights and the imperative method of external referencing regional consensus v. universality", in HAECK, Y., RUIZ-CHIRIBOGA, O., CHERRERA, Y., *The inter-American Court of human rights: Theory and practice, present and future*, ed. Intersentia, Antwerp, Oxford, 2016, pp. 4ss. NEUMANN, G.L., "Inter-American Court of Human Rights (IACtHR)", in WOLFRUM, R., *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2012.

⁵⁰IACtHR, *Heliodoro Portugal v. Panamá*, excepciones preliminares, fondo, reparaciones y costas, 12.08.2008, par. 34; *Ticona Estrada y otros v. Bolivia*, fondo, reparaciones y costas, 12.08.2008, parr. 28 ss. In the same spirit: Colombian Constitutional Court C-317, 02.05.2002, *Demanda de inconstitucionalidad contra el artículo 165 (parcial) de la Ley 599 de 2000 "por la cual se expide el Código Penal"*, par. 2, and Sala Penal Nacional del Perú, *Sentencia contra Jiménez del Carpio y otros por el delito contra la Libertad-secuestro-en agravio de E.R. Castillo Páez*, 26.03.2006 (consideraciones sobre la calificación jurídica de los hechos). In argument see also: MODOLELL, J.L., *La desaparición forzada de personas en el sistema interamericano de derechos humanos*, in AMBOS, K., (coord.), *Desaparición forzada de personas. Análisis comparado e internacional*, ed. Gtz, Bogotá, 2009, pp. 184ss.

⁵¹*Torres Millacura & Others Case*, 2011 (ser.C) No. 229; *Contreras & Others Case*, 2011 (ser.C) No. 232; *González Medina & Family members Case*, 2012 (ser.C) No. 240; *Río Negro Massacres Case*, 2012 (ser.C) No. 250; *Massacres of El Mozote & nearby places Case*, 2012 (ser.C) No. 252; *Gudiel Álvarez & Others Case*, 2012 (ser.C) No. 253; *García & Family members Case*, 2012 (ser.C) No. 258; *Osorio Rivera & Family members Case*, 2013 (ser.C) No. 274; *Rochac Hernández & Others Case*, 2014 (ser.C) No. 285, and *Rodríguez Vera & Others Case*, 2014 (ser.C) No. 287. YENNESIT, P.V., "Género en el derecho constitucional transnacional: Casos ante la Corte Interamericana de derechos humanos", in *Revista Facultad de Derechos y Ciencias Políticas. Medellín*, 41, 2011, pp. 142ss.

Obediencia debida and Punto final⁵² on their opposition to the ACHR according to the "Barrios Altos doctrine"⁵³. The Argentine Supreme Court, however, affirms that it is also bound by that precedent by virtue of the principle of good faith which governs the interpretation of international treaties pursuant to art. 26 of Vienna Convention on Treaty of Law (VCLT)⁵⁴. In fact, one can doubt the validity of this argument, since interpretation in good faith does not in itself imply a departure from the clear literal dictum of the conventional norm, which in this case places a twofold limitation to the obligatory nature of the judgments of IACtHR⁵⁵. The jurisprudence and the national doctrine have elaborated various other arguments to support the binding character, beyond all limits, of the interamerican jurisprudence, but this does not mean that it is an interpretation that contradicts the literal datum of the ACHR⁵⁶.

An at least partially different discourse should be made for those state systems that include within themselves a rule that expressly attributes binding effectiveness to the IACtHR precedents even beyond the concrete case and beyond the country directly involved, thus legitimizing the direct application of its jurisprudence without particular limits⁵⁷. The existence of a basic assumption is essential, that is, between the fact for which it is judged and the case subject of the IACtHR ruling there is an identity or similarity that allows the analogical application of the reasoning developed by the Inter-American organ. This is not the case, for example, in the *Simón* ruling, in which CSJN applies a precedent of the IACtHR, even though it is judging the constitutional legitimacy of two decidedly different laws. The differences-according to him "anecdotal"-, we limit ourselves here to point out the necessity, when we decide to apply the inter-American jurisprudence in national processes, of a previous clarification as to the value we intend to attribute to this source: binding beyond the limits of objective and subjective character that the ACHR poses, or merely argumentative, as a hermeneutical criterion useful to the reasoning developed by the judging organ. In the latter case, it may carry out an authoritative function, aimed at conferring authority on an interpretative solution already identified by the judicial body, as well as the doctrine or precedents of other courts, even foreign ones, or may act as an indicator of existence of an *opinion juris* that contributes to integrating a customary law that the court intends to verify and apply to the case. In fact, they are much more relevant than we want to admit, and they prevent us from simply transferring the juridical considerations referred to the latter to the former⁵⁸. As

⁵²DERGHOUGASSIAN, K., *Evolución de la Política de Defensa, en la Defensa en el Siglo XXI, Argentina y la Seguridad Regional*, ed. Capital Intelectual, Buenos aires, 2012.

⁵³According to the Court in case *Simón* (considerando 29): "(...) que la traslación de las conclusiones de la Corte Interamericana en 'Barrios Altos' al caso argentino resulta imperativa (...) rechazar las leyes peruanas de "autoamnistía". Pues, en idéntica medida, ambas constituyen leyes ad hoc, cuya finalidad es la de evitar la persecución de lesiones graves a los derechos humanos (...)" GÓNGORA MERA, M.E., *Inter-american constitutionalism: On the constitutional rank of human rights treaties in Latin America through national and inter-American adjudication*, ed. Instituto Interamericano de Derechos Humanos, 2011.

⁵⁴FITZMAURICE, M., ELIAS, O., MERKOURIS P., (eds), *Treaty interpretation and the Vienna Convention on the Law of Treaties*, Martinus Nijhoff, The Hague, 2010, pp. 5-14. SOREL, J.M., BORÉ EVENO, B., 1969 Vienna Convention: Article 31-Interpretation of treaties, in CORTEN, O., KLEIN P., (eds), *The Vienna Conventions on the law of treaties: A commentary*, Oxford University Press, Oxford, 2011, pp. 804, 817ss.

⁵⁵HAECK, Y., RUIZ-CHIRIBOGA, O., HERRERA, C., *The inter-American Court of human rights: Theory and practice, present and future*, ed. Intersentia, Antwerp, Oxford, 2016, 46ss.

⁵⁶CONTESSÉ, J., "Contestation and deference in the inter-american human rights system", in *Law and Contemporary Problems*, 79 (2), 2016, pp. 126ss.

⁵⁷GONZÁLEZ-SALZBERG, D., "The effectiveness of the inter-American human rights system. A study of the American States compliance with the judgments of the inter-American Court of human rights", in *Revista Colombiana de Derecho Internacional*, 15, 2015, pp. 116ss.

⁵⁸In fact, while the Peruvian laws (L. 14 June 1995, No. 26.479, of amnesty, and Law 21 June 1995, No. 26.492, of interpretation of the amnesty law) were issued by the government itself involved in the commission of crimes, therefore qualifying as self-amnesties, the Argentine ones (Law 23.492 of 24.12.1986, of Punto Final, and Law 23.521 of 08.06.1987, of Obediencia debida) were approved by the new democratic government in the context of the transition, and were preceded by a effective parliamentary debate. Moreover, the Peruvian laws arranged

reported by Judge Fayt in his vote in dissidence "En efecto, constituye un grave error que se declare inconstitucional (...) una decisión que no es aplicable al caso y una interpretación dinámica que no es tal"⁵⁹.

But the use of judgments of IACtHR to qualify the facts as international crimes and determine the corresponding discipline also raises some problems in relation to the content of those rulings. In fact, apart from the fact that the inclusion of the State in a supranational system already affects the sensitive sphere of its sovereignty, the IACtHR shows a tendency to an increasingly deep interference in the choice of measures designed to cope with serious violations of human rights, thereby reducing the margin of state appreciation in this regard. On the one hand, the Court has, in recent years, passed from traditional condemnations to economic reparations to imposing the most disparate sanctions that entail a far more significant interference in the sphere of state sovereignty. For example, he has condemned to typify certain crimes in the internal system and according to a specific form⁶⁰, to re-enact a criminal trial even if this translates, strictly speaking, into an encore, to exert criminal prosecution even if one opts for an alternative mechanism such as a Truth Commission, and even to invalidate amnesty laws whose validity had been confirmed directly by the people through the referendum vote. Naturally, this affects the validity and correctness of the application of the aforementioned jurisprudence-as far as here it is concerned, essentially the Inter-American case-to the cases from time to time subject to judgment⁶¹.

This tendency of the IACtHR we can characterize it as: "activist, punitivist and nationalizing" that tries to expand its power of control and imposition and to derive from the conventional text much more than what it actually says, it affects, above all, the limits of state sovereignty and the discretion of political choices.

But it also provokes moments of collision with a series of constitutional principles in criminal matters, such as that of legality or *ne bis in idem*, which arise not from the ACHR itself, but "solely as a consequence of the jurisprudential interpretation"⁶² that gives the IACtHR and the integration that it has worked on the

an absolute amnesty, covering any fact "derived from, or committed on the occasion or as a consequence of, the fight against terrorism" (Law 26479/1995, Article 1); the law of Argentina, however, beyond the fact that their technical qualification as amnesties is discussed, did not benefit the leaders of the repressive apparatus (although already condemned in the context of the well-known "juicio a las Juntas": see Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de la Capital Federal, "Juicio a las Juntas", Case No. 13/84, sentence of 09.12.1985) nor those responsible for certain crimes specifically mentioned, such as child abduction.

⁵⁹GIL GIL, A., "La fertilización cruzada entre las jurisprudencias de derechos humanos y de derecho penal internacional y el uso defectuoso de la jurisprudencia ajena. Ejemplificación en la doctrina del Tribunal Europeo de Derechos Humanos y su cita por otros tribunales", in *Revista de Derecho Penal*, 111, 2011, pp. 219ss. GIL GIL, A., MACULAN, E., *La influencia de las víctimas en el tratamiento jurídico de la violencia colectiva*, ed. Dykinson, Madrid, 2017, pp. 380ss. LOBBA, P., MARINIELLO, T., *Judicial dialogue on human rights: The practice of international criminal tribunals*, ed. Brill, Leiden, Boston, 2017.

⁶⁰IACtHR, Trujillo Oroza v. Bolivia, reparaciones y costas, 27.02.2002, par. 97 and case: Goiburú y otros v. Paraguay, fondo, reparaciones y costas, 22.09.2006, par. 83.

⁶¹See the Updated Set of principles for the protection and promotion of human rights through action to combat impunity, ECOSOC Commission on Human Rights, Distr. GENERAL, E/CN.4/2005/102/Add.1, 8.02.2005, and the Report of the Office of the United Nations High Commissioner for Human Rights, entitled: "Study on the right to the truth", ECOSOC Commission on Human Rights, Distr. General, E/CN.4/2006/91, 8.02.2006). from the ICC see: Prosecutor v. Katanga e Ngudjolo-Chui, Judge S. Steiner, Decision 01/04-01/07-474, del 13.05.2008; ICC, Appeals Chamber, The Prosecutor v. Lubanga, Decision 01/04-01/06-2173, del 23.10.2009 (par. 41).

⁶²GUZMÁN, N., "El neopunitivismo en la jurisprudencia de la corte suprema de justicia de la nación y de la corte interamericana de derechos humanos: un pronóstico incierto para el *ne bis in idem* y la cosa juzgada", in PASTOR D., (dir.), *Neopunitivismo y neoinquisición. Un análisis de políticas y prácticas penales violatorias de los derechos fundamentales del imputado*, op. cit., pp. 227.

literal data. So again, also in relation to the interamerican jurisprudence, we emerge that judicial protagonism that we have already identified as a new fact of reality-partly physiological, partly pathological-of the current criminal systems, and the revision that imposes the principle of state obligations and obligations that the ACHR does not expressly provide, but that they were derived from an alleged evolutionary interpretation.

6.CRIMINAL TYPES "SUCH AS GIANO BIFRONTE": THE DOUBLE-SUBSUMPTION METHOD

Another interesting argumentative path that the Supreme Courts have undertaken to reach the conviction for the crimes committed during the past dictatorships is the so-called double subsumption. This technique essentially consists, as the name suggests, in subsuming the facts that are the object of judgment at the same time both in a common case, expressly contemplated by national law, and in an international crime. The courts, in this case, do not intervene directly on the international criminal type, but extend its scope to facts committed before its express typification, by means of an application combined with an ordinary case⁶³.

The purpose of this interpretative operation is to combine two opposing requirements: overcoming obstacles to the persecution and punishment of those responsible for such crimes, interposed by the prescription and by possible provisions of amnesty⁶⁴; respect the principle of criminal legality in its various forms. To the first of these two needs, the qualification of the facts as international crimes answers, from which the applicability of the special regime reserved to this criminal category derives. In this sense, we continue on the path already traced by the interpretative line that we have defined as "progressive", which operates the subsumption of facts in international criminal types, stating that at the time of the commission they were already provided for by international norms at least customary.

However, this qualification is accompanied by the parallel subsumption in a common criminal type, already envisaged at the time of the facts by domestic law, which serves as a complement to international criminal law. In this way, an internal-written norm is applied, determined and pre-existing to the facts, which guarantees - better than the international standard - the respect of the principle of legality⁶⁵. In this combination of two types, therefore, the internal one is used for the description of the typical elements and for the determination of the applicable penalty species and the corresponding edictal frame. The international case, however, can be applied according to two different ways or functions: in many cases, it is used solely for the purpose of applying the special discipline that marks this criminal category and which includes, among other characteristics, the imprescriptibility and inadmissibility of amnesty provisions.

In other cases, instead, the function of the international criminal type is carried out not only on the level of discipline but also on that of typicality, in the light of its suitability to reflect in a more complete and detailed manner the value of the conduct, whose particular gravity and whose mass character is only partially understood by the common occurrence. The courts therefore support, to a "primary typification and sanctioning subsumption", according to national rules, a "secondary qualification subsumption" in accordance with international standards.

The interpretive artifice thus elaborated makes it possible to resolve the dilemma between the application of a criminal figure-the international one-which

⁶³Supreme Court, Sala de lo Penal, sentence 798/2007, recurso casación n. 10049/2006 P, sentencia estimatoria parcial, 01.10.2007). GIL GIL, A., "La sentencia de la Audiencia Nacional en el caso Scilingo", in *Revista Electrónica de Ciencia Penal y Criminología*, 7, 2005.

⁶⁴Tribunal Constitucional peruano, Demanda de amparo promovida por Santiago Enrique Martín Rivas, exp.te n. 679-2005-PA/TC, 2.03.2007.

⁶⁵According to judge Zaffaroni in case: Simón: "No existe problema alguno de tipicidad, pues se trata de casos de privación ilegal de libertad o ésta en concurso con torturas y con homicidios alevosos (...) Estatuto de Nürnberg fueron precisamente masivas privaciones ilegales de libertad seguidas de torturas y de homicidios alevosos" (par. 14).

captures the entire disvalue of the fact and allows it to be sanctioned beyond the limits set by the ordinary penal discipline, but which does not respects the principle of penal legality, and the choice of a specific situation-the internal one-which, on the contrary, complies with the principle of legality and contains a sanctioning provision, but is subject to the limitations and the possible benefits of amnesty and thus prevents, in many cases, the exercise of criminal prosecution.

In this double interpretative operation, international crime enjoys, in our opinion, a certain primacy or logical-temporal precedence. In other words, the judicial body first subsumes the fact in the international criminal type, which well reflects the phenomenology of the offenses subject to judgment and which justifies the penal persecution beyond the ordinary limits; only at a later stage, in the face of the foreseeable objections for which such an interpretation would entail a violation of the principle of legality, is a case in the internal legal system that is as close as possible to the overall structure of international crime.

There is therefore a sort of inversion of the logical order of the operation of interpretation and subsumption, or at least an anomaly in its operation: once the correspondence between the facts being judged and the typical elements of a specific international crime has been found -and the applicability of the relevant special discipline is ensured-it takes a step backwards, looking for a more solid regulatory support in the internal legal system, more in line with the criminal principles, and above all providing the element of which the international standard is absolutely ungoverned, that is to say the sanctioning framework. This second type of domestic law is therefore flanked by the qualification already implemented according to international law, with a twofold function: "strengthening international legality from the point of view of internal legality".

7.FALLACY OF THE MODEL OF SPECIALTY: THE RELATIONSHIP BETWEEN INTERNAL AND INTERNATIONAL CASES

A further critical profile of the double-subsumption method concerns the definition of the relations between the internal and the international criminal figures. The judgments in which this solution is used are sometimes content to verify the double correspondence of the facts that are the object of judgment both to the national criminal offense and to international crime, and on the basis of this justify the simultaneous application of both norms. This vision lends itself to the foreseeable objection that it is impossible to speak of a true identity between the constitutive facts of the two penal types, the internal and the international, since the latter is also necessarily composed of an element of context that give it international relevance. Other judgments, instead of attesting on the factual level, stop to examine the legal relationship between the two types of criminal law, and describe it as a relationship of specialty-or relationship of inclusion-in the sense that the international case is part of the internal one, the which constitutes the widest genus, and is at the same time marked by some additional and peculiar elements that determine its specificity.

The paradigmatic example of this configuration-as well as the crime hypothesis most frequently applied to the interpretative method under examination-is the forced disappearance of people: the conduct that complements it, as some of the Supreme Courts affirm, is also subsumed in this case of illegitimate deprivation of liberty, already provided for by national criminal codes at the time of the facts. The reasoning is well described in the dictamen of the Procurador General de la Nación in the famous judgment Simón⁶⁶.

The specializing elements of forced disappearance of persons with respect to the illegitimate deprivation of liberty are therefore identified, on the part of the Attorney General, in the active subject, which must necessarily be a state agent or a person acting with the authorization, support or acquiescence of the State, and in the lack of information about the victim's whereabouts after his seizure.

⁶⁶Procuración General de la Nación argentina, Dr. N. Becerra, Dictamen en el caso Simón, CSJN argentina, op. cit., 29.08.2002, par. IX. 9.

It seems opportune to specify that these are two elements that are anything but peaceful in the same international definition of the crime; it is sufficient to point out that they suggest the possibility of a rethinking of the typical structure of the forced disappearance crime, and in particular of the second segment of the conduct constituted by the failure to provide information on the missing person, before entrusting to it the dispositive function with respect to the crime of seizure. The identification of possible active subjects appears even more problematic. The delimitation of the latter to state agents is in fact envisaged as a structural requirement by the ACFDP, but not by the Rome Statute, which also includes "members of political organizations" (see article 7.2 letter i of the StICC), an aspect that demonstrates the absence in the international plan of a unanimous consensus around the configuration of this criminal figure as its own crime. Judge Argibay, for example, in his individual vote in the same *Simón* judgment (recital 10). Judge Lorenzetti, on the other hand, alongside the requirement of the presence of a state agent-or of a group holding a domination comparable to the state-as an active subject, identifies as a further element-more than specializing- "exceptional" of the disappearance forced the passive subject, which coincides with the person victim of the illicit fact not only as such, but also as a member of humanity as a whole. From the competition of these two elements derives the relevance of the fact as a crime against humanity⁶⁷.

The distinction between the crime of kidnapping and that of forced disappearance is then based, according to many other sentences, on the legal assets protected by the two figures⁶⁸. This vision of enforced disappearance as a pluri-offense, based on an interpretation of the IACtHR that defines it as "a multiple violation of various rights protected by the ACHR", is also the subject of debate: consequently, even this discrete criterion is not profiled totally free from criticism, while the case of seizure is designed to protect only personal freedom, that of forced disappearance aims to protect a plurality of different legal assets, which include personal freedom but are not limited to it, also including the physical and mental integrity, the right of access to justice and to an effective appeal and finally life. The existence of this element, even before the individual typical elements that we have indicated, constitutes the real discrimina between the common crime-in this case the seizure-and the crime against humanity-the forced disappearance-, and at the same time it is a prerequisite for the applicability of the exceptional legal regime to which the judicial bodies are aimed.

8. FAILURE TO APPLY THE APPARENT COMPETITION OF RULES

But regardless of the identification of the specializing elements that would make it possible to isolate the forced disappearance within the broader genus illegitimate deprivation of liberty, and returning to more general considerations, the specialty relationship that is found between these two cases-and similarly between the crime of torture and the one of injuries-⁶⁹, constitutes, strictly speaking, the application condition of the discipline of the apparent competition of rules. As the Procurador General de la Nación Argentino (PGN) recognizes in his opinion on the

⁶⁷146 "La descripción jurídica de estos ilícitos contiene elementos comunes de los diversos tipos penales descriptos, y otros excepcionales que permiten calificarlos como "crímenes contra la humanidad" porque: 1- afectan a la persona como integrante de la "humanidad", contrariando a la concepción humana más elemental y compartida por todos los países civilizados; 2- son cometidos por un agente estatal en ejecución de una acción gubernamental, o por un grupo con capacidad de ejercer un dominio y ejecución análogos al estatal sobre un territorio determinado" (Voto separato del giudice Lorenzetti, considerando 13).

⁶⁸Colombian Constitutional Court, C-317/2002, capítulo VI (consideraciones y fundamentos de la Corte), par. 2.d); Sala Penal Nacional peruana, Ernesto Castillo Páez (Proceso seguido contra Jiménez del Carpio y otros por el delito contra la libertad-secuestro-de Ernesto Rafael Castillo Páez), exp. 111-04, 20.03.2006, par. 7. de las "consideraciones sobre la calificación jurídica".

⁶⁹TOFAN, C., *Torture in international criminal law*, Wolf Legal Publishers, The Netherlands, 2011.

Simón case: "Debe quedar claro que no se trata entonces de combinar, en una suerte de delito mixto, un tipo penal internacional (...) se hallan parcialmente ambas formulaciones delictivas (...)"⁷⁰.

The regulation of the apparent competition of rules requires that only one of the two cases, abstractly suited to the description of the case, be applied; in particular, where there is a specialty relationship between such provisions, the *lex specialis* will prevail, in which the most generic figure is incorporated. In this case, therefore, only the figure of the forced disappearance of persons should be applied, with the exclusion of the more general illegitimate deprivation of liberty, whose disvalue is already included in the more specific and more serious international case.

This is not the result of the doble subsunción method: the international criminal type and the domestic law case are applied jointly, and each of them fulfills a specific descriptive and disciplinary function. We can not therefore assume that this is an apparent competition of rules, precisely because it can not be resolved by the application of the only special indicative rule - the international criminal type⁷¹.

The unusual applicative outcomes of the double subsumption method derive from a peculiarity that we have already pointed out: that is to say, the lack of autonomy of the two cases that are combined. Neither of the two can be applied independently and separately from the other, since we would be faced with or a norm, already in force at the time of the facts, which prescribes the prohibited conduct and the corresponding sanction respecting the principle of legality, but it would lead to the declaration of extinction of the offense-for the application of an amnesty provision or, on the other hand, to an international standard that fully describes the typical elements⁷² overcoming the statute of limitations and possible amnesties, but does not provide for any sanctions and is often lacking the required tax liability to an incriminating rule⁷³.

9.RECURRING PROBLEMS: THE SYSTEM OF SOURCES AND TEMPORAL VALIDITY OF THE IMPRESCRIPTIBILITY RULE

The critical findings now carried out are flanked, naturally, by those previously reported with respect to the use of international law as a direct source of incrimination, which constitutes, as we have seen, one of the logical steps in which the double subsumption is articulated, and whose problematic aspects they are not sufficiently resolved by the joint application of a domestic criminal law case.

Moreover, this method of interpretation is without prejudice to the question of the still-controversial-temporal validity of the rule which establishes the imprescriptibility and the additional special consequences of international crimes. To take up the example of enforced disappearance, the view that it was already contemplated as a crime at the time of the facts, in the most general case of illegitimate deprivation of liberty, does not in itself eliminate the obstacle to the prescription of the offense. In fact, this conclusion requires the execution of two further steps: first of all, it must be verified that at the time of the commission of the facts under investigation the forced disappearance of persons existed as a penal type, sufficiently defined, included in the crimes against humanity ; secondly, it must be demonstrated that the rule of imprescriptibility in relation to this criminal category was already recognized at that time in international order⁷⁴.

⁷⁰Procuración General de la Nación argentina, Dictamen nel caso Simón, par. IX. 9.

⁷¹SCHÜNEMANN, R., *Strafverfahrensrecht*, ed. C.H. Beck, 2012, pp. 439ss. SCHUON, C., *International criminal procedure: A clash of legal cultures*, T.M.C. Asser Press, The Hague, 2010. SCHUETZE-REYMANN, J., *International criminal justice on trial. The ICTY and ICTR case referral practice to national Courts and its possible relevance for the ICC*, ed. Duncker & Humblot, Berlin, 2016.

⁷²Procuración General de la Nación argentina, Dictamen nel caso Simón, cit., par. IX. 9.

⁷³FINUCANE, B., "Enforced disappearance as a crime under international law: A neglected origin in the laws of war", in *Yale Journal of International Law*, 35, 2010.

⁷⁴SERNÍN RODRÍGUEZ, C.A., "La evolución del crimen de lesa humanidad en el derecho penal

None of these two moments of assessment reserves a foregone conclusion: firstly, as has already been said, the forced disappearance of people has not always been considered in the category of conduct constituting crimes against humanity. On the contrary, in the interamerican sphere it was defined and prohibited by the 1994 Convention, while in international criminal law it has been expressed even more recently, in the Rome Statute. Although there is no doubt that the conduct constituting the crime of forced disappearance of persons was illicit even at the time of the facts in question, its configuration as a crime against humanity at that time had not yet crystallized with a level of sufficient certainty and certainty. Furthermore, as Judge Fayt points out in his vote in dissidence in the *Simón* judgment (recital 38). On the other hand, affirming, as the Supreme Courts frequently do, that this Convention constitutes a mere crystallization of a discipline that was already forming part of the corpus of international custom, clashes with all the difficulties of ascertaining the content and operation of the source customary above described. Another example of the inadequacy of the double-entry method for exceeding the limitation period is illustrated by the Chilean Supreme Court's ruling in the *Vásquez Martínez Y Superby Jeldres* case⁷⁵ in relation no longer to the crime of forced disappearance but to that of homicide. After reiterating that according to Chilean doctrine and jurisprudence international law, both written and customary, enjoys primacy over the internal law, the Court juxtaposes the typification of the facts as a constitutive homicide of international crime and that as a common murder⁷⁶. On the basis of this double subsumption, the Court upheld the appeal in cassation, declaring, contrary to what the tribunal had done, the imprescriptibility of the facts being judged on the basis of a logical double pass: qualifying them as international crimes and applying as a consequence, the rule of imprescriptibility established by the 1968 Convention.

This reasoning reveals a problematic knot: as Judge Ballesteros recalls in his vote in dissidence, the Chilean State is not part of the 1968 Convention⁷⁷, and can not therefore recognize its direct vigor in the internal legal system. The predictable response of the majority of the Court to this objection is that this Convention is merely codifying a customary international norm which, as such, also binds States, such as Chile, that do not have the corresponding Convention. Then reappear that interpretative path that resorts to international custom as a direct source of criminal offense and discipline, with all the reservations and criticalities that we have previously highlighted.

Furthermore, the concrete argument made by the Chilean Supreme Court to justify the typification of the facts as international crimes seems to apply jointly, almost confusingly, the categories of crimes against humanity and war crimes⁷⁸. In fact, in the initial steps of the sentence, the judicial body is concerned with proving that the facts that were the subject of judgment were committed in the context of an internal armed conflict⁷⁹.

From this description we can see the applicability of the 1968 Convention and the customary norm which, in the opinion of the Court, this instrument has intended

internacional", in *Boletín Mexicano de Derecho Comparado*, 47, 2017, pp. 210ss.

⁷⁵Corte Suprema de Chile, Sala Penal, Caso Molco, op. cit.

⁷⁶Corte Suprema de Chile, Sala Penal, Caso Molco, op. cit., considerando 25

⁷⁷Corte Suprema de Chile, Sala Penal, Caso Molco, op. cit., The judge adds that not even the Rome Statute, which provides for a similar rule, was in force at the time of the trial, since the ratification by the Chilean State took place only in 2009.

⁷⁸CASSESE, A., "The nexus requirement for war crimes", in *Journal of International Criminal Justice*, 10, 2012, pp. 1414ss, when he states that: "the armed conflict must also have created the "situation" (...)".

⁷⁹Judge Ballesteros in his dissident vote also contests this statement, arguing that it can not be defined as an armed conflict, on the basis essentially of a decree dictated by the regime itself, the internal situation of the country at the time of the facts: "el D. L. N° 5, de 1973, que erróneamente se invoca de contrario, para tener por acreditado que en la época en que se perpetraron y consumaron los hechos investigados en esta causa el país se encontraba en estado de guerra interna, realmente se dictó para los efectos de aplicar una penalidad más drástica, (...) No se ha acreditado que en la época (...)".

to crystallize, only to refer to crimes that are no longer considered war crimes⁸⁰, but rather as crimes against humanity. This internal incongruity, which may be due to simple imprecision, but which in reality risks translating into a "triple subsumption" of the facts, seems to confirm the suspicion that the Court uses the categories of international criminal law purely instrumental to the declaration of imprescriptibility of crimes, being for the indifferent purpose that typing refers to one or the other of these categories.

10. AN "IMPROPER" USE OF THE DOUBLE SUBSUMPTION: THE FUJIMORI CASE

At the margin of the double-subsumption method or, if you wish, as an example of its "improper" use, then the ruling of the Supreme Court of Peru in *Fujimori* case is placed. The judges of the Court, in typing the facts objects of judgment, opt for a solution so to speak cumulative: the subsumption in this case of aggravated seizure, aggravated murder and serious injury, under the Peruvian penal code, is in fact accompanied by the qualification of the offenses committed in the *Barrios Altos* and *La Cantuta* cases as "crimes against humanity in accordance with international criminal law"⁸¹. In the Court's opinion, in fact, the crimes committed in the cases *Barrios Altos* and *La Cantuta* "transcend the strictly individual or common sphere", since they present the requirements proper to crimes against humanity: it is stated that they formed part of a "state policy" selective but systematic elimination of alleged members of the subversive groups", designed and controlled by the highest spheres of the state, which hit a considerable number of defenseless people of the civilian population⁸².

This qualification does not imply any consequence on the sanctioning plan, nor on the legal regime applied to the facts being judged: the determination of the penalty, in fact, takes into consideration the edictal frames provided by the Peruvian penal code for the common crimes of murder, injury and seizure, in addition to the special aggravating circumstances mentioned above, without any reference being made to the category of international crimes during the commissurative period. The subsumption of the conduct in this type of international crimes would have otherwise clashed with the absence in the Peruvian order, at the time of the facts, of a corresponding incriminating case.

But the underlying reason behind this peculiar interpretative solution is to a large extent connected to the specific procedural events that led to the Supreme Court ruling: in particular, it was imposed by the limits connected to the extradition procedure. The principle of double indictment, in fact, prevented the Peruvian Court from subsuming the facts in the category of crimes against humanity, since Chile, an estranging country, did not contemplate them in its own legal system. The typification of the facts as common crimes can therefore be considered a sort of forced choice, which the Peruvian Supreme Court seems to have somehow wanted to compensate by the declaration that it deals with crimes against humanity.

It is clear that the arguments underlying the typification of facts in the *Fujimori* case do not fully correspond to the double-subsumption method that we have analyzed above: the declaration that the facts are classifiable as crimes against humanity is devoid of practical consequences on the commissural level and on temporal discipline⁸³, and is characterized by a purely symbolic value, aimed at

⁸⁰Constitutional Court of Colombia, sentencia T-689/14 of 7 February 2013: "(...) una infracción al derecho internacional humanitario (DIH) aplicable a los conflictos armados internos, un crimen de guerra y de lesa humanidad, y un delito en algunas legislaciones nacionales (...)".

⁸¹MICUS, A., *The inter-American human rights system as a safeguard for justice in national transitions*, ed. Brill & The Nijhoff Publishers, Leiden, Boston, 2015, pp. 175ss.

⁸²Supreme Court of Peru Sala Penal Especial, *Fujimori Fujimori*, Alberto, 07.04.2009, exp. n° A.V. 19-2001.

⁸³GONZÁLEZ TAPIA, M.I., *Determinación del tiempo de comisión del delito*, ed. Comares, 25

underlining the extreme gravity of crimes and their insertion within a peculiar context of systematic and massive violence⁸⁴.

To seize in the sentence of condemnation against *Fujimori* an applicative hypothesis of the double subsumption method necessarily implies a conception of this method which is broader than that which has prevailed so far in the jurisprudence of the Latin American courts: the judges resort to the international criminal types in this case not as a vehicle to guarantee the attribution of the connected regime of exception, but as a key to a declaration with a mere descriptive and symbolic value.

11.FORCED DISAPPEARANCES AS A PERMANENT CRIME

To overcome the temporal limits to criminal persecution with reference, in particular, to the crime of enforced disappearance, the South American jurisprudence has elaborated a further and different argumentative path, which relies on the permanent nature of the crime. The peculiarities that mark the discipline of the permanent crime-whose distinctive feature, as is known, is the maintenance over time of the anti-juridical situation created by the illicit conduct, by the will of the active subject-entail significant consequences both for the possibility of applying retroactively a penal law occurred while the illicit situation was still in progress, both for setting the starting point for the limitation period: two profiles that appear to be connected but which do not necessarily coincide in the treatment that the criminal system assigns to them⁸⁵. The identification of the *tempus commissi delicti* then reverberates on the discipline of the prescription, marking the beginning of its course⁸⁶. Also with regard to this profile, permanent crimes are characterized by the placing of the *dies a quo* when the anti-juridical situation ceases, unlike what is generally foreseen. The peculiarities of the permanent crime obviously offer advantages that are anything but negligible to the criminal persecution of state crimes that the South American courts are undertaking today, since they allow both the, and also expressly acknowledged by the legislative provisions of various criminal codes, the *tempus commissi delicti* for permanent crimes it coincides not with the beginning of the conduct that establishes the illicit situation, but with the cessation of the maintenance of the same. Precisely at that moment, there is the need to determine the applicable penal law, with the consequence that the application of a criminal law that is not in force at the time of commencement but occurred during the stay, even if such a solution, would be legitimate; as we will see applying a norm that has come about during the maintenance of the anti-juridical situation-for example a law that typifies forced disappearance as a crime against humanity- and to circumvent the obstacle of the prescribed procedure. Asserting that the forced disappearance is a permanent crime and that, given that usually the person illegally seized and illegally has no news to date, his commission still continues, in fact, it is concluded that the starting point of the prescription has not yet begun effect.

The recognition of the permanent nature of the crime of enforced disappearance, on the other hand, not only reflects the phenomenological manifestation of the offending conduct, but also finds confirmation in the inter-American system. Based on what is established by art. 3 of the ACFDP, in fact, the IACtHR has affirmed in several judgments that the crime should be considered as "continuous or permanent as long as the fate of the victim and the place in which he

Granada, 2002, pp. 302-305.

⁸⁴SÁNCHEZ RODRÍGUEZ, L.J., CHINCHÓN ÁLVAREZ, J., "Algunas consideraciones jurídico-internacionales acerca de la sentencia de la sala Especial de la Corte Suprema de la República del Perú contra Alberto Kenya Fujimori Fujimori", in *Revista de Estudios Jurídicos*, 10, 2010, pp. 16ss.

⁸⁵GIL GIL, A., "La aplicación de la ley penal en el tiempo", in GIL GIL, A., LACRUZ LÓPEZ, J.M., MELENDO PARDOS, M., NUÑEZ FERNÁNDEZ, J., *Curso de derecho penal. Parte general*, ed. Dykinson S.L., Madrid, 2011, pp. 56-59ss.

⁸⁶GONZÁLEZ TAPIA, M.I., *La prescripción en el derecho penal*, ed. Dykinson S.L., Madrid, 2003, pp. 146ss.

is not defined"⁸⁷. Consequently, as the Court itself has pointed out, the limitation period does not start to run until there is uncertainty about the fate of the victim. These statements of the IACtHR seem to be based on the erroneous assumption that the concepts of "continuous" and "permanent" crime are equivalent, disavowing instead that, while the former is a "legal fiction"⁸⁸ that considers in unitary terms a plurality of behaviors linked by a particular constraint - in the Italian legal system described as the "same criminal design", the permanent crime is not characterized by any particularity in the typical consumption, simply the consummation lasts for a certain time.

The interpretation proposed in the Inter-American system has been captured and developed by the jurisprudence of the national courts. The Tribunal Constitucional of Peru, for example, followed this interpretative option in two well-known cases related to forced disappearances committed in the context of the violent confrontation between Sendero Luminoso and the Armed Forces and paramilitary forces during the *Fujimori* presidency⁸⁹. The attribution to the forced disappearance of the nature of a permanent crime is used, in both cases, as a vehicle to legitimize the retroactive application of the norm that typifies this crime⁹⁰.

In similar terms, the same ruling body is expressed in the ruling *Vera Navarrete*⁹¹, citing, however, expressly: "(...) Esto quiere decir que entre el 7 de mayo y el 1 de julio de 1992 no existió, taxativamente, en el Código Penal la figura típica correspondiente a la desaparición forzada de personas (...) the valorization of the permanent nature of the crime of enforced disappearance is therefore used by the Latin American jurisprudence⁹². As an interpretative key to broaden the scope of application of this case to facts whose commission began before the entry into force of the corresponding standard. The partial derogation from the principle of criminal non-retroactivity and the consequent extension in the temporal plan of the penal type in question are reached here by not applying international rules, but on the basis that the national laws reserve for a specific class of crimes.

We see that some judgments then resort to similar reasoning but prefer the subsumption of facts in the common crime of illegitimate deprivation of liberty (or illegitimate detention), which shares with the forced disappearance the nature of a permanent crime. A paradigmatic example in this sense is offered by the ruling of the Bolivian Constitutional Court in the *Trujillo Oroza* case⁹³, which cancels with a postponement a sentence declaring the extinction of the offense by prescribing the permanent nature of the crime of illegitimate deprivation of liberty in which the facts were subsumed⁹⁴. The court concludes that the commission of the crime has not yet ceased and that for this reason the statute of limitations has not started to run. This

⁸⁷IACtHR, Velásquez Rodríguez, op. cit., par. 155; Bámaca Velásquez, op. cit., par. 128.

⁸⁸MUÑOZ CONDE, F., GARCÍA ARÁN, M., *Derecho penal. Parte General*, Editorial Tirant lo Blanch, Valencia, 2010 (8ª ed.), pp. 472ss.

⁸⁹MACULAN, E., "La respuesta a las graves violaciones de derechos humanos entre derecho penal e internacional. Observaciones sobre el caso Fujimori", in *Revista Electrónica de Ciencia Penal y Criminología*, 14 (5), 2012.

⁹⁰In the same spirit and from the same Tribunal see the next case: exp. N.02071-2009 PHC/TC Ayacyczo edgar Armando Acevedo López of 7 April 2015.

⁹¹Peruvian Constitutional Tribunal, *Vera Navarrete*, Gabriel Orlando, recurso extraordinario de hábeas corpus, Exp. n. 2798-2004-HC/TC, 09.12.2004.

⁹²Colombian Constitutional Tribunal, C-580/2002 del 31.07.2002, Control De Constitucionalidad De Tratado Internacional y Ley Aprobatoria de la Convención Interamericana Sobre Desaparicion Forzada De Personas, sub art. 3; Sala Penal Nacional peruana, Ernesto Castillo Páez, op. cit., (par. "Situación o contexto de la desaparición forzada de personas en el Perú"); Suprema Corte de Justicia de la Nación mexicana, Tribunal Pleno, Controversia Constitucional 33/2004, 29.06.2004.

⁹³Tribunal Constitucional boliviano, sentencia constitucional N° 1190/01-R sobre recurso de amparo constitucional, *Trujillo Oroza*, 12.11.2001, Exp.te 2001-03164-07-RAC.

⁹⁴Tribunal Constitucional boliviano, sentencia constitucional N° 1190/01-R sobre recurso de amparo constitucional, *Trujillo Oroza*, 12.11.2001, Exp.te 2001-03164-07-RAC.

solution is even more firmly anchored to the internal penal system, and presents even greater advantages than the qualification of the facts as forced disappearance of people: on the one hand, in fact, enhancing the permanent nature of the crime, allows to achieve the result of excluding the limitation period has lapsed, and on the other, it does not entail the controversial retroactive application of an unfavorable penal provision that has occurred-the rule that typifies forced disappearance-because the conduct in a common situation already contemplated in national law at the time of events⁹⁵.

A similar interpretative path, but this time aimed at excluding the application of amnesty provisions, is undertaken by a Chilean Court of Appeals, and subsequently confirmed by the Supreme Court, in relation to the case of *Miguel Ángel Sandoval*. The Court of Appeal, confirming the convictions handed down by the judge of the first instance, subsumes the conduct attributed to the defendants in the seizure of the crime pursuant to art. 141 of Chilean p.c., exacerbated by the prolongation of the action-well-over 90 days and the serious consequences of the action. The specific judicial body that, due to the permanent nature of the seizure offense, does not apply the amnesty law, reserved for its express provision, to the crimes consumed in the period between 11 September 1973-date of Pinochet's coup-and March 10, 1978⁹⁶. The permanent nature of the common seizure crime is therefore asserted, in this case, not only and not so much to justify the non-prescription period, but rather to base the inapplicability of the amnesty law. The latter, expressly providing for an initial and final term of applicability of the benefit, would not in fact be applicable to facts - such as the forced disappearance of *Sandoval Rodríguez*, whose consumption had not yet ceased at that final deadline. In developing this argument, which is logical and consequential in itself, the Court of Appeal incurs two interpretative errors: first, it replaces the detention, which constitutes the anti-juridical situation whose permanence should demonstrate, with the disappearance, understood as a lack information on the illegally detained victim. Secondly, the judicial body mixes, so to speak, the case of seizure, in which the conduct actually subsumes, and the crime of enforced disappearance which, according to his words, "corresponds" to the first. Citing the main international and inter-American instruments that foresee and regulate the forced disappearance, the Court proposes a description, and specifies that it is applied in the Chilean system, even in the absence of its expressed typification, by virtue of the principle of pre-eminence of the treaties. international systems in the internal system⁹⁷. The text of the sentence does not clearly show in what terms the judging body conceives this "correspondence" between the two crimes - even if at a certain point it is stated that "the norm of art. 141 p.c. includes, as a consecuencia del secuestro, the desaparición forzada de personas"⁹⁸-, especially as at no time the existence of the facts in the single case of aggravated seizure is denied. This incongruity does not escape the defenders of the defendants, who, in

⁹⁵Corte de Apelaciones de Santiago (Chile), 5° sala, Miguel Ángel Sandoval, recurso de casación en la forma y de apelación presentado por Laureani Maturana y Krassnoff Marchenko, 05.01.2004.

⁹⁶Miguel Ángel Sandoval Rodríguez, militant in MIR (Movimiento de Izquierda Revolucionaria) was kidnapped by a military commando on 7 January 1975, and detained in the clandestine center "Villa Grimaldi", in which he was tortured and allegedly killed. To date it has disappeared. For his disappearance the former head of the secret services (DINA) General Manuel Contreras Sepúlveda, the former head of the clandestine center of Villa Grimaldi Colonel Marcelo Moren Brito, and other four members of the DINA dome were charged. All were convicted at first instance, as authors and accomplices of the kidnapping and disappearance of the victim, imprisonment from 5 to 15 years. Corte de Apelaciones de Santiago (Chile), 5° sala, Miguel Ángel Sandoval, recurso de casación en la forma y de apelación presentado por Laureani Maturana y Krassnoff Marchenko, 05.01.2004.

⁹⁷IACtHR: Velásquez-Rodríguez and Godínez Cruz, op. cit., considerando 45-57.

⁹⁸Corte de Apelaciones de Santiago (Chile), 5° sala, Miguel Ángel Sandoval, recurso de casación en la forma y de apelación presentado por Laureani Maturana y Krassnoff Marchenko, 05.01.2004, considerando 58.

their appeal before the Supreme Court⁹⁹, contest the application of the penal type of forced disappearance, in the light of the absence of its express typing and a corresponding request by the prosecution or defense¹⁰⁰-and therefore *ultra petita*-, noting that it is based on international treaties not incorporated and not in force in the Chilean system.

However, the Supreme Court rejects these grounds of appeal, considering that the Convention on Forced Disappearance and other international instruments have been invoked by the referring court only "for illustrative purposes", without this contradicting the subsumption of conduct in the case referred to in art. 141 Chilean p.c.¹⁰¹.

The judicial bodies involved do not question the validity of the amnesty provision per se, but they deny it. The Court of Appeal erroneously tried to present the seizure crime as "equivalent" to that of enforced disappearance, "with the sole purpose of denying the applicability of the amnesty and of the prescription" simply the applicability to offenses of a nature permanent, such as enforced disappearance and/or sequestration, whose consumption is maintained until the present time. In other words, the judges, even without expressly annulling the choice of the legislator, proceed essentially to "empty from the inside"¹⁰² the amnesty provision.

The interpretive path described above, which relies on the permanent nature of the crime of forced disappearance of people in order to overcome the obstacle of the prescription and the principle of non-retroactivity, appears preferable compared to the different mechanisms examined above, since it does not involve a surreptitious modification of the system of regulatory sources, nor does it compromise the principles of legal reserve, taxability and the determination of the criminal law. In relation to the consequences that the permanent nature of the crime carries out on the succession of laws over time, to admit the application of a norm occurred after the conduct, but during the maintenance of the anti-juridical situation, may produce detrimental consequences for the offender when the norm occurred to him unfavorable¹⁰³. Precisely on the basis of this consideration, a doctrinal orientation, which still today can be called minority-even if in our opinion shared -, proposes to identify the *tempus commissi delicti* in the moment of the beginning of the execution. In other words, the consummation of the crime would be instantaneous, like the generality of the crimes, and what goes on in time would be only the effects of that consummation, the anti-juridical situation that it caused.

But the problem now reported is intertwined with the typical structure of forced disappearance¹⁰⁴ as a crime-not only permanent, but also-complex, consisting of illegitimate detention as the first active conduct, and the refusal to provide information as a subsequent omissive conduct. The peculiarity that characterizes the discipline of the complex crime is that with respect to it a supervised penal law is applicable, as they have been able to clarify both the Spanish Supreme Tribunal and

⁹⁹Corte Suprema cilena, II Sala, Miguel Ángel Sandoval, rol 517-2004, 17.11.2004.

¹⁰⁰(...) se ha hecho referencia a la Convención sobre Desaparición Forzada de Personas, lo cual es desarrollado en forma amplia, argumentada (...), aplicándose de esta manera no sólo una legislación inexistente en Chile, sino que se le imputa intencionalmente la comisión de un delito que no fue materia de la acusación y de la defensa" (considerando II).

¹⁰¹Considerando V e XVIII.

¹⁰²Considerando XVI.

¹⁰³GUZMÁN, N., "El neopunitivismo en la jurisprudencia de la Corte Suprema De Justicia De La Nación y de la Corte Interamericana De Derechos Humanos: un pronóstico incierto para el ne bis in idem y la cosa juzgada", in PASTOR D., (dir.), *Neopunitivismo y neoinquisición. Un análisis de políticas y prácticas penales violatorias de los derechos fundamentales del imputado*, op. cit., pp. 203-251.

¹⁰⁴MACULAN, E., "La desaparición forzada de personas en el continente latinoamericano: en búsqueda de una definición del concepto jurídico", in REQUENA M., (ed.), *La seguridad y la defensa en el actual marco socio-económico: nuevas estrategias frente a nuevas amenazas*, ed. Marcial Pons, Madrid, 2011, pp. 375-400.

the European Court of Human Rights (ECtHR)¹⁰⁵, only where the conduct committed after its entry into force is sufficient in itself to reflect the negative value of the event¹⁰⁶.

The interpreters are therefore faced with a crossroads: they try to show that illegitimate detention, the result of the first active conduct that makes up the crime, remains even after the new law has come into force, or concentrate the negative value of the fact in the conduct omissive consisting in not providing information on the person illegally detained, which actually continues to be committed even after that time. To this must be added, with specific reference to enforced disappearance, that the retroactive application of this case is in any case possible only in those systems which, in the time between the commission of facts and the celebration of the trial, have provided to crime. In the first hypothesis, to legitimize the application of a penal norm that occurred during the maintenance of the anti-juridical situation, it would be rigorous to prove that, when this new law enters into force, the offended person is still in a state of detention¹⁰⁷.

This presumption is contradicted by what happened in most of the cases recorded as forced disappearances, which usually resulted in the killing of the victim followed by the concealment of his body. It is therefore a presumption that does not correspond to the *id quod plerumque accidit*, and that does not even find justification in the principle of favor, since it determines the application of a criminal offense normally punished with a more severe penalty and subject to a discipline definitely more rigorous. On the other hand, taking into consideration the death of the victim-normal outcome of the unlawful conduct-clashes with the obvious difficulties of ascertainment and timing of this event, which occurred at an unspecified time during illegitimate detention and absolute secrecy. The enforced disappearance thus conceived would become a crime of suspicion (of homicide)¹⁰⁸ aggravated by illegal detention¹⁰⁹. Secondly, the death of the victim determines the disappearance of the passive subject of the crime: from that moment on, it is no longer possible to state that personal freedom and the legal personality of the missing victim are being violated. The question is linked to the problematic profile of the identification of legal assets protected by the law that incriminates the forced disappearance: if you consider that the sole holder of such interests-personal liberty, physical integrity, access to an effective remedy, to the life-both the missing person, it must be accepted that with the death of the latter ceases also the violation of such interests and therefore the unlawful conduct sanctioned by that specific norm.

The only alternative compatible with the solution of the permanence of the crime presupposes, in our opinion, the recognition of the ownership of the protected interests also for the victim's family members. In other words, the legal good that the case intends to protect would be the right of access to an effective remedy not only for the person subjected to illegal detention, but also for his family members, bearers of an interest, worthy of protection, to be informed on the circumstances of the disappearance and the probable death of the loved one¹¹⁰. This extension of the passive subjects of the crime seems inevitable if we want to maintain the permanent character of forced disappearance without incurring internal contradictions, even if it is clear that this would have repercussions, *inter alia*, on the ownership of the right

¹⁰⁵ECtHR: Ecer and Zeyreck v. Turkey, 27.02.2001, par. 33. RAINEY, B., WICKS, E., OVEY, C., Jacobs, White and Ovey: *The European Convention on Human Rights*, Oxford University Press, Oxford, 2017.

¹⁰⁶Constitutional Court of Peru, exp. 0901-2003-PHC/TC, 19.08.2010.

¹⁰⁷IACtHR: Castillo Páez v. Peru, sentencia de fondo, 3.11.1997, par. 90.

¹⁰⁸GUZMÁN DALBORA, J.L., "El principio de legalidad penal en la jurisprudencia de la Corte Interamericana De Derechos Humanos", in AMBOS, A., MALARINO, E., ELSNER G., (eds.), *Sistema interamericano de protección de los derechos humanos y derecho penal internacional*, Konrad Adenaur Stiftung, 2010, pp. 190ss.

¹⁰⁹TS spagnolo, Sala de lo Penal, Sección I, sentence 4918/1990 of 25.06.1990, nominated also as: "caso el Nani", fundamento de derecho 1º, punto 2.b e fundamento de derecho 3º).

¹¹⁰GALAIN, P., Uruguay, in AMBOS K., (coord.), *Desaparición forzada de personas*, op. cit., pp. 148ss.

to reparation.

These problematic implications and the probative difficulties mentioned above have therefore induced part of the jurisprudence to concentrate the negative value of the fact in the only omission conduct that makes up the crime of enforced disappearance, with the consequence that the consummation coincides with the first moment in which it is omitted or absent refuses to give news about the victim. However, even this different solution lends itself to critical criticism. First of all, it seems frankly doubtful that the omissive conduct concretized in not providing information on the person illegally detained is in itself sufficient to reflect the specific disvalue of forced disappearance and to justify the corresponding sanctioning treatment. The second problematic node of this interpretation consists in its incompatibility with the principle of guilt and with the constitutionally guaranteed right not to self-incriminate. If one accepts the reading of the IACtHR, according to which the crime remains until the fate of the victim is clarified and the place in which he finds himself, in fact, the cessation of consummation depends on a random event, independent of the voluntary domination of the active subject on the fact, thereby incurring a violation of the principle of guilt. At the same time, there is a mistaken error-to tell the truth rather frequent in the field of international criminal law-of confusing the obligation of the State to investigate disappearances and to provide the corresponding information to the persons concerned, and the responsibility of international nature¹¹¹ that derives from the non-fulfillment of this obligation, with the individual criminal responsibility attributable to the individual subjects for the violation of a duty imposed on them¹¹². But this conversion of a state obligation into a duty of the individual, namely the accused, is even more serious because it involves the violation of the right not to self-incriminate that many Constitutions count among fundamental rights. This right would inevitably be injured by the imposition of an obligation, extended to all citizens, to give information on an illegal conduct or situation, even when they have participated in it.

The classification of enforced disappearance as a permanent offense-and the same considerations also apply to the subsumption of facts in the common cases of seizure or illegitimate deprivation of liberty as exemplified-opens therefore a range of questions and doubts difficult to solve. It is therefore not surprising that some authors propose to classify the enforced disappearance of persons not as a permanent crime, but as an instant crime, which is consummated with the first offense of the duty to inform; the permanence of the legal situation would instead be irrelevant for the purpose of consummation. This interpretation, which defines it as an instant crime with permanent effects¹¹³, seems preferable, in light of the above considerations, with respect to the dominant one. Naturally, the "price" to be paid for a free classification of internal contradictions is the loss of the applicative advantages that the permanent crime offers with respect to the ordinary discipline of prescription and non-retroactivity.

¹¹¹LIAKOPOULOS, D., "Die Hybridität des Verfahrens der Internationalen ad hoc Strafgerichtshöfe und die Bezugnahme auf innerstaatliches Recht in der Rechtsprechung", in *International and European Union legal Matters*, 2012. TURAN, G., "Responsibility to prosecute in an age of global governamentality: The International Criminal Court", in *Cooperation and Conflict*, 50, 2015. ODRIÓZOLA GURRUTZAGA, M., "Responsabilidad penal por crímenes internacionales y coautoría medita", in *Revista Electrónica de Ciencia Penal y Criminología*, 17, 2015, pp. 7ss. JAIN, N., *Perpetrators and accessories in international criminal law. Individual modes of responsibility for collective crimes*, Hart Publishing, Oxford and Portland, Oregon, 2014. GOY, B., "Individual criminal responsibility before the International Criminal Court: A comparison with the ad hoc Tribunals", in *International Criminal Law Review*, 12, 2012, pp. 5ss. AZZOLINI BIANCAZ, A., "La construcción de la responsabilidad construcción de la responsabilidad penal individual en el ámbito internacional", in *Alegatos Revista*, 20, 2018.

¹¹²ESTUPIÑAN SILVA, R., "Principios que rigen la responsabilidad internacional penal por crímenes internacionales", in *Anuario Mexicano de Derecho Internacional*, 2012, pp. 136ss.

¹¹³VÉLEZ FERNÁNDEZ, G.F., *La desaparición forzada de personas y su tipificación en el Código penal peruano*, ed. PCP, Lima, 2004, pp. 134ss.

12. THE SUSPENSION OF THE LIMITATION PERIOD DURING THE DE FACTO GOVERNMENT

Finally, to overcome the specific problem of the prescription, some Latin American tribunals have elaborated a different and original interpretative proposal, which does not directly affect the content and the scope of the international criminal types, and which in fact ignores the subsumption of the facts in this category. The assumption from which this argumentative path moves is the state of exception in which the facts subject to judgment are placed: the dictatorial regimes on whose background-or rather by which-the crimes were perpetrated were in fact connoted by the suspension, *de jure or de facto*, of a whole series of guarantees, and the impossibility, normative and/or factual, to exercise the criminal action against the perpetrators of the violations according to the ordinary ways. As long as this general suspension of the rule of law continued, it is stated that the limitation periods, designed and governed by the normal functioning of the judicial system, were not enforced. It would be absolutely contrary to the constitutional principles to admit the application of the prescription according to ordinary terms when the criminal persecution was in reality impossible due to the existence of an authoritarian regime which is also responsible for the offenses. A detailed argument to support this interpretation can be found in the aforementioned sentence condemning the former Uruguayan dictator Bordaberry, even if it refers, in practice, to the crime of attack on the Constitution, and not to an international crime. In rejecting the statute of limitations raised by the defense, the District Court of Montevideo¹¹⁴.

The Uruguayan court, in the absence of a precise reference, in the penal code, to the possibility of suspending the prescription in a situation of exceptionality, finds a normative support in the discipline of the prescription contained in the civil code, which expressly provides the hypothesis of "just cause". The statute of limitations would therefore start not after the commission of the crime, but rather from the recovery of a situation of democratic normality in which state institutions and in particular the judicial bodies are not subject to illegitimate impediments. We find then a trace of this interpretation, as well as in the note and discussed lawsuit opened by the Spanish judge Baltasar Garzón for the crimes of Francoism¹¹⁵, also in a recent sentence of the Peruvian Constitutional Tribunal, which originates in an appeal for *habeas corpus* presented by the convicted facts occurred on the occasion of the so-called *matanza de Accomarca*¹¹⁶.

On this occasion the constitutional judge confirms the existence of the facts in the crime of arson (*asesinato*) taken by the national court, as well as his statement that "por las circunstancias que lo rodean, no se le puede negar la condición de violación a los derechos humanos, y por ende, resulta aplicable el criterio de imprescriptibilidad". In short, the Constitutional Tribunal adheres to the interpretation that these are imprescriptible crimes because they constitute international crimes; however, this reading is accompanied by another, apparently considering it as an alternative with the same value ("cualquiera que sea la opción"; "interpretative que se tome", fundamento 19). In this second interpretation he invokes the suspension of the prescription period during the validity of the amnesty laws issued by the Fujimori government, which prevented the prosecution of the penal action according to the ordinary criteria. The Constitutional Tribunal concludes that the statute of limitations began only after the annulment of the partial judgment held in the military forum, following the declaration of unconstitutionality of amnesty laws in 2002¹¹⁷. While the Uruguayan court of first instance, in the Bordaberry ruling above, fixes the

¹¹⁴DAVIS, J., *Seeking human rights justice in Latin America: Truth, extra-territorial courts and the process of justice*, Cambridge University Press, Cambridge, 2013.

¹¹⁵Juzgado Central de Instrucción nº 5, Audiencia Nacional de Madrid, Diligencias Previas Proc. Abreviado 399/2006 V, Auto of 16.10.2008.

¹¹⁶Tribunal Constitucional peruano, Contreras Roberto, exp. N. 00218-2009-PHC/TC, 11.11.2010.

¹¹⁷Tribunal Constitucional peruano, Contreras Roberto, exp. N. 00218-2009-PHC/TC, 11.11.2010, fundamento 19.

starting point of the prescription, generically, in the restoration of the democratic regime, the Peruvian Constitutional Tribunal values a moment more closely connected to the concrete case of judgment, that is to say the annulment of the trial held before the military forum for those same facts. Beyond this-although important-divergence, the two judgments cited move in the same direction: without recalling supranational normative sources, and without claiming to affirm the international criminal nature of the offenses ascribed to the defendants, they reach the elimination of obstacle imposed by the rules on limitation by means of an interpretation based exclusively on the legitimacy of national law.

The solution thus reached seems to be undoubtedly preferable compared to a reading that retroactively applies international standards sometimes not even written¹¹⁸; however, its validity is subordinated to the verification of the actual existence of a provision, in the national legal system, which foresees a similar cause of suspension of the prescription, in the penal system or in the constitutional dictate. It does not fully convince the normative support put forward by the Uruguayan court, which refers to a rule valid for civil law, but not for the different institution of the criminal prescription. Beyond this emphasis, this argumentative path undoubtedly poses fewer problems of compatibility with the constitutional principles in criminal matters, and in any case allows to circumvent the obstacles that the long period of time elapsed by the commission of crimes poses with respect to their persecution and sanction. Naturally, the other limitations that ordinary criminal law fixes-amnesty, indults, *ne bis in idem*-and with which the response to the crimes of the past dictatorial regimes has to deal with in this hypothesis remain unaffected.

13. PLAN OF THE TYPICAL STRUCTURE: THE EXTENSION OF THE SCOPE OF INTERNATIONAL CRIMINAL TYPES

The Latin American jurisprudence has revealed its tendency to widen the scope of international criminal types not only in the temporal dimension, but also with reference to the typical structure of the cases. This expansive movement takes two different forms: on the one hand, it is expressed in the broad interpretation that the courts adopt, in the context of a criminal trial, of the constituent elements of international crimes, particularly of their contextual element. On the other, it manifests itself in the control of the constitutionality of those internal norms that characterize international crimes by introducing new elements, not provided for by the corresponding international definition, which are suitable to restrict the application field of the case.

These are two forms of judicial activity that are obviously different in terms of their modality, object and scope, and which also presuppose a different relationship with the national legislative power. The first tendency, in fact, is maintained on a strictly interpretative level, without affecting the literal dictates of the norm but grasping and enhancing the expansive potentials allowed, perhaps even more than the ordinary incriminating norms, with a vague and evanescent character of the international definitions of crimes. This type of interpretation, which may go as far as the manipulation of the typical structure, is perfectly compatible both with cases in which the legislator has proceeded to classify international crimes in the internal order, in accordance with the definition and the indications provided at the level. international, both with the opposite situation of absolute-or late-legislative inactivity, and with the consequent direct application-in the different forms that we have examined above-the conventional or customary international norms.

The second tendency, which manifests itself in the control of constitutional legitimacy, presupposes a legislative intervention that has chosen to characterize one

¹¹⁸According to PASTOR, "(...) es cuestionable... el hecho de que se ha generalizado una imprescriptibilidad absoluta donde hubiera correspondido establecer nada más que una suspensión de la prescripción mientras la persecución de los hechos estuviera obstruida por el poder real de los autores o sus cómplices". PASTOR, D., *La imprescriptibilidad de los crímenes internacionales en conexión con el fenómeno del terrorismo*, op. cit., pp. 648ss.

or more international crimes by introducing some new and additional elements with respect to the international definition, in the exercise of the margin of appreciation that the International Conventions and Treaties on the subject-including the Rome Statute-grant the States. These elements can produce a restriction on the scope of application of the incriminating rule: this can occur, for example, by providing a minimum threshold for pipelines, or by limiting the range of possible active subjects to a specific category of persons. In this second case, therefore, in the "dialogue" between the norm and the international jurisprudence, on the one hand, and the national jurisprudence, on the other, a third subject is inserted, the legislator, who in turn offers a definition of the type criminal law, departing from the internationally valid one and then colliding with the constitutional legitimacy judgment.

The two interpretive tendencies now outlined also place themselves in a different relationship with the international norm that defines crimes: while the extensive interpretation of the typical elements operated by the criminal tribunals aims to further widen the boundaries, the control of constitutionality in the forms described above implies only a re-expansion of the penal type restricted to internal typing and the recovery of correspondence with the international definition.

In both cases, however, like what has already been noted with reference to the widening of the case in the temporal plan, the motivation underlying this type of interpretative operations is to arrive, through the application of the facts in the international penal types, to the application of the regime special character that characterizes them, and the consequent overcoming of obstacles of a temporal, jurisdictional or beneficiary nature.

Besides this reason of eminently practical nature, however, a different motivation also makes its way into the background, which is not directed towards the production of concrete effects in terms of sanctions and discipline, but is characterized by a merely communicative or symbolic value, aimed at offer a contribution to the construction of a knowledge and memory of crimes. In this sense, it is a ruling pronounced in appeal by the Regional Mixta de la Corte de Apelaciones de Cobán in relation to the "massacre of the Río Negro"¹¹⁹.

The Guatemalan court, while confirming the subsumption of the facts in the case of multiple homicide, makes an explicit rebuke to the Public Prosecutor and the *querellante* (an association for the protection of human rights), for not proposing the classification of the facts as genocide¹²⁰, what which would have allowed the application of a much more severe sentence. It is noted that the application of the genocide case was absolutely justified in light of the concrete modalities of commission, the type of conduct-murder, serious injury, intentional subjection to conditions of existence aimed at physical destruction, forced transfer of children, the dole of destruction that animated them and of the passive subject-a human group that is identified as ethnic, racial and national at the same time¹²¹. However, in view

¹¹⁹Sala Regional Mixta de la Corte de Apelaciones de Cobán (Alta Verapaz-Guatemala), Sentence 96/2008, proceso 89-2008-Of. 4º- Sala, Macaro Alavarado Toj y otros ("Masacre de Río Negro"), 24.09.2008.

¹²⁰BEHRENS, P., HENNAM, R., *Elements of genocide*, ed. Routledge, London & New York, 2013, pp. 194ss. BEIGBEDER, Y., *International Criminal Tribunals*, ed. Palgrave, London, 2011. SÁNCHEZ REVERTE, R.S., "Referencia al crimen de genocidio aproximación genocide crime", in *Revista de estudios jurídicos*, 16, 2016. KELLY, M.J., "The debate or genocide in Darfur, Sudan", in *University of California, Davis Journal of International Law & Policy*, 19, 2012, pp. 208ss. LINGAAS, C., "Imagined identities: Defining the racial group in the crime of genocide", in *Genocide Studies and Prevention: An International Journal*, 2016, pp. 80ss. MAISSON, E., *Justice pénale internationale*, ed. PUF, Paris, 2017. BETTWY, D.S., "The genocide Convention and unprotected groups: Is the scope of protection expanding under customary international law?", in *Notre Dame Journal of International and Comparative Law*, 2011, pp. 102ss. HALLING, M., "Push the envelope: Watch it bend: Removing the policy requirement and extending crimes against humanity", in *Leiden Journal of International Law*, 23, 2010, pp. 828ss. ROBERTS, C., "On the definition of crimes against humanity and other widespread or systematic human rights violations", in *University of Pennsylvania Journal of Law and Social Change*, 20, 2017, pp. 4ss.

¹²¹FOURNET, C., *The crime of destruction and the law of genocide. Their impact on collective*

of the procedural obligation to limit the appeal judgment to the pleas relied on by the appellants, and since there was no specific request to that effect, this consideration of the Court remains at the mere declaration stage, devoid of correspondence in the actual subsumption of facts¹²². In this case, therefore, the qualification as international crimes-specifically as genocide-is carried out, on a purely declarative or descriptive level, with an openly pedagogical purpose, to give instructions-or at least suggestions-for the future to lower-ranking judges¹²³.

14.THE CONTEXT ELEMENT AS A KEY TO OPENING THE TYPE

To illustrate the first of the two lines of interpretation outlined above, which comes to subsume in international crimes through a broad interpretation of their typical elements, it should be noted that the structural component with respect to which this tendency has most manifested itself is the element of context or chapeau¹²⁴, since it constitutes, as we said, the true *quid pluris* which determines the international character of the crimes and on which therefore the qualification of the facts is played. At the same time, the definition, which gives this element international standards and the national provisions that implement them, is by nature broad and open, and therefore lends itself to extensive interpretations. The courts therefore use the element of context-or rather, the individual components that contribute to form it-as an interpretative justification in order to expand the scope of application of the international criminal type.

A recurring argumentative figure in this sense, especially in the Argentine jurisprudence, is the qualification of the atrocities committed by the dictatorial regimes as genocide, on the basis of a broad interpretation of the concept of "national group" or, alternatively, of "group" religious". In this regard, it should be recalled that the chapeau of genocide, which subordinates the configurability of the case to the presence of an intention to destroy in whole or in part a specific human group, as a specific malice that leads to the realization of the sanctioned criminal conduct, limits the groups protected by racial, ethnic, national and religious groups¹²⁵.

This interpretative path was inaugurated by the Spanish Audiencia Nacional, in the context of a proceeding against 98 Argentine soldiers for crimes committed in the context of the military dictatorship of the 70s¹²⁶. The Court, called upon to rule

memory, Ashgate Publishing, Hampshire, 2007, pp. 99-108. HENCKAERTS, J.M., DOSWALD-BECK, L., *Customary international humanitarian law. Volume I: Rules*, Cambridge University Press, Cambridge, 2009. MERON, T., *The continuing role of custom in the formation of international humanitarian law*, in *American Journal of International Law*, 90, 1996, pp. 238. SHAHABUDEEN, M., "Does the principle of legality stand in the way of progressive development of law?", in *Journal of International Criminal Justice*, 2, 2004, pp. 1007ss. MERON, T., "Revival of customary humanitarian law", in *American Journal of International Law*, 99, 2005, pp. 817ss. For the customary nature of the additional protocols of Convention of Geneva of 1977, see: CASSESE, A., "The Geneva Protocols of 1977 on the humanitarian law of armed conflict and customary international law", in *UCLA Pacific Basin Law Journal*, 3, 1984, pp. 55ss. GREENWOOD, C., Customary law status of the 1997 Additional Protocols, in DELISSEN, A.J.M., TANJA G.J., (a cura di), *Humanitarian law of armed conflict*, Martinus Nijhoff Publishers, The Hague, 1991, pp. 93ss.

¹²²Sala Regional Mixta de la Corte de Apelaciones de Cobán (Alta Verapaz-Guatemala), Sentence 96/2008, proceso 89-2008-Of. 4º- Sala, Macaro Alavarado Toj y otros ("Masacre de Río Negro"), 24.09.2008, fundamento 2.

¹²³BOSLY, H.D., VANDERMEERSCH, D., *Génocide, crimes contre l'humanité et crimes de guerre face à la justice*, ed. Bruylant, Bruxelles, 2012.

¹²⁴SLUITER, G., "Chapeau elements" of crimes against humanity in the jurisprudence of the UN ad hoc Tribunals, in SADAT L.N., (a cura di), *Forging a convention for crimes against humanity*, Cambridge University Press, Cambridge, 2011, pp. 102-141. CHESTERMAN, S., "An altogether different order: Defining the elements of crimes against humanity", in *Duke Journal of Comparative and International Law*, 10, 2000, pp. 316ss.

¹²⁵GIL GIL, A., "El principio de jurisdicción universal en España", in *Revue Internationale de Droit Penal*, 78-79 (1-2), 2008, pp. 125-191.

¹²⁶Audiencia Nacional spagnola, Pleno de la Sala de lo Penal, Auto por el que se considera

on an objection of incompetence made by the defense, justified the jurisdiction of the Spanish court on the basis of the principle of universal jurisdiction pursuant to art. 23.4 LOPJ¹²⁷, which in turn is conditioned by the classification of the facts to be considered as crimes of genocide. Not being able to penetrate even to the smallest extent in the vast and complex issue of universal jurisdiction, which transcends the specific object of this research, we will limit ourselves to pointing out that even in this case the subsumption of facts in the category of international crimes seems preordained to achieve a concrete result: precisely, the possibility of invoking universal jurisdiction, on the basis of the discipline dictated by Spanish legislation. However, the notion of "national group" -and, to a lesser extent, that of "religious group" -has been subjected to an extremely broad interpretation that would allow to include also groups whose unifying trait is, in reality, a determined ideology policy. Keeping in mind the ultimate goal underlying the reasoning of the court, it is interesting to analyze the interpretation that proposes the criminal type of genocide in order to make you fall within the facts being judged.

The Audiencia Nacional argues its conclusion on the basis of a "social conception" of the genocide crime, broader than the legal one¹²⁸, and in particular thanks to an extensive interpretation of the concept of "national group", understood as a differentiated human group, distinguished from something, integrated into a wider community. According to the court, this reading is dictated by the need, warned by the member states of the 1948 Convention, to criminalize genocide and to avoid impunity for this horrific crime of international law. In the specific case of Argentina, the extermination plan implemented by the military dictatorship responded precisely to the desire to destroy a certain sector of the population, a very heterogeneous but differentiated group from the majority, integrated by all those who did not respond to the ideal of a citizen set by the repressors .

The Juzgado Central de Instrucción n. 5 of Madrid¹²⁹, in the person of Judge Garzón, in issuing the decree of indictment in relation to the same case. The victims of the Argentine repression were undoubtedly hit for their political affiliation, but also and above all because because of their orientation they integrated a national group, within the wider Argentine population, which was identified by opposition to the characteristics, he further developed this subject and added another alternative to it. The judge, like what previously stated by the Audiencia Nacional, states that the victims of the Argentine state crime can be considered belonging to a "national group"¹³⁰, in light of an interpretation of this concept that relies not so much on a territorial characteristic, but rather on the existence of a trait that distinguishes it within a larger population. The interpretative solution proposed here is divided into three topics: first, a broad concept of "national/nationality", referring to "stable groups of people of common origin"; second, the admissibility-according to the

competente la Justicia española para perseguir delitos de tortura, genocidio y terrorismo cometidos en Argentina (Rollo de Apelación 84/98-Sección Tercera-Sumario 19/97-Juzgado Central de Instrucción Nº 5), 04.11.1998.

¹²⁷RIOS-FIGUEROA, J., *Constitutional Courts as mediators: Armed conflict, civil-military and the rule of law in Latin America*, Cambridge University Press, Cambridge, 2016, pp. 50ss.

¹²⁸Audiencia Nacional: cfr. Audiencia Nacional spagnola, Pleno de la Sala de lo Penal, Auto por el que se considera competente la Justicia española para perseguir delitos de genocidio, tortura y terrorismo cometidos en Chile (Rollo de Apelación 173/98-Sección Primera-Sumario 1/98, del Juzgado Central de Instrucción Nº 6, 05.11.1998. See the report of the Max Planck Institut Sobre la posibilidad de persecución en Alemania de las violaciones de los derechos humanos cometidos en Sudamérica en los casos argentino y chileno, in *Cuadernos de doctrina jurisprudencial y penal*, n. 8 c, 1999, pp. 441ss. FEIJOO SÁNCHEZ, B., "El genocidio en el Derecho penal español", in *Cuadernos de doctrina y jurisprudencia penal*, 8, 1999, pp. 560ss. GÓMEZ BENÍTEZ, J.M., "El exterminio de grupos políticos en el Derecho penal internacional. Genocidio y crímenes contra la humanidad", in *Revista de Derecho y Proceso Penal*, 4, 2000, pp. 151, 157.

¹²⁹Juzgado Central De Instrucción Nº5 de la Audiencia Nacional de Madrid, giudice Garzón, Auto de procesamiento, sumario 19/97-L, 02.11.1999.

¹³⁰MICHEL, V., *Prosecutorial accountability and victim's rights in Latin America*, Cambridge University Press, Cambridge, 2018, pp. 96ss.

doctrine and the international jurisprudence-of the "self-genocide", that is to say the genocide committed against members of the same population of authors; third, the intrinsically political nature that animates not only the criminal practice of the Argentine dictatorship but also, more generally, any plan aimed at the elimination of a specific human group.

This reading proposal is immediately accompanied by another one, presented as an alternative to achieve the same application solution. According to this vision, the victims of the ferocious Argentine military repression were united by a particular ideology and therefore, on the basis of an equivalence between ideology and religious belief, could be assimilated to a "religious group", as such expressly listed among the groups protected by the norm on genocide: nationalist, conservative, fascist, Catholic fundamentalist and anti-communist¹³¹.

The extensive conception of the notion of national group thus elaborated in the Spanish sphere-in reality later rejected by another judgment of the same Audiencia Nacional as well as by the Supreme Tribunal, which considers it violating the principle of legality as constitutive of *analogia contra reum*-was subsequently implemented by an Argentine court, in the context of the trial against¹³².

The Tribunal Oral Federal of La Plata, in addressing the question of the possible qualification of the facts as genocide, confines itself in reality to reporting almost entirely the motivations of the two previous ones analyzed above. Taking on board the extensive interpretation of the notion of "national group" proposed there¹³³, and also recalling that the 1948 draft of the Convention originally provided for both the political groups and the political opinions of its members among the objects of protection, the Judge arrives at the conclusion that the crimes of the Argentine dictatorship constituted a genocide against a national group, citing in confirmation the words of an Argentine sociologist¹³⁴.

These considerations do not correspond in reality to the actual subsumption of facts: Etchecolatz is in fact convicted of illegal detention, torture and murder, even if it is declared that they were committed "in the context of genocide"¹³⁵.

¹³¹Juzgado Central De Instrucción Nº5 de la Audiencia Nacional de Madrid, giudice Garzón, Auto de procesamiento, op. cit., fundamento II.

¹³²Tribunal Oral Federal en lo Criminal de La Plata, Etchecolatz, Miguel Osvaldo, case nº 2251/06, sentence of 19.09.2006, considerando IV.a: "Son actos inhumanos que por su extensión y gravedad van más allá de los límites de lo tolerable para la comunidad internacional, la que debe necesariamente exigir su castigo". With the same words see: CSJN argentina, Mazzeo, op. cit., considerando 23.

¹³³FEIERSTEIN, G.D., *Hasta que la muerte nos separe. Prácticas sociales genocidas en América Latina*, ed. Al Margen, Buenos Aires, 2004, pp. 76ss.

¹³⁴Tribunal Oral Federal en lo Criminal de La Plata, Etchecolatz, Miguel OsvaldoRoberto s/recursos de casación e inconstitucionalidad, causa nº 7896, Reg. nº 10.488.1, decision of 18.05.2007, e Cámara Nacional de Casación Penal, Sala I, Von Wernich, Christian Federico s/recurso de casación, causa nº 9517, Reg. N.1 13.516, resolución del 27.03.2009. FEIERSTEIN, G.D., *Hasta que la muerte nos separe. Prácticas sociales genocidas en América Latina*, op. cit., pp. 78ss.

¹³⁵See, BEHRENS, P., "Genocide and the question of motives", in *Journal of International Criminal Justice*, 10, 2012, pp. 501. JONES, J.R.W.D., "Whose intent is it anyway?-Genocide and the intent to destroy a group", in VOHRAH L.C., et al. (a cura di), *Man's Inhumanity to Man*, Brill/Martinus Nijhoff Publishers, The Hague, 2003, pp. 467ss. TRIFFTERER, O., "Genocide, its particular intent to destroy in whole or in part the group as such", in *Leiden Journal of International Law*, 14, 2001, pp. 399ss. NERSESSIAN, D.L., "The contours of genocide intent. Troubling jurisprudence from the International Criminal Tribunals", in *Texas International Law Journal*, 37, 2002, pp. 231. According to another approach it would be sufficient to act in the awareness that one's conduct contributes to the total or partial destruction of the victim group (knowledge-based approach): "(...) the requirement of genocidal intent should be satisfied if the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group in whole or in part (...)". (GREENAWALT, A.K.A., "Rethinking genocidal intent: The case for a knowledge-based interpretation", in *Columbia Law Review*, 99, 1999, pp. 2259ss). This approach enhances the cognitive element of malice to the

Furthermore, the problem of the prescription is exceeded by attributing to the facts of the nature-not of genocide, but- of crimes against humanity, according to the mechanism of "double subsumption" that we have previously examined.

Here, then, a phenomenon that we have already encountered in the sentence condemning the former President of Peru *Fujimori*: the qualification of the facts as international crimes-in that case, as crimes against humanity, in this case as genocide-not it carries out no specific function in determining the sentence or in relation to the applicable discipline. The Argentine tribunal's declaration, unlike the previous Spanish which he expressly cites, has a merely symbolic value, connected to the idea of criminal trial as a place of truth production, and therefore fits into a wider perspective of reparation to the victims¹³⁶ and the construction of a historical memory that has very little to do with the aims of the penal process. In similar terms, the same Tribunal Oral Federal of La Plata in the *Von Wernich* case¹³⁷, was then expressed, a little later, particularly well known because it offered tangible proof of the involvement of part of the Catholic Church in the crimes of the military dictatorship¹³⁸. In dealing with the question of the possible qualification of the facts as genocide, proposed by the defenders of the victims and by the associations established in the trial, the court slavishly repeats the motivation made in the previous Etchecolatz, and therefore indirectly the pronouncement of the Spanish Audiencia Nacional, merely adding a quote from a new book by the aforementioned sociologist, which develops the concept of "genocide reorganization"¹³⁹-genocidal mode characterized by the systematic use of concentration camps and the purpose of transforming social relations within an existing nation-state, but in such a profound way as to alter its social functioning¹⁴⁰. In this case too, these considerations do not correspond to the subsumption of the facts that are the object of judgment, which are instead qualified as homicides, kidnappings and torture¹⁴¹. In fact, the subsumption in common cases is considered "the one that is most easily combined with the principle of congruence without endangering the legal structure of the sentence"¹⁴².

detriment of the volitional, and opens the door to eventual fraud. See in argument: JESSBERGER, F., "The definition and the elements of the crime of genocide", in GAETA P., (a cura di), *The UN Genocide Convention*, Oxford University Press, Oxford, 2009, pp. 106ss. CLARK, R.S., "Does the Genocide Convention go far enough? Some thoughts on the nature of criminal genocide in the context of Indonesia's invasion of East Timor", in *Ohio Northern University Law Review*, 8, 1981, pp. 327ss. KIRSCH, S., "The two notions of genocide. Distinguishing macro phenomena and individual misconduct", in *Creighton Law Review*, 42, 2009, pp. 352ss. SAFFERLING, C.J.M., "The special intent requirement in the crime of genocide", in SAFFERLING, C.J.M., CONZE, E., (a cura di), *The Genocide Convention sixty year after its adoption*, ed. Springer, The Hague, 2010, pp. 172ss. APTEL, C., "The intent to commit genocide in the case law of the International Criminal Tribunal for Rwanda", in *Criminal Law Forum*, 13, 2002, pp. 277ss.

¹³⁶LIAKOPOULOS, D., ZAGER, U., "Victim-perpetrator and individual criminal responsibility in international criminal law", in *International and European Union Legal Matters*, 2014.

¹³⁷Tribunal Oral Federal Nº1 di La Plata, *Von Wernich*, Christian Federico, case 2506/07, sentence of 9.10.2007. FIGARI LAYÍS, R., *The reparative effects of human rights trials: Lessons from Argentina*, ed. Routledge, London & New York, 2017.

¹³⁸Tribunal Oral Federal Nº1 di La Plata, *Von Wernich*, Christian Federico, case 2506/07, op. cit.,

¹³⁹FEIERSTEIN, D., *El genocidio como práctica social. Entre el nazismo y la experiencia argentina*, ed. Fondo de Cultura Económica, Buenos Aires, 2007.

¹⁴⁰"El grupo nacional se iba integrando con trabajadores, estudiantes, políticos, adolescentes, niños, empleados, amas de casa, periodistas y todo aquel que por cualquier circunstancia los genocidas consideraran sospechoso de entorpecer la realización de sus fines", cited in the sentence from MÁNTARAS, M., *Genocidio en Argentina*, ed. Cooperativ Chilavert Artes Gráficas, Buenos Aires, 2005, pp. 68ss.

¹⁴¹NOWAK, M., "Torture and enforced disappearance", in KRAUSE, C., SCHEININ, M., *International protection of human rights: A textbook*. Turku: Institute for Human Rights, Åbo Akademi University, 2009.

¹⁴²Tribunal Oral Federal Nº1 di La Plata, *Von Wernich*, Christian Federico, case 2506/07, op. cit.,

The same symbolic value and the same purpose of reconstructing the truth and the memory that animated the declaration of the genocidal nature of crimes in the *Etchecolatz* case re-emerge here in all their evidence and problems. However, it is necessary to clarify that in both cases the courts¹⁴³ and reporting passages of interviews released by some authors of the repression that offered tangible proof of this plan. Indeed, it is claimed that the national group victim of the genocide in Argentina did not exist yet, but was gradually created by the same repressors, as they identified subjects who opposed their "national reorganization plan" a mention made almost fleetingly in the execution of the motivations, which does not affect in any way the commensurate sentence or the applicable discipline, and in which we can therefore glimpse the same symbolic and communicative purpose already highlighted. However, this statement is not taken up again in the judgments of the successive degrees of higher judgment in the successive degrees of judgment, namely the Cámara Nacional de Casación Penal and the Supreme Court of the NICE¹⁴⁴, they did not resume this declaration, merely confirming the subsumption of made in common crimes and their imprescriptibility as crimes against humanity. The interpretative path described above, which through a rereading of the concept of "national group" aims to apply the qualification of genocide even where the victims are actually affected for political and ideological reasons, evidently raises some critical profiles.

Although it makes use of the expansive potentials inherent in a vague and open concept-"nation" and "national", one may ask whether it does not exceed the limits set by the literal data. The difficulty in tracing the outlines of this concept concerns more generally the definition of the groups protected by the international norm on genocide, to which neither the text of the 1948 Convention nor the corresponding preparatory works bring any help, and for which we resort to other sciences with respect to the juridical one, like history, sociology, anthropology, although "the opinions in these areas are so varied that it seems impossible to obtain a single and definitive criterion"¹⁴⁵. Faced with this indeterminacy, some authors positively evaluate the broad interpretation of the concept of "national group", considering it a solution allowed by the literal tenor of the rule and valid to avoid impunity: Pacheco Estrada in commenting the judgments of the Spanish Audiencia Nacional in the *Scilingo* and *Pinochet* cases, he argues that "nothing seems to prevent political groups from being considered an identifiable part of the Argentine national group"-or Chilean-and that in favor of this conclusion they lay down the admissibility of self-genocide and intention to destroy the group only partially, as well as the vague nature of the terms used by the standard.

But beyond the intrinsic definitional difficulties in the concepts of "nationality", "religion", "race" and "ethnicity", some doubts about the identification of the victims of Argentine state crime arise in the light of the concrete forms with which it is manifested. We find an excellent description in a recent ruling by the Tribal Oral Federal n. 2 of the Argentine Federal Capital¹⁴⁶, in which the qualification of the facts

¹⁴³Cámara Nacional de Casación Penal, Sala I, Etchecolatz, Miguel Osvaldo Roberto s/recursos de casación e inconstitucionalidad, causa n° 7896, Reg. n° 10.488.1, decisión del 18.05.2007, and Cámara Nacional de Casación Penal, Sala I, Von Wernich, Christian Federico s/recurso de casación, causa n° 9517, Reg. N.1 13.516, resolución del 27.03.2009.

¹⁴⁴CSJN argentina, Etchecolatz, Miguel Osvaldo s/ recurso extraordinario, causa n° E. 191. XLIII, sentence of 17.02.2009 and Von Wernich, Christian Federico s/ recurso de hecho, causa n° 9517 (V. 411. XLV), sentence of 19.05.2010.

¹⁴⁵ICTY, The Prosecutor v. Goran Jelisić, Judgement 1-95-10, Trial Chamber, 14 December 1999, par. 30. HEFENDEHL, R., *Grenzenlose Vorverlagerung des Strafrechts?*, BWV Berliner Wissenschafts Verlag, Berlin, 2010, pp. 24ss. SWART, B., ZAHAR, A., *The legacy of the international criminal Tribunal for the Former Yugoslavia*, Oxford University Press, Oxford, 2011, pp. 298ss. OLÁSULO, H., *International criminal law, transnational criminal organizations and transitional justice*, Brill/Martinus Nijhoff Publishers, The Hague, 2018.

¹⁴⁶Tribunal Oral en lo Criminal Federal n. 2 di Buenos Aires, Miara, Samuel y otros, causa n° 1668, e Tepedino, Carlos Alberto Roque y otros, causa n° 1673, 22.03.2011.

is rejected as genocide proposed by the civil parties constituted in court. In the first place, the difference between the meaning commonly attributed to the term "genocide"-understood as the most serious crime that can be committed against humanity "-and its juridical concept, which is more. As noted by the International Tribunal for the Former Yugoslavia (ICTY) in the *Jelisić* case¹⁴⁷. As emerges from the passage reported here, the alleged group on which the dictatorial repression was attacked was in fact extremely heterogeneous within itself, as it united members of insurrection movements, affiliated to the communist and socialist party, simple sympathizers of generic political ideologies "of left ", trade unionists, students and representatives of youth protest movements, even people without direct involvement in political activities and related to" dissidents "from mere relationships of kinship or knowledge. The only common feature of this varied plurality of subjects is, evidently, their opposition-true or presumed-to the dictatorial regime and to the ideology under whose banner it claimed to unify the "Argentine Nation".

First of all, it is an identification in purely negative terms, in the sense that the victims were selected, regardless of their belonging to one or the other political-ideological movement, simply because they did not correspond to the project imposed by the regime. Moreover, this unique trait of negative sign is purely political in character, which is very difficult to include among the characteristics that are valid for identifying a national group¹⁴⁸. On the contrary, it has emerged from the various criminal investigations carried out so far, as well as from the Comisión Nacional de Verdad y Reconciliación (CONADEP), that the victims were not infrequently of Argentinian nationality, but who came from other South American countries or even Europeans. On the other hand, the characteristics of the group affected by military repression can not even claim to classify it as a religious group: the victims did not share the same creed, and assimilate to it a political ideology-beyond the fact that within the group ideologies were variegated and united only by opposition to the regime-it constitutes nothing more than an analogy in *malam partem* prohibited in criminal law. The military repression, therefore, was intended to exterminate people considered dissidents, and not aimed at the total or partial destruction of a national group as such, as required by the law that typifies genocide-which limits the applicability of such a case to crimes committed with the intention of destroying one of the four protected groups precisely because of the characteristics that distinguish these groups, as confirmed by the prediction of the formula "as such"¹⁴⁹.

Consequently, although there was no doubt that the intent of the criminal acts

¹⁴⁷ICTY, Prosecutor v. Jelisić, n. IT-95-10 of 6 October 2003. In particular see the dissenting opinion of the judge Wald in case Jelisić, which has stated that: "(...) the view that there is no additional public interest in determining a genocide charge simply because the underlying killings have already been dealt with as crimes against humanity and violations of the laws or customs of war may be problematic in the development of international criminal law (...)": ICTY, Prosecutor v. Goran Jelisić, Partial Dissenting Opinion of Judge Wald, AC, IT-95-10-A, 5 July 2001, par. 13. ICTR, Prosecutor v. Jean-Paul Akayesu, Trial Judgment, op. cit., par. 701ss. ICTR, Prosecutor v. Kayishema and Ruzindana, Trial Judgment, op. cit., par. 98. AKHAVAN, P., "The crime of genocide in the ICTR jurisprudence", in *Journal of International Criminal Justice*, 3, 2005, pp. 989ss. SZPAK, A., "National, ethnic, racial and religious groups protected against genocide in the jurisprudence of the ad hoc International Criminal Tribunals", in *European Journal of International Law*, 23, 2012, pp. 155-173. For the ethnic groups see: WIESSNER, S., "Ethnic groups", in D.L. SHELTON (a cura di), *Encyclopedia. Volume I*, Thomson Gale, Farmington Hills, 2005, pp. 304ss. LIPPMANN, M., "The Convention on the Prevention and Punishment of the Crime of Genocide", in *Arizona Journal of International and Comparative Law*, 15, 1998, pp. 456ss.

¹⁴⁸ICTR, Prosecutor v. Akayesu: "as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties": ICTR, TC, The Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, 02.09.1998, par. 512. ICC, Prosecutor v. Katanga and Ngudjolo-Chui, Decision on the Confirmation of Charges, PTC-I, ICC-01/04-01/07, 30 September, 2008, par. 287. ICC, Prosecutor v. Bemba Gombo, Decision Pursuant to Article 61(7)(a) and (b), TC III, ICC-01/05-01/08, 21 June 2016, par. 132. ICTY, Prosecutor v. Milorad Krnojelac, Trial Judgment, TC-II, IT-97-25, 24 February 1999, par. 329.

¹⁴⁹GIL GIL, A., "Persecución de crímenes contra la humanidad en la Audiencia Nacional. Los informes que los fiscales no quisieron firmar", in *Jueces para la democracia*, 31, 1998, pp. 4ss.

of the Argentine dictatorship was to eliminate a plurality of people, it must be accepted that the designated victims could be considered members, at most, of a political group, identified moreover, in negative terms, as opposed to the prevailing political ideology, and not included as such in the category of categories protected by the genocide norm. It should be remembered that one thing is the "social concept" of genocide and the other is its normative definition, which, although more restrictive than the first, is the only one that a criminal court can apply in the exercise of its judicial activity. On this conclusion, the shameful criticism that many voices move to the limitation of protected categories in the normative definition of the criminal type of genocide is grafted. The four protected groups, if in the moment of the elaboration of the norm could perhaps correspond to the victims that the genocidal conducts had struck up to then, certainly do not reflect the phenomenological modalities that the crime has taken over the last decades. The ever more frequent occurrence of episodes of genocide against political and/or ideological groups suggests the opportunity to revise a normative description that dates back to the now distant 1948 and now appears obsolete. Indeed, the tragic Latin American experiences seem to have played a key role in this sense, since they have indeed shown that they are possible-and indeed, they have been extensively tested¹⁵⁰-destructive paradigms different from Nazi-based crime. A desirable modification of the genocide rule could therefore include among the protected categories also other human groups, such as political, economic, social: this is the path chosen by some states that, in typing the crime of genocide within their own legal system, they added, to the groups covered by the international standard, political groups-as happens in Colombia, Panama and Costa Rica-or social-envisaged in Peru and Paraguay-or a plurality of groups of various kinds, as in Uruguay. The adoption of such a regulatory change would allow the scope of the incriminating provision to be extended to cover all possible ways of manifesting the crime, and therefore to eliminate those gaps in protection generated by the restriction of protected groups that the current version of the norm imposes. In any case, this solution should necessarily pass through an intervention of legislative matrix, and can not be implemented through an argumentative path like the ones mentioned above, which, based on the unchanged international definition and in the absence of an express regulatory provision at the level national, tends the meshes of the concept of "national group" (or religious) far beyond the natural limits that the literal figure imposes.

In the sentence: *Jorge Eduardo; Astiz, Alfredo Ignacio y otros* of an Argentine court of first instance has been accused of the need for such a legislative intervention: after a long *excursus* on the crime of genocide and on the precedents of the Argentine courts that have applied-or at least discussed-the qualification as such of the crimes of the dictatorship, the sentence vehemently criticizes the absence of political groups from the category of those protected by the case in question, but at the same time affirms: "En suma, en el caso que nos toca juzgar, el ataque estuvo dirigido a un grupo político que, justamente, no se encuentra abarcado en el ámbito de protección (...)"¹⁵¹. Alternatively, the revision of the rule could consist in replacing the enumeration of the groups with a general clause that assigns relief to the intention to destroy "a specific human group as such", regardless of the reason on which its identification is based. The court, therefore, demonstrating a considerable awareness of the limits of its functions, hopes for a dialogue and collaboration with the other powers of the state in order to fill the void of protection caused by the lack of inclusion of political groups in the incriminating norm of genocide. It should be noted, however, that this conclusion disassembles the judge Farías who, in partial dissidence, notes that such a proposal *de lege ferenda* "constitutes a doctrinal opinion unrelated to the

¹⁵⁰Tribunal Oral en lo Criminal Federal n. 5 di Buenos Aires, Acosta, Jorge Eduardo; Astiz, Alfredo Ignacio y otros, joined cases n. 1270, 1271, 1275-1278, 1298-1299, sentence of 28.12.2011.

¹⁵¹Tribunal Oral en lo Criminal Federal n. 5 di Buenos Aires, Acosta, Jorge Eduardo; Astiz, Alfredo Ignacio y otros, joined cases n. 1270, 1271, 1275-1278, 1298-1299, op. cit., par. 1897.

jurisdiction of this court"¹⁵².

Regardless of similar suggestions in perspective *de jure condendo*, when the concrete phenomenology of the crime does not allow to speak properly of genocide, precisely because the groups affected do not fall within the category of those protected-or even in the different case in which you can not try the destructive intention of the active subjects-, it is still possible to qualify the facts as crimes against humanity¹⁵³. Of course, the application of this case is subject to the verification of the existence of a context of "extensive or systematic attack against the civilian population", but this verification poses decidedly lower probative difficulties and thresholds of significance much less restrictive than the element of genocide context.

This alternative solution to attribute to the facts object of judgment international importance can be found in several judgments: the sentence in the *Miara* case¹⁵⁴, for example, after explaining the reasons why it does not believe that genocide occurred in Argentina, concludes: "Estos argumentos nos convencen de que los damnificados no fueron escogidos por formar parte de un "grupo nacional"¹⁵⁵. In fact, in the decisive part it confirms the qualification of the facts as constitutive of crimes against humanity.

A similar conclusion is reached by the Spanish Audiencia Nacional in relation to the aforementioned proceedings against ninety-eight Argentine soldiers, in which is inserted the famous judgment against *Scilingo*¹⁵⁶: modifying the subsumption in the crime of genocide operated by the Juzgado de Instrucción when referring to trial, the Court chooses to qualify the facts as crimes against humanity. In reality, this change is justified on the basis of a legislative reform that had meanwhile intervened in the Spanish legal system, which had specifically typed crimes against humanity, and was accompanied by a declaration that the validity of the solution proposed by Judge Garzón-which qualified the facts as genocide and on this basis legitimized universal jurisdiction-it had only come to a halt after the pronouncement, precisely because of this reform¹⁵⁷.

The application of the category of crimes against humanity, in the hypothesis in which the qualification as genocide is precluded by the non-compliance of the group-victim with the normative provision, appears therefore as an anchor of salvation: on the one hand, it allows equally to attribute to the facts the nature of international crimes and the consequent special regime, on the other respects the normative limits of the typical genocide structure. The insistence with which the public prosecution and even more the defenders of the civil parties and the associations formed in court often claim the subsumption of the facts in the crime of genocide seems to betray different and further motivations. It seems that behind this insistence there is the conviction-in fact erroneous and without legal support-that there is a hierarchy of seriousness among international crimes, at the top of which genocide would be located, and that a conviction for this crime is to some extent more severe, certainly not in terms of a sanction that is concretely applied - given that usually the penalty does not vary much compared to the other categories of

¹⁵²Tribunal Oral en lo Criminal Federal n. 5 di Buenos Aires, Acosta, Jorge Eduardo; Astiz, Alfredo Ignacio y otros, joined cases n. 1270, 1271, 1275-1278, 1298-1299, op. cit., par. 1897.

¹⁵³LINGAAS, C., "The crime against humanity of apartheid in a post apartheid world", in *Oslo Law Review*, n. 2, 2015.

¹⁵⁴Tribunal Oral en lo Criminal Federal n. 2 di Buenos Aires, Miara, Samuel y otros, causa n° 1668, sentence of 22.03.2011.

¹⁵⁵Tribunal Oral en lo Criminal Federal n. 2 di Buenos Aires, Miara, Samuel y otros, causa n° 1668, e Tepedino, Carlos Alberto Roque y otros, causa n° 1673, sentences of the 22.03.2011.

¹⁵⁶Tribunal Supremo, Sala de lo Penal, sentence 798/2007, recurso casación n. 10049/2006 P, sentencia estimatoria parcial, 01.10.2007. PACHECO ESTRADA, C., "El tratamiento del exterminio de grupos políticos a la luz del caso Scilingo", in *Jueces para la democracia*, 55, 2006, pp. 48-58.

¹⁵⁷According to the Tribunal Oral en lo Criminal Federal: "Es necesario tener en cuenta que la Sala da esta interpretación superestricta y restringida del delito de genocidio en el momento actual, precisamente por haberse incorporado al Código Penal (...) su tipificación penal como delito de genocidio" (fundamento de derecho I.A.6).

international crimes- nor as regards the specific discipline, which is common to crimes against humanity and war , but in terms of social impact and, we could say, media. The suspicion that arises in the face of these mechanisms is therefore that, by claiming to obtain a conviction for genocide, it is intended to attribute to the criminal trial and sentence, once again, a symbolic function and value, even at the cost of forcing, in the terms set out above, the content of the law. It is also true that this alternative qualification does not make it possible to exploit the specificity of the intention to destroy a particular human group, when such a goal is indeed to be found; at the same time, as noted in the ruling *Astiz and others*, the category of crimes against humanity is designed to protect individuals, and not the existence of particularly vulnerable human groups, such as genocide¹⁵⁸.

15.ELIMINATION OF LEGISLATIVE LIMITS TO THE INTERNATIONAL CRIMINAL TYPE: THE CASE OF LEGITIMACY CONTROL

The other modality with which the Latin American courts have intervened to widen the scope of international criminal types is the control of the constitutionality of the national norms that characterize such crimes. This interpretative outcome presupposes that the national legislator, in introducing the case in the internal legal system, has inserted some new elements, not foreseen by the international norm, which introduce higher penalties, penalties or other typical elements whose effect is a restriction on the field of application of the offending rules. Such legislative choices, legitimate in themselves in the exercise of the national margin of appreciation granted by international instruments, can be challenged in the control of constitutionality: the Constitutional Court-or the ordinary judge in diffused or mixed control systems-can declare the unconstitutionality of the norm, usually noting its opposition to international law internally transposed with constitutional status, and thus re-examining the scope of the penal type that had been reduced by internal law. A particularly prolific actor of this line of jurisprudence is the Colombian Constitutional Court, which, through the declaration of partial unconstitutionality of the rules on genocide, on enforced disappearance and torture, has "rewritten" the definition of such crimes in national law, trying to recover its compliance with international instruments.

A significant example of such intervention is the C-177/01, which declares unconstitutional the expression "that act in accordance with the law"¹⁵⁹, which the Colombian legislator had inserted, when genocide was typed, as a requirement for protected groups from this rule. The provision of this clause, as well as the inclusion, in the list of protected groups, of the political ones, can be explained in light of the peculiar forms of manifestation that mass crime has taken in Colombia. On the one hand, in fact, in the context of the internal conflict that for decades has seen clashing guerrilla groups and military and paramilitary forces, the commission of crimes of international importance is not a state prerogative-as in most other states of the continent- but it is imputable to all the actors of the conflict, as demonstrated by the famous episode of massacre against the militants of the Unión Patriótica; on the other, the reasons for the clashes and the commission of crimes are primarily and essentially political. Furthermore, the absence of an explicit typification of crimes against humanity is probably at the basis of this legislative peculiarity; this lack of legislation has led to the expansion of the genocide in such a way as to allow the punishment of conduct otherwise without international criminal cover.

The peculiarities that distinguish the phenomenology of crime in the

¹⁵⁸Tribunal Oral en lo Criminal Federal n. 5 of Buenos Aires, sentence Acosta, Jorge Eduardo; Astiz, Alfredo Ignacio y otros, sentence of 28.12.2011, considerando VI.3, p. 1796.

¹⁵⁹Art. 322 law 589/2000 del 06.07.2000: "Por medio de la cual se tipifica el genocidio, la desaparición forzada, el desplazamiento forzado y la tortura; y se dictan otras disposiciones": "Genocidio.- El que con el propósito de destruir total o parcialmente a un grupo nacional, étnico, racial, religioso o político que actúe dentro del margen de la Ley, por razón de su pertenencia al mismo, ocasionare la muerte de sus miembros (...)".

Colombian state and the delay in typifying crimes against humanity have therefore led the legislator to add to the typical description of the genocide the two elements mentioned above. Now, while it is clear that to foresee among the possible victims also the political groups exerts an expansive effect of the scope of the case, the exact opposite leads to the introduction of the condition that it must be groups that act according to the law, since they are excluded thus from the sphere of protection of the norm all those groups that undertake illegal activities.

The Court perfectly distinguishes these two opposite practical effects, and precisely on the basis of this saves the prediction of "political groups", thus validating the expansion of the penal type determined by the internal legislator. This formula, the Court claims, contrasts first of all with art. 93 of the Constitution¹⁶⁰, which establishes the prevalence of international treaties in internal law and imposes the obligation to interpret constitutionally guaranteed rights in accordance with the relevant international treaties in force in the legal system. Moreover, the discrete criterion introduced by the law is absolutely lacking in precision and clarity: while it cancels the segment "that act within the limits of the law", considering inadmissible internal provisions that restrict the minimum content offered by the international law.

The restriction made by the provision is in clear contrast with the inspiring principles of the Constitution, which do not allow any kind of differentiation in the protection of supreme values such as the right to life and physical integrity, which enjoy the same value for all human beings. On the basis of these arguments, therefore, the Court declares the clause "acting in conformity with the law" unconstitutional, and thus re-enacts protection against genocide to all the groups listed by the norm-ethnic, racial, national, religious and politicians - regardless of whether they act within or outside legal limits. The Court considers that this statement infringes the principle of equality¹⁶¹, in relation to the crime of forced disappearance of people. The disposition that typifies this crime in the Colombian order, in fact, took into account, in its original formulation, the only criminality due to illegal groups: before the Court's intervention, it envisaged as possible active subjects anyone belonging to an armed group that operates in illegality. This formulation appears on a broader side than that adopted at international level, which limits the active subjects of this specific crime to state agents or to those who work with state support; on the other, however, it reiterates that distinction already encountered in relation to the genocide that limits the punitive intervention in relation to illegal groups.

Furthermore, it is noted that this formulation "significantly reduces the meaning and scope of the general protection established by art. 12 of the Political Charter"¹⁶², which places a prohibition of a universal nature, and which responds to the concrete forms of manifestation of the crime in the Colombian experience. As a result, the Colombian Constitutional Court declares the constitutional illegitimacy of the expression belonging to an illegal armed group and thus re-establishes the typical definition and scope of the forced disappearance offense. On closer inspection, in this case, the effect of the sentence is not simply that of recovering compliance with the international definition of crime, since the prediction of the private citizen as a possible active subject remains firm. The forced disappearance is therefore characterized in the Colombian order, following the intervention of the Constitutional Court, as a common crime, which anyone can commit, and thus guarantees a much wider scope of protection than the international definition that conceives of it as a

¹⁶⁰Art. 93 of the Colombian Constitution: "Los tratados y convenios internacionales ratificados por el Congreso, que reconocen los derechos humanos y que prohíben su limitación en los estados de excepción, prevalecen en el orden interno. Los derechos y deberes consagrados en esta Carta, se interpretarán de conformidad con los tratados internacionales sobre derechos humanos ratificados por Colombia". Using also in the case C-589/13 from the Colombian Constitutional Court.

¹⁶¹Colombian Constitution Court, C-317/2002, Demanda de inconstitucionalidad contra el artículo 165 (parcial) de la Ley 599 de 2000 "por la cual se expide el Código Penal", 02.05.2002, fundamento 2.d.

¹⁶²Art. 12 of the Colombian Constitution: "(...) Nadie será sometido a desaparición forzada (...)".

crime . Another example of the Colombian Constitutional Court's intervention on a peculiar typical element introduced by the internal legislation in the definition of an international crime is offered by the sentence C-148/2005, which decides on the constitutional conformity of the adjective "serious" referring to the conduct of lesions constituting genocide, either to pain or suffering suitable to integrate torture as a war crime (torture en persona protegida under article 137 colombian criminal code) and as a common crime pursuant to art. 178 colombian criminal code.

The curious aspect of this sentence is that it arrives at two opposing solutions in relation to the two contested norms, even in the face of an identical literal formula, and this on the basis of a rigorous analysis of the international criminal figures. The Court considers that the provision of a severity threshold for the injuries to be able to supplement the crime of genocide is perfectly compatible with the structure of this crime. Only serious injuries, he notes, are compatible with the specific malice that characterizes this crime, that is to say with the intention of destroying a group, and can produce the violation of the legal good that this case aims to protect: the very existence of a human group. Setting this severity threshold to attribute the status of genocide does not mean that the injuries that do not reach it remain unpunished, since they can be subsumed in other common cases, typified in the chapter dedicated to personal injuries. In short, the judge seems to want to underline the difference between the lightness of the lesions, which can occur, and the lightness of the genocide as a whole, which is not conceivable. On the contrary, in analyzing the same "serious" expression referring to the pain and suffering inflicted on torture victims-both as a war crime and as a common crime-the Court declares its unconstitutionality on the basis of the dictates of the Inter American Convention against Torture¹⁶³.

This requirement is contrary to art. 12 of the Colombian Constitution, which strictly prohibits-in addition to enforced disappearance, as we have seen-torture, cruel, inhuman and degrading treatment and punishment. And on the basis of this rule a member of the judging panel disputes the majority vote for not having declared the unconstitutionality also of the genocide rule, in the part in which it limits the relevance of the injuries to the serious ones. Beyond the critical findings formulated in the votes in dissidence, this sentence offers an excellent example of how a Constitutional Court-in this case the Colombian one-can intervene on the typical definition that the national legislation gives of an international crime, eliminating those elements that contrast with the corresponding international standard, or that limit its scope, and confirming instead those compatible with it.

16.EXPANDING LEGISLATIVE CHOICES OF INTERNATIONAL CRIMINAL TYPES AND ITS OWN VALIDATION

The control of constitutionality can produce an expansive effect of the scope of international criminal types also through another mechanism, that is to say by confirming the legitimacy of national norms that broaden the definition of such figures with respect to the international one. In this hypothesis, unlike the one examined in the previous paragraph, the constitutional judge does not contradict a legislative choice, but on the contrary validates it, thus cooperating with the national legislator in an expansion of the typical definition of the crime with respect to the corresponding international definition. The subject around which this interpretation revolves is the idea that international law limits itself to setting minimum parameters of protection, which the national system is then free to expand, when it comes to internal typing of international crimes. As the Colombian Constitucional Court states in its judgment C-177/01164. On this assumption the Court declares constitutionally legitimate the provision, in the Colombian norm that typifies the crime of genocide, of the political

¹⁶³Colombian Constitutional Court, C-148/2005, Demanda de inconstitucionalidad contra el artículo Ley 599 de 2000 "por la cual se expide el Código Penal", 22.02.2005, fundamento 4.2. of the sentence.

¹⁶⁴Colombian Constitutional Court, C-177/01, Demanda de inconstitucionalidad contra el artículo 322^a (parcial) del Código Penal, 14.02.2001), fundamento 5.

groups within the category of protected passive subjects, even if this does not correspond to the international definition of the case. As already said, in the same sentence the Court instead eliminates the formula "that act within the limits of the law" referred to the protected groups against genocide: this conclusion is a good view of the other side of what has just been stated, because, if it is recognized that the State is free to extend the minimum standards of protection established by international law, it must also be admitted that it is not legitimate for the opposite reduction of these limits.

We find the same statement in a sentence of the Bolivian Constitutional Tribunal, which claims the autonomy of the national legislator with respect to the typification of international crimes, stating that it is consubstantial with the principle of complementarity¹⁶⁵ on which the ICC system is based¹⁶⁶. This sentence because it endorses an expansive choice of the criminal type of genocide operated by the legislator in the internal typing of the crime: art. 138 of the Bolivian penal code, in fact, sanctions, next to the genocide figure substantially coinciding with the international one, the crime of *masacre sangrienta* (bloody massacre), devoid of compliance with the international standard and so described¹⁶⁷.

It is therefore a crime figure quite different from genocide, which shares with it, at most, macro-dimensions, but certainly not the specificity: it therefore seems legitimate to ask why the Bolivian legislator has decided to place it alongside the genocide, and not instead, for example, in proximity to the crime of extermination, with which it presents notable similarities, it differs from genocide because it does not limit the number of possible passive subjects to certain human groups, thus reaching an abstractly broader applicative field; moreover, it does not include among the typical elements the specific intent of destruction that is required for the genocide configuration.

The absence, among the typical elements, of the context element proper to the crime of genocide, but also of that characterizing crimes against humanity, leads us to conclude that it is a common crime, which can not be applied to the regime special reserved for international crimes¹⁶⁸. The question of unconstitutionality

¹⁶⁵See in particular: ROBINSON, D., "Three theories of complementarity: Charge, sentence or process?", in *Harvard International Law Journal*, 53, 2012, pp. 87ss. TRAHAN, J., "Is complementarity the right approach for the International Criminal Court's crime of aggression-Considering the problem of overzealous National Court prosecutions", in *Cornell International Law Journal*, 45, 2012, pp. 576ss. HELER, K.J., "A sentence-based theory of complementarity", in *Harvard International Law Journal*, 53, 2011, pp. 208ss. ZAWATI, M.H., "The International Criminal Court and complementarity", in *Journal of International Law and International Relations*, 12, 2016, pp. 208-228. DAZA GONZÁLEZ, A., *El principio de complementariedad en el derecho penal internacional*, ed. Universidad Católica de Colombia, Bogotá, D.C, 2015. SASCHA, D., BACHMANN, D., EDA NWIBO, L., "Pull and push- Implementing the complementarity principle of the Rome Statute of the ICC within the AU: opportunities and challenges", in *Brooklyn Journal of International Law*, 43, 2018, pp. 464ss.

¹⁶⁶Bolivian Constitutional Tribunal, sentencia constitucional 0034/2006 (exp. 2005-12941-26-RDI), Leigue Hurtado diputado nacional v. Sandra Giordano Presidente de la Cámara de Senadores, 10.05.2006, fundamento II.3.2., "Sobre la supuesta vulneración al principio de taxatividad". SANTALLA VARGAS, E., "Bolivia", in AMBOS, K., MALARINO, E., ELSNER, G., (eds.), *Jurisprudencia latinoamericana sobre derecho penal internacional*, op. cit., pp. 78ss.

¹⁶⁷Bolivian Constitutional Tribunal, sentencia constitucional 0034/2006 (exp. 2005-12941-26-RDI), Leigue Hurtado diputado nacional v. Sandra Giordano Presidente de la Cámara de Senadores, 10.05.2006, op. cit.,

¹⁶⁸See also: ICC, Prosecutor v. Ruto, Kosgey and Sang, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, P-TC II, ICC-01/09-01/11, 15 March 2011, par. 21-70. In our opinion it is necessary to consider the extension of the sphere of application of crimes against humanity resulting from the adoption of an extensive approach. If by organization we mean any entity capable of carrying out an extensive or systematic attack, it should be concluded that a whole series of non-State actors-such as those belonging to organized crime-can commit crimes against humanity. A restrictive reading of the concept of organization seems therefore preferable in order to prevent excessive dilation of the category of crimes against humanity. In a consistent sense, see, BASSIOUNI,

presented to this norm, however, concentrates on another critical aspect, which concerns, rather than its location, its formulation. First of all, it is contested to be structured as a blank criminal law, and therefore to oppose with the principle of reserve of law. This reading is decidedly rejected by the Tribunal Constitucional¹⁶⁹. The overly broad formulation adopted by the law would also constitute, according to the applicants, a violation of the principle of taxation. Even in this case, however, the Bolivian court denies this contrast, believing that the concept of "*masacre sangrienta*" is sufficiently clear and defined, only to then resort to an extra-normative source for its definition. The court also rejects the ground of appeal based on the alleged violation of the prohibition of analogy, caused by the fact that the law describes the objective type in such wide terms that allow to punish any conduct. This relief is overcome on the basis of an argument that exploits the comparison with the crime of homicide, and which appears frankly weak¹⁷⁰.

The Constitutional Tribunal, refuted all the grounds for appeal on the basis of which it argues that the rule is contrary to the principle of legality, declares its constitutional legitimacy. This decision-whose outcome seems difficult to share, in light of the actual vagueness of the normative formulation-arises therefore on the wake of the jurisprudential trend that we have defined expansive: in this case, the extension of the international criminal type-the genocide-is not carried out independently by the judicial body, but by the legislator, and the Constitutional Court limits itself to endorse the choice. In light of the substantial differences between "*masacre sangrienta*" and genocide, it is reasonable to doubt that this is a real extension of this last typical figure: rather, we are faced with a mere juxtaposition of different cases, which the legislator has inexplicably decided to type within the same provision, but who do not share either the typical structure, nor the character of international crimes and the corresponding discipline. This key to reading, while leaving unadulterated profiles of opposition to the principle of legality in the internal sphere, allows to overcome frictions with international criminal law and its harmonizing movement.

In finis, the Bolivian Supreme Court seems to disprove this interpretation, when it condemns the seven defendants of the massacre known as "*Octubre Negro*"¹⁷¹ for "delito de genocidio bajo la modalidad de *masacre sangrienta*"¹⁷²: this formulation seems to suggest that, Unlike what we maintain, the crime of "*masacre sangrienta*" is a mere commissioning modality of the crime of genocid

17.INTERPRETATION OF CRIMINAL TYPES IN A REDUCTIVE KEY

At the extreme opposite to the expansive trend lies a jurisprudential orientation that moves in a so-called centripetal direction, trying to delimit the scope of application of international criminal types. The position taken by the Supreme Courts thus determines a different configuration of their relations with the other state institutions: in some cases, through the control of constitutional legitimacy, the judges are opposed to a legislative solution that, in the exercise of the margin of

M.C., *The legislative history of the International Criminal Court: Introduction, analysis and integrated text*. Volume I, Brill/Martinus Nijhoff Publishers, New York, 2005, pp. 151ss. LUBELL, N., *Extraterritorial use of force against non-State actors*, Oxford University Press, Oxford, 2010.

¹⁶⁹Bolivian Constitutional Tribunal, sentencia constitucional 0034/2006 (exp. 2005-12941-26-RDI), Leigue Hurtado diputado nacional v. Sandra Giordano Presidente de la Cámara de Senadores, 10.05.2006, op. cit., fundamento II.3.2., "Sobre la supuesta vulneración del principio de reserva legal (...)".

¹⁷⁰Bolivian Constitutional Tribunal, sentencia constitucional 0034/2006 (exp. 2005-12941-26-RDI), Leigue Hurtado diputado nacional v. Sandra Giordano Presidente de la Cámara de Senadores, 10.05.2006, op. cit., Fundamento II.3.2., "Sobre la prohibición de la analogía".

¹⁷¹Bolivian Constitutional Court, Tribunal de Sentencia, Claros Flors Roberto y otros, 31.08.2011.

¹⁷²Bolivian Constitutional Court, Tribunal de Sentencia, Claros Flors Roberto y otros, op. cit.

state appreciation, he typed an international crime in much broader terms than those traced by the international standard. In other cases, however, the higher courts recall the international definition of international criminal types, departing from an excessively extensive interpretation made by the courts of first and second instance. Like what we have noted in relation to the opposing expansive interpretative tendency, this type of intervention appears strictly conditioned by the possibility of applying the special regime of international crimes. The exceptional nature of this system, and the significant contra-effects it causes, impose particular caution in delimiting the circumstances that justify its application. Consequently, the limiting or specific intervention of the Supreme Courts plays a key role in avoiding an excessive expansion of the category of international crimes and of the special regime assigned to them. This circumstance is noted by a judge of the Peruvian Constitutional Court: he, while arguing the importance of excluding the prescription-and other limits to the persecution and punishment-for crimes against humanity, points out that recognition of this exceptional discipline must be accompanied by a restrictive conception of this criminal category, to avoid undue inflation and exploitation¹⁷³. In undertaking the reductive work now described, often the judicial bodies carry out an analysis of the typicality of international crimes that not only recovers the international intentions in this regard, but which further defines and clarifies the individual structural elements, drawing on the baggage of tools and categories of criminal dogmatics. There is thus a further, possible function of the Latin American jurisprudence in the field of international crimes: in configuring the typical structure of such criminal figures, it not only aims to align its national interpretation with the international one, but, adopting in this operation the lenses of the criminal law classically intended, provides a definitive contribution that clarifies and perfects the international standard. This jurisprudential tendency can therefore play a fundamental role in the progressive and desirable phenomenon of harmonization of domestic and international criminal law in relation to the persecution of international crimes.

18.THE CONTEXT ELEMENT OF THE INTERNATIONAL CRIMINAL TYPE IN A SELECTIVE FUNCTION

Within this reductive macro-trend there is a first argumentative figure that, through an enhancement of the context element of international crimes, refutes those interpretations, usually proposed by lower-ranking judges, who claim to subsume the facts subject to judgment in this criminal category by an improper extension of the case. In particular, some judgments qualify the facts as international crimes even if committed in the absence of the specific context that determines the international nature of the crime, through an improper interpretation of the typical elements of such crimes-sometimes lacking also from the point of view of motivation. This argumentative artifice is usually aimed at circumventing the limits that the penal system poses to persecution-for example, the prescription-, and which would prevent in the concrete case of reaching the conviction of the manager. This manipulation of the international penal types, preordained to the application of the corresponding special regime-which therefore fits into that expansive trend examined in the previous paragraphs-is sometimes rejected by the Supreme Courts, which intervene by reporting the typicality of the offense.

This mechanism perfectly illustrates a ruling by the Argentinean Supreme Court of the Nacional de la Nacion, which, in contrast to the expansive interpretation often expressed in relation to the application of international criminal figures, intervenes in the *Derecho* case¹⁷⁴ with an exactly opposite address. The peculiar aspect of this sentence is that it refers to an isolated episode of torture, which occurred in the restored democracy and without any kind of connection with the

¹⁷³Tribunal Constitucional del Peru, Pleno jurisdiccional, Demanda de inconstitucionalidad interpuesta contra el Decreto Legislativo n° 1097, exp. N° 0024-2010-PI/TC, 21.03.2011.

¹⁷⁴CSJN Argentina, Recurso de hecho deducido por Juan Francisco Bueno Alves y Carlos A. B. Pérez Galindo (querellantes) en la causa Derecho, René Jesus, s/ incidente de prescripción de la acción penal, causa n° 24.079 (D. 1682. XL), sentence of 11.07.2007.

systematic plan of repression carried out by the last military dictatorship. Nonetheless, the civil parties filed in court, to overcome the declaration of an offense prescribed by the judge of the first instance, venture into the demonstration of the alleged international nature of the crime. The Supreme Court, invested in the matter, confirms the declaration of an interim prescription of the crime¹⁷⁵. The ruling correctly states that the conduct that integrates crimes against humanity are at the same time "attacks against individual legal assets", like common crimes, and that it is of fundamental importance to identify a discrete criterion that allows them to be separated from the latter. To draw this distinction, the Court uses two different argumentative paths: first it refers to a definition in general terms, based on the identification of the protected legal asset, noting that the distinctive feature of crimes against humanity is that they not only harm the victim, direct, but also humanity as a whole. Thus, the criminal laws which characterize them protect only secondarily the individual legal assets of the persons directly affected, who, while bearing in mind that importance, the Court declares that it wishes to analyze this figure in the light of the most recent developments in the subject, namely, on the basis of the internationally shared definition offered by the Rome Statute, acknowledging the historical evolution of the previous years, referring entirely to the arguments made by the Procurador General de la Nación (PGN) in its lucid opinion. The motivations of the ruling start from a preliminary statement which shows the awareness that at the time of the facts there was no provision that would characterize crimes against humanity, but that they were already prohibited by customary international law with full binding already they would find protection in the incrimination of common crimes such as murder: their primary purpose is instead the protection of humanity.

The sentence, while recognizing the lack of serious doctrinal attempts to identify the essence of the legal good protected by this criminal category by developing Aristotelian reminiscences, identifies this element in the protection of the human being as a "political animal" against the perversion of the legal systems within of which men organize themselves, in cases where governments-or organizations comparable to them-commit atrocities to the detriment of the civilian population placed under their control. The Court declares that it assumes as a "general test"¹⁷⁶ to identify crimes against humanity, it is inevitable to conclude that the episodes of torture allegedly committed by the accused *Derecho* against *Bueno Alves* can not fall into this category¹⁷⁷.

The same conclusion is also reached by following the further argumentative path that the Court carries out below, based essentially on a detailed analysis of the constituent elements of crimes against humanity in accordance with the current international law, consolidated in the Rome Statute.

The sentence rightly identifies as typical elements, in addition to the behaviors listed by the norm-and that correspond to a "core of acts of extreme cruelty"-, their inclusion in a generalized or systematic attack directed against a civilian population and implemented in execution of, or to promote a policy of a state or an organization¹⁷⁸, the involvement of the State or of an organization comparable to it,

¹⁷⁵IACtHR, *Bueno Alves v. Argentina*, fondo, reparaciones y costas, 11.05.2007.

¹⁷⁶LUBAN, D., "A theory of crimes against humanity", in *The Yale Journal of International Law*, 29, 2004, pp. 85-161.

¹⁷⁷"No son muchos los intentos realmente dogmáticos de encontrar un criterio de distinción, o si se prefiere expresarlo con un lenguaje más tradicional, de determinar cuál es la esencia del bien jurídico protegido en los crímenes contra la humanidad" (Considerando IV).

¹⁷⁸The Corte Suprema de Justicia de la Nación argentina cited the case *Tadić*: ICTY, Prosecutor v. Tadić, Case No. IT-94-1-A and IT-94-1-A bis, Judgment in Sentencing Appeals, 26 January 2000, par. 38 In the same spirit the dissenting opinion of judge A. Cassese in case *Tadić*, which has stated: "(...) if classified as a crime against humanity, the murder possesses an objectively greater magnitude and reveals in the perpetrator a subjective frame of mind which may imperil fundamental values (...)". ICTY, Prosecutor v. Duško Tadić, Separate Opinion of Judge Cassese, AC, IT-94-1-A e IT-94-1-A bis, 26 January 2000, par. 16. See also: CLARKE, K.M., "Refining the perpetrator culpability history and international criminal law's impunity gap", in *The International Journal of Human Rights*, 19, 2015, pp. 594ss.

which enjoys control over a given territory-, the sentence concludes that the forms with which the offense subject to judgment is manifested do not correspond to this structure.

The Court therefore does not find, in this case, any of the characteristics that distinguish crimes against humanity, especially the policy element that contributes, together with the other components of the element of context, to attribute to the conduct that *quid pluris* of specificity and gravity that motivates its international importance. And he concludes by openly criticizing the evident instrumentality. And precisely in light of the characteristics of this last element, the policy element-which requires, according to the doctrine and international jurisprudence of the qualification proposed by the applicants with respect to the application of the special international crimes regime, in order to legitimize the persecution of crimes also by way of derogation from ordinary criminal law institutes. This consideration captures the problematic core of the jurisprudential tendencies that we are analyzing, summarizing perfectly and with great lucidity the terms of the conflict of values underlying them.

19.THE ELEMENT OF CONTEXT AS A DISTINCTION BETWEEN INTERNATIONAL CRIMES AND SERIOUS VIOLATIONS OF HUMAN RIGHTS

The valorisation of the context element of crimes against humanity thus exerts a fundamental reductive function that acts as a shield against excessive and improper expansion of the application field of such crimes. But at the same time it plays an essential role in defining the relationships between the various normative sources that, in different ways and in different fields, incriminate the same illicit conduct. Numerous acts are sanctioned both as serious violations of human rights, in the context of international law, and as international crimes, within international criminal law. While sharing a common core, these two figures do not fully coincide, and the distinction between them is fundamental because only the behaviors that fall into the second category achieves the applicability of the special regime described above. An excellent example of this duplicity is offered by the forced disappearance of people who are the object of express condemnation both in the international protection of human rights and in international criminal law, where it is typified among the constitutive deeds of crimes against humanity. The essential difference between these two areas- in addition to those, also important, related to the description of the typical behavior and to the identification of possible active subjects-is that only the second provides the structural element among the structural requirements, from which it depends precisely the subsumption in the category of crimes against humanity. In other words, the enforced disappearance of people is always a serious violation of human rights, which international law requires states to criminalize and punish, but only its systematic practice reaches the threshold of relevance to crimes against humanity. This fundamental distinction, which also has repercussions on national legislation, is sometimes taken up by Latin American jurisprudence. The Costa Rican Supreme Court of Justicia¹⁷⁹. National courts do not always demonstrate this discrete trait, leading to the classification of crimes against humanity by the inclusion of enforced disappearance in a generic "practice", without analyzing in detail the specific characteristics that it must assume to integrate this category, as evidenced by the following statement of the Peruvian Constitutional Tribunal¹⁸⁰.

A similar imprecision in the definition of structural elements, and of the particular context element, risks generating confusion, especially in those systems in which we think of Peru. Forced disappearance is typified as a common crime or in any case, although included in the title dedicated to the "crimes against humanity", it does not include among structural requirements that element of context on which

¹⁷⁹Corte Suprema de Justicia de Costa Rica, Consulta sobre el proyecto de ley de aprobación del "Estatuto de Roma de la Corte Penal Internacional", sent. Nº 09685, exp. Nº 00-008325-0007-CO, Consulta Judicial Perceptiva, 01.11.2000, considerando II.A.

¹⁸⁰Peruvian Constitutional Tribunal, Vera Navarrete, Gabriel Orlando, recurso extraordinario de hábeas corpus, Exp. n. 2798-2004-HC/TC, 09.12.2004, considerando 25.

the subsumption depends on international crimes. Admission to the category of crimes against humanity on the basis of generic elements-"patrón de violaciones"-which do not correspond to the international normative definition, goes in the opposite direction to the desired harmonization of national and international criminal laws-in matters of persecution of international crimes.

Consequently, domestic jurisprudence should always bear in mind that, regardless of the *nomen juris* that national legislation assigns to typical conduct, its correspondence with the typical elements of enforced disappearance as indicated by the ACFDP is not sufficient in itself to subsume it in the category of crimes against humanity: to this end it will be necessary to prove that it was part of an extensive or systematic attack against a civilian population, accomplished in the execution of a precise state policy. If this contextual element is not satisfied, it is certainly possible to punish the conduct as a common crime of enforced disappearance-or, if it is not foreseen as such, subsuming it in other similar cases such as the illegitimate deprivation of liberty or illegal detention-, but it will not be possible to attribute it the status of crime against humanity nor the special regime that distinguishes this criminal category.

20.DELIMITATION CRITERIA FOR CRIMES AGAINST HUMANITY, CRIMES OF DRUG TRAFFICKING AND TERRORISM

The cross-border dimension that characterizes these criminal figures has often led to talk of their presumed international importance prevails the orientation that classifies them as transnational and non-international crimes in strict sense¹⁸¹. The distinction between these two categories is based on their different nature and on the fact that only with respect to the latter the typical elements, the causes of non-punishment and the models of attribution of responsibility apply in a substantially uniform manner in the various States. Furthermore, compared to transnational crimes, the special regime of international crimes, nor by express conventional provision-the Convention of Imprescriptibility of 1968 does not mention them-nor according to customary law, given the absence of a consolidated state practice and consensus in this regard. However, there have been no lack of interpretative proposals, formulated by the public prosecution and by the civil parties and sometimes accepted by the courts, which, precisely in order to justify the application of the special regime of international crimes, and in particular the rule of imprescriptibility, have dared the classification of such criminal conduct as crimes against humanity, making it included in the opening clause with which the listing of the conduct constituting the crime ends, or relying on the formulation adopted in the corresponding internal legislation. Similar interpretive artifices were then disregarded by the Supreme Courts, which also deployed in these cases their role as "guardians of regulatory" limits in the face of excessively broad interpretations, often based on incorrect premises and on an incorrect perception of international standards in matter. A corrective action of this kind emerges in a judgment of the Supreme Court of Justice of the Argentine Nacional (Argentine CSJN) in relation to the case *Lariz Iriondo*¹⁸². On this occasion, the Court of First Instance, called upon to rule on the extradition of a presumed ETA terrorist requested by Spain, had decided to deny it, deeming the expiry of the limitation period for the crimes ascribed to him.

The pronouncement of the Supreme Court is of particular interest for our analysis because it rejects the reading proposed by the Appellant Public Ministry, according to which the facts ascribed to *Lariz Iriondo* must have been subsumed in "acts of terrorism" under the International Convention on the Suppression of terrorist

¹⁸¹ BANTEKAS, I., *International criminal law*, Hart Publishing, Oxford-Portland, 2010, pp. 8-9 and 260ss. DI FILIPPO, M., "Terrorist crimes and international co-operation: critical remarks on the definition and inclusion of terrorism in the category of international crimes", in *European Journal of International Law*, 19, 2008, pp. 533ss.

¹⁸² CSJN argentina, *Lariz Iriondo*, Jesús María s/ solicitud de extradición, (L. 845. XL. R.O.), decision of 10.05.2005.

attacks with explosives¹⁸³, and constituted as such crimes against humanity. From this qualification the appellants caused, as is to be expected, the consequence of the imprescriptibility, thus eliminating the obstacle on the basis of which the judge at first instance had denied the extradition. The Supreme Court, after analyzing the definition of "terrorism" and "acts of terrorism" formulated by the relevant international instruments. In light of this difference, the possibility of applying to the present case the criterion elaborated in the previous *Arancibia Clavel*, which legitimizes the imprescriptibility of the crime of illicit association aimed at the commission of crimes against humanity, considered in its turn constitutive of a crime against humanity. That solution, which caused the attribution of the same character to the associative offense from the international nature of the crimes-ends, can not be transposed to the present case, since here the crimes of purpose constitute acts of terrorism and are therefore not included among the crimes against humanity. The difference between the *Lariz Iriondo* case and the precedents of CSJN in matters of imprescriptibility is further specified by the special vote of the judges Maqueda and Zaffaroni¹⁸⁴.

The judges base the imprescriptibility of crimes against humanity on customary law and therefore legitimizes its application to facts committed before the entry into force of the relevant Conventions; however, they point out that this criterion does not apply to crimes such as terrorism which, according to customary law, do not fall into that category or autonomously enjoy the regime of imprescriptibility. The extraneousness of these behaviors with respect to the category of crimes against humanity remains at the current state, given that international law and jurisprudence do not show a consensus on this point, nor does the doctrine agree on it, even if this does not exclude *a priori*, as Judge Fayt suggests, a possible future evolution of international law in this direction, considering the inclusion of terrorist acts within crimes against humanity as perfectly admissible, adopting the opening clause as a legislative support, present in the international standard since the time of the Statute of the Court of Nuremberg, which incriminates "other inhumane acts" of similar nature and gravity. According to our opinion, it would be absurd to deny the applicability of the Barrios Altos doctrine, which as we have seen affirms the imprescriptibility, the impossibility of amnesty and the obligation of persecution and punishment with respect to international crimes, elaborated by episodes of state terrorism, to all acts of terrorism, even if not attributable to state responsibilities, since they are simply different forms of manifestation of the same crimes. The possibility of considering crimes of terrorism as crimes against humanity is still controversial, but, as the majority of the Court rightly points out, there is no standard or international consensus that is sufficient, at present, to support this qualification. In the Bolivian system, where the Corte Suprema de Justicia has on several occasions affirmed that the crimes of drug trafficking-also traditionally considered transnational crimes-are among the crimes against humanity, as they "undermine the stability and social peace of the people Bolivian". In support of this statement we quote art. 145 of the law on drug trafficking, which defines it "a transnational crime of" injured humanity "and contrary to international law", disavowing the different nature of transnational crimes compared to international ones, the consequence of this qualification, as well as the objective pursued by the courts that support it, is the subtraction of this offense from the ordinary regime of criminal prescription. The Bolivian Tribunal Constitucional had a first opportunity to rule on this in an appeal for *habeas corpus* interposed in the context of a drug-trafficking process¹⁸⁵. The appeal

¹⁸³DOSWALD BECK, L., *Human rights in times of conflict and terrorism*, Oxford University Press, Oxford 2011, pp. 230ss.

¹⁸⁴CSJN argentina, Lariz Iriondo, Jesús María s/ solicitud de extradición, (L. 845. XL. R.O.), decision of 10.05.2005, considerando 27-28.

¹⁸⁵Constitutional Court of Colombia, sentencia C-630/12 of 15 August 2012: "(...) que afecten el patrimonio del Estado o quienes hayan sido condenados por delitos relacionados con la pertenencia, promoción o financiación de grupos ilegales, delitos de lesa humanidad, narcotráfico en Colombia o en el exterior, o soborno transnacional, con excepción de delitos culposos (...)".

is however declared inadmissible due to procedural defects, without entering into the merits of the correctness of the interpretation proposed by the prosecution, which qualifies the crime of drug trafficking as a crime against humanity and therefore declares it imprescriptible. The sentence limits itself to referring to the plaintiff's argument that this classification is completely arbitrary, since no international instrument assigns the character of "*lesa humanidad*" to such a crime, but does not really leave the court's about. While waiting for a clearer position, therefore, we can hypothesize-or at least hope-that this body acts as a "guardian of the limits" of the typicality of international crimes, circumscribing it with respect to misleading and excessively expansive interpretations.

21.THE COMMITMENT OF THE LATIN AMERICAN JURISPRUDENCE IN THE DEFINITION OF THE BOUNDARIES OF CRIMINAL TYPES FROM THE "VAPOROUS QUALIFICATION"

The intervention of the Latin American Supreme Courts in a restrictive key to the international criminal types manifests itself, as well as in the expressed refusal of argumentative proposals that claim to apply such qualification to conduct extraneous to those indicted by the international standard, or to facts committed in the absolute absence a context suitable to give them international relevance, even in the different form of the clarification of the typical elements of such cases. International crimes show, even more than common crimes, a "need for conceptual delimitation" that derives from their very nature, characterized by a great openness, not to say indefiniteness, on the typical plane. The Latin American jurisprudence, when it applies such cases, is often preoccupied with drawing out its contours, arranging to define more precisely the individual structural elements and to identify the peculiar features that determine the distinction with respect to common crimes. The courts, within this bounding work, also perform a valuable synthesis between the international definition of crimes, which is lowered in the national system, and the institutes proper to internal criminal law, which they are called to apply. The intervention of meticulous reconstruction and combination thus undertaken offers a fundamental contribution to the definition of the international penal types that avoids easy manipulations for instrumental purposes, and at the same time contributes to their inclusion in the internal systems in harmony with the principles and institutions of criminal law.

22.INTERPRETATIVE PARAMETERS OF THE TYPE

The Latin American Supreme Courts, as part of the definitional work described above, sometimes dictate some interpretative parameters for the definition and application of international criminal types, exercising their *nomofilattico* role intended to condition all the jurisdictions of the internal legal system. A paradigmatic example of this intervention is a Plenary Agreement drawn up by the Peruvian Supreme Court of La República in which certain binding criteria are established to discern the crime of enforced disappearance of persons from other common crimes governed by the penal code. The Court, ascertaining that the essential and distinctive element of forced disappearance is the refusal or omission to provide information on the fate of the victim, is concerned with "translating" this element into categories familiar to the internal criminal lawyer¹⁸⁶.

The criteria thus established by the Supreme Court are intended to condition the application of law that incriminates the enforced disappearance of all the courts of the country, and therefore arise as an interpretative source of primary importance for the typical nature of this international crime. Another manifestation of this

¹⁸⁶Corte Suprema de la República peruviiana, Acuerdo Plenario N° 9-2009/CJ-116, "que fija criterios interpretativos del delito de desaparición forzada de personas", 13.11.2009 (adopted according to art. 116 of Texto único Ordenado de la Ley Orgánica del Poder Judicial), fundamento n. 11.

commitment by the Supreme Courts in defining and circumscribing the typical elements that determine the attribution of the character of crime against humanity is offered by a sentence of the Peruvian Constitutional Tribunal, called to rule on the constitutional conformity of a legislative decree which establishes a uniform discipline for crimes which constitute, in fact, violations of human rights¹⁸⁷.

Constitutional courts can play a fundamental role in defining international criminal types, specifying their typical elements and tracing more precise boundaries than those that international law tends to leave confused and uncertain.

23. THE DEFINITION OF THE NON-POLITICAL NATURE OF GENOCIDE

The Supreme Court of Justice of the Mexican Nation also ruled on the crime of genocide, on the occasion of the extradition request made by Spain against Ricardo Miguel Cavallo, a former Argentine military involved in the criminal repressive plan of the dictatorship. The Court clarifies on this occasion that genocide does not constitute a political crime, and is therefore not among those crimes for which the Mexican law prohibits extradition. This conclusion is, first of all, based on the connotation that the current language and the scientific language give to the term "political", and that leads to the understanding that the crime committed against the State is a political crime. Secondly, by carrying out a detailed reconstruction of the origins and historical evolution of the notion of genocide, the judging organ identifies its *ratio*, which consists in the protection of certain human groups characterized by stability, and the protected legal asset, which coincides precisely with the existence and integrity of these groups: in both cases, these are aspects that are extraneous to the concept of political crime. Finally-and this is perhaps the most interesting data for the purposes of our speech-the Mexican Supreme Court states that the typicality of the crime contemplates a "subjective element of injustice"¹⁸⁸, namely the specific intent of destroying one of the protected groups, but that remains indifferent to the possible motives of the crime, within which a political motivation can take on importance. The clarification of the nature of the intentional element and its extraneousness with respect to the motives of crime, besides contributing to the concrete purpose of denying the political character of the crime of genocide and therefore legitimating the extradition of its alleged perpetrator, can also provide useful tools to counteract a growing tendency, especially widespread in Latin America¹⁸⁹, "to portray as genocide any conflict that involves a certain degree of violence and which produces victims within ethnic minorities or socially perceived marginal groups"¹⁹⁰.

24. THE CONFIGURATION OF INSOLVENCY RELATIONSHIPS WITH COMMON CRIMES

The ruling by the Brazilian Supreme Tribunal Federal on the case known as the massacre de Haximu¹⁹¹ is probably the only sentence to date pronounced in the Latin American continent to carry out a proper analysis of this criminal case. The subject of the dispute was in this case the identification of the competent court, contested in the appeal brought by the convicts in the first instance, following the outcome of a trial held before a federal monocratic judge. The appellants claimed that the crime of genocide ascribed to them fell within the category of fraudulent

¹⁸⁷Tribunal Constitucional del Peru, Pleno jurisdiccional, Demanda de inconstitucionalidad interpuesta contra el Decreto Legislativo nº 1097, exp. Nº 0024-2010-PI/TC, 21.03.2011, considerando 50-52.

¹⁸⁸Suprema Corte de Justicia de la Nación mexicana, Tribunal Pleno, Amparo en revisión promovido por Ricardo Miguel Cavallo nº 140/2002, 10.06.2003, considerando 11.

¹⁸⁹SANTALLA VARGAS, E., "An overview of the crime of genocide in Latin American jurisdictions", in *International Criminal Law Review*, 10, 2010, pp. 448ss.

¹⁹⁰SANTALLA VARGAS, E., "An overview of the crime of genocide in Latin American jurisdictions", op. cit.,

¹⁹¹Supremo Tribunal Federal brasileiro (STF), Tribunal Pleno, Recurso extraordinário 351.487-3 Roraima ("massacre de Haximu"), 03.08.2006.

crimes against life, which a constitutional provision assigns to the jurisdiction of the Tribunal do Júri (collegiate and comprising non-toga judges).

The Brazilian Supreme Court rejects the appeal, refuting the classification of the genocide as a fraud against life on the basis of a detailed examination of the typical structure and characteristics of the crime of genocide. Once again, central in this analysis is the identification of the legal good protected by the law, which, we read, transcends the individual goods life or physical integrity-whose violation constitutes only a modality of the genocidal behavior- essentially coincides with the existence of human groups that make up "humanity in its diversity"¹⁹².

The determination of the legal good protected by the law that incriminates the genocide thus acts as a discrete criterion with respect to the category of crimes against life and, consequently, as a methodological assumption to deny the special jurisdiction of the Tribunal do Júri¹⁹³. But the Supreme Court of Brazil does not limit itself to this conclusion, and analyzes the possibility of considering this body as competent on the basis of the connection criterion, on the assumption that there is a competition of crimes between the genocide and the established murders. Preliminary to this question is the verification of the configurability of a crime offense between the crime of genocide and the individual crimes that determine the constitutive conduct: it is a matter of extreme practical importance. The Brazilian court goes deeper into the matter, citing a sentence of the German BGH¹⁹⁴ the first sentence of a national court to condemn for genocide - and above all the comment made by A. Gil Gil¹⁹⁵, showing that it fully adheres to the thesis interpretive of this author. The reference to the sentence of the Supreme Court of Germany, which, in reform of the first instance sentence, condemned the defendant for a single crime of genocide in formal competition with thirty murders, is considered entirely appropriate in light of the perfect correspondence between the typical description of the genocide foreseen in that legal system and that adopted by the Brazilian legislator, declaratively inspired by the German model. The Brazilian sentence breaks down the problem of the bankruptcy proceedings of the genocide in two dimensions: on the one hand, remaining within this criminal type, it is necessary to define whether the commission of more homogeneous and constitutive conduct of a genocidal modality- for example, more homicides-results in the ascription of multiple crimes of genocide in material competition between them and, in parallel, if the same conclusion applies to the commission of multiple heterogeneous behaviors constituting genocide-for example, one or more murders and injuries. On the other hand, the problem emerges from the confines typical of the case, and concerns the relationship between genocide and each of the behaviors that integrate it and which are at the same time autonomous common situations set up to protect individual legal assets, such as life and physical integrity. This conclusion, which the Brazilian court fully shares, derives once again from the identification of the legal good protected by the norm on genocide with the existence of a specific human group, and the recognition of the individual who concretely suffers the injury as a mere illicit object. The different criminal acts that integrate the crime do not therefore stand out as autonomous cases, but as mere commissioning modalities of a single crime of genocide, or, on the

¹⁹²Supremo Tribunal Federal brasileiro (STF), Tribunal Pleno, Recurso extraordinário 351.487-3 Roraima ("masacre de Haximu"), op. cit., considerando 1 of the vote of Relator (Ministro Cezar Peluso) (pp. 11-13).

¹⁹³In the same spirit also: Procurador Geral da República: "Como se vê, diferentemente do homicídio, no qual o elemento subjetivo do agente é matar alguém, no genocídio o dolo é de exterminar, total ou parcialmente, fisicamente ou culturalmente determinado grupo. Não se inclui, por isso, o genocídio, dentre os crimes dolosos contra a vida, muito embora os bens jurídicos vida e integridade física e mental também são afetados por este crime (...)".

¹⁹⁴Bundesgerichtshof, Jorgic, 3 StR 215/98-OLG Düsseldorf, sentence of 30.04.1999. SAFFERLING, C., KIRSCH, S., *Völkerstrafrechtspolitik: Praxis des Völkerstrafrechts*, ed. Springer, Berlin, 2013, pp. 243ss.

¹⁹⁵GIL GIL, A., *Comentario a la primera sentencia del Tribunal Supremo alemán condenando por el delito de genocidio*, op. cit., pp. 774ss.

contrary, as different forms of attack on the same legal good. Consequently, the imputation of a single crime of genocide fully reflects the disvalue of the fact¹⁹⁶.

The genocide is therefore characterized as a "unit of typical action", in the sense that the type is realized only once even in the presence of the repetition of several homogeneous acts. Against a plurality of heterogeneous behaviors, however, the conclusion in favor of the criminal unit derives from the conception of genocide as an "alternative mixed type", with respect to which the individual executive modalities simply represent a different degree of disvalue of the action. As for the second profile, concerning the "external" relations between the genocide crime, considered in a unitary way, and the different criminal conduct that integrate it, the Supreme Court of Brazil claims that the absorption criterion can not be applied¹⁹⁷. The logical conclusion of this configuration is that between the crime of genocide and the individual crimes that integrate it, there is a concurrence of crimes, all of which must be taken into account for the purpose of commensurate sentences. The insolvency relationship develops, so to speak, in two directions: the various murders of murder are linked to each other by a continuation constraint, determined by the identity of conduct and by the conditions of time and place and executive modalities. The crime thus continued configured then arises in a formal competition relationship with the crime of genocide, assessed in unitary terms.

The judicial body seems to "land" abruptly, recognizing that it is limited by the prohibition of *pejus* reform of the sentence when the appeal was lodged by the defense. Since the plaintiffs had not been convicted of murder, but only for that of genocide, the various murders were also to be charged with causing an aggravation of punishment not allowed by the aforementioned principle. The court confines itself to reiterating that genocide is not among the malicious crimes against life, and that the jurisdiction to judge on it is therefore not up to the Tribunal do Jurí, rejecting the appeal accordingly. Beyond the outcome of the ruling, however, the Supreme Court of Brazil on this occasion performs an extremely interesting analysis of the criminal genocide and in particular the complex issue of its insolvency relationships with the individual conducts that integrate it, offering a interpretation-followed by the German-strict BGH and firmly anchored to classical institutes and criminal dogmatics. In this way, it offers a valid contribution to the definition of the boundaries of the international criminal type-in this case the genocide-, specifying a profile - the bankruptcy relations - which international criminal law has not yet profoundly examined, but which is extremely practical relevance at the time of application.

25.THE JURISPRUDENTIAL VALIDATION OF RESTRICTIVE LEGISLATIVE CHOICES

A final manifestation of the centripetal jurisprudential motion that we are examining emerges in some judgments that, in judging the constitutional conformity of the norms that characterize international crimes, endorse legislative choices that are restrictive with respect to the corresponding international definition. This is the other side of the coin with respect to those sentences of Constitutional Courts which reiterate the freedom of the national legislator to extend the application field of international indictment rules, on the assumption that they limit themselves to setting a minimum of protection that can not be waived but on the contrary, it can very well be expanded. Well, there are also some-not numerous, for the real-judgments that validate legislative choices operating in the opposite direction, which omit some structural elements of the case envisaged by the international standard. In fact, the positive judgment regarding the constitutional conformity of such

¹⁹⁶Supremo Tribunal Federal brasileiro (STF), Tribunal Pleno, Recurso extraordinário 351.487-3 Roraima ("masacre de Haximu"), op. cit., considerando 1.

¹⁹⁷Supremo Tribunal Federal brasileiro (STF), Tribunal Pleno, Recurso extraordinário 351.487-3 Roraima ("masacre de Haximu"), op. cit., considerado 1.

provisions does not seem to call into question the necessary respect for the minimum threshold that the international norm imposes: simply, it is believed that this standard is not compromised by the mere absence of a specific textual element which is however included in the generally considered standard.

This argument appears clearly in a recent ruling by the Guatemalan Court of Constitucionalidad, called to rule on the presumed unconstitutionality of the incriminating norm of genocide, in the part in which it does not include racial groups among the protected groups. The request for unconstitutionality states that art. 376 of the Guatemalan penal code, which provides for groups protected by the provision against genocide only national, ethnic and religious groups, with the exclusion of racial groups, which contrasts with the Constitution. In particular, it would violate the rights to life, physical integrity and security, as set forth in articles 2 and 3 of the Constitution, recognized not only to individuals but also to human groups as a whole. Moreover, the appellant points out the violation of the principle of pre-eminence of international human rights treaty, expressly provided for by art. 46 of the Constitution, since the contested provision deviates from the Genocide Convention, which imposes on the Member States the obligation to classify the crime of genocide and to provide for adequate and effective penal sanctions (article 5) according to the definition provided by the Convention itself (article 2). This argument seems especially interesting, since it enters into the merits of the relationships between internal and international normative sources, claiming the pre-eminence of the latter, even when this collision involves criminal provisions that typify crimes. The content of the international treaty- the Genocide Convention-is therefore used as a parameter to assess the defect of unconstitutionality of the law by means of art. 46 Constitution, which acts as a link between the international system and the internal one, as well as the principle of equality (article 4 of the Constitution), since it marks an unjustified and unreasonable difference in treatment between the three categories envisaged by the norm and the racial groups which remain excluded from it. Finally, the appeal attributes to the contested provision the violation of the obligation to criminalize the serious violations of jus cogens, which can be interpreted by means of interpretation 44 and 149 of the Constitution.

The Constitution Court, with a rather concise motivation, rejects the appeal on the basis of a topic of linguistic tenor, without taking into consideration in particular the interesting facts-arguments presented by the applicant. In the opinion of the judicial body, in fact, with the term "racial" -regulate the peaceful cohabitation refer to the human race understood, and therefore find application with respect to all human beings Considering II of the sentence. Consequently, concludes the ruling, the contested law, in providing protection recipients for ethnic groups, also includes the so-called racial groups, and is therefore not contrary to the Constitution. Without going into the complex question of the difference between "race" and "ethnicity", which can best be resolved by anthropologists and sociologists, it is sufficient to note that the Court considers two terms equivalent to international standards on genocide- the 1948 Convention, both the treaties establishing international criminal tribunals- expressly distinguish. In this way, the Constitutional Court chooses to endorse a choice made by the internal legislator which clearly departs from the international normative dictate. However, on closer inspection, what may appear to be the confirmation of a restrictive typification is denied by the Court, according to which the difference between the internal and the international norms is purely literal, and does not affect their actual field of application, which remains unchanged and extended also to racial groups. A completely analogous procedure has recently been activated on the initiative of the same applicant in relation to art. 201 bis of the Guatemalan penal code, which typifies the torture offense. In particular, the unconstitutionality by omission of the norm is noted, in the part in which it does not provide for the obligation to punish the conduct and discrimination or any other purpose as the purpose that animates the active subject, in contrast to the definition of the crime provided by the 1984 International Convention. In addition, the unsuccessful provision, among the possible modalities of the conduct, of the application of methods aimed at nullifying the personality of the victim or decreasing

their physical or mental capacity, even if they do not cause physical pain or suffering, are contested. psychic, in violation of the provisions of the Inter-American Convention on Torture. The arguments on which the appeal is based are identical to those, examined earlier, on which the appeal against the incriminating norm of genocide is based, namely: the violation of the rights to life, physical integrity and safety, of the principle of equality, of the pre-eminence of international human rights treaties and of the obligation to classify crimes of *jus cogens* and human rights as crimes. The proceeding is still ongoing: it will be interesting to verify, when the ruling of the Guatemalan Constitutional Court occurs, whether it remains on the line of validation of national legislative choices, or if, contrary to what happened in relation to the genocide rule, it will be considered that the torture rule, in omitting typical elements provided for in the international definition, effectively contravenes the minimum standards of protection imposed by the latter. The constitutional judge therefore proposes the alternative between invalidating the normative solution adopted by the internal legislator, restoring the wider application field of the corresponding international norm, or adhering instead to the restrictive legislative choice, seeking a justification with respect to the internationally imposed obligations. Once again, the key role played by the judgment of constitutionality in the combination and harmonization of national and international sources, and its immediate impact on the definitions of international criminal types and on the significant practical consequences, in terms of punishment and discipline, is clearly highlighted, that the subsumption of the facts in this category involves.

26.CONCLUDING REMARKS

The principle of typicality is implemented by means of a normative drafting technique called typological construction or typological construction, which makes it possible to lay a permanent bridge between abstract disposition and concrete fact. The product of this technique of selection and schematization is the category of typicality, the penal type, which constitutes the technical precipitate of the homonymous principle and the true connecting fabric between abstract norm and concrete fact. The content of the penal type, which only partially coincides with that of the case-broader concept-consists of all and only those elements that determine the core of the essential disvalue of a particular criminal figure. At the end of a long dogmatic evolution, we have now come to recognize that it includes not only the objective and descriptive elements, but also the normative and subjective elements that characterize conduct. The category of typicality is perfected in the dynamic moment of judicial interpretation that coincides with the judgment of conformity to the type, thanks to which the meeting and mutual completion take place between abstract disposition and concrete fact. Protagonist of this moment, essential to the life of criminal law, is the judge, which therefore plays a constructive role in law. Recognizing this role implies the abandonment of the Enlightenment paradigm that sees the judge as the mere applicator of an already perfect law, by means of a mechanistic subsumption operation.

The analysis of the jurisprudence of these Courts in the field of international crimes has demonstrated the centrality of the typical definition of these criminal figures and the consequences that it entails in terms of applicative and sanctioning consequences. At the same time, this jurisprudence has provided an important contribution to the configuration and evolution of these cases. From the overview outlined in the second chapter, the special complexity that distinguishes the international criminal offenses has emerged, and which derives from their nature in progress, from the convergence of international law and criminal law in their definition and the multilevel structure of the sector in which they are inserted. These characteristics determine the coexistence of different normative definitions in the Founding Statutes of the international criminal tribunals and in the various Conventions for the protection of human rights, which are flanked by further differences in national legislation. In fact, in fulfilling the obligations of incrimination imposed by the instruments for the protection of human rights, or in the adaptation of the law to the Rome Statute, the States can take advantage of a margin of

appreciation-confirmed, lastly, by the principle of complementarity which supports the ICC¹⁹⁸, system, which allows them to take into account local needs and specificities. As a result, international crimes are configured as a variable geometry category.

The expansion on the temporal plane tends to allow the subsumption in international criminal cases of facts committed prior to their typification in the internal order: to achieve this objective, different argumentative paths have been developed, some of which are entirely based on international law as a direct source of incriminating rules. The "progressive" jurisprudence that develops this path, faced with the absence, in the national legal system, of pre-existing provisions that typify international crimes, resorts to the direct application of international norms that define international crimes, stating that they correspond to the international custom, which allows to anticipate their validity and to give them an imperative character. The Courts seek support for the existence of such a norm in the Statutes of international criminal tribunals, in the instruments of protection of human rights and in the jurisprudence of the IACtHR¹⁹⁹. This argument based on the direct application of international law is used both to affirm the existence-previous to the facts-of the international criminal offenses, and to base the rule of the imprescriptibility of this class of crimes. In relation to this last profile, the judicial bodies usually refer to the Convention of Imprescriptibility of 1968, regardless of its ratification by the State in question and the date on which it occurred, since it is considered a mere crystallization of a pre-existing customary law, which therefore admits a retrospective application. Finally, a ruling by the Argentine Supreme Court (*Arancibia Clavel*) was examined, which pushes this argumentative path to the point of reaching a proper judicial typification of the associative crime: the offenses attributed to the illicit association of which the accused was a member they are qualified as crimes against humanity through the direct application of international norms, and as a further step it is affirmed that even the mere participation in this illicit association constitutes, almost by osmosis, a crime against humanity, as such imprescriptible.

Another original path that the Latin American jurisprudence has elaborated to allow the widening of the international criminal cases in the temporal plane is the so-called double subsumption: this method combines a primary subsumption, of typing and sanctioning, in a common situation foreseen by the national legislation prior to the facts- for example the crime of imprisonment or illegitimate deprivation of liberty-with a secondary subsumption in an international criminal case, which serves to reflect the peculiar disvalue of the fact that the common crime does not capture and, above all, to apply the special regime reserved for international crimes. Also in this case, the international criminal offense has a logical-temporal priority; the common one intervenes in second instance to provide the sanctioning framework and to remedy the problems that the former poses with respect to the principle of legality and non-retroactivity.

The interpretive artifice thus elaborated raises perplexity not only because it consists in the creation from scratch of an incriminating case by the judge-as formed by the merger of two normatively foreseen cases-but also because it is based on a paradoxical if not erroneous assumption. While affirming the existence of a relationship of specialty between the domestic and international cases-in the sense that the latter would be *lex specialis* compared to the former, even if there remains a certain discrepancy of views on the identification of the specializing elements-not then follows the rules of the apparent competition of rules governing such hypotheses, and which would like the application of the special rule only, but, as we have seen, both apply jointly. Finally, the same reservations are raised with respect to this interpretative process, and precisely with respect to the part that applies the

¹⁹⁸MELLOH, F., *Einheitliche Strafzumessung in den Rechtsquellen des ICC-Statuts*, Dunker & Humblot, Berlin, 2010.

¹⁹⁹LIAKOPOULOS, D., "The advisory power of the inter American Court", in *International and European Union Legal Matters*-working paper series, 2016.

international criminal offense, to the argument based on the international custom as a directly applicable offense. The double-subsumption method has also been the object, on some occasions, of an "improper" use, which has added to the subsumption in this case a statement, with a purely declarative function and without any disciplinary consequences, according to which the facts also constitute international crimes. The value of such statements is purely symbolic, and aims to underline the extreme gravity of the crimes and their massive size.

Finally, a last interpretative path that can be placed within the expanding trend in question overcomes the problem of the prescription stating the suspension for the duration of the *de facto* regime, considering it an exceptional state. Such a solution, which obviously does not directly involve international sources, should however be able to count on the existence of a provision that provides for such a suspensive cause of the prescription with specific reference to the criminal sphere.

The same instrumental purpose that marks the widening of the international criminal cases in the temporal plane can also be found in those interpretative tendencies which determine an expansion on the more typical plane: even in this synchronic perspective, the limits of the typical structure of these are forced. criminal figures in order to include the concrete facts that must be judged. This expansion can take shape either through an extensive interpretation of some elements constituting the case, or through the control of constitutional legitimacy, when it validates legislative choices that expand the scope of the cases in relation to their definition at international level or when, on the contrary, decides to eliminate elements, introduced by the national legislator, which restrict the applicative scope of the cases in question. The first form of manifestation includes the numerous sentences that qualify the crimes of the Argentine dictatorship as genocide on the basis of a very broad interpretation of the notion of "national group", which aims to conceal nature in the political reality of the group affected by the repression systematic. Examples of the widening of the cases because of the constitutional legitimacy check are instead offered by some sentences of the Colombian Constitutional Court and the Bolivian one in the field of genocide, torture and enforced disappearance, which intervene on some typical elements inserted by the legislator during the typing of such crimes, which deviate from the corresponding international definition in the double sense highlighted above.

The expanding trend now described coexists with an opposite tendency that we have defined as reductive, which, although it appears to be a minority, opens up new and interesting possibilities with respect to the contribution that the jurisprudence of the Supreme-Latin American Courts but not only can offer to the definition and development of international criminal cases. This contribution sometimes assumes the form of clarification or clarification of some of the constituent elements of the case, on the assumption that the latter, in the light of the significant *contra-reum* consequences that their exceptional discipline entails, must be interpreted restrictively and clearly delimited. This line of jurisprudence includes the judgments that recover the selective value of the context element of international crimes in order to counter undue expansion of the latter to facts that do not present the characterizing traits or the special gravity. Furthermore, the element of context is sometimes enhanced by these interpretative tendencies to mark more clearly the distinction between international crimes and serious violations of human rights-which do not always coincide with them-and between those crimes and transnationals crimes, such as drug trafficking and terrorism.

The overall assessment of the analyzed Latin American jurisprudence has revealed that it has a very significant impact both within the national system in which it is inserted, and beyond these boundaries. This influence assumes different traits depending on the macro-trend in which the pronunciations are inserted: the expansive tendency negatively affects the defendant's defense guarantees, expanding the sphere of applicability of that exceptional regime which has for him decidedly detrimental effects. The "differentiated" criminal ²⁰⁰ that is thus created,

²⁰⁰AMBOS, K., *Internationales Strafrecht*, C.H. BECK, München, 2014, par. 4. LIAKOPOULOS, D., "Die Hypothese des Rechts auf ein faires Verfahren internationalen Strafgericht", in

and which seems to expand more and more, risks to easily slip into a manifestation of the enemy's terrible-criminal law, which suspends a whole series of institutes and principles guaranteed freedom and dignity of the accused. At the same time, the tendency to widen the boundaries of international criminal cases through the direct application of international norms generates profound friction with the principle of legality, understood here not so much in its political aspect linked to the separation of powers, but in its material-maintained appearance even in the "weakened" version that adopts the international law of this principle-which is concerned with ensuring the knowledge of the criminal law as a prerequisite for the guilty judgment and the orientation function of the members²⁰¹.

The jurisprudence of the Latin American Supreme Courts has a strong external impact, which projects it on a world scale. Through the phenomenon of jurisprudential circulation in its various directions and dimensions-horizontal and vertical, ascending and descending-, the interpretative solutions elaborated by those Courts, the argumentative paths developed by them, even their general tendencies and tendencies, influence the foreign judges, international criminal jurisdictions and bodies for the protection of human rights. This circulation of precedents and tendencies, which is independent of the binding effectiveness of decisions and is based instead on their persuasive authority, assumes an informal and dynamic face, which has led to talk of a "global community" of judges. The mutual influence between Courts of different countries and levels gives rise to a phenomenon effectively described as "jurisprudential cross-fertilization"²⁰², which, while concealing in some cases an amplification of hermeneutical errors or the instrumental use of previous decontextualized, in its complex provides an essential contribution to the process of harmonization of international criminal law.

Within this complex phenomenon of interaction, the Supreme Courts stand out as a true creator of the harmonization of definitions and interpretation of international crimes, and a leading player in the configuration of international criminal law as a legal space characterized by a pluralism ordered.

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²⁰¹LIAKOPOULOS, D., *Parità di armi nella giustizia penale internazionale*, vol. 1, ed. Libellula, Puglia, 2018.

²⁰²SLAUGHTER, A.M., *A new world order*, Princeton University Press, Princeton 2004. JENEUSS, J., "Obstacles to cross-fertilisation: The international criminal tribunals "unique context" and the flexibility in the European Court of Human Rights' case law", in *Nordic Journal of International Law*, 84 (3), 2015, pp. 408ss.

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