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An *Histoire Juridique Commune*? Historiographical frames in European and Inter-American human rights narratives

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ABSTRACT

In every human rights court procedure, arguments related to history – tacitly or explicitly, willingly or unwittingly – are rehearsed by legal professionals, especially in difficult cases that attempt to bring closure to ‘historical wrongs’. With this in mind, in this article, I interrogate the ways in which historiographical frames underpin human rights narratives, focusing on cases concerning authoritarianism and state violence in the European and Inter-American systems. With this notion, I refer to how courts use existing public materials – *as if* they were historians encountering a body of scholarly work – and make ‘historiographical’ decisions about the way these documents shed light on the facts or the applicable law in the dispute at hand. In particular, I focus on how the Strasbourg and San José tribunals engage with arguments related to factual context, legal change, and (dis)continuity in relation to their understanding of the history of the respective regions in which they operate – with important consequences for legal reasoning and judicial interpretation. By bringing these two regional systems in conversation, I highlight how a sense of a shared temporal experience is central to their claims to speak on behalf of Europe or the Americas.

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Furthermore, the [Inter-American] Court [of Human Rights] takes note of the special gravity and repercussions that these facts have had for Colombian society. In fact, even the state recognized before this Court that the ‘event surrounding the Palace of Justice has no precedent in our recent history,’ while the Truth Commission note that [...] it constitutes one of the most dire and perturbing incidents in the long history of violence in Colombia.¹

[The Court] does not have to have to transform itself into a self-taught historian. The Courts rule on the facts and the law [...] the opposing parties at least agree on one point, namely that is not for the [European] Court [of Human Rights] to write history. The Court is of the same opinion as all the parties.²

1. Introduction: ‘for future historians’

We all hope, perhaps deep in our hearts of hearts, that one day history will redeem us.³ How else can we understand the recurring appeal to the quixotic figure of the ‘future

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historian' in contemporary political discussions?⁴ When one is faced with a past of recurring injustice and a present of defeat, it is entirely understandable to pin one's hope onto the idea of future absolution – a promised time in which, at long last, one's story might have a happy ending. From the tiniest intimate dispute to the most public controversy, every contention is inscribed in a (sometimes imagined, but often very real and institutionalised) 'historical record' – an open archive of sorrows that offers solace for today's vanquished and perhaps even a cautionary lesson for the future. In this way, history as a discipline (or at least as a practice) comes to serve a sort of judicial function – a 'juridified' form of historiography, so to say.⁵ The record of the past serves as a weapon in present and future struggles.

This is especially true for those who turn to history to seek redress for 'vertical' forms of violence inflicted by state actors – another way of understanding what we usually call authoritarian repression.⁶ For if the state itself is responsible for violence, how can we expect its judiciary to impartially provide justice? For that reason, it is not surprising that in difficult cases that attempt to bring closure to state-inflected scars, litigation often occurs not only inside the 'official' courtroom but also in what the historian Joan W. Scott has critically examined as the imagined space of 'the judgement of history' as a 'higher court' of appeal (Scott, 2020, p. xii). One thinks of Walter Benjamin and his thesis that '[o]nly [the] historian will have the gift of fanning the spark of hope in the past [if she] is firmly convinced that *even the dead* will not be safe from the enemy if he wins'.⁷

This offers an opportunity for cross-fertilisation, albeit an awkward one, between the disciplinary sensibilities of (international) law and (global) history. For if history is often entrusted a sort of 'judicial' function, it is also true that legal courts are also often endowed (willingly or unwillingly) with the task of 'history-writing' (Kozheurov, 2013). As the European Court of Human Rights (ECtHR) aptly noted in the epigraph, courts are expected sometimes to work in the guise of a 'self-taught historian'.⁸ Even if the judicial record is not meant to be taken to speak on behalf of 'capital H History', it is undeniable that judgments play an important role in the creation of collective narratives – especially in cases of 'transition'.⁹ But it is quite unclear who – if at all – can speak on behalf of 'History'. Is this a role for the academic profession – a field which has, by and large, abandoned any nineteenth century fantasies about a singular 'History' and embraced the 'postmodern' fragmentation of its truth(s)? (Scott, 2020, p. xii)¹⁰ Or is this a task for 'public history' – and should we instead expect museums, primary schools, or the arts take up the mantle? (Donnelly & Norton, 2021, pp. 181–224). Or is this where 'memory' (which Judt has described as history's seductive and younger step-sibling) should step in? (Judt & Snyder, 2013, pp. 276–277).

As these debates rage between historians (especially between those who see themselves primarily as social scientists *vis-à-vis* those who believe history is perhaps the last of the humanities¹¹), lawyers have taken the 'history-writing' challenge of courts seriously, producing an interesting series of interventions on 'responsible history-making' by national, hybrid, and international tribunals (Bevernage, 2021; Borda, 2020, 2021; Hirsch, 2019; Waters, 2022). This is especially relevant in the wake of the increasingly frequent deployment of 'memory laws' in our day and age – measures that judicially proscribe a particular understanding of our past century's 'age of extremes' (Baranowska & Castellanos-Jankiewicz, 2020; Ertür, 2019).¹²

In this article, I want to approach this disciplinary encounter in a slightly different way. Drawing from the literature on narratology and international law; (Bianchi, 2021; Boer, 2019; Cover, 1983; Windsor, 2015) and in line with the theme of this special issue, I ponder on the ways historiographical arguments frame judicial interpretation.¹³ Instead of reflecting on the juridification of history or on the importance of a ‘responsible’ craft of history-making for judicial actors, I want to focus on a less overt form of cross fertilisation. In particular, I am interested in interrogating how historiographical moves are inscribed into the *internal* registers of legal argument without being noted as *external* to the discipline (Tamanaha, 1999, pp. 153–195). This difference is important because, as I’ve argued more extensively elsewhere, we have sadly found ourselves in a moment in the literature in which many international lawyers (especially those on the ‘socio-critical spectrum’ (Davies, 2017, p. 14)) have come to take a defensive position of our field against the encroachment of ‘historians proper’.¹⁴ Indeed, after a decade or two of much enthusiastic collaboration between the two fields (marked by international law’s ‘turn to history’ and intellectual history’s ‘international turn’), in the state of the art we have now found ourselves struck in a rather acerbic debate about the ‘inherent’ difference between these two professional sensibilities (d’Aspremont, 2020).¹⁵ Now that the method wars have been waged, let us rebuild a new conversation on more productive terms of engagement. The challenges ahead for a new generation of legal scholars and historians affords us no time to cling to the bitterness of those who preceded us – and do note that this is, itself, a sort of historiographical argument!

With this in mind, in this article I argue that both lawyers and historians can learn from a deeper interrogation of the use (and abuse) of historiographical frames for the inner life of judicial interpretation,¹⁶ by focusing on their deployment in cases of vertical violence or authoritarian repression litigated before the ECtHR and the Inter-American Court of Human Rights (IACtHR). To do so, after this introduction, I first unpack (2) three historiographical moves which I suggest are key to judicial reasoning: arguments surrounding (factual) context; (legal) change; and (dis)continuity between past, present, and future. For even if we might think that the two fields have distinctively ‘inherent’ differences, in every human rights court procedure, historiographical arguments of this nature are – tacitly or explicitly; willingly or unwittingly – rehearsed by legal professionals (Baade, 2021, pp. 221–243). Then, (3) I turn to a series of European and Inter-American judgments to see how these historiographical moves allowed these two regional human rights bodies to take decisions – with legal and not only ‘historical’ consequences. Finally, (4) I conclude with a plea for a *détente* in the disciplinary Cold War between law and history, highlighting that the challenges ahead (especially those related to the rise of authoritarian rulers, given the recent resurgence of the extra-parliamentary politics) will require scholars to harness the analytical tools of both fields. To do so, I focus on the growing interest in cross-regional comparison between Europe and the Americas and how *both* law and history will be indispensable for such efforts (Specter, 2022).

To be sure, my goal is not here to pass judgement on the courts. Nor is to argue that, in any of these given cases, either of the two courts got ‘history’ wrong. Above all, by placing these two regional human rights systems in conversation, I am not particularly interested in making an argument about which is ‘better’ or more ‘precise’ when dealing with history. I am not even addressing a wider concern about the limits of these sort of

institutions or of the language of human rights to begin with.¹⁷ Instead, here I want to focus (with a rather *internal* perspective) on the uses of historiographical frames in judicial reasoning and legal interpretation.

2. Framing historiographical frames: context, change, and continuity

When it comes to the question of narratives in history-making, we can find no better point of entry than the work of the US historian Hayden White (Robinson, 2014, pp. 3–24; Simpson, 2021, pp. 136–137). In retrospect, his monograph *Metahistory: the Historical Imagination in Nineteenth-century Europe* of 1973 has been read as the high water mark of a wave of scholarship associated with the ‘linguistic’ or ‘postmodern’ turn in the historical discipline – and is rightly credited with opening vistas for work that took seriously the relevance of literary storytelling devices in the writing of ‘scientific’ or ‘realistic’ history (White, 1973).¹⁸ In what follows, drawing from his work and its influence in both history and in international law, I introduce the notion of ‘historiographical frames’ – and in particular, of three particular argumentative moves employed by judicial actors to make sense of: (factual) context; (legal) change; and (dis)continuity between past, present, and future. While White himself doesn’t use the notion of a ‘frame’ in these interventions (instead he heavily relied on the notion of ‘emplotment’, for example) his work has been productively read to think about ‘framing as a stance’ in history-writing (Kantawala, 2020). Moreover, in his response essay to Rosenstone’s proposal for what White calls ‘historiophoty (the representation of history and our thought about it in visual images)’ he does employ the notion of the ‘frame’ as used in film studies (White, 1988, p. 1198 compare with Rosenstone, 1988).

But first, it might be pertinent to take a step back to introduce the notion of ‘historiography’ or ‘historiographical frames’ in the first place. With the former, historians usually make reference to ‘the study of the writing of history (Donnelly & Norton, 2021, p. 13). Or in other words, it refers to ‘debates between historians about just what did exactly happen, why it happened, and what would be an adequate account of its significance’ (White, 1988, p. 1196). A quite pertinent example of this term in use is offered by Donnelly and Norton is that usually historians talk about the historiography of something – such as, for instance, the Spanish Civil War in the long thirties (Donnelly & Norton, 2021, p. 13). Used in this manner, one talks about the historiography of this war to refer to the works published by different historians (often with competing aims, interpretations, or sources) to make sense of the crisis of Spain’s Second Republic as a historical event.¹⁹ In this way, historians usually distinguish an argument that is based on *primary* sources (for instance, the close reading of the correspondence left behind by a Republican partisan in a Fascist prison) and a *historiographical argument* that is based on the analysis of *secondary* sources – for example, an intervention that argues that the study of this correspondence is essential to understand to everyday struggles of anti-fascist partisans and that it is in fact much more illuminating than the ‘high level documents’ usually read by diplomatic historians.²⁰ Of course, historians tend to give interventions that cross-examine primary sources directly much more weight, but historiographical arguments (especially in the form of a comprehensive review essay or as the ‘on-way-out’ privilege allowed to senior scholars) have always played a crucial role in the discipline (Bloch, 2002, p. 53).²¹ For graduate students of history,

the preparation of historiographical essay on the tentative field(s) of their dissertation is a typical first step in their scholarly training.

With this in mind, I would like to introduce the notion of a ‘historiographical frame’ or ‘historiographical argument’. I deploy this notion to make sense of how legal and judicial operators approach a historical event (say, the Colombian civil war) *as if* they were historians encountering a body of already existing work – like grad students, who must first map the contours of the underlying controversies in the secondary literature of their field before they can proceed to write their own historiographical essay. In this sense, the court does not (usually, at least) operate as a historian analysing a primary source, but rather as an *historiographer* engaging with a body of *secondary* sources. And from this cacophony of already-existing material, the court must make a decision to evaluate the legal significance of a particular historical event, by framing its relevance within a series of already-given markers provided by that secondary literature. For that reason, I am less interested in the ‘history-making’ function of a court and more in its role as a curator and narratives produced by others: a judicial actor operates here as a surveyor of historiographical materials that can be mobilised to inform a legal narrative.²² The image I wish to conjure is not that of *the judge as a historian* – deep in the archives. Rather, it is that of *the judge as a history grad student*: as an apprentice scholar that must first make sense of the already existing state of the art related to a complex situation that has just reached her docket. In particular, I would like to focus on three historiographical moves which, I believe, are central to judicial reasoning: arguments surrounding (factual) context; (legal) change; and (dis)continuity between past, present, and future. Before I provide some examples of how these moves are used in European and Inter-American human rights narratives, I will introduce each of these moves.

First, courts must always make judgments about the right factual context of any given dispute – and these decisions, I suggest, are better understood as ‘historiographical’ than ‘historical’. For the judicial operator rarely goes directly to the cross-examination of a primary source itself – and perhaps rightly so! Instead, the court relies on a series of already assembled documents prepared by the parties in dispute or already circulating in public discourse to make sense of the context against which the facts of the case are to be understood. But where does historical context end and the hard facts of the case begin? It is here that the court must deploy a frame to separate ‘the facts of the dispute as such’ from the ‘root causes’ of violence or injustice (Marks, 2011).²³ For that reason, I suggest we have plenty to learn from a closer study of the ways in which courts adjust their frames and ‘ways of seeing’ the facts of the case – and in particular in how historiographical arguments allow them to do so with legal consequences. As White notes,

when historians list or indicate the ‘effects’ or a large scale historical event, such as war or a revolution, they are doing nothing different from what an editor of a documentary film does in showing shots of an advancing army [... as m]uch depends on the nature of the ‘captions’ accompanying the two kinds of images, the written commentary in the verbal account and the voice-over or subtitles in the visual one, that ‘frame’ that depicted the events. (White, 1988, p. 1198)

The task of the court, in that sense, is not too dissimilar from that of a student of history or a documentary editor as it must also decide how to frame the human rights

violation in the background of a broader historical event – which is thus reduced to ‘context’, often circumscribed to the ‘as to the facts’ section of the judgment. While these set of facts are rarely brought up again in the substantive sections of the ruling, it does have ‘tremendous implications’ in the way a Court frames the nature of the problem at hand (Dembour, 2023b, p. 363).

The second movement I am interested in the historiographical understanding of legal change itself. This will sound familiar to human rights audiences, long haunted by debates between ‘textualism’ and ‘evolutive interpretation’ in international law.²⁴ Again, for this task courts must embrace a decidedly historiographical function: they evaluate how to make sense of the significance of an alleged change in the content of the law by rereading the secondary texts on human rights practices or standards – understood broadly, to include for instance domestic or regional patterns of conduct – (Theilen, 2021) instead of closely analysing the primary source itself (i.e. the human rights convention at hand).²⁵

Finally, historiographical frames play an important role in the making of arguments about continuity – and above all, discontinuity. Even beyond the Common Law tradition, notions surrounding ‘precedents’ play a central role in human rights litigation – especially in cases of gross violations and vertical violence (Simpson, 2019). This is especially true in cases of ‘transition’ – where a historiographical evaluation of a (dis)continuity might actually provide some leeway in judicial interpretation.

With these three moves, human rights courts and tribunals attempt to create a common historical narrative (an *histoire juridique commune*, so to say): a frame in which legal arguments can adequately make sense of the historical significance of the event at hand. In what follows, I show how the ECtHR and the IACtHR have used these three moves in some of their cases related to vertical violence (especially, but not exclusively, related to the past or present instances of vertical violence), highlighting the ways in which legal arguments feed from the wells of the historiographical imagination. I do so by reading a selection of paired cases from each human rights tribunal, mapping how they deploy the three historiographical moves I have just introduced. For that reason, my selection of cases relied on the way each court framed its argument, more than on the factual comparability of the subject-matter. I will detail some of difficulties of making these choices in my concluding remarks.

3. From an *Espace Juridique Commun* to a *Histoire Juridique Commune*: historiographical frames in regional human rights judicial practice

3.1. War (what is it good for)?²⁶ Framing human rights violations in times of armed conflict

War, I was once taught (and have also taught), is ‘considered a term of the past that has no substance in modern international law’ (Yeini, 2023). Instead, the international legal profession has devoted much attention to the meaning of ‘armed conflict’ or ‘force’ in intra- and interpolity relations. But as Clapham has convincingly argued, even if ‘declared war’ has been largely ‘abolished’ as a legal term of art, it continues to influence the way we think about international rights and obligations (Clapham, 2021). This is also true for questions of human rights violations – a subject addressed

extensively in a robust field of literature on the convergences or divergences of international human rights law and the laws of war (Clapham, 2018). While there is, in my view, a general consensus that the laws of war do not ‘displace’ those of human rights, the fact that a violation occurs in time of war does have legal implications (Lubell, 2005, p. 738). Indeed, as both the ECtHR and the IACtHR have recognised in their jurisprudence, the fact that a human rights violation occurs in a context of warfare can shape the interpretation the Court makes of the injured rights (Burgorgue-Larsen & de Torres, 2011; De Koker, 2018). For that reason, the ways in which these human rights tribunals make historiographical decisions about the existence of a ‘war’ (*vis-à-vis* mere ‘peacetime’ violations) can have important consequences for the judicial reasoning. To show this, I turn to two cases in which these tribunals did not frame the facts of the cases as part of a wider conflict – making a particular historiographical choice about how to *see* violence and repression. These are the *Ireland v. the United Kingdom* (in its original judgment issued by the ECtHR in 1978) and *Gomes Lund y Otros* (*‘Guerrilha do Araguaia’*) vs. *Brasil* – decided by the IACtHR in 2010.²⁷

While the Inter-American case was delivered decades later than its European counterpart, both cases ultimately deal with (roughly) the same period: the mid-seventies.²⁸ Let us see how each Court sets up their recount about the facts of each case – and like White’s documentary filmmaker, adds captions and edits images as it frames the kernel of the case. In *Ireland v the United Kingdom*, the ECtHR’s first sentence (at least in relation ‘to the facts’) already alerts us that the root of the case is ‘[t]he tragic and lasting crisis in Northern Ireland’.²⁹ This situation is also known by another famous euphemism: ‘the troubles’ (Munck, 1992).³⁰ In particular, it dealt with the detention, and alleged mistreatment, of a group of Pan-Irish militants by the UK’s security apparatus. The Court then offers the respondent state a friendly gesture, noting that the ‘extrajudicial powers of arrest, detention and internment’ that were under review in the case were adopted to face ‘the longest and most violent terrorist campaign witnessed in either part of the island of Ireland’.³¹ This is followed by a section on context (‘social, constitutional and political background’) that begins with the creation of the Irish Free State in 1922 until the escalation of the conflict in the late 60s.³² The next section documents how initial tensions aroused by the emergence of the movement of Civil Rights for Catholics eventually led to a spike of violent operations carried out by the Irish Republican Army (IRA, introduced in para. 16).³³ This was followed, in turn, by ‘some terrorist activity on the party of Loyalists’ and an intensification of the violence by 1971.³⁴ All of this constituted ‘the background’ in which the measures taken by the respondent state ought to be understood.

My goal in this article is not to argue that the Court ‘got’ the history right – or wrong, for that matter.³⁵ Rather it is to show that this particular narrative of ‘troubles’ is not self-evident – it required the ECtHR to make deliberative, even if not particularly conscious, historiographical choices. The most obvious one is: when should the camera start rolling? 1922, no doubt, is a perfectly reasonable choice. But so could have been 1916, 1609, or even 1167.³⁶ Another one is the use of a very specific caption underneath the moving image: *terrorism*. Despite the notorious fuzziness of this category, it can also influence the way the Court interprets human rights (or, more precisely, the actions taken by states to limit them; Moeckli, 2009). Absent, in turn, is any reference to another set of captions that could have been deployed to make sense of the situation: the laws of

war. While the Court noted that the IRA was ‘organized along military lines’³⁷ and highlighted that big part of the controversy revolved around a military operation conducted by ‘the army, with police officers occasionally acting as guides’,³⁸ the analysis of the detention itself never considered if the laws of war applicable to prisoners of war (POW) under international humanitarian law could be relevant. And it could have been, as some of IRA fighters did claim some sort of POW protection – and, as Caesar notes, the ‘potential status [of ‘the troubles’] as an international armed conflict has been improperly disregarded’ (Caesar, 2017).

In this same vein, I want to highlight how the Court’s account of the facts largely replicates at least one tendency of the one narrative deployed by the UK: it emphasises ‘the ‘internal’ nature of the problem (Campbell, 2005, p. 324). This is significant given that this case is one of the few cases of inter-state human rights litigation. And as such, it would have been insightful to think about the ‘international dimension’ of the conflict at hand. Indeed, it is not surprising the eventual ‘resolution of the troubles’ required an extensive process of negotiations that eventually did involve Ireland, the European Union, and even the US.³⁹ But by 1978, what the ECtHR saw were mere instances of domestic unrest and ‘terrorism’. A very different picture would have emerged if the lenses would have been focused instead to register a ‘war’ – and above all, if they would have captured that all of this occurred during a particularly chilly moment of the broader ‘Cold War’.⁴⁰

In this respect, it shares plenty with the approach taken by the IACtHR some years later. For a case named after a Communist *Guerrilha*, questions related to the laws of war, or any transnational implications, are conspicuous by their absence. The shorter summary of facts begins in 1964, with the (US-supported, though this is not mentioned) military *coup*.⁴¹ Then, the Court notes that the years between 1971 and 1974 were marked by ‘a sudden and devastating attack on the armed opposition groups’.⁴² It is in this context, the Court adds, that we must understand the emergence of the Communist Party’s ‘popular liberation army’: the *Guerrilha de Araguaia* in 1972.⁴³ The controversy of this case revolved around the operation undertaken by ‘a contingent of approximately three thousand and ten thousand men of the Army, Marines, Air Force, Federal Policy, and Military Policy’ that virtually eliminated any trace of this inchoate guerrilla by late 1974.⁴⁴ The regime did not recognise the belligerent status of this group nor the existence of an internal armed conflict, of course, so the corpses of the vanquished *guerrilheiros* and *guerrilheiras* largely ‘disappeared’.

Given that Brazil only ratified the Pact of San José in 1992, it is not surprising that the lion’s share of the facts’ section traces the measures undertaken by the respondent state after the restoration of democracy. But these past violations had consequences in the present. Given that enforced disappearance is an injury with a *continued* nature, the lack of investigation of the military operations of the seventies could give rise to international responsibility decades later.⁴⁵ A sense of deference to the respondent in the light of the dangers of ‘terrorism’ – central to the ECtHR’s engagement with the UK in the previous case – was also absent.⁴⁶ In fact, accusations of terrorism are only invoked to be levied against the state, as the Court cites that a Special Commission created for transitional purposes noted that the military elimination of the guerrilla happened ‘in an atmosphere of true “terror of State”’.⁴⁷ But the San José tribunal, just like its Strasbourg counterpart, did not stop to reflect on whether the intensity of the hostilities,

the organisation of the *guerrilha*, or its degree of territorial control would have warranted any consideration of international humanitarian law. I'm not necessarily claiming it would have *needed to do so*, but I am highlighting this implied a particular framing that excluded 'war' from the picture. While sometimes invoking 'war' can have regrettable effects (as Clapham shows in relation to the rhetoric on the 'war' on drugs, terror, or even COVID-19; Clapham, [in press](#)), it can also open pathways for innovative legal interpretation – as I show below in Section 3.3 in relation to transitional justice in Colombia. I am well aware that invoking war – or triggering the application of international humanitarian law – might not necessarily lead to more progressive outcomes in terms of human rights protection. I also recognise that important concerns can be raised about the applicability of the laws of war in these two cases – although, legally, I do not anticipate them to be unsurmountable. What I want to stress, instead, is the 'moment of vertigo' that opens once we realise that behind a seemingly natural framing lies a political choice – one that we can question or accept, but ultimately credit to the contingent decision-making process of the Courts (Kennedy, 2016, p. 255).

Read together, these two cases show that the human rights Courts opted to read the violent context purely through a domestic frame: as if the violations did not have any roots that went beyond the frontiers of the polity under judicial scrutiny.⁴⁸ Moreover, in one case the language of terrorism allowed one of the Courts more leeway than in the other when it came to the evaluation of state conduct. These historiographical choices in relation to the nature of the problem, in conclusion, have important consequences for legal reasoning and judicial interpretation.

3.2. Future tense: broadening the understanding of torture

Placing these two last judgments (the *Irish case* and *Gomes Lund*) in conversation not only tells us something about the transnational history of anti-Communist suppression in the mid-seventies (Duranti, 2017, pp. 321–344), but it also illuminates some of the historiographical choices taken by these two tribunals to frame human rights violations.⁴⁹ As Dembour noted, many in 1978 considered the ECtHR adopted a rather misguided frame insofar as it did not find that the so-called 'five techniques' that the UK deployed against IRA detainees constituted torture (Dembour, 2023a, p. 377). I concur with her that '[t]his finding [...] is generally recognised to have not stood the test of time well [as a] broader, more enlightened and more appropriate conception' has developed in international law since then (Dembour, 2023a, p. 378). This point serves as a pivot to my next argument on historiographical frames in relation to changes in the content of applicable law. I focus on this 'broadening' of torture, by reading *Selmouni v. France* in tandem with *Cantoral Benavides vs. Perú*.⁵⁰ What is framed here is the relationship between law and time. Human rights litigants often make their plight a 'struggle *over time*' – insofar as some claim the Court to recognise an expansive, and *new*, interpretation of a norm (Theilen, 2020). The Court must then make a decision on whether such interpretation can muster 'the test of time'.

Indeed, these two cases reflect a conscious effort undertaken by each Court to 'correct' the limited scope of past decisions. As mentioned above, the ECtHR had ruled in the *Irish case* of 1978 that the measures taken by the UK 'did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood'.⁵¹ Two decades

later, the Court felt it was time for a change (Rodley, 2002, p. 476). Drawing on its famous ‘living instrument’ doctrine, it concluded that ‘certain acts which were classified in the past as ‘inhuman and degrading treatment as opposed to ‘torture’ could be classified differently in future’.⁵² Indeed, it considered ‘that the increasingly high standard being required in the area of protection of human rights and fundamental rights correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies’.⁵³

To be sure, I am not arguing against this broader notion of torture! But I do want to highlight that the Court endows the passage of time with a certain degree of agency which makes legal change seemingly ‘inevitable’. But humans, not time, make the world change – and the same is true for the law too. As Rodley noted, the Court’s lofty language ‘cavalierly overlooked’ how the scope of the definition of torture had been extensively debated in the previous years in the context of the United Nations’ Torture Declaration of 1975 or its Convention Against Torture (CAT) of 1984 (Rodley, 2002, p. 477). From a traditional generalist perspective, what is absent is any grounding in a theory of change in relation to the ‘spectre of the sources’ of international law – for example, the emergence of a customary rule or an interpretation guided by subsequent state practice at the regional level (Parfitt, 2014). Absent, moreover, are any overt references to questions of ‘intertemporal law’ or the ‘critical date’ of legal change (Wheatley, 2021). An ‘evolutive’ (or rather teleological) sense of historiography, instead, does quite a lot of heavy lifting.⁵⁴

And as we know all too well as international legal scholars, narratives of ‘progress’ can easily turn into self-fulfilling prophecies (Diggelmann & Altwicker, 2014). Across the Atlantic, the San José Court drew from the ECtHR’s decision to open a ‘new phase’ in its own jurisprudence on torture (Galdámez, 2006, pp. 94–96). Paraphrasing almost verbatim the phrases of the Strasbourg Court cited above,⁵⁵ the Court concluded that a ‘true international system prohibiting all forms of torture has been put in place’.⁵⁶ But, by whom? Historiographical thinking permits the Court to use here the passive voice – as if time, slowly but surely, had on its own constructed such ‘system’. While the IACtHR goes a further than the ECtHR in its use of sources (referring not only to its Strasbourg counterpart but also to the CAT and the work of its expert Committee), it did not claim to show that subsequent state practice called for a new interpretation of the San José Covenant, nor did it aim to prove the crystallisation of a customary rule either.⁵⁷ Only time might tell, perhaps, if this historiographical move proved to be ultimately convincing.

My argument is not that the Court’s interpretation would have been necessarily ‘better’ should it had been based on the traditional doctrine of sources or treaty interpretation. Rather, it is that the Court’s reliance on temporality, on the gradual change of the applicable law’s content over time, allowed the Court to avoid identifying the actors and forces driving this transformation. Claims of consensus (regional or otherwise) as Boer noted in relation to legal scholarship, often tend to rely on an imagined ‘out there’ that is rarely substantiated in practice (Boer, 2016).

3.3. Facing exceptional times: history and the call to do things differently

But time does not always flow steadily like a river. As I have been unable to locate a credible source, I will use the passive voice to note that Lenin has been often credited to have

said that there are moments in which nothing happens, punctuated by weeks in which decades happen. Without (mis)quoting Lenin, international human rights tribunals have also come to share this sentiment. This is best seen, I suggest, by their use of arguments related to historiographical exceptionalism: human rights violations – like the Colombian *Palacio de Justicia* (‘Palace of Justice’) incident cited in the epigraph – that exceed any sense of historical continuity. Or, to put it in Simpson’s words, moments that are simply *unprecedented* (and that, accordingly, demand the Courts to do things differently) (Simpson, 2019). But this historiographical move is the riskiest of the three, and for that reason it is often best identified by reading the minority opinions of concurring or dissenting judges. In this light, I read the two minority dissents in the *Janowiec and Others v. Russia* case (ECtHR, fifth section in 2012 and Grand Chamber in 2013) in tandem with Garcia-Sayán’s concurring vote in *El Mozote vs. El Salvador* case.⁵⁸

Both cases, alas, deal with massacres. *Janowiec*, as the majority of the first decision notes, revolved around the summary execution of more than 20,000 Polish POWs by the Soviet army in the wake of the ‘territorial and political rearrangement’ of Central and Eastern Europe that occurred after the 1939 Molotov-Ribbentrop Pact of 1939.⁵⁹ The exact number of victims is unclear, as the Soviet authorities decided to destroy much of the pertinent evidence.⁶⁰ But what is clear is that the massacres occurred in 1940–1941. That is, of course, years before the European Convention of Human Rights (ECHR) was drafted – to say nothing about the date in which the Russian Federation actually ratified this treaty (1998). This, of course, raised important questions in relation to the Court’s jurisdiction. The applicants, however, had sought to make good use of a point made in passing in *Šilih v Slovenia* – which recognised, like the IACtHR in the *Gomes Lund* case cited above, the ‘continued nature’ of human rights violations.⁶¹

As *Šilih* dealt with a death caused by an instance of medical malpractice that occurred right before the treaty was ratified by Slovenia, it faced a similar jurisdictional hurdle.⁶² But in this case, the ECtHR concluded that while it could not rule on the deprivation of life caused by the malpractice itself, it could analyse if the state complied with the separate ‘procedural obligation to carry out an effective investigation’ in relation to the malpractice *after* the entry of force of the treaty.⁶³ As long there was a ‘genuine connection’ between the past violence and the present lack of investigation, there was room for a future ruling.⁶⁴ But then the Court in *Šilih*, just like the International Court of Justice famously did in relation to *erga omnes* obligations in *Barcelona Traction* judgement of 1970, opened Pandora’s box by adding that it would not ‘exclude that in certain circumstances the connection could be based on the need to ensure that the guarantees and the underlying values of the Convention are protected’.⁶⁵ This ‘humanitarian clause’, as it has been called in the literature, could open to allow the Court to extend its temporal jurisdiction in *exceptional* circumstances (Schabas, 2015, p. 111).⁶⁶

For the two minority dissents issued at the two stages of the *Janowiec* case, the Katyn massacres called for the exceptional application of this ‘humanitarian clause’. As Spielmann, Villiger, and Nußberger argued in their dissent vis-à-vis the ECtHR’s fifth section, ‘the gravity and magnitude of the war crimes committed in 1940 in Katyn, Kharkov and Tver, coupled with the attitude of the Russian authorities after the entry into force of the Convention, warrant application of [the so-called humanitarian] clause’.⁶⁷ While it was clear that the Court did not have jurisdiction to rule on the

legal consequences of the massacres as such, the fact that they constituted a war crime ‘contrary to the underlying values of the Convention’ did allow the Court to establish its ‘temporal jurisdiction over the investigation into this act, especially [... as] a substantial part of the investigation was conducted in the post-ratification period’.⁶⁸

This line of argument, in turn, was continued by the dissenters of the final Grand Chamber ruling. Indeed, for them, one could hardly compare ‘a death resulting from medical malpractice [... to] the massacre of more than twenty-one thousand Polish prisoners of war’.⁶⁹ Indeed, what is a ‘humanitarian clause’ that would open the door to an expanded jurisdiction in cases of ‘gross human rights violations [... including] war crimes, genocide or crimes against humanity’ good for if not for exceptional cases like *Janowiec*?⁷⁰ The minority concluded that the ECtHR – when it shied away from applying the humanitarian exception in this case – had ultimately failed its responsibility to act as ‘Europe’s conscience’.⁷¹ In the pages of the *Polish Yearbook of International Law*, the decision was also criticised as deferring its jurisdiction to an imaginary ‘court of history’ (Kozheurov, 2013), and of missing ‘an historic opportunity to tidy up a piece of the continent’s sombre history’ (Schabas, 2013, p. 258). The historiographical framing that the minority would have taken was as follows: the crushing weight of history had demanded the Court to take the route of the exceptional humanitarian exception. The majority in the Court, instead, politely declined.

Across the Atlantic, in those same years, the IACtHR was coming to terms with a massacre in its own neighbourhood. *El Mozote* (and a surrounding series of villages) were virtually eliminated by agents of the Salvadorian Army in the context of the country’s civil war during the eighties.⁷² With this in mind, the IACtHR deployed what was by then a consolidated line of jurisprudence on transitional justice and the illegality of blanket amnesty laws.⁷³ Garcia-Sayán, in his concurring opinion, argued that the Court had not paid enough attention to a particular – and perhaps exceptional – aspect of the facts of *El Mozote*. While that line of jurisprudence had been largely created to deal with cases of transition from dictatorship to democracy, the Salvadorian case had a new complexity: it was a case of civil war.⁷⁴ Unlike the previous approach in *Gomes Lund*, Garcia-Sayán urged the court to recognise this case as one that occurred in times of war – and, accordingly, one that required a full consideration of international humanitarian law. On this basis, Garcia-Sayán famously went on to argue that the laws of war might allow certain partial amnesties, relaxing the standard for transitional justice in cases of civil war in comparison to a stricter standard in cases of transition from dictatorship. The elephant in the room was that, factually, it is hard to trace a very clear line between dictatorial violence and civil war in Cold War Latin America – it is ultimately a question of framing.⁷⁵

Be that as it may, Garcia-Sayán’s framing in relation the exceptional nature of ‘civil wars’ (and the need for the jurisprudence to do things differently than in previous cases) went on to have a long and influential career – especially in relation to my own polity of birth, Colombia. In fact, it even made it all the way to become footnote 7 of the 2016 Peace Agreements subscribed between the *FARC-EP* guerrilla group and the government.⁷⁶ What was in 2012 a relatively modest historiographical move became a central legal justification for the Colombian transitional justice model, in which the need of some degree of partial amnesty (balanced by a mechanism of punishment for

the gravest of all crimes) in line with international humanitarian law's loosening of a tighter human rights standard.⁷⁷

My aim in highlighting these historiographical moves is not to criticise them. I do not see my role as a scholar to be that of playing the 'air guitar' as a pale mimesis of the office of the judge (Schlag, 2009). Nor do I – personally and intellectually – necessarily disagree with some of the difficult choices made in the pairs of cases reviewed so far. Rather, my aim has been to render explicit the chain of historiographical choices that have informed the decisions and interpretation taken by these two human rights tribunals – with *both* legal *and* historical consequences. Legal materials matter in these processes of judicial reasoning (Kennedy, 1986), but so do the historiographical frames that contain the legal narrative itself. Either trained or peripatetically – and, hopefully, not just pathetically – judicial operators have to embrace the task of the historiographer: of making choices in relation to questions of periodisation; the hierarchy of sources; or the (in)comparability of contexts. To this last thorny issue, we turn now.

4. Concluding remarks: never again?

The task of comparing atrocities is a rather atrocious one. When human rights activists in the latter decades of previous century coined the dictum *Nunca Más* ('never again'), they did so with the hopes that the tragedies of this 'age of extremes' would only remain strictly confined to the history books (Hobsbawm, 1994). Alas, even if the past is a foreign country, we still share with it a rather extensive, and porous, land border. We still live in a time of ineffable atrocities – and the road ahead does not seem much brighter than the path we have just left behind. In fact, recent public discourse on the two shores of the Atlantic – which has been not only the general theatre of comparison in this article but in many ways that of my own way of understanding the world⁷⁸ – has been marked by acerbic debates about the ethical and intellectual dangers of comparative thinking in relation to these atrocities: past, present, and future (Moyn, 2020). As I lay writing, my former institutions (and perhaps more broadly, the polity in which they are situated) have been wrecked by questions in relation to the comparability of the *Shoah* and 'Axis Rule in Occupied Europe' *vis-à-vis* contemporary violence in certain occupied territories in Western Asia.⁷⁹ At the same time, across the ocean (and sadly, all around the world), there is a growing debate on how to make sense of the return of authoritarianism and extra-parliamentary politics.⁸⁰ These conversations place us in the morally awkward position of making choices about how to compare the world we inherited *vis-à-vis* that one we had in principle prescribed to the realm of *Nunca Más*.

I have faced this task as a scholar writing this article, as I sat down to think if cases of enforced disappearance, torture, and massacre were truly 'comparable' across European and American human rights jurisprudence. We will face, moreover, this task as citizens or residents – especially those of us living in polities that claim to be enacting the mandate of *Nunca Más* or implementing the 'judgment of history' when they implement 'organized, social practices of violence' in the name of (international) law (Cover, 1986, p. 1601). Above all, judges – who as Cover reminds us, can cause 'pain and death' just by articulating an 'understanding of a text' – will have to embrace this difficult duty (Cover, 1986, p. 1601). And this will require us (I use 'we' here to refer to legal scholars) to think

carefully and deeply about the historiographical choices we make in legal argumentation. Ideally, as I've argued so far, the best way to defend such choices is by making them explicit: to embrace that the way we think about history is not neutral, but it's underpinned by historiographical frames. I suspect this might prove ultimately challenging for a field that owes much of its power to implicit 'strategic assumptions' (Diggelmann & Altwicker, 2014, p. 432), but I hope that making visible the frames that shape our view we might allow us to imagine a different 'order of things' (Foucault, 1994). We, both lawyers and the Courts we study, will continue to make arguments related to factual context, legal change, and exceptional (dis)continuity. Let's embrace, then, the 'moment of vertigo – and of freedom, professional freedom' of our historiographical choices (Kennedy, 2006, p. 645). If we stop pretending that the frames we use are the natural frameworks to understand a given controversy, will hopefully be better equipped to respond to the challenges of our increasingly polarised times.

I, for one, remain committed to the possibility of comparing the Americas and Europe – especially the regions south of the *Río Bravo*, on the one hand, and the nebulous space ambiguously known as Eastern and Central Europe, on the other. Both are regions scarred by tragedies, as we have shared the exceptionally brutal experience of serving as 'laboratories' for local atrocities, that later became global.⁸¹ Tragedy might not be the best of teachers. But it seems to me we have much to gain by learning together. The *Irish case* bears witness to that (Regan, 2006).

Notes

1. Inter-American Court of Human Rights (IACtHR), *Caso Rodríguez Vera y Otros (Desapariciones del Palacio de Justicia) vs. Colombia*, 14 November 2014, para. 80. Author's own translation. Thereafter, any material in Castilian or French will be translated in the same way. I use 'Castilian', as opposed to more familiar but less precise 'Spanish', hoping to provincialize it. See further Quiroga-Villamarín (2024).
2. European Court of Human Rights (ECtHR), *Case of Perinçek v. Switzerland (Grand Chamber)*, 15 October 2015. At 8.
3. See further Scott (2020). See also Quiroga-Villamarín (2023a).
4. See, for example, Time Staff (2017).
5. I take the notion of the 'juridification' of international politics from Simpson (2007, p. 132).
6. Following Orozco, I use 'vertical' to refer to patterns of asymmetrical violence that an authority (usually the state or an imperial power) inflicts on its citizens or subjects, in contrast to the 'horizontal' violence of civil war (see Abad, 2005). Another way of understanding this would be through the lenses of authoritarianism. In contexts like this, typically characterized by an outgrowth of the executive power into the other branches of the state and a questionable degree of independence for the judiciary, little can be expected of the victor's justice.
7. And in our times, just as in Benjamin's, 'this enemy has not ceased to be victorious' (see Benjamin, 2019a, p. 255). In the original German, 'Nur dem Geschichtsschreiber wohnt die Gabe bei, im Vergangenen den Funken der Hoffnung anzufachen, der davon durchdrungen ist: auch die Toten werden vor dem Feind, wenn er siegt, nicht sicher sein. Und dieser Feind hat zu siegen nicht aufgehört' (see Benjamin, 2019b, p. 695).
8. European Court of Human Rights, *Case of Perinçek v. Switzerland (Grand Chamber)*, 15 October 2015. At 8.
9. Quiroga-Villamarín (2023b).
10. In this same vein, see Judt and Snyder (2013, p. 259). Of course, the persistence of Orthodox holdouts proves, rather than dispels, this point. Compare with Evans (2004).

11. Interestingly enough, a sentiment shared by some international lawyers (see Simpson, 2021, p. 4).
12. This last reference is, of course, to Hobsbawm (1994).
13. See, for example, a similar argument in relation to comparative constitutional adjudication (Biagi et al., 2023).
14. Quiroga-Villamarín (2021, 2023c); Quiroga-Villamarín, ‘Bridging the Houses of Clio and Themis.’
15. I often wonder if anything worth the candle in these debates has been published after Benton (2019).
16. With apologies to Nietzsche (2010).
17. See, for instance, Kurban (2020); Quiroga-Villamarín (2022).
18. Of course, this was preceded by his also highly influential essay (White, 1966). This was followed, some years later, by his collection of *The Content of the Form: Narrative Discourse and Historical Representation* of 1987 – ‘a decade of reflection since [the publication of] *Metahistory*’ (see White, 1987, p. 144; see further Vann, 1998, p. 144).
19. White has his own series of reflections on what constitutes ‘the historical event’, but I will bracket this conversation here for the sake of brevity. See instead White (2008). See also Johns (2011).
20. This is just a cursory example, but I’ve heard many variations of a similar argument in history conferences over the last couple of years.
21. See also Quiroga-Villamarín (2025, forthcoming).
22. Of course, the closer a court gets to this traditional ‘historical’ function is the analysis of the *travaux préparatoires* of the instrument it is interpreting. Historians (and some lawyers too), however, have long noted the deficiencies of this sort of ‘Law Office History’ – in which the primary source is usually analysed superficially, cherry-picking particular historical debris in view of the needs of the judgment at hand (see Klabbers, 2003; Bederman, 2007). See also Çalı and Hatas (2021).
23. While Marks’ goal here is to counterpose her concept of “planned misery” to the mainstream of language of “root causes,” I just wanted to note this discourse precisely pivots around the difficulty of linking concrete human rights violations with the wider structural contexts which produce them.
24. See, respectively, Zarbiyev (2015) and Abi-Saab et al. (eds.) (2021). See also Letsas (2013).
25. This would be, after all, the orthodox approach under the Vienna Convention of 1969. See further Bianchi and Zarbiyev (2024, pp. 85–100).
26. With apologies to Norman Whitfeld.
27. See, respectively, ECtHR, *Case of Ireland v The United Kingdom* (Court (Plenary)), 18 January 1978; IACtHR, *Caso Gomes Lund y Otros (‘Guerrilha Do Araguaia’) vs. Brasil*, 24 November 2010.
28. The decade of breakthrough of human rights, after all (see Moyn, 2014).
29. ECtHR, *Ireland v The United Kingdom*, para. 11.
30. This would also be taken up by the Court in para 12.
31. ECtHR, *Ireland v The United Kingdom*, para. 11.
32. ECtHR, *Ireland v The United Kingdom*, paras. 13–19.
33. Paras. 20–28.
34. Paras. 29–33.
35. The applicant state, in fact, did request a revision of the judgement in 2014 as it considered that new historical evidence could alter the Court’s decision. It was ultimately unsuccessful. See European Court of Human Rights, *Case of Ireland v The United Kingdom*, Judgment (Revision), (Third Section), 20 March 2018. This case revolved around whether a particular factual testimony could have ‘misled’ the system’s interpretation of the rights at hand.
36. These are all crucial dates for the history of the Irish polity – from the first Anglo-Norman intervention to the Plantation of Ulster, the Easter Rising, and the establishment of the Free State.

37. ECtHR, *Ireland v The United Kingdom* (1978), para. 28.
38. ECtHR, *Ireland v The United Kingdom* (1978), 39.
39. I use ‘resolution’ here rather tentatively. In any case, see Dixon (2002).
40. Ultimately, the Court took a ‘domestic’ approach to authoritarian and political repression, while perhaps a broader story of transnational training in torture for the suppression of insurgency across the North Atlantic could have been relevant.
41. IACtHR, *Caso Gomes Lund y Otros*, para. 85.
42. IACtHR, *Caso Gomes Lund y Otros*, para. 86. And here the parallel with the UK is particularly striking. Thereafter, I have used the Court’s own translation of the judgment in English in my citations.
43. IACtHR, *Caso Gomes Lund y Otros*, para. 88. It is important to note that this was the Maoist Party (PCdoB), not the Moscow-line Party (PCB).
44. IACtHR, *Caso Gomes Lund y Otros*, paras. 89–90.
45. IACtHR, *Caso Gomes Lund y Otros*, paras. 101–125.
46. ECtHR, *Ireland v The United Kingdom* (1978), para. 214.
47. IACtHR, *Caso Gomes Lund y Otros*, para. 85. para 123. In the original Portuguese, *terror de Estado*. I think ‘state terrorism’ would have been a better translation here. On the history of this episode, see further de la Torre (2017).
48. See also the contributions by Başak Çalı and Corina Heri, in this special issue in this regard.
49. See also the contribution by Esra Demir-Gürsel, in this special issue.
50. ECtHR, *Case of Selmonui v. France*, 28 July 1999; IACtHR, *Caso Cantoral Benavides vs. Perú* (Fondo), 18 August 2000.
51. ECtHR, *Ireland v The United Kingdom* (1978), para. 167.
52. ECtHR, *Case of Selmonui v. France*, para. 101. See further Letsas (2013).
53. ECtHR, *Case of Selmonui v. France*, para. 101.
54. See generally Theilen (2021).
55. IACtHR, *Caso Cantoral Benavides vs. Perú*, para. 99.
56. IACtHR, *Caso Cantoral Benavides vs. Perú*, para 103. I am citing here the official English translation.
57. On ‘crystallization’ as a metaphor, see Quiroga-Villamarín (2023d).
58. See, respectively, ECtHR, *Case of Janowiec and Others v. Russia*, Fifth Chamber, 16 April 2012, ‘Joint Partly Dissenting Opinion of Judges Spielmann, Villiger, and Nußberger’; ECtHR, *Case of Janowiec and Others v. Russia*, Grand Chamber, 21 October 2013, ‘Joint Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Lafranque, and Keller’; IACtHR, *Caso Masacres de el Mozote y Lugares Aledaños vs. El Salvador* (Fondo, Reparaciones y Costas), 25 October 2012, ‘Voto Concurrente del Juez Diego Garcia-Sayán.
59. ECtHR, *Case of Janowiec and Others v. Russia*, Fifth Chamber, 16 April 2012, paras. 10–16.
60. ECtHR, *Case of Janowiec and Others v. Russia*, Fifth Chamber, 16 April 2012, para. 20–21.
61. ECtHR, *Case of Šilih v. Slovenia*, Grand Chamber, 9 April 2009.
62. ECtHR, *Case of Šilih v. Slovenia*, Grand Chamber, 9 April 2009, paras. 10–18.
63. ECtHR, *Case of Šilih v. Slovenia*, Grand Chamber, 9 April 2009, para. 159.
64. ECtHR, *Case of Šilih v. Slovenia*, Grand Chamber, 9 April 2009, para. 163.
65. ECtHR, *Case of Šilih v. Slovenia*, Grand Chamber, 9 April 2009, para 163. See also International Court of Justice, *Case Concerning the Barcelona Traction (Belgium v. Spain)*, New Application (Second Phase), 5 February of 1970.
66. The clause is called ‘humanitarian’ insofar as it addresses war crimes and other grave violations.
67. ECtHR, *Case of Janowiec and Others v. Russia*, Fifth Chamber, ‘Joint Partly Dissenting Opinion of Judges Spielmann, Villiger, and Nußberger’, para. 4. Underline in the original.
68. ECtHR, *Case of Janowiec and Others v. Russia*, Fifth Chamber, para. 7.
69. ECtHR, *Case of Janowiec and Others v. Russia*, Grand Chamber, ‘Joint Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Lafranque, and Keller’, para. 4.
70. ECtHR, *Case of Janowiec and Others v. Russia*, Grand Chamber, p. 31.

71. ECtHR, *Case of Janowiec and Others v. Russia*, Grand Chamber, pp. 34–35.
72. IACtHR, *Caso Masacres de el Mozote y Lugares Aledaños vs. El Salvador*, paras. 62–126. In many ways, the facts of this case are quite similar to those of *Gomes Lund*. I am including it here because no considerations of transitional justice were raised in 2010 but they were central by 2012. This a telling example of the emergence of these sorts of considerations in the region.
73. Which I have reviewed, in Castilian, elsewhere. See Quiroga-Villamarín, ‘Historia Conceptual de La Justicia Transicional: Contextualizando El Caso Colombiano.’ In English, see Freeman (2011).
74. IACtHR, *Caso Masacres de el Mozote y Lugares Aledaños vs. El Salvador*, ‘Voto Concurrente del Juez Diego Garcia-Sayán’, para. 10.
75. Garcia-Sayán’s own polity of Peru, against which the first landmark amnesty case was directed, is a telling example. See IACtHR, *Caso Barrios Altos vs. Perú* (fondo), 14 March 2021.
76. *Acuerdo Final para la Terminación del Conflicto & la Construcción de una Paz Estable y Duradera* (acuerdo final, versión 24.11.2016), 143. Available online in <https://www.jep.gov.co/Documents/Acuerdo%20Final/Acuerdo%20Final.pdf> Garcia-Sayán was, rightly, so proud of this that he included it in his official CV when he applied for UN positions. See https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.ohchr.org/sites/default/files/Documents/HRBodies/SP/CallApplications/IndJudges/GARCIA_SAYAN.doc&ved=2ahUKewji-5qfxoKGAxUQ0gIHHZL4DesQFnoECBUQAQ&usg=AOvVaw1CfQAhR9tEjL3g_ITpBvRa
77. For an overview, see Ramírez-Gutiérrez and Quiroga-Villamarín (2022).
78. Indeed, one of the effects of Reading Specter’s comparison of imperial thought between the US and Germany has been a sober reminder of the rather Atlantic scope of my own path (this is reinforced, not countered, by certain antipodal sojourns). See Specter (2022), *The Atlantic Realists*; Paul and Gilroy (1995), *The Black Atlantic: Modernity and Double Consciousness* (Cambridge: Harvard University Press, 1995).
79. Indeed, much could be written about the experience of writing and revising this piece during the difficult period that has followed 7 October 2023, as a non-European scholar affiliated with different institutions in the German Federal Republic. I presented a first draft at the Hertie School while being affiliated with FU Berlin and for our second workshop, I was based instead at the Max Planck Institute for Social Anthropology. Finally, the final submission, revision, and acceptance of the piece occurred while I was visiting the Max Planck Institute for Comparative Public Law and International Law. In different ways, the politics of comparison were a central concern animating the many conversations that shaped this manuscript, and me, in Berlin, Halle (Saale), and Heidelberg over these difficult months. With further apologies to Lemkin (2008).
80. Quiroga-Villamarín (2020).
81. On Latin America, see Grandin (2007) and Hobsbawm (2016). On Eastern and Central Europe, see Snyder (2011) and Kott (2024).

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