MAKING JUSTICE

Further Discussions on the Prosecution of Crimes against Humanity in Argentina

CENTER FOR LEGAL AND SOCIAL STUDIES
INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE

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CELS CENTRO DE ESTUDIOS LEGALES Y SOCIALES
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Introduction

This book represents one of the main activities conducted in the framework of the "Domestic Prosecution and Torture Prevention in Argentina" project, a joint effort between the Center of Legal and Social Studies (*Centro de Estudios Legales y Sociales*, CELS) and the International Center for Transitional Justice (ICTJ), with funding from the European Union.

The concern that gave rise to this project was the need to build mechanisms capable of disrupting the persistence of torture and abuse by Armed and Police Forces in Argentina, by channeling and making effective the fight against impunity for serious human rights violations committed during the military dictatorship. This impunity is understood as one of the main factors in the prevalence of torture, which characterized the period of State terrorism and persists to this day.

The peculiarities of the justice process in the country have provided the necessary input for outlining the main objectives sought through actions, designed for the purpose of strengthening the development of the process and prosecuting perpetrators. Therefore, the project includes, among other activities, technical assistance to members of the Public Ministry, as well as discussions and joint work with plaintiff attorneys from human rights organizations for implementing effective strategies for prosecuting torture.

Another specific project goal is to share the local experience at an international level, as current progress in the prosecution of torture in Argentina is not known in depth abroad and can be enriching for countries undergoing similar processes, most of which are in their initial phases.

To that end, this book provides a selection of texts on different relevant aspects of the process, with the intention that they may become reference material for scholars, researchers, and members of the legal community. It consists of seven papers on specific topics related to Argentina's experience, reflecting the political, legal, and social complexity of this historical process.

The first two chapters constitute a descriptive approach aimed at introducing the reader to the main historical and legal aspects of the process.

In the first text, "Criminal Prosecution in the Search for Justice," Leonardo Filippini reviews the historical route of the justice process in Argentina from a comparative perspective between criminal prosecution, crystallized in the trial of the first three military juntas in 1985-1986, and the processes that are taking place today. The main purpose of this paper is to highlight the milestones of each stage, while identifying and analyzing possible ruptures and continuities between them. From the analysis of the Argentine case, the author addresses criminal prosecution as a transitional measure.

In the second chapter, “Testimonies as Evidence in Criminal Prosecutions for Crimes against Humanity - Some thoughts on their importance in the Argentine justice process,” Carolina Varsky analyzes the joint effort between lawyers acting as private prosecutors on behalf of victims, their families, or organizations and witnesses, in the construction of the narrative of events. In first place, this paper highlights procedural challenges while evaluates the work of these lawyers guiding the construction of testimonies. Then it discusses the “hierarchy” of victims in criminal proceedings in relation to criminal responsibility and the tensions resulting from their political affiliation. The author also dedicates a brief section on the issues of cooperation from perpetrators with the investigation of crimes of State terrorism, from the paradigmatic case of Navy officer Adolfo Scilingo.

The following articles examine particular aspects of Argentina's experience, through an innovative socio-historical-legal approach toward issues related to legacies inherited by the democratic system from State terrorism, which constitute obstacles to the full exercise of the Rule of Law.

Therefore in the third chapter, “Restricting Access to Public Office for Perpetrators of Crimes against Humanity - The Argentine Experience,” Diego Morales analyzes vetting and lustration mechanisms for restricting access to public office for people who have been involved in serious human rights violations as a response to their persistent impunity in democratic regimes.

In the fourth chapter, “Forms and Meanings of the Repression between the Dictatorship and Democracy,” Pilar Calveiro describes the differences and continuity of “repression” at two very distinct political times in Argentina: State terrorism and 21st Century Democracy. To that effect, she analyzes the concrete mechanisms of repression during the last military dictatorship and highlights present forms of exercising repressive power and its imprisonment mechanisms.

Other aspects that this book attempts to conceptualize are considered controversial by some stakeholders in the justice process and the human rights movement in general, which is why our intention is to provide an original contribution to the discussion and open the debate on these issues. The fifth chapter, “International Crimes and Non-State Actors - The Argentine Case,” was written by Fabricio Guariglia, who ponders on the possibility of prosecuting non-state actors involved in this type of crime, addressing the precepts of international criminal law, its current status, its requirements, and the consequences of the emerging scenario in such cases.

In relation to some less explored aspects of the process, the sixth chapter, “Gender Violence and Sexual Abuse in Clandestine Detention Centers - A contribution to understanding the experience of Argentina, ” by Lorena Balardini, Ana Oberlin and Laura Sobredo, the authors undertake the analysis of sexual abuse and other gender violence perpetrated during the illegal repression from the particular perspective of human relationships that are characteristic of the coexistence between oppressors and victims in clandestine detention centers. The article proposes a psycho-socio-legal

approach to understanding this practice, while discussing the potential for and obstacles against prosecuting and analyzing certain cases.

Finally in, “Proof of Identity in the Criminal Prosecution for Abduction of Children and Identity Substitution,” Marcelo Ferrante tackles the illegal appropriation of children as part of the mechanisms of repression and social unrest of the time, and rekindles the discussion regarding evidence and conflicts of interest that arise in such cases, when crimes have two victims.

The underlying intention of this book is to move toward a theoretical ground that goes beyond the strictly legal approach to cases. It is thus intended as a compilation of researches that reflects the political complexity of this historical process, in order to contribute to the academic debate and general knowledge on the subject.

Preface

Our world today faces constant challenges inasmuch as the validity of human rights and fundamental freedoms. Some occur in the context of surmounting violent domestic and international armed conflicts. Others involve rebuilding or strengthening domestic institutions after the systematic commission of grave human rights violations. Revealing the truth about what really happened and prosecuting and punishing perpetrators of these crimes are always key challenges for pacifying society, reconstructing its social fabric, repairing the damage caused, preventing recurrence, and ensuring future democratic coexistence.

In fact, through its main universal and regional intergovernmental bodies and judicial and quasi-judicial bodies, the International Community has established that there is no amnesty for these crimes and that States have an obligation to prosecute perpetrators of serious human rights violations. The entry into force of the Rome Statute and creation of the International Criminal Court are clear manifestations that the prosecution of perpetrators of human rights violations not only rests with the States directly affected by their actions, but the international community as a whole.

In this context, there is great interest in the lessons learned and challenges derived from the Argentine case whose evolution has been steady for nearly three decades and consistent with the development of international standards on truth, justice, reparation, and memory. In addition, in recent years, Argentina has become a key player in the adoption of instruments such as the International Convention for the Protection of All Persons from Enforced Disappearances, the resolutions of the United Nations Human Rights Council on Genetics and Human Rights and the Truth, and the creation of the mandate of Special Rapporteur on the Promotion of Truth, Justice, Reparation, and Guarantees of Non-Recurrence. These foreign policy goals and the State resolutions that have accompany them have originated in the recent history of Argentina.

Between 1976 and 1983, on the basis of national security reasons, the Armed Forces took power in Argentina and adopted a series of measures designed to eliminate the democratic institutions established in the Constitution and institute systematic repression. These mechanisms involved the indefinite suspension of fundamental rights and basic judicial guarantees together with the construction of a powerful clandestine apparatus through which serious human rights violations were perpetrated against thousands of people, including torture and forced disappearance. Using the same apparatus human remains, newborn children, and all kinds of evidence were concealed.

After the return to democracy, and in its search for means of coexistence and institutional rehabilitation, Argentina embarked on a path that simultaneously pushed it closer to and further away from truth and justice. The report by CONADEP and Juntas

Trial are milestones in the collective understanding of the dimension and impact of State terrorism, but the subsequent passing of laws and decrees of impunity prevented the judicial investigation of crimes. Even so, many events kept society's willingness to reach truth and justice alive: the confession of Navy Captain Adolfo Scilingo; the Truth Trials (*Juicios por la Verdad*) initiated by the Federal Appeals Court of the Federal Capital; the prosecutions held in Spain, France, Italy, Germany, and the United States against Argentine military; the arrests of Jorge Rafael Videla and Emilio Massera in Argentina for kidnapping; the repeal of the Full Stop (*Punto Final*) and Due Obedience (*Obediencia Debida*) laws in 1998 and, particularly, the decision by a Federal Court to render said laws unconstitutional in March 2001.

After taking office, President Nestor Kirchner gave a decisive impetus to this process by condemning impunity, repealing the mechanisms that prevented the extradition of the accused, and, in September 2003, promoting the bill that decreed the parliamentary annulment of impunity laws. Finally, in this context, the Supreme Court's decision on the invalidity of impunity laws in the *Simón* case, marked the resumption of judicial actions aimed at prosecuting those responsible for committing crimes during the dictatorship and restored the path that led to the investigation of the multiple human rights violations committed in those years.

Since then, hundreds of defendants, victims, and witnesses have appeared before the courts in many trials taking place across the country. It is noteworthy that given the specific characteristics of these judicial actions, the complexity in the production of evidence, the number of witnesses and victims, and the historical and reparation value of its public hearings, not only for direct victims but for society a whole, its programming and development has required unprecedented coordination between State powers, particularly represented by the Ministry of Justice and Human Rights, Public Ministry, and the Supreme Court. In addition, the realization of the goal of imparting justice for serious past crimes in Argentina, as part of a State policy, has been decidedly accompanied by civil society organizations who have also contributed to the consideration of the most suited means for achieving this goal.

This publication is another valuable contribution of the Center of Legal and Social Studies (*Centro de Estudios Legales y Sociales,* CELS) to the defense and promotion of human rights and strengthening of democracy. CELS has and continues to play a key role in promoting key court cases, accessing victims and witnesses, obtaining justice and reparation, disseminating information on objectives and results achieved in judicial actions, and, of course, driving justice initiatives in legislative and policy areas, with an at the same time strategic and critical view.

This work, compiled in collaboration with the International Center for Transitional Justice (ICTJ), is an important tool for reflecting on the historical processes associated with the repression and its far-reaching effects on our society. It analyzes their impact on the actual enjoyment of fundamental rights, including the right to personal integrity, and the construction of mechanisms for overcoming illegal practices that persist today in our institutional fabric.
The recognition of democracy, justice, and freedom as fundamental values is the basis on which to settle our future as a Nation and must be accompanied by a deep

understanding of the rules of democratic life, the observance of fundamental human rights, and the mechanisms that must be devised and implemented to ensure that observance. Our recent history and judicial actions for the determination of liability for participation in the crimes committed during the dictatorship, offer elements for regaining perspective over our institutions and the challenges ahead in strengthening democracy and individual rights.

Jorge E. Taiana

1. Criminal Prosecution in the Search for Justice

Leonardo Filippini

Introduction

Criminal justice is one of the most delicate tools in transitions. This is due, in part, to the fact that its use replicates problems that are characteristic of criminal punishment, such as selectivity or roughness and, also in part, to the fact that its use is associated with new risks of its own, such as the potential to destabilize an emerging democracy, as no other institution can.[1] However, when we assume (as many communities currently do) that, under certain circumstances, resorting to criminal justice is a justified course of action, questions regarding whether or why certain behaviors must be condemned prove impractical and attention is focused on questions of how and when to do it, which are equally complex and challenging.

Argentina has had a relatively consolidated transitional experience in terms of the application of criminal law. For nearly three decades, despite significant interruptions, Argentina has managed to consolidate a favorable opinion toward the criminal prosecution of crimes against humanity. This has generated numerous concrete experiences in implementing the criminal investigation and sanction of these crimes and the observation of these developments raise an undeniable interest in reflecting upon the universal problems that repeatedly arise before conflict scenarios already surmounted or thought to be surmountable. On a regional level alone, this experience has effectively been observed in Brazil, Colombia, Peru, Uruguay, and Chile.

In this paper, we will focus on some of the questions that the Argentine experience may have inspired. We will first make a very brief summary of main events throughout the transition and provide a potential characterization of the Argentine process. As we will see, the criminal justice option was chosen amid broad social claims, which were sustained by resisting to a peculiar form of overcoming the past that was marked by impunity. Argentina, therefore, had two phases of criminal prosecution. The first, which was a period of nearly five years, began once the last dictatorship had been abolished, after December of 1983. During this phase, criminal prosecutions focused on higher commanders and had significant symbolic impact. However, these prosecutions were not sustainable and their criminal consequences were quickly overturned by the impunity laws of 1986 and 1987. The second phase of prosecutions, which is the currently ongoing phase, resulted from the resistance against impunity and consolidated when the Full Stop Law (*Ley de Punto Final*) and Due Obedience Law (*Ley de Obediencia Debida*) were declared null, between 2001 and 2005. Since then,

[1] H. Kim and K. Sikkink question the existence of scientific evidence of the destabilizing nature of criminal prosecutions, in "Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries," International Studies Quarterly 54, 2010, pg. 939-963.

the criminal prosecution of State terrorism seems to have become a consolidated and irreversible state practice.[2]

The existence of these two phases of criminal prosecution draws attention to the difficulties in chronologically delimiting the transition and the consequences of a conflictive past. It also highlights the difficulties in conceiving instantly-created solutions to serious issues. Today's justice, whether late or delayed, not only involves a decision in terms of State terrorism (that is facilitated by the time that has elapsed since the events took place), but also in terms of the solutions adopted to overcome the past. The same can be said about Chile, Colombia, Uruguay, or Brazil where debates are still ongoing, after decades, as to the quality and validity of the effects of the initial mechanisms used in overcoming the past. Argentina is currently reviewing its violent past through the prism of criminal justice. To that effect, its first step was to review the decisions adopted immediately after the conflict was overcome. This paper reflects on these two related phenomena: on the one hand, reviewing impunity and on the other, the effects seen in time over current criminal justice when facing events that occurred three decades before.

Thirty Years in Search of Justice[3]

A PAST OF REPRESSION

During the nineteen seventies, with the endorsement of the political power, massive human rights violations were committed against the civilian population, including enforced disappearances, arbitrary detentions, executions, enforced exile, torture, rape and sexual abuse, theft, and looting, attacks against civil, political and union-related liberties, censorship, all forms of persecutions and even abducting children born to mothers who were in captivity. State terrorism had reached its peak by March 24, 1976, when a coup d'état forced María Estela Martínez de Perón, the widow of Juan Domingo Perón, out of office and placed the high commanders of the three military forces in power. The four military *juntas* that governed the country for the subsequent seven years left a distinctive legacy of systematic enforced disappearances. It is estimated that thirty thousand people were kidnapped and sent to hundreds of clandestine detention centers, where they were interrogated under torture, raped, or murdered. In 1983, when the reinstitution of democracy was imminent as a result, among other factors, of the military loss in the Malvinas Islands War (a.k.a. Falkland

[2] So said the Argentine Congress. Statement of the Honorable House of Representatives, 57-P-2010.

[3] In general, among many others, see H. Verbitsky, "Entre olvido y memoria," in G. Andreozzi (Ed.), *Juicios por crímenes de lesa humanidad en Argentina*, Atuel, Buenos Aires, 2011; M. Novaro and V. Palermo, *Historia argentina. La dictadura militar 1976/1983. Del golpe de Estado a la restauración democrática*, Paidós, Buenos Aires, 2003; R. Alfonsín, *Memoria política. Transición a la democracia y derechos humanos*, FCE, Buenos Aires, 2004; G. Fernández Meijide, *La historia íntima de los derechos humanos en la Argentina*, Sudamericana, Buenos Aires, 2009; D. Weissbrodt and M. L. Bartolomei, "The Effectiveness of International Human Rights Pressures: The Case of Argentina 1976-1983,'" *Minnesota Law Review* 75, 1991; E. Lutz y K. Sikkink, "The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America." *Chicago Journal of International Law* 2, 2001, pg. 1-34.

Islands War), the military government sanctioned a decree granting itself amnesty and ordering the destruction of all evidence of the repression.

THE REINSTITUTION OF DEMOCRACY AND THE FIRST TRIALS

Raúl Alfonsín was the first democratically elected president after the end of the military rule. He took office with a debilitated democratic infrastructure and a strong military party that actively resisted accounting for its past actions. Alfonsín created the National Committee on the Disappearance of Persons (*Comisión Nacional sobre Desaparición de Personas*, CONADEP) for the purpose of investigating the fate of disappeared persons; in 1984, these public organizations published the Never Again (*Nunca más*) report, with a list of identified victims and detention centers that had been active under the authority of the armed and police forces and the complicity of many civilians.

CONADEP analyzed thousands of cases and each one was recorded in a numbered database. Over fifty thousand pages were compiled, including seven thousand three hundred and eighty (7,380) files, with testimonies from family members, people who had been released from detention centers, and members of the police forces that had participated in the repression. In addition, thanks to investigations in different parts of the country, the report included information about the Armed Forces, Police Forces, and other private and public organizations. The official report, released in Spanish in 1984, represents merely a fraction of the work that was actually carried out. Amid thousands of testimonies and horrendous events, the Committee made a series of recommendations for initiating legal actions against those responsible for these crimes, while presenting evidence before the courts and offering a partial list with the names of both disappeared persons as well as members of the Armed and Police Forces mentioned by the victims. To date, those files continue to represent a key piece in ongoing prosecutions.

In 1985, all nine members of the first three military *juntas* that governed the country were successfully prosecuted in the Trial against Commanding Officers (*Juicio a los Comandantes*). The trials began merely eighteen months after the dictatorship had ended and concluded with the conviction of former Presidents Jorge Rafael Videla and Roberto Eduardo Viola, Admirals Emilio Eduardo Massera and Armando Lambruschini, and Brigadier General Orlando Ramón Agosti. Over 800 witnesses testified and 700 cases were analyzed based on CONADEP files. The conviction of some of those bearing most responsibility for human rights violations during the democratic government was unprecedented and marked a turning point in world-wide efforts toward transitional justice. Both the trials and the Never Again report helped consolidate the rule of law in Argentina and, at the same time, gave weight and credibility to the claims of victims and their families for investigating other crimes.

IMPUNITY

Despite judicial progress, criminal prosecutions also crystallized claims against the judicial review of the past. There were anti-democratic uprisings specifically aimed at

resisting orders to appear before the courts. As a result of these pressures, the Full Stop (*Punto Final*) and Due Obedience (*Obediencia Debida*) laws were passed in 1986 and 1987. These laws represented a compromise before the threat of instability potentially resulting from the impunity that was being demanded. The Full Stop Law established a peremptory term after which it would not be possible to file criminal complaints for human rights violations, and the Due Obedience Law established an irrefutable legal presumption that lower ranking officers were not punishable because they were following orders. In actuality, these laws were a generalized amnesty and led to the closing of most of the hundreds of investigations that were already in place at the time. Between 1989 and 1990, the military commanders that had been convicted in 1985 and the few individuals that were still under investigation for events that were not contemplated under the impunity laws were pardoned by Carlos Menem, Alfonsín's successor, on the foundation of an alleged need to pacify the nation.

THE FIGHT AGAINST IMPUNITY

Despite these setbacks, the human rights movement continued to demand justice in both domestic and international forums. In 1992, Report 28/92 of the Inter-American Human Rights Commission (IAHRC) found that impunity laws and presidential pardons violated the American Convention on Human Rights. In 1996, victim family members filed several cases before Spanish courts and obtained detention orders and extradition requests. On a local level, federal courts in Argentina authorized, at the request of victim family members, the so called "Truth Trials" (*Juicios por la Verdad*), i.e., judicial proceedings aimed at obtaining or gathering information about the fate of victims, before criminal courts that lacked the authority to apply sanctions. These trials were challenged by those who demanded ordinary criminal justice as well as by those involved who believed impunity laws also prohibited these types of investigations. The "Truth Trials" contributed to revealing the facts and allotting accountability; in addition, they set the foundation for future developments and ultimately served as a compromise between the commitment to finding the truth and the context of impunity.[4]

Meanwhile, thousands of claims were filed demanding reparations. In the nineteen nineties, in accordance with the stipulations of ICHR 1/93, Congress established a legal administrative compensation system.[5] Although this policy was questioned by those who saw it as a way of concealing impunity, it helped consolidate the idea of State accountability. Efforts were made for finding the truth before courts and before the government, particularly in terms of identifying children who had been born to captive mothers. In 1998, a key loophole in impunity laws began to be explored: The abduction of children born to captive mothers was not contemplated in the amnesty

[4] See H. Cattani, "La llamada 'búsqueda de la verdad' por los tribunales federales de la Ciudad Autónoma de Buenos Aires," *Revista de Derecho Penal y Procesal Penal* 8*,* LexisNexis, Buenos Aires, 2007, pg. 1461-1470, and E. Mignone, "Editorial: El derecho a la verdad," *CELS Newsletter*, year 10, issue 42, July-August of 1998.

[5] M. J. Guembe, "Economic Reparations for Grave Human Rights Violations: The Argentinean experience," in P. De Greiff (Ed.), *The Handbook of Reparations*, Oxford, Oxford University Press, 2006.

laws and that made it possible to prosecute, in the context of a changing political framework, high ranking criminals, such as former president Videla.

REOPENING THE TRIALS

In March 2001, the "Simón" case was brought forth by the Center for Legal and Social Studies (*Centro de Estudios Legales y Sociales*, CELS) and for the first time a federal judge declared the Full Stop and Due Obedience Laws void on the basis of their incompatibility with the international obligations assumed by the State. The ruling was upheld by the Buenos Aires Federal Appeals Court. In August of 2003, during the administration of Néstor Kirchner, Congress passed Law 25,779, which repealed the aforementioned law. Days later, the Federal Appeals Court requested the files of cases that had been closed during the nineteen eighties by their respective judges to evaluate the possibility of their reopening, thus supporting the criteria of Congress.

In July of 2005, the Supreme Court confirmed the decision in the "Simón" case and, at the same time, validated Law 25,779. This ruling closed the door for judicial challenges against the reopening of the judicial process that had been brought forth in 2001. In September 2006, a court also found pardons for military junta members who had been convicted in 1985 to be unconstitutional; and in 2007, the Supreme Court backed this decision. Since then, all three branches of government have strongly supported criminal prosecutions. Today, over one million people have been accused before federal courts, and hundreds have been convicted.[6]

The criminal prosecution process seems to have been consolidated. Even though we often speak of reopening cases; current trials (as opposed to the trials held in the nineteen eighties) include not only higher commanders, but all material authors of these crimes. The main focus is still on military and police personnel, but many civilians who participated in several ways are being investigated, including priests, judges, and former cabinet members. Today, criminal prosecution helps consolidate, and share, the idea that there were actions of State terrorism that were supported and carried out beyond the military framework while shedding light on an aspect of the issue that had not been adequately acknowledged by criminal justice in the nineteen eighties.

Despite all this, current criminal prosecutions have their roots in the framework that was established in the nineteen eighties and this is confirmed without doubt in the conclusions regarding State terrorism reached in the ruling against higher commanders. Many ongoing cases had been investigated and closed in accordance with amnesty laws and were then reopened. Perhaps fewer cases are new, and were filed or activated on the basis of evidence gathered during the decades after cases were closed, or as a result of the drive of the second phase.

[6] Additional information regarding the status of criminal prosecutions can be found in the official site of the Fiscal Unit for Coordination and Monitoring (*Unidad Fiscal de Coordinación y Seguimiento*) of Cases of Human Rights Violations that occurred in the framework of State terrorism: <http://www.mpf.gov.ar/index.asp?page=Accesos/DDHH/ufi_ddhh1.asp>, and on the official site of CELS <http://www.cels.org.ar/wpblogs/>.

It is in this new scenario that, without renouncing to the prosecution of all crimes that were committed, an attempt is being made to achieve the most “significant trials” in the least possible period of time.[7] To that effect, efforts are being made to gather all the events that took place within the framework of this repressive system in a single procedure and for there to be, at least, one major active case in each jurisdiction in the country.

Criminal Prosecution in the Search for Justice

The Argentine case suggests, firstly, that criminal prosecution is an expression of the key aspiration of achieving justice for a violent past. As we have stated, shortly after reinstating democracy in 1983, and once initial attempts were made to investigate the past, impunity became a hallmark of the Argentina transition, resulting from pressure and military uprisings against ongoing criminal prosecutions. Impunity laws and presidential pardons issued by Carlos Menem ultimately shielded those responsible for human rights violations and destroyed all hopes for justice.

As a result, the reopening of cases must be viewed as a decision that was adopted within a realm that was already limited by the impunity that precipitated from antidemocratic pressures. The decision to reopen prosecutions does not only constitute a reaction designed to address the crimes of the past, but it mainly involves a response to the impunity decreed in regards to these crimes during the nineteen eighties. Today's prosecutions are a response to the crimes of the past, but are also, more importantly, a reaffirmation of the task of installing justice in the framework of democracy; a task that succumbed to pressure the first time around.

Other debates about this delay in justice often place the issue outside of its historical context thus, in my opinion, disregarding the fact that the ultimate goal of current prosecutions cannot be apprehended without adequately comprehending that these prosecutions also overcome the frustration of a failed previous attempt. The moral and political resistance of the human rights movement managed to impact the legal system and reopen criminal prosecutions. The prosecutions and the enormous volume of related activities (i.e. testimonies, debates, and news reports) have made their mark on the construction of memory, truth, reparations, identification of kidnapped children, and discharging of government officials and judges with ties to the dictatorship.

Because of this, criminal prosecutions partly materialize, to an irreplaceable extent, the aspiration for the justice denied by laws and pardons of poor democratic value. They are not free from error, and undoubtedly suffer from the problems that are characteristic of any criminal response to a deep social conflict. Even so, they express a rejection for unrestricted impunity as a collective escape from a shameful and embarrassing past. The prosecutions assimilate three decades worth of the struggle for memory, truth, and justice and it would seem suspicious to sustain that any institutional

[7] Attorney General's Office (*Procuración General de la Nación*), Resolution 13/08, available at <http://www.mpf.gov.ar//resoluciones/PGN/2008/PGN-0013-2008-001.pdf>.

tool other than the reopening of prosecutions that had been forcefully closed (such as truth commissions or other accountability systems) could have the same results.

The decision to reopen criminal prosecutions thirty years after the events in question took place was not a simple one to make. The time that elapsed could favor either oblivion or the need to close certain phases in order to look to the future. Those mainly responsible for the events that are being investigated are now older, some even elderly, and possibly lack the actual power with which they initially resisted the first democratic government. In addition, others were already tried or convicted before they could benefit from impunity laws. Argentina's choice, however, was to have faith in the meritoriousness of the reopening of criminal prosecutions.

Similar to other nations and in accordance with international law, Argentina seems to be prioritizing the value of investigating and condemning crimes against humanity, regardless of the time that elapsed since the crimes took place. In reviewing impunity laws, the Supreme Court and Congress had no choice but to acknowledge the fact that these laws had mainly sought to release the perpetrators of atrocious crimes of all responsibility for their actions. They had not been the product of genuine consensus or of a joint decision, but were instead a result of pressure aimed at hindering the efforts of democratic institutions. The reopening of criminal prosecutions constituted an expression of the value of justice in the face of these pressures.

International Law in Transition

Argentina resolved the tensions between its impunity laws and the principles of justice the country upheld by appealing to international law. The country chose to revisit its past and condemn the closing of criminal investigations. To that effect, Argentina accepted that some international norms containing criminal sanctions could result in more appropriate convictions than local norms that had been sanctioned amid anti-democratic pressures. The predominance of resorting to criminal justice in Argentina's transition, to the extent to which it led to the reopening of prosecutions, can be explained, to many, by the influence of international law on a domestic level.

Many debates surrounding transitional justice raise the question of whether resorting to international law to face the challenge of overcoming the past can lead to undesirable outcomes. This question was raised, for instance, amid the rich discussion between Carlos Nino and Diane Orentlicher, mainly in terms of the Argentine government's potential and duties shortly after reinstituting democracy. Orentlicher argued in favor of an international duty to punish human rights violations based on the assumption that pressure from different countries would partly strengthen the new democratic government. Instead, Nino believed that excessive subjection to international criminal prosecution duties would destabilize the judicial process and increase the existing polarity between human rights and military groups. In Nino's opinion, the duty to prosecute all violations could be an excessively rigorous tool for a government that was struggling to reinstitute democracy.

However, Argentina does not and has not experienced an insurmountable dilemma between the degree of national maneuvering and the way in which some solutions to transitional problems are conceived on an international level. The international pressure Nino criticized either failed to develop or lacked the potential for the negative results he foresaw. International law did not offer a moral or legal framework that was rigid enough to render it useless or incompatible with the needs of the local community. Instead, international law, its institutions and its surrounding scope of influence and political pressure have proven to be valuable resources. On some occasions, it has constituted a source of pressure, on others, an opportunity for refreshing debates where democratic forces were able to find their own space for reflection and action, which had been denied on a domestic level, particularly when it involved questioning the State itself, who had to acknowledge these opinions.

In transitional Argentina, transnational influence, interaction, or dialogue have been ever present and increasing. Progress has clearly been made since the joint ratification of several human rights instruments during the initial years of democracy (i.e. 1983 to 1985), which has been confirmed from the Supreme Court rulings of the nineteen eighties to the confirmation, first legal and later constitutional in 1994, of the supremacy of international treaties over domestic law. Since the reinstatement of democracy, Argentine case law has engaged in what Slaughter et. al. have called *judicial cross-fertilization*.[8] This includes Argentine courts borrowing non-authoritarian (or authoritarian according to some) foreign law, frequently quoting court decisions from more advanced Western democratic courts and doctrines established by international courts. Judges also apply international law when deciding individual cases, even for declaring domestic laws unconstitutional.

All this occurs amidst the growing importance of international law on a world-wide level. In the last decade, the progressive absorption and hierarchical establishment of international norms led to concrete transition-related decisions. Mainly as of 2004, the Supreme Court reviewed the entire normative framework of the two previous decades in the light of international norms and principles, especially in regards to criminal issues, but also in regards to memory, the search for truth, the discharging of government officials who were involved in past crimes, reparation policies or identification of children born to disappeared persons.

The internationalist bias of Argentina's transition does not, in itself, constitute a recent development or the rupture of an opposite tradition, but rather a sort of political continuity of State that has been roughly consistent since 1983. The rising democratic stability was entrusted, in part, to the scope of International Human Rights Law (IHRL). From there, regardless of numerous breaches and tensions, different political forces that drove the country's fate have remained open and receptive. Every administration signed the main treaties and human rights declarations of the last few decades, they have all striven to maintain at least a decent relationship with international supervising

[8] Slaughter, Anne-Marie. 2003. “A Global Community of Courts.” Harvard International Law Journal
44:191-219

bodies, and none have seriously claimed an existing incompatibility between international conventions and the constitutional framework.

In this context, Inter-American law has had, and continues to have, a prominent place. The Inter-American Human Rights Commission visited the country in 1979, in the midst of the military dictatorship, with the full support of the human rights community. Perhaps it was not a coincidence that Raúl Alfonsín, who was president during the transition, and other politicians met with Commission Members; maybe envisioning the democratization potential of the visit and the value of establishing international support networks. The IAHRC's report changed the paradigm for understanding State terrorism. In addition, the report confirmed the violations that the military government had tried to conceal and forever disavowed the excess thesis, thus consolidating claims against a systematic plan of repression. This intimate relationship has lasted until now. The IAHRC processed petitions against the absence of compensation and in 1992 emitted report 28/92, condemning impunity laws. Since then, it has actively monitored domestic process. Over the last years, and given the growing volume of cases, the Inter-American Court of Human Rights has also joined this regional exchange network. As we have stated, the repeal of impunity laws is based on the rules and principles of the Inter-American system and is consistent with the interpretation in the "Barrios Altos" case.

The journey that initiated in the nineteen eighties thus influenced the overwhelming decisions that came two decades later in favor of the application of IHRL on a domestic level for the definition of transition-related issues.[9] The human rights law integration process is, therefore, not so much the hallmark of a particular conformation of the Supreme Court as it is that of an evolution, which was perhaps unnecessary but predictable, in the path that the first democratic administration chose when directing the national transition process toward human rights treaties.

Reopening Prosecutions and the Constitution

For some critics, reopening prosecutions is reprehensible for several reasons. Among these reasons, one that is relatively recurrent is that said solution was erroneous and unconstitutional. According to this point of view, international law constitutes an undue interference in the country's constitutional development. The main divergence is that of those who believe that the consequences that arise from Supreme Court decisions, which are consistent with those of the Inter-American Court of Human Rights, affect constitutional development.

[9] The Supreme Court ordered the reopening of prosecutions on the basis of its own jurisprudence regarding the reception of IHRL. Thus, the President of the Supreme Court stated that, "in accordance with the 1994 amendments to the Argentine Constitution, the Argentine State has assumed before international law, especially before the Inter-American legal system, a series of duties, with constitutional standing that have been consolidated and the scope and content of which has been delimited toward a clear limitation of the power of local law to condone or fail to prosecute events such as those in dispute" ("Simón", paragraph 15).

Many posit that impunity norms sealed a process whose conclusion had to be respected and, therefore, question the internationalist constitutional interpretation. Many postulate that, "for better or worse", the issue had to be permanently closed; that reopening prosecutions violated basic Constitutional guarantees such as that of *res judicata*, double jeopardy, the guarantee of precision in criminal law and formal criminal law requirement, among others; and that they have oversized the rights of the victim by undermining the rights of the accused. All these factors conspire against the reconstruction of an authentic constitutional rule of law that is mindful of certain ethical limits. The fact that the Supreme Court deemed case law of the Inter-American Court of Human Rights as mandatory in cases in which Argentina was not a party was also criticized; there is reluctance to apply the doctrine established in the "Barrios Altos" case and to its use as a precedent while circumventing the differences between the case in Peru and that in Argentina.

The underlying premise in all of these criticisms is that, either driven or manipulated by international law, we have fallen in a slippery slope toward a gradual undermining of the rule of law. According to this view, the repeal of impunity laws has interfered with the constitutional construction that should have been more politically introspective, more faithful to the written Constitution and less permeable to arguments developed by the international community. Evidently, these are not the fears expressed by Nino, but rather a discussion about the quality of the processes through which the decision was made to reopen prosecutions.

I do not believe that the Constitution invalidates the decision in the "Simón" case, or that reopening prosecutions constitutes an example that demands changes to the initial opinion regarding the overall existing synergy between the two; the Argentine case creates, through its transition, domestic and international opportunities. As highlighted by Keck and Sikkink, the international Inter-American forum has served as a sounding board or opportunity for claims when domestic channels were closed to certain groups or persons.[10] The international process functioned as another forum for respecting the personal dignity of those who were not deemed subjects of law in their own communities. Those same papers also suggest that the course of the transition was not defined from an external basis of international norms that were foreign to the community; instead, this regulatory body developed from a domestic process and, at a given moment, expressed the aspirations of justice of those who could lead to change. External pressures were almost always linked to the efforts of a pursued member of the domestic community, or by someone close to that person, (i.e. exiled persons themselves, victim associations, advocacy networks) looking for the opportunity to express their voice.

Despite the imperative tone of some of its contents, throughout the transition, international human rights law has functioned mainly as a regulative ideal in normative terms and as a moral or symbolic compass toward the truth, justice and memory, in more concrete terms. These pressures have never constituted an actual threat to the necessary balance for democratic stability. IHRL barely had an impact when the

[10] M. E. Keck and K. Sikkink**,** *Activists Beyond Borders: Advocacy Networks in International Politics,* Ithaca-London, Cornell University Press, 1998.

Argentine transition failed to meet its international duties. As many have noted, there are no insurmountable contrasts between the Constitution and IHRL in terms of prosecuting those responsible for human rights violations.

The constitutional block formed in 1994, which set the foundation for the decision to reopen cases, simply enabled a constitutional reconstruction that was compatible with the principles of justice that always justified rejecting the impunity option.[11] It seems possible to ultimately sustain that, in Argentina, IHRL resulted from a constitutional practice that acknowledges the existence of principles and rules that are not written in the Constitution. In addition, it is possible that those of us who believe that the law constitutes a fraction of the moral speech have a tendency to view the use of these principles less vigorously and to accept them as manifestations of legally defensible moral principles.

From this point of view, in the context of the Argentine transition, international law has expressed, in a way that is legally feasible, those elements of justice that were absent or denied by written law but which remained alive within the community and were represented by groups and voices that had been excluded from collective decision-making processes. International law catalyzed the moral discourse and enabled the expression, in a more traditional format of legal norms and court decisions, of the firm decision to condemn impunity. Therefore, without denying the virtues of positive domestic law, international law supplied domestic law with contents of justice and equity that were otherwise absent.

Legal Activism

At this point, the question of whether to adopt international law principles and norms on a national level or less formalist criteria for interpreting the Constitution poses an additional challenge. How much of this constitutes an actual issue and how much ultimately results from the tension generated by the active judicial intervention before this serious social problem? Many of the debates actually constitute a reaction against the legal apprehension felt by judges toward a highly sensitive issue, to the detriment of the political scenario or, if preferred, the politicization of justice.

The identification of a legal problem implies "that other goals or preferences must be subordinated to the fulfillment and respect of the latter […]. Rights constitute interests that merit special protection and should be a priority in all agendas and public policies."[12] Judicial interventions clearly demonstrate strong legalistic contents in terms of facing certain questions. This involves limiting some possible interpretations of the terms used in a particular discussion and narrowing available procedures and

[11] See R. Uprimny, "El bloque de constitucionalidad en Colombia: un análisis jurisprudencial y un ensayo de sistematización doctrinal," in D. O'Donnell, I. M. Uprimny and A. Villa (Ed.), *Compilación de jurisprudencia y doctrina nacional e internacional,* Bogotá, Oficina Alto Comisionado de Naciones Unidas para los Derechos Humanos, 2001, and V. Abramovich, "Editorial," *Nueva doctrina penal* B, Buenos Aires, Del Puerto, 2007.

[12] M. Alegre, "Pobreza, Igualdad y Derechos Humanos," *Revista Jurídica de la Universidad de Palermo*, October, 2005, pg. 176.

remedies. To some extent, it also involves narrowing the political scope, limiting discretion, and demanding explanations.

International law has enabled judges to participate, through some of their decisions, in a social process that would otherwise involve fewer principles and reference rules. We do not expect judges to play with purely political rules. However, international law, along with its set of transition-related rules, expanded the scope of judicial control toward areas that would otherwise have been excluded from the political domain. As a result, judges have been able to advance in the social scenario, not as purely political actors (since they are prohibited from doing so), but from within the framework and with the support of a set of legal norms.

In Argentina at least, the discussion involves the existence, laxity and powers these rules may effectively offer. There is a real issue surrounding international law or the constitutional interpretation of criminal norms since judges have effectively found rules to confirm their jurisdiction and apply principles for deciding cases that would traditionally not have been justiciable. This extension of judicial potential seems anecdotal if we view the issue in more general terms and consider instead other possible interventions on conflicts that transform society. The non-literal judicial interpretation of constitutional clauses related to, for example, equality has resulted in advancements in racial and discriminatory issues or the right to safe abortion. In that sense, the more committed judicial defense of economic, social, and cultural rights has emerged from a sustained idea of enforceability. The idea of the Judiciary as a mediator of political processes nourishes the potential for greater judicial presence in areas that were traditionally linked to the political sphere.

All of these interpretations, as well as claims for the implementation of transitional measures aided by international law, are accompanied by positions and movements that provide support and pressure. If we think of the different judicial interventions associated with paradigm shifts or changes in current values, we also find variations in terms of how the role of the judiciary is perceived, either by facilitating more active or more restrictive participation on a procedural level or advancing in the conceptual understanding of the rights involved.

Accordingly, my hypothesis is that a great part of the attention that was dedicated to the relationship between international law and the Argentine Constitution actually reflects antagonistic ways of understanding the underlying issue at stake. The eminently prospective and extremely respectful view of the institutional arrangements accomplished in the past was associated with a nationalist thesis, while the revisionist and skeptical view of the value of consolidating unjust solutions has spread over the foundation of international human rights law. What was always at the heart of the scene was the tension between these two ways of facing impunity for State terrorism, as it materialized, when facing the need to hear and enable the participation of the victims.

International law, the development of which was more or less contemporary with Argentina's transition, was always associated with the demand of the human rights

movement for “prosecution and punishment” and more active judicial participation. It began with the IAHRC report in 1980 and was nurtured by the local experience.

Those who promoted alternatives to criminal prosecutions, in turn, always offered more limited interpretations of the potential for judges to intervene. During the nineteen eighties, they sustained that civil justice could not interfere with military jurisdiction or the military's self-granted amnesty, based on the constitutional principle that orders the application of the most benign criminal norm. More recently, the constitutional review of the Full Stop and Due Obedience Laws met with opposition; as did the application of international human rights law for reopening criminal cases.

What makes the incorporation of international law into the Constitution attractive is, thus, not so much its transnational content, but its ability to authorize firm judicial interventions before situations of injustice. During the initial years of democracy, the desire for justice manifested in the form of activist legal constructions, such as the annulment of the military's self-granted amnesty, the confirmation of the supremacy of civil jurisdiction over military jurisdiction, or the thesis that authorship is immediate when contextualized within a repressive system, which is based on a criminal code that is quite lenient in this sense. Later, that activism was associated with intense monism, which led to the consolidation of a constitutional block. Our pending task is, therefore, to elucidate when we can actually speak of a fundamental problem in the application of international law before the Constitution and when we embark instead in such a discussion simply because there is a deeper underlying issue.

Continuity and Rupture in the Justice Speech and Criminal Practices

Transition involves leaving behind a conflict and, at the same time, driving the community involved to a better destination. It also involves an interest in viewing the past as an exception that should not affect other aspects of the community that are necessary for its future continuity. The notions of continuity and rupture coexist, and that coexistence is present in criminal institutions as well. Some form of renovated criminal justice must face the authoritarianism that is being left behind, while doing so in a way that renders change comprehensible. In order to reflect change, justice must be innovative and have the ability to condemn past events while at the same time provide an intelligible solution. In addition, change is unlikely accomplished instantly. There may be milestones and more or less paradigmatic events marking a change in time, but they will always be part of a larger process.

This is evident in issues that are rather pedestrian, but complex in terms of practical implementation: i.e. under which Constitution and laws should the criminal acts of the past be prosecuted? Which judges, prosecutors, and defense attorneys should participate? Which police and penitentiary forces should assist in the criminal justice process of the transition? Which procedural rules should apply?

Argentina suffered illustrious changes in constitutional and criminal law that demonstrate a legislative rupture in the way in which the past is discerned. The democratic government of 1983 was reestablished on the foundation of the Argentine

Constitution and eliminated the Bylaws and Guidelines for the National Reorganization Process (*Proceso de Reorganización Nacional*) that the military *juntas* had established in the normative apex. As we have seen, Argentina had also ratified leading human rights treaties during the first years of the transition. During the 1983 electoral campaign, one of the main issues discussed was precisely whether the military's self-granted amnesty had to be upheld in light of the Constitutional principle that orders the application of the most benign criminal norm, or if instead, changes could be based on the annulment of these laws as a result of their illegitimate sanction; in practice, the latter option prevailed. It was also through new democratic procedural norms that the Federal Appeals Court of the Federal Capital replaced military courts and was awarded jurisdiction over the prosecutions. The *Juntas* Trial was possible because of these norms.

As of 2001, when prosecutions were reopened, so was the issue of whether or not the statute of limitations of these regulations was retroactive, whether Law 25,779 (through which the impunity laws were repealed) was valid, or if it was possible to review past judicial decisions with *res judicata* effect. During these three decades, the convenience of new game rules versus respecting previous rules has been intensely debated, as were arguments in favor and against more or less formalist legal interpretations. In all cases, the position against impunity seems to have upheld revisionist perspectives over conservative ones.

Other more concrete changes have, however, faintly and effortfully emerged. Men and women who administer justice have, for instance, faced serious criminal charges since the second phase of prosecutions. As with penitentiary and police institutions, these men and women have not been subjected to any form of scrutiny other than a simple change in power throughout time; the same can be said about other civil sectors associated with State terrorism.

The Relevant Universe of Cases throughout Time

Another aspect over which time has had an influence is that of the value of past conducts in establishing what actions are criminally condemnable today. The current phase of prosecutions not only reflects the effect time has had over our choices, but also the practical issues related to their implementation. Prosecutions in the nineteen eighties revealed who had to be held accountable. This may have been a useful strategy for minimizing the use of criminal law and facilitating court decisions such as that of 1985, which, lest we forget, resulted in the convictions of two former presidents. However, the issue of the way in which other lower ranking commanders were held accountable resulted in an unlimited reopening of cases in the period between 2001 and 2005. The current universe of cases depends on the actual capacity of courts to manage them. Some general guidelines and certain factual conditions draw today's lines.

Surely, there have been advances both in holding more emblematic or known persons accountable for their actions and in shedding light on events for which there is a considerable amount of evidence. However, possibly due to the fact there is a more

limited capacity to resist prosecutions or to the natural extinction or absence of evidence, Argentina has not currently made, as it did in the nineteen eighties, the express decision to limit the reach of the investigations of all behaviors contemplated in criminal laws.

This has enabled current extensions that involve a different view from that sustained during the trials held in the nineteen eighties. First, the cut-off date is no longer March 24, 1976, which is when the coup d'état took place; instead, claims can now be filed for events occurring at any time if state-sponsored political prosecution can be credited. Today, all crimes perpetrated by the Argentine Anti-Communist Action force (Triple A or *Acción Anticomunista Argentina*), or even those that occurred earlier, are being investigated. These prosecutions contributed to crediting the commission of hideous crimes of political power that occurred prior to the coup d'état and consolidated the widely accepted hypothesis that we must confront civil/military State terrorism and not just the military *juntas*.

This shift in the temporal scope for allotting responsibility also reflects a shift in the type of behaviors over which prosecutions are currently focusing. Shortly after investigations were reopened, most of the attention began to fall on cases that had been closed during the nineteen eighties. Once the process was consolidated, focus shifted from the core of the violent acts perpetrated by military and police personnel to other forms of contributing to the criminal machinery. Today, priests and doctors associated with practices such as torture, airplane pilots that flew detainees, civil intelligence personnel, judges, and lawyers who concealed facts and enrobed certain processes in garments of legitimacy, and businesspersons who financially profited from State terrorism are all being investigated and convicted.

Time has also generated divergent views in terms of how to face non-State violence. During the nineteen eighties, the predominant response was that of not treating repressive State actions in the same way as private political violence. When the criminal debate was reopened nearly twenty years later it brought about changes in terms of the criminal response that each group of behaviors merited. Argentina currently allows the prosecution of crimes committed with the support of the political powers only, i.e. actions carried out by the actual State or with its support. Actions carried out by armed groups with no proven political control have been excluded. In addition, violent actions that were more or less uniformly or symmetrically subjected to criminal structures in the nineteen eighties are currently viewed as events with dissimilar relevance. Crimes against humanity are prosecuted, but other violent actions are not because time has had a different effect over each group of events.

The investigation of cases of abducted children or babies born to captive parents and raised by substitute families is strongly influenced by the passage of time. Today, these victims are adults and prefer not to cooperate with ongoing investigations. Therefore, the passage of time could have more benefits for the autonomous decisions of those who are against continuing with prosecutions than for those who wish for the investigations to continue. However, there is no telling whether victims feel more or less pain with the passage of time. For older generations, as time goes by, the decreased chances of finding the truth may be more mortifying than it is for younger

generations. The process itself is not very promising, it's an obligation imposed by time and it subjects people to unlikely comparisons and re-victimizations.

Similarly, so much time has elapsed since the nineteen seventies that the political militancy of victims is being reclaimed. During the eighties, this militancy was “invisible” or concealed mainly behind the parallel prosecutions of the chief leaders of outlaw armed organizations. During the nineteen eighties the paradigm was that of an innocent victim, who was portrayed as a mere “student,” “blue collar worker,” or “lawyer” that was being persecuted by the State.

However, since prosecutions were reopened, there is a stronger claim for identifying affiliation or political activity, which is reflected in criminal institutions, such as the growing claim for courts to identify actions of genocide in an attempt to highlight the persecution of groups based on their political activity.[13] This is analogous to the issue of sexual abuse. During the nineteen eighties, cases of sexual abuse did not receive the attention or contention they deserved; since then, they have served, for decades, for improving society’s overall understanding of gender-related issues and have provided victims with an opportunity to give their own testimonies and accounts. Time itself made it possible for legal structures to renovate themselves, which included the addition of many women and more concrete awareness of gender-related issues.

With all the above it is clear that the process of justice has served as a sort of opportunity to reclaim the dignity of victims. However, the task has not been simple. Despite the problems of delayed or belated justice, time has undoubtedly contributed to the generation of a deeper comprehensive framework and progressive strengthening of the ability of victims who had been persecuted by the State to once again trust government institutions and be able to make their claims public.

Perhaps that voice that had once been silenced is what gained momentum after all these years and ultimately drove the decision to reject impunity as a collective escape.

[13] The same could be said by appealing to “persecution crimes.” But, as we have seen, discussions and feelings have been constructed in unforeseeable ways. Today, regardless of the legal accuracy of such a conclusion, the reclaim of political militancy is strongly present when demanding that these actions be classified as genocide.

Time line

1971 March 23. Alejandro Agustín Lanusse took office as president.
1972 August 22. Massacre of Trelew.
1973 March 11. Elections were held. Héctor J. Cámpora won the elections.
June 20. Perón returned. Massacre of Ezeiza.
October 17. Juan Domingo Perón took office as president for the third time.
November 21. First recorded attempt of the Triple A.
1974 July 1. Death of Juan D. Perón. María Estela Martínez de Perón took office as president.
1976 March 24. Coup d'état.
July 6. Massacre of Las Palomitas.
December 12. Massacre of Margarita Belén.
1977 April 30. Madres de Plaza de Mayo were established.
1979 CELS was founded.
1981 March 29. General Roberto E. Viola took office as *de facto* president.
1982 December 22. General Leopoldo F. Galtieri took office as *de facto* president.
April 2. Malvinas (a.k.a. Falkland) Islands War.
June 14. Argentina surrendered in Malvinas (a.k.a. Falkland) Islands War.
July 1. General Reynaldo B. Bignone took office as de facto president.
1983 September 22. The National Pacification Law (*Ley de Pacificación Nacional*) was passed (22 924).
October 30. Presidential elections.
December 10. Raúl R. Alfonsín took office as president.
1985 April 22. *Juntas* Trials.
December 9. Convictions in the *Juntas* Trials.
1986 December 23. Full Stop Law was passed (23 492).
1987 Prosecutions against the First Army Corps (*Primer Cuerpo del Ejército*) and the School of Naval Mechanics (*Escuela de Mecánica de la Armada*, ESMA).
April 20. "*Carapintada*" military uprising.
June 4. Due Obedience Law was passed (23 521).
1988 January 14. Monte Caseros uprising.
December 2. Villa Martelli uprising.
July 8. Carlos Saúl Menem took office as president.
1989 October 6. Decrees 1002, 1003, 1004 and 1005 were issued granting pardons to military officers and members of the armed forces.
1990 March 20. "Schwamberger" Case.
A French tribunal condemned Alfredo Astiz in absentia.
December 29. Decrees 2741, 2742, 2743, 2744, 2745, 2746 and 2747 granting pardons to members of the military juntas, de facto government officials, and members of the armed forces.
1991 Law 24 043, which granted benefits to persons named by the Executive during the coupe d'état or who were detained after being prosecuted by military courts.
1992 Report 28 of the Inter-American Human Rights Commission.
1994 December 7. Law 24 411, which granted exceptional benefits to those entitled to make claims for victims of enforced disappearance.

Constitutional reform: International rights treaties were granted legal supremacy.

1994 May 11. Law 24 321 (regarding enforced disappearances).

1995 Truth Trials begin.
March. Commander Adolfo Scilingo publicly spoke out about “death flights.”
November 2. The Argentine Supreme Court ruled on the “Priebke” case.

1996 Massive human rights marches.

1997 Spanish judge Baltasar Garzón requested the extradition of forty five Argentine military members.

1998 Law 25,066 was issued, creating the Historical Reparation Fund for the Restitution of Kidnapped Children and/or Children Born in Captivity in Argentina (*Fondo de Reparación Histórica para la Localización y Restitución de Niños Secuestrados y/o Nacidos en Cautiverio en la Argentina*).

2001 Federal judge Cavallo decreed the annulment of the Due Obedience and Full Stop laws.

2003 May 25. Néstor Carlos Kirchner took office as president.
August 21. Law 25 779 was issued, repealing Full Stop and Due Obedience Laws.

2004 August 4. Law 25 914 was issued, establishing benefits for people born to mother in captivity.
August 24. The Argentine Supreme Court decided on the “Arancibia Clavel” case.

2005 June 14. The Argentine Supreme Court decided on the “Simón” case.

2006 First oral trial after the repeal of the Full Stop and Due Obedience Laws.
December 13. Law 26,200 (implementing the Rome Statue).

2007 November 14. Law 26,298, approving the International Convention for the Protection of All Persons against Enforce Disappearances
December 2007. First conviction of military members.

2009 December 22. First conviction of a judge (Víctor Hermes Brusa) for his actions during the dictatorship.

2011 First judge (Luis Francisco Miret) removed from office due to his actions during the dictatorship and since the reinstatement of democracy.

2. Testimonies as Evidence in Criminal Prosecutions for Crimes Against Humanity

Some thoughts on their importance in the Argentine justice process

Carolina Varsky[*]

Introduction

This paper parts from the premise that testimonies constitute a key aspect in the production of evidence in criminal prosecutions, and particularly in cases in which crimes against humanity committed during the last military dictatorship are investigated, where testimonies are usually the only available piece of evidence as a result of the destruction or concealment of documentary evidence.

It is up to witnesses to provide elements for proving the facts in such cases. This is so either because they saw the victim, were present when the crime was committed or directly or indirectly knew of the existence of a crime. In the justice process, witnesses are oftentimes also victims of these crimes. This adds complexity to the work surrounding their testimonies.

Occasionally, those who are able to retell the facts are people who directly or indirectly participated in their commission either as members of the Armed or Police Forces or as actual perpetrators of the crimes in question.

In this chapter we will also analyze debates regarding the "cooperation" of those who may be viewed as perpetrators or accessories to these crimes in finding the facts, and this analysis will be based on an interview with Horacio Verbitsky, who has explored this issue in his book *The Flight* (*El vuelo*),[14] which tells the story of former Navy officer Alfredo Scilingo.

We believe it is interesting to investigate the various ways in which testimonies are constructed during the different phases of truth and justice processes, as well as their procedural implications and obstacles, and the roll of attorneys in the production of testimonies.

As has been stated in the first chapter of this book, the justice process for crimes against humanity in Argentina has undergone two distinct phases: The first of which took place during the nineteen eighties and the second has been ongoing since 2001.

[*] The author wants to thank specially Lorena Balardini, who made possible the writing of this article. Without her invaluable help, this text would not have existed.

[14] Horacio Verbitsky, *El vuelo,* Planeta, Buenos Aires, 1995.

This paper focuses on the ways in which testimonies have been constructed during both phases, while highlighting the role of a key stakeholder that has proven essential for the process, both when testimonies are being produced as well as when evaluating their viability (i.e. selection, location, summoning witnesses), while driving judicial officials through their tasks: the plaintiff attorney.

We will first describe what constitutes the production of a testimony in the framework of a criminal prosecution, highlighting the particularities of the cases of crimes against humanity that concern us. We will then analyze the roll of the plaintiff attorney and prosecutor in rendering the necessary conditions for facilitating testimonies. Our goal is to redeem the tasks shared by lawyers acting as plaintiff attorneys and victims or their families, among other stakeholders, for the reconstruction of the facts. We seek to highlight procedural problems, evaluating the production work of these lawyers as guides for the construction of testimonies.

Next, we will focus on "necessary witnesses" and the many shapes this concept has taken since the justice processes began. We will analyze the implications of the political affiliation of the victim/witness and their association with armed organizations; finally, we will address the question of the knowledge suspects may provide for the prosecution and how the Argentine process has dealt with this.

Testimonies in Criminal Prosecutions: Their Construction during the Different Phases of the Justice Process in Argentina

Testimonies are an important and valuable piece of evidence for revealing the facts in every prosecution. However, when it comes to testimonies in the framework of the justice process for crimes against humanity, testimonies most likely constitute paramount pieces of evidence. This is especially true if they come from survivors or people who witnessed kidnappings, as they can provide precious information about the events, especially in light of the shortage of official documents that may be submitted as evidence or the adulteration of the few existing documents available, such as the files of the defendants. Testimonies are then the most valuable piece of evidence for helping to prove a fact.

> It goes without saying that most of the witnesses who have provided their testimonies in court play a double role, both as witnesses and direct victims of similar events to those described in their testimonies; which, from a procedural point of view, makes them direct witnesses as to the way in which the State repression operated during these events. In other words, they are living proof of the operation of the plan conducted by those who took office by way of a seditious act, the true purpose of which was (as proven by documentary evidence), among others, to repress and annihilate not only outlaw organizations, but all opposing views, with utmost disregard for the Rule of Law and Human Rights. (Oral Federal Criminal Court No. 1 of Córdoba, case 40/M/2008)

In order to properly value a testimony, witnesses must first remember either what they experienced first-hand or were told by others. Because we are reviewing events that took place over thirty years ago, those "others" are often unavailable (for reasons of health or death, or simply because they refuse to testify). However, those instances of, "I heard that..." or, "Someone told me this or that was happening..." are important, but are often insufficient or fail to convince judges of the criminal responsibility of someone involved in the events. In such cases, what witnesses remember from first-hand experience or what they heard from someone who was with them bear greater weight, provided they are able to pinpoint who he or she was.

In the Argentine criminal system there are two scenarios in which witnesses can be subpoenaed. First during what is known as the investigative phase (*etapa de instrucción*), which is usually conducted by a court clerk or deputy secretary assigned to the case. At that point, if witnesses are summoned by the plaintiff attorney, said attorney may be present during their testimony and, depending on the point of development of the case (i.e. whether there is a defendant or not), defense attorneys may or may not be summoned. Neither the defendant nor the public attend hearings during this phase, as these hearings are private.

During the investigative phase, the public official usually begins the hearing by saying, "You have been summoned in the framework of this case investigating these facts in order to hear what you have to say." If witnesses are also survivors, they are interrogated about what they remember and are asked to testify about the time during which they were held in captivity. If they had witnessed a kidnapping, they are asked about that specific event. Everyone is asked if they have been witnesses at previous points of the trial, whether in judicial or administrative court, in order to spare them from having to repeat their testimony. If they had previously testified, they are asked to ratify their testimonies and the public official then proceeds to ask questions about the facts that have already been stated and to invite them to add any additional information.

The second phase is that of the oral trial or debate. In accordance with procedural law, the testimony that is admitted as evidence is that provided during this phase (as opposed to that provided in the investigative hearings). As far as witnesses who are deceased or somehow unable to testify during this phase, their investigative hearing testimonies are admitted into evidence and read out loud after the submission of applicable certificates. Nevertheless, if they are alive or able to testify but still fail to appear before the court, their testimony cannot be submitted as evidence in the trial. This causes serious problems in current trials because most victims and their families are tired of these proceedings. Many of them have been subpoenaed repeatedly to testify in cases that do not concern them directly and, throughout the years, many people have testified numerous times both judicially and extra judicially. In addition, in the case of elderly people who wish to submit their testimony before the courts before the trial commences, courts have often allowed them to provide an early testimony and have resorted to video-conferences for witnesses who live abroad or far from the jurisdiction in which the trial is being held.

Because of the time that elapses and the circumstances under which witnesses provide their testimonies, it is possible for contradictions to arise during the trial. It is

common for a witness to remember seeing a particular defendant or victim and then mention more people during the trial. The defense tends to linger on this issue. Therefore, it is important to remember the way in which witnesses testified in the nineteen eighties as opposed to how they testified in more recent trials. From a criminal strategy perspective, during the nineteen eighties the main focus was on identifying perpetrators and proving that there had in fact been a systematic extermination plan in motion. Victims testified about what they had seen, who had been held captive with them and who had been held at particular clandestine detention centers; in addition, they also testified as to aliases used by certain individuals, but rarely testified as to their own captivity. In general, they usually referred to the experiences of others. They would say things such as, “I remember so and so was there, so and so was held next to me or I was kidnapped on such and such date at such and such time.”

Throughout Argentina's truth and justice process (CONADEP, *Juntas* Trials in 1985, “Truth Trials” (*Juicios por la Verdad*), trials held abroad, and the ultimate reopening of criminal prosecutions after the annulment of the Full Stop [*Punto Final*] and Due Obedience [*Obediencia Debida*] Laws) these testimonies have been expanded. Therefore, even though throughout the nineteen eighties the goal focused more on reporting atrocities, identifying perpetrators and remembering the disappeared, and less on recounting the witness' personal experience, current trials are characterized by the depth with which the victim's experiences are explored; more structured testimonies are currently left behind to make way for an expanded concept of torture that contemplates the extent of abuse suffered from the time the person was kidnapped to the time he or she was held captive at clandestine detention centers until they ultimately recovered their freedom, without prejudice to how all this impacts their environment. As a result, victims now play a leading role as they retell their first-hand experiences (as opposed to what happened during the *Juntas* Trials).

Throughout this process, testimonies were not only given at courts, but were heard on other opportunities as well. Reports were filed before domestic and international human rights organizations, such as the Permanent Assembly for Human Rights (*Asamblea Permanente por los Derechos Humanos*, APDH), Center of Legal and Social Studies (*Centro de Estudios Legales y Sociales*, CELS) or CONADEP, before which reports continue to be filed. The discussion surrounding these administrative testimonies revolves around whether they may be added to case file as early testimonies instead of as documentary evidence, which is how they are currently added.

Plaintiff Attorneys and Testimonial Phases in Oral Trials

The decision as to the way in which testimonies are to be given in oral trials is directly related to the plaintiff's strategy and the prosecutor's accusation, the purpose of which are to result in a conviction. It therefore follows that this strategy is divided into a series of interrelated phases:

SCREENING

The procedural point in which witnesses are screened is during the evidence phase of the trial. At that time, both parties record their testimonial (i.e. witnesses) and documentary (i.e. documents that support the facts) evidence, as well as expert reports in some cases.

One of the issues that plaintiff attorneys take into account when providing evidence in a case is whether or not survivors or victim relatives can testify in the trial. These witnesses are the main source of information for finding other potential witnesses or collecting case-related documents.

As a result, during the evidence phase all documents and witnesses who can support said documents, and any information pertaining to the defendant, are gathered. This involves requesting the remission of files or guidelines issued by the institutions in question which, in practice, has created the need to audit these files as they have been found to be adulterated on many occasions.

The most generic kind of documentary evidence consists of documents that prove the existence of a particular clandestine detention center or directive issued by the Armed Forces or the organization of each force. Depending on which armed or police force is in question, particular documents can be requested or submitted. Next, specific evidence regarding each of the victims is submitted, which is usually surfaced by the prosecuting parties, family members, and survivors. In general, family members are asked to submit personal notes and letters in hopes of finding evidence. Petitions of Habeas Corpus also constitute documentary evidence.

Moreover, when collecting testimonial evidence family members and survivors are asked who is able to shed the most light on the facts under investigation. In some cases, these searches rendered new witnesses who had never testified before, or had testified but not on that particular event, either because they were not asked about the event or were not granted the opportunity to testify. It is therefore common for new potential witnesses to arise during the trial, as occurred, for example, during the prosecution for the Fátima Massacre.[15] During that trial, a survivor who had been mentioned repeatedly in trial testified for the first time and the Court was asked to summon this witness and enter the witness' testimony as new evidence in the trial, because this person's testimony represented new facts and such request was consistent with procedural law. The same thing occurred during the trails in which disappeared persons were identified by the Argentine Forensic Anthropology Team (*Equipo Argentino de Antropología Forense*, EAAF).

[15] The Fátima Massacre case was part of the mega-case investigating crimes committed by the 1st Army Corp of the Federal Capital. During this event, a group of political detainees who were held captive in the building of the Federal Police Superintendency under the conduction of the Federal Police, were illegally executed in a route from a village outside the city,. The trial was held by the Federal Oral Court No. 5 of the Federal Capital, and the ruling was issued in 08/2008.

However, before people are called as witnesses, prosecuting parties must first ask them whether or not they wish to testify. Sometimes, obtaining this information proves difficult and individuals are summoned anyway. But this must be consistent with the prosecuting party's strategies. If there is only one witness, and that person's testimony is deemed indispensable, the situation may be handled so as not to burden that person.

CELS attorneys always ask witnesses whether they wish to testify or not. (However, witnesses who are parties to the trial are often summoned by the prosecution regardless of their preferences.) In general terms, we do not call on witnesses who wish not to or are in doubt as to whether to testify. Instead, we list them as potential witnesses so as not to immediately exclude them from the case and then try to persuade them to testify. However, the possibility to force a witness to testify does not depend as much on the prosecution but on the court, as many courts consider that once a person has been listed as a potential witness that person's testimony belongs to the court. As a result, if the defense challenges the omission of a witness, that witness will be forced to testify. Regardless of these exceptions, witnesses are usually asked whether they wish to testify and are informed of what testifying involves; and if they refuse to cooperate, they are not listed as potential witnesses.

It is usually lawyers who come into direct contact with witnesses; nevertheless, in very large cases involving crimes against humanity, where there are hundreds of victims and dozens of defendants, it is impossible for lawyers to come into contact with every single witness. An example of this is the “ESMA” case where, even though we summoned numerous witnesses during the evidence phase, in many instances, lawyers came into contact with them after the evidence phase had already concluded. A very thorough task was carried out in the “Vesubio” case, at which time, CELS attorneys worked closely with nearly every witness.

PREPARATION

Preparing testimonies is an important part of this strategy. But what does preparing a witness entail? On the one hand, it involves supporting the witness in the unusual task of having to testify in court while, on the other, it involves getting to know the person and reading through their testimonies so he or she may remember what was said.

Preparation also requires facilitating witnesses with their own previous testimonies as they often fail to keep copies or re-read the statements they made during the nineteen eighties. In addition, it also involves telling them what to expect in each case during the different phases of the process. This is much simpler during the investigation phase because, as we have stated, hearings are closed to the public. But during the trial hearings, when not only defense attorneys but often even defendants are present, it is important to paint the scenario for witnesses; that is, to inform them that there will be three judges in the room, describe the room for them, and tell them where the defendants and the accused will be. Additionally, witnesses are also prepared for the kinds of questions they will be asked in court (if they are familiar with the defendants and victims on the list, if they have testified before) as well as where everyone will be

seated so that they can understand who will be questioning them during their testimony. Finally, witnesses are assisted in organizing their testimonies, either chronologically or thematically (if the witness is a clandestine detention center survivor, he or she must first describe the center and conditions of captivity and then the rest).

It is important to warn witnesses that under no circumstances is it acceptable to lie or fabricate. From 2006 to date, trials have exhibited the desire to search for the truth, but under no circumstances should said desire justify lying. It is necessary to tell witnesses that now that cases are being reopened it is acceptable to remember new facts, to make new reconstructions of what happened or testify as to the captivity of another person at clandestine centers where they were held. It is perfectly reasonable for witnesses to meet with the Forensic Anthropology Team thirty years later and piece together facts they had not been able to connect before. That is also part of the testimony seeking strategy.

It is up to the attorneys to respond to these potential "changes" in witness testimonies, which result from the passage of time, the circumstances surrounding the case or the place in which the person testifies, among others. During each hearing we must reiterate that the witness is not fabricating new facts, but is instead remembering or reconstructing these facts at a later time, in order to justify why the witness hadn't reported them before or is reporting them now. Because of this, preparing witnesses involves warning them that a previous testimony cannot be transformed; instead, new testimonies can only shed light on previous ones.

The following quote clearly reflects this situation:

> In terms of testimonial evidence, there is a rule that emerges from shared experiences and judicial practice which is that intellectual abilities, practice, and experience acquired by individuals all have a direct and notorious impact on their perception. Regarding this particular issue, the time elapsed between the event and the testimony or following testimonies undoubtedly has an impact on witnesses' depositions, although not necessarily on key aspects of those depositions.
>
> […] For that reason, it is understood that when witnesses are summoned so long after the events occurred, it is possible for reality to meet imaginary fabrications, which is why it is important to use every available resource for an accurate conceptual reconstruction of the events under investigation, i.e., to contrast witness statements with all other existing evidence, whether testimonial or documentary, for the purpose of revealing the truth and reaching the level of certainty needed by judges to rule on cases. (Oral Federal Criminal Tribunal No. 1 of Córdoba, case 40/M/2008)

We also instruct witnesses that it is acceptable to say, "I don't remember," "perhaps," or "I'm not sure." Therefore, as lawyers, we acquire the necessary tools –as contained in the Criminal Code– to remind witnesses of their previous statements. If a witness' testimony is contradictory, questions can be asked and the witness' memory can by refreshed by reading previous testimonies to him or her. In these cases, the discussion

revolves around whether or not testimonies made before administrative organs are admissible.

Therefore, it is also important to instruct witnesses on who can ask questions and, above all, who opens the interrogation. Interrogations are usually opened by the prosecuting party, the prosecutor or the complainant, depending upon who summoned the witness. We always warn witnesses that they need not worry about remembering exact dates, names, or addresses, given that these events took place thirty years ago, because it is always possible to reference their prior testimonies for such information.

As far as structuring their testimony, witnesses must always feel comfortable with said structure, therefore, they may prefer to build their testimonies chronologically or it may be easier for them to sort the events by names. Many times the latter is traumatic either because they only remember nicknames or are afraid of omitting someone. Lawyers must always bear in mind the need to cover as many facts as possible and must take into consideration that nervousness on behalf of witnesses may lead to oversights. That is why before testifying, witnesses should be asked whether they prefer a specific order, which questions should and should not be asked, etc.

Therapeutic work during witness preparation is also paramount. Witnesses must feel aided and supported in the moments before, during, and after their testimonies. They often need to practice their testimonies, how they plan to phrase them, what they are going to say, and with whom they will be speaking. CELS has always been at the forefront of these key interdisciplinary tasks, strengthening interactions between therapeutic and legal aspects, especially since the “Simón” case.

As a result, witnesses have begun to identify CELS as a place where they can openly discuss everything from what they have to say to how they feel, as well as their thoughts on testifying. This is crucial and extremely necessary, mainly because as far as the Court is concerned, they are just another witness in just another trial. Courts are not trained on how to handle witnesses who, as we have seen, are also victims of such serious crimes.

As far as witnesses are concerned, finding a place in which they are heard and where their feelings are understood, as well as the implications of testifying after thirty years and once again remembering their co-captives, prevents re-victimization. In addition, witnesses are also able to share their feelings with others who may feel the same way, to listen to each other, and call on other people who have never testified.

Nevertheless, there are occasions in which witness preparation fails and witnesses are questioned because, in an attempt to cooperate with the justice process, the stories or details in their description are excessive. However, I believe that, overall, court decisions seem to weigh the value of witness testimonies.

SUBPOENAS

The process of summoning a witness to appear in trial depends greatly on each court and has shown improvements lately. After the disappearance of Julio López[16] and the creation of witness protection programs, courts were asked to be particularly carefully when summoning witnesses. On occasions, we have requested that subpoenas be sent to CELS' address in order to ensure the confidentiality of their personal information.

Later, courts developed restricted case files that are allegedly only available to court staff and cannot be viewed by any of the parties. To that effect, courts request that parties offer their list of witnesses and provide their personal information (such as their telephone numbers) in order to contact them. When witnesses are called to the stand, judges omit questions regarding sensitive personal information.

Personally, I believe the way in which courts summon witnesses is deficient, despite the fact that trails have been conducted for several years. Even though some improvements were seen throughout 2010, courts continue to approach witnesses in a very harsh way.

In their daily practice, some courts confect a list of witnesses once they have all been summoned to ensure they are all accounted for and determine the order in which they will testify. Other courts elaborate a temporary list and summon witnesses one by one, then make changes to the list based on how witnesses respond; this has led to a discussion regarding whether or not it is convenient to make witness lists public.

In general, witnesses continue to be summoned as follows: courts contact witnesses and request that they appear in trial to testify. We facilitate courts with the witness' personal information because we know this information will be kept in a confidential file.

The Role of Different Kinds of Witnesses: Necessary Witnesses

> Testimonial statements constitute the main piece of evidence of particular kinds of crimes the footsteps of which are deliberately erased or of an untraceable nature, or even for crimes perpetrated in absolute privacy. In such cases, witnesses are referred to as necessary. These testimonies are supported by the secrecy with which the repression was handled, the deliberated destruction of documents and traces, and the anonymity concealing perpetrators. It is therefore not surprising that most available evidence was provided by victims or their relatives; who constitute necessary witnesses. (Ruling 309: 319)

[16] Julio López was a witness in the first trial held in La Plata prosecuting former police commander Miguel Etchecolatz. López disappeared on September 18, 2006, when he was on his way to testify against the former repressor. His disappearance has not yet been solved and the investigation is severely deficient. However, this case is viewed as an attempt, during the early stages of the justice process, to intimidate witnesses as well as others involved in the justice Process.

This Federal Appeals Court quote from the decision in case 13/84 summarizes the way in which testimonies are viewed in this criminal process. However, as the justice process advances, the "necessary witness" criteria has suffered changes.

In the framework of the first trials since cases were reopened,[17] witnesses were mainly survivors or their relatives, and even though it was a relatively small trial (revolving around two events of unlawful deprivation of freedom and abduction of a child), approximately sixty witnesses were called to testify.

During the evidence phase of the “Jefes de Área” case,[18] there were even more testimonies, including everyone in the neighborhood who had seen and heard shots fired across the street to survivors of clandestine detention centers in the Federal Capital. Of course this was a very particular case as most victims had not been seen at any clandestine detention center by any of the survivors. This “broadened” the concept of necessary witnesses to include a larger scope of contexts.

Nevertheless, we have currently advanced to the point of considering that witnesses who should be subpoenaed are only survivors who are a party to each trial or those who can shed light on the complex issues that arise when victims were only seen be a few people or were held for short periods of time. In the ESMA case, some people were only held for one or two weeks and were seen by very few people. Therefore, it is important to summon those people as they are the only ones that can shed light on the case; likewise, it is important not to summon survivors of the same center who can merely “illustrate” what life was like at said center.

Witnesses to kidnappings may also be subpoenaed, but no more than two or three per case so as to avoid excess. For example, witnesses may include the doorman of the building where the victim lived (since they were often forced to lead perpetrators to the apartments of the victims) or neighbors who witnessed the operation from across the hall and know that, for instance, “seven people came” and “broke down the door.”

Unfortunately, many of these people have passed away. It would not make much sense to summon witnesses who went to the victim's house forty-eight hours after the kidnapping occurred and saw their home was messy, as they can shed absolutely no light on the actual unlawful detention. Ideal witnesses are the victim's parents (provided they are still alive) or whoever reported their disappearance. But these people are oftentimes very old and the victim's siblings are summoned instead to testify as to the actions of their parents. However, sometimes these witnesses were living abroad at the time or were too young to remember the moment of the kidnapping. In all cases, selecting enough witnesses to prove that the event took place makes the trial more dynamic, but when witnesses are not adequately selected trials extend unnecessarily.

[17] “Simón” case. Federal Oral Court No. 5 of the Federal Capital, case No. 1056 and 1207, ruled on 08/07/2006.
[18] Federal Oral Court No. 5 of the Federal Capital, case No. 1261 and 1268, ruled on 12/10/2009.

Another issue is that of case fragmentation. Oftentimes, cases are organized as mega-cases, where a large amount of victims and defendants are accumulated and are then subdivided for trial. This has resulted in many survivors being subpoenaed as witnesses and not as victims/objects of the trial. It has also led to victims being summoned to describe their captivity for the sole purpose of proving the captivity of someone else. This should be avoided as there will be a second or third opportunity in the trial to testify on events involving the same defendants.

Because of the above, since trials were reopened, a clear strategy for criminal prosecution has not been developed; therefore, witnesses have had to parade around the courts ten or fifteen times to testify in other cases, while no one was looking into their case. As a result, they were called in to testify as to the captivity of others, not to give testimony as to their own captivity, release or hardships. Nevertheless, when testifying they are asked whether they were held captive and, if so, when. In such cases, we must find a way not to call them or withdraw them from the list of witnesses.

One of the challenges of screening and producing testimonial evidence is finding witnesses for cases in which victims were not seen at any clandestine detention center. This was the case of many crimes committed in the greater Buenos Aires area or outskirts of the Federal Capital and evidence collection consisted of literally visiting the local “barrios” (neighborhoods) and talking to their residents. An example of this was the prosecution of Luis Abelardo Patti in the framework of the “Campo de Mayo” case; at that time, visits were made to Escobar (a neighborhood in Buenos Aires) to speak to residents of the area regarding their experiences during the repression. This work was carried out by lawyers or the complainant and consisted of gathering information related to cases for which there is relatively little evidence. In smaller places, where events strongly resonated, someone who witnessed the scenario can be very relevant.

Another practice that began shortly after prosecutions were reopened, and which is consistent with the Criminal Procedure Code, is that of summoning witnesses who are either of very advanced age or of delicate health to provide an early testimony. This resulted from the repetition of testimonies throughout different cases and the fact that some trials will initiate over the next few years. Therefore, Courts summon the parties to appear, witnesses then provide their testimonies, which are evaluated and validated later in the trial.

Early testimonies are also being evaluated for cases revolving around the same facts in different trials. In such cases, witnesses as well as the parties involved in all of the trials (i.e. the defense and the prosecution) are summoned at the same time so that witnesses only testify once.

Controversies Surrounding Testimonies. The Issue of Militancy of the victims and Cooperation from Perpetrators

WITNESSES, VICTIMS AND MILITANTS

During the Juntas Trial, according to witnesses, the prosecution requested that they refrain from mentioning their political militancy. This may have been related, on the one hand, to the historical context of the time. Democracy was barely emerging and had not proven to be sustainable in time and a military threat was imminent. On the other hand, it may also have been related to the strategy employed by the prosecution and was likely aimed at counteracting the defense's "Theory of the Two Demons." In that sense, any reference to political militancy could have been subject to attack by the defense and the goal was to prevent such attacks, even though that involved hiding the victim's identity.

In the current justice process, there are two distinct viewpoints on this issue. While some continue to sustain that it is best not to mention the political militancy of the victims, others feel it should be vindicated. To the effects of criminal prosecution, this makes no difference. As far as case law is concerned, crimes committed by guerillas or armed groups do not constitute crimes against humanity. Nevertheless, it is noteworthy that many cases have been opened throughout the country and attempts have been made to prosecute armed groups in Argentina. While some try to highlight their political activity during the nineteen seventies, other survivors or relatives of victims continue to view this strategy as dangerous. Notwithstanding the numerous advancements in case law which have closed the discussions regarding the statute of limitations, res judicata, and definition of crimes against humanity, resurfacing these issues could pose the “danger” of giving the defense tools with which to delay trials, while missing the purpose of the prosecutions and opening a discussion on whether or not a murder committed by an armed group could also be deemed as a crime against humanity.

In current trials, mainly private defense attorneys have attempted to resort to such strategies by inquiring about the possession of weapons or membership to certain “guerrilla” groups. When facing such situations, we often warn witnesses that such questions exceed the framework of the case at hand and remind them that they have no obligation to answer. The prosecution or complainant often objects to this line of questioning as it is irrelevant to the case.

During the first trial, i.e. the "Simón" case, the question was raised of whether or not to mention political militancy. Some victim relatives wished to mention that the disappeared person had been a political militant, others merely mentioned their “base work” or visits to “villas” (extremely poor areas). However, those who wished to vindicate the fact that victims were political militants play a key role in the development of current trials. In turn, while some are open about their past as “montoneros” (insurgent group members), others try to hide it and instead mention local or university level activism.

COOPERATION FROM PERPETRATORS IN THE INVESTIGATION OF CRIMES OF STATE TERRORISM[19]

[19] This section is based on an interview with Horacio Verbitsky, CELS president, that was conducted by the author. Editing by Lorena Balardini and Alejandro San Cristóbal, who are also members of the institution.

In this section, we will analyze the way in which people who had to some extent perpetrated crimes against humanity during the military dictatorship cooperated with the judicial investigation of such crimes. Instances of cooperation are chronologically described from the dictatorship to date. At the same time, the different ethical and political debates that emerged from human rights movements regarding the accountability of accessories to these crimes made it possible to analyze the role of those who repented for their crimes and their assistance in the production of evidence (during times of impunity) for clarifying the truth and gathering concrete proof once the prosecution of these crimes had begun.

Perpetrators' Cooperation During the Transition.
Claims filed before CONADEP and the Juntas Trials

During the democratic transition phase, cooperation from those who had some extent of participation in these crimes occurred in the framework of CONADEP. Several people came forward with information while others spoke to the media, but no one came forward before the judiciary.

Those who cooperated with CONADEP included people who had been arrested for petty crimes or who had been sanctioned by their own forces for lack of cooperation with the repression. However, this was not systematic and the State failed to implement a policy aimed at promoting such cooperation. Such claims made before CONADEP were met with great caution; testimonies were accepted and were then contrasted with recorded data.

During the early nineteen eighties, Constable Antonio Cruz testified before the Peace and Justice Service (*Servicio Paz y Justicia*, SERPAJ). His testimony was consistent and credible. However, he did not fit the category of "repentant" as he had merely witnessed the events. He was a very low ranking officer at the time and was neither able to prevent nor report the events that took place during the dictatorship; therefore, he filed his report after the de facto period had ended. He later also testified in the trial against Antonio Bussi in Tucumán, where he had witnessed several executions perpetrated by said former provincial "interventor" (auditor).

Other similar testimonies were seen throughout the *Juntas* Trial. These include the testimonies of Constable Omar Torres, Sergeant Armando Luchina and Commander Jorge Búsico. The testimony of the latter, who died in 1998, was key as he testified to have seen people wearing hoods and to have been ordered to hide their identities, an order which he refused to carry out.

It is noteworthy that no one who questioned the regime from within the Armed Forces received any form of punishment. Búsico, for example, was never promoted; however, his divorce meant the end of his military career and he was forced to retire, although there was no retaliation.

Another example of a certain degree of questioning from within the Armed Forces is that of the "Teinta y Tres Orientales" (Thirty-Three Orientals).[20] Many of them claimed to have been very afraid, but nothing ever happened to any of them. They were outcast, their careers were stagnated, they were accused of being cowards or infiltrated by their co-members, but none of them were kidnapped or tortured.

What is relevant here is that the State never developed any strategy to promote these kinds of behaviors. Even when members of the Armed Forces came forward with the intention of cooperating with the investigations, their cooperation was rejected.

Testimonies in Times of Impunity.
The Scilingo case

After the Full Stop and Due Obedience laws were passed, former Lieutenant Commander Adolfo Scilingo filed a report before the Federal Appeals Court's Prosecution regarding everything he knew:

> "I am not saying that I need to make a public confession or justify my actions. Not in the least. I want to confess to something that I did and that my superiors led me to think was bad."
>
> He spoke to Luis Moreno Ocampo, who had prosecuted (former Juntas' members) Videla, Massera, (Navy officers) Pernías and Astiz, and who then ruled in favor of the constitutionality of presidential pardons. "I went to speak with him because I needed to understand why none of this had been brought to light. Moreno Ocampo was lying on a large leather couch with his feet on a coffee table. He was courteous, but that was it. This may be hard for many to understand. But the reality is that this issue is either taboo or being swept under the rug." He shared his story and provided his documents. He claims that Moreno Ocampo listened to him and suggested he see an editor. "I thought his head was somewhere else."
>
> The prosecutor remembers the interview differently. "He came with his wife. First he said he had only accompanied some detainees on the street in order for them to identify their associates. But shortly after, he claimed he had participated in a kidnapping. When he participated in a death flight, he realized the man he had kidnapped was on the airplane. Despite the injection, the prisoner awoke and semi-consciously resisted being thrown off the plane, nearly pulling him off as well in the struggle. After the Due Obedience Law and presidential pardons were issued, the events could not be legally prosecuted. He asked me to put him in touch with Somos magazine, but I chose not to get involved. His motives were contradictory: he would lose sleep over the memory of what he had done, the Army was investigating him

[20] This was a group of thirty three members of the military who refused to obey illegal orders from their superiors. Between 1979 and 1980, the Army either denied their promotions or forced them to retire because they did not abide by "the motto or institutional feeling of the Army, which decidedly harms its prestige and surrounding concept."

for his actions, and at the same time, he wanted money in exchange for his story."[21]

The Scilingo case seems spontaneous and anecdotal. At the time, a debate had emerged regarding the promotion of Navy Lieutenants Antonio Pernías and Juan Carlos Rolón, former members of the "Tasks Unit" (Unidad de Tareas) that lead the illegal repression carried out at the School of Naval Mechanics (Escuela de Mecánica de la Armada, ESMA). Menem denied requesting said promotions, and it is safe to say that from that point on the code of silence had been broken. After the last pardons were signed in 1990, the issue seemed to have been closed for prosecution and it was assumed that those who were repentant could begin to speak of the crimes committed in the framework of State Terrorism with no fear of reprisal. However, the Argentine experience proved otherwise. Cooperation has been more vast in the framework of criminal prosecutions than in periods of impunity.

The Scilingo incident was a result of the search for truth. This was a person who could no longer stand his guilt or keep silent. But above all, this case resulted from the cowardly and petty method of illegal repression that, on the one hand, guaranteed impunity to some, and on the other, involved institutions as a whole.

After his testimonies, Scilingo began to be persecuted. He was offered money in exchange for his silence, then he was threatened and fake charges were brought against him for which he was imprisoned for two years.

Upon his release, he once again began to receive threats and was taken hostage one day near Congreso (area near downtown Buenos Aires) and a “V” for Verbitsky was carved into his forehead with a pocket knife. After this, and despite being advised against it, he traveled to Spain. Scilingo was convinced judge Baltasar Garzón would grant him protected witness status, but he wasn't a witness, he had been an accessory to crimes against humanity. Meanwhile, in Argentina his situation was also unsustainable: he was not receiving his retirement and was unemployed, he was a public and notorious figure, but had no means with which to support himself.

One could wonder what moral or political motives led Scilingo to testify. It seems guilt is the most adequate explanation. He could have been motivated by his need to be punished for his actions in order to regain his self-esteem, i.e. by his “humanity.” But these questions are secondary to the underlying issue: Why was it that if everyone had acted the same way some were punished and others were not, some were promoted and others were not? So it was that Adolfo Arduino, Scilingo's superior who had ordered him to carry out the "death flight" was promoted to Vice Admiral, while Rolón and Pernías lost their careers. This is almost a union-like question emerging from the feeling of being abandoned by those who had pushed them to commit these hideous crimes.

[21] Horacio Verbitsky, op. cit., pg. 72-73.

Reactions from Human Rights Movements

When facing Scilingo's confession, the human rights movement also had to face moral and political dilemmas and so positions became polarized. Some organizations such as CELS, Abuelas de Plaza de Mayo, Madres de Mayo-Línea Fundadora, approached Scilingo for additional information. In addition, he was obsessed with finding out who he had killed. To that effect, he visited different organizations, requested photos and attempted to find out as much as he could about his victims.

There were victims and organizations that were completely closed to speaking to those who had been accessories to the perpetration of these crimes. Instead of opening themselves to the idea that Scilingo's testimony confirmed everything they had been reporting for years, they were offended by the actions of those who listened to the testimonies of former repressors.

Dissuasion

In Spain, Scilingo was detained at the request of judge Garzón when he appeared for his testimony. Garzón organized the interview very cleverly. First, the judge interrogated Scilingo regarding how the repressive system worked and then he interrogated the witness about his role in that system. When Scilingo described the death flights he had perpetrated, the judge ordered his arrest. He was held for two years with no conviction and was, therefore, released by the Appeals Court.

However, despite this release, his passport was withheld and he was prohibited from leaving Madrid. He was completely alone, he had no money, his former mates viewed him as a traitor and organizations viewed him as a murderer. During that time, he survived thanks to the charity of a priest until in 1998 Chilean dictator Augusto Pinochet's lawyer, Fernando Pamos de la Hoz, took over Scilingo's defense.

The Flight (*El Vuelo*) was published in 1995 and in April of that year Army Commander Martín Balza rushed to release a public critique on television to prevent other repentants from coming forward. Balza requested that anyone who had evidence of crimes committed during the dictatorship should hand such evidence over, but no one did.

The trial in Spain acknowledged the legitimacy of the claims made by human rights organizations. In addition, Scilingo's confession also acknowledged the legitimacy of the testimonies of detainees/disappeared persons, as did the fact that a "first-world country" viewed these events as crimes against humanity with no statute of limitations. However, this did not dissuade others from going public. What did prevent others from confessing was the response on behalf of the State whereby instead of shielding Scilingo and granting him protection in exchange for his confession he was treated as a delinquent.

When someone violates such a code of silence, the State should protect, support, and value that person. Instead, the State accused, harassed, and insulted him, ultimately filing false charges and arresting him. President Carlos Menem accused him of being a

fraud, to which accusation Polish sociologist Zygmunt Bauman replied as follows: “What did the president expect, for this person who threw thirty people into the ocean to became a model citizen and spend the remainder of his life working on his garden?”

The New Justice Process and Ethical/Political Questions Surrounding Cooperation. The Extent of the Penalty

The reopening of the justice process has raised new questions, including that of the possibility of reducing sentences in exchange for cooperation from defendants. A resonant case revolving around this issue took place in the framework of a trial in Rosario involving former Army Intelligence Officer, Eduardo Constanzo. Some complainants contemplated the possibility of requesting that the sentence be reduced below twenty-five years since the defendant had provided large amounts of information during the investigation. The question of whether or not this was feasible arose.

Reduced sentences could constitute a legitimate tool, provided they do not equal impunity. It should be clearly legislated in terms of the level of usefulness of the information provided in order to obtain a reduced sentence. In the case of a repentant of drug trafficking, for example, such reduced sentences have been legislated. In addition, not just any information would suffice, the person would have to provide information that helps identify which commanding officers were involved.

Recognition for cooperation, whether applied to existing criminal penalty scales or consisting of a criminal system reform that includes bonuses in exchange for cooperation are valid as long as they are used with caution, so as not to lead to deviations, as those occurring in South Africa which ultimately constitute covert amnesty.

The South African model, which consists of exchanging truth for impunity is immoral. Said model does not consist of reducing a person's penalty for providing information on a crime committed by someone else, instead, it results in the reduction of a person's penalty for providing information on a crime he or she committed. Thus, the key purpose of criminal prosecution is unmet: i.e. there is no punishment. South African victims have had to watch police officers, deputy officers or military officers provide detailed accounts of the physical or moral destruction of a family member, only later to be freed from all punishment. This is worse than impunity as it constitutes a new offense against the victim.

In Chile, the system includes a statute of limitations and individuation of the sentence. Defendants of crimes against humanity are sentenced to seven years of jail. This is inconceivable in Argentina where the minimum sentence is twenty-five years in prison.

A lesson that can be learned from the Argentine experience is that these situations are not static. It is important to always be aware of new opportunities and tools that arise throughout different historical periods. This is an important lesson left behind by Emilio Mignone (CELS founder and president until his death in 1998). Every time a course of action was denied, Mignone attempted a different one. As a result, by the nineteen

nighties the so called “Truth Trials” began, although with strong criticism. However, shortly after and partly as a result of the process, the scene changed. The power play shifted, social perspectives changed and the relationship between the legal process and the social process was modified. With no social awareness and no claims or activism, there are no changes and laws remains dormant.

The willingness to listen to those who had repented has proven to be paramount for the justice process: the search for the truth. One often feels that certain organizations with maximalist views often succeed only at obstructing the path to truth. If the goal is to find the truth, how can one refuse to listen to someone who was there and has a story to tell?

Willingness to listen is of great value. The same can be said regarding the issue of cooperation and that of exhumations. What is most questionable is failure to listen. Unwillingness to listen. Closing one's ears.

Conclusions

The main challenge faced by stakeholders of the justice process is that of working as best possible with the biggest amount of witnesses and evidence available. On the foundation of criminal doctrine and with the conviction that perpetrators must be held accountable, the most appropriate and sustainable conviction must be sought. This conviction must be sustainable in time as a result of sufficient evidence, truthfulness of witness testimonies, and efficient accusations.

When searching for that conviction, work must be done with witnesses to present reasonable evidence and show consistency when providing said evidence to the court. The work of lawyers involves everything from the investigation to the trial. During the trial, lawyers must be rational, available to family members, explain to them that regardless of whether or not they are complainants (which is very important to some family members), cases will be prosecuted by the Public Prosecution or collective representatives. If they wish to provide additional information, they must be informed that they can approach the prosecuting parties to expedite the process.

Regardless of the procedural aspects, therapeutic work is also required. Witness testimonies, which are very emotionally charged, must prove facts and this is a great challenge.

Working with witnesses involves taking into account both the passage of time as well as the trauma of having to appear before a court. It is true that at this point in the justice process it is rare for someone to be testifying for the first time, however, the aspects described in the preparation phase are still essential. As we have said, testifying before a court is different from testifying during the investigation phase. Before the court, the public, the defense, and sometimes even the defendant, witnesses must limit themselves to “stating only the facts,” which is not always the case during the investigation phase where witnesses testify only before the defense.

Today it is possible to differentiate at least two moments in the history of testimonies. One which was “nameless”, where witnesses simply remembered someone else and who repressors were; the other today, where witnesses are testifying about their own cases. Certain topics which had been relegated or eradicated from the private sphere, such as sexual violence, are beginning to surface and today the possibility of reporting sexual assaults against disappeared persons is even under consideration.

Another issue that must be perfectly clear is who witnesses are. In this sense, it is important to remember that any person who entered a clandestine detention center is a witness. Debates regarding the potential “cooperation” with the system should not weaken the ongoing process. The same can probably be said regarding confessions from perpetrators. We understand that the debate surrounding the Argentine process for evaluating these testimonies as evidence is still pending, as is that of possibly motivating other accessories (who may not necessarily be accountable) to come forward with facts and reveal the truth of what happened during the repression.

We believe the guiding principle for participants of the justice process must be to win criminal cases and to do so they must be able to prove the facts. If to that effect lawyers believe certain witnesses can be helpful, even when other survivors disagree, said witness must still be viewed as necessary.

> In short, if what we are evaluating is the value of a piece of testimonial evidence, particularly when surrounded by the circumstances described above (spontaneity, lack of particular interests, persistence, stability, truthfulness), and if said piece of evidence is also consistent with other pieces of evidence (documentary or circumstantial), in said cases witnesses must be admitted. (Oral Federal Criminal Court No. 1 of San Martín, ruling on cases 2023, 2034 and 2043, 05/18/2010)

3. Restricting Access to Public Office for Perpetrators of Crimes against Humanity
The Argentine Experience

Diego R. Morales

Introduction

The quality of democracy when facing serious human rights violations of the past is being discussed in many Latin American countries. The different types of conflict that have arisen, the time elapsed since the events took place, and differences in processes for confronting crimes each have their own specific characteristics within this shared concern.

In countries in the Southern Cone, most of the controversy revolves around the criminal prosecution of perpetrators of serious human rights violations such as torture, murder, enforced disappearance, sexual violence in general and against women in particular, children abduction, or other related crimes, such as theft. What these countries have in common is that they have suffered similar military or civil-military coups d'états that overthrew elected governments[22] and planned and then systematically executed crimes against humanity (with logical differences in each case that have undoubtedly had an impact on future political processes). In each of these countries, dictatorships ended with the reinstatement of elections and democracy. However, they each have marked differences in terms of inclusion of transitional political parties, social stakeholders, and victims, or the constitutionality of the new system.

In Argentina, the coup d'état overthrew the constitutional government in March of 1976; and when democracy was reinstated in December of 1983 a series of institutional debates that are characteristic of the transition were sparked. How should past crimes be managed? How and how far should criminal, political, and administrative accountability extend? How should institutions be rebuilt and should existing institutions be continued?[23]

Many of these debates have not yet been closed and continue to be discussed to this day. These discussions include whether or not individuals who were linked to State terrorism should remain in public office.

[22] Their experiences may vary in terms of which political system carried out these crimes or during what period. For example, Mexico suffered "regime crimes" (*crímenes del régimen*) while countries like El Salvador experienced armed conflicts.

[23] See Comparative Peace Processes in Latin America. Jose Zalaquett Daher. Cynthia Arnson. Woodrow Wilson Center Press/Stanford University Press, Washington, D.C. (1999), 1999; L. Filippini and L. Magarell, *Instituciones de la justicia de transición y contexto poltico, en Entre el perdón y el paredón. Preguntas y dilemas de la justicia transicional* Universidad de Los Andes, Bogotá, 2005, among others.

Although during the initial phase of the reinstatement of democracy the Armed and Police Forces were a priority, due to the need to subordinate said forces to civilian authority, many institutions were subjected to political decisions. The elected government, as well as several corporations, political parties, human rights organizations, etc. challenged the measures that were to be adopted for establishing democratic institutions. Challenges and appeals were filed against individuals who were accused of crimes of the dictatorship (lustration proceedings,[24] in international terms) have been constant since then and are directly related to the debate surrounding democratization.

This paper focuses on how these measures were implemented in Argentina, while highlighting the influence of several factors, stakeholders, and partnerships intended for that effect.

Some General Concepts Relating to Challenging Access to Public Office

The reformation of public institutions constitutes a key task in countries that are transitioning away from an authoritarian regime and into a democratic system of government. During these times of change a need arises to transform the public fabric that once represented the authoritarian regime into institutions that facilitate the transition and guarantee the rule of law. In this sense, necessary institutional reforms contribute to the transitional justice process mainly in two ways. On the one hand, they create new mechanisms and operations that prevent future abuse, which is a key goal in transitional strategy. On the other, they make it possible for public institutions, particularly justice and police institutions, to seek accountability for past abuse. A reformed political institution, for example, can professionally investigate cases of abuse that took place during the authoritarian regime, and a purged judiciary can impartially prosecute cases of abuse that took place in the past.[25]

In cases such as that of Argentina, this represented a drastic change due to at least two characteristics imposed by the military government. On the one hand, the dictatorship had a tangible beginning and end. On the other, the dictatorship operated in a parallel space between illegal repression and the "legal" institutional structure. In addition to (ordinary and exceptional) legislation, there was a normative plane that consisted of a set of organizational rules and illegal actions that resulted in the structure of the official organization of the Armed Forces to be coordinated through an

[24] "This type of political disqualification, which originates from the Latin term *lustratio*, is known in English as *lustration* and means 'purging through ritualistic sacrifice.' When applied to the political sphere, this concept translates into that of 'political cleansing,' i.e., alluding to the exclusion and purging of government of agents from the repressive and authoritarian system from which it is transitioning," (M. Maxit, "*El caso 'Patti' y el desafío de asumirnos como una sociedad democrática transicional*," in *Revista jurídica de la Facultad de Derecho de la Universidad de Palermo*, Year 7, issue no. 2, November of 2006. pg. 169).

[25] Cf. Office of United Nations High Commissioner for Human Rights, "Rule-of-law tools for post-conflict states. Vetting: an operational framework," 2006.

ad hoc operational structure, among other characteristics.[26] Thereby, the entire State that had been organized to exhort terror had to be drastically transformed by a specific date, establishing institutions and practices aimed at protecting human rights.

The scope of potential measures that can be taken is broad.[27] Therefore, they can be contemplated in the Constitution (as we shall see is the case with Guatemala and Argentina) or specific laws (which is generally the case with Eastern European countries), they may result from a judicial decision (most criminal codes include restrictions to public office as a penalty) or the conclusions that arise from the Truth Commission created for prosecuting such past events.[28] These measures could also result from the combination of several obligations stemming from the Constitution[29] as well as from recommendations by bodies for enforcing and interpreting human rights treaties, as was the case in Argentina.

In addition, it is noteworthy that there was a certain level of concern regarding whether the measures adopted by the State were consistent with its other human rights obligations and if these measures constituted stable procedures instead of exceptional and circumstantial measures. In that sense, the labor of human rights organizations was always aimed at permanently strengthening the democratic system, as opposed to creating autonomous measures in particular points in time.

Therefore, due process and access to justice represent State obligations that must be ensured when measures are developed for vetting or removing officials from public office. The experiences of some Eastern European countries in regards to public administration purging measures has been the object of much criticism due to the inexistence of effective measures for determining the concrete accountability of each person removed from public office, as well as for the lack of judicial measures for challenging these removals. As a result, the scrutiny of the procedure used in the mechanism for vetting and removing individuals from public office, as well as the

[26] There are numerous sources and bibliographical references providing an in-depth view of this issue. Among others, see A. Conte and E. Mignone, "*El caso argentino: desapariciones forzadas como instrumento básico y generalizado de una política*," presented at "*La política de desapariciones forzadas de personas*," Paris, 1981; CELS, *Colección Memoria y Juicio*, Buenos Aires, 1982; *Nunca más. Informe de la Comisión Nacional sobre la Desaparición Forzada de Personas*, Eudeba, Buenos Aires, 1984; CELS*, Terrorismo de Estado. 692 responsables*, CELS, Buenos Aires, 1986; J. L. D'Andrea Mohr, *Memoria debida*, Colihue, Buenos Aires, 1999; F. Mittelbach and J. Mittelbach, *Sobre áreas y tumbas. Informe sobre desaparecedores*, Sudamericana, Buenos Aires, 2000.

[27] For more on these measures, see the thorough work of M. Maxit, "*El caso 'Patti' y el desafío de ser una sociedad democrática transicional*," op. cit.

[28] The recommendations on the Truth Commission's *Report* for El Salvador include measures for separating the Armed Forces and public administration as well as restrictions on access to public office for the individuals that had been investigated by the Commission to determine serious human rights violations in the country. See recommendations directly resulting front the final Investigation-Report of the Truth Commission for El Salvador.

[29] By that we mean article 36 of the Argentine Constitution. For more on the correlation between the constitutional system and human rights obligations, see V. Abramovich, "*Una nueva institucionalidad pública. Los tratados de derechos humanos en el orden constitucional argentino*," in V. Abramovich, A. Bovino and C. Courtis (Ed.), *La aplicación de los tratados de derechos humanos en el ámbito local. La experiencia de una década (1994-2005),* CELS and Del Puerto, Buenos Aires, 2007.

respect for due process throughout the use of these mechanisms as well as the possibility of later judicial review and characterization (or lack thereof) of said decision as a political and not a legal issue shall all constitute relevant topics for establishing effective measures for challenging and removing individuals in compliance with other State obligations.

Transitional Justice Mechanisms in Argentina and the Role of Purging Strategies

Argentina does not have a formal vetting mechanism in the traditional sense of the word. Because of massive participation from members of the Armed and Police Forces in State terrorism during the last military dictatorship, this translated into a major deficiency in the transnational "package" of measures established by the Argentine State.[30]

With the advent of democracy in 1983 it was clear that the main question facing the authoritarian government would revolve around serious human rights violations.[31] The search for truth, the investigations of these facts, and the sanction through criminal prosecutions of those accountable for the violations committed during the dictatorship represented the goals of both the State and civil society for redesigning this new consensus. From there, it was possible to establish a commission for reporting practices of the dictatorship and the status of individuals who even today remain disappeared.[32] In 1985, the Federal Appeals Court convicted the heads of the three first Military Juntas for crimes of the past.[33] Meanwhile, several legal investigations were making advancements in terms of finding the individuals who had been part of these serious violations.

It follows that, if the advancement of these investigations and the subsequent criminal sanctions against the perpetrators of these crimes had been consolidated at the earlier state, the revealing of facts and ultimate sanction would pose a limitation or restriction against the fulfillment of or access to public office of those involved in these processes.

Nevertheless, as of 1986 the goal of revealing the truth and seeking justice through criminal prosecutions faced many obstacles. These include failure in developing an investigation and sanction strategy based on the idea of self-purging of the Armed

[30] V. Barbuto, "Strenghtening Democracy: Impugnation procedures in Argentina", *Justice as prevention. Vetting public employees in Transitional Democracies*, ICTJ, 2007.
[31] From 1976 to 1983, a military junta (board) led the State. This government's main form of social control consisted of massive human rights violations. The report drafted by the National Committee on the Enforced Disappearance of Persons (*Comisión Nacional sobre Desaparición Forzada de Personas*, CONADEP) revealed the systemic practices used by the military *junta*: enforced disappearances (the report can concretely identify nine thousand disappeared individuals), torture, bans on protests, and other illegitimate actions.
[32] CONADEP was created in 1983 through Decree 187, the purpose of which was to reveal the truth behind State terrorism and was to carry out its functions for one hundred and eighty days.
[33] The Argentine Federal Appeals Court issued its ruling on December 9 and convicted members of the three military forces.

Forces,[34] the sanction of Full Stop (*Punto Final*)[35] and Due Obedience (*Obediencia Debida*) Laws,[36] as well as lack of diligence on behalf of the Judiciary for revealing the fate of disappeared persons, the granting of pardons or amnesties[37] to individuals who had been convicted for crimes of the past.

This exchange of justice for impunity had an impact on the measures for vetting individuals who had been involved in the dictatorship and were operating within State structures or attempting to reach public office.

However, since the constitutional reform of 1994 that banned those who had forcefully interrupted democracy from holding public office[38] (which can be understood in the framework of a transitional constitutional process)[39] victims, their families, and human rights organizations have strategically used several pre-established mechanisms to transform them into procedures for vetting current and future officials on the basis of different justifications and in accordance with the advancement, or lack, of the process of truth and justice in Argentina. Processes were created for vetting military promotions and removing members of the Armed Forces, the vetting or removal of officials from within police forces, the vetting of members of the Judiciary,[40] as well as the vetting of officials that held elective offices, among other purposes.[41]

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[34] The procedure that was established left investigations in the hands of military justice. Article 10 of Law 23,049 granted supervising powers to the Federal Appeals Court over the actions of the Armed Forces Committee as well as the power to rule on cases of noncompliance on behalf of the Committee. Eventually, on October 4, 1984, the Appeals Court finally took over the investigation altogether.

[35] Law 23,492, known as Final Stop Law, closed the judicial investigation phase in December 1996.

[36] Law 23,521, known as the Due Obedience Law, banned the criminal prosecution of subordinate officers.

[37] In 1989, President Carlos Menem pardoned the heads of the military *juntas* of the last dictatorship who had been convicted during the *Juntas* Trials.

[38] We are referring to article 36 of the Argentine Constitution that reads: "This Constitution shall remain in force even when its observance is suspended by acts of violence against the institutional order and political system. Said acts shall be irredeemably annulled. The perpetrators of such acts shall be subject to the sanction contained in article 29, and forever banned from holding public office and excluded from any pardons or commutation of sentences." On that issue, Margarita Maxit wrote that, "article 36 of the Argentine Constitution introduces the concept of permanent ban from holding public office as a relevant and necessary normative and political sanction for those who have perpetrated any acts such as those described above [...]. Through this constitutional clause, the duty of deeming those who have attempted against the democratic order as unfit to hold public office is added to that of sanctioning attempts against democracy and prosecuting and punishing those who have committed massive human rights violations." (M. Maxit, op. cit., pg. 168).

[39] "Transitional constitutionalism responds to a previous repressive government through principles that delimit and redefine the incumbent political system. These kinds of constitutions are retrospective and simultaneously aimed at the future, while containing a concept of constitutional justice that is typical and characteristic of transitions [...]. This affects constitutional interpretation. What the transitional perspective and the 'originalist interpretation' theory have in common is their understanding that constitutions are better understood in their historical and political context and that constitutions have statutory purposes that are transforming and dynamic [...]. As time progresses, transitional constitutional clauses will operate in a dynamic way, with a number of interpretative consequences" (Ruti Teitel, "Transitional jurisprudence: the role of law in political transformation," *The Yale Law Journal*, New Haven, 1997).

[40] In this case, see the work by M. J. Sarrabayrouse Oliveira, "*Poder Judicial y dictadura. El caso de la Morgue Judicial,*" *Cuadernos de Trabajo del Instituto de Estudios e Investigaciones*,

To some extent, these *vetting* actions[42] accompanied the process of truth and justice and constituted an innovative strategy in the struggle of the human rights movement, both as an "alternative" before the lack of criminal process or its "supporting feature." In addition, these processes have created an opportunity for recovering and gathering data about the background of current or future public officials.

Similarly, these actions could be justified from different sources. One of these sources was the report on the impunity of perpetrators of human rights violations by Louis Joinet[43] who believes such responses generate for States the obligation to repair and refrain from repetition. The author believes that in order for victims not to be subject to violations of their dignity, there is an obligation, among others, to "remove from public office any high officials involved in serious human rights violations. These measures must be administrative and not repressive, as they are preventive in nature and officials must still be ensured their guarantees."[44]

Juan Méndez' argument was also used.[45] He believes that the obligation to purge and remove perpetrators of past events from public office is an autonomous State obligation that is additional to that of investigating the facts, making them public, prosecuting, and sanctioning those responsible, as well as making due reparations. There is an obligation to "remove from the police forces all those who have committed,

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no. 4, *Defensoría del Pueblo de la Ciudad de Buenos Aires, Facultad de Filosofía y Letras*, Buenos Aires, 2003. It is there highlighted that administrative investigations for determining the accountability of Judiciary officials for events that occurred during the last dictatorship at the Judicial Morgue has been used by the Senate to prevent the necessary quorum required for judges to act during the period between 1976-1983, in order for the Judiciary to continue functioning during democratic times.

[41] V. Barbuto, "Impugnation Procedures in Argentina: Actions Aimed at Strengthening Democracy," research carried out in the framework of the Vetting Research Project of the International Center for Transitional Justice, New York, 2007.

[42] In the Spanish version of this paper, the terms "*impugnación*" and "vetting" are used interchangeably. The former is the local word used to define these types of challenges while the latter is the international term with which these processes are known. Despite the above, these terms are not similar; therefore, certain clarifications must be made as both terms generate certain controversy. The main issue is that the actions carried out by human rights organizations to remove public officials who have violated human rights relate not only to the idea of justice, but also to the strengthening of democratic institutional procedures created to that effect. In that sense, the idea is not so much that of "purging" in the sense given to the term in the Eastern European case, for example, or that of a concept of vetting that usually refers to an actor using his/her power of "veto" from an unquestionable and/or superior position. In general, debates, regulation changes, public ethics norms, and other forms of creating solid processes that do not depend on only a few stakeholders have been opened, while permanent mechanisms within ordinary institutions have been transformed.

[43] Final revised report on the impunity of perpetrators of (civil and political) human rights violations by L. Joinet, in accordance with Resolution 1996/119 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. United Nations, E/CN.4/Sub.2/1997/20/Rev.1, October 2, 1997.

[44] Accordingly, Joinet recommends the adoption of "administrative or other measures related to State agents involved in serious human rights violations."

[45] J. Méndez, "*Derecho a la verdad frente a las graves violaciones a los derechos humanos*;" in M. Abregu and C. Courtis (Ed.), *La aplicaciones de los tratados internacionales sobre derechos humanos ante los tribunales locales*, Del Puerto, Buenos Aires, 1997, pg. 518.

ordered or tolerated"[46] serious human rights violations. The obligation to remove these people from government institutions is "one of the basic requirements for the effectiveness and respect of human rights in post-transition regimes, which is the right of a society to have institutions that are democratic and free from human rights violators."[47]

Another source used in vetting processes was the decision of the Inter-American Human Rights Commission (IAHRC) in the "Ríos Montt" case,[48] which considered that the measures for removing officials from public office who have attempted against the constitutional order are aimed at protecting and defending the democratic system. The IAHRC ruled on a de iure ban established in the Constitution of Guatemala against allowing those who have attempted against the constitutional order of the democratic system from running for president. The Commission concluded that this constitutional clause did not violate article 23 of the American Convention on Human Rights (which refers to political rights), as this is a customary constitutional clause that is deeply rooted in Central America and is aimed at protecting and defending the democratic system.

The Human Rights Committee, which is responsible for enforcing the International Covenant on Civil and Political Rights, concluded that in the case of Argentina, the State was obligated to adopt necessary measures for excluding those suspected of serious human rights violations during the last military dictatorship in order to change the "feeling of impunity."[49] In its final observations in November 2000, the Committee highlighted that:

> 9. Despite the positive measures recently taken to repair past injustices, including the abolition in 1998 of the Due Obedience and Full Stop Laws, the Committee is concerned that many people that acted accordingly with those laws continue to hold military or public office, and some have even been promoted in subsequent years. Therefore, the Committee once again expresses its concern regarding the feeling of impunity against perpetrators of serious human rights violations under the military government.[50]

In 1995, the Committee recommended that the Argentine State:

> [...] Establish adequate procedures for ensuring that members of the Armed and police forces against whom there is sufficient evidence to prove their

[46] J. Méndez, op. cit., pg. 526.
[47] J. Méndez and G. Chillier, "*La acción del Congreso y las obligaciones internacionales de la Argentina en materia de derechos humanos*," in AAVV: "*El caso Bussi. El voto popular y las violaciones a los derechos humanos*." Imprenta del Congreso de la Nación, Buenos Aires, 2002, pg. 45 and subsq.
[48] Inter-American Human Rights Commission, case 10 804, "Ríos Montt vs. Guatemala", in *1993 Anual Report*.
[49] Final Observations of the Human Rights Committee: Argentina. 11/Mar/2000. CCPR/CO/70/ARG, available at <http://www.unhchr.ch/html/menu2/6/hrc/hrcs68.htm#70th>.
[50] Final Observations of the Human Rights Committee: Argentina. 11/Mar/2000. CCPR/CO/70/ARG, available at <http://www.unhchr.ch/html/menu2/6/hrc/hrcs68.htm#70th>.

> involvement in serious past human rights violations be removed from their positions.[51]

Therefore, said resolution recommends that:

> Serious violations of civil and political rights during the military government must be prosecuted for as long as necessary with whatever retroactive effects necessary to ensure the prosecution of perpetrators. The Committee recommends that rigorous efforts be made to that effect and measures be taken to ensure that those who participated in serious human rights violations are removed from positions in the Armed Forces or Public Administration.[52]

Finally, the position of the Argentine Electoral Chamber in the "*Muñiz Barreto Juana y otros s/impugnación de candidatura de Luis A. Patti*" case (a case of electoral vetting that we will analyze below) are worth noting, where the judicial tribunal took into special consideration the existence of a criminal investigation related to serious human rights violations and, therefore, considered that the actions of the electoral college when evaluating the candidate's eligibility must also involve analyzing potential obstructions of justice that could arise from the acceptance of their nomination.

Ultimately, whether we understand the obligation of vetting and removing from public office as a form of reparation or non-repetition (Joinet), as a basic requirement for the effectiveness and respect of human rights (Méndez), as an obligation for the protection and defense of the democratic system (IAHRC), as an obligation to overcome the feeling of impunity (Human Rights Committee), or as a form of supporting ongoing criminal prosecutions (Argentine Electoral Chamber), the reality is that States, particularly Argentina, have an duty to take measures to comply with the obligation of vetting or removing current or future officials who have committed serious human rights violations, as a response to their actions.

Mechanisms for Vetting and Removing Public Officials in Argentina

We would like to highlight the arguments that supported the development and conclusion of mechanisms and procedures for vetting current and future public officials who have committed serious human rights violations in Argentina. First, we will describe the ways in which human rights organizations have participated in debates surrounding promotions within the Armed Forces. Second, we will focus on the vetting of Luis Patti's nomination for Congress since this has generated the most controversy over the potential validity of these kinds of measures in democratic societies. When analyzing the Argentine experience, it can be said that these mechanisms promote an additional tool for remembering the past and taking action in the present.

[51] United Nations Human Rights Committee, CCPR/C/79/Add.46, Meeting 1411, Session 53, April 5, 1995. That highlighted above belongs to us.
[52] Final Observations of the Human Rights Committee: Argentina. 11/Mar/2000. CCPR/CO/70/ARG, available at <http://www.unhchr.ch/html/menu2/6/hrc/hrcs68.htm#70th>.

VETTING THE PROMOTIONS OF ARMED AND POLICE FORCE PERSONNEL

Among the mechanisms driven by the human rights movement as part of a strategy to bring democracy to post-dictatorship institutions arose the issue of promotions within military ranks, for which Senate approval is required.

This mechanism constitutes a complex system that involves the Armed Forces, the Executive, and Legislative Powers. The approval or disapproval of military promotions is basically a political decision involving the designation of public officials.[53] In accordance with this Norm, the Executive submits to Congress a list of which officers will be promoted to higher ranks. This list is drafted in accordance with Law 19,101 (regulating Military Personnel). A review board is then responsible for determining whether the proposed members meet established requirements. Then, the House of Representatives forwards the list submitted by the Executive to the Agreements Commission (*Comisión de Acuerdos*). This Commission has the power to decide on all approvals requested by the Executive regarding public officials.[54] Each Chamber then issues a decision that is subject to consideration and vote by the full House.

From the reinstatement of democracy until 2003, all governments have supported the promotion of individuals involved in serious human rights violations and have defended such candidates before the public. In 1987, the government of Raúl Alfonsín (1983-1989) nominated Alfredo Astiz for promotion, a notorious repressor in the clandestine detention center in the School of Naval Mechanics (*Escuela de Mecánica de la Armada*, ESMA).[55] During that year, the Review Board (*Junta de Calificaciones*) of the Ministry of Defense nominated him for promotion to lieutenant commander. The Minister of Defense supported this nomination by claiming that those who had been benefited by Due Obedience laws could carry on their military careers as usual. There was a case with even stronger institutional repercussions in 1993, during the administration of Carlos Menem (1989-1999). The case involved the promotion of Juan Carlos Rolón and Antonio Pernías, known members of ESMA's Tasks Unit (*Unidad de Tareas*).

In regards to Astiz, the House of Representatives discussed the possibility of vetting his promotion as a result of claims made by human rights organizations. President Alfonsín supported this promotion but simultaneously ordered Astiz' retirement. This order was never followed.[56] In the case of Rolón and Pernías, information provided by

[53] Article 99, section 13 of the Argentine Constitution grants the President power to name "the country's military personnel: with approval from the Senate, granting positions and rank to higher officers of the armed forces as well as the battle field."
[54] Article 70 of the Regulation of the Senate.
[55] ESMA functioned as a clandestine detention center during the last dictatorship. Since the reinstatement of democracy it has turned into an icon of the repression.
[56] In 1990, Astiz was convicted in absentia by a French court for kidnapping and causing the enforced disappearance of French nuns Alice Domon and Léonie Duquet. He was also accused of of the same crimes aganist a group of members of Madres de Plaza de Mayo in 1977. However, in 1998 he was merely discharged from the military after telling Tres Puntos Magazine that he is "technically better prepared to kill a politician or a journalist" than any other man. Through Decree 83/98, the Executive discharged Astiz from the military which resulted in the loss of all the rights he had acquired while he was a member of the military, but he also

the victims and their families regarding their participation in serious crimes[57] generated a public scandal of massive proportions that ultimately resulted in the resignation of the Vice-Minister of Defense and three undersecretaries of said Ministry. The debate in the Argentine Senate regarding these promotions extended to 1995, and in August of that year both officers were forced to retire.[58]

After this incident, Congress began requesting official background information on these military members from the Permanent Assembly for Human Rights (*Asamblea Permanente por los Derechos Humanos*, APDH)[59] and CELS. A similar request was made before the Argentine Undersecretariat of Human Rights (currently with Secretariat status), which stored the files that belonged to CONADEP and other files made after the initial claim. This meant that not only questionings, but also documents began to be included in the procedure. These official requests opened the possibility of holding meetings and participating in hearings before the Senate's Agreements Commission.

It is also noteworthy that reforms in the publicity procedure as well as the opening of the process to the public which were ordered by the Regulation of the Senate in 2002, driven among other factors by human rights organizations, broadened the scope for broadcasting these lists and made it possible to object to them. These lists sent by the Executive, for example, were to be discussed in a public session and were made available to journalists in the Chamber for possible objections:

> Citizens can raise objections within seven working days after the list is submitted to Congress and is read in the Hall. While the lists are under consideration, the Commission also hears observations regarding nominations.[60]

In addition, the Argentine Congress also acknowledged different kinds of publicity and citizen participation. On the one hand, public sessions can be held in which citizens are able to attend debates and have access to their transcripts. Meanwhile, as of 2002, public hearings are possible.[61] According to the regulation, a public hearing is:

> [...] an opportunity for citizen participation in the legislative decision-making process, which consists in opening a space for individuals and non-

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recovered his freedom. In May of that year, he was subject to a civil suit and his assets were seized.

[57] *Página 12*, "*Premios y castigos*," December 28, 1993.

[58] During 2001, Pernías was detained by judge Bonadío under charges of causing a disappearance and theft. At that time, he again defended his actions and complained to the judge that he was not being tried "as a veteran, but as a common delinquent" (*La Nación*, "*Pernías and Rolón have been detained on the count of their involvement in crimes carried out during the dictatorship that are being investigated in different cases*," 22/Aug/01).

[59] APDH was founded in December 1975 and defines itself as the result of a self-convened group "of people from diverse social, political, intellectual sectors, and union as well as religious organizations, in response to the increasing violence and forceful ineffectiveness of the most basic human rights" throughout the country. During the dictatorship, APDH did extensive work gathering testimonies and information about the repression.

[60] Article 22 of the Regulation of the Argentine Senate.

[61] Public hearings for designating judges were an exception to this rule adopted as of 2003.

> government organizations who could be affected by these decisions or have a particular interest in them to express their opinion. The purpose of this hearing is for the committee responsible for studying an issue or project to have simultaneous and equal access to the different viewpoints on the issue, by coming into direct contact with stakeholders.[62]

These promotion vetting mechanisms generated other important changes. First, it created the possibility for the military to discharge members in the event of questioning. In that sense, the Ministry of Defense incorporated the practice of adding a military file on nominated members. This information has proven paramount before the lack of official documents.

Another example is that of vetting procedures for members of the police forces. As is the case with the Armed Forces, there was no formal vetting procedure for severe human rights violations carried out in the framework of State terrorism. Therefore, since 1983, human rights organizations have reiterated their request for removing members of the forces who have committed crimes during the dictatorship. These requests were made before the Ministry overseeing the forces (Ministry of the Interior in some cases and Ministry of Justice, among others, in accordance with subsequent reforms in government structure).

Once again a concrete situation sparked the public debate regarding the issue surrounding individuals who have participated in serious human rights violations holding public office. In 1996, Carlos Menem's administration designated as chief of the Center for Victim Orientation of the Federal Police (*Centro de Orientación a la Víctima de la Policía Federal*) police commander Ricardo Scifo Módica. On May 27, 1996, *La Nación* (local newspaper) published a report explaining the new department's mission. Some survivors of the clandestine detention centers known as *Club Atlético, El Banco and El Olimpo* recognized the commander as a member of the Task Group that went by the name of *"Alacrán"* (Scorpion).[63] Both human rights organizations and certain legislators publicly vetted this nomination[64] while CELS wrote a letter to Carlos Corach, Minister of the Interior, expressing its concern over the nomination of this official. Consistent with the actions of human rights organizations throughout the democratic government, this request was based on the need to remove him from office through democratic institutional mechanisms:

> Because of the serious reasons expressed above, this institution believes that this nomination must be vetted since it is unethical, not only from a domestic point of view but from that of humanity as a whole, and will undoubtedly lead to reactions that are detrimental to the constitutional government and the Federal Police. Argentineans long for peaceful coexistence, founded on principles of truth and justice. To that effect, these kinds of unjust vindications must be prevented, as they conspire against such principles. Meanwhile, the

[62] Article 99 of the Regulation of the Argentine Senate.
[63] There were also judicial records of his participation since he had been identified as a repressor in the preliminary hearing of 1985.
[64] On behalf of the UCR these public vettings were made by Jesús Rodríguez and Federico Storani, and on behalf of Frepaso, Mary Sánchez, Alfredo Bravo and Alfredo Villalba.

> Argentine state has signed, ratified, and given Constitutional hierarchy to international treaties that would be violated if such measures were adopted.[65]

However, as far as security forces, no substantial advancements were made in establishing procedures for running background checks for serious human rights violations on members of these forces.[66] However, the debates generated by this deficiency, in addition to other questions raised by the violence and corruption of police forces, ultimately managed to lead to healthier mechanisms when establishing the Airport Security Police (*Policía de Seguridad Aeroportuaria*). In fact, in 2006, article 36 of Law 26,102, established that:

> Without prejudice to the stipulations contained in the above article, *the following are banned from joining the Airport Security Police*:
> 1. Any individuals who have participated in forceful attempts against the institutional order and democratic system, in accordance with article 36 of the Argentine Constitution and Book II, Title X of the Criminal Code, even with a pardon or waived sanction.
> 2. *Any individual with a record of human rights violations as established in the files of the Human Rights Secretariat of the Ministry of Justice and Human Rights or any other organization or public dependency that may replace it in the future.*

It follows that, inasmuch as the Airport Security Law, members cannot have records of human rights violations. This is understood to include serious human rights violations of the past.

So far it may be said that inaction from the legal system up to 2005, due to laws and amnesty decrees, hindered the identification of perpetrators, but not the possibility, in other situations, of resorting to the political "alternative" of vetting and removing these officials from office for their participation in crimes during the dictatorship, without violating the rights they have acquired through their positions. The Argentine experience has proven the possibility of establishing ad hoc mechanisms that have managed to salvage this situation.

After 2005, there was a concrete need to define vetting and separation mechanisms to "support" criminal prosecution strategies. Particularly after the questioning of lower court judges who were reported and/or under investigation in criminal prosecutions for their responsibility in serious human rights violations.

Next we will focus on the process for vetting nominations for elective positions.

VETTING NOMINATIONS FOR ELECTIVE OFFICE - THE CASE OF CANDIDATE LUIS A. PATTI

[65] Letter from CELS to Minister Carlos Vladimiro Corach, dated July 17, 1996.
[66] V. Barbuto, "Strenghtening Democracy: Impugnación procedures in Argentina," op. cit.

In June 2009, the Electoral Committee[67] decided that Luis Patti could not be a congressional candidate in the elections that would be held on the 28th of that month as proposed by *Alianza Con Vos Buenos Aires*, and *Movimiento por la Dignidad y la Independencia*, and *Partido Unidad Federalista* (PAUFE). The decision ensured the continuity of the judicial process for establishing Luis A. Patti's responsibility for his participation in kidnappings, tortures and the murder of Gastón Gonçalves and Diego Muniz Barreto as well as other human rights violations against Juan Fernández, Carlos Souto, Luis and Guillermo D'Amico and Osvaldo Ariosti during the last dictatorship. On April 14, 2011, the Federal Oral Court of San Martín sentenced him to life in prison.

In addition, the decision ended a ten-year process in which victims, relatives and human rights organizations had sustained that his nomination was incompatible with human rights law as he was suspected of active participation in serious human rights violations in the past.

In fact, in 1999, CELS had vetted Patti's nomination for governor of the province of Buenos Aires. At that time, in accordance with the legal term established in the provincial Electoral Code, the provincial Electoral College was asked[68] to verify the constitutional fitness of existing requirements for the position of governor. However, in a decision that was merely half a page long, the Committee determined its powers were those of formal control only (i.e. age, domicile, etc.), as the Electoral Code contemplated no other grounds for challenging a nomination.

In 2005, Patti gathered the necessary votes to become a deputy. However, on May 23, 2006, the House of Representatives, by special majority,[69] decided not to admit him as the Representative for PAUFE for the Province of Buenos Aires.[70] To that effect, the arguments presented and information submitted by the victims and human rights organizations were taken into account. Based on article 64 of the Argentine Constitution, the Committee[71] evaluated the elected Representative's possible participation in serious human rights violations committed during the last military dictatorship and concluded that he met the ethical and moral standards necessary to join Congress.

Patti resorted to the electoral justice system, as he deemed the House of Representatives lacked the authority to evaluate the ethical or moral eligibility of elected Representatives. Although in the first instance court judge Servini de Cubría

[67] The Argentine Electoral Committee is the only appeals court in electoral matters and its decisions are mandatory for first instance courts. See competency and jurisdiction at <www.pjn.gov.ar>. Judges include Santiago H. Corcuera, Alberto Dalla Via and Rodolfo E. Munne. The Appeals Court Secretary is Felipe González Roura.

[68] Consisting of the presidents of the Higher Justice Court, the Court of Audits, and three Appeals Courts of the capital district. See article 62 of the Constitution of the Province of Buenos Aires.

[69] Special majority consists of two-thirds of the House of Representatives, as follows: 162 affirmative votes and 62 negative votes.

[70] According to data from the Electoral Committee, PAUFE obtained 394 398 votes, which represents 5.25% of votes. See <http://www.pjn.gov.ar/electoral/documentos/Buenos_Aires-1235-d.pdf>.

[71] Article 64 of the Argentine Constitution establishes that "each Chamber may decide on the validity of the rights and rank of their members."

confirmed the House of Representative's decision, in October of 2006, the Electoral Committee[72] left the decision standing. In its decision, the Committee strongly criticized the procedure followed by Congress, and deemed that the contents of Article 64 of the Argentine Constitution are also contemplated in Articles 60 and 61 of the Electoral Law. These articles establish a procedure for vetting the nomination of candidates in general on the foundation of noncompliance with the constitutional requirements for holding elective office. In the Electoral Committee's view, the only ones with authority to decide on issues relating to the vetting of candidates are electoral judges. Once this venue has been exhausted, it is no longer possible to evaluate and control the position of elected candidates.[73]

The efficacy of the procedure for running background searches for serious human rights violations during the last military dictatorship as sustained by the Electoral Committee was uncertain and practically null. In many opportunities, the Judiciary was able to interfere in cases where elected officials were being vetted for crimes committed during the dictatorship, and in several cases, it found formal ways to avoid deciding on vetting requests. Ultimately, in September 2006, the House of Representatives submitted an extraordinary federal appeal so the Supreme Court may evaluate the legitimacy or lack thereof of the decision to remove the elected Representative.

While this process was being resolved, Patti was detained without bail and prosecuted for several crimes against humanity. Therefore, on April 8, 2008, while Patti was being held at a criminal detention center, the Argentine Supreme Court of Justice (*Corte Suprema de Justicia de la Nación*, CSJN) confirmed the invalidity of the Representative's removal by the House and authorized him to swear into office,[74] thus making it possible for him to plead immunity (privileges) to suspend his detention. In its decision, the Court, after hearing from the Attorney General,[75] issued a one page decision and referred to the arguments expressed in the "Bussi" case[76] the year before. The majority opinion was that the House had exceeded its supervising powers (as conferred by article 64 of the Argentine Constitution and that, in the Court's opinion, are merely restricted to formal requirements), as it was evaluating aspects of the candidate's ethical fitness, which it was not authorized to do, and therefore, nor was it authorized to prevent the incorporation of the elected official.

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[72] Argentine Electoral Comittee, "*Patti Luis Abelardo s/promueve acción de amparo c/Cámara de Diputados de la Nación*," ruled on September 14, 2006.
[73] See Argentine Electoral Committee, ruled on June 18, 2009, in "*Muniz Barreto Juana María y otros s/impugnan candidatura a Diputado Nacional*," paragraphs 15, 16, and 17.
[74] The decision in the "Patti" case as issued with four votes in favor (Ricardo Lorenzetti, Carlos Fayt, Carmen Argibay, and Raúl Zaffaroni) and 3 dissident votes, Elena Higton de Nolasco, Enrique Petracchi, and Carlos Maqueda, who believed Congress' decision to reject the incorporation of Patti into the House was consistent with Constitutional norms and applicable international human rights treaties.
[75] The Attorney General's recommendation, issued on July 19, 2007 by Luis Santiago González Warcalde, was consistent with the Supreme Court's decision, but was surprising and inconsistent with its previous recommendation in the "Bussi" case, where the Attorney General had praised the decision by the House of excluding a former repressor for reasons of ethical, moral, and unconstitutional unfitness.
[76] CSJN, "*Bussi, Antonio D. c/Estado nacional*," ruled on July 13, 2007.

Because Patti had been prosecuted by a criminal court and sent to jail, when said decision was notified his defense attorneys requested, as predicted, immediate release from police custody under the grounds of immunity. The Federal Appeals Court of San Martín, i.e. the intervening court, decided to suspend "the effects of his detention until he is removed" and on April 16, 2008 the repressor was released.[77]

On April 23, the House, in full, decided in favor of his removal which was approved at dawn the following day with 196 votes in favor,[78] 9 against,[79] and 11 abstentions.[80] As a result, Congress deprived him of his immunity and federal justice reordered his detention.

Main criticisms against the Supreme Court's ruling, which enabled Patti's release during eight days, revolved around the fact that the Court failed to correctly evaluate the House's vetting or to sufficiently justify a decision of such paramount institutional relevance. The Court's decision ignored Argentina's international obligation to take measures to prevent individuals suspected of crimes against humanity from holding public office. The Court failed to evaluate the exceptional nature of this case as a legacy of State terrorism and the subsequent impunity with which thirty years later the prosecution and timely conviction of individuals responsible for atrocious human rights violations during the last dictatorial period were hindered. The Court also failed to consider the current status of judicial actions against Patti; where in some cases, he had already been prosecuted and held in custody without bail for alleged crimes against humanity.

For these reasons, the Argentine Electoral Committee's decision not to authorize Luis Patti's nomination, when he was being prosecuted for serious human rights violations, acquires particular significance.

Indeed, the Committee expressed two key aspects in its compendious decision. First, because Patti had been removed in 2008 by the House of Representatives, he was not able to aspire to that same position until the criminal prosecution that motivated his removal was resolved. Second, the Electoral Committee considered that allowing his candidature could obstruct the legal investigation against him because if he was elected, he could invoke parliamentary privileges for his release. The Electoral Committee considered that, as these were crimes against humanity, all government branches had the obligation to act together in his investigation and prosecution. As

[77] On that same day, CELS urged the House to meet and discuss the issue, reminding them that "there are precedents of other cases of crimes against humanity that make his removal possible with no need for the House to swear him in," and claimed that, "until he is detained again, authorities should talk to the media to prevent flight and protect witnesses, relatives, lawyers, and judicial officials who are investigating him."

[78] Votes in favor included that of the incumbent party (*Frente Para la Victoria*) and its allies in the UCR and *Encuentro Popular*, as well as opposition representatives from *Coalición Cívica*, *Partido Socialista*, *ARI Autónomo*, part of the UCR, and other unipersonal Representatives. After arguing against, Representatives from *Movimiento Popular Neuquino* also voted in favor.

[79] Other votes against his removal were made by Representatives from PRO, their allies in *Recrear*, democrats from Mendoza, "*radicales*" Héctor del Campillo and José Ignacio García Hamilton and the Represenative from PAUFE, Adriana Tomaz.

[80] Eight (8) Representatives from UCR and 3 from Frejuli who report to the Rodríguez Saá brothers refrained from voting.

predicted above, on April 14, 2011, Patti was convicted by Federal Oral Court no. 1 of San Martín for the events that lead to his removal in 2008.

"Patti" is an emblematic case because during the last ten years there have been several attempts to vet different candidates. These included developing strategies and policies aimed at preventing such vettings from becoming concrete events affecting one particular candidate, and instead transforming into a procedure in which both those vetting as well as those being vetted have equal tools for defending their position so that those who decide on the admissibility or inadmissibility of the vetting may do so through regulated and public procedures. In turn, the vetting or removal process separates itself from mere vengeance from one political group to another and takes on new meaning in the sphere of ethical values and principles of a cosmopolitan view of human rights.[81]

This emblematic case has another particular characteristic. Luis Patti's candidature for governor of the province as a member of the House of Representatives was based on a discourse of order and a "firm hand" against common crime, as well as on the basis of an explicit contempt for established legal procedures for investigating crimes. In public statements, Patti had confirmed that in order to investigate a crime, the police had to commit at least four or five crimes of their own.[82]

It is also noteworthy that in his electoral campaign he never denied the crimes and tortures of which he was accused during the dictatorship or after the reinstatement of democracy. So Patti embodied, as few characters did, an electoral option that proposed the supremacy of illegal police procedures for maintaining local order above those established by the law or any other means of social conflict resolution. This pitiful political speech and viewpoint is supported by a large number of people who have repeatedly voted for him.

However, the Argentine Electoral Committee's decision supported the debate generated in Congress regarding the establishment of legislative criteria for setting the requirements for running for public office. In fact, the Argentine Electoral Committee stated:

> That it is correct to postulate that *the global solution to problems such as the one that motivates this controversy surrounding the legislator's decision, as the general regulation of political rights is well within the legislator's powers.*

[81] I have taken Boaventura de Sousa Santos's concept of cosmopolitan view of human rights to express a particular kind of ethical or moral values that result from the struggle between oppression and refrain from imposing local values that have become universal through the public domain. ("*Hacia una concepción multicultural de los derechos humanos*," *Lua Nova*, no. 39, Cedec, San Pablo, 1997).

[82] "I'm going to be very clear. In order to investigate a crime, the police have to commit no less than four of five crimes of their own. Otherwise, no facts can be revealed. This is true of Argentina and any other country in the world. What crimes are we talking about? Illegal detention, illegal searches, illegal entry, among others. When Police Commissioners fail to reveal the facts of a case it's because, in our jargon, they're not going all the way." (*Clarín,* 4/OCT/90). In: "*Patti: Manual del buen torturador*." Dossier of the Documentation Center of CELS, 1999.

> But it is wise to say that the individual solution to these problems, when brought before courts in cases for which they have competency, belongs to the Judiciary; not to legislate on the issue, but to resolve the case for the purpose of "enforcing justice" as established in the Preamble (cf. arg. Ruling 312: 496).[83]

Law 26,571, known as the political party reform law, which was intended to amend Law 23,298, was sanctioned on December 11, 2009 and states:

> Article 15. Article 33 of the Organic Law Regulating Political Parties, i.e. Law 23,298, shall be rephrased as follows:
>
> Article 33. The following are banned from being nominated for primary and general elections to public elective office and from being designated to hold such office:
>
> a) Those excluded from the electoral roll as a result of existing legislation;
>
> b) Higher and lower personnel of the Argentine Armed Forces, whether active or retired, called to serve;
>
> c) Higher and lower personnel of the national and provincial police forces, whether active or retired, called to serve;
>
> d) Permanent judges and judiciary officials whether domestic, provincial, or of the Autonomous City of Buenos Aires, as well as municipal claims court judges;
>
> e) Higher management or power of attorney holders of companies that hold service company or public works concessions for the Nation, provinces, Autonomous City of Buenos Aires, municipalities or autarchic or decentralized entities or companies that operate gambling businesses;
>
> f) *Individuals who have been prosecuted for genocide, crimes against humanity or war crimes, illegal repression constituting serious human rights violations, torture, enforced disappearance of persons, children abduction, and other serious human rights violations or whose criminal conducts are contemplated within the Rome Statute as crimes competing to the International Criminal Court for any events that took place between March 24, 1976 and December 10, 1983.*
>
> g) Individuals convicted of any of the crimes described in the previous paragraph, even when the conviction is not enforceable. (The above text was highlighted by the author.)

Political parties may not nominate candidates for domestic public elections in violation of the above. It follows that when submitting their nominees, political parties must follow this rule and cannot nominate any candidates that are being investigated for

[83] Argentine Electoral Committee, "*Muñiz Barreto, Juana María y otros s/impugnan candidatura a diputado nacional*," ruled on 18/JUN/2009.

serious human rights violations during the last military dictatorship and who are being prosecuted.[84]

In retrospect, one can see an action strategy in the vetting of Luis A. Patti, that consisted of contextualizing, establishing rules, identifying international legal arguments, and trying them out in this case to later debate, convince, and strengthen alliances with those who had the power and responsibility to decide on the issue.

Conclusion

We have reviewed the Argentine experience in inaugurating the debate regarding the democratization of the State and alternative institutional or supporting mechanisms for ensuring the end of impunity. In some cases, the search for institutional opportunities for vetting and removing current or future officials from public office constituted an alternative before the inexistence of criminal prosecutions for determining their responsibility for crimes of the past. In other cases, the search for these mechanisms has supported open criminal investigations in Argentina since 2001 which have been developing strongly since 2005.

The debate surrounding the vetting of public officials also involves discussing the moral and ethical requirements for holding public office in the republic. Regulated and precise restrictions to public office will strengthen the system, provided they are open, participative, and broadcast. They must constitute clear and explicit limitations based on basic principles that should guide the political system, such as human rights principles.

Transitions have driven several kinds of purges, lustrations, and removals. In Argentina, after twenty-five years, several alternative strategies have been attempted. If, on the one hand, this illustrates the enormous difficulties in a process that is currently tainted with political immunity, it has, on the other, also served to open profound debates on the legitimacy principles of the political system and norms and procedures that must guide said institutions, a solution that would have been impossible if radical measures had been taken.

Argentina has incorporated International Human Rights Law into its legal system and done so through profound debates on a representational level (Argentine Congress, Constitutional Conventions). The political consensus reached is often relegated before other grounds or majority decisions, as this consensus are often opposite to direct votes. However, public debates about human rights have characterized Argentine democracy since 1983, and profound political debates, which are characteristic of democracy, motivated by the events that took place in the framework of State terrorism continue due to structural human rights violations.

[84] In article 306, the Criminal Procedure Code establishes that: “Starting on the tenth (10th) day after the preliminary hearing, judges must order the prosecution of the defendant provided there are sufficient elements to sustain that a crime has occurred and that this suspect has been an accessory in its commission.”

These principles, their norms and recommendations by international organizations obligate Argentina to build democratic institutions by removing public officials who have been involved in crimes against humanity. The inclusion of specific criteria for banning individuals from public office under such grounds is feasible, constitutional, and effective, considering the socio-historical context of Latin America and its internal legislation. Meanwhile, decisions such as those of the Argentine Electoral Committee in the “Patti” case illustrate that such measures would constitute a global solution to the problem.

4. Forms and Meanings of the Repression between the Dictatorship and Democracy

Pilar Calveiro

We are often tempted to view dictatorships and democracies as direct opposites, which is quite misleading, especially in regards to the repressive models of each system. However, this opposition is not always present when the issue at hand is that of the systems as they exist in reality, regardless of their theoretical basis.

Rather than fluctuate according to the civil or military characteristics of a certain government, repression, with its democratic "format," is transformed according to the twists, turns, and bumps of the hegemonic power,[85] whether it is based on relatively valid electoral procedures or otherwise sustained authoritarian models. However, the scene changes when we think of democracies that are effectively and actively supported by majorities that manage to trace a new power play. In that case, repression does not disappear; it takes on new forms, intensities, orientations, and meanings.

This paper focuses on the specific forms of repression at two distinct points in Argentina, for the purpose of analyzing these evident distinctions, but also the possible continuities that allow us to identify where we stand today and what the dangers of the present must be overcome: State terrorism and 21st Century democracy.

State Terrorism

Even though the repressive model instituted in Argentina after 1976 (which is correctly labeled as State terrorism) recognized the continuity of important State practices of the previous Argentine government, it also involved a new approach to these practices and, above all, to the relationship with social power structures that had drastically changed since the defeat of all alternative political proposals to the neoliberal model that was instilled at the time in Argentina.

The new hegemonic and repressive model pivoted mainly on the enforced disappearance of people, constituting political imprisonment as a secondary (but in no way irrelevant) phenomenon and the incarceration of delinquents in accordance with applicable law, which had undergone a notorious process of sentence harshening.

[85] Hegemony means the exercise of political power by a group of stakeholders who are capable of using not only force but also significant levels of consensus, through the formation of ideologies and "bodies of truth" that are consistent with the specific organization of power to maintain the existing *status quo*.

The truth is that all these strategies had been attempted before during both civil and military governments, as we will see below.

1. The penitentiary system had a long trajectory in the country and had undergone different modalities. Since the end of the 19th Century, consistent with punitive reforms of the time, a modern prison system had been established which viewed prison as an institution aimed at preserving public safety and "sheltering" inmates, as opposed to an instrument for physically punishing criminals. However, this modernization did not end the countless forms of abuse, including torture, suffered by prisoners.

The Argentine Penitentiary was an emblem of this new tendency, based on principles of order, cleanliness, uniformity, and isolation that shortly after transformed into a space of promiscuity, corruption, and illegality. As was the case in the rest of the prisons in the country, which multiplied throughout the 20th Century, prisoners included mainly perpetrators of crimes against property, who originated from the most vulnerable social sectors. By the middle of the 20th Century, Peronism had changed the perspective of the penitentiary system, as was the case with so many other aspects of domestic life. "By inverting the traditional roles of the correctional pedagogic speech, prisoners were referred to as victims and society as their victimizers."[86] Social discrimination in general and the justice system in particular took the blame; this was evident in the conformation of the prison population, which consisted mainly of poor people. This led to a series of system reforms as well as social reinsertion programs for prisoners once they had served their sentences.

After the Peronist government was overthrown there came a phase that was highly controversial on a political level, characterized by increasing social violence and alternations between civil and military governments that failed to complete the term of their administrations. Between 1970 and 1975 the homicide rate skyrocketed above previous years (including political assassinations), but there was a relatively low rate of crimes against property; nevertheless, the prison population profile still mainly consisted of crimes perpetrated by members of society with limited financial resources. It follows that throughout the 20th century, the penitentiary system was the focus of repression for crimes, concentrated mainly in unlawful actions by the most vulnerable social groups. From a comparative point of view, political imprisonment, which was also a permanent practice, became more relevant toward the nineteen sixties.

2. The incarceration of political dissidents was, similarly, a relatively common practice of different governments that reached its zenith during the nineteen thirties, against socialists, anarchists, communists, and union activists. During the nineteen forties, even though Peronism had unprecedented popular support, there was also significant dissidence, which was repressed by the former. The Special Police Unit (*Sección Especial de la Policía*) investigated and detained opponents, particularly communists, and subjected them to different forms of torture including electric prod, with all other associated practices: blindfolding, gagging, and loud music to silence out their screams. Back then the prod was already referred to as the "parrilla" (*grill*) and

[86] Lila Caimari, *Apenas un delincuente: crimen, castigo y cultura en la Argentina, 1880-1955,* Siglo XXI, Buenos Aires, 2004, pg. 263.

"máquina" (*machine*).[87] The use of these practices increased, especially after the coup d'état in 1955, during the Peronist Resistance (*Resistencia Peronista*) and during the nineteen sixties and seventies, to repress independent union representatives and armed groups that emerged and multiplied after the dictatorship in 1966.

3. Enforced disappearance has been one of the most radical forms of exercising repression in Argentina and other parts of the world. This method is characteristic of a type of political power that can be defined as "disappearance prone," as it views any and all opposition as a threat and then, feeling empowered to do so, attempts to make it "disappear." This practice manifested early in the country's history, as was the case of the "enforced disappearances" of the natives during the "Guerra del Desierto" (*Desert War*), which was characterized by physical annihilation followed by symbolic extinction. A similar practice was that of trying to make Peronism "disappear" through the naive ban against saying Peron's name in public, a measure taken in October of 1955 by the "Revolución Libertadora" (*Liberating Revolution*) that constituted a vain attempt to make anything out of its control "disappear" from both speech and language. But this radical practice consisting of the kidnapping and ultimate disappearance of the physical person, as opposed to political assassination which involves the disappearance of the legal person, his or her body, and proof of his or her existence for the purpose of making the crime itself disappear, was already practiced in 1962 in the renown case of two union leaders, Felipe Vallese and Héctor Mendoza.

Later, dating as far back as 1966 and the early nineteen seventies, enforced disappearances were not limited to isolated cases. Although they did not represent the predominant form of repression at the time, they took dozens of victims who had been targeted on the count of their political participation in armed organizations, such as Juan Pablo Maestre, Mirtha Misetich, and Marcelo Verd, among others, of whom only one body was ultimately found.[88] However, in February 1975, in the framework of the repression, the rural *guerrila* group named "*Ejército Revolucionario del Pueblo*" (People's Revoluationary Army or ERP) was established in the province of Tucumán, when the enforced disappearance phenomena took on another dimension. At that time, the Executive (which was under the administration of Marla Estela Martínez de Perón) ordered the "neutralization and/or annihilation of the actions of the subservice groups acting in the province of Tucumán,"[89] a measure that, interestingly enough, was supported by the political parties. Annihilation is not the same as disappearance. In fact, after the ERP's attempted takeover of the military garrison in *Azul*, on January 21, 1974, General Juan D. Perón ordered the "immediate annihilation of this criminal terrorism,"[90] without establishing enforced disappearance policies on that account.

However, the method adopted to comply with Isabel Person's decree was to authorize the Army to intervene in the repression of the subservice group which, in turn, established enforced disappearance as its annihilation method. This allowed the Army

[87] See Ricardo Rodríguez Molas, *Historia de la tortura y el orden represivo en la Argentina,* Eudeba, Buenos Aires, 1984.
[88] See Duhalde, Eduardo Luis. El Estado terrorista argentino, Buenos Aires, Ediciones El Caballito, 1983.
[89] *La Nación*, February 6, 1975.
[90] *La Nación*, January 21, 1974.

to indistinctly capture “subversive” group members or suspects with no limitations, to extract useful information from these individuals for the purposes of the repression, and later dispose of them without accounting for their actions. This practice was established more systemically through “*Operativo Independencia*” (Independence Operative) and installed a new repressive institution: Clandestine detention centers. These centers were nothing more than concentration-extermination camps. The new repressive model carried out by a military institution that was responsible for concentration camps and enforced disappearances as well as systematic state repression was set into motion on a regional level.

This innovative “doctrine” was first practiced in Tucumán and Córdoba; whereby both provinces served as a sort of testing range of the model that would later be applied on a national level. Since then, the detention of political and union militants in clandestine prisoner concentration camps have been recorded as part of a practice based on illegal detention and unlimited torture who's “main motto is the unpunished implementation of the kidnapping-disappearance-torture model, and the repetition of this tragic cycle.”[91] At that time, the idea emerged of creating an organization on a national level to coordinate the “struggle against subversion” under the following premise: Enforced disappearance as a key and privileged mechanism for organizing the repression.

Although all these methods (punishment and incarceration of poor people in highly repressive penitentiary systems, incarceration of political dissidents, and enforced disappearances) were all previous state practices, during the 1976 coup d’état and the beginning of the last dictatorship, the repressive model was reorganized as was its relationship with these practices, all in the midst of a regional scenario that was already part of a global strategy that exceeded domestic frontiers.

The idea of war that, in its traditional version, guided the actions of the Armed Forces to protect domestic sovereignty adjusted to the idea of a global war (of the Western world against international communism) that was being waged within the national territory against an enemy who, although foreign, acted from the inside, i.e. “infiltrated” subversion. Enforced disappearances thus became the State's central repressive model. This is not surprising as it was a government that was akin toward disappearances and would implement a series of physical, psychical, legal, economic, political, and symbolical “disappearances” that would be surrounded by other forms of state-induced violence.

DISTINCT CHARACTERISTICS OF ENFORCED DISAPPEARANCES

- This practice was instilled in the framework of a *State of exception*, which was justified by equally exceptional conditions that “call for” the transgression of rights and resorting to *extra-legal forms of repression*, through which power is affirmed as absolute and unappealable while coexisting with the pretention of totality.

[91] Juan Martín en Duhalde, op. cit., pg. 49-50.

- Illegal repression is carried out within a circuit of legal institutions, thus leading to a *superposition of legal-illegal circuits and practices*.
- The repressive machinery and domestic security is then controlled by police forces that report to the *Armed Forces*, particularly to centralized military *intelligence services*, under a unified command, in the framework of an informative community. There has been talk of the militarization of civil society, but under that logic, one could also speak of the *police-socialization* of the Armed Forces, followed by its subsequent deterioration.
- Under this process, radicalized dissidence is persecuted, especially that of armed groups, but the focus extends to the periphery in order to conclude that anyone who is dissident is potentially guilty. Legal proof is not required, *as the mere suspicion of guilt suffices.*
- *Unrestricted and unlimited torture* (that extends in time and form) of prisoners is used to extract information from them and consists of subjecting them to all forms of sensory deprivation, "emptying" them of their humanity, discarding them as *expendable objects while removing any traces of the actual person including, ultimately, their remains.*
- *Concentration camps* (which could also be defined as isolation camps)[92] represent the main embodiment of the development of these practices, which function in accordance to the principles of a *bureaucratic-disappearance causing machine*.
- The functioning of this machine is possible because it is deeply rooted in older public and private practices that have been "naturalized" by *the most important sectors in society*, who partake in the disappearing logic and plan.
- Although the existence of concentration camps has been denied and silenced, their existence is no secret; everyone knows they existed, but no one talks about it. They form a universe of disappearances that claim their own "disappearance," under the reign of *terror to which society was subjected.*
- The model is aimed at terrorizing prisoners and society, as a whole, to accomplish a *general paralysis* and induce "necessary" transformations for obedience and submission.

The remaining repressive systems were built around this disappearance-causing machinery, which have adopted some of its modalities.

Even before the 1976 coup d'état, the arrival of prison inmates who had been previously kidnapped had already been recorded, and the same can be said about the threat of individuals who were being transferred from one center to another or being tossed alive into the sea or rivers.[93] The idea of these elimination methods seems to

[92] Their purpose is to isolate individuals from each other while isolating the camp from society, and aims at rupturing social and political ties, while leading to fragmentation and isolation.
[93] See Garaño, Santiago and Werner Pertot, Detenidos aparecidos, Buenos Aires, Ed. Biblos, 2007.

have been developed as possible even before its implementation with “disappeared persons.”

Once the coup d’état was in motion, in prison, political prisoners were (as were all other citizens) *under exceptional conditions* exposed to all sorts of *illegal practices*, consistent with the plan to exterminate the dissenting party. Penitentiary facilities were subjected to the control of the Armed Forces. Prisoners were murdered in these facilities with absolute impunity, either as a retaliation method or under the pretext of their being “dangerous” or “*unrecoverable*.” In addition, the word “transfer” was used as a euphemism for concealing the *outright elimination of individuals*.

Even within the legal framework that recognized the existence of individuals within penitentiary facilities, these individuals could “*disappear*” within the legal criminal network or during their transfer to clandestine detention centers. Similarly, previously “disappeared” persons simply “appeared” in prisons, showing the strong *connection between the “legal” and “illegal” repression systems* or, in other words, the extension of the exceptional nature of these measures.

The use of *unlimited torture*, to the point of resulting in death, has also been corroborated, along with other forms of *humiliation and isolation* aimed at emptying or annulling individuals of their humanity. Isolation was the main form of punishment, as was the case in concentration camps. Prisoners were often held for prolonged periods of time in punishment cells, where they would spend months in utmost darkness, cold, and isolation. In the new prison in Caseros, even though prisoners were in adjacent cells they were unable to speak to each other, share food, sing or laugh, and were thus forced to live in radical and maddening isolation. For years political prisoners were deprived of any contact with their families and were denied legal defense, in a sort of *disappearance of their legal personality*. In addition to all these exceptional measures, their relatives were kidnapped and arbitrarily detained as a form of retaliation. For these political prisoners, jails were not equivalent to concentration camps, but were a representation of the system that displayed different forms of repression and resistance. They constitute another side of State terrorism, while still being part of the disappearance-causing mechanism.

Meanwhile, the system did not evade common prisoners. As of 1976, the military *junta* sanctioned 1,783 laws and 18,146 decrees,[94] legislating, among others, the creation of the Central Aeronatical Police and granting it jurisdiction over every airport in the country; this was probably related to the use of these *airports for transferring and eliminating prisoners*. In terms of general legislation, the State's repressive power grew and criminal legislation was toughened while punishment was increased for several crimes.[95]

These circumstances, coupled with the effective intimidation imposed by State terrorism over the population as a whole, led to a decrease in crime rates during those

[94] Roberto Gallardo Terán, *Políticas de seguridad asociadas al delito en dictadura y democracia,* CLACSO, 2004, pg. 9

[95] María I. Bergoglio, “Efectos de la institucionalización democrática,” available at <www.bibliojuridica.org/libros/3/1078/4pdf-1741k>.

years. However, it is also possible that the terror instilled, the fear of resorting to all repressive institutions such as the police, also decreased the percentage of people willing to report crimes. What is certain is that *fear, social discipline,* and *silence* conspired and, between 1976 and 1983, there was a significant decrease in theft, robbery, and homicide rates; provided State-perpetrated homicides are not counted.[96] The enforced disappearance phenomenon captured attention, because of its dimension and centrality in the repressive system and displaced the penitentiary issue, while a similar situation occurred between political and common prisoners.

Most reports and claims that were filed related to political prisoners. There is *very little information* with regards to crime rates, related public policies, police force actions and prison conditions for common prisoners and the role of the Judiciary. In general terms, we know that crime, as an internal security issue, was tackled by the police forces who reported to the Ministry of Defense, i.e. the Armed Forces, as part of the above mentioned *police-socialization*. During the dictatorship, "the security issue was understood as a whole that did not differentiate between competencies or jurisdictions since the issue was, in its entirety, in the hands of the Armed Forces."[97]

As a result, the lack of information is understandable, as indicated by Gallardo Terán, in the sense that the persistence of crime would result in the questioning of the police forces, which was unacceptable in the framework of State terrorism. However, with regards to its study, there exists certain evidence against the penitentiary and justice systems, such as that proving *the practice of torture*. As in the case of political prisoners, torments were used as a means of obtaining confessions. That is how on January 21, 1979, for instance, the *Buenos Aires Herald* reported the use of illegal detentions and torture, including electric shock, to obtain a confession from seven individuals accused of kidnapping a child; these individuals were held for three years and later released for lack of evidence against them.[98]

That same year, the Solidarity Committee with the Argentine People reported the "*inhumane conditions in prisons* throughout the country," and the existence of chronic disease and malnourishment.[99] One year later, the Permanent Assembly for Human Rights (APDH) reported "*the degrading circumstances to the human condition that subsists in the penitentiary system*."[100]

It follows that the dictatorship built a *repressive state model that was consistent with the globalization* of capitalism, in the context of a *bipolar* world. The notion of domestic wars that was implemented in different countries through the national security doctrine was functional for the Cold War that was being waged for the sake of global control. That is to say that it responded, in a particularly radical way, to the specific form in which the periphery adjusted to the needs of the capitalist system, which was already beginning its globalization process. It was, therefore, a *repressive model that exceeded*

[96] "Dirección General de Reincidencia Criminal," in María I. Bergoglio, op. cit.
[97] R. Gallardo Terán, op. cit., pg. 24.
[98] Selser, Gregorio, Cronología de las intervenciones, México, UACM, 2010January 22 and 23, 1979.
[99] Idem, January 31, 1979.
[100] Ibidem, April 3, 1980.

national limits, extended throughout the region (as evidenced by the "Cóndor" Plan), and aligned itself *with the capitalist project for world domination*.

In the political reality of Argentina, the Armed Forces, particularly the Army, had for decades been at the core of the state-run machinery with consent from most dominating groups. Therefore, the superposition between war and repression, i.e. the fact that the military took over the local repression (through the police-socialization of the Armed Forces) was part of a previous process and was viewed as being fairly "natural" by the general public. However, the notion of a national war, the wartime construction of an "infiltrated enemy" were part of this globalization process and, on a local level, constituted a "novelty" that brought on the so called "Proceso de Reorganización Nacional" (*National Reorganization Process*). In terms of the police-socialization, it is noteworthy that, within military and operation commanding units, the so called "*dirty war*", the core of the repressive model and its locus of power were based in the intelligence service and each armed force.

An authoritarian repressive system was installed, i.e. a binary system, from a complex logic that overlapped the war vision with the police vision to engender a disappearance-causing model as the core of the entire system. It is noteworthy that the idea of causing the disappearance of the enemy-other was not a novel one, as this line of thinking can be traced back to the genocides that occurred during World War II, of which Auschwitz is an emblematic example. Argentina combined and merged the ideas of exterminable enemy, punishable criminal, and disappearance-prone other, creating an enemy (the other), transforming criminals into a sort of enemy and the other (as was the case of political dissidents) into someone who was a criminal and enemy at the same time. This series of overlaps guided the machinery first toward this logical construction and later, toward the persecution and elimination of that "other" who had to be caused to disappear.

The ways in which enforced disappearances were handled in clandestine detention centers (including the imprisonment of individuals deprived of all human attributions and the processes for eliminating these individuals, who were tossed into the Ocean as if they were "packages") are evidence of *dehumanization* practices by which people were treated as disposable objects.

Furthermore, concentration camps were structured as the State's elimination system, with the ability to select *who would have to die and who deserved to live*. In some sense, the act of holding pregnant detainees until the time of delivery was a way of moving past the mere *allowing to live* and into *forcing to live*. Administrating life and death is a permanent ambition of any *bio-power*.

Enforced disappearances (an illegal practice that was at the core of the entire system) were carried out from within legal institutions, through orders that trickled down from the highest ranks. A legal-illegal network was therefore formed, including the same individuals and institutions that operated indiscriminately in different dimensions, with increasing authority and discretion.

In addition to enforced disappearances, the entire model led to political disappearance and, with it, banishment from the public eye, coupled with a strong retraction of civil society toward private spaces.

Neoliberal Democracies

In Argentina, the end of the dictatorship and reinstatement of democracy did not imply the end of *domination*, but rather its organization under a different paradigm that entails new forms organizing politics, the economy, subjectivity and, in turn, new ways of exercising repression. Some characteristics of this "hegemonic shift" must be analyzed to understand how the system works, what it entails, what it excludes, and what it punishes.

Globalization imposed a unique (neoliberal) political and economic model (i.e. limited democracy). At a first glance, these processes are contradictory and conflicting, as neoliberalism tends toward the increasing exclusion from revenues (and, therefore, of all of society), while democracy proposes the constant extension of political participation, which is inseparable from participation in economic resources, education, culture, etc. However, provided democracy is compressed to a normative body (proposed, administered and validated by the elites), then that conflict is only apparent. This is evidenced by the global world; while progress toward democracy is constant everywhere, polarity in income and increased exclusion are also equally constant.

One of the main characteristics of the world's neoliberal reorganization is that it extended market rationality to every aspect of life. The economic logic of efficiency was applied to the problematic analysis of other orders, such as the political and social order and led to their asphyxiation. From there derived the destructurization of politics and weakening of the State. "The market has ceased to serve as a self-limiting government principle (as in classic liberalism), and is now a principle that works against it. It is a sort of economic court […] that intends to judge government actions from a strictly economical and market-oriented point of view,"[101] while hindering the State.

The most significant example of this economic control that penetrates the political arena in general (specifically on a state level) is that of *corporation*. The new forms of domination revolve around corporate control (i.e. decentralizing the State while concentrating power in different economic groups) of every social resource. At its core, it is a financial-military-technological-media network, with many bases and fronts that differ in their functions and power, but are interconnected. It is regulated by the rules of a *globalized market*, i.e., by *patterned competition* that serves the most powerful and concentrated sectors. In order to penetrate every area and space, it structures its speech with concepts of competition, on both an economical and political level, but in this competition the cards have already been dealt. The game has been structured to benefit those who control the most amount of resources, of which the State is just another.

[101] Michel Foucault, *Nacimiento de la biopolítica,* Fondo de Cultura Económica, Buenos Aires, 2007, pg. 286.

Under this “free competition” scheme, State mechanisms are absolutely not neutral, although certain “laterality” is required so the State may create and apply norms that are consistent with the model without restricting or hindering accumulation processes. It is for that reason, as opposed to anti-authoritarian will, that in large power centers proliferate *speeches against state or domestic homogenization*, vindicating the separation and autonomy of powers, favoring the creation of autonomous and regulating entities that would “control” and “limit” the power of the State, persecuting transparency, consensus, and any extent of political *fair play*. Most of these assumptions constitute fictional constructions that operate on the level of their speech and representations; and while this is not a secondary issue, it fails to constitute the political reality.

What truly limits the State's power is *corporative power*, which has different fronts that are highly connected to each other in terms of competition and are reluctant to any form of centralization or norms that could eventually limit their power. They are unlimited in a world that is open for their penetration. There is nothing more contrary to this global world construction than those great military-police-like states of the nineteen sixties.

In that sense, toward the late nineteen seventies Michel Foucault warned that the type of society that springs from neoliberalism does not correspond to an extreme disciplinary model (of radical interjection of norms) nor with a rigid normalization that would expel all that is unregulatable (in the State terrorism style), but with “a society in which *difference-based systems are optimized*.”[102]

An initial substantive difference (that encompasses the entire scenario) is that of Law. The coexistence of the Rule of Law (which modern democracies so eagerly vaunt) with an exceptional State for a large part of the population (immigrants, poor people, delinquents) is legally unprotected on the one hand, while the appearance of exceptional legal features continues to multiply on the other, thus restricting the universality of law principle and remitting societies to different courts, legal systems and prohibitions.

A key aspect of these different systems is the management and administration of life itself: forcing to live, allowing to live, allowing to die and forcing to die, manifest as levels of bio-power that, when administrating life and death, differentiate between social groups according to their access to these groups within the kind. This does not mean that old repressive forms have been overcome; instead they overlap with new ones. So the great web of power allows entire populations to die from hunger or incurable diseases, while also causing their death in their fictitious “wars” and forcing them to live as in assisted reproduction systems; while sometimes tolerating life provided it does not hinder its economic accumulation.

It is from this viewpoint, where the life of some must be protected (at the expense of the life of others), that the security issue becomes a concern. Global *security* is an ever

[102] M. Foucault, op. cit., pg. 302.

rising issue that is linked to the development of control systems that would extend throughout the world and its inhabitants. It is in this sense that many authors refer to a *securitarian State*[103] that intends to gain absolute control, develop communication technologies, tracking technologies, gigantic databases, and that fail to control anything but manage to increase violence rates.

In actuality, rather than having a full grip on security, these systems result in the *successive transfer of risks*, which have been developing for decades. If risks can be transferred to the periphery, the system can continue to function harmlessly; from bankers to clients and clients to consumers during economic crisis, from officers to soldiers and soldiers to civilians during armed conflicts, from politicians to mafia leaders who pay for their electoral campaigns and from there to delinquents operating their distribution networks. The process is based on transferring and differentiating and ultimately impacts system terminals consisting of the most vulnerable social sectors: civilians, consumers, poor people who are not landowners, as these people constitute the "workforce" allowing the insured to insure and protect their able bodies. In the end, they are all reduced to mere able bodies, with higher or lower life expectancies and quality of life.

This inflating concern over security is resolved in these transfers by way of two methods: waging war against the enemy (mainly for combating terrorism) and locking up delinquents. It goes without saying that, consistent with the above, both methods are highly profitable and involve *intelligence services, politics, and business*.

The *war against terrorism* (particularly the construction of terrorism as a threat to global security) is a key element for forcing any State that had refused globalization to join the system and for maintaining and demonstrating a war power that spreads fear and favors obedience. But, above all, it constitutes the exceptional State's main form of sustaining itself as it installs the difference-based system (between those who have rights and those who do not) on a legal and criminal level. At the same time, this construction has facilitated the reclassification and application of different forms of torture. Terrorists are lower than enemies (as humanitarian law does not even apply to them) and are, therefore, subjected to the most exceptional of treatments, justified by the mere suspicion of terrorist actions. It then follows that the "war" on terrorism is an artificial construction, as was the subversive war of the nineteen seventies and, like that war, resorts to legal power networks for the perpetration of illegal practices that merge, as part of a same circuit with legal/illegal actions, *switching* between one and the other according to the needs of the system.

On its part, the *war on crime* has saved a spot on this global hegemonic reorganization. A new term has also been coined to express this and some authors refer to it as a *criminal State*[104] to refer to the increasing tendency (on a global level) to imprison individuals, particularly those belonging to the most vulnerable sectors of society.

[103] See Fernández Bessa, Silveira Gorski, Rodríguez Fernández and Rivera Beiras (Ed.), *Contornos bélicos del estado securitario,* Anthropos, Barcelona, 2010.
[104] Loïc Wacquant, *Las cárceles de la miseria,* Buenos Aires, Editorial Manantial, 2000.

The neoliberal model has increased social marginalization, while at the same time encouraged all forms of accumulation of capital, whether legal or illegal. In fact, one of the characteristics of this accumulation phase is the connection *between legal and illegal circuits*. In this framework, groups that are excluded from the formal economy are pushed toward "informality" through criminal networks. As a result, they manage to support themselves and are "allowed to live" while proving useful for certain efficient forms of accumulation.

The proliferation of these criminal networks that are protected by economic and political power groups increases violence and crime, while spurring social demands for greater security. The institutional and media response aims at increasing punishment and toughening criminal actions. While society demands longer jail sentences, police officers detain those who are easier to capture and incriminate, the young, the poor, and the "worthless" upon whom judges then impart tough convictions. When they reach prison, they have been twice victimized: by jails and by major criminal networks that function from within prison walls. Many of them then officially become officers of corrupted criminal networks with institutional power. They become useful for the illegal accumulation that results inside and outside prison and, if they make it, they are allowed to live. If they don't, they are allowed to die or are killed.

Wars waged on make-believe enemies and the incarceration of those excluded from the system both constitute the main mechanisms through which state-induced violence occurs in a globalized world. They are characterized by differentiating between those who do and those who do not deserve to live, while establishing what kind of life they deserve. A huge part of the world's population is sentenced to death either by passively allowing them to die or by forcing their death as if they were disposable. They are "risk subjects" as defined in social, economic, and cultural standards, not because they pose a risk to society (despite the fact that there are many mechanisms for preventing this) but because they are constantly at risk of disease, crime, violence, and death.

Finally, it is noteworthy that these forms of organization of global repression (consisting of war and incarceration) are not limited to the groups that are most directly affected. On the contrary, they are *aimed at* and *impact society as a whole*. We are all considered discardable or disposable at the same time, based on our usefulness at any given moment.

"Loopholes" in Democracy

The radical characteristics of the disappearance-inducing model in Argentina that functioned under State terrorism led to democracy taking on a human rights policy that experienced many different phases; in addition to other factors, such as the loss of legitimacy of armed institutions after the Malvinas (a.ka. Falkland) Islands War as well as constant resistance of civil society against forgetting the past and granting amnesty to perpetrators. With more or less political will, governments were obligated to acknowledge the issue to some extent, and finally during the administrations of Néstor Kirchner and Cristina Fernández, there was enough will to judge and punish perpetrators of crimes against humanity.

As a result, toward mid 2010, less than 10% out of the 1,494 individuals involved in these kinds of processes had been dismissed. Out of 1,355 individuals charged with such crimes by that year, the only ones pardoned were those against whom reports had merely been filed but no charges were pressed, or those who were fugitives, unfit to stand trial, or deceased. A total of 746 individuals remained (49.9%) of which 77 had already been convicted and 669 were being prosecuted. Of these individuals, 33% were members of the Army, 27% of the provincial police, 14% of the Navy, 3.5% of the Federal Police, 3.2% of the provincial Penitentiary Police, 2.5% of the Federal Penitentiary Police, 2% of the Coast Guard, 1.8% of National Guard, 1.6% of the Air Force, 1.6% of Uruguayan repressive forces and 7.6% of civilians who cooperated with the illegal repression.

It cannot be affirmed that these numbers correspond with the level of responsibility of each group in the enforced disappearances that took place during State terrorism. In fact, the role of the Air Force, which was responsible for the so called “death flights” appears significantly played down. However, in general terms, it is possible to confirm the predominance of cases in the Army, police force, and Navy, thus confirming its utmost responsibility in the enforced disappearances that occurred during the nineteen seventies.

It is also noteworthy that of 669 individuals who were prosecuted, 63.5% were held in pretrial detention and over half of those who were convicted were high ranking officers, a segment that was highly representative of the prosecuted group.

In current democracies, it is common to sentence individuals within repressive modalities that are typical of the dictatorial States of the nineteen sixties and seventies which were, as stated above, part of a *different hegemonic model*. However, due to their regularity, these convictions are stronger in speech than in judicial action. In any case, they involve economic and symbolic remedies for the victims; ultimately, middle and lower ranking perpetrators will be prosecuted, although for the most part, the prosecution of the highest ranking perpetrators is avoided.

The case of Argentina marks an exception, as the first to be prosecuted and incarcerated in 1985 were members of the three military *juntas*, i.e. the masterminds of the “Process.” The accountability principle was then established, as it involved a State policy that was managed at that time by the Armed Forces and was consistent with the chain of command. Later, after the annulment of the Due Obedience Law during the administration of Kirchner, it was held that subordinate officers were not exempt from liability for the commission of these crimes. All of the above resulted in the criminal prosecutions to which we have referred above.

It can then be said that the great number of defendants, high percentage of prisoners, distribution based on weapons and rank, and the public diffusion of the process reveal the social and political decision to *condemn State terrorism*, close this issue in light of the future, and *break away from the ancient tradition of State impunity*. In other words, it is not limited to the mere speech or “reconciliation” that predominates in global democracies; instead it expresses a deep democratic will by breaking away from State

impunity, central collusion mechanisms, and abatement between managing sectors, i.e. the political class. Corruption and impunity, which overlap with and feed one another, are two great backbones of global democracies. With the trials against perpetrators of State terrorism, the Argentine government *broke the ties that bound it with prior power networks*, without agreements, negotiations or escape routes in order to establish, from that point on, other power relations that, like all others, will have their own ways of organizing repression.

Today's state violence is significantly different from that of the nineteen seventies. First, it establishes two distinct areas of action between the Air Force and Police Force that is consistent with the classical distinction between domestic defense and national security. The latter of which is exercised under the Rule of Law as "protecting society" from those who break the law, i.e. from criminals. For that purpose, the Department of Criminal Policies (*Dirección de Política Criminal*) was created in 1991 under the direction of the Ministry of Justice, which researches and establishes programs aimed at controlling crime, its consequences and the punitive response of the State. Back then, there was already talk of an "increased crime rate in major cities in the country."[105]

Even though the general crime rate doubled in the years immediately after the reinstatement of democracy, between 1983 and 1996, according to the Office of Criminal Recidivism (*Dirección General de Reincidencia Criminal*),[106] it wasn't until the nineteen nineties that the issue gained momentum in the public eye.[107] However, most cases revolved around crimes against property, which are linked to poverty, unemployment, social inequality, and, clearly, hyperinflation. This is evidenced by the fact that between 1984 and 1989 theft rates were 591.97 for every 100 000 inhabitant, while in 1989, when inflation sharply increased, it skyrocketed to 864.[108] The same cannot be said about homicide rates, which increased in a much smaller proportion.

During the Menem decade, the increase in crime rates was enormous. Between 1991 and 2000, crime rates doubled as did crimes against property and persons. Only intentional homicide rates decreased.[109] All these rates peaked in 2002, especially cases of crimes against property which increased to 23% in only 2 years. Since then, there has been a sharp decrease both in general rates and in rates of crimes against property, which decreased from 13 to 27%, respectively between 2002 and 2007.[110]

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[105] R. Gallardo Terán, op. cit., pg. 17.
[106] M. I. Bergoglio, op. cit., pg. 34.
[107] It is important to stress that the data and statistics used to measure crime (as well as those referring to police violence) follow different criteria, thus making it difficult to thoroughly compare the development of this phenomenon throughout the years. In addition, the relative flexibility of this data must also be considered, as data can be very feeble according to the measuring methodologies used in each case.
[108] M. I. Bergoglio, op. cit., pg. 34.
[109] Criminal offense rates increased from 1484 to 3051; crimes against persons increased from 255 to 548 and crimes against property from 994 to 2035. Meanwhile, intentional homicide rates decreased from 7.5 to 7.2.
[110] Department of Criminal Policies, "Evolución anual de hechos delictuosos registrados," available at <http://www.jus.gov.ar/media/28415/TotalPais2007_evol.pdf>.

Meanwhile, there has been a constant increase in prison population, which does not result from these rates, increasing from 63 prisoners for every 100,000 inhabitants in 1992 to 109 prisoners every 100,000 inhabitants in 2001 and representing a 73% increase throughout the Menem administration. Later, between 2001 and 2006, it increased even further from 109 to 154, displaying an even more accelerated increase (41% in only five years), but toward 2007 it decreased to 132.[111] However, if one also counts the prisoners held in police stations throughout the country, this rate reached 156 prisoners for every 100,000 inhabitants in 2008.[112]

The constant increase in prison population is not necessarily associated with the increase in criminality rates or with greater judicial efficiency when punishing the same amount of crimes. This is sustained by the fact that, while the criminal offense rate increased to 37% between 1997 and 2006, incarceration rates increased over 50%, and this tendency was even higher in Buenos Aires.[113] In addition, while criminal offense rates decreased between 2002 and 2007, as we have stated above, the incarceration rate continued to increase.[114]

Despite all this, the elevated criminality and insecurity perceived by society has not decreased, and has been clearly supported by large media corporations. Similarly, victimization polls (elaborated with the most dubious of criteria) contributed to strengthening that perception as well as highlighting the inefficiency of the judiciary; already in 1996 it was estimated that 70% of crimes were never reported, thus reflecting the lack of efficiency of the criminal system for prosecuting these crimes.[115]

The favored social logic was that the authorities were overwhelmed by these crimes and, as a result, by insecurity which could only be controlled by granting more material and human resources to the police and increasing legal tools for criminalizing delinquents. The demand revolved around, among other things, toughening the system in order to favor judicial reforms aimed at reducing the legal age for standing criminal trial and increasing sanctions[116] while incrementing grounds for pretrial detention, which currently represents 63% of all detentions in Argentina,[117] and, in the province of Buenos Aires, 85% of women and 76% of men.[118] All this leads to an increase in the amount of people that are incarcerated under the mere suspicion that they may have committed a crime or oftentimes minor offense, without decreasing crimes rates, as “no criminalist in the country will ever admit that delinquency will decrease with stronger

[111] International Centre for Prison Studies (ICPS), King’s College of London, available at <http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_country.php?country=212>, 2010.
[112] Ministry of Justice, in CELS, CELS, *Informe anual 2008,* Siglo XXI, Buenos Aires, 2009, pg. 2.
[113] Idem, pg. 5.
[114] International Centre for Prison Studies, op. cit.
[115] M. I. Bergoglio, op. cit., pg. 35.
[116] Convictions to more than five years of prison have increased from 10.6% to 18.1%. See CELS, Informe Anual 2008, ob. cit, pg. 7.
[117] CELS, *Informe anual 2008,* op. cit., pg. 7, available at <http://www.cels.org.ar/common/documentos/carceles_ia2008.pdf>.
[118] Comisión Provincial por la Memoria (CPM), *Informe anual 2009,* CPM, La Plata, 2009.

penalties. What decreases crimes are socio-political measures, such as employment."[119]

The victims of these toughened policies against crime are mainly poor and young people (who are increasingly younger). The Fourteenth Report of the National Coordinator against Police and Institutional Repression (*Coordinadora contra la Represión Policial e Institucional*) notes that in the first ten months of 2009 there were 269 teen deaths at the hands of the police (including the disappearance of some, such as Luciano Arruga in January 2009) and that "'police, national guard, coast guard, and the correctional service office as well as private security guards have killed 2,826 youths since December 10, 1983.' Of which 51% were victims of 'quick draws' and 33% died in jail, police stations, or in custody."[120] These violations are particularly severe in the province of Buenos Aires where detention centers show elevated teen suicide rates and self-inflicted harm, in addition to torture and abuse, as well as frequent use of disciplinary measures, such as isolation and excessive use of pretrial detention for those under the age of 18.[121] All of this has been made possible by the impunity enjoyed by the police and reductions in criminal age, which make it possible to prosecute children under the age of 16. As if that wasn't enough, legislators are discussing possible initiatives for decreasing the criminal prosecution age to 14, i.e. for incarcerating children.

CELS' *2010 Annual Report* also noted that in 2009, "there was an increase in the criminalization of poverty that was evidenced by the fact that many homeless persons, youths from poorer social classes, and residents of marginalized neighborhoods have been the focus of many official repressive policies." The number of police-induced violent deaths has increased by 12% compared to the previous year, although it was below that recorded in 1996 and 2003.[122]

Marginalization often leads the poor, particularly youths, to function as cheap labor for large criminal networks (who are often pressured and recruited by the police) which, in turn, expand and multiply their large earnings. Meanwhile, for the police it is easier and less risky to persecute and detain poor, marginalized, and stigmatized teenagers than to investigate those truly responsible for large illegal networks, who collude with power groups.

A direct consequence of this criminalization policy is the overcrowding of penitentiary facilities. This problem, denied by the authorities, is clearly visible to anyone who has ever come into contact with the penitentiary world and is mentioned in Amnesty International's *2009 Report* that stresses the "poor conditions and overcrowding of

[119] Elías Neuman, in Arturo Lozza, "La venganza de los culpables," Foro por los Derechos, 6 de julio 2010, available at <https://mail.google.com/mail/?hl=es&shva=1#inbox/129ad33476efa86a>.
[120] Arturo Lozza, op. cit.
[121] Comisión Provincial por la Memoria (CPM), "Niñez en la provincia de Buenos Aires," Press Release, June 14, 2010.
[122] CELS, *Informe anual 2010,* Siglo XXI, Buenos Aires, 2010, pg. 125-126, available at <http://www.cels.org.ar/common/documentos/carceles_ia2010.pdf>.

prisons and detention centers".[123] The mere fact that no parameters have been established for estimating the maximum capacity of penitentiary units and that said data differs from one facility to another points to the irrelevance with which the prison conditions of inmates is viewed, regardless of how much this increases the suffering of lockup. However, in April 2010, the International Center for Penitentiary Studies (ICPS) considered the occupation rate of Argentine jails to be 132%, although that number was lowered in June that same year to 93.8%.

Prison life involves a twofold circuit of violence that is allowed and encouraged by these institutions and consists of institutional violence on one hand, and violence exercised by prisoner networks on the other. As a result, inmates are twice prisoners and twice threatened, once by the institution itself and then by informal power networks, both of which determine their living conditions and shelter.

Even in a democracy, torture continues to be applied at these facilities (including electric shock, water-boarding, beatings, and abuse) either to obtain confessions or impart punishment. The Committee against Torture, of the Provincial Commission for Memory (*Comisión Provincial por la Memoria*, CPM), determined that, according to its records, during the first quarter of 2007 alone, there had been 2,057 events of violence resulting in damages or death. Meanwhile, the Prison Ombudsman surveyed 939 federal prison inmates and found that 64.3% of detainees had suffered physical abuse at the hands of Federal Penitentiary Service personnel, over half of which suffered physical damages.

The CPM's *2009 Report* alleged abuse and illegal detentions of children and minors, particularly in police stations. However, these incidents of torture were not recorded in their respective clinical charts and are buried under technical jargon aimed at making such incidents invisible. A decision has been made to ignore the shameful persistence of these torments; this is evidenced by the fact that only 1% of the 11,000 claims filed against police forces between the years 2000 and 2008 for such incidents were prosecuted.

The existence of an "extensive and generalized problem" throughout the country has been acknowledged, but the State does not admit its own responsibility in this problem. It is merely deemed to be "the legacy of the last military dictatorship, one which democratic governments have been unable to solve,"[124] without admitting that, while torture continues to be a general problem, it can only result from the political decision to promote it or at least tolerate it.

As a result of this institutional violence, the informal power structure of jails also imparts discipline and punishment, with the consent of penitentiary personnel, thus constituting a thick and complex network of complicity and benefits. The result of the two branches of this mechanism (i.e. the institutional branch and its parallel branch) is that entering the penitentiary system involves overexposure to death, either through institutional

[123] Amnesty International, *2009 Report*, available at <http://report2009.amnesty.org/es/regions/americas/argentina>.
[124] CELS, Informe anual 2008, op. cit., pg. 31.

violence, other forms of violence suffered at the hands of fellow inmates, or death resulting from deficient sanitary conditions. The irrelevance with which inmate life is viewed in this system is evidenced by countless facts, such as the death resulting from a fire of four prisoners that were held illegally and under unacceptable conditions in the 2nd Precinct of Lomas del Mirador on December 14, 2008. It is also evidenced in prison riots, which take an enormous life tolls. Recent examples include the 35 inmates that died on November 4, 2007 at the 1st Men's Penitentiary in Santiago del Estero during a fire that was started while a riot was being controlled, or the 33 inmates that died under similar conditions in Unit 28 of Magdalena in 2005. "These preventable deaths show the lack of ethical and moral apprehension surrounding the lives of people who are deprived of their freedom."[125]

With regards to corruption at criminal institutions, far from deeming it an exception, it is actually a key element of its operation. On the one hand, corruption guarantees absolute freedom to benefit from crime, ensuring business as usual inside and outside prison. On the other hand, it feeds the mechanism with "expendable" individuals so as to confirm its meaning and ensure its reproduction.

Conclusions

It follows from the above that the current repressive model in Argentina (that parts from prosecuting and punishing perpetrators of State terrorism) has clearly *cut its ties with the disappearance-inducing model* that was in place during the nineteen seventies. Said cut is made possible by current democratic domination methods that involve other forms of organizing political power, government, and State. However, it also clearly involves condemning previous state impunity practices, generally sheltered by the political elites. Consistent with this reorganization of State is the separation of military and police powers, where the latter is now responsible for ensuring local security.

In clear sync with the predominant tendencies in global democracies, State repression has leaned toward tougher legislation, decreasing criminal age, increasing sanctions and increasing pretrial detention, all of which have resulted in soaring prison populations that consist mainly of the poor. Although this phenomenon suffered a mild inflexion as of 2007, a change in this tendency has not yet been seen.

The population that is victimized by large criminal networks and repressive State policies at the same time is composed mainly of young excluded males. The business of organized crime is to use them as cheap, disposable labor. Meanwhile, they are arbitrarily detained by the police and subjected to different forms of violence (including illegal execution and disappearance). They are then convicted by judges, recycled by the penitentiary system, and led to relapse. Generalized torture is part of this mechanism either to obtain confessions or to find the "guilty" or obtain information that leads to the arrest of other delinquents to feed the circuit.

[125] CELS, *Informe anual 2010,* op. cit., pg. 174, available at <http://www.cels.org.ar/common/documentos/carceles_ia2010.pdf>.

Once in prison, these young men for poor social sectors are victims of the institution itself and internal criminal networks alike. Corruption and illegality are part of daily life in jail. The purpose of both is to impart discipline. They each demand their own form of obedience, but are equally aimed at resulting in the individual's subjection to power networks based on all forms of legal and illegal trafficking. A prisoner's survival depends on his capacity to adapt and somehow join these networks. The word survival is not an exaggeration. If in neoliberal societies the poor are disposable objects that are allowed to die, in the penitentiary system their condition changes dramatically and they become objects forced to die.

As a result, we are facing a system that *criminalizes poverty* and, as any authoritarian model, inverts responsibility. Far from being responsible for crime, the poor are its main victims, both inside and outside prison.

Society views delinquents as social others that are not only outside the system, but deserve to be there. *Vulnerable* and *non vulnerable* subjects are maintained separate from criminal networks on the foundation of socio-economic parameters. In the best of cases, the State creates policies that decrease the risk of vulnerable individuals of "falling" at the hands of crime, but once they have fallen, they are conceived as a blend of unassimilable, antisocial, and dangerous, thus rendering them disposable. In the words of Carlos Ruckauf,[126] over a decade ago, "we must choose between people and delinquents,"[127] who according to this logic are not people. "Their death […] is what makes life healthy and pure," thus ensuring the safety of those who deserve to live.[128]

This logic that has long been promoted by the media (upon which it has become increasingly more insistent) is *shared by a good part of society*, who often views respect for human rights as a form of complicity with criminals. Although depicted as a threat, delinquents are *not represented as enemies*; they have not acquired that rank. They are instead depicted as harmful and unnecessary life forms, as disposable bodies, or trash. It seems the younger and poorer, the more *irrelevant*. In general terms, we seem to have transitioned from a terrorist, disappearance-inducing State to a differentiated and wasted consumer State.

The national State does not lack the means to confront these tendencies, even though it does not have complete control of every level of the issue. It is, again, a global issue that has a direct impact on domestic policies. Large criminal networks are so far above the national level as are the organizations that establish general international safety policies and anti-terrorist treaties that bind the States, measure crime rates and prison conditions and evaluate the country's performance.

In turn, current *democracies are absolutely not homogeneous*. At the heart of democracy are dissenting opinions, while some push to maintain and further promote these practices (even from the left), others (constituting minorities) stop to think of the increasing exclusion phenomenon and approach the crime issue as a social problem

[126] A right winged politician from the Peronist party and Vice-President of Argentina at the time these words were spoken.
[127] *La Nación*, 06/AUG/99.
[128] Michel Foucault, *Genealogía del racismo,* La Piqueta, Madrid, 1992, pg. 265.

that must be collectively and responsibly assumed. They postulate that police forces must be democratic, while "hard hand" policies, criminalization of the poor and stigmatization of youths and poor people must be rejected, while social inclusion policies promoted. They acknowledge that insecurity at middle and higher levels is inseparable from other forms of insecurity that torment the poor and are instilled by those who demand security. They are two sides of the same coin.

Toward the end of *Poder y desaparición* (Power and Disappearance),[129] I asked myself how the disappearance-inducing power of the contemporary world is recycled, what are current forms of repression and totalization under the format of radical individualization; i.e. how does this social schizophrenia function today? These are questions of the mid nineteen nineties that fifteen years later remain, to me, an enigma.

Many things have changed. Today Argentina has a freely elected government. The Armed Forces have been pushed back into place and separated from internal security forces. Both the State as well as civil society condemn human rights violations that occurred during State terrorism, particularly, enforced disappearances. However, we are part of an increasing globalization process that has imparted the neoliberal model in all harshness, thus creating new threats. One of these threats is the strengthening of bio-powers with which we were already familiar. If this concentration-based model established who had to die and who had to live, today this classification has grown more complex, while still involving forms of administering and managing life itself as an instrument of social differentiation. This leads to treating people, significant groups of people, as if they were disposable objects, mere phenomena that nested in State terrorism. Finally, if this form of organizing power and society is sustained and strengthened, it will result in a system that combines the Rule of Law and State of Exception for those who are excluded from the protection of the Law. It would result in the legal, political, and moral disappearance of part of ourselves.

Whether we advance toward that inferno or retreat from it is a choice that current democracies must face.

[129] Pilar Calveiro, *Poder y desaparición. Los campos de concentración en Argentina*, Colihue, Buenos Aires, 1998.

5. International Crimes and Non-State Actors
The Argentine Case

*Fabricio Guariglia**

Introduction

The debate initiated only a few years ago and which continues to this day in Argentina about the possibility of currently prosecuting terrorist actions that were committed during the nineteen seventies has several particular characteristics that call for a thorough analysis. On the one hand, there's a debate on the reach of principles of international criminal law and customary international law while on the other, criminal policy and material justice arguments pile on which, allegedly, should display the interpretation of applicable international norms.

In fact, since the prosecution of massive human rights violations committed during the dictatorship that governed Argentina between 1976 and 1983 emerging from Supreme Court (*Corte Suprema de Justicia de la Nación*, CSJN) decisions in the "Arancibia Clavel" and "Simón" cases, many have spoken out to demand the criminal prosecution of perpetrators of terrorist events tried as part of the universe of actions that are reprimanded under customary international law (i.e., extremely serious crimes that violate universal norms), which have no statute of limitations and are unpardonable. This is promoted either through the inclusion of terrorism as a crime under international law by subsuming the facts in question either as crimes against humanity or war crimes. Ultimately, this is a political-criminal issue that requires a more comprehensive definition of the crimes included under international criminal law, while extending its scope to certain specific acts of violence committed by non-state actors.[130]

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[130] "Non-State Actors" are defined under international humanitarian law as "armed groups that operate beyond government control," and include, among others, rebel opposition groups (groups that openly oppose the incumbent government, generally related to government or territorial control), local militia (based on ethnicity, clans, or other criteria), vigilantes, warlords, civilian defense forces, and paramilitary groups (when they are clearly outside government control), and private companies that provide military and police services. See A. Clapham, "Non-State Actors," pg. 4, available at <http://ssrn.com/abstract=1339810>.

The question is whether this position is legally correct. International criminal law, as is only fair to admit, is an even more fragmentary legal system and, in some aspects, is still more diffuse than domestic criminal legal systems. However, it is in no way an "anything goes" type of system in which the task of interpreting and creating law can be fused into a single operation, nor into an inconsistent conglomerate of juxtaposed conventions, treaties, and resolutions by international organizations and comprising just any kind of criminal conduct. In that regard, I'm afraid the above debate showed extensive confusion about the current state of customary international law and international criminal law. In actuality, these troubled waters hide truly ideological arguments dressed in legal robes that come across as distorted or incomplete before the universe of existing international norms; at other times, purely evaluative arguments are used that are only relevant in regards to the issue of how the law should be (i.e. *lege ferenda* arguments), instead of what the law actually is (i.e. *lege lata* arguments). In this sense, Baroness Ramsay of Cartvale's words before the British Parliament during the debate regarding the legitimacy of the then imminent military intervention in Iraq are particularly relevant, "Of course we admit that international law is not an exact science, but this doesn't have to seem as odd as some of those who practice international law have made it out to be in recent months."[131]

In this paper I do not intend to provide a definitive answer to such a complex question, both in legal as in historical terms, regarding whether the acts of violence committed by armed non-state actors in Argentina during the late nineteen sixties and early seventies can be subsumed under international criminal law. Instead, I will settle for clarifying certain key misunderstandings about the evolution of international criminal law, its current state, its requirements for the introduction of certain behaviors under its main categories, and the consequences of the emerging case of non-state actors.

For that I will first examine whether acts of terrorism in themselves suffice for criminal prosecution under international criminal law and customary international law. Second, I will explain under what circumstances acts of terrorism may be considered war crimes and whether said conditions are applicable to the actions attributed to insurgent groups in Argentina. Third, I will analyze if the crimes against humanity criteria may be applicable to such actions and finally, I will present some conclusions.

The Crime of "Terrorism" and Customary International Law

One of the arguments used by those demanding the criminal prosecution of perpetrators of past terrorist actions is, in short, that terrorism is subsumed, one way or another, under the framework of international crimes and, therefore, must be treated by Argentine criminal justice bodies as were the actions of State terrorism committed by the military dictatorship in March of 1976. For that reason,[132] the Argentine Supreme Court's (CSJN) decision in the "Lariz Iriondo" case, rejecting the extradition of an alleged member of the Basque separatist organization ETA for acts of terrorism in

[131] Quoted in H. Duffy, *The "War on Terror" and the Framework of International Law*, Cambridge University Press, 2005, pg. 443.
[132] See, for example, M. A. O'Grady, "Don't Count on Argentina to Help Fight Terror." *Wall Street Journal*, July 8, 2005, pg. A11.

Spain on the basis of the statute of limitations on the crimes for which the defendant was being charged, received harsh criticism. According to the Court, since terrorism has not (yet) been classified as an international crime (i.e. as an action that is prohibited under customary international law), it is subject to regular statutes of limitations. In the case at hand, this meant rejecting the extradition requested under the grounds that the right had expired under Argentine law, in accordance with the terms established in the relevant bilateral treaty between Argentina and Spain.[133] In dealing with actions of terrorism as "regular crimes," for lack of a better term, the Court managed to irritate several critics.[134]

The first underlying question in the "Lariz Iriondo" case is whether terrorism was viewed as a crime under customary international law at the time of the Court's decision. However, even if it was, that would not constitute grounds enough to classify the actions of violence committed by insurgent groups in Argentina during the nineteen seventies as terrorist actions, as there is a broader issue that needs to be resolved first; i.e., whether or not there was a customary international norm reprimanding terrorism at the time when the actions took place, which must also be upheld in the context of international criminal law, as the legality principle stipulates that the only actions prosecutable as international crimes are those reprimanded by customary international law at the time of their commission.[135]

Let's begin with the first question: Is "terrorism" currently contemplated as a crime in the framework of customary international law? It seems safe to say it is not. In fact, the prevailing view is that terrorism continues to fall under the catalog of crimes that are reprimanded through different international conventions (as is the case, for example, with drug or human trafficking),[136] but has not yet been included in the catalog of crimes contemplated under customary international law.[137] Among other arguments, this position sustains itself on the fact that, as opposed to genocide, crimes against humanity, and war crimes, there is still no definition of the crime of terrorism that has been accepted on a universal level (note, for example, that terrorism was not incorporated in the list of crimes in the Rome Statute of the International Criminal Court, as noted by the Argentine Supreme Court in the above mentioned decision). It

[133] See "*Lariz Iriondo, Jesús María s/solicitud de extradición*," May 10, 2005, paragraphs 21 and subsq.
[134] See, for example, P. L. Manili, "*El rol de la Corte Suprema en el proceso de desconstitucionalización (2003-2007)*," paper presented at the XVIII Meeting of Constitutional Law Professors, Paraná, September 2007, available at <http://encuentroparana.aadconst.org/archivos/ponencia-20.pdf>.
[135] For example, although the International Criminal Court for the Former Yugoslavia (ICTY) has jurisdiction over crimes committed in the framework of treaties that bind the parties in an armed conflict, it has in practice confirmed, through the application of the *nullum crime sine lege* principle, that, "the crimes charged in the indictments […] constituted crimes under customary international law at the time of their commission and were sufficiently defined by said legal body." See "Prosecutor v. Galic," *Appeals Judgement*, November 30, 2006, § 83 (Appeals Court decision).
[136] Please note, however, that a generic treaty on terrorism does not yet exist. See B. Saul, *Defining Terrorism in International Law*, Oxford University Press, 2006, pg. 129 and subsq., reviewing different regional and international treaties.
[137] Duffy, op. cit., pg. 31 and subsq., with additional references. Also Saul, op. cit., pg. 270, who believes arguments based on the existence of terrorism under customary international law are "premature."

has been recognized, however, that a crystallization process of a new punitive rule of customary international law is most likely underway as a result of the massive terrorist attacks on September 11, 2001.[138] However, if such new norm existed, it is not possible to sustain that it could be applied retroactively to events that took place thirty years ago, thus establishing a main difference with the crimes against humanity perpetrated by military authorities as of 1976 that were clearly prohibited under customary international law at the time of their commission.[139]

In that sense, the above Supreme Court decision may be disliked by those sustaining the still minority view of the customary nature of the crime of terrorism, but this decision can never be labeled as unfounded or arbitrary.[140]

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[138] Duffy, op. cit., pg. 40. On the different ways by which a rule of customary international law is crystallized see the seminal work of M. Akehurst, *Custom as a Source of International Law*, British Yearbook of International Law, 1977.

[139] At this point, the proposition that crimes against humanity were punishable under customary international law in 1976, as sustained by the Argentine Supreme Court in the "Arancibia Clavel" case, is universally accepted and is only subject to secondary criticism. For instance, the law establishing the Extraordinary Chambers in the Courts of Cambodia (national court with international support created by the United Nations and the government of Cambodia) attributes jurisdiction to the court over the crimes against humanity that took place between April 17, 1975 and January 6, 1979, which have no statute of limitations (article 5). Some critics point to the comparatively low number of ratifications to the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity as contrary to the Court's reasoning (see, for example, M. Padilla, "*El fallo de la Corte Suprema de Justicia en Arancibia Clavel*," pg. 3, available at <http://www.energyworld.org/UP/areajuridica/Compendio/Cartilla%20Orientacion/Escritos/Fallo%20CSJ%20caso%20Arancibia%20Clavel%20-%20Dr%20Padilla.doc>, including a quote by Gutiérrez Posse). Among other things, this stresses (as Akehurst points out) that the fact that a treaty has not been widely ratified is not an argument for sustaining that it is not declaratory of customary international law; for example, Akehurst sustains that a possible reason for not ratifying the treaty is that States believe ratification is unnecessary as the norms contained in the treaty *are already* binding as customary law (op. cit., pg. 49). In that sense, the recent study on customary naturalization rules of international humanitarian law by the International Committee of the Red Cross is of interest as it found that, during the discussions that preceded the 1968 Convention, some States affirmed that the rule of non-applicability of the statute of limitations had already been established on an international level, while others held that this rule had already been adopted on a domestic level (these included France, the United Kingdom, Israel, Poland, Rumania, the United States, and Uruguay). See ICRC, *Customary International Humanitarian Law,* vol. I: *Rules*, Cambridge, 2009, pg. 614 and subsq.

[140] A recent decision of the Appeals Chamber of the Special Tribunal for Lebanon affirms that, contrary to the majority opinion, terrorism does indeed have a customary nature and even ventured in a definition of the term. The Chamber's decision, presided by Antonio Cassese, the only jurist affirming the existence of terrorism under customary law, has been strongly criticized by experts on the subject, accusing the Chamber, among other things, of selectively or incompletely analyzing international precedent, capriciously affirming the existence of a state practice, and even basing its conclusions on norms or bodies of domestic norms that violate human rights. See B. Saul, "Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism," *Leiden Journal of International Law* 2011, published in <http://journals.cambridge.org/action/displayFulltext?type=1&fid=8279879&jid=LJL&volumeId=-1&issueId=-1&aid=8279877&bodyId=&membershipNumber=&societyETOCSession=>. As far as the discussion on crimes committed by insurgent groups in Argentina, however, this decision is irrelevant as it follows that, even if there was a customary norm prohibiting terrorism, such norm would be recent and supported by statements and instruments entered into in the last

"Terrorism" and War Crimes

Once terrorism has been discarded as an autonomous crime, there are two possible avenues for prosecuting insurgent groups for international crimes, neither of which is without its difficulties. The first avenue is to treat terrorist actions as war crimes in accordance with international humanitarian law (IHL) definitions. The non-state status of insurgent groups is not an impediment for such treatment as domestic armed conflicts, and as per IHL, these are common between a belligerent party and a non-state party. Armed conflicts constitute "recourse to armed force between States or prolonged armed violence between government authorities and organized armed groups, or between said groups within a State."[141] Therefore, in order for the war crime category to be applicable, there would have to have been a *non-international armed conflict* in Argentina during the historic period in question. If this were the case, all belligerent parties would be subsumed under common article 3 of the Geneva Conventions of 1949, which prohibits, among other behaviors, all forms of homicide, mutilation, cruel treatment, torture, hostage taking, and convictions and executions without trial.

However, in order for there to be a domestic armed conflict, the situation must exceed mere tensions and domestic disturbances or isolated and sporadic acts of violence (as expressed in article 1 [2] of Additional Protocol II to the Geneva Conventions), as well as the existence of two or more conflicting armed groups, a requirement that could include insurgent groups provided they could be considered a party in the conflict and have achieved a certain degree of organization. Therefore, periods of domestic commotion, even when acts of violence are perpetrated by groups of individuals during these periods, are not subsumed under the norms that regulate non-international armed conflicts, unless they meet the above requirements relating to the intensity, nature, and duration of said violence. As the International Criminal Court for the Former Yugoslavia (ICTY) has established, if the *organization or intensity* of the actions of non-state actors in the conflict do not suffice, their violence merely constitutes "banditry and non-organized, short-lived or terrorist insurrections that are not contemplated under international humanitarian law."[142] Conversely, whether the alleged acts are terrorist in nature or not is not decisive. What is relevant when determining whether a domestic

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decade of last century and the beginning of this century. This is contemplated by the Appeals Chambers, "However, while many legal scholars and experts hold that a globally accepted definition of terrorism has not been established as a result of the sharp differences in viewpoints on certain issues, a thorough analysis reveals that a definition has in fact gradually surfaced." See "Special Tribunal for Lebanon. Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Perpetration, Cumulative Charging," February 16, 2011, §§ 83 and subsq., published at <http://www.stltsl.org/x/file/TheRegistry/Library/CaseFiles/chambers/20110216_STL-11-01_R176bis_F0010_AC_Interlocutory_Decision_Filed_EN.pdf >. Saul ("Legislating…", pg. 3) affirming that the decision must be interpreted as referring to international law that was in existence by February 2005, at which time the behavior that served as the basis for allotting subject-matter jurisdiction took place.

[141] "Prosecutor v. Tadic," *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction Jurisdiction* (hereon, *Tadic Jurisdiction Decision)*, Appeals Chamber, October 2, 1995, § 70.
[142] "Prosecutor v. Tadic," *Judgement* (Trial Chamber), May 7, 1997, § 562.

armed conflict exists is if these acts "were isolated or part of a prolonged campaign that involved both parts in the hostilities."[143] In other words, acts of terrorism, in themselves, do not suffice as grounds for founding the existence of an armed conflict. A non-international armed conflict exists only when said actions are committed by an armed group with sufficient magnitude and organization and when the violence of these actions, combined with the government response, reaches a nature, intensity, and scope that leads to the conclusion that both parties are belligerent in and conducting hostilities.

Therefore, there is an elevated factual threshold that must be surpassed for the actions of insurgent groups to be deemed as war crimes committed in the framework of a domestic conflict. An additional obstacle, in my opinion, that completely discards the possibility of criminally prosecuting these actions is the recent customary nature of common article 3 before the main norms regulating the war crimes committed during non-international armed conflicts.[144]

In fact, unlike serious violations of the Geneva convention, violations of common article 3 were not comprised, until just recently, in the circle of *erga omnes* criminal prohibitions under customary international law constituting the *condictio sine qua non* for such actions to be repressed under the umbrella of international criminal law by rule of the *nullum crime sine lege* principle. It was only after a foundational decision of the Chamber of Appeals of the ICTY in the "Dusko Tadic" case (1995),[145] that the customary nature of applicable IHL norms was consolidated in cases of domestic conflict. As stated by Gerhard Werle, a leading author in this field:

> War crimes were traditionally considered as mere violations of international rules that regulate war itself, i.e., international armed conflicts as opposed to civil wars. After the ICTY's decision in the "Tadic" case in 1995, it has been widely accepted that such serious breaches of international humanitarian law in domestic armed conflicts can also be considered war crimes if the conduct in question has been criminalized. Evidence of this is article 8 (2) (c-f) of the Statute of the International Criminal Court.[146]

Werle also highlights that for a long time under international law, the punishability of violations of IHL norms applicable to non-international armed conflicts had not been recognized; even in 1993 a comment of the Committee of the Red Cross regarding the Statute of the ICTY concluded that the concept of war crime was limited to international armed conflicts.[147] In that sense, the above decision of the ICTY, which sought convergence between IHL norms applicable to international armed conflicts and those

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[143] "Prosecutor v. Boskoski" *et al.*, *Judgement* (Trial Chamber), July 10, 2008, § 185.
[144] Developed and later expanded in Additional Protocol II of 1977.
[145] *Tadic Jurisdiction Decision*, note 13.
[146] A. Cassese, *International Criminal Law*, Oxford University Press, 2008, pg. 81.
[147] G. Werle, *Völkerstrafrecht*, Mohr Siebeck, Tübingen, 2003, pg. 311. See also G. Mettraux, *International Crimes and the Ad Hoc Tribunals*, Oxford University Press, 2006, pg. 130 and subsq., in the same sense, R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Cambridge, 2007, pg. 230: "Until 1990, it was broadly accepted that the norms regulating war crimes were not applicable to non-international armed conflicts."

aimed at domestic conflicts, paved the way and later led to consensus regarding the inclusion of war crimes committed in non-international armed conflicts in the ICC's Statute.[148] However, its transformation effects could not be projected toward the past.

This proves that acts of violence by armed groups during the nineteen seventies could also not be criminally prosecuted under the label of war crimes perpetrated in the framework of a domestic armed conflict, even in the highly unlikely event that violence at the time had surpassed the threshold of domestic disturbances.[149] Against this, there has been alleged support by external actors (especially from the government of Cuba) and, as a result, serious violations of the Geneva Conventions that only regulate international armed conflicts have been deemed applicable as they were both criminalized by customary international law at the time the actions in question were committed and governed by the principle of non-applicability of statutes of limitations.[150] This logic is flawed.

Even assuming a foreign government has shown some sort of support for insurgent groups (a hypothesis for which I have no information and which I shall not analyze here), for an armed conflict to be "internationalized" not just any intervention from a foreign State suffices, instead what is required is the direct intervention of its own troops or its actions through other agents. In turn, the existence of an international armed conflict has been confirmed in cases in which one belligerent group was shown to be under the "overall control" of another State, and said control "exceeded the mere financing and provision of equipment" and also involved "participation in the planning and supervision of military activities."[151] That is to say, even assuming Cuba or any other State were sympathetic toward and/or supported insurgent groups, said state involvement would in no way change the nature of the armed conflict (if there was one), unless the overall control threshold was passed.[152]

As far as I know, the thesis that Argentine insurgent groups of the nineteen seventies were actually agents working under the overall control of a foreign State has not been seriously sustained by anyone. In any case, opening an investigation and criminal

[148] Cryer, Friman, Robinson and Wilmshurst, op. cit., pg. 231. The Statute includes violations of common article 3 as well as a limited list of other fundamental precepts.
[149] The Fiscal Unit for Coordination and Monitoring of Cases of Human Rights Violations Committed During State Terrorism (*Unidad Fiscal de Coordinación y Seguimiento de las Causas por Violaciones a los Derechos Humanos Cometidas Durante el Terrorismo de Estado*) reached the same conclusions in its report on the "Larrabure" case, pg. 18-20, published in <http://www.mpf.gov.ar/Institucional/UnidadesFE/Informe-caso-Larrabure.pdf>.
[150] In turn, some have made reference to the alleged "promotion" of insurgent actions in the region during the nineteen seventies at the hands of the Cuban regime. See E. Cárdenas, *"Los crímenes de guerra" y la resolución de la Procuración General de la Nación 158/07*, ED, no. 11 945, February 12, 2008.
[151] "Prosecutor v. Tadic," *Appeal Judgement,* July 15, 1999, Chamber of Appeals of the ICTY, § 145.
[152] Note that the "effective control" adopted by the International Court of Justice in the "Nicaragua" case and recently ratified in the "Bosnia and Herzegovina v. Serbia and Montenegro" case for determining *State* (not individual) accountability for actions committed by non-state actors is even more restrictive and requires "dependence on the one hand, and control on the other." See R. J. Goldstone y R. J. Hamilton, "Bosnia v. Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia," *Leiden Journal of International Law*, 21, 2008, pg. 97 and subsq.

prosecution on that basis would require, among other things, the existence of reasonable objective suspicion that such relationship existed, so that the characterization of these criminal actions as serious violations of the Geneva Convention could be deemed, at least, plausible.[153]

"Terrorism" and Crimes against Humanity

The other venue that has been proposed for justifying criminal prosecutions of acts of terrorism committed during the nineteen seventies is their characterization as crimes against humanity (CAH). This involves examining whether the underlying behavior in a given event classified as a terrorist action can also be subsumed as a crime against humanity (torture, homicide, extermination, persecution, among others). However, the use of this categorization raises two main issues that must be analyzed. One of these issues relates to the *active subject* of CAHs, i.e., who can perpetrate such crimes. The other issue relates to the specific requirements for its categorization as a CAH, especially, the general element of context that defines this category, i.e., the question of the distinctive elements that turn an instance of torture into a CAH instead of an individual criminal act or an individual human rights violation. Let's analyze both issues separately.

As conceived today, the CAH category involves not only crimes committed under the context and protection of a state policy, but actions committed in light of an *organizational* policy as well.[154] Therefore, for example, it has recently been sustained that indiscriminate missile or morter attacks by armed Palestinian groups against civilian targets in Southern Israel may constitute CAH.[155] Nonetheless, this principle is not automatically applicable to the actions of insurgent groups in Argentina toward the late nineteen sixties and early nineteen seventies as the inclusion of non-state agents in the list of possible active subjects of CAH is, in actuality, a recent addition to the catalog of international crimes created for actions of state violence against the civilian population. In fact, the category was recently codified in the Nuremberg Charter (article 6 [c]) in order to handle massive acts of brutality perpetrated by the state against its *own* civilian population, as the existing international law provisions of the time regulated the conduct of States and said little or nothing regarding how states should treat its citizens.[156]

The position that CAH were inexorably linked to state actions was upheld until the Office of the Prosecutor of the ICTY raised, before the Appeals Chamber in the "Tadic" case, the question of whether the statute of limitations of international customary law at the time of the conflict in the former Yugoslavia meant that CAH could also be

[153] No serious justice administration system would throw away resources in investigating facts that *ab initio* lack any tangible sustenance.
[154] Statute of the International Criminal Court, article 7 (2) (a). The scope of the term has been subject to debate, see *below* note 33.
[155] See *Human Rights in Palestine and Other Occupied Arab Territories. Report of the United nations Fact-Finding Mission on the Gaza Conflict*, September 15, 2009, §§ 108 and 1724, among others; available at <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf>
[156] See, among others, Cryer, Friman, Robinson & Wilmshurst, op. cit., pg. 188.

committed by *certain* non-state organizations. The importance of this particular aspect of the decision justifies its reproduction:

> An additional issue is that of the nature of the entity behind the policy [aimed at particular groups of persons]. The traditional view sustained, in fact, not only that there was a need for a policy, but that said policy should come from the State, as was the case in Nazi Germany. The prevailing view, as explained by the author, was that crimes against humanity, which are collective in nature, demand state policies "because their commission requires the use of state institutions, personnel, and resources for the commission of the crimes specifically described in article 6 (c) [of the Nuremberg Charter] or abstention from their commission. While this may have been the case during World War II, in accordance with which there is legal precedent from courts adjudicating charges of crimes against humanity based on events that had allegedly occurred during that period, this is no longer the case today. As the first international court to consider charges of crimes against humanity that allegedly took place after World War II, the International Court is not bound by its previous doctrine and must instead apply customary international law as it was at the time when the crimes were committed. In that sense, the law pertaining to crimes against humanity has been expanded to include forces that, although not stemming from legitimate governments, *have de facto control over a specific territory or can freely move within that territory.*[157]

This test has been reaffirmed by legal doctrine. Therefore it has been held that the extension of the CAH category to non-state actors is possible when said actors "share the characteristics of state perpetrators in that they exercise dominion or control over the territory and population and carry out a 'policy' that has similar characteristics to 'state policy or action.'"[158] It was recently affirmed that the CAH category is applicable to state or de facto actors, provided it is always part of a practice.[159]

Later ICTY jurisprudence has followed the same logic as in the "Tadic" case. In turn, in a case relating to crimes committed by the Kosovo Liberation Army (KLA), the Chamber of Appeals, when analyzing the entity's capacity to commit CAH stated the following:

> Due to structural factors and organizational as well as military capacities, an "attacked aimed at the civilian population" will often be deemed as committed in representation of the State. When acting as the organized authority within a specific territory with the capacity to mobilize and direct military and civilian groups, because of its own nature, a sovereign State has characteristics that enable it to organize and carry out attacks against the civilian population in an "overall" and "systemic" way. In contrast, the factual situation before the Chamber includes allegations of an attack against the civilian population

[157] "Prosecutor v. Tadic", *Judgment* (Trial Chamber), May 7, 1997, § 654. That highlighted above belongs to me.
[158] C. Bassiouni, *Crimes Against Humanity in International Criminal Law*, 1999, pg. 245.
[159] Cassese, op. cit., pg. 100-101.

committed by a non-state actor with extremely limited resources, personnel, and organization.[160]

Later, when analyzing the group's capacity to develop an attack policy against the civilian population, the Chamber reiterated the requirement of de facto territorial control in the "Tadic" case. Additionally, upon applying such criteria to the case at hand, the Chamber concluded that the KLA had had, within the relevant time frame, "*de facto* control over parts of Kosovo and its forces had been able to move freely within those and other parts of Kosovo."[161]

The "Triadic" test is, therefore, an interim milestone in the development of the CAH category that envelopes everything from the restrictive view in Nuremberg (whereby CAH can only be committed by the State) to the broader view expressed in the Rome Statute (whereby CAH can be committed by organizations that are capable of establishing policies for attacking civilian population).[162] As we have said, the test constitutes an established precedent in the ICTY.[163] This test was also applied by the

[160] "Prosecutor v. Limaj, Bala and Musliu," *Judgment* (Trial Chamber), November 30, 2005, § 191.
[161] Ibid., § 214.
[162] Even so, a recent divided decision of Pre-Trial Chamber II of the ICC, authorizing the initiation of a preparatory criminal investigation by the Office of the Prosecutor, shows that even to this day there are still those who believe that CAH require at least one non-state actor with some state-like characteristics. In his dissenting opinion, justice Kaul lead an ICC investigation in Kenya on the grounds that the non-state actors involved lacked sufficient magnitude and organization so as to act as or like a State, among other considerations. See *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, March 31, 2010, dissenting opinion of justice Kaul, §§ 50-53 and 71-153. This opinion has had some doctrinal support; see C. Kress, "On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement. Some Reflections on the March 2010 ICC Kenya Decision," *Leiden Journal of International Law*, vol. 23, no. 4, December 2010, pg. 855 and subsq., where it has been claimed that customary international law requires the existence of an organization comparable to that of a State, and that said requirement must govern the concept of "organization" in terms of article 7 (2) (a) of the Statute. Although the author of this paper disagrees with the arguments held in said opinion and academic commentary, they still illustrate the weight carried by the state component in the debate surrounding CAH on the one hand, and on the other, the importance that is given to whether or not non-state organizations charged with the commission of CAH have a significant degree of importance, means, hierarchy, coordination, and structure.
[163] When referring to an alleged abandonment of the territorial control requirement found in some ICTY decisions, which have not been clearly identified (see *La Nación* editorial of August 16, 2007, published at http://www.lanacion.com.ar/nota.asp?nota_id=934933>, with general reference to the "Milosevic" case), the precedents of the Court are simply distorted. The only time the ICTY can be said to have abandoned the territorial control requirement was in reference to the necessary requirements for non-international armed conflicts, in which case, article 3 of the ICTY Statute was applicable. It was this, and not the conditions for CAH applicability, that was discussed in the "Prosecutor v. Dragomir Milosevic" case (Sarajevo site); see *Judgment* (Trial Chamber), December 12, 2007, § 870 and footnote no. 3007. It must be added that in this particular issue, the ICTY has never deemed territorial control as a sine qua non requirement for affirming the existence of a non-international armed conflict, although such element would be analyzed by the ICTY when determining in each case whether hostilities had exceeded mere banditry or insurgence (Mettraux, op. cit., pg. 36 and subsq.). Territorial control is, indeed, a jurisdictional requirement for the application of Additional Protocol II (Duffy, op. cit., pg. 222). The issue here is, in any case, determining relevant criteria for establishing the violence threshold that differentiates mere domestic disturbances in a non-international armed

Argentine Supreme Court in the "Derecho" case, in which the Court decided on the statute of limitations of an individual account of unlawful deprivation of liberty and police abuse committed in 1988.[164] According to the adopted decision, much more than a group of people with criminal purposes is required; meaning that an organization with enough territorial control or autonomy within said territory is needed for deeming such organization state-like and, therefore, able to commit CAH.

The test reflects the state of development of customary international law at least at the time of commission, as in the "Tadic" case (1992). There are no solid grounds for sustaining, beyond any reasonable doubt, that the principle established in the "Tadic" case was already enforceable during the nineteen seventies,[165] however, in any case, it is clear that the behavior of armed non-state groups that were effective at the time could never be analyzed in light of the more flexible test in the "Tadic" case. This at least means that the stricter requirements adopted by the ICTY for a non-state organization to commit crimes against humanity should be deemed met in order to begin to discuss the possibility of including members of insurgent groups within the circle of potential CAH perpetrators.[166]

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conflict, in accordance with IHL (see previous section on this issue), instead of the requirements that non-state actors must meet in order to be deemed as fully accountable perpetrators of CAH (a category that is currently related with international human rights law instead of IHL). See P. Akhavan, "Reconciling Crimes Against Humanity with the Laws of War," *Journal of International Criminal Justice* 6, 2008) pg. 26 (with additional references).

[164] "*Recurso de hecho. Derecho, René Jesús s/incidente de prescripción de la acción penal - Causa 24 079*," July 11, 2007. The Court majority adhered to the grounds and conclusion of the Attorney General. See an in-depth assessment of the decision and a detailed response to its criticism in L. Filippini, "*La definition de los crímenes contra la humanidad en el fallo 'René Jesús Derecho' de la Corte Suprema argentina*" in Leonardo Pitlevnik (Ed.), *Jurisprudencia penal de la Corte Suprema de Justicia de la Nación*, v. 4, Hammurabi, Buenos Aires, 2008, pg. 316-350.

[165] As has been stated above (see footnote no. 12), the law establishing the Extraordinary Chambers in the Courts of Cambodia includes the CAH category for actions perpetrated in Cambodia as of April of 1975. This includes actions committed against the People's Republic of Kampuchea as well as those against Khmer Rouge toward its final attempt to take power, i.e. before it became formally incumbent. This could support the interpretation that the principle expressed in the "Tadic" case was already in effect at the time.

[166] A recent legal decision rejected a request for reopening a case of terrorism where a final decree has been issued (i.e. the attack against Captain Humberto Viola and his two daughters in 1974, resulting in the death of the Captain and one of his daughters), the perpetrators of which had been pardoned in 1989, on the grounds that, among others, neither the insurgent group in question (ERP) nor its members "were part of the State, nor depended on the State in any way that indicated the basic characteristic of having transitioned into *the perverse mechanism of systematic and organized persecution against a group of citizens, thus deviating from its main function of promoting the common good and peaceful coexistence among members of society*" ("*Figueroa, Rolando Oscar y otros s/doble homicidio y lesiones*," File 478/74, decreed on December 1, 2009 by the Federal Judge of San Miguel de Tucumán, with reference to the "Derecho" case of the Argentine Supreme Court. (The highlighted text is reflecting the source). That is to say that the decision rests on a more restrictive interpretation of CAH based on which the active subject must necessarily be linked to the State. The pertinent question is then whether this judge would have reached a different conclusion had he applied the less restrictive, but equally demanding test established in the "Tadic" case; however, there is nothing in the decision (including elements of the facts there analyzed) to suggest that the conclusion could have been any different.

The second issue to be analyzed relates to the definition of CAH. In order for an individual criminal action (i.e. homicide, torture, etc.) to be deemed as CAH, it must constitute a "generalized or systematic attack *against the civilian population*," and must be committed "with knowledge of said attack." According to existing international precedents, the decisive factor is either the scale or magnitude of these crimes ("generalized" attacks) or their recurring patterns or organizational scheme ("systematic" attacks).[167] Said attack must be directed against the civilian population and not against military objectives or elements. Therefore, a series of attempts against military outposts can affect the surrounding civilian population and even inflict generalized fear, but it is insufficient for founding the existence of crimes against humanity. In contrast, the terrorist attacks on the Twin Towers on September 11, 2001, represents such a widespread degree of victimization of purely civilian population that the can be characterized as crimes against humanity.[168]

For the purposes of determining whether an attack was directed against the civilian population what should be considered, among other factors, are the means and methods used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed during its course, resistance against the attackers and the extent to which the attacking force has complied or attempted to comply with precautionary requirements of the laws of war.[169]

If insurgent groups operating in Argentina in the nineteen seventies had "*de facto* control over or were able to freely move within part of the territory" and had carried out a "generalized or systematic attack against the civilian population" is a fundamentally factual and evidentiary issue that will not be analyzed here. It is up to criminal justice administration organs and historians to determine if these clearly restrictive requirements (which ultimately differentiate CAH from other kinds of criminal conducts that were later perpetrated by organized groups of people, such as terrorism) could be met in the case of crimes committed by these groups.[170] Personally, I feel an

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[167] See, among others, "Prosecutor v. Kordic and Cerkez," Appeals Judgement (Appeals Chamber of the ICTY), December 17, 2004, § 94.

[168] See Duffy, op. cit., pg. 77-83, sustaining that the requirement by which the civilian population must be victimized by the attack can lead to different considerations depending on whether they are clearly civilian targets, as was the case at the World Trade Center in New York, or those who are clearly military, such as the Pentagon.

[168] "Prosecutor v. Kunarac," Appeals Judgement (Appeals Chamber of the ICTY), June 12, 2002, § 91.

[169] "Prosecutor v. Kunarac," Appeals Judgement (Appeals Chamber of the ICTY), June 12, 2002, § 91.

[170] An extremely restrictive position related to the applicability of CAH to acts of terrorism, even large scale acts such as the September 11 attacks, can be found in M. Mavany "*Terrorismus als Verbrechen gegen die Menschlichkeit – Analyse und Konsequenzen der Zuordnung zum Vökerstrafrecht," Zeitschrift für Internationale Strafrechtsdogmatik* 8, 2007, pg. 324 and subsq., published in <http://www.zis-online.com/dat/artikel/2007_8_155.pdf>, sustaining that, in cases involving an organization, laterality is required with state agencies which, according to the author, is absent in the case of terrorist groups, among other requirements, as they have no control over the territory. Three criticisms have been formulated against this position: first, that although the "Tadic" test demanded laterality between the organization and state authorities, the ICC Statute departed from this precedent and only required the organization's ability to formulate a policy for attacking the civilian population (obviously appropriate for achieving these purposes); second, that under the "Tadic" test, a group that did not control a certain territory but

affirmative answer to this question is highly unlikely. However, it is clear that, as we have seen when analyzing the war crime category, in order for there to be an investigation and criminal prosecution for CAH perpetrated by non-state actors, there must be some minimal substance for considering that the application of said category to the facts in question is plausible. In this regard, theories that are purely conspiratorial or interpretational trickery that deviate or circumvent applicable legal requirements[171] fail to constitute an adequate foundation for criminal investigation and, even more so, for later prosecution.[172]

In Conclusion

The preceding pages should suffice to show that there does not exist today a solid and uncontroversial foundation under which to subsume the violence committed by non-state actors in the nineteen seventies in a category of international crimes recognized under customary international law. Upon discarding that terrorism falls within the universe of crimes contemplated under international criminal law, said acts could be contemplated under other international crimes *if and only if* the specific elements of the former have been met in the case at hand.[173] Making this determination is a complex operation that must be carried out on a per case basis, in a detailed and objective way, and, above all, without yielding to the temptation of manipulating legal concepts or representing distorted historical facts for arriving at solutions based on correct values. The analysis developed in this work should serve to explain that the above could be extremely difficult if not impossible, at least in most cases.

Acts of terrorist violence, without ceasing to be criminal in nature, do not possess, at least for the moment, the same entity as international crimes such as genocide, crimes against humanity, or war crimes, and therefore are not governed by unique principles that are applicable to these latter categories. Whether we like it or not, it should not be denied on the count of forced dogmatic constructions or attempts at rewriting existing international norms and jurisprudence. As noted acutely in the context of international discussions on the nature of the crime of terrorism, "the *lex ferenda* should not falsely be represented as *lex lata* by judges, regardless of how persuasive the moral case is in favor of punishing evil doers, or even in cases in which positive law proves deficient."[174]

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was able to freely move within that territory (such as the Lord's Resistance Army in North Uganda) can classify as an active subject in the commission of CAH; lastly, a methodological criticism: *ex ante* and abstractly discarding for all cases in which a type of organization fails to meet the CAH requirements does not constitute a good practice, as this is a question that mainly revolves around the facts and, therefore, should be analyzed in each particular case.

[171] For example, considering that because some individual members of the Montoneros group could use public transport, this group was able to "freely move" within the territory of the City of Buenos Aires.

[172] See Juan Méndez interview in <http://www.unsam.edu.ar/publicaciones/nomada/material/Mendez.pdf>, expressing his doubts regarding the existence of factual grounds for applying CAH to the actions of insurgent groups.

[173] It must be emphasized here that in the above mentioned extradition case decided by the Supreme Court, Spanish authorities had not characterized the events as crimes against humanity or war crimes, but as common crimes, such as membership to an armed group, raising havoc, illegal detention, and yes, terrorism.

[174] Saul, "Legislating…", op. cit., pg. 2.

This does not mean, however, that the underlying claim for justice by victims of terrorism[175] is illegitimate or that it can be ignored, even when supported by strong underlying ideologies[176], or concealed behind corporate attempts to secure their own impunity. How and to what extent to respond to these claims is certainly a challenge the Argentine government must face. But in any case, the answer cannot mean "backing down" from the satisfactory completion of the criminal prosecution of crimes against humanity committed by de facto state authorities between 1976-1983, or by the stubborn and legally untenable equation of crimes that are completely different in terms of nature and effects.

[175] See an analysis of violence imparted by insurgent groups in C. Nino, *Radical Evil on Trial*, Yale University Press, 1996, pg. 50 and subsq., and J. Malamud-Goti, *Game Without End. State Terror and the Politics of Justice*, University of Oklahoma Press, 1996, pg. 30-40.

[176] The same can be said regarding some of the claims of justice related to state repression during the National Reorganization Process, without undermining the legitimacy of the claim itself. In this sense, attempts to push the limits of CAH or war crimes to allow the inclusion of criminal acts committed by insurgent groups bear some resemblance to the attempts to subsume the persecutory acts of the military dictatorship against its own civilian population as acts of genocide, regardless of whether this is legally unsustainable. Regarding "self-genocide" in the 1948 Convention on the Prevention and Punishment of Genocide véase W. A. Schabas, *see Genocide in International Law,* Cambridge University Press, 2000, pg. 118-119.

6. Gender Violence and Sexual Abuse in Clandestine Detention Centers

A contribution to understanding the experience of Argentina

Lorena Balardini, Ana Oberlin, and Laura Sobredo

Introduction

The reopening of justice processes for serious human rights violations committed during the years of State terrorism in Argentina has led to a profound recognition of the living conditions of detainees in clandestine detention centers (CDC), which, for the most part and for reasons we will discuss below, had been circumvented in the experience of truth and justice of the nineteen eighties.

One aspect of this issue is gender violence in the broadest sense of the term, including rape, all kinds of abuse and mistreatment of detainees-disappeared persons, both male and female, in CDCs under the command of the Armed and Police Forces.

The gender perspective helps to analyze the distinct impact of a practice, process, or institution upon men and women, as well as how said practice legitimizes, reinforces, or reverses the hierarchical relationships between them. In the issue at hand, the gender-based approach enables studying life in CDCs, where femininity is a condition that exceeds woman and paints, in brutal and violent strokes, the usual hierarchical organization of society in general.[177]

This chapter, therefore, analyzes the particular gender-based violence experience of Argentina during the repression. This is a gender-based analysis that will address many questions related to the impartment of this form of violence under clandestine custody, the forms such violence took as it crystallized in survivor accounts as part of the processes of truth and justice that followed, and the possibilities of prosecuting this particular violence, understood and defined *a priori* as a crime against humanity, committed systematically throughout the country. Therefore, we will combine theoretical approaches to this topic, parting from psychoanalytical, sociological and legal discussions, with the invaluable testimonies of survivors, in order to reflect upon these issues from the justice process arena, starting from the exaltation in the voices of survivors.

[177] We are referring to the aggressive impulse, that is characteristic of male subjects, toward anyone who manifests signs and gestures of femininity, regardless of whether that person is "male" or "female." Thus, rape, understood broadly as the use and abuse of the body of another person, is not limited only to women. However, men are usually identified as subjects with masculine characteristics, and gestures of femininity are more frequently displayed by women. As a result, we refer to men and women with certain reservation, suggesting the use of both concepts by way of construction, linked to structures and positions occupied in social space.

This experience is the result of a long road in the reconstruction of the stories that conform our recent past. It is also reflects, as we will sustain below, a current and increasing need.

The Construction of Testimonies at Every Stage of the Process of Truth and Justice – A Time Related Hypothesis

To analyze gender violence in the particular experience of Argentina, we must consider that the ways to "reconstruct" the victim testimonies have suffered changes at different stages of the long process of truth and justice.

As far as gender policies, today's speech allows the enunciation of that for which we fight and at the same time, the means by which we fight. Therein lies the value of witness statements in each of the areas where they were made, regardless of the norms supporting opportunities to testify. Statements made in court reconstruct a speech that is much richer and broader than the individual testimonies themselves, extending and adding complexity to cultural production, militancy, and infinite modes of collectively constructing history.

The focus of testimonies in the nineteen eighties was aimed at proving the existence of a systematic plan of repression and legally conceptualizing the notion of disappearance. The initial statements before the National Committee for the Disappearance of Persons (*Comisión Nacional sobre la Desaparición de Personas*, CONADEP) reveal the situation of systemic torture in CDCs, and torture and inhumane living conditions also include a range of sexual abuse and gender-based differentiation of punishments. In particular, the stories focused on providing information that is relevant for identifying fellow prisoners who were killed or "transferred,"[178] the fate of whom was uncertain.

This view of testimonies was reflected in the strategy implemented for the trial of the military *juntas* leaders in the context of case "13/84," known worldwide as the *Juntas* Trial, in 1985. In this process, the criminal prosecution strategy involved taking paradigmatic cases to trial, and accusations against perpetrators focused on offenses under the Argentine Criminal Code,[179] which did not include charges for crimes against sexual integrity,[180] even though multiple references had been made to such crimes in numerous testimonies. Thus, court decisions in this case contain excerpts from different testimonies evidencing the systematic use of torture on detainees, including the type of abuse that is characteristic of gender-based violence; however, these incidents were not charged as such in the framework of the criminal strategy surrounding the proceedings.

[178] In the jargon of the clandestine detention context, "transfers" was the term used to describe the final fate of the hostages, i.e., death and subsequent disappearance of their bodies.
[179] The crimes tried in case "13/84" were unlawful deprivation of freedom, torture, torture followed by death, murder, and theft.
[180] "Crimes against sexual integrity" are restricted charges in Argentine law and are limited to cases that can be understood broadly as "gender-based violence."

In short, the analysis of the experience of the nineteen eighties has shown that the overall objective of proving illegal repression overshadowed personal experiences, which, regardless of having been consistently mentioned by witnesses and narrated in historical texts, were evidently displaced by the wide scope of systematic disappearances and extermination.

While technically the possibility of prosecuting these crimes remained in effect in times of impunity,[181] these crimes remained concealed. However, time passed, survivors continued to file reports and claims, and in the so called "Truth Trials"[182] testimonies multiplied leading to the reopening of criminal prosecutions; all this has contributed to changing the narrative of each particular experience. In this new process, survivor testimonies focused on their own experiences, instead of being limited to those of their fellow captives, whose disappearance had to be confirmed. This must not be minimized as, for the first time, the focus is on personal experiences.

> "At first, we testified about the people, that were still disappeared, who we had seen with life at clandestine detention centers; then we testified about the repressors that we were able to recognize; but now, we are testifying about ourselves."[183]

Thus, under the new justice process, witness testimonies are much more detailed when describing the experience of each survivor. Therefore, we are seeing a clear qualitative leap in the construction of testimonies, which have begun to expose (particularly in the case of women) increasing accounts of gender-related abuse and harassment suffered during captivity.

"Testifying about ourselves" is something that women have been doing since the beginning. However, for that speech to resonate on a collective level, it must be verbalized by some and heard by others who are willing to listen. Private verbalization (and perhaps even individual verbalization at first) is the start of the construction of collective initiatives and the redefinition of institutional speech.

Over thirty years have gone by and we still find ourselves (in paper and beyond) attempting to account for what happened while fitting the past in the justice process. That said, why not attempt to explain these events as they relate to the passage of time? If these events had already been verbalized, if they had been stated eloquently

[181] Crimes against sexual integrity, abduction of children, and property theft were beyond the reach of the Full Stop (*Punto Final*) and Due Obedience (*Obediencia Debida*) laws, enacted in 1986 and 1987. Our time hypothesis also suggests why these crimes were not investigated like the rest of the crimes that could potentially be solved.

[182] The so called Trials for Truth were carried out in several jurisdictions as an alternative to criminal prosecutions that were not possible at the time. They were the culmination of a phase marked by the pursuit of truth and ultimate fate of disappeared-detainees, in the framework of the right of victims and society as a whole to know their past and ensure their future. Regardless of the impossibility of holding perpetrators accountable for their actions, this legal remedy contributed to the formation of a corpus of evidence that proved paramount in the upcoming justice process.

[183] Testimony before CELS as part of a group interview on May 18, 2010.

and concretely, why then is it that gender-based violence has only recently gained an explicit place in judicial speech?

An initial explanation is that it is difficult, both on an individual and collective level, to hear accounts of traumatic experiences and to believe in witness accounts. In *Los hundidos y los salvados* (The Drowned and the Saved), Primo Levi reproduces the words of Lager guards in Auschwitz:

> "Regardless of the outcome of the war, the war waged against you has been won, none of you will live to tell your story, and even if you managed to escape, the world will not believe you [...]. Even if some evidence were to remain or some of you were to survive, people will say that the events you describe are too monstrous to be true [...]. We will be the ones writing the history of Lager."[184]

These words are not only an inescapable account of the reality of concentration camps, but are also a clear reflection of the disturbing experiences of concentration camp survivors, which is comparable, in the case of Argentina, to those of CDC detainees. As if time (over three decades) had not elapsed between one horror and the other, a survivor of a clandestine detention center known as Vesubio narrated her re-encounter with her mother when she returned home nearly one year after her disappearance. After hugging her daughter, the mother said, "Well, you're home now, we're going to say that you've been away all these months and we will never speak of this again."[185] They never spoke of it again; the mother refused to hear the horrors endured by her daughter.

Silence, in this case, replaced the precept that "no one will believe you," thus, constituting the most radical form of denial. The issue no longer revolves around whether or not survivor accounts are credible, its simply swept under the rug as something we "will never speak of again," as if we had ever really spoken about it.

TIME AND TRAUMA

Hearing the aftereffect of the horrors endured by so many human beings throughout the 20th Century has, from a psychoanalytical point of view, allowed us to see the peculiarities of traumatic experiences through time; to witness the durability of experiences that have made a mark in someone's psyche and attempt to linger on forever, to find a place in the person's recorded images and meanings. This trauma reappears in testimonies when survivors relive their experiences through their narrations.[186]

It is impossible to assign meaning to a traumatic situation that demands we allow the continuity of life in subjective, as well as material, terms; a task that takes an enormous

[184] Primo Levi, *Los hundidos y los salvados*, El Aleph, Barcelona, 3rd Ed., 2006.
[185] Testimony before CELS as part of a group interview on May 18, 2010.
[186] CELS, *Informe anual 2000*, Eudeba, Buenos Aires, 2000.

psychical toll from individuals and society as a whole and is opposed to the "opacity of trauma, its resistance to meaning."[187] These traumatic experiences always represent a crossroad that extends beyond chronological time. The insistence of that which is not represented when binding with the rest of the psychical fabric, with the rest of the signifiers, makes elaborating trauma possible to some extent, thus facilitating the recovery of the ability to develop and desire, to remember and forget. That which could not be elaborated, the rest of the horror that remained untold, unacknowledged in the private narration mentioned above, or that was silenced by those who were listening or denied by social institutions that suspended the possibility of seeking justices is, thus, revealed and expressed.[188] What cannot be recorded as meaningful images or words will continue to linger, to appear as something that must be elaborated, that must be repaired.

Therefore, traumatic experiences, as are all forms of torture, remain pending and in place, waiting to be contained and acknowledged in speech. The durability of trauma extends through generations, and the scars of the horror experienced remain on individual lives, in speech, and institutional structures. It, therefore, follows that such experiences are rekindled in all cultural productions, in an endless time.

LOGICAL TIME

It is possible to identify a moment in which a subject talks to him or herself about the horrors endured, while still keeping silent before others, often for several years. Later, subjects are able to tell others of the experiences that persist in their memory. On this, Paul Ricoeur has stated:

> "I would like to insist on the expression "it happened," because when witnesses say "it happened" they are saying three things at the same time. First, they are saying, "I was there," and this is the very heart of the real ambition of memory. [...] But the witness is saying something else other than "I was there," he or she is saying, "please believe me," which involves asking the other person to trust him or her, thus, making the memory real [...] and that is when the witness says a third thing, not simply, "I was there," and, "please believe me," but also, "if you don't believe me, ask someone else," but ask someone who will have their own testimony to offer."[189]

In this book, the author approaches issues regarding testimony reliability, collective construction of memory and, in our opinion, the issue of time. Witnesses find themselves talking to someone from whom they require trust ("please believe me") and remit to a series of others who can confirm their stories. All these interactions conform, add complexity to, facilitate, or silence speech. Witnesses and their interlocutors can establish a stereotyped version of their story and, in turn, of history itself, even that

[187] Jacques Lacan, *Seminario 11. Los cuatro conceptos fundamentales del psicoanálisis* (1964), Paidós, Buenos Aires, 1987, pg. 63.
[188] Françoise Davoine, *La locura Wittgenstein*, EDELP, Buenos Aires, 1993.
[189] Paul Ricoeur, "Definición de la memoria desde el punto de vista filosófico," in *Por qué recordar*, Granica, Buenos Aires, 2002.

which extends beyond them, similarly, witnesses can be protagonists in the construction of the narration resulting from that which the trauma separated from the rest of their subjectivity, including their individual stories and collective history.

Testimonies are aimed at a recipient, there is an intention behind them and they have great potential as an instrument for subjective elaboration, both for witnesses as well as for society as a whole. We propose understanding the possibility providing testimony and having that testimony stored within the social trauma of a logical time. Logical time is organized in relation to the possibility of approaching events as consecutive logical stituations that have nothing to do with the notion of chronological time. The former is, therefore, a consequence of the latter; one event logically derives from the other.

In the particular issue at hand, when it comes to gender-based violence in CDCs during the last dictatorship, from a logical point of view it makes no difference whether it has been two, ten, or thirty years since the event or since the first narration of the event. What is relevant, however, is that certain prior events would be a pre-condition for the possibility of approaching gender-based violence as part of the sufferings endured by victims of CDCs.

Survivor testimonies confirm that they have consistently played down the hardships they personally suffered during their captivity before their partners, relatives, or fellow militants (most of whom have disappeared). Sexual violence is, in particular, a crime that has often been concealed to prevent detracting attention from (in their own words), “more important things,” i.e. uncovering the fate of their loved ones. In other cases, the goal was to protect their setting from “at least one” of the horrors endured.

“I was only recently able to say it out loud. I had never put it into words before. We didn't tell our families because we didn't want to upset them,”[190] states one survivor, while another survivor says, “Among all the horror in concentration camps, rape seemed secondary. With my husband's death, with everything that happened in there, all the horror, rape was displaced.”[191]

Changes to legislation on “crimes against sexual integrity,”[192] in addition to extensive academic, artistic, and political work by women's rights movements, as well as changes in international law governing women's human rights violations have, undoubtedly, made it possible for those survivor testimonies (analyzed in different areas for decades) to be seen today under a new light and to be prosecutable in the justice process.

[190] Testimony before CELS as part of a group interview on October 2, 2010.

[191] Testimony in the “*Molina*” case, oral trial. From the decision by the Federal Oral Court of Mar del Plata, June, 2010.

[192] Until the Criminal Code was modified in 1999, rape and other forms of sexual violence were characterized as crimes against decency. After the above reform, they were re-classified as crimes against sexual integrity. The right under protection is the victim's sexual integrity, not a specific social order.

Approaching the Gender Issue. Status-Based Relationships
The Legacy of Patriarchy

In order to analyze the issue at hand, we must first pinpoint some key concepts that will allow us to frame the gender perspective in our assessment of violence at CDCs. Incidentally, we have already anticipated our proposal of understanding femininity as a specific position in a hierarchically organized structure.

Following Rita Segato,[193] when referring to the phenomics in the ethnography and history of rape, we understand the gender-based structure as, "anchored in the field of symbolism, the epiphenomenon of which is found in the concrete and historical relationship between men and women."

In line with a structural understanding of these relationships, Lacan, Freud, and Lévi-Strauss interpret the murder of the primal father as a mythical moment that founds social life from the prohibition of incest. Before the prohibition, before the law that puts the father in the place of authority, there is a *status-based* order with the enforcement of a primal almighty father, unequal for both genders, foregoing the contract arising from the murder of the father.

Gender-based relationships result from this patriarchal hierarchy and as such, maintain current status relationships. Status-based regulation precedes contractual regulation. But even in the contract between equals, which will be understood for a long time as a contract between men, women remain under the guardianship of a certain man.

In the law instituted by the prohibition of incest, women become an exchange value. The inseparable result of the prohibition of incest is the statute of limitations on exogamy. According to Levi-Strauss, women circulate within a patriarchal social order in accordance with exchange rules (i.e. exogamy) that constitute, together with language, the representation of a symbolic function. In this conceptualization, words and women are exchange values within social life and that is why they can function as symbols.

The concept of citizenship, which was slowly extended to women as subjects of law and equal to men, is a modern acquisition (16th Century) in the midst of a historical moment and philosophical development. In the modern world, situations of serious human rights violations perpetrated against women highlight the standing of the status-based or hierarchical order in gender relationships, an order that is by definition violent and which insists on re-instituting itself regardless of the contractual categories organizing society.

LIFE IN CLANDESTINE DETENTION CENTERS AND GENDER
BASED VIOLENCE

[193] Rita Segato, *Las estructuras elementales de la violencia*, UNQ-Prometeo, Buenos Aires, 2003.

There is extensive bibliography narrating the ways in which CDCs functioned, i.e. with parallel and secret norms, concentrated power, state of exception, etc. However, when it comes to the sexual abuse suffered by women at the hands of their repressors, there is a prevailing belief that reveals the underlying social reluctance toward abused women, the idea that she must have had it coming. Suspicion is still highly put on the victim: She must have done something (seduction), she must have refused to do something (resisted, denied), and she commited betrayal. Therefore, these same prejudices are copied and transferred toward clandestine detention centers, with utmost disregard for the realities that despitefully governed what happened at these centers. Status-based relationships are violently reproduced but are not, however, reported or viewed as such.

A hypothesis that enables understanding the complexity of the issue is the following: It is very difficult both for the person hearing the story as well as for the person who experienced the situation to acknowledge, know, and evaluate the horror of the experience. As we have said, trauma (and the concentration camp experience as a whole can be classified as traumatic, right down to the smallest details) is, by definition, unrepresentable. It is impossible to put such experiences into words, even though they have been carved into the material bodies of society and the individuals who endured them, whilst brutally modifying social relations. In contrast with this overwhelming abuse that painfully insists on being expressed, heard, and somehow understood, labels arise that are strongly tied to culture, such as seduction, the possibility of saying no and resisting the attack, and betrayal, which are the way in which what happened to these women is expressed.

As a result, we will describe two forms of exercising gender-based violence that are characteristic of the CDCs of the last dictatorship in Argentina, these are subjective devastation and the accusation of betrayal. These perspectives facilitate an accurate description of the particularities of the serious human rights violations suffered by women in this context. Although there undoubtedly are unexpected “leaks” and deliberate “communications” between the operation of CDCs and the whole of the social body, we believe what happened had a specific nature, in general, within the concentration camp order. This specific nature must also be identified in regards to gender-based violence.

Subjective Devastation of “Pure and Impure” Victims and Guilt

The representation of women as dangerous beings who can use their sexuality as a means for obtaining their every desire is deeply rooted in Western culture. A possible interpretation of this is that in patriarchal organizations, women are objects that are conceived as exchange values. Lévi-Strauss refers to women as “natural stimulants” for men, “stimulants of the only instinct whose satisfaction may be delayed.”[194] This conception is concealed when the “offered” (exchange value) “offers itself” (seduces). If understood in this way, women bear the weight of responsibility for the attacks. As a

[194] Claude Lévi-Strauss, *Las estructuras elementales de parentesco*, Paidós, Buenos Aires, 2000.

result, the history of women's place in society is silenced and any possible reexamination is closed.

The dehistoricization of gender-related conceptions has already been studied, it is, in fact, one of the traditionally accepted operations for concealing and sustaining inequality and domination structures.[195] Awarding to women a characteristic that is indivisible from their gender, such as persuasion or seduction, and painting it to their benefit, overturns the place of victims and makes them responsible for the crime.

This inversion effectively disguises, and maintains, the underlying social order revolving around this practice. The idea of the positive value of saying no, of resisting abuse and the presumption that woman should or must have done something to prevent being raped reflect the Christian belief that it is more valuable to be decent than to be alive, thus sustaining the idea of martyrdom (which is particularly Christian), defined in the dictionary as a "list of victims in a case" and the sheer definition of a martyr in general. Therefore, it can be understood as a way of accusing victims and holding them accountable for crimes committed against them, constituting a maneuver that allows perpetrators in particular, as well as the State and society in general, to rid themselves of all responsibility over the decisions, omissions, and horrors committed.

It is very difficult to find a more dramatic display of defenselessness and vulnerability than that of the violence brutally imparted on the bodies of these victims, inasmuch as their sexual condition, gender identity, and childbearing potential. The brutal breakdown of primitive barriers that are constitutive of all that is human, such as shame and embarrassment, were regularly practiced by torturers in their attempt to subdue their victims.

The Accusation of Betrayal

Another particular form of sexual violence at some CDCs was the establishment of long term ties between abducted women and their abductors, in which particular repressors would engage in "sexual relations" and other forms of "coexistence" with a victim. It still persists the idea that women who had sexual relations in the framework of submission (in which the full exercise of freedom of choice is inconceivable) should have refused sex or at least done so "more firmly" and resist rape. Does anyone really believe that someone can resist torture?

What constitutes resisting torture? First, surviving, and second, remaining silent. "Resisted torture" simply means, "alive and silent." Although this is off topic it must inevitably be mentioned, especially because when it comes to these crimes, victims are tried first, and a recurring accusation is that of betrayal.

[195] Pierre Bourdieu, *La dominación masculina*, Anagrama, Buenos Aires, 2000.

In her book *Traiciones* (Betrayals), Ana Longoni asks herself: “If traitors are those who speak up and these women remained silent, what makes them traitors?”.[196] What we propose here is a different answer, one that is less contradictory than the former and is consistent with laws that, until their recent modification, were in effect in our country.

As per the above, Until the Criminal Code was modified in 1999, rape and other forms of sexual violence were characterized as crimes against decency. Therefore, the aggression instilled upon a woman's body was aimed at a particular value, at another subject (men as signatories to the above mentioned contract) and threatened society as a whole. Crimes against decency (where decency was a value that had to be upheld) involve men, as their moral integrity is affected by the actions of the women that somehow surround them. Therefore, the law was not intended to protect the victim as a citizen, but rather to ensure a certain social order, a certain morality, expressed in certain customs; therefore, the law clearly expressed the hierarchical patriarchal order in detriment of the modern order that has at least been expressed in regards to citizen rights. Not all stakeholders are equal; instead, they each have a place in the hierarchical regime. This is clearly exemplified in the definition of rape.

The fact that rape is only legally constituted when there is vaginal penetration, thus excluding other possible forms of abuse, indicates that what is truly being protected is legacy and offspring. Understood in this way, what rape threatens are the rights and prerogatives of the father and husband, such as controlling their legacy and the continuity of their lineage. So much so that it is difficult to sustain the idea of marital rape, whereby husbands are granted “conjugal rights” of biblical origin, noncompliance with which constitutes a sin under Canon Law. Therefore, rape is an action that is regulated by social standards and associated with particular circumstances.

We believe this is the “betrayal” of which women who were raped at CDCs are accused; betrayal of the order imposed, betrayal of the men with whom they are associated as partners or part of the same cause, as if the “revolutionary cause” as a value that cannot be betrayed included norms on sexual exchanges and, once again, women were a value subject to exchange by men.

This legislative change, so recent and close to the beginning of this century, reflects times that are completely different from the cronological ones and includes the development of the gender perspective.

Potential for Criminalizing Acts of Sexual Violence Committed in the Framework of State Terrorism

TECHNICAL-LEGAL ISSUES SURROUNDING ABUSE AND SEXUAL VIOLENCE AS CRIMES AGAINST HUMANITY

[196] Ana Longoni, *Traiciones*, Norma, Buenos Aires, 2007, p. 151.

"Women were not only tortured, they were also raped, [...] and that too is a crime against humanity."[197]

Indeed, everyone knows that crimes against sexual integrity are another one of the many heinous crimes committed by members of the repressive group during the last military dictatorship, a crime affecting most male and female detainees who were illegally deprived of their freedom. There is nothing new about this. This repressive model that consists of systemically imparting sexual violence upon detainees or opposing parties has repeatedly been used throughout human history in almost every armed conflict, dictatorship, and genocide. The acknowledgment of this extended practice has paved the way for its distinct inclusion in the international human rights framework and generated concern among many human rights, feminist, and women's advocacy organizations and bodies around the globe.

RAPE AS A CRIME AGAINST HUMANITY
INTERNATIONAL BACKGROUND.

In order to fully comprehend the evolution of this crime as a crime against humanity it is important to remember International Human Rights Law, Humanitarian Law, and International Criminal Law perspectives. Throughout its evolution, this issue has been particularly emphasized in the case of armed conflicts. We will briefly summarize the main milestones in its development, as they can serve as tools in our context.[198]

The main issues in International Humanitarian Law are codified in the Geneva Conventions (1949) and its Additional Protocols (1977), the purpose of which is to protect those participating in an armed conflict either as soldiers, war prisoners, or civilians. In the Fourth Geneva Convention, sexual violence, involuntary prostitution, and any other "indecent assault" occurring during an armed conflict were not deemed as serious violations but as mere actions contrary to international humanitarian law, they were, at best, an assault against female decency.

However, the difference is relevant. The fact that a particular conduct is viewed as a serious violation implies that States must repress such act and punish it, even under international jurisdiction. However, if it is deemed a mere action contrary to international law, it only involves the general obligation to take timely measures for the action to cease. Meanwhile, it was not until the 1977 protocols that rape began to be deemed as an assault against personal dignity and not against "decency." It was not until 1992 that the International Committee of the Red Cross began to view them as serious violations of international humanitarian law.

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[197] Testimony in the "*Vesubio*" case, oral trial, on February 8, 2011 before Federal Oral Court no. 4 of the Federal Capital.

[198] In this section, we will adhere to the thesis developed by María Julia Moreyra, in *Conflictos armados y violencia sexual contra las mujeres*, Editorial del Puerto, Buenos Aires, 2007, and the publication by DEMUS, *Estudios para la Defensa de los Derechos de la Mujer ,* "Violencia sexual en conflictos armados: el derecho de las mujeres a la justicia," Buenos Aires, September of 2008.

The next key milestone was the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY)[199] and Rwanda (ICTR).[200] Both their statutes included rape as a crime against humanity and war crime and, therefore, have resolved core issues, such as the classification of rape as an independent crime and crime against humanity, thus linking rape to a broader or systemic attack against civilians.
Two outstanding examples are:

i) The *Akayesu* case, decided by the ICTR in 1998, defining rape and sexual violence for the first time under the international framework. The former was defined as a physical invasion of a sexual nature instilled upon people under coercive circumstances and was characterized as an independent crime and crime against humanity. In addition, it was stipulated that under certain conditions, rape could also constitute a form of genocide. The decision established:

> "Rape and sexual violence indeed constitute one of the worst ways of inflicting harm on a victim, as the victim suffers both mental and physical harm [...]. Sexual violence was an essential part of the process of destruction, specifically targeting Tutsi women and contributing to their destruction in particular, and that of the Tutsi group in general."[201]

ii) In the *"Foca"* case, decided by the ICTY on February 22, 2002, rape was once again deemed as a crime against humanity and war crime. This decision also addressed the possibility of victim consent and concluded that, when rape occurs in a context of generalized violence, any form of consent is deemed invalid. The Court analyzed whether it was possible to prosecute actions such as rape and torture, and upon differentiating both actions, the Court concluded that, although they are comparable, they each have distinct elements: In the case of rape, the element that distinguishes it from torture is sexual penetration, which is not present in cases of torture. In addition, the Court clarified that a single instance of rape can constitute a crime against humanity if it is linked to the specific context of a widespread or systemic attack on civilians.

Finally, the last milestone in the international arena was the Rome Statute, through which the first international court, i.e. the International Criminal Court, was established in 1998. María Julia Moreyra describes it as follows:

> "[...] it is a historic event not only because it codifies, for the first time, an impressive list of sexual violence and gender-specific crimes, defining them as serious crimes under International Law, thus repairing failures in previous treaties and international tribunals, but it also establishes procedures for ensuring that these crimes and their victims are given adequate treatment while preventing that perpetrators of these heinous crimes go unpunished."[202]

[199] The ICTY was established on May 25, 1993 by the United Nations Security Council in accordance with Resolution 827.
[200] The ICTR was established on November 8, 1994 by the United Nations Security Council in accordance with Resolution 955.
[201] M. J. Moreyra, op. cit., pg. 81.
[202] Ibid., pg. 98.

In addition, it established a definition of rape (as a crime against humanity) in article 7.1.g.1 ("Elements of Crimes") from the Statute's Annex:

> "i) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
> ii) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent."

PROOF OF SYSTEMATIC NATURE: WAYS OF EXERCISING SEXUAL VIOLENCE IN ARGENTINA

Gender violence in Argentina did not result from the obliteration of peoples as a planned collective attack, as was the case in other Latin American countries.[203] In Argentina, the detention of every man and woman in the framework of the illegal repression resulted from extensive investigations by intelligence agencies; therefore, no act of violence exercised to its detriment was improvised nor did it result from individual perversions, instead, each act was part of a strategy for obliterating the enemy in the broadest sense, within a shared context between captives and captors.[204]

We have stressed this point because it is our belief that, when analyzing gender-based violence in the country, one of the components that must be factored in is that it was exercised within a context of clandestine detention. Clearly, the concentration camp experience has a specific nature in terms of the configuration of social relations, as it is an environment of coercion and exception.

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[203] In that sense, cases of obliteration of peoples in which state actors used systematic sexual violence in the context of armed conflicts occurred in Peru and Guatemala. According to the report "*Guatemala, memoria del silencio*" (Guatemala: Memory of Silence), by the Guatemalan Commission for Historical Clarification (*Comisión para el Esclarecimiento Histórico*, CEH), until 1979 rape was "selective," targeting mainly women from political organizations, who were detained and abused. As of 1980, and approximately until 1989, this kind of violence became indiscriminate, massive, and basically collective. According to the CEH, this concurs with the government land razing policy; during that time, women were rapped before the killings of the predominately Mayan population.
In the case of Peru, sexual violence exercised by State and non-state groups was recorded in the final report of the Commission on Truth and Reconciliation (*Comisión de la Verdad y Reconciliación*). According to this Commission, during the conflict, both parties raped and sexually abused women during their raids in emergency areas or during detentions and interrogations (volume VI, section IV, chapter 1.5: "*Violencia sexual contra la mujer*" [Sexual Violence against Women]).

[204] P. Calveiro, op. cit.

Testimonies have uncovered that the sexual aggressions to which detainees were subjected were not isolated events, but rather part of this general plan to annihilate and degrade the subjectivity of victims. Additionally, the full range of sexual violence and rape in particular was exercised, on some occasions, by members of different armed and police forces who held different ranks throughout these vertical structures, and on others, by civilians that participated in repressive actions.

Our investigation of legal cases in the framework of the judicial process has resulted in valuable information that proves gender-violence was exercised as systematically as the rest of the crimes investigated throughout Argentina. However, it is still important to stress, as we have mentioned, that for a crime to be considered systematic under international standards governing the issue, a single prosecutable crime suffices, provided it is related to a generalized attack against the population. What we are attempting to highlight is that, although according to our investigation, sexual violence in Argentina was extensive and generalized, this requirement for classifying an event as a crime against humanity is not essential, as its mere perpetration suffices as part of the systematic attack suffered by civilians.

As a result, in order to sustain this hypothesis, when selecting which experiences to analyze and upon having discarded the possibility of individual "deviation," broad criteria were adopted in regards to the territorial dimension of clandestine centers or circuits and, as a correlation, in regards to the diversity of the armed or security forces in charge of the abductions and unlawful deprivation of freedom. In view of these investigational parameters, we focused our analysis on the types of gender-based violence exercised during the last dictatorship in the study of cases that are paradigmatic in terms of the orchestration of repressive practices. These include:

- In the City of Buenos Aires, CDCs known as *Atlético-Banco-Olimpo* (ABO), under the command of the Federal Police; *El Vesubio*, commanded by the Federal Penitentiary System and Army, and the center that operated from the officer's casino in the School of Naval Mechanics (*Escuela de Mecánica Armada*, ESMA).
- In the City of Mar del Plata, Province of Buenos Aires, *La Cueva*, operating under the command of the Air Force, and the CDC operating out of the Non-commissioned Officers Academy of the Marine Infantry (*Escuela de Suboficiales de Infantería de Marina*, ESIM), whose operations depended on the local Naval Base.
- In the cities of Zárate and Campana, Province of Buenos Aires, the repressive circuit of approximately fourteen CDCs operating under the command of the Army, headquartered in Campo de Mayo, with the assistance of the Coast Guard, Provincial Police, and National Guard.
- In the City of Resistencia, Province of Chaco, CDCs operating out of Army Logistic Base and Police Headquarters, under the authority of the Provincial Police.[205]

[205] These cases were selected on the basis of particular knowledge of the authors, who worked on gender-based violence issues from a psychosocial and prosecution perspective with survivors of these CDCs. As we will see below, in Mar del Plata the sexual violence issue

This broad territorial criterion, as related to different participating Forces (i.e. the three Armed Forces, the Federal Police, and Provincial Polices) is essential when sustaining that sexual violence constituted a systematic practice. Drawing on this pattern, investigations have only shed light on differences in the ways in which violence was exercised in each case, but not on the existence or frequency of this practice. The plurality and heterogeneity of active subjects, in addition to territorial extension, reinforce what has been stated in regards to the deliberate nature of these practices, which in no way constitute isolated or occasional events resulting from the actions of a few individuals that took advantage of the context to commit such crimes.

In CDCs throughout the Federal Capital, prolonged "forceful coexistence" resulted in the selection by perpetrators of detainees, particularly women, as sexual slaves. This context of submission placed them in a situation of utter helplessness and imminent threats to their lives.

> "In that sense, I was also sexually abused. Over the first few months, two officers made sexual passes at me, as if we were in a normal context. However, after some time, by the year 1977, on several occasions A... had non-comissioned officer M... escort me to an apartment where he would later arrive and force me to have sexual intercourse with him. There was no possibility of refusing, because I knew that if I did, A... could order my transfer. My sexual servitude to A... was humiliating and morally destroyed me, I lost my dignity and integrity as a human being, it forced me to live in a state of alienation from which I slowly emerged when I recovered my freedom, through the passage of time and therapy."[206]

> "I was escorted by F..., who tried to initiate a relationship with me as if he were my "savior." I was forced to have sexual intercourse with him. It took me a very long time to realize I had been sexually abused."[207]

> "I also saw R... He raped me. I don't really remember the year. He took me to a hotel under the pretext of an operative. The hotel was somewhere in Belgrano."[208]

This was in addition to the gender-related abuse systematically endured upon arrival at camps, including forced nudity, lack of intimacy when satisfying physiological necesities, and the rape of people who were debilitated by torture, chained, shackled, and blindfolded, all of which were part of everyday life at CDCs.

> "B... took me to a small room and forced me to take off my clothes. He tied me to a metal bed and discharged an electric pod on my breasts and genitals.

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emerged after former Air Force NCO Gregorio Molina's conviction for raping two CDC detainees in the center known as *La Cueva*.

[206] Testimony in the "ESMA" case, during the investigational phase. Repressor names have been replaced by their initials to preserve witness identities.

[207] Ibid.

[208] Ibid., oral trial.

People were constantly walking in and out. […] Guards would escort you to the showers and you would be forced to take your clothes off in front of them, and they would just stand there! They would open and close the faucets, comment on our bodies..."[209]

"Of course the entire time I was detained at ESMA I was forcefully stripped, examined, and rapped."[210]

"When I was abducted, one of the repressors inserted his fingers in my vagina, supposedly to check if I had a hidden cyanide pill..."[211]

"I was lying down, they stripped me, took off my nightgown... I made the mistake of asking them not to touch my sister, she was 17. It was a mistake because as of that moment they began to torment me through her, they threw her on the ground, they inserted a gun in her vagina and abused her [...]."
"During the mornings they would line us up and take us to the bathroom in shackles. You could shower, but when you took off your clothes they would tease you or grope you [...]. They would grab male detainees by the testicles, it was constant humiliation [...]."
"After the last session of torture J... walked in and violently rapped me and when he was finished he said to me, "Go tell your *montonerito* (fellow insurgent/partner)" [...]. After being raped, waiting for my period became another form of torture for fear of having been impregnated by such monsters."[212]

"I know D..., he was also in our sector. He was only 15 when he was rapped by C..."[213]

"After a session of torture, a guard groped me and masturbated in front of me..."[214]

"A guard with the nickname S... started saying how he was going to rape a woman and said to another guard, 'You know the new one, the dark one, I told her not to play hard to get here because we are all going do her.' She was pregnant..."[215]

"[...] I'm sure that in a different context Charly wouldn't be a serial rapist, he raped women because it was part of the power play in there [...] he wasn't some nut that just got up and started raping women one day, everyone knew, they had their preferences in there, it was part of a plan."

[209] Ibid.
[210] Ibid.
[211] Testimony in the "*ABO*" case, oral trial.
[212] Ibid.
[213] Ibid.
[214] Testimony in the "*Vesubio*" case, oral trial.
[215] Ibid.

> "He had the particularity of raping us after the torture chamber, you can imagine the state we were in, we couldn't walk, our motility was null, we were in a pitiful state, they would have to carry us or leave us in the room."
> "[...] the last time they interrogated my husband they took me in the room immediately after him, hooded, he gave me a rag and a bucket, made me clean the torture table and then rapped me. I always feared my husband had seen it, that he had been there seeing the whole thing."[216]

> "What they did to me was very abusive, I was only 22 years old... I felt denigrated [...]. They entered the room and forced me take off my clothes, there were seven or more of them. I could hear voices and footsteps because I was lying on a mattress on the floor. They started cursing at me and telling me to take off my clothes [...] when they were off they staked me down, with my arms and legs open [...]. At that moment, I distinctly remember wondering if a woman can survive being raped by seven men, one after another. Can the body resist that? Well, if it can't, it's going to have to. I have to resist, because if not, they'll kill me [...]. They left me there for a long time, yelling at me, cursing at me, hitting me. But they didn't rape me, even though they repeatedly simulated like they would."[217]

In many cases, the situation was aggravated by the fact of having to carry part of their pregnancies to term and give birth in the context of their disappearances.

> "A... had been brutally tortured when she was two months pregnant, she had holes on her breasts from the torture. When her baby was born, she said to me, 'Check if the baby has all its fingers, check if it has malformations.'"[218]

> "I never saw a doctor in the four months that I was pregnant at ESMA. My child was born on the tenth month... they let my pregnancy take a wild and uncontrolled course."[219]

> "I was pregnant and every morning my stomach hurt from hunger... hunger hurts [...]. When they released me, I was 5 or 6 months pregnant and only weighed 53 kilograms..."[220]

In the Zárate-Campana circuit, at the Base and Police Headquarters in the City of Resistencia, similarly to the case of the Marine Infantry Academy in Mar del Plata, sexual violence was exercised against all detainees indiscriminately since the very beginning of the detention, as was the case with torture sessions including electric prod, water-boarding, or cruel beatings. At these centers, rather than resulting from the "forced coexistence" due to prolonged enforced disappearances, it was a systematic "initiation" practice of detainees entering CDCs, in addition to torments and subjection to degrading living conditions.

[216] Testimony in the "*Molina*" case, oral trial.
[217] Ibid.
[218] Testimony in the "*ESMA*" case, oral trial.
[219] Ibid.
[220] Testimony in the "*ABO*" case, oral trial.

Detainee stories from these centers are consistent: One of the main forms of torture was having to listen to the cries of detainees that were being sexually abused by their captors.

> "On the ship I was also raped by one of the members of the crew. I was tied up and blindfolded and was dragged on a mattress to a small room where I was raped."
>
> "I knew people had been raped on the ship, for example, M... would cry out that she had been raped..."
>
> "T... was brutally rapped several times... she was raped in the ship's cellar by several different people on the same day. I would constantly hear rapes, tortures, and beatings..."
>
> "When I was in the warehouse, there was a woman next to me. Gabuti and another National Guard officer started talking about how fine she was, in the sense that she was pretty or attractive. Then they immediately proceeded to raping her, while she was tied up and blindfolded."
>
> "M... told me she had been raped. They had inserted a stick up her husband's anus right in front of her, he was an engineer [...]. The worst part was when they would tell me they had my daughter and would rape her and kill her in front of me..."[221]
>
> "Abducted women there [at the Light House] were constantly being raped and their screams and cries were inevitably heard by everyone who was detained there."
>
> "I was psychologically abused in addition to possibly having heard my wife being raped."[222]
>
> "They went as far as to insert a gun barrel in my anus and ask me if I liked it [...]. There were many women there and rape was the least that was done to them."[223]

THE PROSECUTION OF SEXUAL VIOLENCE IN THE NEW JUSTICE PROCESS CHALLENGES AND ADVANCEMENTS

[221] From testimonies in the investigation phase of events that occurred in the context of the Curate-Campana repressive circuit, in the "*Campo de Mayo*" case.
[222] Testimonies on events that occurred in the CDC of the Non-commissioned Officers Academy of the Marine Infantry, in the framework of the prosecutions for crimes committed in the Naval Base in Mar del Plata.
[223] Testimony in the "*Margarita Belén*" case, oral trial.

Although we believe that it is perfectly possible to prosecute crimes against sexual integrity committed in the framework of State terrorism (and, in fact, as we will see they have been prosecuted), these prosecutions face many challenges, from issues that are characteristic of this type of crimes (such as the sexist and discriminatory nature of the Judiciary toward gender-related issues, insensitivity on behalf of system operators, and the fact that these crimes are "privately prosecuted") to issues related to the provision of evidence, their nature as a crime against humanity, and beliefs regarding criminal authorship and participation. Finally, there is a tendency to subsume the charge of rape under that of torment.

General Background

Failure to Investigate Crimes against Sexual Integrity and the Private Prosecution Requirement Surrounding Sexual Violence

The first difficulty we face is, unquestionably, failure from investigating judges[224] to file criminal charges against perpetrators of crimes against sexual integrity. Additionally, in the select few cases in which charges are filed, as opposed to what happens with other crimes, sexual violence suits are later dismissed for lack of merit[225] and dismissals are then decreed, thus terminating the criminal investigation.

The foundation of this failure (which is also systematic) rests in several factors. The main factor is blatant sexism in judiciary practices and the gender-based discrimination promoted by the system, that manifests in criminal investigations for crimes against sexual integrity, the victims of which are almost always women. These crimes are rarely investigated, without distinction as to whether sexual violence was committed recently or during the dictatorship. When an investigation is opened, it rarely results in a conviction, while the entire judicial process displays high rates of re-victimization.[226]

Despite legislative changes that have attempted to modify prevailing views as to crimes against sexual integrity, these crimes continue to be deemed by judicial operators as secondary. This tangibly hostile context toward the judicial investigation of this criminal

[224] We mention judges because in our criminal systems, they are the ones who conduct investigations and decide whether or not to file charges, however, this failure extends to the rest of the judicial operators who participate in the process, mainly prosecutors.

[225] The lack of merit decree establishes an intermediate legal situation in which the judge decides that, although there are not enough elements for a conviction, there are also not elements for a dismissal and, therefore, the defendant must be completely released from the process.

[226] As accurately stated by Alberto Bovino: "The complexity of this issue is not exhausted in its qualitative and quantitative severity or the feeling of helplessness and despair of the victims. What is added to these circumstances is the re-victimization that occurs when the justice process takes on the case, as the process is characterized by both questioning the victim's own participation in the events, thus re-victimizing women who resorted to the justice process, as well as by the blatantly sexist nature of the practices of this type of justice." See A. Bovino, "Delitos sexuales y justicia penal," in Haydé Birgin (Ed.), *Las trampas del poder punitivo*, Biblos, Buenos Aires, 2000, pg. 178.

category is common to all victims, both recent and past, and operates as yet another screening factor within the criminal system.[227]

Another element that affects the prosecution of these crimes, which is also common in current crimes, is insensitivity from judicial operators toward these issues. Experience shows that it is very difficult for any person to narrate sexual abuse, and this difficulty increases when judicial operators, as is usually the case, are reluctant to hearing these testimonies within an adequate setting for victims to tell their stories. In the context of crimes committed within CDCs, in general, when testifying, witnesses are not asked if they were victims of sexual violence during their detention, even though they are asked about other crimes, such as theft, torture, violent raids in their homes, etc. In the few criminal cases in which victims testified to having been sexually assaulted, it was the victims who spontaneously volunteered the information.

This failure to interrogate cannot be justified by the "private prosecution" requirement of these crimes[228] which is commonly unknown to those who have no legal training or contact with the criminal system, and thus constitutes a need to provide additional information to the victim.

All of this influences the great "blank number"[229] in terms of crimes against sexual integrity, as their commission is rarely reported to system operators. This leads to extreme tension as to the crimes that are actually committed and those that are investigated by the system, which results in high rates of impunity.

The above can also easily be said about cases of crimes against sexual integrity committed in the framework of State terrorism, for which there is also an elevated "blank number." This can be inferred from victim testimonies (who often claim to have heard others being sexually assaulted, but fail to mention it in their testimonies) and

[227] The criminal system not only defines which rights are to be protected, but also which perpetrators will be prosecuted and which victims will be protected. This screening takes on different forms including, among others, the legislative determination of criminally condemnable conducts and, mainly, the daily practice of judicial operators and other stakeholders in the criminal system, such as the Police. Ultimately, it is them, i.e. the police, judicial operators, prosecutors, and judges, who decide which active and passive subjects will be sanctioned by law.

[228] Articles 72, 119, 120, and 130 of the Criminal Code show a particularity in our system, as they regulate cases of crimes for which criminal prosecution can only be exercised with express consent from the victim, provided the victim survived. That is what is known as the "private prosecution" requirement, which determines that the criminal investigation of these crimes does not depend on system agents, as is the case with most other crimes, but on the victim's report, or if the victim is a minor, that of the victim's tutor, guardian, or legal representative. This requirement is not effective when the victim dies, as per paragraph 1, article 72 of the Criminal Code. In that case, the crime is investigated like any other crime.

[229] "Blank number" is the name given to the series of crimes that are not reported before criminal agencies, therefore, their true rates are unknown. On this issue, Bovino sustains that, "The private prosecution requirement, abuse suffered by victims at the hands of the judicial process, and mainly, the systematic impunity that is ensured to perpetrators of these crimes, significantly reduce the amount of events reported and, therefore, increase the 'blank number' in terms of their rate of incidence." (op. cit., pg. 215).

from their testimonies in non-judicial contexts, where many decide not to report the sexual violence to which they were subjected.[230]

Evidentiary Issues
The Validity of Testimonies as Only Piece of Evidence

In addition to the above, what is also incorrectly deemed as a challenge is the fact that in many cases, the only piece of evidence proving the material commission and authorship of a crime is the victim's testimony. This is also partly common to what happens in investigations for crimes against sexual integrity committed today and relates to an essential and obvious characteristic, i.e. the private or secret nature of these crimes, which are generally committed where no one other than the victim and the perpetrator can see.

However, in the case of victims of State terrorism, it is virtually impossible to find other evidentiary proof beyond the testimonies of victims and their fellow captives. In fact, victim testimonies are key evidence, as the passage of time makes it impossible to show physical lesions or other forms of evidence that are present immediately after an attack, such as semen samples or fingerprints. In addition, the central role of testimonies as an element of proof is also common to a good part of the events that occurred during the dictatorship and cannot be presented *a priori* as a challenge. In any case, judges must evaluate testimonies according to the established standards of sound judgment and determine their weight as elements for sustaining the accusation, even if that is the only[231] element they have.[232] The validity of victim testimonies as evidence is key in the case of rape and the above mentioned difficulties are most likely a paradigmatic example of the gender inequality on which the patriarchal system is founded and maintained.

[230] Proof of this is the only conviction to date of a crime against sexual integrity (see pg. 223-224), where a witness expressly testified to having knowledge of at least four other women who had been raped by the defendant, but who refused to state their names out of respect and care for the victims.
[231] In this regard, case law regarding the validity of testimony as the sole piece of evidence in a criminal prosecution is relevant (Chamber II of the Criminal Court of Cassation [CNCP] of Buenos Aires, in the case “G., J. R. s/rec. de casación,” decided on 05/APR/2005; CNCP, Chamber I, in the case “Barrionuevo, José M. y otro," decided on 22/NOV/02, and case 4468, “Panópulos, Jorge s/rec. de queja,” decided on 20/NOV/2002, reg. 5494; Chamber III of the CNCP, in the case “Soberón, Alberto M.,” decided on 18/JUL/2007; Criminal Court of Cassation of Buenos Aires, Chamber II, in the case “T., W. F. s/rec. de casación,” decided on 29/JUL/2004; Chamber V of the Criminal and Correctional Court of Appeals, in the case “Domínguez, Edgardo O.V.,” decided on 23/JUN/1997, among many others).
[232] As far as the evaluation of a testimony, the principle of immediacy is particularly significant as it determines that judges must come into direct contact with the evidence in order to formulate their decisions. Witness credibility is evaluated on the basis of internal (i.e. speech coherence, lack of contradictions, etc.) and external (i.e. consistency with other forms of evidence, including so called contextual evidence, experience-based, logical, and psychological veracity, etc.) criteria. As this crime is associated with a high level of guilt and shame, these factors affect willingness to report this crime; however, it is unlikely that someone would lie about this, especially considering that defendants are also being accused of other crimes with harsher sentences.

The same can be said regarding cases of sexual abuse that were not originally reported by victims in their testimonies. The fact of not reporting it, does not take credibility away from the victim's accusation, and both judges and prosecutors must take into account the difficulties that surround these cases. Finally, legal, social, and personal views regarding these crimes, which constitute the key issue in our proposal, have evolved and generated a context that favors reporting these incidents, which was virtually impossible years ago.
That is why we stress that adequate standards for evaluating evidence in these cases must take the above characteristics into account.

Authorship and Criminal Participation in Crimes against Sexual Integrity in Regards to the Perpetration of Rape by Members of Repressive Groups

Another issue brought up by criminal system operators for not prosecuting rapes committed by members of repressive groups is the difficulty in conclusively knowing who the immediate authors of these crimes were.
This is because the prevailing view of these crimes is that they must be committed "first hand," which is why they sustain the impossibility of other forms of commission (i.e. indirect or co-authorship, imparting official orders, etc.) that our perfectly admissible in our opinion. Regarding this issue, we agree with Javier De Luca and Julio López Casariego, who, basing themselves on the material-object theory, sustain that the dominion over the event criterion is applicable:[233]

> "In fact, behind the idea that only the person who touches or penetrates the victim can be the author of the crime is the underlying idea that these crimes require some form of pleasure, lust, or libidinous elements that, by definition, can only be understood on an individual level. However, criminal charges bear no such requirements, instead they require sexual meaning behind the action, regardless of the subject's reasons or motives. In addition, in some cases these same charges require the presence of other characteristic elements such as violence and intimidation, with no specifications as to whether they must be exercised by the actual perpetrator or someone else. Dominion over a sexual event is not exercised through the motive or objective driving any participating subjects, but rather through an objective criterion that must be known and coveted by them."[234]

The authors correctly highlight that, "what defines a sexual crime is not the pleasure or 'retribution' on that crime, as neither can be present in cases where the only purpose or motive driving the author is to sexually defile the victim."[235] Additionally, specifically in

[233] This was clearly explained by Eugenio Zaffaroni, who sustains that, "According to this criterion, the author is the person who exercises dominion over the event in terms of *if* and *how* it occurs, or in other words, *the person who can control the development of the event.* If there are several perpetrators in a crime, the author is the person who has a level of power comparable to that of an individual author" (Raúl E. Zaffaroni, Alejandro Alagia and Alejandro Slokar, *Manual de Derecho Penal*, parte general, Ediar, Buenos Aires, 1st Ed., 2005, pg. 605-606).
[234] J. De Luca y J. López Casariego, *Delitos contra la integridad sexual*," Hammurabi, Buenos Aires, 2009, pg. 77.
[235] Ibid., pg. 78

regards to active subjects in cases of aggravated sexual abuse due to the existence of physical penetration (rape), they sustain that:

> "[...] it is our understanding that these are not first-hand crimes, which is why the sexual and abusive meaning that must drive this conduct for its classification under these crimes and not others is the need to determine whether or not there is dominion over the event (either individual or shared), to differentiate authorship from other forms of participation, whereby any form of contribution to its commission constitutes an accessory to the criminal action."[236]

Evidently, in cases of State terrorism, determining who committed acts of concrete sexual violence is rare. Because of the context in which these crimes took place - where victims where often blindfolded, submitted to inhumane living conditions, stripped, physically and psychologically abused, thus increasing their vulnerability before perpetrators who intentionally sought their future impunity by using alliances in order to prevent identification, all in a framework of secrecy that surrounded the Argentine State - opportunities for pinpointing the direct authors of certain events are rare.

However, this difficulty exists with other crimes as well, and in most cases it is very difficult to concretely identify who directly executed a crime. Despite that, thanks mainly to the positive disposition and creativity of valuable jurists that are committed to their prosecution, advancements have been made in penalizing indirect authors.

Therefore, we believe that the criteria establishing *indirect authorship resulting from the organized power system*,[237] which is sustained to hold those who were not immediate authors of other crimes accountable for their commission, including unlawful deprivation of freedom and torments, is perfectly applicable to cases of rape and extermination in clandestine detention centers, regardless of whether the direct authors of certain criminally punishable conducts have been identified.

Certain general issues must be taken into account to understand why we believe that at least those who held high ranks in the repressive system must be held criminally responsible. The main point that must be considered is that crimes against sexual integrity committed in the framework of State terrorism were part of a deliberate repressive plan, particularly of the order to annihilate[238] those who had been labeled as

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[236] Ibid., pg. 91.

[237] We concur with Hernán Shapiro, who holds that, "The massive series of events in terms of number of victims and perpetrators, carried out systematically and in large scale, through the use of State mechanisms, which must be investigated and adjudicated in these prosecutions, are difficult to label under traditional dogmatic categories, originally designed for singular and simple crimes, as illustrated in the examples contained in classic Criminal Law literature." (H. Shapiro, "La recepción jurisprudencial de la testis de la autoría mediata por el dominio de aparatos organizados de poder," in Eduardo Rezses (Ed.), *Aportes jurídicos para el análisis y juzgamiento del genocidio en Argentina*, Secretaría de Derechos Humanos, Gobierno de la provincia de Buenos Aires, 2007, pg. 197).

[238] Annihilation was ordered in military norms even before the coup d'etat through Decree 261/75 of February 25, 1975, where the Executive entrusted: "the General Command of the

enemies by the dictatorial regime, and that these abuse processes were systemic in nature.

Inasmuch as the above, reknowned case 13/84 proved that State terrorism in the country was characterized by the fact that, even though operative groups were generally highly organized, the concrete depersonalization and dehumanization of those identified as enemies took on distinct shades, depending on which group was carrying out the operation. This “discretionary power” in the hands of those who directly executed the objectives established by the State-run repressive system determined the existence of distinct repressive practices; however, this does not excuse those high ranking officers of their responsibility. As we have stated, in most cases, the “fate” of those who were apprehended included prolonged unlawful deprivation of freedom and all sorts of torment and sexual violence while in captivity, as part of the destruction process to which they were subjected.

It is in light of these premises that we must view the issue of authorship and participation in these crimes, in the context of State terrorism. The thesis known as “indirect authorship resulting from the organized power system” can very well be incorporated into our criminal-legal system, as proved by its reception in most trials throughout the country. This doctrine, originally developed by Claus Roxin to understand Nazi criminality, rests on an innovative conception of the existing category of indirect author,[239] which can be applied to cases such as those that took place in the country.

In general, this kind of authorship requires the following elements: a) a mastermind or “the man behind the desk,” b) interchangeability or fungibility of direct authors (although this in no way excludes their responsibility), and c) the existence of an organized power mechanism on the sidelines of the legal system.
Regarding the repercussion of this thesis when allotting responsibility for State terrorism, Hernán Schapiro holds that:

> “In order to conclude this section, we must highlight some of the dogmatic and procedural repercussion of Roxin's thesis. First, assigning indirect authorship

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Army with the mission to execute any necessary military operatives to neutralize and/or annihilate the actions of subversive groups in the Province of Tucuman.” Later that year, Decree 2,772 ordered: “[...] the Armed Forces to execute any necessary military and police operatives to annihilate the actions of the 'subversive elements' throughout the country.” This norm was perfected and completed after the coup d'etat, when it acquired an additional level of sophistication. It is noteworthy that although the repressive plan was highly normatized, it included a large range of verbally expressed orders (that are difficult to prove, except in cases in which perpetrators themselves have testified), that are complementary to written norms. It is also noteworthy that to the masterminds behind State terrorism, “annihilation” did not mean physical extermination, but rather the process of destroying the enemy, which involves a repressive design that extends far beyond death and includes concentration camps and submission to all sorts of aberrations that can be subsumed under a plurality of criminal charges.

[239] In the classical conception, the immediate author is he or she who indirect perpetrates an action by using others as instruments for its commission.

> to those who are nowhere near the perpetration of the crime involves incorporating them as protagonists in the criminal event, even though if the issue were seen under the light of traditional categories, they would constitute accessories or instigators [...]. Finally, indirect authors have at least, oblique intent, in terms of the development of the event they have planned out and the predictable consequences of their actions."[240]

From this perspective, it is clear that those who were in higher or middle ranks[241], i.e. those "behind the desk," must be held accountable concomitantly with the direct executors of the crime. It is important to highlight that both types of authorship, i.e. direct and indirect, can coexist without dogmatic inconveniences and are independent from each other. In most cases of sexual crimes in the context of State terrorism, when the immediate perpetrator is unknown, it is perfectly acceptable to hold indirect authors accountable. It is noteworthy that, although there are notorious differences for determining who were part of task units and who were direct authors of most of the crimes committed, the same difficulty does not arise when trying to identify rank in the Armed or Police forces, as these forces keep records that are submitted as evidence in most trials.

Regardless of the above, it is out belief that in some cases it is possible to apply the classification of co-author per functional repartition of tasks. This means that those who knowingly carried out other tasks that facilitated the commission of sexual abuse (or had reason to believe sexual abuse would be the outcome of their actions) are also accountable. As per the above mentioned goal, liability involves abduction, unlawful deprivation of freedom or intelligence tasks that led to certain persons being targeted by repressive actions.

Co-authorship per functional repartition of tasks requires the necessary concurrence of several people in the comission of the crime, who should respond for all the events that occurred, even if they only assisted in part. On this, Santiago Mir Puig sustains that, "Co-authors are authors because the crime is committed by everyone. Co-authors delegate the partial execution of the crime." In regards to the reciprocal imputation principle affecting each contribution, he believes that, "In accordance with this principle, everything a co-author does (is extensible) to the rest," thus overwhelmingly confirming our belief, "For there to be reciprocal imputation, there must be mutual consent, which frames all the different parts of each individual contribution into a global plan."[242]

Either way, even if this thesis is not deemed applicable, as these are systematic crimes against humanity that were committed, it is perfectly acceptable to resort to the

[240] H. Shapiro, op. cit., pg. 212.
[241] Even though intermediate ranking officers, as opposed to high ranking officers, lacked the ability to direct and control the entire system, they could control a portion of it by imparting orders from their superiors. This is the case of those who directed CDCs and a good portion of "operative groups."
[242] Santiago Mir Puig, *Derecho Penal*, Parte General, Reppertor, Barcelona, 5th Ed., 1998, pg. 386-387.

classification of "necessary accessories"[243] to those who held positions in the Armed or Police Forces within the geographic area in which the sexual assaults took place, and/or were responsible for operative groups, acting as immediate participants in the commission of these events.

Because these crimes are necessarily linked to the context in which they were committed, it is evident that without the special structure required for the repression, and without the material and human means provided by order-givers and decision-makers in the Armed and Police Forces, these rapes would never have occurred. These contributions can be deemed as essential because without them, these crimes could not have been perpetrated, therefore allowing the possibility of deeming higher ranking officers as necessary accessories.

Should Crimes against Sexual Integrity Committed by Members of Repressive Groups be Charged Differentially?

Another issue is whether sexual violence should be deemed as a criminally punishable conduct or if it should be treated differentially, regardless of the possibility of concurrence with other crimes.

Some judicial decisions have established that rape and other forms of sexual violence constitute the crime of torment, defined as a much broader concept that contemplates all forms of abuse, including deplorable detention conditions, constant threat and intimidation, physically tormenting prisoners, their families (including in some cases children and even babies) or their partners, forcing them to listen to the murder of other detainees, absolute secrecy (which entailed uncertainty as to their immediate fate), and identification through numbers and letters, among many others.[244]

Our opinion is that rape should be differentiated from other criminal charges, regardless of their similarities, points in common[245] or material concurrence. The reason for this is quite simple: when these crimes were committed, crimes against sexual integrity were independently contemplated in the Criminal Code (under a different Title) and constituted a specific dimension of the terrorist and repressive system instilled by the dictatorship. In addition, they necessarily carry a sexual meaning before society, which is not the case in other criminal charges, and

[243] Also known as "primary abetment" and defined in article 45 of the Criminal Code, which stipulates: "Anyone who takes part in the commission of an event or provides aid or abet to the author or co-author of said event without which the event would not have been possible, shall be subject to the penalty established for that crime. The same penalty shall be established for anyone who directly instigates another to commit that crime." From our perspective, the criminal charges in question tolerate other forms of participation, such as instigation or secondary complicity.

[244] Range established in "Suárez Mason y otros s/privación ilegal de la libertad," File. 14.216/03, Federal Criminal and Correctional Court 3, Office 6; Federal Criminal and Correctional Appeals Court of La Plata, in "Etchecolatz, Miguel sobre apelación," res. 25/AUG/05; "Simón," and International Court of Human Rights in "Velásquez Rodríguez," "Godínez Cruz," "Fiaren Gabri," among many others.

[245] One point in common with the crime of torment is that both attempt against human dignity.

assimilating them would involve disregarding this singularity. That is why we believe it is a mistake to include these crimes with other unlawful conducts, as that would involve concealing them behind other crimes that are no more or less serious.

Sexual violence, on the other hand, is different (including forced nudity, groping, simulations, or threats of violence, for which there are no pre-existing criminal categories) and can be criminally charged as torment as, for the most part, it either lacks independent criminal categories or it is impossible to determine the existence of the necessary elements for its configuration.

Finally, we must add that we not only believe that differentiating these crimes is dogmatically correct, but it is also extremely important to do so for victims that have decided to report these events so that their perpetrators can be criminally punished for the sexual violence they inflicted. As per most victim testimonies, crimes against sexual integrity cause such severe harm that even after many years it continues to affect the subjectivity of the victim.

This differentiation is also relevant for the current development of crimes against sexual integrity. Revealing past sexual violence sheds light on current sexual violence. Today, the fact that highly publicized and massively disseminated judicial decisions, academic research, legal and other forums, are beginning to discuss past sexual violence is a way of promoting and driving the debate on sexual violence in general, in order to bring about exchanges and expand the current vision on this issue that remained taboo for so long.

ADVANCES IN CRIMINAL CASES

The School of Naval Mechanics (ESMA)

The CDC located at ESMA operated out of the Officer's Casino for two years during the military dictatorship, under the authority of the highest ranking officers in the force, as well as School authorities and Tasks Unit 3.3/2. Not only did the School serve to implement the repression, but it also served to "recover" abducted political militants that could be useful to the political project of Emilio Massera. As a result, some detainees were "selected" to live during their enslavement with the same officers who had abducted and/or tortured them.

In regards to our topic, according to survivor testimonies, during torture sessions in the framework of their detention, in a section known as *"Capucha"* (Hood), sexual abuse against detainees, particularly women, were everyday events. This even included pregnant captives. At ESMA, the presence of pregnant women was constant because a maternity ward to which captive women from several CDCs were taken to give birth operated out of the School.[246]

[246] In most cases, these women's sufferings, which included threats and abuse most likely aggravated by their pregnancies, had a dreadful outcome, i.e., their "transfer," followed by their murder, and the delivery of their babies to another family.

Sexual slavery was a particular form of violence exercised at ESMA. Several survivors have testified to have been forced to have regular sexual intercourse with their captors. Through their testimonies it was possible to determine that these relationships occurred amidst physical and psychological torture, which included coercion and the permenent threat of their imminent transfer, or the mention of the death of a loved one (husband, children, parents, siblings).

Even though a great part of the above was made public in the *Juntas* Trial and during the years of impunity, even during the investigational phase once cases were reopened, the issue continued to be concealed. In fact, the first complaint filed in the "ESMA" case, was a rape perpetrated by a Navy officer from the Tasks Unit, reported in July 2007, with representation from CELS.

Testimonies given in the framework of the investigation mainly reflected that detainees-disappeared persons had suffered sexual abuse. However, little by little, more and more survivors began to mention being abused during their captivity by Navy officers and Guards.

In the framework of this reopening of cases, CELS believed an essential part of the concentration camp experience at ESMA had been ignored and it was important to shed light on this issue. Therefore, CELS worked with one of the victims who had been able to narrate her experience and the sexual abuse to which she was subjected; a complaint was then filed accusing the Chief of Intelligence of Tasks Unit 3.3/2, Jorge Acosta, also known as el Tigre" (the Tiger) as being the direct author of the crime of rape.

It is safe to say that in this case, every procedural obstacle for the investigation of this crime was overcome, that is, there was a victim who was willing to file charges and a direct liable author.

Jorge Acosta was interrogated for this crime and on June 23, 2009 he was prosecuted for rape, with a solid accusation. Initially the judge had used the legal classification of "rape" as an independent crime. Later, he evaluated the victim's testimony as a key piece of evidence for adjudicating responsibility. He further enriched this testimony with that of other testimonies in the case that mentioned rape from survivors who had direct or indirect knowledge of the rape of fellow captives that are still disappeared. Finally, he stressed that it had been thirty years since the events took place, and that it was, therefore, not possible to establish the precise moment and place where the crimes were committed (as is the case of torment), but to his understanding, during the prolonged detention of the victim and in an appartment to which she was escorted, Acosta had raped her repeatedly.

> "G... is not the only victim that claims to have been subjected to sexual abuse. S... and other women who are either still disappeared or survived made similar claims of rape or attempted rape during their detentions. Such is the case with J... or J... Because of the reiteration of these claims during the investigational phase, it mis my belief that there is no reason to doubt the

> veracity of the testimony provided by G... or of the intimidation to which she was subjected from the time she was deprived of her freedom. [...]
> The particularity with this aspect, as with so many others acts of rape in which physical penetration is not exhausted with a single action but rather extends through time, is the inability to undoubtedly and precisely determine all the instances in which there was physical penetration, including the dates and times when it happened. That is way each event cannot be individualized, although we do know that they occurred during the year 1977 in an apartment to which she was escorted from ESMA, at which Acosta would later arrive. According to the victim's testimony, there was absolutely no chance of refusing or attempting to defend herself. At that time, she was unlawfully held at the clandestine center operating out of the School of Naval Mechanics and was subjected to the will of her captors, who had absolute control over her fate. She could not reject the attack, as any attitude toward the defendant could be held against her, and as she stated, if she refused, her transfer could be ordered." [247]

For the first time in a case tried in the Federal Capital, the rape of a detainee was deemed as an independent criminal action.

However, the Chamber II of the Appeals Court, in a decision on October 21, 2009, interpreted the events differently and held that:

> "In this regard, the undersigned find that the events to which she was subjected [...] during the year 1977, deemed by the lower court judge as a violation of article 119, paragraph 3 of the Criminal Code, are actually concurrent with the *torments* to which she was subjected, as the actions reported were imparted with a specific purpose; therefore, we confirm the prosecution but *reclassify* the *charges* here filed, without prejudice to the charges that could be applicable."[248]

The Chamber deemed that rape must be subsumed under torture. It, therefore, added an additional charge of torment against Acosta, reclassifying the original crime. This part of the prosecution was taken to trial in April 2011, along with other charges.

In June that same year, in the framework of the prosecutions for crimes committed at ESMA, which began in December 2009, CELS included in its complaint the commission of systematic sexual abuse and rape against female detainees at ESMA. CELS requested that the court investigate the crimes mentioned in witness testimonies as part of an independent investigation, thus, reporting perpetrators of sexual abuse and rape, including Juan Carlos Rolón, Jorge Carlos Radice, and Julio César Coronel, members of Tasks Unit 3.3/2.

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[247] Prosecution in case 14,217, "Escuela de Mecánica de la Armada s/delito de acción pública," Federal Criminal and Correctional Court No. 12, under the authority of federal judge Sergio Torres, Office 23, June 23, 2009.

[248] Federal Appeals Court, Chamber II, case 28,178, "Damario, Hugo E. y otros s/ampliación de procesamiento," Federal Court 12, Office 23, File 14 217/03/518. We have preserved the victim's identity and added italics.

In August of that year, judge Sergio Torres evaluated the claim brought forward by CELS and initiated a separate case focused particularly on investigating the complaints of sexual abuse and rape committed at ESMA, thus deeming them as crimes against humanity.[249] This is an extremely relevant decision because of the visibility and publicity received by the ESMA case, and because it acknowledges the horrors suffered at CDCs by female detainees on the count of their gender.

In his decree, the judge analyzed some of the challenges we mentioned in this chapter and sustained that these crimes have "distinct and specific normative frame" and that the mere mention of a single event of this nature during a testimony, given the difficulties it involves, is equivalent filing a claim by the victim. He further developed his gender-based rape theory by sustaining that in trial on the basis of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, Belem Do Para[250] and the IAHRC decision in *Gelman v. Uruguay* regarding the pregnancy under captivity of María Claudia García,[251] i.e. the case of women who were pregnant and gave birth at CDCs. Lastly, Torres criticized the above mentioned decision of the Appeals Court, and sustained his disagreement with the reclassification of rape as torment.

The Atlético-Banco-Olimpo (ABO) Circuit

These three CDCs, under the authority of the First Army Corp, operated subsequently as a repressive circuit. This involved moving detainees and guards to each center as the previous one closed. The one known as *El Atlético* operated from mid 1976 to December 1977, in a property belonging to the Federal Police in San Telmo, City of Buenos Aires. When the facilities had to be torn down to build a highway, detainees were transferred to a center known as *El Banco*, property of the Town of La Matanza in the Province of Buenos Aires, which operated until mid 1978. The last center in the circuit, *El Olimpo*, was also property of the Federal Police and operated as of August 1978, in the Town of Floresta, City of Buenos Aires.

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[249] The decree initiating the prosecution has yet to be numbered and labeled, Federal Criminal and Correctional Court No. 12, under the authority of Federal Judge Sergio Torres, August 23, 2011.

[250] Convention adopted in Belém do Pará, Brazil, on June 9, 1994. Argentina has been signatory to the Convention since 1996. Article 2.b stipulates that, "physical, sexual and psychological violence: that occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment," and 2.c ,"that is perpetrated or condoned by the state or its agents regardless of where it occurs" constitute violence against women.

[251] Inter-American Human Rights Court. *Gelman v. Uruguay*, Merits and Reparations, ruled on February 24, 2011. In paragraph 97, the IAHRC sustains that, "because María Claudia García was pregnant when she was detained, she was in a particularly vulnerable state, which is why her case was treated differentially [...] The facts of the case reveal a particular conception of the female body that attempts against maternal freedom, which is an essential part of the free development of female personality. The above is even more serious if we consider, as has been stated, that her case took place in a context of disappearances of pregnant women and unlawful appropriation of children in the framework of Operation *Cóndor*. The aforementioned actions against María Claudia García may be classified as serious and condemnable forms of violence against women, perpetrated by Argentine and Uruguayan State agents, who severely attacked her personal integrity on the obvious basis of her gender."

The conditions in the two latter centers were harshly exposed in the framework of the first oral trial that took place since the reopening of judicial processes for crimes against humanity in which Julio Héctor Simón was convicted of unlawful deprivation of freedom of spouses Gertrudis Hlaczik and José Poblete and appropriation of their daughter.

During this first trial, the cruelty of the abuse to which detainees were submitted came as a surprise, especially because the acts of sexual violence that had been exposed also involved male detainees. According to survivors, degrading practices included enforced homosexual relations between cell mates and rape by repressors at the center. These stories were again heard in the trial for crimes committed by the entire repressive circuit, and some were even more intense.

The position of the court conducting the investigation in the mega-case known as "*Primer Cuerpo del Ejército*" toward sexual violence is similar to that of the Federal Appeals Court in the "ESMA" case, that is, rape is subsumed under torture, and is hence a crime that must be understood in a broad sense as including all degrading treatment to which detainees were subjected during captivity at CDCs. Therefore, sexual abuse in a broad sense (including nudity, groping, lack of privacy when carrying out biological functions, among others) and rape are deemed as torture. This position is interesting as it goes beyond the traditional conception of electric prods and beatings, which are usually the only actions classified as torture, and incorporates living conditions at CDCs as part of the crime. This involved breaking away from the traditional view that the only one who suffered torture was he or she who was subjected to the electric prod, and involved acknowledging that the fact that being held in a clandestine detention center constitutes torture. However, this position does not allow the concrete investigation of rape as an independent crime.

In this sense, oral trials in the "*Simón*" and "*ABO*" cases have helped highlight, as we have seen, the existence of this practice under investigated. As has been stated, this was initially revealed in the first trial since cases were reopened, at which time survivors spoke of sexual abuse and, regardless of the questionings in the "*ABO*" case, which came later, it did not include questioning defendents who had been identified as authors of these crimes, even though prosecutor Federico Delgado so requested in April 2007. In his claim based on the information obtained in the "*Simón*" case, Delgado emphasized the need to specifically investigate the crime of rape. Said document includes the testimonies that connected certain defendants to the commission of this kind of violence, thus giving the judge tools to move the accusation forward.[252]

The "*ABO*" case was elevated to trial three years later, in November 2009. Once again crimes against sexual integrity committed within the repressive circuit arose. In July 2010, one of the complainants requested additional charges against the defendants that had been identified as rapists on the basis of a testimony by a survivor in the oral hearings. Unfortunately, the request was denied by the court, for deeming that from a

[252] Federal Prosecution No. 6, claim filed on 12/APR/2007.

procedural point of view, it had been requested in an untimely fashion (once testimonies had already concluded).

CELS, who is also a complainant in this case, expanded its claim on the commission of sexual crimes and requested (as it did in the "ESMA" case) the extraction of testimonies so that crimes that would arise in the hearings, which were not part of the accusation, could be investigated in the proper phase. Once the grounds of the judgment were read in December 2010, the court rejected the request made by CELS and another complainant and resolved (without expanding too much on the reasons and in concurrence with the decision by the investigational judge) that sexual crimes constituted a form of the "crime of torture."

The ruling was confusing and lacked soundness on a key issue: It held that it is "easy" to conclude, based on witness testimonies, that the events narrated by the witnesses met the objective description of the charges in article 119 of the Criminal Code, regulating rape, as well as the objective requirements for classification as rape in the Rome Statute (art. 7). "Evidentiary requirements have been met," claimed the Court. However, in terms of the subjective aspect, i.e., the defendant's will to commit the crime, the Court ruled that:

> "It seems clear that the intent is that of torment rather than that of attacking sexual integrity. An example of this is the case of the detainee who was asked to chose between being raped or tortured."

In this case, it was not only assumed that a detained victim could choose what form of degradation to which to be subjected, but instead, a false argument was used to – in fact – describe two distinct conducts: rape and torture. In addition, how could it possibly be clear that a person who is raping another person does not have the intent to rape but rather to commit torture through rape? By that rationale, any case of rape, under any context, not just that of clandestine detention centers, can be subsumed under other conducts, such as theft or inflicting harm.

Vesubio

This CDC was located in *La Matanza*, province of Buenos Aires, in the intersection between *Ricchieri* highway and *Camino de Cintura*. It operated between April 1976 and late 1978. It had three main buildings known as Ward 1, Ward 2, and Ward 3. Ward 1 was used in 1976 to house detainees and in 1977 it became the personal living quarters of Field Commander Pedro Alberto Durán Sáenz. Ward 2, also known as *Enfermería* (Infirmary) was the first place in which detainees were held and was where torture chambers were located. Finally, Ward 3 was where most detainees were housed.

El Vesubio underwent three phases. During the first phase in 1976, it was under the authority of the Federal Penitentiary Service, during the second and third phases, from early 1977 to the end of that same year, the Army took over the center.

During this trial, a great number of survivors claimed to have suffered rape and sexual abuse. Once again in this case, CELS requested in its complaint that the acts of sexual violence that arose during the hearings were duly notified to the judge leading the investigation. Because by then the grounds in the *"ABO*" case had already been made known, for the purpose of preventing any surprises to the defense, a request was made for charging the events in question as sexual violence, provided the court deem it had jurisdiction over the events, and for the CDC chiefs to be accused of being the indirect authors of the rapes and/or sexual abuse perpetrated in *El Vesubio* during their periods of service there. In addition, Durán Sáenz was charged as the direct author of the rape of a detainee, although said accusation was annulled when the defendant died during the hearings phase of the trial.

The Zárate-Campana Circuit

In this repressive circuit, consisting of at least 14 CDCs located in what was later known as Zone IV of the Argentine Army, under the authority of the Military Academy Command in Campo de Mayo,[253] most survivors testified before CONADEP or the courts, to having been victims of sexual violence or to have known of other fellow captives who were.

The investigation of crimes committed in the framework of this circuit is included in the mega-case known as "*Campo de Mayo*."[254] Two former detainees in this circuit testified to having been raped. Santiago Omar Riveros was interrogated for these crimes, as the main person responsible for the human rights violations that occurred in that repressive circuit, as were the chiefs and sub-commanders of the CDCs where the rapes occurred. When defining the procedural situation, the investigating judge filed charges for all the crimes in question except crimes against sexual integrity, regarding which he decreed lack of merit for considering any "possible sexual abuse" was not included in the "Plan set forth by the Military *Juntas*."

The victim's legal representatives appealed the decision, objecting to the differential treatment given to the crimes in question and the adjudication of responsibility. If defendants were being prosecuted as necessary participants in unlawful deprivations of freedom, torments, and other raids, because (in the judge's own words) without their personal and material contribution the commission of these crimes would have been impossible, it was contradictory to establish a distinction between these crimes and

[253] Although the main CDCs were located in the same place as *Campo de Mayo* (where at least five thousand people were detained), there were numerous other centers with capacity for fewer detained in what would be known as Zone IV after May of 1976. The following were identified: 1) Armed and/or Police Force Units: Marine Artillery Arsenal, Zárate; Coast Guard Training Academy, Zárate; Zárate Coast Guard; Campana Coast Guard; the *Murature* vessel, which according to testimonies was anchored in front of the Zárate Naval Base to which detainees were transfered on a raft from the Coast Guard Training Academy; Zárate Police Pricinct; 1st Police Pricinct of Escobar; Police Precinct of Campana, 2) Privately-Owned Units: "*El Tolueno*," a synthetic toluene factory; Fabricaciones Militares; Tiro Federal de Campana; Club Siderca; facilities that belonged to Dálmine-Siderca SAIC; Casa De Piedra, in Zárate, where Campo de Mayo intelligence operated; Mansión Güerchi or Casa de la Barranca, in Zárate, 3) Others: Reserva Natural Otamendi.

[254] Filed as "Riveros, Santiago Omar[254] y otros s/privación ilegal de la libertad y otros."

crimes against sexual integrity. However, the judge highlighted the systematic nature and extent of sexual violence as a degrading practice in the repressive circuit.

Upon analyzing the appeal, the Federal Appeals Court of San Martín upheld the decision of the lower court judge. Their criteria are transcribed below:

> "5) For their part, the complainants requested that the charges be filed as rape for deeming that these events contributed to the plan to annihilate and degrade the subjectivity of each individual held in clandestine detention centers. To that effect, it cannot be determined at this time that the crime was systematic, but rather that it was occasional (file 8365, Appeals File for Santiago Omar Riveros, 31/OCT/07, May 9, 2008, dec. 7484).
> Although it is evident from all the accusations brought before this Court that the crime had repeated on several occasions and affected other victims, we cannot help but think that if this crime had been committed against all victims as held by the complainants, then all or most victims would have reported it."

In the first paragraph, this crime is deemed as having occurred on occasion, without any minimal thought by the Court. The second paragraph ignores that victims were disappeared, therefore, it is ridiculous to sustain that they "would have reported it." In addition, the judges ignore the difficulties surrounding reports of this crime and, indirectly, disregard the value of the testimonies provided in the complain, which are numerous and consistent, regarding the extent of sexual violence in the repressive circuit.

The First Conviction for Crimes against Sexual Integrity in the Context of a Clandestine Detention Center in Argentina: The "Molina" Case

The first conviction by a Federal Oral Court for crimes against sexual integrity committed at a CDC ocurred in Mar del Plata, on June 9, 2010 and its grounds were made known on the 16th of that month. In that trial, Air Force NCO Gregorio Rafael Molina was prosecuted, and sentenced to life in prison for several crimes, including five counts of aggravated rape and one count of attempted rape, against two detainees. During the trials, it was proven that Molina was the direct author of these rapes.

The development of the case shows the herculean task of the victims for obtaining justice. The first reference to the sexual abuse to which mainly female victims were subjected in the clandestine center *La Cueva* was made in the context of the Juntas Trial, and was repeated in the "Truth Trials" in Mar del Plata.

Finally, with the reopening of the justice process in 2007, one of the victims came forward as a complainant and pressed charges against Molina for rape. When analyzing the case, the lower court judge determined that there was insufficient proof to hold Molina accountable for the crime (regardless of victim testimonies) and decided to dismiss the charges against the defendant for this crime. But on September 13, 2006, the Federal Appeals Court of Mar del Plata overturned that decision on the grounds

that there was indeed sufficient proof on the count of the testimony of the victim and those of other survivors.

After all these comings and goings, Molina was eventually prosecuted for this and other charges that were added later. The case was submitted to trial in September 2007, and in May 2010 the first oral trial in which rape was deemed as an independent crime, was held in Mar del Plata, stemming from the claims of two victims.

This judicial decision marks a position, and precedent, regarding some of the issues we have raised here. It parts from the premise that rape in clandestine detention centers is a crime against humanity (for which there is, therefore, no statute of limitations) and it overcomes the evidentiary difficulties in these cases by granting relevance and credibility to victim accounts. In addition, it approaches questions regarding why these crimes had not been reported before and highlights that this delay is logical and reasonable given the difficulty expressed by victims in narrating what happened.
In addition, the ruling explains the systematic nature of the crimes by clearly stating that:

> "Reference was made above to the clandestine repression plan and the Court here remits to the above to avoid unnecessary redundancy, and finds that in this context, it was common for unlawfully detained women to be sexually subjected to their captors or guardians or to suffer other forms of sexual violence. These rapes, as we have stated, do not constitute isolated or occasional events. They were part of systematic and generalized practices carried out by the Armed Forces during the last military dictatorship (CONADEP report and ruling in case "13/84")."

Final Thoughts

Sexual violence has been yet another aspect of the complex and sophisticated method of terror imparted upon victims at CDCs in the country. There is no doubt as to the severity of these procedures, used in many cases to inflict horror on a daily basis in camps. However, in the particular case of rape, there are differences related to the definition of the criminal charge for these crimes, as they constitute a differentiated practice, with a specific dimension within the implemented repressive system. What difference in severity or destructive potential against an individual's integrity could we sustain if we held on to a strict definition of the criminal charge in question when women were threatened on a daily basis, stripped, and tied to torture beds with their legs spread open, objects being introduced into their bodies while they were told that they would never be able to have sex again, that they would never be able to have children or with the threat of being "saved" to be "used" by a particular repressor later?

The annihilation of subjects as such was clearly the purpose of every form of torture perpetrated. It was also the purpose of sexual violence. Rape as a form of "initiation" immediately after being abducted occupies the same place in the structure of CDCs as the framework of impunity with which abductions, sensory deprivation, beatings,

deprivation of identity, threats or other physical torments were inflicted. Torments were exercised over the body to break the individual's will, ideals, commitment to solidarity, hopes, in short, their humanity.

The naturalization of these practices within the social order we have described facilitates the disappearance of this issue from the justice system, even when testimonies insist on making it reappear.

The process of truth and justice has obvious value when it comes to this traumatic experience as a way of including it in our individual and collective narration. By acknowledging the responsibility of those who committed these crimes and holding the State responsible for failing in its duties to ensure the human rights of citizens; the establishment and enforcement of punishments and implementation of policies for effective reparations are great challenges for all stakeholders in this process and open the possibility to represent on a social level, the unrepresentable nature of individual subjectivity. These two movements, i.e. the individual and social movement, are simultaneous and overlapping, feeding each other and even contradicting each other, thus reflecting the complexity and richness of the task at hand.

In light of all the above, now is clearly the time to discuss these issues as they are emerging from the testimonies of victims themselves. The challenges described for definitively activating the prosecution of these crimes in light of the decision in the "*Molina*" case and the initiation of the prosecution of sexual crimes in the ESMA case demonstrate that the difficulties identified by the judicial system for advancing these prosecutions are based on more on artificial constructions than on real or insurmountable procedural or criminal foundations.

We firmly believe in the restorative potential of criminally convicting crimes against humanity. Every time a serious human rights violation goes unpunished, every time an irreparable wound inflicted on a victim goes without justice in a framework that separates the victim from his or her oppressors, the justice system is failing in its functions. Just as the existence of atrocities renders the law necessary, the full exercise of rights and convictions for crimes enables the reconstruction of social ties that were damaged in times of horror.

7. Proof of Identity in Criminal Prosecutions for Abduction of Children and Identity Substitution

*Marcelo Ferrante**

Introduction

The massive abduction, torture, and homicide plan imparted by the military dictatorship that seized the Argentine government between 1976 and 1983 has many, in fact too many, gruesome characteristics. One of them was the fate of the young children of detainees, who were abducted with their fathers or mothers, or born to captive mothers at clandestine detention centers where they were held by members of the military and their accomplices. An estimated five hundred girls and boys were separated from their families and given up for adoption as unidentified children (known as *nomen nescio* or "NN") or directly given to families who unlawfully adopted them (pretending to have received the child from parents who were willingly giving them up) or registering them as their biological children (thus simulating childbirth).[255] Hence, they lived and grew as members of other families, with no knowledge of their true origin or identity.

In Argentine Criminal Law, taking a child away from his or her family or altering or substituting the child's identity with that of someone else is a felony.[256] After democracy was reinstated in 1983, a great number of criminal prosecutions were initiated aimed at applying criminal law to child abduction and identity substitution cases during the dictatorship.[257] Therefore, to date, at least twenty-seven people have been convicted of child abduction, identity substitution, kidnapping, unlawfully holding, and hiding children under the age of ten,[258] and at least thirty-nine people are currently being prosecuted for such crimes.[259]

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[255] *Abuelas de Plaza de Mayo*, libro de casos *Niños desaparecidos, jóvenes localizados, 1975-2009*, available at <http://www.abuelas.org.ar/Libro/f_desaparecidos0.htm>. By March 20, 2010, *Abuelas de Plaza de Mayo* had identified 13 cases of children who were abducted with their parents and 180 cases of children born to captive mothers. See *Niños desaparecidos, jóvenes localizados, 1975-2010*, available at <http://www.abuelas.org.ar/Libro2010/index.php>.

[256] The Argentine Criminal Code (CC) penalizes these conducts mainly in articles 138 to 139 bis, and 146. These rules were modified in 1995, ref. Law 24,410, *ADLA* LV-A, 6 (1995), but they essentially stem from the original text of the 1921 CC.

[257] As opposed to what happened with other crimes committed during the military dictatorship, the criminal prosecution for crimes against the sons and daughters of victims was not interrupted by the Full Stop (*Punto Final*) Law (Law 23,492, *ADLA* XLVII-A, 192 [1986]) or the Due Obedience (*Obediencia Debia*) Law (Law 23,521, *ADLA* XLVII-B, 1548 [1987]).

[258] This information was provided by the Fiscal Unit for the Coordination and Monitoring of Cases of Human Rights Violations Committed in the Framework of State Terrorism (*Unidad Fiscal de Coordinación y Seguimiento de las Causas por Violaciones a los Derechos Humanos cometidas durante el terrorismo de Estado*, UFDH), of the Public Defense Ministry.

[259] The number 39 was taken from the information provided in the list of people who had been prosecuted by June 2010, drafted by the UFDH, available at <http://www.mpf.gov.ar/Accesos/DDHH/Docs/Listado_procesados_Junio_2010.pdf>. However,

In this paper I will analyze a key and characteristic aspect of these criminal prosecutions, which I will denominate *identity* tests. Identity tests are evidentiary measures aimed at determining a person's genetic identity when that person has allegedly been unlawfully taken from his or her parents or families, and his or her true identity has been substituted by that of someone else. (I will refer to these people as "son and daughters and/or children," according to context.) The test consists of extracting a DNA sample from these sons and daughters, mainly by extracting a drop of blood via finger pricking, and comparing that sample to the information on record of direct victims of enforced disappearances occurring during the military dictatorship or to that of their direct relatives.[260] If this test establishes a genetic link between the son or daughter and the victim of an enforced disappearance or a direct relative of said victim, the identity test will reveal, with more or less certainty depending on the case, that the son or daughter of the victim was abducted and that his or her real identity (i.e., the identity confirmed through the DNA test) has been substituted by that of someone else.

Defendants in these criminal prosecutions are mainly those who established parental ties with these sons and daughters of victims by substituting their real ones, as they are accused of having personally taken these children or conspired with those who have either by somehow requesting them or favoring their kidnapping, or by concealing their true identity, via either falsely registering them as their own or fraudulently giving them in adoption. (I will refer to these people as "adoptive parents" for the sole purpose of distinguishing them from the actual parents whose paternity or maternity was impeded or obstructed when their children were taken from them and their identities were substituted, in turn, I will refer to the actual parents as "legitimate" or "biological" parents.) Identity tests, therefore, constitute an element that contributes to advancing criminal prosecutions against adoptive parents and results in their ultimate conviction.

However, when facing the possibility that this test could help convict adoptive parents, some of these sons and daughters are reluctant to cooperate with the criminal process, refusing to give the authorities DNA samples that would confirm their parental relationship with a victim of enforced disappearance. Judicially, their claim (to which I will refer as "right to refuse cooperation") shall be the key focus of this paper.

The fate of the right to refuse cooperation has been inconsistent. While some courts have rejected it and ordered the compulsory extraction of DNA samples for identity tests, others have allowed it and decreed the invalidity of decisions ordering the compulsory extraction of biological samples. The Argentine Supreme Court of Justice has ruled on this on two opportunities (once in 2003, in the "*Vázquez Ferrá*" case and again in 2009 in the "*Prieto*" case), and both times majorities were complex and accomplished by way of concurring votes based on distinct arguments. In both cases, the Court ruled that the judicial decision under consideration violated constitutionally protected rights of the son or daughter and, therefore, was void.[261]

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other documentary evidence provided by the UFDH indicates the actual number is as high as 50.

[260] DNA tests are carried out at the National Record of Genetic Data (*Banco Nacional de Datos Genéticos*), established as per Law 23,511, *ADLA* XLVII-B, 1529 (1987).

[261] Both decisions were made before there was any legislation expressly authorizing judges to order this evidentiary measure. In "*Vázquez Ferrá*" (CSJN, "*Vázquez Ferrá, Evelin Karina*

s/incidente de apelación," V. 356. XXXVI, ruled on September 30, 2003), the claim was filed by Inocencia Luca de Pegoraro, the mother of a woman named Susana who disappeared in 1977 when she was five-months pregnant. Susana gave birth while she was held at a clandestine detention center and her daughter was given to Policarpo Vázquez and registered as the biological child of him and his wife, Ana María Ferrá, under the name Evelin Karina Vázquez Ferrá. In the framework of the criminal investigation, the judge ordered the compulsory blood test of Vázquez Ferrá to determine if she was the granddaughter of the complainant. The decision was appealed and the Supreme Court ultimately overturned the judge's decision. Although the judges that adhered to the majority rule agreed on the outcome, they each had similar arguments. Judges Belluscio and López, on the one hand, and Petracchi, Moliné O'Connor, and Fayt, on the other, and Vázquez with an independent opinion, all concluded that the judge's decision violated the right to privacy ensured in article 19 of the Argentine Constitution and extended to the "*Vázquez Ferrá*" case the procedural norms that prohibit ascendants and descendents from filing criminal reports against one another as well as the norms that prohibit summoning descendents to testify against the accused (articles 163, 278 par. 2, and 279 of the Criminal Procedure Code (CPC)). The judges added that blood tests were not necessary to determine whether the accused had committed the crime for which they were charged, as they had both already confessed. Petracchi, Moliné O'Connor, and Fayt believed that a witness' right not to testify against the closest members of her inner-family circle is intricately related to the right not to incriminate oneself. On his part, Judge Boggiano believed that the procedural norms that prohibit summoning descendents of the defendants to testify against them was not applicable to the case, since the extraction of blood does not constitute a testimony and it had already been proven that the defendants were not the biological parents of Vázquez Ferrá; in addition, the Judge also held that this evidentiary measure was not essential for determining what really happened, as there was sufficient evidence to prove she was not the daughter of the accused. Finally, in his partially dissenting opinion, Judge Maqueda believed the blood test ordered by the lower court judge was not comparable to a testimony and, therefore, the CPC norms that prohibit descendants from testifying against their ascendants were not applicable. In addition, he held that the right to privacy contained in article 19 of the National Constitution, on which Vázquez Ferrá's claim was based, had to yield before the need to criminally prosecute crimes against humanity and to honor the right to truth of the complainant and society.

In the "*Prieto*" case (CSJN, "*Recurso de hecho deducido por Emiliano Matías Prieto en la causa Gualtieri Rugnone de Prieto, Emma Elidia y otros s/sustracción de menores de 10 años, causa nº 46/85 A*," G. 1015. XXXVIII, ruled on August 11, 2009), what was being investigated was the responsibility of the adoptive parents of brothers Guillermo and Emiliano Prieto for the crime of kidnapping a child under the age of 10, the victims of which had been both brothers. The investigating judge ordered Emiliano Prieto to submit to a blood test to determine if he was a descendent of the complainant's family. The Supreme Court overturned this decision. In their vote, Judges Lorenzetti and Zaffaroni believed that the rights at stake were Prieto's right to autonomy (article 19 of the Argentine Constitution) and the right to truth of the alleged biological parents. They concluded that subjecting Prieto to a compulsory DNA test violated his right to personal autonomy because: 1) other non-invasive methods for obtaining DNA samples had to be initially discarded; and 2) it was not necessary for Prieto to undergo all the negative consequences of uncovering his true identity in order to satisfy the complainant family's right to truth. The judges held that, in order for the complainant's right to truth not to conflict with Prieto's autonomy, "the test had to be conducted so as solely to satisfy the right to truth of the alleged biological family, and any other claim or judicial effect should be rendered void." Judges Petracchi and Fayt remitted to their votes in the "*Vázquez Ferrá*" case. Judge Argibay held that Prieto's right to refuse to take the DNA test was protected under article 18 of the National Constitution, which protects private life and not article 19. According to Judge Argibay, although the State can interfere with certain aspects of private life such as house and correspondence searches, said interference must be reasonable (for example, making it possible to obtain essential trial elements for deciding a case). The Judge held that this level of

The arguments sustaining the right to refuse cooperation are basically two.[262] Both arguments part from the position that these sons and daughters have a right not to contribute evidence for the criminal prosecution of their adoptive parents. The stronger argument attributes so much weight or value to this right that it necessarily prevails before the interest of punishing adoptive parents for the commission of crimes related to the kidnapping and identity substitution of children. Instead, the weaker argument holds that the right of sons and daughters not to cooperate is comparable to the constitutional rights that protect their private homes or mail, i.e., particularly valuable rights, the protection of which yields before the need to comply with the public demand for punishing those who have violated the rights of others. This argument combines the conception of the right not to cooperate with the claim that the identity test is unnecessary or impertinent in criminal prosecutions in which the punitive claim is driven toward convicting crimes against identity, as legally regulated under Argentine Criminal Law.

Although according to this weaker argument, the right not to cooperate does not bear the weight claimed in the stronger argument, it is still powerful enough for interferences to only be justified when necessary for the satisfaction of the applicable punitive interest. In addition, the belief that the identity test is not necessary leads, according to this argument, to the conclusion that interference with the right not to cooperate is not justified.[263]

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reasonability had not been ensured and, thus, the measure had to be overturned. In her dissenting opinion, Judge Highton de Nolasco classified the conduct in question as a crime against humanity. Therefore, the State's duty to prosecute perpetrators of crimes against humanity as per international treaties, the violation of which duty would result in international responsibility, conflicted with Prieto's right to intimacy. The judge determined that it was indeed reasonable, proportional, and, therefore, valid, for the State to interfere with the right to intimacy of a person for the purpose of satisfying the right to truth and revealing the material truth of the facts in question in a criminal case. Finally, in his dissenting opinion, Judge Maqueda, remitted to his arguments in the "*Vázquez Ferrá*" case. The Judge differentiated between giving testimonies and compulsively providing DNA samples and held that, if the accused can be subjected to this kind of test without violating the right to refrain from self-incrimination, then it is also valid to force a third person, including victims, to subject themselves to such testing when necessary, adequate, proportional, and reasonable for the purpose of revealing the material truth of the facts in question and satisfying the right to truth of the complainant, in their capacity as victims of the crime.

[262] Those who defend this view often add a third element that is not analyzed here, i.e., the physical integrity of the son or daughter, which is undermined by the compulsory extraction of DNA samples (see para. 8 of the vote of Judges Belluscio and López in the "*Vázquez Ferrá*" case and para. 2 of the vote of Judges Lorenzetti and Zaffaroni in the "*Prieto*" case). This argument is only slightly accurate. The traditional way of extracting a DNA sample is through finger pricking, which involves some sort of invasion of the body that, if unconsented, could constitute some form of violation of the right to physical integrity. However, this invasion is so mild that it is justified under the pretext of a reasonable state interest, such as the imparting of a legitimate punishment. In fact, finger pricking is no more invasive than the taking of fingerprints (even though finger pricking can cause a temporary sense of pain, this discomfort does not seem to be any worse than that caused by the ink used to regularly take fingerprints) but it is still massively viewed as an invasion that is justified by the state's interest in imparting a legitimate punishment. Therefore, I see no reason to extend this conclusion to the case of finger pricking.

[263] In the "*Vázquez Ferrá*" case, the following judges held the stronger position in their vote: Judges Petracchi, Moliné O'Connor and Fayt, on the one part, and Belluscio and López, on the other (although they all also included the weaker argument at some point); Judge Boggiano held the weaker argument and Vázquez first resorted to a version of the weaker argument and

In 2009, the Argentine Congress expressly regulated the compulsory extraction of DNA samples and the right to refuse cooperation.[264] This view is similar to that in the regulation of the right to inviolability of residence in that it allows criminal prosecution bodies to obtain a DNA sample from the son or daughter in order to carry out an identity test if necessary for the final goal of the criminal process. To order the extraction of a son or daughter's DNA, the law requires a judicial decision decreeing that said measure is necessary for verifying the "circumstances that are important for the investigation" and, at the same time, justifying the "need, reasonability, and proportionality" of the adopted measure.[265] In short, the 2009 law stands against the stronger argument, as it assumes that the right to refuse cooperation can be subjected to the interest of the state in imparting a legitimate punishment, and establishes some guidelines for defining the context in which the weaker argument can be applied.

Over the following pages, my goal is to explore the deeper grounds behind the central premises of these two arguments, offering a defense for the right to refuse cooperation and, hence, determining its genuine scope. In short, the following conclusion will be reached: There are good reasons for adhering to the strong right to refuse cooperation (i.e., a right that prevails before the state's interest in imparting a legitimate punishment for child abduction and identity substitution), and the compulsory extraction of DNA samples from the sons and daughters of victims does not, or should not, interfere with that right. Identity tests can, indeed, interfere with the right to enjoy a parental relationship that binds, in relevant cases, these sons and daughters with their adoptive parents. However, this right cannot prevail over the interest of imparting a legitimate punishment, if there really is a conflict between both rights, for example, in cases in which the identity test required for imparting legitimate punishment somehow has a relevant effect over the existing parental relationship. Finally, I will sustain that, although identity tests are not strictly necessary, in the sense that a conviction for

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then resorted to the stronger argument. Judge Maqueda's dissenting opinion was based on the question that characterizes the weaker argument and then rejected it for considering that identity tests in criminal cases are clearly pertinent. In the "*Prieto*" case, Judges Lorenzetti and Zaffaroni on one part, and Petracchi and Fayt on the other, defended their versions of the stronger argument, while Judge Argibay developed her own version of the weaker argument, thus considering that the conditions that justify the compulsory extraction of DNA samples were not met in this process. Instead, Judges Maqueda and JudgeHighton de Nolasco, dissented and considered the identity test was indeed pertinent.

[264] Law 26,549, *ADLA* LXX-A, 51 (2009), introducing article 218 bis to the Argentine Criminal Procedure Code. After the Supreme Court's decision in the "*Vázquez Ferrá*" case, the biological family that had been injured by the decision appealed before the Inter-American Human Rights Court and in September 2009 an amicable settlement was reached with the State. In this settlement, the Argentine Executive committed to submitting to Congress a draft resolution for "protecting the rights of those involved and implementing effective measures for the investigation and prosecution of the kidnapping of children that took place during the military dictatorship." The resolution was drafted and submitted to Congress and, after certain modifications, formed the basis of Law 26,549, sanctioned in November of that same year.

[265] The measures explicitly established by law include special rules for cases in which, during the investigation of publically prosecutable crimes, the extraction of a DNA sample from the victim is ordered and the victim refuses to cooperate. In such cases, in accordance with the law, judges must initially respect the will of the victim and attempt to obtain necessary DNA samples through other means, for example, by searching their homes or seizing personal items, and the extraction of DNA samples from the victim's body must only be ordered against the victim's will when the level of certainty required is unobtainable *via* any other means.

kidnapping and identity substitution is possible without it, it is always pertinent, and that pertinence suffices for justifying its use.

Loyalty

The first line of argument supporting the right to refuse cooperation revolves around the possible right of the person whose identity has been substituted not to cooperate with the criminal prosecution of his or her adoptive parents. (I will refer to this as the "loyalty argument.") The regular, and simplest, way of phrasing this argument stems from the premise that the rules of criminal procedure law grant the sons and daughters of defendants the right not to be summoned as witnesses in criminal proceedings against their parents. It is sustained that these rules must be understood in a broad sense so that they are not limited to testimonies only and also include any form of cooperation in the process, especially, the provision of DNA samples. Not respecting this would involve arbitrary discrimination, as there are no means for justifying any differential treatment.

The broad interpretation of these rules, which regulates the production of testimonial evidence, is correct because it is equally correct to deem the logical conclusion that stems from it (and which justifies these rules) as true.

Valuable personal relationships (especially those with which we identify, such as our family relationships) require commitment and loyalty. Commitment and loyalty are essential to these relationships in that it is not possible to foster or protect such relationships without at the same time fostering or protecting that commitment or loyalty; and, conversely, undermining these commitments also implies undermining the relationships that are important to us.

When we say someone is loyal to someone else, we are saying that person is willing to preserve the relationship that merits his or her loyalty (for example, by avoiding or refusing options that could threaten said relationship), by preserving the wellbeing or foundation of that loyalty, even at the risk of his or her own wellbeing or interests, or by violating other general duties at its expense (for example, of treating everyone equally).[266]

Meanwhile, punishing a person involves subjecting them to some form of severe mistreatment. If the process is fair and the person is guilty, that person deserves the mistreatment, and imposing certain conditions is permissible and even dutiful. However, the fact that justice was deserved does not mean that the punishment and process through which it is imposed does not constitute a particularly brutal way of mistreating others. Therefore, cooperating with someone's criminal prosecution by facilitating their conviction or punishment involves contributing to this mistreatment.

[266] For this conception of loyalty I have based myself mainly on John Kleinig: “Loyalty”, in Edward N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy (Fall 2008 Edition)*, available at <http://plato.stanford.edu/archives/fall2008/entries/loyalty/>. Also, Simon Keller, in *The Limits of Loyalty* (Cambridge, Cambridge University Press, 2007), who holds a somewhat different view.

It seems to follow from the above that forcing someone to cooperate with the criminal prosecution of a person to which he or she is tied by a close family bond usually involves forcing that person to be disloyal and, therefore, to an action that can undermine the relationship that generated such duties of loyalty. The connection between intimate personal relationships (such as family relationships) and the duty of loyalty is that, if we have reasons to ensure and protect the former, we have reasons to ensure and protect the latter.

If we postulate, and I believe we should, that there are powerful reasons to protect and foster the development of personal relationships such as family relationships, these inferences would suggest that the rules of exception to the duty of testifying in criminal prosecutions based on close parental ties with the accused have a solid foundation and, in addition, that foundation extends beyond testimonies, covering every area of possible cooperation with the criminal prosecution. As a result, that foundation makes it possible to hold that there is a moral duty not to cooperate with the criminal prosecution of those to whom we are closest. There seems to be no reason to question the correctness of interpreting these judicial rules of the criminal process in a way that reflects this right.[267]

The loyalty argument that I have just reconstructed requires an important clarification. If loyalty constitutes grounds for refusing cooperation, we must determine what exactly constitutes cooperation. What I propose is that, inasmuch as it is founded on this right, the right to refuse cooperation is only applicable in claims that can somehow allot *responsibility* for the advancement of criminal prosecutions.

The thesis I am supporting in this section is the following: In a criminal prosecution for identity substitution, as we are here analyzing, obtaining DNA samples from the sons and daughters of the accused for the purpose of establishing their prior identity, does not affect their right to refuse to cooperate with the criminal prosecution of their parents if they bear no responsibility for the prosecution. In other words, in order for the extraction of a DNA sample to violate the right to refuse cooperation, it must in some way result from a cooperative action on behalf of the person entitled to this right; in addition, in order for there to be such cooperation, the person entitled to this right must have personally acted (not just as a physical medium) in the procedure by which the DNA sample is being obtained. This personal intervention is what constitutes his or her responsibility.

The notion of responsibility to which I am referring is the weaker notion; that is, responsibility as a personal attribute. In that sense, a person bears some responsibility for an event if, and only if, that person is even minimally involved in the production or maintenance of that event. More specifically, a person is responsible for a given event (for example, a specific action) provided that event is an expression of the deliberative

[267] As reconstructed here, this argument ensures the constitutionality of the right at hand either by way of bypassing the protection against arbitrary discrimination (particularly against unfounded differential treatment before the law) or of constitutionally protecting state interference in the subject's intimacy, such as that of private personal relationships. See, for example, paragraphs 26, 27, 28 and, especially, 30 from the opinions of Judges Petracchi, Moliné O'Connor, and Fayt in the "*Vázquez Ferrá*" case.

abilities that characterize us as people. Even more to the point, a person is responsible for an event if the event, or any of its essential characteristics, expose what constitutes a justification for that person and what relative weight it bears for that person.

Responsibility, in this sense, means being the adequate object of the moral reaction of someone else.[268] Moral reaction means any attitude that possess an evaluative moral component aimed at someone else who is, thus, the *object* of this reaction, and to whom the reaction is reserved, such as gratitude, recognition, admiration, resentment, reproach, condemnation, etc. If an event is not attributable to one person, i.e., if the event is not a reflection of him or her as a person or an expression of the characteristics of his or her personal identity, then there is no point in taking that event as a moral reaction aimed at that person. In other words, if we see someone take an event that is not attributable to a person as the foundation of a moral reaction against him or her, we would either think the first person had made a mistake (by thinking that something is attributable to someone when in actuality it is not) or we would be confused by the first person's actions.[269]

This relationship between the possibility of attributing an event to a person and susceptibility to the moral reactions aimed at that person in light of said event is the foundation of my thesis on the right to refuse cooperation with the criminal prosecution of a person that is bound to another by a significant personal relationship.

According to the loyalty argument, the right to refuse cooperation is mainly based on: 1) the acknowledgment that at least some close personal relationships are valuable (such as personal relationships that generate the commitment to loyalty), and 2) the idea that this value provides a reason to protect and foster the development of these relationships. Thus, the right to refuse cooperation implies that if we have a reason to protect a close personal relationship and a certain event could threaten that relationship, then we also have a reason to prevent that event; mainly, we have a reason to demand that someone refrain from producing that event or, conversely, that they produce it.

A personal relationship can be threatened in many ways and the aspiration of a right to refuse cooperation seems to require some distinction. A personal relationship can be exogenously threatened through obstacles that impede or hinder contact between

[268] This conception of responsibility as susceptibility to the reactive moral attitudes of others was developed by Peter Strawson: "Freedom and Resentment," in G. Watson (Ed.), *Free Will,* Oxford, Oxford University Press, 1982, pg. 59. See also John Martin Fischer, "Recent Work on Moral Responsibility," *Ethics* 110, 1999, pg. 93-139. On personal attribution as a foundation for responsibility per Strawson, see Marcelo Ferrante, "Recasting the Problem of Resultant Luck," *Legal Theory* 15, 2009, pg. 267, 272-278.

[269] Let's imagine, for instance, that someone falls ill through no fault of their own and someone else reproaches them for it. In such a case, we could likely wonder if the person doing the reproaching is erring in his or her judgment (perhaps the person thinks the illness resulted from something the ill person should have refrained from doing or something that inevitably results in illness). In that case, we would understand that person's reproach, even though we would still believe he or she is wrong. However, if we know the first person's judgment as to the sick person's responsibility were not erred, then said reproach would be unintelligible to us, as it would constitute a reproach against something (falling ill) that simply does not fit or match this sort of reaction.

members of said relationship (in extreme cases, this may involve the death of one them). At the same time, the relationship can be *endogenously* affected not by the lack of obstacles, but by the characteristics of the reciprocal attitudes and behaviors of the individuals in the relationship (typically by the adoption of certain attitudes and behaviors that are contrary to the commitment of loyalty that characterizes the relationship).

The right of members in a personal relationship, such as a parental relationship, not to be obligated to cooperate with the criminal prosecution of other members of the relationship bears a different weight or importance between one and the other and, therefore, affects that relationship. More specifically, this right implies that there is something distinctively more serious when endogenously affecting a relationship (especially, by obligating members of that relationship to engage in disloyal behaviors) that consist of affecting it exogenously through the imposition of obstacles. In fact, the right to refuse cooperation implies that the punitive aspirations of the State are not valuable enough to justify affecting this personal relationship by forcing cooperation. However, that same punitive aspiration of the State is valuable enough to justify seriously affecting the same types of personal relationships when they derive, for example, from the obstacles that are created through the imposition of criminal punishment, by preventing that these sons and daughters live with their parents when punishment consists of some form of imprisonment or confinement. In other words, the value of the parental relationship that would justify a strong right not to cooperate with the criminal prosecution of parents if said cooperation would negatively affect this relationship in no way grants the State the right not to (deservedly) punish parents when this may equally affect the relationship.

If this contrast is to be sustained (as it seems unlikely that someone would object to the State hindering, through the imposition of a punishment, a parental relationship for the purpose of imparting rightful punishment, provided members of the relationship are not forced to cooperate with the criminal prosecution of other members when necessary), then it follows that the asymmetry between the exogenous and endogenous forms of affecting a personal relationship must be sustained.

Fortunately, there is no need to defend this asymmetry here.[270] Identifying the conditions under which the right is endogenously affected suffices, particularly, in terms

[270] This is so, for the following reasons: What is in question is the existence and reach of a strong right to refuse cooperation, that is added to the weaker right for our close personal relationships (such as closest family) not to be hindered or impeded by others. There is no doubt as to the existence of this weaker right, or (as is the case with other rights related to certain aspects of private life) as to whether this hinders the legitimate criminal prosecution aimed at imparting punishment for the commission of significant crimes, because in that case, the right yields as necessary before the aspiration to impart punishment. As I have sustained in this paper, the only reasonable justification for the existence of a stronger right not to cooperate added to the weaker right to the protection of valuable family relationships is their difference in terms of the importance of endogenously or exogenously affecting that relationship. Furthermore, if we are to believe that this difference does not hold some moral significance, then it could not be sustained that there is a different (stronger) right to refuse cooperation in addition to a weaker right to the protection of valuable personal relationships. What I wish to establish here is that there exists a stronger right to refuse cooperation and, therefore, the difference on which it must be based is morally significant. Thus, my goal is not to defend the

of the conditions that constitute a disloyal behavior on behalf of members of that significant personal relationship that could pose a threat to it.

In general, a strong personal relationship with someone *implies* being bound to that person through a network of reciprocal arrangements to behave a certain way, i.e., to do certain things and refrain from doing others, to feel certain things and refrain from feeling others, to consider the interests of others, and the sustainability of the relationship through time, among others. It is difficult to generalize what those behaviors, feelings, considerations, etc. may be. However, one thing is certain: When an action unambiguously means mistreating the other person, favoring that action definitively constitutes a behavior that is contrary to the arrangements involved in one's relationship to that person. If members of a relationship were willing to engage in these sorts of behaviors, the relationship would grow weaker and weaker. In other words, if the existence of a strong personal relationship between two people is to be measured, as I am proposing, in terms of their reciprocal behaviors, if one of them should engage in a behavior that threatens this relationship or a behavior that is simply disloyal, this would involve limiting, weakening, or narrowing that relationship. Therefore, the more disloyal the behavior, the weaker the relationship. On the other hand, when there is no arrangement that could compromise loyalty between two people, it cannot be said that there is a strong personal relationship between them.

Disloyal behavior in an existing relationship not only threatens that relationship, but can have an even stronger impact. In fact, when relationships are reciprocal, any behavior that threatens the bond with one member gives the other member reason to adopt a negative moral reaction (such as reproach or resentment) that is, in itself, contrary to that bond. The dynamics of personal relationships can, therefore, enhance the debilitating nature of the disloyal behavior.

The behavior of one member of a strong personal relationship can be disloyal or threaten the bond partly in light of the potential to unleash consequences that independently count as exogenous obstacles. Normally –except cases of euthanasia and other similar scenarios)– attempting against the life of another member of a strong personal relationship counts as a behavior that opposes the commitments that are characteristic of a relationship that generates loyalty. Note, however, that the act of causing someone's death does not suffice for deeming that action contrary to the relationship. Let us suppose, for example, that *A*, receives a transplanted organ from his father, *B*, but the organ transplanted from *B* triggers an adverse reaction in *A*'s body that results in his death. Despite *A*'s death, *B*'s actions do not necessary threaten their relationship in the terms analyzed above. This action would surely not threaten the relationship if others had forced *B* to donate said organ against his will. It wouldn't be so because, under those conditions, there would be no evidence of a limitation or restriction to their relationship, nor would there be reasons for other members of the relationship (such as *A*, if he had survived) to adopt negative moral reactions toward *B*'s actions. In other words, in order for an action to threaten the relationship it must

existence of this right, but to understand to some level of certainty what the existence of this right entails and why. Whoever wishes to defend the existence of this right should also defend the idea that the difference between endogenously and exogenously affecting a personal relationship is significant enough so as to justify the distinction between these kinds of rights.

consist of attitudes and actions that are contrary to that relationship. If an action or event related to a member of the relationship has a negative effect over that relationship but is not an expression of attitudes and actions that are contrary to that relationship, then this action or event does not suffice for questioning said relationship. In that regard, an endogenous weakening factor is not constituted, even if it is somehow associated with an exogenous factor that could hinder or destroy the relationship (such as *B*'s action, casually being associated to *A*'s death).

These observations regarding the morality of strong personal relationships enable certain conclusions regarding the rights at stake in cases where DNA samples are extracted from these sons and daughters for identity tests that favor the criminal prosecution of their adoptive parents.

Criminal prosecutions in general and criminal prosecutions for child abduction and identity substitution in particular may, exogenously, affect the parental relationship between the accused and their children. Since this relationship is valuable, criminal prosecution must advance with caution. For example, if the identity test can attempt against the parental relationship between these sons and daughters and the accused, then perhaps such tests should be subject to strict scrutiny, similar to that applicable to house searches, which involve a reasonable judicial evaluation of the pertinence of the measure and probability of complying with the evidentiary aspirations of the party proposing the measure.

If such conditions are met, identity tests are justified despite their possible contribution to weakening the existing parental relationship. However, even under those circumstances where obtaining DNA samples for identity tests is justified, these sons and daughters still have the right to refuse to the cooperate with the criminal prosecution of their parents. In other words, permission to exogenously affect the existing personal relationship that derives from the goal of imparting punishment does not extend to that which would endogenously affect the relationship. Criminal prosecutors could request that these sons and daughters cooperate by providing DNA samples for identity tests.[271] However, if these sons and daughters exercised their right and refused to cooperate, as they probably would if they were genuinely bound to the accused by way of a solid personal relationship, demanding their cooperation would be impermissible. In this context, for these sons and daughters, “cooperating” would involve doing things that would give other members of the relationship reason to adopt certain moral reactions that are inconsistent with a relationship of such nature. For that condition to be met the son or daughter must bear responsibility, i.e., liability must be attributable to him or her; otherwise, it would not serve as a foundation for a moral reaction.

[271] Note that in the case of testimonial evidence, some procedural laws go as far as to prohibit this request by banning the possibility for these sons and daughters to be summoned to testify. This broader prohibition, which includes requesting cooperation with the consent of these sons and daughters, is founded on pragmatic considerations (e.g., the observation that a stricter rule permitting said request would give way to too many cases of forced testimonies masked as mere requests). It could easily be said that these considerations are applicable to cases of non-testimonial evidence, such DNA samples. Nothing in this paper denies this possibility.

Delimiting that for which we bear responsibility and that for which we do not is a difficult task that, fortunately, we need not consider here.[272] Given my goal in this paper, it would suffice to sustain the ambitionless thesis that we are not responsible for the fact that our genetic configuration or samples from our bodies (i.e. a drop of blood, mucous, skin, or hair) can be used to determine our genetic coding. Finally, and this thesis is also difficult to refute, we are not responsible for that from which we suffer, for that which others do to us, that is, for actions or events from which we are mere victims or objects.

This observation regarding that for which we are surely not responsible (i.e. our genetic coding and the things others do to us without our active intervention) coupled with the right to refuse cooperation leads to the conclusion that obtaining DNA samples from these sons and daughters for contributing to the criminal prosecution of their parents should not interfere with their right to refuse cooperation. In fact, if the prosecutor obtains DNA samples with no active participation from these sons and daughters, for example, by way of temporarily holding them and resorting to a finger pricking test, or by searching their homes and seizing personal effects that could contain physical traces) and said samples constitute unequivocal evidence, there would be no possible reason for an endogenous weakening of the parental relationship between the accused and their sons and daughters, since the only connection between the latter and the punishment of their parents for their appropriation and identity substitution is a physical one, i.e., traces from their bodies, obtained and incorporated through the actions of others and later used by the courts to convict the parents. There is no acceptable reason to sustain that this purely physical connection could constitute disloyalty or actions and behaviors that conflict with the parental relationship.

If my reasoning so far is correct, then it is possible to carry out the compulsory extraction of DNA samples from these sons and daughters for identity tests in cases of criminal prosecution for child appropriation and identity substitution during the last dictatorship, under the umbrella of the regime.

My argument does not deny the possibility that identity tests can interfere with a broader and weaker right to the protection of personal relationships from attacks that could in any way threaten such relationship. However, this interference could be justified, if necessary, for satisfying the goal of imposing a legitimate punishment.

Next, I will analyze the second type of argument used to defend the right to refuse cooperation by those who sustain that identity tests are not pertinent in the criminal process at stake in these cases.

Pertinence

The type of argument that emphasizes the impertinence of identity tests (to which I will refer as the "pertinence argument") results from the conjunction of two ideas. The first

[272] Ref., for example, Joseph Raz, “When We Are Ourselves,” *Engaging Reason: On the Theory of Value and Action*, Oxford, Oxford University Press, 1999, pg. 5-21.

idea sustains that the adoption of an evidentiary measure of this sort in a criminal process is only justified when attempting to verify or deny the accusation. The second idea sustains that in order to assure a conviction for an attempt against someone's identity under Argentine criminal law, particularly for a conviction for the crimes stipulated in articles 138 and 139 bis of the Criminal Code, the prosecutor must prove that the accused gave the child a new identity. In accordance with this observation, the child's original identity does not necessarily have to be determined if it can independently be shown that the accused gave him or her an identity that was not his or her own. For example, if the prosecution showed that the accused simulated childbirth and registered a child that was not biologically theirs as their own, there would be enough grounds for conviction for crimes against identity. The identity test for determining the child's previous identity would be unnecessary and, in accordance with the first argument related to pertinence, it would also be unjustified. Similarly, the identity test would not be justified if the prosecution proved that the accused pretended to have received the child voluntarily from his or her family and obtained, through this deceit, an otherwise legal adoption, when in actuality the child had no bond to the adoptive family and had been abducted from someone who gave birth to him or her at a clandestine detention center. Information regarding the identity of the biological mother would not be necessary before other proof that the child was abducted from a clandestine detention center.[273]

I would like to mention two possible responses to the pertinence argument, although I will not analyze them in depth here. The first response stresses the contingent nature of the argument. The situation may develop in such a way that, in a particular process, the most convenient way, or even the only way, of proving identity substitution is by proving the child's prior identity. In that case, this test would be justified in accordance with the pertinence argument. The strength of the pertinence argument, therefore, depends on the frequency with which identity substitution cases arise where the optimal way of proving the accusation does not involve proving the child's original identity.

The second response is that although identity tests could be unnecessary in regards to the goal of imparting punishment, there are other goals that are valuable enough to justify interfering with the right to refuse cooperation. A prominent example of this is the state's duty to satisfy the right to truth.[274]

However, I do not wish to elaborate on these responses here. On the contrary, I intent to defend the thesis that the pertinence argument is erroneous, as identity tests proving

[273] The pertinence argument was used by Judge Boggiano in the "*Vázquez Ferrá*" case, where in paragraphs 13 and 14, he held that: "Whether or not the above is the granddaughter of the complainant adds no relevant data to the investigation, since the evidence shown thus far proves that she is not the daughter of the accused and this suffices for the criminal offense under consideration [...] [therefore] blood samples in no way affect the possibility of proving the crime that is hereby being prosecuted, which has been established regardless of Evelin Karina Vázquez Ferrá's filiations." The same was sustained in paragraph 11 of the vote of Judges Belluscio and López in the "*Vázquez Ferrá*" case.

[274] See, for example, the votes of Judge Maqueda in the "*Vázquez Ferrá*" case and "*Prieto*" case and the vote of Judge Highton de Nolasco in the "*Prieto*" case.

the child's identity prior to its substitution are *always* pertinent. Denying this, in my opinion, implies committing to unnecessary formalism.

As I've said, the pertinence argument is founded in that characteristic of the criminalization rules These rules define general rules of conduct that typically identify the conditions that would render any particular action a violation of a right of this sort. For example, the rule that criminalizes homicide defines this conduct as the act of killing another person. Any particular action that satisfies a general definition such as this shall also have other distinct characteristics in light of which the action will match the definition. Therefore, any particular action that meets the definition of homicide (i.e., killing another person) will have many other characteristics in addition to those that specifically relate to killing another person, for example, it could have happened on a cloudy Sunday, the perpetrator's hand could have shaken when he pulled the trigger, the victim could have died instantly or left no children, etc. All of these characteristics, however, are irrelevant if the only thing that matters is determining whether the action constitutes homicide. Variations in these other characteristics would in no way alter this conclusion.

The pertinence argument, as I said, is grounded on that characteristic of the rules of criminalization, and as that characteristic is not exclusive of the rules that criminalize attempts against identity under Argentine criminal law, the argument exceeds cases of identity substitution and is, in fact, very general. Imagine, for example, the context of a prosecution for murder. Let us suppose there is doubt as to the victim's identity: We are certain the accused killed someone, but we are not sure if that person was *A* or if, instead, it was *B*. Because homicide consists of killing another person, regardless of who that person is (i.e. the action does not cease to be homicide depending on the victim's identity) and supposing the prosecution has proved that the accused killed someone, any tests aimed at identifying who that person killed would be impertinent and, therefore, according to the pertinence argument, this test would not be justified.

The pertinence argument is incorrect in the case of homicide for the same reason that it is in the case of identity substitution, that is, when the crime for which a criminal prosecution is in place consists of the violation of an individual right, the identification of the person entitled to the violated right is always pertinent.

Therefore, my response to the pertinence argument is two-fold. The first part ensures an analogy between the value of the identity test in the sample homicides of *A* or *B* above, on the one hand, and in cases of abduction and substitution of children during the military dictatorship, on the other. The second part defends the broader thesis that identifying the person who was entitled to the right that was violated always constitutes relevant information in the process through which punishment is being imparted for violating that right.

The first part of my answer constitutes an interpretation of the rules that criminalize attacks against personally identity, as contemplated in articles 138 and 139 bis of the Argentine Criminal Code. The interpretation I am proposing is the following: What the law is criminalizing with these kinds of rules is mainly the behavior of someone who breaks an existing family relationship or impedes the establishment of another one.

Family relationships unite or bond people (i.e. parental relationships unite parents with their children, fraternal relationships unite brothers and sisters, marital relationships unite spouses, etc.) and are uniquely valuable in a way that is very difficult to explain but simple to understand. Meanwhile, that unique value clearly involves every member of the family relationship, i.e. every person involved in the family relationship. Whoever breaks a family relationship, as does he or she who attempts against another person's identity, destroys or hinders the value of that family relationship, thus affecting every person that would have been bound by that relationship. That is why I believe that the sons or daughters in identity substitution cases are no more or less victims of the crime that is being prosecuted than any other member of his or her legitimate family. Therefore, I conclude that any test aimed at identifying the biological family of the person who's identity has been substituted is equal to any test aimed at determining whether the person that was murdered was *A* or *B*.

Those who adhere to the pertinence argument could insist that identifying victims of identity substitution (i.e., identifying members of the family relationship that was impeded by the identity substitution) is impertinent, as would be the identification of the victim in the homicide example above. Mainly, if the disjuncture "*A* or *B*" ensures that the conditions for conviction have been met under applicable law (i.e., the law criminalizing homicide as the killing of another person), then the production of proof of the identity of the victim will be impertinent, and, therefore, there would be no reason to justify any form of cost of gathering evidence). The second part of my response to the pertinence argument shows why this position is unduly formalistic.

The importance of identifying the victim lies in the justification of the criminal conviction. By criminally convicting the person responsible for violating the rights of another person, we are reaffirming that rights have been violated. Identifying the victims of the crimes for which we are convicting someone is part of the task of identifying the right that we are reaffirming through our conviction and, therefore, also part of the task of ensuring that the conditions that justify the criminal conviction have been met in this case. Of course, one could conceive of criminal law differently; particularly, in a way in which the idea of violating individual rights does not play a central role in the justification of punishment. But, by not conceiving of criminal law as a mechanism for reaffirming rights, we lose sight of something that is very important. In this paper, I can merely offer a schematic view of a conception of criminal law in which the reaffirmation of rights plays a key role.

Convicting or justifying a person requires justification. Wherein lays such justification? An affirmative response to this question highlights the existence of moral reasons for imparting what we call "punishment."[275]

In this sense, the act of punishing involves an expressive action, that is, an action that is, in part, characterized by the vehicle through which an attitude is expressed. The attitude that characterizes punishment combines reprimand and negative emotions that

[275] A recent conceptual analysis of what constitutes justifying punishment can be found in Mitchell N. Berman, "Punishment and Justification," *Ethics* 118, 2008, pg. 258-290. ["Castigo y justificación," *Revista Argentina de Teoría Jurídica* 8.2, 2008, available at <http://www.utdt.edu/ver_contenido.php?id_contenido=2455&id_item_menu=4082>.]

we usually identify as reproach or condemnation. Therefore, punishment is not just any form of mistreatment imposed by a legal authority in light of a legal violation or any similar mechanism aimed at preventing the crime. Punishment is, among other things, an essentially social practice for the expression of reproach or condemnation.[276] Justifying punishment, therefore, involves partly justifying that expression of condemnation.

However, what can justify the expression of condemnation? Any convincing answer parts from the basic notion of "duty." The belief that someone has the duty to do something is usually closely related to the commitment to condemn that person for not doing something they should have done, and by "condemn" I mean generate and adequately express the complex attitude of moral condemnation. Genuinely saying that S has the duty to do α implies committing to condemning S if he or she fails to do α. This basic idea enables an answer to the question of the expression of condemnation. The answer is this: If we have reasons to impose and recognize duties, then we have reasons to express condemnation for the violation of those duties that we have imposed and recognized. It is impossible to recognize duties without committing to expressing condemnation for their violation.[277]

This step enables easily reducing the issue of justification of punishment to the even simpler question regarding the reasons for imparting punishment. The latter is relatively simply because: 1) it is difficult to deny that we have rights that must be legally recognized, and 2) there is a correlation between the recognition of these rights and duties. The former needs no defense. Whoever is willing to deny it must bear the burden of proof. The latter is equally robust. In the main example regarding the notion of right, rights correlate with duties so that when we say that A is entitled to B doing α, we are (partly) saying that B has the duty to do α.[278]

The conclusion I have just schematically reconstructed for this argument is the following: Punishment is justified if, and only if, when imparting it we are expressing condemnation for the violation of a correlative duty toward, and on the basis of, a right of another person. The reason this right must be recognized constitutes, at the same time, the reason for condemning violations, and punishment is the way through which we express that condemnation. Punishment is justified when, in imparting it, we reaffirm that the person being punished has violated a genuine right.

A conception of punishment such as the one I have just reconstructed assigns a central role to the violation of a right. Justified punishment involves reaffirming a right that has been violated. According to this conception, information regarding which punishment-reaffirming right we are trying to impose is always pertinent. In fact, it reveals the precise conditions in light of which the impartation of punishment is appropriate. A

[276] The seminal analytical work on this issue is that by Joel Feinberg, "The Expressive Function of Punishment," *Doing and Deserving. Essays in the Theory of Responsibility*, Princeton, Princeton University Press, 1970, pg. 95-118.
[277] The person who most clearly understood this notion of duty and justification of punishment was Igor Primoratz, "Punishment as Language," *Philosophy* 64, 1989, pg. 187-205.
[278] See, for example, Joel Feinberg, "In Defense of Moral Rights: Their Bare Existence," *Freedom & Fulfillment,* Princeton, Princeton University Press, 1992, pg. 197, 203-205.

natural conclusion of this conception is that the criminal process must be open to the production of evidence that reveals what right has been violated, which naturally includes the identity of the person who's right is supposed to be vindicated through the imparted punishment.

Therefore, my opinion is that the pertinence argument is incorrect, as it ignores these substantive conditions, of which the justification of criminal condemnation depends. In contrast, those who adhere to this argument determine the reach of pertinent proof by appealing exclusively to the criminal law that defines the criminalized conduct (for example, the law that defines homicide or identity substitution), as if it were constitutive of the conditions that legitimize criminal condemnation. In that sense, the pertinence argument is unduly or overly formalistic.

In the main cases of criminal law, the substantive conditions on which the condemnation of a person depends are not created by criminal law, that is, a person is legitimately condemnable if he or she is, indeed, guilty of violating a genuine right of another person.[279] Subjection to criminal law (a criminal law that foregoes the events under prosecution, created by a republican legislative body, and strictly interpreted by the courts) serves the distinct values of reaffirming rights that justify criminal condemnation, i.e., those that reject arbitrariness in the exercise of state coercion.[280] What is inappropriate about the formalism behind the pertinence argument is that it attributes to the legal tool for limiting state arbitrariness (i.e., criminal law) a normative role in the justification of a criminal condemnation that cannot be fulfilled.

My argument has stressed the identification of the person entitled to the right that is being violated through the conduct being prosecuted. However, the same can be said about many characteristics of the criminal conducts judged, which are accepted as pertinent and yet exceed the elements of the legal definition of the type of crime involved. Thus, judicial decisions condemning homicide usually take into account, among many other characteristics, the way in which the accused killed the victim, for instance, if it was done in an especially aggressive or sly way, causing pain, etc., as well as the characteristics of the victim, for example, if the victim had many years ahead, if the victim was in his or her twilight years, if he or she had dependants, among others. These characteristics have no incidence on the conclusion as to whether the action being condemned was a homicide or not, as legally defined. The brutal or subtle nature of a homicidal mechanism, the youth or old age of the victim, etc. in no way affect the actual "killing of another." However, information regarding these characteristics can be pertinent to the discussion about condemnation and, therefore, the production of evidence can be justified for the criminal prosecution at hand, provided the information contributes to proper condemnation. Whether or not it does will depend on the appropriate theory regarding that on which the properness of the condemnation depends.

[279] Aside from these key cases of criminalization, the justification of criminalization is challenging. See, for example, Douglas Husak, *Overcriminalization. The Limits of the Criminal Law*, Oxford, Oxford University Press, 2009, pg. 103-119.

[280] Regarding the legality principle in Argentine criminal law, see, “Argentina”, in Kevin Jon Heller and Markus D. Dubber (Ed.), *The Handbook of Comparative Criminal Law*, Stanford, Stanford University Press, 2010, pg. 12-48, 16-18.

The above argument shows why information regarding the identity of someone who is entitled to a right that was violated by the criminal action being judged, i.e., the action at hand in the discussion surrounding identity tests, is a key aspect of the information that is deemed relevant for a legitimate criminal prosecution.

Conclusion

Before finishing, I would like to highlight a limitation of the arguments I have here defended. My arguments approach the potential clash between the value in imparting punishment for the serious crimes analyzed in this paper and the value of the personal relationships between the accused and their sons and daughters for the commission of these crimes. If my arguments are correct, then obtaining DNA samples through no responsibility of the sons and daughters in this process should not interfere with the right of these sons and daughters to refuse to cooperate with the criminal prosecution, that is, the measure, should in no way affect the interests that motivate the right to refuse cooperation. At the same time, if we admit that the interest in reaffirming, through the application of punishment, the right violated by the child abduction and identity substitution would justify affecting the right to the protection of the parental relationship that binds the son or daughter (victim) with his or her adoptive parents (accused), then it is not possible to object to obtaining DNA samples by holding that identity tests are impertinent in these cases, as this allegation, in my opinion, constitutes unnecessary formalism.

These arguments simply postulate the conflict between these two values, i.e., on the one hand, the application of punishment and on the other, the parental relationship, to the extent that they could conflict in terms of obtaining DNA samples for identity testing in the criminal processes here analyzed; particularly in terms of arguments aimed at resolving this tension, which imply nothing about the way in which the information obtained through the identity test is to be used. For example, in the "*Prieto*" case, judges Lorenzetti and Zaffaroni especially highlighted that the use of information obtained through identity tests must show sensitivity toward considerations regarding "the emotional and legal consequences of the establishment of a new formal or legal identity."[281] In cases in which sons or daughters claim their right to refuse cooperation with the criminal prosecution of their adoptive parents and reject establishing a relationship with their original families, these considerations could demand a strictly restricted use of the information obtained through the identity test, ensuring, for example, that the information be subjected to members of the original family only, who's rights could then be vindicated, provided punishment alone fails to accomplish such vindication, without restricting the son or daughter's interest in not altering his or her current identity.[282] There is nothing in my arguments denying the value of such considerations.

[281] CSJN, "*Prieto*", *supra* no. 7, para. 19.

[282] In their vote in the "*Prieto*" case, Judges Lorenzetti and Zaffaroni take this a step further and sustain that, in these cases, identity tests must be totally excluded from the criminal process. I think considerations of the emotional cost of establishing a new identity are insufficient for taking the argument so far. But this issue can be put aside.

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