

# Combating impunity for international crimes in Spain: from the prosecution of Pinochet to the indictment of Garzón

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**Barcelona, May 2011**

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### **Translation**

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### **Typesetting and printing**

Àtona, S.L. / gama, sl

### **ISSN**

2013-5793 (online edition)

2013-5785 (paper edition)

### **DL**

B-38.039-2009



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## ABSTRACT

This paper analyses the technical and legal aspects of developments that have taken place in practice involving lawmakers and the judicial authorities in Spain in the prosecution of international crimes. Since the mid-nineties, when the Spanish courts, under the protection of universal jurisdiction, recognised their jurisdiction to prosecute Pinochet, through to the recent indictment of the Spanish National Court judge Baltasar Garzón for abuse of judicial authority for starting proceedings in relation to possible international crimes committed in Spain during the civil war and the period of the Franco dictatorship, various different actions concerning this matter have been taken by lawmakers and the judicial authorities.

The apparent schizophrenia manifest in these actions, which is made evident throughout this paper, should serve as a proving ground for the arguments for and against efforts to combat impunity at the national level, without sight being lost of the very meaning of this struggle, namely, the right to effective judicial remedy for the victims of the most abominable crimes committed against mankind.

**Keywords:** International criminal law, transitional justice, crimes against humanity, Spain

## RESUMEN

Ese trabajo analiza la evolución que ha tenido el legislador y la judicatura española en la persecución de los crímenes internacionales. Desde que amparados en la jurisdicción universal los tribunales españoles se declarasen competentes para perseguir a Pinochet, hasta la imputación del delito de prevaricación al juez Garzón por iniciar diligencias en relación con posibles crímenes internacionales cometidos en España durante la guerra civil y el período de la dictadura, muchas y variadas han sido las actuaciones por parte del legislador y del poder judicial. La esquizofrenia que éstas denotan debería servir como laboratorio de los pros y contras a los que tiene que hacer frente el modelo de lucha contra la impunidad a nivel nacional, sin que ello suponga perder el sentido mismo de esta lucha: ofrecer el derecho a una tutela judicial efectiva a aquel que ha sido víctima de los más abominables crímenes que se puedan cometer contra el género humano.

**Palabras clave:** Derecho penal internacional, Justicia transicional, Crímenes de lesa humanidad, España

## RESUM

Aquest treball analitza l'evolució que ha tingut el legislador i la judicatura espanyola en la persecució dels crims internacionals. Des que emparats en la jurisdicció universal els tribunals espanyols es declararessin competents per perseguir Pinochet, fins a la imputació del delict de prevaricació al jutge Garzón per iniciar diligències en relació amb possibles crims internacionals comesos a Espanya durant la guerra civil i el període de la dictadura, moltes i variades han estat les actuacions per part del legislador i del poder judicial. L'esquizofrènia que aquestes denoten hauria de servir com a laboratori dels pros i contres a què ha de fer front el model de lluita contra la impunitat a nivell nacional, sense que això suposi perdre el sentit mateix d'aquesta lluita: oferir el dret a una tutela judicial efectiva a aquell que ha estat víctima dels més abominables crims que es puguin cometre contra el gènere humà.

**Paraules clau:** Dret penal internacional, Justícia transicional, Crims contra la humanitat, Espanya

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“From the origins of mankind until the present day, the history of impunity is one of perpetual conflict and strange paradox: conflict between the oppressed and the oppressor, civil society and the State, the human conscience and barbarism; the paradox of the oppressed who, released from their shackles, in turn take over the responsibility of the State and find themselves caught in the mechanism of national reconciliation, which moderates their initial commitment against impunity”.<sup>1</sup>

# 1. HOW AND WHY CERTAIN OFFENCES BECAME INTERNATIONAL CRIMES

One of the most important contributions to be found in the new structure of the international system since the Second World War is the idea of a nascent international community.<sup>2</sup> This is reflected in the legal system, on the one hand, through a series of obligations by members that are “owed towards the community as a whole” (known as obligations *erga omnes*) and, on the other, in the establishment of a hierarchy of international regulations or, in other words, a small set of pre-emptory norms that represent the interests of this nascent international community and from which no derogation is ever permitted (*jus cogens* norms).<sup>3</sup>

The consequence of all this, structurally speaking, has been a certain playing down of the quasi monopolistic nature of the statist core of international society<sup>4</sup> and also of the elements that have shaped the sovereign state.<sup>5</sup> Thus, in certain spheres –albeit very few – it is accepted that a state’s hitherto inviolable sovereignty is invaded in the interest of the protection of a series of values considered to be fundamental for the international community as a whole and, as such, are therefore given preference over individual interests.

This is the basis, for example, of the institutionalisation of a mechanism of collective security described in the Charter of the United Nations, the purpose of which, as an international regulation, is the protection of human beings or, what is under analysis in this paper, the fight against the impunity of crimes that “go beyond the limits that are tolerable to the international community and offensive to mankind as a whole”,<sup>6</sup> thereby giving rise to what in the present day is known as international criminal law.<sup>7</sup>

The way chosen to defend these common values in this case has been the categorisation of criminal offences of a specifically international nature,<sup>8</sup> which give concrete expression to the responsibility of

individuals who are the perpetrators of such offences because, as the Nuremberg Tribunal stated, “Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.

This has obviously not been easy. Being a sphere that is as representative of the exercise of sovereignty as they come, states have always been very cautious in this regard. This is borne out by the fact that, apart from specific exceptions such as piracy or diplomatic protection, the sole jurisdiction incumbent on states up until the middle of the twentieth century was to protect people and detect and punish offences by them according to their internal law.<sup>9</sup>

Against this background, the configuration and prosecution of international crimes has been – and continues to be – difficult and intermittent, and it has depended on the level of sensitivity and understanding of states at any given time.<sup>10</sup>

The first ten years after the Second World War, for example, were marked by the Nuremberg Statute and the Nuremberg Principles, together with a whole series of treaties, acts and resolutions that stemmed from these and which crystallised into international criminal law.<sup>11</sup>

This was followed by a period of marked paralysis with the power-bloc confrontation that led to a return to the preservation and protection of state sovereignty and its exclusive powers, in contrast to cooperation and the institutionalisation of society on a global level.<sup>12</sup> From this point onwards, it would not be until the late sixties and seventies, with the rapid development of the Non-Aligned Movement and the bloody coups in Latin America, that the configuration and delimitation of international crimes committed by individuals returned to the international agenda, although for only a short time and of a limited nature.<sup>13</sup>

This was followed by a period during which there was a certain apathy regarding this subject, reflected, for example, in the zero impact of the International Law Commission, which had resumed the work that had been pending since 1954 of drafting a code of crimes against the peace and security of mankind.<sup>14</sup>



In contrast, and coinciding with the end of the Cold War, the period from the nineties onwards can without a doubt be referred to as the high point since Nuremberg in that prosecution mechanisms, which, except for isolated cases, had up until then been lacking, also began to be finally activated. This period coincides, at the international level, with the adoption on first reading of the draft code of offences against the peace and security of mankind,<sup>15</sup> which later on served as the basis for the drafting of the statutes of the first *ad hoc* international criminal courts that would followed the draft code;<sup>16</sup> the start of the trials of ex-prime ministers and ex-heads of state such as Jean Kambanda, Slobodan Milosevic and more recently Jean Pierre Bemba; the UN General Assembly's adoption of principles and basic guidelines on the right of victims of gross violations to a remedy and reparation,<sup>17</sup> which is laid down in international jurisprudence in terms of the human rights in this area;<sup>18</sup> and above all the setting up of the International Criminal Court.<sup>19</sup>

In addition to the cooperation that states establish with these international authorities, mention should also be made of the advances made at the internal jurisdiction level, the significance of which is twofold. On the one hand, different countries that have been the protagonists of tragic pages of mankind's history have begun to initiate proceedings, hitherto impossible, to prosecute international crimes that had occurred in their territory. The legal basis for these actions has usually been international regulations that are also considered to be part of their legal system, with a legal status that is in certain cases above that of its own internal laws. This occurred, for example, in certain judicial rulings in Estonia, Chile, Argentina and Peru, where criminal offences not provided for in their respective criminal codes have been applied, immunities waived and amnesty laws abolished in accordance with the international legal order.<sup>20</sup>

The other point of note, which is no less important, is the prosecutions relating to this matter being pursued by courts in third states on the basis of what is known as *universal jurisdiction*, namely, the cross-border prosecution and punishment<sup>21</sup> of "crimes that, due to their nature, affect the entire international community".<sup>22</sup>

It has been through this latter approach in particular that Spain, over the last twelve years, has undoubtedly played a particularly important role, which is even more significant given the attitude of the Spanish legislature and judiciary to crimes committed in its own territory.

## 2. A DOUBLE STANDARD IN THE PROSECUTION OF INTERNATIONAL CRIMES IN SPAIN ACCORDING TO THEIR ORIGIN: TERRITORIAL IMPUNITY V. UNIVERSAL JURISDICTION.

### 2.1. AMNESTY AS A SHIELD AGAINST THE PROSECUTION OF INTERNATIONAL CRIMES COMMITTED IN SPAIN DURING THE FRANCO DICTATORSHIP

A fundamental aspect in the transition to democracy in Spain, which was endorsed by the great majority of the political parties that formed the first democratic parliament within the transition period, was law 46/1977 of 15 October 1977,<sup>23</sup> or the Amnesty Law, which is still in force today.<sup>24</sup> Politically speaking, its existence formalised a tacit pact between the political forces in the country to “forget the recent past” (i.e. the Franco era) for the sake of social peace and the national reconciliation of all Spaniards, and upon which the process of transition was founded.<sup>25</sup> In legal terms, it practically disqualified the victims of the Civil War and the subsequent period of dictatorship from initiating criminal proceedings for human rights abuses, in what was a clear attempt to consolidate the impunity of the Franco regime.<sup>26</sup>

An attempt was made to remedy this situation in 2007 by way of “law 52/2007, 26 December, which recognises and elaborates on the

rights, and establishes redress, for those who suffered persecution or violence during the civil war and the period of dictatorship”, referred to as the Historical Memory Act.<sup>27</sup> This law “acknowledges and declares to be fundamentally unjust” certain actions which are considered to involve war crimes or crimes against humanity (art. 2), it introduced a mechanism for identifying and locating victims (arts. 12-14), it made provision for economic support for the victims (arts. 5-10), and it even stated their “compatibility” with potential legal actions (second additional provision). What it did not do, however, was declare the invalidity of judgments passed down by courts qualified under the same law as being “illegitimate” (art. 3), nor include the Amnesty Act in the list of repealed laws, meaning that it is still in force and continues to stand as an obstacle to the potential legal actions that it refers to.

In view of this fact and the absence of any willingness to change the *status quo* that was established in 1977, notwithstanding the opportunity afforded by the Historical Memory Act, it is no wonder that criminal proceedings in relation to the matter remained closed until very recently when, in October 2008, Baltazar Garzón, the judge assigned to National High Court’s Central Court of Investigation section no. 5,<sup>28</sup> accepted a petition filed in 2006 seeking information surrounding enforced disappearances during the Franco era, in relation to which he delivered a decision to exercise his jurisdiction for a period of several months in a case of alleged offences of a continuing nature of unlawful detention and forced disappearance, within the context of crimes against humanity carried out from 1936 onwards, during the years of the Spanish Civil War and the following post-war years.<sup>29</sup> His actions could therefore be viewed – as in fact they were by the Human Rights Committee’s International Covenant on Civil and Political Rights<sup>30</sup> – as an attempt to overcome this and other legal barriers that were blocking prosecutions in these situations by way of a legal approach based fundamentally on the existence and primacy of international criminal laws applicable to the case.<sup>31</sup>

Similarly, mention should also be made of the other statements and recommendations made at the time by the Human Rights Committee

to Spanish lawmakers on this matter, in accordance with United Nations' policy on the matter.<sup>32</sup> In paragraph 9, it recalls that “crimes against humanity are not subject to a statute of limitations and draws the State party’s attention to its general comment No. 20 (1992), on article 7, according to which amnesties for serious violations of human rights are incompatible with the Covenant, and its general comment No. 31 (2004), on the nature of the general legal obligation imposed on States parties to the Covenant. While noting with satisfaction the State party’s assurance that the Historical Memory Act provides for light to be shed on the fate of the disappeared, the Committee takes note with concern of the reports on the obstacles encountered by families in the judicial and administrative formalities they must undertake to obtain the exhumation of the remains and the identification of the disappeared persons”. For this reason, it then goes on to specifically state, “The State party should:

- a) Consider repealing the 1977 amnesty law;
- b) Take the necessary legislative measures to guarantee recognition by the domestic courts of the non-applicability of a statute of limitations to crimes against humanity;
- c) Consider setting up a commission of independent experts to establish the historical truth about human rights violations committed during the civil war and dictatorship; and
- d) Allow families to exhume and identify victims’ bodies, and provide them with compensation where appropriate”.<sup>33</sup>

Nevertheless, the response of both the Executive and the judicial system to this initiative was to reaffirm the law with everything that this implies. At the political level, the Spanish government, in response to the Human Rights Committee, not only failed to comply with the recommendation, but also defended the legitimacy and appropriateness of the law in question,<sup>34</sup> while the judge who initiated the proceedings in the National High Court was indicted by the authorities for knowingly overstepping his judicial authority.<sup>35</sup> The accusation of having knowingly overstepped his judicial competence was based, amongst other arguments, on the statute of limitations (prescription) for crimes during the Franco era and the fact that the

Amnesty Law is still in force. In this respect, the investigating magistrate, Luciano Varela Castro, in the indictment of 3 February 2010, even states in point 4.D.a), concerning the legal basis for the accusation of abuse of judicial authority, that: “The consideration of the context as a crime against humanity does not authorise the revival of a criminal responsibility that has already terminated through the statute of limitations (prescription) and amnesty”,<sup>36</sup> without any analysis of the arguments presented by the defence regarding the application in domestic law of specific international laws that declare that there is no statute of limitations or amnesty for these international crimes. The refusal to analyse this possibility implies obviating any possibility of there being an alternative interpretation regarding the possible prosecution of such crimes, which in itself – irrespective of whether one agrees or not – could rule out the fact of any intentional abuse of power.<sup>37</sup>

All of this points to the limited if not non-existent willingness to end this form of restriction as to the right of effective legal remedy – also known as “impunity” – in Spain. As will be seen below, however, this way of dealing with the Spanish victims of the Franco dictatorship has not extended to other cases of potential international crimes committed overseas, where use has been made of the available possibilities in the wording of article 23 of the Organic Law on Judicial Powers (LOPJ, hereinafter, the Judicial Powers Act)<sup>38</sup> regarding the conferral of jurisdiction on the Spanish courts in the post-Franco democratic period.

## 2.2. UNIVERSAL JURISDICTION AND THE PROSECUTION OF INTERNATIONAL CRIMES WHICH HAVE NO CONNECTION WITH SPAIN

Article 23 of the 1985 Judicial Powers Act<sup>39</sup> defines systematic rules for criminal jurisdiction by the Spanish courts in the post-Franco constitutional period. While paragraph 1 sets out the general rules regarding territorial aspects, the other three sections establish exceptional criteria, with the last section specifically dealing with universal jurisdiction. This section, in the 1985 version, establishes that “the Spanish

courts shall have jurisdiction over offences committed by Spanish citizens or foreigners outside Spanish territory that are classed, according to Spanish criminal law, as one of the following:

- a) Genocide
- b) Terrorism.
- c) Piracy and unlawful seizure of aircraft.
- d) Counterfeighting currency.
- e) Prostitution related crimes
- f) Illegal trafficking in psychotropic, narcotic and other toxic drug substances.
- g) And any other which, in accordance with international treaties and agreements, should be prosecuted in Spain".<sup>40</sup>

According to this legal basis, which included, amongst other offences, international crimes, in 1996 the *Unión Progresista de Fiscales*<sup>41</sup> filed charges to initiate the prosecution of those responsible for the dictatorships in both Argentina and Chile, which thereby marked a turning point in action by Spain against the impunity of those responsible.<sup>42</sup> The subsequent arrest of the head of the Chilean dictatorship, Augusto Pinochet, in London, which was endorsed by the House of Lords,<sup>43</sup> and the Spanish Constitutional Court's strict and purposive interpretation of the jurisdiction of the judicial bodies of a country (Spain) with no direct connection to any such crimes in its historic judgment of unconstitutionality that overturned the judgment by the Supreme Court<sup>44</sup> concerning an action brought by Rigoberta Menchú and others in 2005 in relation to the genocide committed in Guatemala in the 1970s and 1980s<sup>45</sup> were undoubtedly when this fight was at its peak. This was in terms of both the figure of the accused, on the one hand, and, on the other, for having opened the door to the right of victims to effective legal remedy through Spanish domestic law, which up until that time had been denied to them in the processes of transition and reconciliation in their respective countries.<sup>46</sup>

While the general rule is that, unless otherwise agreed, only the courts in countries with a link to or interest in the criminal act have jurisdiction to judge crimes – a rule also considered to be applicable to international crimes by the then Chief Prosecutor of the National High

Court in the Pinochet case<sup>47</sup> and the Supreme Court in the Menchú case,<sup>48</sup> the Spanish Constitutional Court in 2005 held that, according to Spanish legislation, this did not apply in the case of offences, “the adverse effects of which go beyond specific victims and affect the international community...”, and consequently “their prosecution and punishment constitute not only a commitment, but also an interest that is common to all states, whose legitimacy accordingly does not depend on ulterior national concerns specific to each one”.<sup>49</sup> According to the Court, the requirement of a connection called for by the regular judicial authorities concerning the application of article 23 of the Judicial Powers Act ran contrary to the very basis of this law and its characteristics, as stipulated in the abovementioned article, under Spanish law.<sup>50</sup>

The Constitutional Court’s interpretation of the article did not stop at that, however. It used the occasion to also establish that universal jurisdiction as envisaged in Spain was also absolute. In the opinion of the court, this meant, on the one hand, admitting in such cases the possibility of collective redress<sup>51</sup> and, on the other, not just not having to demonstrate any connection – the essence of universal jurisdiction – but also the non-requirement of any type of express authorisation according to convention-based rules, nor the obligation to apply a principle of subsidiarity in relation to the country directly affected. Relations between the countries should be governed by the principle of concurrence, given that their fundamental purpose is to prevent the impunity of the perpetrators,<sup>52</sup> thereby giving preference to the individual’s right to effective judicial protection over any procedural requirements of a jurisdictional nature or possible interests of state.

It was on this basis, and sometimes grudgingly,<sup>53</sup> that the Spanish courts, up until the recent amendment of article 23.4,<sup>54</sup> resolved the issue of their jurisdiction in the succession of law-suits filed that, one way or another, affected people, some of them very important, in Chile, China, Colombia, El Salvador, United States, Guatemala, Israel, Morocco, Peru, Rwanda, Argentina, Cuba, Equatorial Guinea and Venezuela.

### 3. A FIRST ATTEMPT BY THE SPANISH COURTS TO LIMIT UNIVERSAL PROSECUTION: THE “REINTERPRETATION” OF THE “INTERPRETATION” OF UNIVERSAL JURISDICTION IN ARTICLE 23.4

#### 3.1. THE ONSLAUGHTS OF THE NATIONAL HIGH COURT AND THE SUPREME COURT

Just two months after the Constitutional Court’s judgment 237/2005 was issued, a resolution was announced by a Plenary Session of the National High Court’s Criminal Chamber, which under Spanish law exercises first instance jurisdiction in matters of universal jurisdiction. Although the stated objective of the resolution was to “unify criteria dealing with jurisdiction in article 23.4 of the Judicial Powers Act following the Constitutional Court’s judgment of 26 September 2005”,<sup>55</sup> the fact is that it represented the first attempt to restrict the new doctrine as much as possible, on the grounds of the possible consequences that an excessively broad interpretation of the same might incur.

Thus, as stated in the resolution, “Article 23.4 of the Organic Law on Judicial Powers shall not be construed in any such way that it leads in practice to criminal proceedings in relation to the committing of acts classified among the offences referred to, wherever they were committed and irrespective of the nationality of the author or victim, as it is not incumbent on any particular state to unilaterally establish order, through the application of criminal law, against everybody and everywhere in the world”. On the basis of this line of argument, it resolved that “... in order to prevent any possible duplication of process and infringement of the *ne bis in idem* principle (double jeopardy), and in view of the priority of jurisdiction where the offence has been commit-



ted (*locus delicti*) and of international courts,<sup>56</sup> prior to any criminal proceedings or legal action dealing with such offences, it must be established that the jurisdiction of the state where the events allegedly took place and that of the international community has failed to act...<sup>57</sup>, to finally add, moreover, that the assessment of compliance with these requirements and of their admissibility must “ultimately take into account the criterion of reasonableness”, i.e. that, according to the National High Court, it does not entail any “excess or misuse of power through total inaction over the matter of offences and places considered to be alien and/or foreign and where the complainant or plaintiff fails to demonstrate any direct interest or relation with them”.<sup>58</sup> This means that, in addition to the narrow interpretation, a new restrictive criterion was added to the analysis of jurisdiction that stems from neither the law nor the interpretation of it by the Constitutional Court. Furthermore, given its view that the scope for action by Spanish courts was still unacceptably broad, a year later it took advantage of the first ruling that dismissed the case concerning the death of the journalist José Couso in Iraq<sup>59</sup> to propose the need for legislative reform to the legislature in order to establish limitations on the exercise of criminal actions in cases of international crimes. The arguments put forward this time in support of the proposal were examples of comparative law that require the concurrence of certain links and it was this requirement in fact that was the intention of the lawmakers, as demonstrated by the then recent reform of article 23.4, which, when feminine genital mutilation was added, called for those responsible to actually be in Spain.<sup>60</sup>

While this was the position of the National High Court, on the one hand, that of the Supreme Court on the other was no less restrictive. The harsh criticisms made by the Constitutional Court in its judgment 237/2005 in turn came under heavy criticism from the Supreme Court’s Judicial Chamber for Criminal Cases section 2 as soon as it could. In June 2006, using the opportunity of judicial review 1395/2005,<sup>61</sup> the tribunal insisted not only on the validity,<sup>62</sup> but also the broader relevance of its interpretation, especially concerning the requirement of a point of contact. To this end, amongst other argu-

ments, it pointed out that “in this discussion it is important to be aware, as many qualified jurists who call for broad approaches to universal jurisdiction in the doctrine have pointed out, of the fact that the principle of universal jurisdiction presents ‘certain future risks that cannot be totally excluded’ and that ‘the opening up of the state’s judicial sphere to the intervention of third states gives rise to major potential for arbitrary developments’, recognising that these consequences, particularly with regard to forum shopping, do not suggest that the principle of universal jurisdiction is an ‘ideal solution’. It is these risks of abuse that are now inducing the legal community to precisely reflect on the need for the requirement of ‘additional points of contact’, which may limit the scope of the principle. Of particular importance in this regard are the Princeton Principles on Universal Jurisdiction, formulated in 2001 by professors at the University of Princeton (USA), Utrecht (Netherlands), Cincinnati (USA), and other jurists from the International Association of Penal Law and the International Commission of Jurists, with a foreword by the United Nations High Commissioner for Human Rights. Principle 1 (2) of this text establishes that: “Universal jurisdiction may be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused of committing serious crimes under international law as specified in Principle 2(1), provided the person is present before such judicial body”.<sup>63</sup>

As a result, after pointing out on several occasions that there had been “misinterpretations” by the Constitutional Court or that it had “misconstrued case law”,<sup>64</sup> the Supreme Court called on it to review its jurisprudence<sup>65</sup> since it was of the opinion that “it seems clear that nothing could be more removed from international legal theory than the idea of an absolute principle of universal jurisdiction, which judgment 237/2005 has established”.<sup>66</sup>

### 3.2. THE CONSTITUTIONAL COURT REMAINS UNSWAYED

In spite of all the reluctance and arguments in favour of a more restrictive view, plus an amendment to the law in line with the proposals put forward, the Constitutional Court, in its decision in October 2007 re-

garding the appeal against the Supreme Court's judgment,<sup>67</sup> not only did not review its previous jurisprudence, but it fully reaffirmed it.<sup>68</sup> As a result of the possibilities opened up under article 23.4, this meant that, for example, the National High Court had to reopen the investigation of the proceedings in the Guatemala case,<sup>69</sup> grant leave for various actions to be brought against senior officials in China for their alleged involvement in international crimes committed against the Tibetan people and the Falun Gong group<sup>70</sup> and continue with other cases that were already open.<sup>71</sup>

Out of all of these, it is the Scilingo case that is of particular significance.<sup>72</sup> It is of interest, on the one hand, for being the first and, up until now, only case that has involved a trial based on the exercise of universal jurisdiction and, on the other, for the use of a crime against humanity, which is not expressly stated in article 23.4.<sup>73</sup>

On the basis, therefore, of a clear dissociation existing between the criminal justice system and that of procedural law, the Supreme Court, in order to determine Spanish jurisdiction in this case, turned not to the alleged crimes – which as ordinary offences (unlawful killings and detentions) do not give cause for universal jurisdiction – but to the customary norms of international criminal law.

According to its opinion, "... the factor that justifies the territorial extension of the jurisdiction of the Spanish courts is, in point of fact, the concurrence in the acts being prosecuted of a series of circumstances that are unconnected with the offence, but which are clearly relevant in legal terms inasmuch as they are typical of crimes against humanity according to customary international criminal law at the time of the events ...".<sup>74</sup>

Such an approach is based on three premises. One, as mentioned above, is that, when jurisdiction is being determined, reference is not always made to the alleged offence that is to be tried and sentenced.<sup>75</sup> Two, a crime against humanity consists in fact of a series of ordinary offences to which is added an identifiable context "that makes it possible to attribute a greater wrong to behaviour that already constitutes a criminal offence"<sup>76</sup>, and it is this context that makes it an international crime. Three, given this aggravated (or additional degree of) se-

riousness and the universal character of protected legal rights, in the Court's opinion, it is internationally accepted that "states must prosecute and punish them".

According to the Supreme Court, the decisive factors for assessing whether or not universal prosecution applies in Spain are therefore the additional circumstances that form the context of ordinary offences and turn them into international crimes. Furthermore, an approach such as this cannot be seen as vulnerating the rule of law<sup>77</sup> – with a strict interpretation being made in relation to the actual offence<sup>78</sup> – as it is a procedural issue which, to be complied with, merely requires proof that the facts are clearly consonant with crime of this type against the international community which "is recognised internationally at the time of the facts, with sufficiently defined limits".<sup>79</sup>

Having established the principle on which to base Spanish jurisdiction in the case, the Supreme Court then settled two other allegations also associated with jurisdiction: the non-retroactive character of criminal laws and, above all, the non-provision of crimes against humanity in article 23.4 of the Judicial Powers Act.

With regard to the non-retroactive character of criminal laws, the Court declared that, even though the Judicial Powers Act which provides for universal jurisdiction did not come into force in Spain until 1985, i.e. much later than when the offences were committed, the fact remained that "this has not given rise to any insoluble problems in the case of offences against essential human rights", as exemplified by the *ad hoc* international courts set up by the Security Council.

It is striking that its solution to the allegation of the retroactive application of the Judicial Powers Act – which it regarded as a "problem" – was based on the fact that the offences "are an attack on human rights", when it was much easier to simply resort to the unquestioned doctrine according to which the arrangement and allocation of jurisdiction is governed by procedural law, which is applied from the time it comes into force, irrespective of when the offences were committed.

As for the second allegation, after making a comparative analysis of crimes against humanity and genocide – which is expressly covered in

article 23.4 – the Supreme Court concluded that they are “profoundly similar, not just in terms of their nature and seriousness, but also in relation to the same typical wording used to formulate them in Spanish domestic law”.<sup>80</sup>

This, together with a series of references aimed at demonstrating the willingness of lawmakers to contribute to the prosecution of international crimes, led the Supreme Court to maintain that Spanish courts also have universal jurisdiction in this case, even though it is not expressly provided for. For this, it again turned to the dissociation between substantive criminal law and procedural law, whereby it held that “the prohibition of analogy under criminal law relates solely to the substantive framework relative to the description of criminal offences and criminal liability, *with this not affecting either procedural or organic laws*”.<sup>81</sup>

Ultimately, in the Supreme Court’s opinion, a crime against humanity according to international customary law – which is neither limited by a statute of limitations nor allows for amnesty – is directly applicable as the basis on which the universal jurisdiction-based competence of the Spanish courts is founded, as provided for in article 23.4 by way of analogy, which in practice means a broad approach to the material element (criminal offences) that justifies this type of jurisdiction, in accordance with its ultimate purpose of combating impunity for what are regarded as international crimes. It is regrettable that, as described in greater detail below, the Supreme Court has been of a different opinion when actually dealing with cases and has turned instead to the ordinary offences that a crime consists of, without taking into account the specific context that makes it distinctive and allowed for its universal prosecution.

## 4. ANOTHER PROCEDURE LIMITING THE FIGHT AGAINST IMPUNITY IN SPAIN: THE SUPREME COURT'S LEGAL DOCTRINE IN THE CONVICTION IN THE SCILINGO CASE

While the subject of jurisdiction, from what has been seen from the above, leads in overall terms to a highly positive appraisal of the actions of the Spanish judiciary in combating impunity for international crimes, this alone is obviously not sufficient in terms of combating impunity. The function of universal jurisdiction is to allow for the prosecution of suspected perpetrators of international crimes, so for a complete analysis it is also necessary to know how it works in this sphere. Given that the only case so far where a ruling has been issued by both the National High Court and the Supreme Court (which partially overturned it) is the Scilingo case, the following section deals mainly with this case.

### 4.1. THE "REVOLUTIONARY" LIMITATION OF THE INTERNATIONAL LEGAL ORDER AS AN APPLICABLE SOURCE IN SPAIN IN THE CASE OF INTERNATIONAL CRIMES

In relation to this matter, the Supreme Court, in its court consideration no. 6, overturned the National High Court's interpretation regarding the application in Spain of international criminal law.<sup>82</sup> In doing so, it made an assessment of the value of international laws in Spanish domestic law that was diametrically opposed to that which it had made in other spheres, including criminal procedural law, as seen above.

Contrary to the view of the National High Court whereby there is "a general principle of direct applicability of international law in relation

to individual criminal responsibility for international crimes against humanity.....”<sup>83</sup>, the Supreme Court argued that assertions concerning the existence of rules of international criminal law do not lead directly to their application, “a prior transposition operated according to domestic law being necessary, at least in systems, such as in Spain, which *do not provide for the direct applicability of international laws*”,<sup>84</sup> to which it thereupon added, “Articles 93 and following of the Constitution contain the rules aimed at incorporating international law into domestic law, which must be observed. In this respect, the Spanish courts are not, and cannot act as, international courts, subject only to laws of this nature and their own statutes, but domestic courts that *must apply their own legal system*.”<sup>85</sup> The same paragraph ends with “they obtain their jurisdiction not from customary or conventional international law, but from democratic principles, namely, the Spanish Constitution and *the laws passed by Parliament*”.<sup>86</sup>

One aspect that is not clear from the grounds for this decision, which, as pointed out above, overturned and modified quite radically the opinion of the National High Court in its historical judgment of 2005, is whether reference is made to the transposition of international laws in Spain or to the possibility that international laws have legal implications that are self-executory, i.e. there is no need for any transposing legislation.

The confusion is evident in the terminology used, the articles quoted and the reasons given. On the one hand, in the first of the paragraphs referred to, the Court uses typical Eurospeak terminology (typical of the European Community) in relation to the self-executory nature or not of the content of laws, not with how they are transposed. In EU Community law, the term “transposition” is in fact reserved for directives that, due to their very nature, require national implementation rules, which has nothing to do with the transposition of Community laws by the states. Hence, from this first sentence it would appear that the Court was referring not to the transposition of laws in Spain, but rather the impossibility of *international laws* – in general – that are self-executory, which represents a highly contentious statement even with its own jurisprudence, as will be seen below.

Regardless of whether or not this is the meaning behind the Court's statement, a subject which is examined further on, this approach is meaningless because it is a known fact that the *self-executory* nature of a law depends *prima facie* not on the legal system that transposes the law, but on the content that has been laid down in it when it is formulated, or at best the interpretation made of an international rule by a judicial body when analysing its content,<sup>87</sup> so it is difficult to understand why the Court then goes on to state that it is "*Spanish law*" that "*does not provide for the direct effect of international laws*". This is particularly striking when, in the same judgment but in reference to the determination of jurisdiction, it turns precisely to crimes against humanity through its conception of the customary role of international law in order to determine the offence that gives rise to jurisdiction.

On this basis, it may be that, in spite of the terminology used, when talking about transposition the Court was referring to the fact that the transposition of international laws in Spain requires a domestic law. This possibility is reinforced by the end of the same paragraph and the following one, where reference is made to "*articles 93 and the following*" of the Constitution as being the "*provisions aimed at applying international law to domestic jurisprudence*"; to which the domestic courts "*must apply their own legal system*"; or, even clearer still, the fact that Spanish courts only obtain their jurisdiction "*from the Spanish Constitution and the laws passed by Parliament*".

In respect to this possibility, attention is drawn particularly to the reference to "*articles 93 and the following*" of the Constitution, even though it is a well-known fact that both article 93 and the following two articles deal with the stage when a treaty is being concluded, which is an act that precedes the state's expression of consent and therefore obviously prior to its transposition in Spain,<sup>88</sup> which, as is well known, in respect of treaties is governed by article 96 that, in contrast, was not mentioned at all by the Court. Incidentally, this article establishes in no uncertain terms that treaties as such – once they have been validly ratified and officially published – do form part of Spain's domestic legal framework, without any need for legislation by Parliament to transpose them, as the above wordings would seem to imply.<sup>89</sup>



It is in fact clearly accepted by both the doctrine, lawmakers and the Supreme Court itself, under constitutional mandate, that, once conventional international laws as such are published, they form part of domestic law, irrespective of whether their clauses require national implementation rules or not.<sup>90</sup> Moreover, such a form of transposition with no change in the nature of the law – i.e. without the need for any law being passed by the state’s parliament – has even been applied by extension to enforced resolutions emanating from the Security Council,<sup>91</sup> meaning that if, by “transposition”, what was actually meant was implementation (of national rules), then it can only be concluded that this approach is entirely wrong inasmuch as, under constitutional mandate, they also come under Spanish law, without any limit to their subject matter jurisdiction, whether under civil, criminal or procedural law.

Nevertheless, as has already been pointed out, it may be that the Supreme Court wanted to refer to the impossibility of international laws containing self-executory clauses in criminal matters and with regard to the attribution of jurisdiction to the Spanish courts.

In this case, it is worth recalling what Spanish lawmakers have unquestionably reiterated on numerous occasions in their recognition of the self-executory nature of specific items in international treaties, even when dealing with criminal offences or matters of jurisdiction. Admittedly, these have often been accompanied by legislation for implementation at the national level, although not for such clauses but in fact others contained in the wording of international law – that already forms part of the Spanish legal system because it has been officially published – and which, in the opinion of the lawmakers, required legislation to establish national implementation rules in order for it to become effective.<sup>92</sup> It was also understood this way by the Supreme Court’s Chamber no. 3 (Administrative Proceedings) which, in its now classic judgment of 10 March 1998, not only recalled that treaties are part of the domestic legal order, but also that they may have provisions that are *directly applicable* if they are *self-executory*, “in other words, their relation is sufficiently precise to consent direct application without any need for the development of further legal or regu-

latory rules for implementation that reflect the willingness of the contracting states.”<sup>93</sup> Moreover, it could be said that even the Supreme Court’s Chamber no. 2 (Criminal Proceedings), which here denied the possibility of the direct applicability of international laws, admitted that it was so when, in relation to the Convention against Torture, it pointed out that the convention incorporates “other criteria that confer jurisdiction, including that of passive personality, which allows for the prosecution of acts when the victim of an act is one of its nationals and the State Party considers it appropriate.”<sup>94</sup>

Thus, the opinion held here is that, regardless of whether the intention was to deny the existence of self-executory laws in Spanish criminal law or to try and justify the need for legislation to establish national implementation rules in Spain for international law in this matter, it is obvious that the arguments developed by the Court just do not stand up; in the case of the former, for the definition and conferral of the self-executory attribute to a given law and, in the latter, because this is not what is provided for in article 96.1 of the Constitution.

It is quite a separate issue that, as already commented, at the national level certain contents of a specific international law are interpreted as being insufficiently clear and precise to be self-executory and therefore require national regulations that implement the international precepts that have been incorporated into Spanish law, but that, for some reason, are considered to be lacking sufficient precision for their direct effectiveness.

This brings us to a second aspect dealt with in the Supreme Court’s recitals, namely, the divergence with the National High Court regarding the rule of law applicable in criminal matters in Spain when the offences being prosecuted are international crimes.

#### 4.2. APPLICATION OF THE RULE OF DOMESTIC LAW IN THE PROSECUTION OF INTERNATIONAL CRIMES

One key aspect in the decision of the National High Court and the Supreme Court is the rule of law they chose to apply for the prosecution of acts classified as international crimes. On this issue the National

High Court, in accordance with the offence in the Scilingo case, regarded that, in view of the fact that the substantive rule applicable in Spanish domestic courts was an international law, i.e. that of crimes against humanity, the legality of the same should likewise be analysed on the basis of the international formulation of this principle.<sup>95</sup> That accordingly meant that the requirements to be complied with were the existence of a *jus certo* and *previo*, conditions that are much less strict than those stipulated in articles 1 and 2 of the Spanish Criminal Code for offences covered by the same.<sup>96</sup>

The Supreme Court, on the other hand, stated that it was radically opposed to this interpretation. Its line of reasoning was based on the idea that the model for criminal matters in Spain is dualistic, in other words, the international sphere and the domestic one – in which the Spanish courts act – are governed by two independent legal systems, both with their own criminal offences, legal sources and principles, the effect of each one being separate from the other. On the basis of this premise, it stuck to the idea of the Spanish rule of law that can be summed up in the maxim, *nullum crimen sine lege, nulla pena sine lege*, for which there are the requirements of *lex scripta*, *lex previa*, *lex certa* and *lex stricta*, it being understood moreover that these can only apply in the case of “prior notice in the form of a law”.<sup>97</sup> From this it concluded categorically that “...customary international law, from our legal perspective, is not apt for creating complete criminal classifications that are directly applicable in Spanish courts”.<sup>98</sup>

Given therefore the indisputable and recognised nature of *jus cogens* in the international sphere of crimes against humanity, the Supreme Court thereupon pointed out that, in spite of this, it cannot serve as the legal basis for prosecuting a criminal offence in Spain until it is “transposed” into Spanish criminal code. According to the Court, only then will the crime be indictable, or in specific terms, in 2004, when crimes against humanity were first included in the criminal code.<sup>99</sup>

This highly restrictive interpretation by the Supreme Court of the application of international criminal law in the Spanish courts is not only very different to that of the National High Court, but is also the

one currently defended by the State Prosecutor's Office (the national state prosecutor's office or *Fiscalía*),<sup>100</sup> in line with the interpretation by the Inter-American Court of Human Rights in the Almonacid Arellano case<sup>101</sup> and, above all, the European Court of Human Rights (ECHR) in the case of Kolk and Kislyiy v. Estonia.<sup>102</sup> In the latter case, as is well known, the ECHR ruled that the application by a domestic court in Estonia of a crime against humanity deriving from rules of international customary law, even though the offence was not provided for in the country's prevailing Criminal Code at the time when the criminal offences were committed, was not a violation of the rule of law laid down in article 7 of the Convention.

In order to overcome any possible contradiction between the jurisprudence and its interpretation, the Supreme Court declared that article 7 of the Convention establishes a minimum general standard, "without prejudice to the right of each state to formulate the rule of law in a demanding way in relation to the application of their own criminal laws by the National High Courts".<sup>103</sup> Consequently, and bearing in mind the extreme protection given to the individual's basic rights under Spanish criminal law, it was the Court's opinion that a criminal prosecution is not permitted under either customary law or laws that make no reference to the offence.

Seen in this light, however, the Supreme Court's conclusion regarding the non-applicability of customary law which places an offence of crimes against humanity in the international sphere does not therefore derive from its international nature, as implied by the recitals analysed above, but from the fact that its formulation fails to satisfy the requirements of the rule of domestic law, considered to be applicable here, which is debatable but, if accepted, in itself would have constituted sufficient grounds on which to base its reasoning without entering into such confusing, if not contradictory and erroneous arguments regarding national implementation rules and/or the enforcement of international law.

Nevertheless, the opinion maintained here is that both of these arguments are, to say the least, debatable inasmuch as they are based on the premise that the system of national implementation rules for

criminal law in Spain is different to all other regulations since, as shown above, the doctrine and jurisprudence according to which international law in its original form – following compliance with certain requirements, such as the publication of treaties – forms part of the Spanish system of legal sources is uncontested, and this is also valid for its customary form. In this respect, one has only to remember, for example, the assertion by the Court itself in its judgment 1092/2007 in which, regarding the right to free and unimpeded navigation on the high seas, it declared that [freedom of the high seas] “must be exercised under the conditions laid down by international conventions and by other rules of international law”,<sup>104</sup> or the application in this particular (Scilingo) case of a crime against humanity in its international version as the point of reference for determining the jurisdiction of the Spanish courts.

Nevertheless, when it came to the actual accusation, the Supreme Court chose to do the opposite and this resulted, amongst other things, in the paradox of a foreign national ending up being tried in Spain for common crimes of murder and illegal detention committed abroad and against foreign nationals, which seems odd and highly limitative. For example, this interpretation implies that, if the institution of the statute of limitations (prescription) is considered to be substantive criminal law, just as the principle of the international rule of law does not apply, then neither should the non-applicability of statutory limitations to these crimes, which is a basic principle of international criminal law that has remained unquestioned in this sphere for many years,<sup>105</sup> despite attempts by certain judges in the Supreme Court to deny this.<sup>106</sup>

The effective prosecution of alleged international criminals in Spain, if this logic is to be followed, is accordingly limited by a time factor that depends on the applicable domestic statute of limitations for crime, which contradicts the very meaning that their universal prosecution is based on – i.e. the special nature and seriousness of the acts – and renders useless the interpretative criterion stated by the Court itself in the same judgment, according to which “the principles enshrined in international law should be taken into account when interpreting and enforcing national law, and more importantly when these are of a *jus*

*cogens* nature. Therefore, the rules of substantive criminal law and those of fundamental (organic) and procedural law must all be interpreted teleologically in keeping with the need for efficient protection and the effectiveness of the non-violation of human rights.”<sup>107</sup>

This line of argument ultimately enhances the paradoxical situation in which crimes committed during dictatorships in other countries have been prosecuted and even condemned, whereas this is not possible with crimes committed under the dictatorship that existed here in Spain. In the case of the Franco dictatorship, natural judges with jurisdiction to prosecute war crimes or crimes against humanity committed at that time,<sup>108</sup> as we have seen, must first deal with the amnesty law, which is problematic but can be got around given the procedural nature of this regulation. Consequently, by following the Supreme Court’s very same doctrine in the Scilingo case in relation to jurisdiction, as this is also a procedural matter, the use of the unquestioned international regulation whereby any amnesty preventing the prosecution of international crimes shall be deemed null and void should not even be contested, and no interpretation made of the retroactive implementation of the regulation because the requirement of when it comes into force begins the moment that proceedings are initiated, not from when the offences were committed.<sup>109</sup> Having dealt with the amnesty, however, another obstacle is that, with the facts being judged on the basis of common domestic offences – unless such crimes are considered to be continuous offences – they will be subject to a statutory limitation and as such will have expired. If this is not recognised, other judges will run the risk of following in the footsteps of judge Garzón in the recent case of the victims of the Franco regime commented above.<sup>110</sup>

Arguably, the Supreme Court’s interpretation in this matter, which puts excessive emphasis on the guarantee of protection for basic rights, converts the Spanish rule of law into the guarantor of impunity and consequently results in the denial of justice to the victims.<sup>111</sup>

Given that so far there has only been this one unclear precedent, fortunately it cannot be asserted that this interpretation has yet become consolidated. This is corroborated, as mentioned above, by dif-

ferent proceedings brought by various National High Court prosecutors and magistrates following the Supreme Court's judgment in the Scilingo case and that have taken a different route. This is the case with the events so far regarding the charges against those responsible for the Nazi concentration camps between 1943-1945, who stand accused of genocide and crimes against humanity. As grounds for the accusation, it was categorically asserted in both the prosecutor's report and the court order of 2008 whereby the case was admitted that "the category of crimes against humanity is one that pre-exists in customary international law, which sets out the prohibition of inhumane acts against any civilian population and political, racial or religious persecution of an imperative nature, *jus cogens*, and which lays down the obligation of states to prosecute and punish these offences. The aggravated seriousness of crimes against humanity pertains to customary international law in force now for many decades, with *erga omnes* effectiveness also applicable to Spain, although the specific types of criminal offence and punishment were not developed by law-makers and set out in the Spanish Criminal Code until 2004. Prior to 2004, the applicable regulations were article 137b, then 607 and now 607b, all without interruption."<sup>112</sup>

On the other hand, and with regard to the rule of law, as indicated above, it is expressly contended that "the rule of law applicable to international offences such as crimes against humanity is not domestic law, but international law contained in article 15 of the UN International Covenant on Civil and Political Rights, 1966", and given that section two of the Covenant establishes that "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nation", [...] "the prevailing Criminal Code can be applied retrospectively to acts committed that were already criminal at the time when they were committed in accordance with international criminal law; i.e. they were criminal because they were prohibited under customary international law at the time, even though they were not punishable under the Spanish Criminal Code".<sup>113</sup>

It therefore remains to be seen which one of the two theses takes hold when those responsible for international crimes in Spain are tried, in spite of the fact that there will be fewer and fewer opportunities to find out, given the threat of the accusation of abuse of judicial authority for overseeing cases in Spain and the trimming of article 23.4 to limit the prosecution of cases that have no connection with Spain, which, as is explained below, has finally been accomplished.

## 5. THE FINAL BLOW TO JUDICIAL ACTION BY SPAIN: THE AMENDMENT OF ARTICLE 23.4 (AND THE END OF UNIVERSAL JURISDICTION TOO?)

There is no doubt that the jurisdiction of the Spanish courts provided for in article 23.4 of the Judicial Powers Act in cases of international crimes and the scope pursuant to the 2005 jurisprudence of the Constitutional Court aroused apprehension and reactions at the time, not just in domestic judicial bodies as explained above, but also in the political establishment in Spain and abroad.

Suffice it to mention the controversy at the time around the issues of the legality and above all the “convenience and opportunity” of prosecuting Pinochet in Spain.<sup>114</sup> Since then, the opinions against initiating these proceedings and the political pressure in such matters – especially when it was “important” states involved<sup>115</sup> – have been increasingly frequent, at the same time that the number of cases has increased.

There have been many examples that suggest that this is true, especially from October 2007 onwards when the Constitutional Court in the case against the ex-president of the People’s Republic of China, Jiang Zemin, and others confirmed the broad interpretation of absolute universal jurisdiction,<sup>116</sup> which resulted in new cases being



brought. For example, and again in the case of China, this includes the notice issued on 7 May 2009 by the spokesperson of the Chinese embassy in Spain, following the request by judge Santiago Pedraz to question three ministers in relation to the repression that took place in Tibet on 10 March 2008. After pointing out to the National High Court that “it must immediately cease its activities in this unfounded and unsubstantiated case, in which it has turned a deaf ear to the facts, confusing right with wrong and deliberately by-passing the rules of international relations”, it urged the government of Spain to “take immediate and effective measures to ensure that this unfounded case is withdrawn as soon as possible, to avoid harm and disruption to bilateral relations between China and Spain.”<sup>117</sup>

In this same context another example is the pressure exerted following the acceptance on 29 January of the case against seven senior ranking Israeli officials for war crimes and crimes against humanity committed in Gaza in 2002, in connection with the bombing of the house of Hamas leader, Salah Shehade.<sup>118</sup> In this respect, the then Israeli prime minister, Ehud Olmert, expressed the view that “legal proceedings such as those by Madrid are an expression of the double standards of certain elements that for years have turned their back on continuous attacks on the State of Israel”,<sup>119</sup> while the Israeli Minister of Defence, Ehud Barak, announced he would exert all of his influence to reverse the decision: “I will appeal”, he warned, “to the Spanish minister of Foreign Affairs, the minister of Defence and, if necessary, the Prime Minister, who is my colleague in the International Socialist, to over-rule the decision”.<sup>120</sup>

Given this display of reaction, according to news media sources, the then Spanish minister of Foreign Affairs, Miguel Ángel Moratinos, even indicated that the Executive would try to ensure that the investigation had as little impact as possible on bilateral relations, in addition to ensuring that the law would be amended in order to avoid abuse of the Spanish legal system.<sup>121</sup> The shadow foreign minister of the main opposition party, Gustavo Arístegui, also took the opportunity to reflect on the political consequences that decisions of this type “have for the credibility and mediation capabilities of Spain in the Middle

East.”<sup>122</sup> Without going into an assessment of whether such pressure did ultimately have an influence on judicial procedures, the fact is that on 30 June 2009 a Plenary Session of the National High Court’s Criminal Chamber decided to uphold the prosecutor’s action and closed the case. The grounds for this decision was that it was the priority of Israel, as a democratic state, to substantiate the case and, given that there had been an initial military investigation – the result of which being there was no evidence for starting a criminal investigation – and also that the government had created a committee of inquiry, it was no longer appropriate for the case to be pursued anymore in Spain.<sup>123</sup>

In this incomplete list, mention should also be made of the potential political interference over prosecutions brought against the intellectual or physical authors of international crimes who were US citizens. This was the case with the investigation into the secret CIA flights,<sup>124</sup> the filing of criminal charges on 17 March 2009 against the Bush Administration’s legal team that designed the legal “loophole” of Guantánamo,<sup>125</sup> and the proceedings instituted by judge Garzón in April 2009 to investigate allegations of torture in the Guantánamo centre.<sup>126</sup> With regard to these, the Spanish Minister of Justice, Francisco Caamaño, in an interview in the *El País* newspaper, stated, “I agree with the State Prosecutor’s Office,<sup>127</sup> which has issued a report contrary to this. The principle of subsidiarity with countries that are unequivocally democratic must be taken into account”.<sup>128</sup> He was referring to the arguments given by the State Prosecutor’s Office, which had spoken out against admitting the case – the chief prosecutor Conde-Pumpido had even described it as “fraudulent” – as it had not been brought before the competent territorial courts in the United States first.<sup>129</sup> It is worth noting here that both Conde-Pumpido and the head of the State Prosecutor’s Office at the National High Court were recently referred to in documents released by Wikileaks as “collaborators who the United States contacted so that various legal proceedings in Spain against US military leaders and politicians would be dropped”, although the news – not the documents where it was taken from – was immediately denied by both sides.<sup>130</sup>

Lastly, the statements by the President of the Supreme Court and

the General Council of the Judiciary,<sup>131</sup> Carlos Dívar, who at the time openly spoke out against the formulation and consequent use that was being made of this type of jurisdiction, should also not be ignored. In this respect, he pointed out that “we cannot become global policemen” nor be in “diplomatic conflict on a daily basis”, and he therefore called for a legislative reform to limit this jurisdiction, in line with what both the National High Court and the Supreme Court had recommended.<sup>132</sup> In his opinion, according to the EFE news agency, this would refer to specific aspects dealing with Spanish interests abroad that were insufficiently protected and certain crimes in relation to which no judicial action had been undertaken in the countries in question.<sup>133</sup>

Within this context, it is not surprising that, politically speaking, the two main parties in the Spanish parliamentary spectrum, with the support of the Basque and Catalan nationalists, agreed to amend the 1985 ruling. Following a resolution passed by the Spanish Parliament<sup>134</sup> on 19 May 2009 that called for the Government to urgently restrict section four, article 23 of the Judicial Powers Act, on the 3 November 2009, in a late night session and through the back door,<sup>135</sup> it took advantage of the discussions on Organic Law 1/2009, a bill to amend procedural legislation for the setting up of a new judicial office,<sup>136</sup> to include in its article 1, and without any connection to the rest of the content of the law, an amendment to article 23.4 of the Judicial Powers Act according to the directions set out previously by the Supreme Court which, it should be remembered, had been dismissed by the Constitutional Court in 2005 as being *contra legem*, in addition to it running contrary to the very basis of this type of jurisdiction.<sup>137</sup>

The wording of the bill that was finally approved and is currently in force is as follows:

- “4. Likewise, Spanish jurisdiction is recognized over acts committed by Spanish citizens or foreigners outside Spanish territory and classed, in accordance with Spanish law, as one or more of the following offences:
- a. Genocide and crimes against humanity.
  - b. Terrorism.
  - c. Piracy and unlawful seizure of aircraft.

- d. Offences relating to prostitution and the corruption of minors and persons without legal capacity.
- e. Illegal trafficking in psychotropic, toxic and narcotic drugs.
- f. Human trafficking and illegal clandestine immigration by persons and/or workers.
- g. Offences relating to feminine genital mutilation, provided that those responsible are actually in Spain.
- h. Any others which, in accordance with international treaties and agreements, in particular the Conventions on international humanitarian law and the protection of human rights, should be prosecuted in Spain.

Without prejudice to the provisions of international treaties and conventions to which Spain is a party, in order for Spanish courts to have jurisdiction over the abovementioned offences, it shall be established that the victims are of Spanish nationality and still alive, that the alleged perpetrator is present in Spain, that Spain has a relevant connecting link with the offence, and that proceedings implying an effective investigation and prosecution have not begun in another competent country or in an international court.

A criminal prosecution brought before the jurisdiction of the Spanish courts shall be granted a stay of proceedings where it is established that a judicial action in relation to the acts has been started in the country or court referred to in the previous paragraph”.

Without going into an in-depth analysis of this reform, which is not the purpose of this paper,<sup>138</sup> it is important to at least note the implications stemming from the main changes introduced with regard to action by the Spanish judicial authorities in combating impunity is concerned.

Firstly, judicial doctrine has highlighted as positive the unquestionable inclusion of crimes against humanity and the reference to the conventions of international humanitarian law and human rights. Most noteworthy of the two, however, is the one relating to crimes against humanity in that, whilst the two could be considered as being implicit in the previous version of article 23.4, international humani-

tarian law and human rights were considered implicit in their own right given the generic reference to the letter g) in international treaties – including those listed now – whereas crimes against humanity were by way of a teleological interpretation and on the basis of the analogy used by the Supreme Court in the Scilingo case and, as such, liable to be revised at any time.<sup>139</sup>

Secondly, and on the other hand, a series of requirements was added to the new version that, in practical terms and depending on how they are interpreted, may extensively restrict the capacity of the Spanish courts to act. What is even worse, however, is that, from a theoretical standpoint, they distort the institution of universal jurisdiction in terms of both its content and object. For example, and always “without prejudice to the provisions of international treaties and conventions to which Spain is a party”, a connecting link based on the fact that the victim is Spanish implies the use for these cases of the institution of extraterritorial jurisdiction based on the principle of passive personality, not universal jurisdiction. This “subtlety”, which would appear to be strictly formal, illustrates better than anything else this distortion since the very meaning of the institution analysed in the first part of this paper, i.e. the fight against crimes that are not against any particular state, but the entire international community, in other words, for reasons of international and not state interest, becomes lost.

Seen in this light and applying the same reasoning, the same thing should be said about the alternative condition consisting of a generic requirement to prove “a relevant connecting link with Spain”. In this case, while jurisdiction does not necessarily need to be based on an extraterritorial criterion, the requirement of a link that is “relevant”, in addition to it being tremendously ambiguous, denotes that the interest in prosecution is not of an international nature.

Indeed, out of the three alternatives offered in paragraph three of the article for declaring jurisdiction in the absence of any treaty, the only one that is not contrary to the nature of the institution of universal jurisdiction is the one specifying that the alleged perpetrators are in Spain, since this may be conceived for practical purposes, given the prohibition by Spanish law of trials *in absentia*. However, this means

that in the sole remaining circumstance for universal jurisdiction where strictly speaking there is no basis in conventional international law, there is a renunciation of pre-trial proceedings being initiated which, where applicable, and as happened with Pinochet and Cavallo, allow for the issuance of international arrest warrants or the request for extradition of those allegedly responsible, in an out-right limitation of the capacity of the Spanish courts to act.<sup>140</sup>

In addition, the very end of the article transforms the scope of Spanish jurisdiction for the cases listed not only into subsidiary in relation to international jurisdiction – the same applied with the International Criminal Court – but also in relation to any other that specifies the start of proceedings in the matter, irrespective of the possible connections with the crime. This means that the mere confirmation that proceedings involving an “effective” investigation and prosecution may lead the Spanish courts to not accept a case or to grant a stay of proceedings if one has already been accepted (paragraph four).

Ultimately, the intention behind this reform is obviously to limit jurisdiction, although perhaps due to the pressure and haste, an through interpretations that can be made, a door to the universal prosecution of international crimes may have been left open, at least more so than it might first appear. Terms such as “relevant connecting link with Spain” or “an effective investigation and prosecution” leave a sufficiently wide margin of discretion to substantiate this opinion. This is not to mention any consequences stemming from the first stage that conditions everything commented here in relation to paragraph three according to which the requirements must be established, “without prejudice to the provisions of international treaties and conventions to which Spain is a party”. On the basis of this, it could be interpreted that this seeks to reaffirm the faculty of Spanish legislation to add requirements to those already laid down in international laws, although it could also give rise to interpretations according to which treaties, such as the Geneva Conventions and their protocols and the Convention against Torture, which contain the legal obligation of the principle of *aut dedere aut judicare* (Latin for “extradite or prosecute”), do not call for the proposed requirements in the case of these crimes

– unlike the case of others, such as genocide or crimes against humanity.<sup>141</sup> The opinions expressed by certain National High Court magistrates, albeit a minority, endorse this possibility.<sup>142</sup>

Only time, and practice, will tell, although at this stage there does not seem to be a common understanding. For example, according to the Real Instituto Elcano, “there has already been a case of dispute between a judge and prosecutors in interpreting the article. On 26 November 2009, the National High Court judge Andreu [contrary to the opinion of the State Prosecutor’s Office, which failed to see any connection with Spain] issued a letter rogatory to the authorities in Iraq requesting information on whether judicial proceedings had been initiated to investigate the facts alleged in a written complaint [...] on the grounds of the violation of the Fourth Geneva Convention, 12 August 1949, relative to the Protection of Civilian Persons in Time of War, which was ratified by Spain and Iraq, and its protocol I, 8 June 1977”.<sup>143</sup> It has been useful, however, for closing certain cases that were pending, especially the more difficult ones politically speaking, such as the recent dismissal of the case against three Chinese ministers and other senior officials by a Plenary Session of the National High Court’s Criminal Chamber – with the three aforementioned votes against – on the grounds that the case did not comply with the supervening requirement of “relevant connecting link” with Spain.<sup>144</sup>

If this is the interpretation that becomes consolidated, this option of legal protection for the victims of international crimes that are unconnected with Spain will have become residual, if not impossible, pending any decision by the Constitutional Court in this regard, a possibility that, even though it has in fact been attempted on one or two occasions, has so far not had the chance to materialise.<sup>145</sup>

## 6. FINAL CONSIDERATIONS

UN Special Rapporteur on Impunity, Louis Joinet, has made it clear that the situation of impunity “arises from a failure by States to meet their obligations to investigate violations, to take appropriate meas-

ures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished, to provide victims with effective remedies and reparation for the injuries suffered, and to take steps to prevent any recurrence of such violation”.<sup>146</sup>

In this light, there is a two-fold way of approaching the combat against impunity for international crimes, the legitimacy of which derives from the international community itself; on the one hand, the approach aimed at those responsible for the crimes, and on the other, in no way less important, by re-establishing the right of the victims to justice. The thorough study carried out in recent years by the United Nations on these issues, which concluded with the formulation of the updated *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*<sup>147</sup> and the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*,<sup>148</sup> leaves no margin for doubt.

In order to achieve this objective in terms of both of these aspects, the international community has adopted a series of conventional and customary laws and principles that ensure both the classification and prosecution of these crimes, either through international and/or domestic law. This, in my opinion, is precisely what the *Unión Progresista de Fiscales* and the judges in Spain who dealt with these and other cases tried to do when they started to bring prosecutions in 1996. This forced the lawmakers and the Spanish judiciary to state their position in this struggle, by way of pronouncements on the content of international crimes and their transposition in Spain to aspects of Spanish law that facilitate the effective exercise of criminal jurisdiction in the prosecution of these acts.<sup>149</sup> Above all, however, they opened up a possibility of protection for the victims of such crimes who, for the very first time, acquired prominence after having been lost for many years in processes of transition, with the restitution of their rights that this entails, including, amongst others, that known – and recognised by different domestic and international courts and tribunals – as the human right to effective legal remedy.



Such a commendable goal also meant opening up the Pandora's box of Spanish legal regulations in this field, which revealed their great potential, on the one hand, and their weaknesses and poor definition, on the other. Incidentally, it also brought to light ghosts from the past that had been trapped in a model of transition based on forgetting, together with the issue of legal accountability.

With regard to the Spanish legal system, significant efforts have been by lawmakers to not only co-operate with international criminal courts, but also to incorporate international crimes into the Spanish criminal code through specific criminal offences, in an attempt to prevent impunity for crimes in the future. However, the failure to abolish pre-Constitution laws obstructs the process to prevent and do away with impunity for crimes in the past, which, in the case of Spain, continue to have recourse to the 1977 Amnesty Law, as well as the Supreme Court's interpretations of the law.

When the subject of Spanish law comes up in relation to impunity for international crimes, however, the most important issue is without doubt the interpretation and application of universal jurisdiction. It has been said that its original formulation, interpreted *in extenso* by the Constitutional Court, has been abused by groups more interested in the media impact than in effective entitlement to justice. All things considered, as Roldan maintains,<sup>150</sup> "the Judiciary in Spain, with the limitless and even excessive endorsement of the Constitutional Court in its judgment regarding the *Guatemala case*, regardless of any ulterior motives on the part of its creators, and with the support of British justice in the *Pinochet case* and Mexican justice in the *Cavallo case*, has carried out a civilising mission of great value in terms of precedent and public criticism and as an effective deterrent for despots both now and in the future. In this respect, one important development has been that the initiatives by the Spanish courts, aside from the use made of the international arrest warrants, which is a positive initiative, have already encouraged steps to be taken, in accordance with the political and judicial principle of preferential territorial jurisdiction, in relation to court actions against human rights violations in the whole of Latin America...". For this reason alone it has been worth it.

On the other hand, there is no doubt that, in practice, it has also given rise to situations that can only be appraised as negative, such as the irreconcilable antagonism between different judicial bodies and erratic judicial decisions, for example, regarding the subsidiary nature of jurisdiction or the need (or not) for elements that connect the facts being investigated with Spain, as discussed above. This, together with the internal and external pressures previously discussed in this paper, has led to an important step backwards in the form of the new reform of article 23.4 of 3 November 2009 that, in our view, has tended so much to one side that the institution of universal jurisdiction as a means of combating international crimes has become distorted, especially if we are to believe the Constitutional Court's rulings at the time – and this is very important – on the right to effective legal remedy.

If this is coupled with the Supreme Court's current interpretation in the Scilingo case regarding the alleged crimes and the role of international law following the acceptance of admissibility, it has then only to be said that the scope of action for prosecuting international crimes in Spain through the institution of universal jurisdiction has been seriously impaired. Not only has the attribution of jurisdiction been restricted, but, in cases where this obstacle has been overcome, others still remain, such as the classification of an offence under the Spanish Criminal Code at the time when it was committed – even though it bears no relation to Spain – and the possible existence of a statute of limitations on offences.

Lastly, the impunity that has existed and continues to exist for international crimes committed in Spain also deserves a special mention, especially those offences classified as crimes against humanity. The Supreme Court, with its judgment in the Scilingo case and the proceedings for abuse of judicial powers against judge Garzón who, regardless of the quality of investigation, based judicial actions on international law to tackle barriers that have led to impunity, has not made things any easier.<sup>151</sup> Sheltered behind the amnesty law and the rule of domestic law, it dispenses with any international law or principle, even though these, and the international community in which they are applied, are what establish and substantiate crime and its

prosecution, even in Spain. Furthermore, it even goes so far as to deny the validity of international law as part of the domestic legal order, in clear misalignment with the practice, jurisprudence and the Spanish Constitution itself.

However, as we have also seen, the jurisprudence in the Scilingo case, over and above the questionable arguments that have been made, is not the only possible interpretation. There are still prosecutors and judges who are willing to defend that, if the norm emanates from the international community, it is this norm that shall set the content and date from which certain acts became classified and prosecutable as international crimes; that their prohibition is imperative for all human beings, with the obligation *erga omnes* of this being enforceable. This means that, with the jurisdiction established, the perpetrators of such crimes must be prosecuted and tried in accordance with the corresponding legal system, which, incidentally, must also form part of the Spanish legal system. Perhaps this will be the way to prevent the understanding of the rule of law based on the guaranteed protection of basic rights from constituting the guarantor of impunity and the denial of justice for the victims.

## NOTES

1. Afterword to the final report, “The administration of justice and the human rights of detainees. Question of the impunity of perpetrators of human rights violations (civil and political)”, presented by M. Joinet to the Sub-Commission on Prevention of Discrimination and Protection of Minorities pursuant to Sub-Commission decision 1996/119 (E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997, par. 51).
2. In these cases the use of the term “international community” is intentional. In international law the term “society” implies the presence of fewer values and less institutionalisation, whereas the word “community” is reserved for cases in which a series of values is considered to be shared by all peoples, which, according to De Visscher,

also calls for the existence of a sense of community and the willingness of particular collectives to ensure their conduct is in keeping with the higher good of a universal community. De Visscher, Ch., *Theories and Realities in International Law*, pub. by Bosch, Barcelona, 1962, p. 95. In this regard, the distinctive idea put forward by Barbé in his analysis of the text by Poch, in which he refers to the community as a way of being that implies integration, as to society which is a way of being that is equivalent to the sum of its parts, would appear highly appropriate. Barbé Izuel, E., *Relaciones Internacionales*, Tecnos, 3rd ed., Madrid, 2007, p.132. This meaning of the term “international community” has been used extensively in international law doctrine when placing special emphasis on the common values of the international system. See amongst others, Carrillo Salcedo, J., *El derecho internacional en un mundo en cambio*, Tecnos, 1984, pp. 25-37, 214 and Dupuy, R., “Communauté internationale et disparités de développement: cours général de droit international public.” *Recueil des Cours*, vol. 165, 1979-IV, pp. 21.

3. A similar verdict was given by the International Law Commission, in the commentaries on article 19 of the draft articles on the responsibility of states during the 28th session period. Examples of the changes and new developments introduced in international law as the consequence of new protected values and possessions of mankind referred to include the distinction between enacting regulations and *jus cogens* norms and “the development of the principle that an individual who is an organ of the state and by his/her conduct has breached international obligations of specific content must him/herself, even though he/she acted as an organ of the state, be regarded as personally punishable...”. *International Court of Justice Yearbook*, 1976, vol. II (part two), par. 15-16.
4. With regard to this, amongst others see Schreuer, Ch., “The Waning of the Sovereign State: Towards a new paradigm for international law?” in *European Journal of International Law*, vol. 4, no. 4, 1993, pp. 447-471.

5. Without entering into the dichotomy of real sovereignty and formal sovereignty, it is interesting to point out here that the approach put forward by Chaumont back in 1960 that refutes the excessively absolute character of the idea of sovereignty given the existing uncertainty over the spheres of reserved state authority, following on from which current mutations and even the permeability of borders that has been referred to do not necessarily alter the construct on which public international law is based. Chaumont, Ch, “Recherche du contenu irréductible du concept de souveraineté internationale de l’Etat”. *Hommage d’une génération de juristes au Président Basdevant*, Pedone, Paris, 1960, pp.114-151. Along the same lines, but based on the analysis of the effects of the current globalisation process, see Hinojosa Martinez, L.M., “Globalización y soberanía de los Estados” in *Revista Electrónica de Estudios Internacionales*, no. 10, 2005. See [www.reei.org/reei%2010/LM.Hinojosa%20Martinez\(reei10\).pdf](http://www.reei.org/reei%2010/LM.Hinojosa%20Martinez(reei10).pdf).
6. Extract from jurisprudence at the Inter-American Court Of Human Rights in relation to crimes against humanity. Judgment, 26 September 2006, the case of *Almonacid Arellano et al. v. Chile*, Series C, no. 154, par. 152. This in fact required the reformulation of international law, as Miaja de la Muela claimed in 1950. According to this professor of international law, in order to criminally prosecute individuals using international law – as has occurred in practice – “it was necessary to transcend the conception according to which the sole emphasis of international law is to regulate interstate relations”. Miaja de la Muela, A., “El genocidio, delito internacional” in *Revista Española de Derecho Internacional*, vol. IV, no. 2, 1951, pp. 363-408, p. 370
7. The conceptualisation of this sphere of international law as “criminal” should be accepted with certain reservations in that it assumes the partitioning of this code of laws through the transposing of categories of domestic law that do not always dovetail with those of international law. Nevertheless, bearing in mind the

aforementioned reservations, use of this term is made throughout this paper as it is a useful instrument for expressing the uniqueness of what is being analysed here, and as it is a category that is generally accepted, whereas it has rarely been defined. From the international point of view, a definition of this is given in Bollo Arocena, M<sup>a</sup>, D. *Derecho Internacional Penal. Estudio de los crimes internacionales y de las técnicas para su represión*. Servicio editorial, Universidad del País Vasco, 2004, pp. 52 ff.

8. In this respect it is important to make a clear distinction between behaviour that involves the violation of an international obligation aimed directly at the individual and that which has an international element, but where there is no international responsibility inasmuch as the obligation is directed at the state. On this subject, in particular see, Jiménez Cortés, C. “La responsabilidad del individuo ante el derecho internacional: hacia una sistematización de los delitos” in *Yearbook of the United Nations Association of Spain/ Agenda ONU. Anuario de la Asociación para las Naciones Unidas en España*, no. 1, 1998, pp. 39-59.
9. In relation to this, Mariño Menéndez states that “international law normally applies to individuals through the jurisdiction of the state. It is primarily through internal procedures and mechanisms of domestic law that the state applies international laws that affect and protect individuals who are subject to their jurisdiction.” Mariño Menéndez, F., *Derecho Internacional Público. (Parte General)*, ed. Trotta, Madrid, 1999, p.173.
10. In this respect, albeit in specific reference to mercenaries, Jiménez Piernas has stated that “the *relational* structure determined above all by the principles of sovereign equality and non-interference has traditionally been unconcerned about the role of the individual in international society, and the legal status of this role must inevitably entail – amongst many other things – the application of the principle of cooperation between states...”. Jiménez Piernas,

“La codificación del derecho de la responsabilidad internacional: un balance provisional (1988)” in AEPDIRI, *La responsabilidad internacional. Aspectos de Derecho Internacional Público y de Derecho Internacional Privado*, XII AEPDIRI seminars, 1989, Alicante, 1990. p. 82

11. In historical terms, the earliest references to possible criminal aspects of international law – besides what was set out by different civilisations since ancient times regarding piracy and the laws of war and in relation to mankind – go back to the nineteenth century and offences connected with armed conflicts and their control, which resulted in The Hague Conventions on the peaceful settlement of disputes. De la Cuesta Arzamendi, J.L., “Derecho penal internacional y derechos humanos” in Beristain. A; De la Cuesta Arzamendi, J.L. (directors), *Protección de los derechos humanos en el derecho penal internacional y español*. VII Cursos de Verano de San Sebastián, 1988, Serv. Ed. Universidad del País Vasco, 1989, p.15. On this subject, amongst others, see also: Sunga, L., *Individual responsibility in international law for serious human rights violations*, Martinus Nijhoff, The Hague, 1992, pp. 17 ff. As far as their origin is concerned, broad speaking it was from the end of the First World War onwards that certain offences committed by individuals – always in connection with armed conflicts – began to be considered as crimes in accordance with international regulations, chiefly the Hague Conventions of 1907 on the laws of war and war crimes, although it is generally accepted that the decisive watershed was the Agreement for the prosecution and punishment of the major war criminals of the European Axis (London Agreement) of 8 August 1945, which served as the legal basis for the Nuremberg Trials. Charter of the International Military Tribunal, published in *American Journal of International Law*, vol. 39, 1945, special supplement, pp. 259 ff.
12. See the development, or rather lack of development, of this and many other issues concerning the individual and more specifically

the paralysis in the International Law Commission's drawing up of a code of offences against the peace and security of mankind in 1954, a victim of the Cold War after its height at the end of the Second World War. Following five sessions of debates, a draft version was adopted at the ILC's sixth meeting and submitted to the General Assembly (*Yearbook of International Law Commission*, 1954, vol. II, pp. 150-152, supp. No. 9, doc. A/2693 and corr. 1). However, once consensus was reached on the first draft, work was paralysed by General Assembly itself until a definition was found for the concept of "aggression", which was already creating considerable problems.

13. The main areas where progress at the policy-making level was made during this period were undoubtedly the International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted and opened for signature and ratification by the General Assembly on 30 November 1973), the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Mankind (adopted and opened for signature and ratification by the General Assembly on 26 November 1968), and the Protocols Additional to the Geneva Conventions of 1949, adopted in Geneva on 8 June 1977. In spite of its non-conventional nature, mention is also made of General Assembly Resolution 3074 (XXVIII) of 3 December 1973 on the Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity.
14. After the Nuremberg and Tokyo processes had come to an end, the UN General Assembly, through Resolution 177 (III), 21 November 1947, entrusted the recently created International Law Commission, amongst others, with preparing a draft code of offences against the peace and security of mankind, a process that became paralysed in 1954. It was not until 1978 that the subject was again put back on the agenda and even later still, in 1981, when the Ge-



neral Assembly entrusted the ILC with continuing work on the draft code. A text of the draft articles was provisionally adopted by the Commission on a first reading in 1991. *Yearbook of the International Law Commission*, 1991, vol. II, UN doc. A/CN.4.SER A 1991/Add.1 (part 2).

15. *Ibid.*
16. This refers to the statutes of the international criminal courts set up by the Security Council, such as the International Tribunal on War Crimes in Former Yugoslavia, Security Council, resolution 827 (1993), 25 May 1993, and the International Criminal Tribunal for Rwanda, Security Council, resolution 955 (1994), 8 November.
17. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. General Assembly, resolution 60/147, adopted 16 December 2005.
18. This refers to the important jurisprudence emanating from the Inter-American Court of Human Rights that, since the *Barrios Altos* case and through a new interpretation, has turned to international regulations on international crimes regarding the accountability of states party to the Convention that have not prosecuted and tried such crimes. For a study of this jurisprudence in the same collection, see Sánchez Montero, J., *Corte Interamericana, crímenes contra la humanidad y construcción de la paz en Suramérica*, ICIP working papers: 2010/02, available in electronic format from the ICIP website: [http://www.gencat.cat/icip/pdf/WP10\\_2\\_CAST.pdf](http://www.gencat.cat/icip/pdf/WP10_2_CAST.pdf). The European Court of Human Rights expressed a similar opinion in the *Kolk and Kislyiy v. Estonia* case. ECHR, judgment of 17 January 2006, *Kolk and Kislyiy v. Estonia* case, no. 23052/04 and 24018/04.

19. Its mere creation – with all the objections that were made about the text, about its “relative” universality and, as Tallgren says, even in relation to its meaning – is one of the clearest successes that there has been recently in community values in spite of – or precisely because of – the vehement opposition expressed by the United States, Russia, China and India, amongst many others. As for the questioning of the retributivist, as to the utilitarian, meaning of contemporary criminal law, see the interesting article by Tallgren, I. “The sensibility and sense of international criminal law” in *EJIL*, 2002, vol.13, no. 3, pp. 561-595.
20. For a follow-up of the cases and the content of the relevant legislation, see the Nizkor website, [www.derechos.org/nizkor](http://www.derechos.org/nizkor). In relation to this subject, also see the aforementioned articles in the same collection by J. Sánchez Montero, *Corte Interamericana... op. cit.*
21. Cross-border here refers to the generic concept of universal jurisdiction that consists of “the ability of the court of any state to try persons for crimes committed outside its territory which are not linked to the state by the nationality of the suspect or the victims or by harm to the state’s own national interests.” Definition by Amnesty International, *Universal jurisdiction: the duty of states to enact and implement legislation*. AI Index: IOR 53/002-018/2001, September 2001. See: [www.amnesty.org](http://www.amnesty.org).
22. Judgment 237/2005 of Chamber no. 2, Spanish Constitutional Court, 26 September 2005, regarding the appeal for the protection of individual constitutional rights (writ of amparo) lodged by Rigoberta Menchú (et al.), court consideration no. 7.
23. Law 46/1977, 15 October, published in the Spanish State Gazette/*BOE*, no. 248, October 1977.
24. For more details on this law, see Espuny Tomás, M. J. and Paz Torres, O., (coords.) *30 años de la ley de amnistía (1977-2007)*.

Dykinson, Madrid, 2009. A study from the point of view of the implications regarding impunity can be found in Chinchón Álvarez, J., “*El viaje a ninguna parte: Memoria, leyes, historia y olvido sobre la guerra civil y el pasado autoritario en España. Un examen desde el derecho internacional*” in *Revista del Instituto Interamericano de Derechos Humanos*, 2007, no. 45 (January-June), pp. 119-233, in [http://eprints.ucm.es/6980/1/Articulo\\_Transicion\\_Espa%C3%B1ola\\_Revista\\_IIDH.pdf](http://eprints.ucm.es/6980/1/Articulo_Transicion_Espa%C3%B1ola_Revista_IIDH.pdf)

25. Chinchón, *Ibid*, p. 123.
26. A detailed study of the existing means and, according to the authoress, the impossibility of enforcing them in the current legislative context can be found in Gil y Gil, A., *La justicia de transición en España. De la amnistía a la memoria histórica*, ed. Atelier, Barcelona, 2009.
27. Law 52/2007, 26 December, published in the Spanish State Gazette/*BOE*, no. 310, 27 December 2007, pp. 53410.
28. The National High Court or *Audiencia Nacional*, is a special court with nationwide jurisdiction for serious crimes committed in Spain and crimes committed outside Spanish territory where the law declares that Spain has corresponding jurisdiction. The decisions of the National High Court may be subject to review by the Supreme Court.
29. Ruling of the National High Court’s Central Court of Investigation No. 5, adopted 16 October 2008. Fast-track preliminary proceedings 399/2006V, at: <http://www.derechos.org/nizkor/espana/doc/compet.html>. Two months later, on 18 November 2008, Garzón deferred responsibility in the case to local courts in the places where mass graves that he had ordered exhumed the previous month were located, a decision that was ratified on 2 December 2008 by the Plenary Meeting of the National High Court’s

Criminal Chamber (*Pleno de la Sala de lo Penal*), which was effectively a formal appeal by state prosecutors of Judge Garzon's jurisdiction, which virtually annulled all of the acts and resolutions adopted by the judge between 16 October and 18 November 2008. Writ of the National High Court's Criminal Chamber on dossier 34/08, of 2 December 2008.

30. As referred to by the Human Rights Committee in the final observations in the examination of the regular report submitted by Spain in October 2008. In paragraph 9 of the observations, it states, "While taking note of the recent decision of the National High Court to consider the question of the disappeared, the Committee is concerned at the continuing applicability of the 1977 amnesty law." HRC, 49th session period, final document CCPR/C/ESP/CO/5 of 5 January 2009.
31. See the legal arguments of the ruling, 16 October 2008, *op.cit.*
32. A reference to these developments can be found in the International Commission of Jurists' *Impunity and gross violations of human rights. ICJ Practitioner's guide no.3* (in Spanish), ICJ, Geneva, 2008, pp. 10-17, in electronic format from <http://icj.org/dwn/database/PGN0-3-ElectrDistribution.pdf>
33. *Ibid.*, paragraph 9.
34. The Spanish government's response to the draft of the concluding observations was that "the Spanish Government further wishes to stress that the Committee is calling into question a decision that was supported by the whole of Spanish society and that contributed to the transition to democracy in Spain. The law in question was called for by the entire democratic opposition and was one of the first laws to be approved by consensus by the same parliament that approved the 1978 Constitution. Not only Spanish society, but also public opinion worldwide knows about and has always sup-

ported the transition process in Spain, which was made possible in part by this law.

The Spanish Government therefore regrets the inclusion of this point in the Committee's observations, and believes the Committee has made procedural errors in terms of its sphere of competence (failure to refer to the relevant provision of the Covenant), due process (failure to provide an opportunity for defence during the process) and ascertaining the facts (lack of knowledge of the origin and social significance of the Amnesty Act). "Commentaries by the government of Spain on the final observations of the Human Rights Committee," of 8 January 2009, Doc. CCPR/C/ESP/CO/5/Add.1, 13 January 2009.

35. Or what is known in legal terms as malfeasance.
36. Summons issued by investigating magistrate, Luciano Varela Castro, in special case no. 20048/2009 regarding the indictment for abuse of judicial power of the judge Baltazar Garzón in the case of the victims of the Franco era, 3 February 2010. To reaffirm his position, he states in point c) that "it is manifestly contrary to law to not exclude (i.e. to include) the criminal nature of the acts denounced by the amnesty established in law 46/1977, 15 October".
37. On the subject of Garzón's indictment for abuse of judicial power in relation to crimes during the Franco era, see Chinchón Álvarez, J., and Vicente Márquez, L. "La investigación de los crimes cometidos en la guerra civil y el franquismo como delito de prevaricación. Análisis crítico del auto del Tribunal Supremo de 3 de febrero de 2010 desde la perspectiva del derecho internacional" in *Revista Electrónica de Estudios Internacionales*, 2010, no.19. See: <http://www.reei.org/index.php/revista/num19/articulos/investigacion-crime-nes-cometidos-guerra-civil-franquismo-como-delito-prevaricacion-analisis-critico-auto-tribunal-supremo-3-febrero-2010-desde-perspectiva-derecho-internacional>. A less favourable opinion of the judge's performance in this case is that of Gil y Gil,

*La justicia de transición en España. De la amnistía a la memoria histórica*, Atelier, Barcelona, 2009, pp. 157-166.

38. *Ley Orgánica del Poder Judicial*

39. *Ibid.*

40. Organic Law 6/1985 on Judicial Powers (Judicial Powers Act), of 1 July, published in the Spanish State Gazette/*BOE*, no. 157, of 2 July 1985. Section 4 of article 23 of the 1985 law underwent three minor amendments prior to 2009 whereby new criminal offences were added to this jurisdiction, specifically the corruption of minors, genital mutilation and human trafficking. See Organic Law 11/1990, of 30 April, which amended Title VIII of Book II of the Criminal Code, endorsed by Organic Law 10/1995, of 23 November, published in the Spanish State Gazette/*BOE*, no. 104, 1 May 1999; Organic Law 3/2005, 8 July, which amended Organic Law 6/1985, 1 July, on Judicial Powers, for the extraterritorial prosecution of the practice of female genital mutilation, published in the Spanish State Gazette/*BOE*, no. 163, 9 July 2005 and Organic Law 13/2007, 19 November, for the extraterritorial prosecution of illegal immigration and human trafficking, published in the Spanish State Gazette/*BOE*, no. 278, 20 November 2007.

41. Progressive Union of Prosecutors in Spain.

42. Legal proceedings against those responsible for the end period of the dictatorship in Argentina, lodged on 28 March 1996 and declared admissible by the judge assigned to the National High Court's Central Court of Investigation No. 5, Baltazar Garzón, and legal proceedings against the Chilean military junta headed by Augusto Pinochet, lodged on 4 July 1996 and declared admissible by the judge assigned to the National High Court's Central Court of Investigation no. 6, Manuel García Castellón. Subsequently, the

examination of the criminal offences within the context of the so-called “Operation Condor” led to judge García Castellón deferring jurisdiction to the Central Court of Investigation No. 5, the assigned judge of which was the judge Baltazar Garzón, who took charge of the proceedings from then on.

43. House of Lords, Judgment – Regina v. Bartle and the Commissioner of the Police of the Metropolis and Others Ex Parte Pinochet on appeal from the Divisional Court of the Queen’s Bench Division on 24 March 1999, see <http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm>. While Adolfo Scilingo had been remanded in custody in 1997 for his responsibility in the death flights in Argentina, it was the arrest of Pinochet in London in October 1998 that brought to light this new phenomenon of universal jurisdiction in the media, envisaged in Spain under article 23.4 of its Judicial Powers Act since 1985. His arrest, which in overall terms has to be considered positive, involved amongst other things a reopening of the debate on this model for the exercise of jurisdiction. On the Pinochet case, see, amongst other, GARCÍA ARAN, M., and LÓPEZ GARRIDO, D. (coord.), *Crimen internacional y jurisdicción internacional. El caso Pinochet*, Tirant lo Blanch, Valencia, 2000, and, strictly speaking from the international law perspective, REMIRO BROTONS, A., *El caso Pinochet. Los límites de la impunidad*. Política Exterior, ed. Biblioteca nueva, Madrid, 1999.
44. *Tribunal Supremo*, the highest judicial body in Spain for all matters other than constitutional issues, for which the Constitutional Court is responsible.
45. Sentence 237/2005 of the Constitutional Court, 26 September 2005.
46. On the effects and repercussions of the Pinochet case in Chile, see Brett, S. (author) and Collins, C., (ed.) *El efecto Pinochet. A diez años de Londres, 1998*. Report of a conference at the Diego Por-

tales University, Santiago. Chile, 8-10 October 2008, <http://www.ictj.org/images/content/2/0/2066.pdf>

47. Statements by the then Chief Prosecutor at the National High Court, Eduardo Fugairiño, to the Chilean newspaper “El Mercurio” on 2 October 1997, which coincided with an unsigned document submitted to the Supreme Court’s Board of Procurators General, on the same date, colloquially known as “Fugairiño’s document”. See <http://www.derechos.org/nizkor/arg/espana/fuga.html>
48. See judgment 327/2003, which ruled on appeal no. 803/2001, handed down by the Supreme Court’s Judicial Chamber for Criminal Cases on 25 February 2003, court considerations nos. 10 and 11, also listed in judgment 237/2005 of the National High Court, *op. cit.*, court consideration no. 6.
49. *Ibid*, court consideration no. 9.
50. According to a statement by the court itself, this type of interpretation should be qualified as a “teleological reduction”, which it then qualifies as “*contra legem*, based on corrective criteria that cannot even by implication be considered to be present in the law and that are also clearly contrary to the purpose that the institution embodies...”. *Ibid.*, court consideration no. 8.
51. *actio popularis*
52. *Ibid*. Court consideration no. 9.
53. In the case of the Supreme Court, for example, a standard feature of its decisions was to make continually make express reference to the grounds for its judgment of 2003, which was overturned by the Constitutional Court’s aforementioned judgment 237/2005, in which a large part of the legal arguments in the earlier ruling were revised. On this subject, see the following section. An analy-



sis of the Constitutional Court's judgment and its consequences is to be found in Alcácer Guirao, R., "El principio de justicia universal en la jurisprudencia española reciente", in Cuerda Riezu, A., and Jiménez García, F., *Nuevos desafíos del derecho penal internacional. Terrorismo, crímenes internacionales y derechos fundamentales*, ed. Tecnos, Madrid, 2009, pp. 465-487.

54. See further on this document, section 5.
55. Resolution of the Plenary Session of the National High Court's Criminal Chamber regarding the interpretation of the judgment by the Constitutional Court on Guatemala, on 3 November 2005.
56. Reference here is made to the indirect limitation introduced by way of article 7 of the Law on Cooperation with the International Criminal Court, (*Ley Orgánica de Cooperación con la Corte Penal Internacional*, 18/2003, 10 December 2003). This establishes a *prima facie* subordination to the proceedings of the Court where it has jurisdiction, where the authors of crimes are not Spanish nationals and when the events have not taken place in Spain. This subordination is qualified, however, on the one hand, by the requirements that must be complied with in order for the Court to act and, on the other, by the fact that deferral is temporary while the prosecutor or Court acts, with the possibility being left open, as stipulated in paragraph 3, of criminal proceedings again being filed when this does not happen. See: Pigrau Solé, A., *La jurisdicción universal y su aplicación en España: la persecución del genocidio, los crímenes de guerra y los crímenes de lesa humanidad por los tribunales nacionales*. Generalitat de Catalunya-OPPDH, 2010, pp. 117-120.
57. Resolution of the National High Court, of 3 November 2005, *op.cit.* paragraph 3.
58. *Ibid.*, paragraph 4.

59. Order of Section Two of the National High Court's Criminal Chamber, 8 March 2006, whereby the case concerning the deaths of the Spanish journalist José Couso and the Ukrainian journalist, Taras Protsyuk, was dismissed. It should be noted that, in this case, the argument put forward by the Court for dismissing the case was that it considered that the death of Couso, which occurred in the context of an armed conflict, did not fall within the scope of a war crime. An appeal against the order was lodged before the Supreme Court, which in a judgment of 11 December 2006 recognised Spanish jurisdiction, which led to the case being reopened. Following a subsequent order by the National High Court, 23 October 2009, that declared a stay of proceedings, the case returned to the Supreme Court. For a follow-up of the case, see: [http://www.josecouso.info/rubrique.php3?id\\_rubrique=4](http://www.josecouso.info/rubrique.php3?id_rubrique=4)
60. In the case of comparative law, it used the examples of Germany, France and Belgium, where the proof of certain links is called for in war crimes. As for the reform, reference was made to the introduction in July 2005, Organic Law 3/2005 of 8 July, *op.cit.*, of the requirement of the presence in Spanish territory of those responsible for mutilations. This argument, however, could also be valid for defending just the opposite given that lawmakers, taking advantage of the opportunity to include a new section to add some general requirements, did not add any requirements on that occasion.
61. Supreme Court judgment 645/2006 of 20 June 2006, which ruled on an appeal for procedural defect and infringement of the law brought by Zhiznen Dai, Ming Zao, Victor Manuel Fernández Sánchez and others, against an order by the National High Court that had rejected its jurisdiction in the case of possible genocide against the Falun Gong movement.
62. With regard to the validity of its interpretation, contrary to the Constitutional Court's assertion, the Supreme Court declared that

“the teleological reduction of the literal scope of a law is also specifically permitted in the interpretation of criminal offences and criminal laws in general by constitutional jurisprudence,” (Court consideration no. 2.a), adding further on that “an interpretation, such as that of Supreme Court judgment 327/2003, based on the fundamentals of two indisputable legal principles, as are the principle of non-intervention (art. 2.7 of the Charter of the United Nations) and that of universal jurisdiction, can never be an arbitrary or unfounded interpretation, above all when such fundamentals are accepted in the doctrine and practice of other European courts that have come to similar conclusions, on the basis of actual laws and are analogous to our own.” (Court consideration no. 2.6.d).

63. *Ibid.* Court consideration no. 2.10.

64. As an example, see the beginning of court consideration no. 2, where it points out that “in judgment 237/2005 the Constitutional Court misconstrued our judgment”, and court consideration no. 2.7 where it states, “The findings of the Constitutional Court on this point are manifestly incorrect.”

65. *Ibid.* Court consideration no. 2.

66. *Ibid.* Court consideration no. 2.11 as a conclusion to the legal arguments.

67. Judgment 227/2007 issued by the Spanish Constitutional Court on 22 October 2007 in relation to the appeal for the protection of constitutional rights (writ of amparo) lodged by Zhi Zhen Dai and others. The outcome of the appeal was identical to judgment 237/2005, with use made of the same arguments used on many other occasions.

68. According to Alcácer, whose opinion is shared by the authoress, with this the Constitutional Court rejected “– as being contrary to

the right to have due process – a specific interpretation of the same, i.e. the interpretation upheld by the Supreme Court, in the acknowledgment that the legislature’s choice to introduce a criterion of universal jurisdiction cannot be repealed or amended by Chamber No. 2.” Alcácer Guirao, R., “El principio de...” *op. cit.*, p. 486. On the other hand, in support of the Supreme Court’s interpretation for all the reasons voiced there, amongst others, see Jaén Vallejo, M. *Legalidad y extraterritorialidad en el derecho penal internacional*. Atelier, Barcelona, 2006, p. 123-4.

69. Order 178/2006 of the National High Court’s Criminal Chamber, 16 February 2006. On the basis of this order and given the unwillingness shown by the Guatemalan authorities to cooperate in the investigation (expressed by the Constitutional Court (*Corte de Constitucionalidad*) of Guatemala in a decision on 12 December 2007), the National High Court’s Central Court of Investigation no.1 set in motion a series of actions, described by Zapatero as being “unparalleled from the point of view of comparative law” in that it resorts to the media “as a vehicle of private cooperation”. For more details on this subject, see Zapatero, P. “Acción judicial lateral en la lucha contra la impunidad” in *Revista Española de Derecho Internacional*, 2008, vol. LX, no. 1, pp. 303-307, p. 304.

70. See, for example, the Order of the National High Court’s Criminal Chamber of 10 January 2006 which granted leave for action against the former President of China, Jiang Zemin, the ex-Prime Minister Li Peng and five other senior officials of the People’s Republic of China, and the court order of the National High Court’s Central Court of Investigation no. 1, 5 August 2008.

71. On the cases open in Spain, see Pigrau Solé, A., *La jurisdicción universal...op.cit.*, pp. 85 ff.

72. Opinion previously expressed by the authoress in an unpublished

paper, “La cal y la arena del crimen de lesa humanidad en la sentencia del Tribunal Supremo sobre el caso Scilingo”, presented at the discussions on international human rights in the twenty-first century, *Los derechos humanos en la sociedad internacional del siglo XXI. Jornada en conmemoración del 60º aniversario de la Declaración Universal de los Derechos Humanos*, organised by AEPDIRI and sponsored by the Human Rights Office/Diplomatic School, Spanish Ministry of Foreign Affairs and Cooperation, Madrid, 10 December 2008.

73. On 1 October 2007 the Supreme Court accepted in part the request for a judicial review against judgment 16/2005 of 19 April, issued by the National High Court’s Central Court of Investigation no. 3, which condemned Adolfo Scilingo to 640 years of imprisonment for a crime against humanity. Judgment 798/2007, 1 October 2007, issued by a Plenary Session of the Supreme Court’s Judicial Chamber for Criminal Cases, section 2. <http://www.derechos.org/nizkor/espana/juicioral/doc/sentenciats.html>.
74. Section 4, court consideration no. 7.
75. Section 3, court consideration no. 7.
76. Section 3, court consideration no. 6.
77. *principal de la legalidad*
78. See section 4.b further on in this paper.
79. Section 10, court consideration no. 7.
80. Section 7, court consideration no. 7.
81. *Ibid.* Italics added.

82. On the National High Court's point of view, see the interesting article by Capellà i Roig, M. "Los crímenes contra la humanidad en el caso Scilingo" published in *REEI*, 2005, vol. 10, [www.reei.org](http://www.reei.org)
- 83 Section B, paragraph 3, court consideration no. 1, judgment 10/2005, *op. cit.*
84. Section 4, court consideration no. 6. Italics added by the authoress.
85. *Ibid.* Italics added by the authoress.
86. *Ibid.* Italics added by the authoress.
87. As referred to in cases where no express reference is made in the treaty itself, it is the judicial authority that shall determine, by way of interpretation, if a law is self-executing or not, even though it may objectively be evident that it is. On this subject, see Remiro Brotons, A. (et. al.), *Derecho Internacional. Curso general*, ed. Tirant lo Blanch, 2010, section 254.
88. While article 93 does refer to the enforcement of treaties and resolutions issued by international bodies with the right to the transfer of powers, this is perhaps a matter of the subsequent implementation of the treaty or resolution, not its transposition.
89. So, for example, and to use the same references as those used by the Court itself further on in section 5, recital 7, in the case of the International Criminal Court, one juridical act was the law authorising ratification and had to follow the parliamentary process of article 93, – Organic Law 6/2000 of 4 October – and another was the publication of the instrument of ratification with the text of the treaty, which appeared in the Spanish State Gazette/BOE no. 126, 27 May 2002.

90. In this respect, the Supreme Court's Judicial Chamber for Criminal Cases, section 2, had pointed out four years previously that "pursuant to article 96 of the Constitution, provisions agreed in treaties shall apply in the domestic legal system and, moreover, in compliance with article 27 of the Vienna Convention on the Law of Treaties, may not be invoked by the provisions of a state's internal law as justification for its failure to perform a treaty. Judgment of the Supreme Court Criminal Chamber number 2, 327/2003, 25 February 2003, court consideration no. 10. See: <http://sentencias.juridicas.com/docs/00184214.html>
91. This is the case, for example, with the Security Council's Resolution whereby the International Criminal Tribunal for Rwanda was established. Law 4/1998 concerning Spanish cooperation with the Tribunal establishes that "the Resolution, adopted on the basis of Chapter VII of the Charter of the United Nations, is directly binding on the Member States, and therefore for Spain, in accordance with article 25 of the Charter. This Resolution is incorporated in Spanish domestic law, following its publication in the Spanish State Gazette/*Boletín Oficial del Estado* on 24 May 1995, and given that the Security Council's Resolution is equivalent to the Treaty ratified by Spain, on the basis of which it is enacted". Paragraph 2 of the statement of reasons, law 4/1998, 1 July, concerning cooperation with the International Criminal Tribunal for Rwanda, Spanish State Gazette/*BOE*, no. 157/1998, 2 July 1998.
92. For example, law 15/1994, which established the cooperation of the Spanish courts with the International Criminal Tribunal for the former Yugoslavia (ICTY), in paragraph 5 of the statement of reasons, states that "the law, substantively speaking on the basis of the self-executing nature of much of the Statute, only provides several provisions whereby it may be implemented in matters reserved for organic law by the Spanish constitution." Organic Law 15/1994, of 1 June, for cooperation with the International Tribunal for the prosecution of persons responsible for serious viola-

tions of international humanitarian law committed in the territory of the former Yugoslavia. *Spanish State Gazette/BOE*, no. 131, 2 June 1994, paragraph 5 of the statement of reasons.

93. Judgment of the Supreme Court's Chamber no. 3 for Administrative Proceedings on 10 March 1998, court consideration no. 6. <http://sentencias.juridicas.com/docs/00052780.htmlf>
94. Judgment 327/2003, 25 February 2003, by the Supreme Court's Judicial Chamber for Criminal Cases, court consideration no. 12, referred to in judgment 237/2005 by the Constitutional Court of 26 September, *Spanish State Gazette/BOE* 258, 28 October 2005, record d, 7).
95. On this subject, amongst others see Fernández Pons, X., "El principio de legalidad penal y la incriminación del individuo" in *Revista Electrónica de Estudios Internacionales*, 2002, no. 5, available at: <http://www.reei.org/reei5/XFdez.pdf>
96. This interpretation by the National High Court has been supported by part of the doctrine, particularly jurists of international and procedural law. Amongst others, see, for example, Capellà, M., *op.cit.*, p. 13, Fernández Pacheco, C., "La jurisprudencia española en aplicación del principio de jurisdicción universal. El caso de la represión en Argentina" in *Repositorio Institucional de la Universidad de Alicante (RUA)*, 2008, <http://rua.ua.es/dspace/bitstream/10045/9005/1/La%20jurisprudencia%20espa%C3%B1ola%20en%20aplicaci%C3%B3n%20del%20principio%20de%20jurisdicci%C3%B3n%20universal.pdf>. Nevertheless, the interpretation has also been severely criticised, fundamentally by criminal defence jurists. This is the case of Gil y Gil, A., in the article "La Sentencia de la Audiencia en el caso Scilingo" in *Revista Electrónica de Ciencia Penal y Criminología, reflexiones (Jurisprudencia)*, 2005 See [http://www.crimeshumanite.be/data/documents/sentencia\\_de\\_la\\_audiencia\\_nacional\\_en\\_el\\_caso\\_scilingo.pdf](http://www.crimeshumanite.be/data/documents/sentencia_de_la_audiencia_nacional_en_el_caso_scilingo.pdf).



97. The basis for this is judgment 283/2006, according to which the rule of law requires an “*absolute reservation* of law over criminal matters, which implies compliance with the requirements referred to. Significantly, the Supreme Court took advantage of this to point out that, according to an interpretation by the Constitutional Court, the reference to “*legislación vigente*” (prevailing legislation) in article 25.1 of the Spanish Constitution should be understood simply as “ley” (law). Supreme Court, judgment 798/2007 *op cit.*, section 1, court consideration no. 6.
98. Concluding statement of point 4, court consideration no. 6.
99. Assertion in point 2, court consideration no. 6, in relation to the new article 607 b) set out in article 160 of Organic Law 15/2003, of 25 November, in force from 1 October 2004, which amended Organic Law 10/1995 of 23 November, of the Criminal Code. *Spanish State Gazette/BOE* no. 283, 23 November 2003.
100. In this respect, see the comments made by the prosecutor in the report submitted on 9 July 2008 in favour of admissibility in the case of *SS Totenkopf*, reproduced by the examining judge who aligned himself with the prosecutor in the ruling to grant leave to admit proceedings in the case of the Spanish victims of the National Socialist camps, by the National High Court’s Central Court of Investigation no. 2, 17 July 2008, preliminary proceedings 211/08L, both of which are available at: <http://www.derechos.org/nizkor/espana/doc/klm10.html>. In this same context, at the doctrinal level, see the article by Castresana, C. in “De Nüremberg a Madrid: la sentencia del caso Scilingo”. *Jueces para la Democracia. Información y debate*. November 2005, no. 54, pp. 3-11, p. 5.
101. Judgment of the Inter-American Court of Human Rights on 26 September 2006, the case of Almonacid Arellano et al. v. Chile, (Series C No. 154), especially paragraphs 100-105 and 151-153. See: <http://www.derechos.org/nizkor/chile/doc/almonacid.html>

102. ECHR, Section Four. Decision on the inadmissibility of actions 23052/04 and 24018/04, adopted on 17 January 2006. See <http://www.justiciaviva.org.pe/nuevos/2006/octubre/19/TEDH.doc>
103. Paragraph 2, section 4, court consideration no. 6.
104. Judgment of Supreme Court's Judicial Chamber for Criminal Cases, section 1, on 27 December 2007, no. 1092/2007, RJ, 2008\49, court consideration no. 4. For other jurisprudence references in a similar vein, see, amongst others, Remiro Brotons, A., *Derecho Internacional Público*, Mc Graw Hill, 2007, p. 631.
105. Evidence of this can be seen in, amongst other things, all of the cases connected with crimes committed during the Second World War that continue to be considered today in different countries – including Spain – and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted on 26 November 1968 and in force from 1970 onwards; the Statute of the International Criminal Court, signed 17 July 1998, and the Inter-American Court of Human Rights, which, in the Almonacid Arellano case and as regards non-implementation of the non-applicability of statutory limitations in Chile as it was not signatory to the 1968 Convention de 1968, declared that “the Court believes that the non-applicability of statutes of limitations to crimes against humanity is a norm of general international law (*jus cogens*), which is not created by said Convention, but it is acknowledged by it. Hence, the Chilean State must comply with this imperative rule”. Inter-American Court of Human Rights, case of Almonacid Arellano, *op.cit.*, paragraph 153.
106. See the Ruling by the Supreme Court investigating magistrate, Luciano Varela Castro, of 3 February 2010 *op. cit.*, in which the judge declared that “Neither has international law established in

an unambiguous way the non-applicability of statutory limitations for such offences. It did not do so at the time of the facts. It does it do so now.” p.36. Such a statement ignores not only the wider backdrop of all that has gone before (see details in the previous footnote), but also the observations by the Human Rights Committee on Spain in the 2008 *op. cit.*, in which it recalls “that crimes against humanity are not subject to a statute of limitations”. Doc CCPR/C/ESP/CO/5, *op. cit.* Whether or not it is applicable in Spain is another matter, but this has little or nothing to do with the denial, at the international level, of the very existence of the law.

107. Court consideration no. 6.

108. In this case, given that they are crimes that were committed in Spanish territory, universal jurisdiction is not an issue, meaning that in principle the corresponding courts are the ones where the crime was committed, and not the National High Court. This interpretation was endorsed in practice with the sudden inhibition of the judge, Baltazar Garzón, in the case of the victims of the Franco regime in a Ruling of 18 November 2008 and the subsequent Ruling of the National High Court’s Criminal Chamber of 2 December 2008, confirming his lack of jurisdiction. For all of these, see: <http://www.derechos.org/nizkor/espana/impu/#mall>. On this aspect, also see the case presented in Argentina before Federal Court no.1 in Buenos Aires, 13 April 2010. Text published on the *El País* website on 14 April 2010: [http://www.elpais.com/elpaismedia/ultimahora/media/201004/14/espana/20100414elpepunac\\_3\\_Pes\\_PDF.pdf](http://www.elpais.com/elpaismedia/ultimahora/media/201004/14/espana/20100414elpepunac_3_Pes_PDF.pdf).

109. Gil i Gil, in *La justicia de transición...op. cit.*, pp. 100-114, is not of the same opinion although, in the authoress’ opinion, this is because his analysis fails to take into account the procedural nature of the issue, and it therefore revolves around the existence of the international regulation on the date when the law came into ef-

fect, not when the proceedings started, despite the fact that the regulation dealing with this under Spanish law is exclusively set out in the code of criminal procedure (art. 666.4) as a derogation.

110. See section 2.a.
111. This refers to the Supreme Court ruling on 26 May 2009 whereby it admitted the case against Baltasar Garzón, Royal Magistrate Judge at the National High Court's Central Court of Investigation no. 5, for the alleged offence of abuse of judicial authority in the case of the victims of the Franco regime and the successive proceedings brought since then. For a full list of the proceedings, see: <http://www.derechos.org/nizkor/espana/impu/#mall>
112. Ruling of the National High Court's Central Court of Investigation no. 2, 17 July 2008, *op.cit.* and the prosecutor's report of 9 July 2008, *op. cit.*. Underlining added by the authoress.
113. *Ibid.* This view is shared by Remiro Brotons, who states that “the decisive date for instituting the prosecution and punishment of an international crime is not when national implementation rules came into effect nor when consent to be bound by treaties regulating international crimes was given, but when it became crystallised into the general rules of international law. Remiro Brotons, A., “Los crímenes de derecho internacional y su persecución judicial” in Bacigalupo Zapater, E., (dir.) *El derecho penal internacional*. Cuadernos de Derecho Judicial, VII-2001, Consejo General del Poder Judicial, Madrid, 2001, pp. 69-150, p. 93-4.
114. In this case the arguments put forward ranged from the proceeding being described as “an act of colonialism” to the potential adverse effects that they might have on Spanish investments in Chile or the potentially harmful effects on the process of transition and the need or opportunity on occasions to “grant amnesty” by way of “selective forgetting” in exchange for “peaceful co-ex-

istence and the construction of democracy”. As a simple example, see the work of Malamud, J. (et. al) *Los dilemas morales de la justicia internacional: el caso Pinochet*. Miño y Dávila editores, Buenos Aires, 2003.

115. In this regard, a group representing Jueces para la Democracia, Unión Progresista de Fiscales, MEDEL (European magistrates for democracy and freedom) and Grupo de Estudios de Política Criminal, in a statement against the forthcoming reform which was made official on 25 May 2009, argued that “6.- It is clearly of concern that our policy makers have decided to consider introducing limitations to prevailing legislation under the guise of matters that affect world powers. It just goes to show that the need to limit the protection of human rights only arises when faced with the ambitions of the powerful.” *Boletín informativo. Jueces para la Democracia*, no. 51, July 2009, p. 5, pdf document at <http://www.juecesdemocracia.es/pdf/boletin/Boletin%2051%20MV3.pdf>
116. *Op.cit.*
117. Reference translated from the transcribed text in Spanish on the website of the Embassy of the People’s Republic of China in Spain, <http://www.embajadachina.es/esp/zxdt/t561120.htm>
118. Ruling by judge Fernando Andreu Merelles, examining magistrate at the National High Court’s Central Court of Investigation No. 4, 29 January 2009, preliminary proceedings no. 157/2.08
119. Statement from the on-line version of the *El Mundo* newspaper, 3 February 2009, <http://www.elmundo.es/elmundo/2009/02/02/international/1233601260.html>
120. Statement from the on-line version of the *El País* newspaper, 5 May 2009, <http://www.elpais.com/articulo/espana/juez/>

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121. Statements from the news article, “Moratinos promete cambiar la ley para frenar al juez, según la ministra israelí” published in the *El País* newspaper, 31 January 2009, [http://www.elpais.com/articulo/espana/Moratinos/promete/cambiar/ley/frenar/juez/ministra/israeli/elpepunac/20090131elpepinac\\_13/Tes](http://www.elpais.com/articulo/espana/Moratinos/promete/cambiar/ley/frenar/juez/ministra/israeli/elpepunac/20090131elpepinac_13/Tes)
122. Statements from the Nizkor website on Spain, where this case has its own section. <http://www.derechos.org/nizkor/espana/doc/main.html#Gaza>
123. Ruling of the Plenary Session of the National High Court’s Criminal Chamber, roll no. 118/2009, adopted 9 July 2009. This ruling was subsequently endorsed by the Supreme Court in judicial review no. 1979/2009, 4 March 2010.
124. Ruling recognising jurisdiction, 9 June 2006, National High Court’s Central Court of Investigation no. 2, preliminary proceedings 109/06.
125. Complaint brought before the National High Court’s Central Court of Investigation no. 6, which began preliminary proceedings through a ruling, 4 May 2009, in which the United States was asked if the facts were being investigated or prosecuted in the US, in order to determine jurisdiction.
126. Ruling, National High Court’s Central Court of Investigation no. 5, 27 April 2009 (preliminary proceedings 150/09-N) .
127. *Fiscalía del Estado*
128. *El País*, 20 April 2009. Interview with Francisco Caamaño, Minister of Justice, in <http://www.elpais.com/articulo/espana/>

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elpepiesp/20090420elpepinac\_4/Tes?print=1

129. Statements made within the context of an informative breakfast meeting and released by the EFE news agency. See *Libertad digital internacional*, Tuesday 28 July 2009, <http://www.libertaddigital.com/national/pumpido-se-opondra-a-quegarzon-investigie-guantanamo-1276356549/>.
130. The information provided by Wikileaks was published in the *El País* newspaper on 30 November 2010 with the headline, “Estados Unidos maniobró en la Audiencia para frenar los casos” (Manoeuvring by the US in the National High Court to block legal proceedings) [http://www.elpais.com/articulo/espana/EE/UU/maniobro/Audiencia/Nacional/frenar/casos/elpepiesp/20101130elpepunac\\_1/Tes](http://www.elpais.com/articulo/espana/EE/UU/maniobro/Audiencia/Nacional/frenar/casos/elpepiesp/20101130elpepunac_1/Tes)
131. *Consejo General del Poder Judicial*
132. See section 3.a.
133. Statements made within the context of the First Meeting of the Association of Judicial Rapporteurs (Acijur)-El Derecho Editores, and reproduced by the EFE news agency. See: *Libertad digital Internacional*, Wednesday 2 December 2009, <http://www.libertaddigital.com/mundo/divar-no-nos-podemos-convertir-en-los-gendarmes-judiciales-del-mundo-1276358244/>
134. *Congreso de los Diputados*
135. As for the way in which this amendment was introduced, Chinchón wrote: “It is striking to say the least that, in the heat of the general policy debate on the state of the nation, in which absolutely nothing at all was discussed about the principle of universal jurisdiction, not even a specific mention as such, the reso-

lution formally leading to this process of limitation/repeal was passed; although no less perplexing than the fact that the channel used for “the reform” was an additional amendment to the law reforming procedural legislation for establishing the new Judicial Office, the wording of which would apparently have nothing to do in terms of scope with that of universal jurisdiction in relation to what is being analysed here. Of course, this cannot be accepted as being the most appropriate procedure for making such a far-reaching amendment”. CHINCHÓN ÁLVAREZ, J., “Análisis formal y material de la reforma del principio de jurisdicción universal en la legislación española: De la «abrogación de facto» a la «derogación de iure»” in *La Ley*, 13345/2009.

136. Organic Law 1/2009, of November 3, 2009, Supplementing the Law Reforming Procedural Legislation for the Establishment of the New Judicial Office, and Amending Judiciary Organic Law 6/1985, of July 1, 1985 (Judicial Powers Act). Published in the Spanish State Gazette/BOE no. 266, 4 November 2009, p. 92089.
137. Reference analysed in section 2 of this paper. For a summary of the reform of article 23.4, see REMIRO BROTONS, A., “Crímenes internacionales, jueces estatales” in *Política Exterior*, no. 134, March-April 2010. See: <http://www.politicaexterior.com/2010/03/crimenes-international-jueces-estatales/>.
138. For an analysis of the potential consequences of the new version of article 23.4, see Pigrau Solé, A., *La jurisdicción universal...op. cit.*, pp.122-125 and Chinchón Álvarez, J., “A propósito del proceso de reforma del artículo 23.4 de la Ley Orgánica del Poder Judicial (mayo-noviembre de 2009): De los motivos a las consecuencias para el principio de jurisdicción universal” in *Revista de Derecho de Extremadura*, 2010, pp. 13-31. See: [http://eprints.ucm.es/10021/1/Art%C3%ADculo\\_Reforma\\_JU\\_Motivos\\_RE-VISTA\\_EXTREMADURA.pdf](http://eprints.ucm.es/10021/1/Art%C3%ADculo_Reforma_JU_Motivos_RE-VISTA_EXTREMADURA.pdf).



139. See section 3.b of this paper.
140. Ideas along the same lines are also expressed by Bollo Arocena, M<sup>a</sup> D., *Derecho Penal...op.cit.*, p. 369 and Remiro Brotons, A., “La responsabilidad penal individual por crímenes internacionales y principio de jurisdicción universal” in Escobar Hernández (ed.), *Creación de una Jurisdicción Penal Internacional* Colección Escuela Diplomática, no. 4. Escuela Diplomática/AEP-DIRI, Spanish State Gazette/BOE, Madrid, 2000, pp. 193-235, p. 200.
141. The principle of “extradite or prosecute”, which appears in numerous treaties, is a specific subject of study by the United Nations’ International Law Commission. In 2004, it appointed Zdzislaw Galicki as special rapporteur, who submitted three reports; in 2008, a working group was appointed, which submitted its last report in ILC meeting no. 3071, 30 July 2010. In addition to this, there is the Commission’s work on crimes against the peace and security of mankind; article 9 of the project presented in 1996 includes this principle for war crimes, genocide and crimes against humanity.
142. Separate opinion of the magistrates Clara Bayarri García, Ramón Sáez Valcárcel and José Ricardo de Prada Solaesa, against the Ruling of the Plenary Session of the Criminal Chamber, 27 October 2010, in the application for leave to appeal in proceedings DP 242/2005 at the National High Court’s Central Court of Investigation no. 1, point 6. See: <http://www.juecesdemocracia.es/Sentencias/2010/Voto%20particular%20Tibet.def1.pdf>
143. Complaint lodged by S. Morteza Komarizadehasl and Reza Mohad against Hossein al-Shemmari, for the attack by approximately 2,000 soldiers of the Ninth Badr Brigade and the Scorpion Brigade in Bagdad, the Second and Third Battalions and the riot police, planned by Lieutenant General al-Shemmar against un-

armed resident civilians in the Ashraf camp, who fired indiscriminately at people protected under the Fourth Geneva Convention. Information from the website of the Real Instituto Elcano, Fernández de Liesa, C. “Perfiles de la política exterior española de derechos humanos”, DT 6/2010-17/02/2010, [http://www.realinstitutoelcano.org/wps/portal/rielcano/contenido?WCM\\_GLOBAL\\_CONTEXT=/elcano/elcano\\_es/zonas\\_es/europa/dt6-2010#\\_ftnref19](http://www.realinstitutoelcano.org/wps/portal/rielcano/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_es/zonas_es/europa/dt6-2010#_ftnref19), visited on 30 November 2010.

144. Decision by the investigating judge to dismiss the proceedings on 26 February 2010, endorsed by a Plenary Session of the National High Court’s Criminal Chamber on 27 October 2010, *ibid*.
145. See the separate opinion of three magistrates at the National High Court’s Criminal Chamber in the Ruling, 27 October 2010, which ratified the dismissal of the Tibet case, in which they point out that neither the request brought before the Ombudsman (*defensor del pueblo*) nor the proposal that they themselves made in the chamber during the deliberation of the ruling were successful. Separate opinion of the magistrates Clara Bayarri García, Ramón Sáez Valcárcel and José Ricardo de Prada Solaesa, point 3. See <http://www.juecesdemocracia.es/Sentencias/2010/Voto%20particular%20Tibet.def1.pdf>
146. CHR, Sub-Commission on Prevention of Discrimination and Protection of Minorities. 49th session, “*The administration of justice and the human rights of detainees. Final revised report on the question of the impunity of perpetrators of human rights violations (civil and political)*”, prepared by L. Joinet E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997.
147. Principles by the UN’s Human Right Organisation, Resolution on Impunity, number 2005/81 (whereby it takes note of the updated set of principles as guidelines to assist states in developing effective measures to combat impunity, recognises the regional

and national application of the Principles and adopts other relevant law instruments), Doc. ONU E/CN.4/RES/2005/81.

148. Principles endorsed by the UN General Assembly, GA Res. 60/147, 16 December 2005.
149. This, in the words of Saenz de Santamaría, and according to the International Law Commission, “covers the entire judicial process, from the initiation or institution of proceedings, service of writs, investigation, examination, trial, orders which can constitute provisional or interim measures, to decisions rendering various instances of judgments and execution of the judgments thus rendered, or their suspension and further exemption”. Andrés Sáenz de Santamaría, M<sup>a</sup>, “El estatuto internacional del Estado: la inmunidad soberana del estado extranjero. (jurisdicción y ejecución)” in Mangas Martín, A., *Cuadernos de derecho judicial. Cuestiones prácticas de derecho internacional público y cooperación jurídica internacional*. Consejo-General del Poder Judicial, Madrid, 1994, pp. 93-223, p. 97.
150. Roldán Barbero, J., “La política exterior española en materia de derechos humanos” in VV.AA. *Estabilidad internacional, conflictos armados y protección de los derechos humanos*, ed. Tirant lo Blanch/Univ. de Valencia, Valencia, 2010, pp. 253-292, p. 278.
151. Following a comprehensive analysis of the subject, Gil i Gil, amongst other authors, concludes that their prosecution by legal means is practically impossible. Gil i Gil, *La justicia de transición....op.cit.*. See in particular the conclusions, p.165.

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