THE APPLICATION OF THE CRIME AGAINST HUMANITY CATEGORY IN SIMON RULING FROM ARGENTINEAN SUPREME COURT (2005)

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Sommaire

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"An order of law thought as supreme and general, not thought as a tool in the complex fight for power, but as an instrument against the general fight…would be a hostile principle in life, a destructive and dispersing order of man, an offense to man's future, sign of a tired and tortuous way to nothing"

Nietzche, Friedich. 1996. Genealogía de la moral, Madrid: Alianza Editorial.

"The first way of foundational juridical time is memory. Memory remembers that we have what is given and what is established. Events that were important, that still are and could give meaning to the collective existence and individual destiny (…) That's the interest of the question we study (…) to unify memory and questioning: the necessary juridical security and the no least important faculty to revise the past to inscribe the premises of a law or justice which were lost"

Ost, François. 1999. Le temps du droit, Paris: Odile Jacob.

Introduction

In Argentina, International Human Rights Law (IHRL) implementation in local tribunals and its impact cannot be separated from recent history, which has been tainted with massive crimes committed during the dictatorship period 1976-1983. In 1987, the Supreme Court had voted valid the "Due Obedience Law" also called "Impunity Law" under a rationale of weak democracy threatened by opposing interests, making Human Rights principles application impossible. In 2005, the so-called Impunity Law was declared invalid regarding IHRL by a new Supreme Court ruling. In the 2005 decision, International Law principles prevailed on National Law allowing effective justice. And this change highlights the role of civil society. Since claims for justice kept arising from large sectors in the Argentinean society, the role of civil society is essential to understand the transformation and increase of IHRL's normative value in Argentinean Higher Courts. In fact, the Argentine Human Rights Movement has produced an unexpected impact on State and society through the transformation of norms, practices and institutions.

International civil society action is closely linked to South America democratization processes, in particular in the Human Rights area.[2] Both the nature of the Human Rights agenda and the movement's use of symbolic politics have shaped the transition to democracy. In the local level, Human Right's NGOs imagine new and original (in Argentinean context) legal claim strategies (participation in trials through *amicus curiae*, permanent crime idea to overpass prescription rules, searching for gaps in the so-called impunity laws', etc.) and ask for deeper independence from the political power of juridical structure. On the international level, they have worked with supranational institutions in the emergence of norms that resulted in the enlargement of categories of crimes and strengthened the normative force of IHRL. The fight against impunity has hit the public agenda only recently- as from 2003 on- and it is translated into today's increasing role of juridical and ethical expertise in the implementation of public policies nowadays. As a matter of fact, new strategy's influence largely depends on the openness of bureaucrat administration, on values and political will of the government.

In my thesis[3], I analyze the strategy[4] and civil society notions, considering its effectiveness in the resolution of the different dimensions of our research question through different conceptual frames (Foucault, Bourdieu, De Certeau, Latour, Dezalay and Garth, Keck and Sikkink). My aim is trying to link civil society's strategies with legal argumentation in the 2005 ruling. Legal change can be analyzed in terms of the actor, which is the source of change, the mechanism by which change is effected, and the context that provides an opportunity for change. As Verón states, everything indicates that there are levels of political processes that can only be reached through discourse analysis.[5] And the possibility of "meaning" lies on the hypothesis that the productive system leaves prints on discourses, and meaning can be reconstructed by manipulating those prints. Thus, analyzing judges' argumentation[6] in their rationale presented in the 2005 decision we can trace back the origin of the arguments and notions. In this presentation we are going to focus on some argumentative strategies presented by the judges in the fact's

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[2] Yves Dezalay and Brian G Garth , *La Mondialisation des guerres de palais*, Paris, Seuil, 2002.

[3] Guthmann Yanina "La decisión judicial y lo político. Discurso jurídico, legitimidad y derechos humanos. El *Caso Simón*". Defended in april 2012.

[4] 'Strategy' in its dependence from politics shows a rationality compelled by community. To be strategic is to give reasons, and by reasoning, the subject find community and takes rationality from it.

[5] Eliseo Verón, "La palabra adversativa', in Verón E et al., *El discurso político-Lenguajes y acontecimientos*, Edicial, 1987.

[6] Discourse, according to Foucault 'is the thing for which and by which there is struggle, discourse is the power to be seized'. Broadly speaking, discourses are the 'authorized social languages that tell us how we can speak about particular topics'. Discourse involves identification, acquisition and the deployment of knowledge constitutive of subjects and the relations they enter into. Michel Foucault, *El orden del discurso,* Buenos Aires*,* Tusquets Editores, 1992.

description in the 2005 ruling. These strategies lead to overpass the juridical obstacle: the fact that crimes against humanity were not codified in the national law when they occurred (and still are not). We are going to leave other parts of the rationale and further analysis of other aspects of these same strategies for future research in my thesis.

I. Some preliminaries

1.1. The *Simon case*

Almost twenty years after the end of the dictatorship periods, the case against Julio Simón, also known as "El Turco Julián", brings crimes against humanity punishment to the public agenda. In October 2000, the CELS (Legal and Social Study Center, a Human Rights NGO) uphold the non-constitutionality of the so-called impunity legislation mentioned above. José Poblete and Gertrudis Hlaczik were kidnapped and killed in Buenos Aires, on 28th November 1978, together with their eight -year-old daughter, Claudia Poblete, by an army group. Julio Simón was part of it. After being kidnapped a long time, Claudia Poblete was given to a police lieutenant colonel and his wife, who inscribed her in the registry office as their biological daughter. She had lived more than twenty years under this fake identity until her family found her and started a lawsuit to give her real identity back. The appropriators of Claudia were condemned in 2000 for baby appropriation crime and identity substitution. The Amnesty Laws protected Claudia's parents' killers. This paradox led to the "Obedience Due" and "Final Point" (Also known as Full Stop) legislation annulment by a federal judge, Cavallo. The Supreme Court ratified this decision in 2005.

1.2. The object of study: ruling fragment chosen for analysis.

We will take as object of this study the fact's description in the Argentinean Supreme Court "Simon" ruling (2005) (§4). We will focus on the president of the Supreme Court rationale. This

rationale is the one signed by all the judges[7]. In a first section (§1 al §5), the ruling narrates the facts that appeared in the judicial file and the treatment that this file received in the judicial system. In fact this file reached the last instance: the Supreme Court. Through these paragraphs, the crime facts are constructed[8].

Julio Simón,

> *"As a member dependent on the Argentinean federal police and a member of a "work group" depending of the first body of the army, as part of the clandestine system of repression (1976-1983), he kidnapped José Liborio Poblete, with other public officials of security forces heavily armed (…) kidnapped his wife, Gertudris Marta Hlaczik (who was with their little girl, Claudia Victoria) (…). Poblete and Hlaczik were adherents to the political group "Christians for the Liberation". The kidnapping was done with the objective to take the victims to the clandestine center named "The Olimpo" (…) knowing that they were going to be submitted to torture, lampoons and, then, (…), they would probably be physically eliminated (killed) in hands of members of security forces who were part of the clandestine system of repression (…) Already in the Center "El Olimpo" José Poblete and Gertrudis Hlaczik were tortured by Julio Héctor Simón, and others. They were asked about other members of the political group of which they were members.*
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> *Among the torture methods used we could find "la picana electrica" (electric methods) and the application of hitting with heavy elements as sticks or pieces of strong rubber. Besides, Julio Simón, with other members of security forces, kept Gertrudis Hlaczik and José Poblete depredated of liberty without giving intervention to the judicial authority. During the time they were arrested in the "Olimpo' Hlaczik y Poblete were submitted to torments and bad treatments. For example, (…) Gertrudis Hlaczik was pulled along by her hair, naked. José Poblete, who was told "cortito" (short man) was lifted and then released from high above knowing that his absence of inferior limbs couldn't impede hitting the floor (…) Everything was done by the work group in which Simon participated, (…) He gave orders, looked after the arrested and stayed in the center in a permanent way. This situation was stable until January 1979 when Poblete and Hlaczik were take out of "Olimpo" center and we can presume physically eliminated by people not identified (…) These facts were qualified as crimes against humanity consisting on illegal deprivation of*

[7] This decision is composed by eight votes. Even if the majority of the judges declared the annulment of the legislation (with the exception of Fayt who voted in dissidence and Belluscio who abstained himself from voting), not every one has used the same rationale. Each minister has written his own vote.

[8] And the hierarchical structure of the judicial power in Argentina implies that 'this is not just the 'last juridical word' but also the political one. Inside the country, no one can go beyond the Court. Roberto Gargarella, "Piedras de papel" y silencio: La crisis política argentina leída desde su sistema institucional" en http://www.ciepp.org.ar/discusion/cels.doc. 2002, p. 5.

liberty, twice grave, because of violence and threat and because this lasted more than a month, repeated in two opportunities, (...) with torture and committed with politic reasons (art. 118 of the National Constitution [and other articles from the Penal Code]".

1.3. "Strategy" definition (in Discourse Analysis Theory)

As it was mentioned before, legal change can be analyzed in terms of the actor who is the source of change, the mechanism by which change is effected and the context that provides an opportunity for change.

In Discourse analysis theory: Strategies are 1) made by a subject (individual or collective) led to choose (consciously or not) a certain amount of "operations" of the language, 2) to talk about a "strategy" has no meaning if we do not define an imperative framework: rules, norms or conventions; 3) it will be important to have a goal, an uncertain situation and a possibility of resolution through a calculation. And a frame that assures stability and anticipation of behaviors is needed.

In the case we introduce

1) Subject: Judges of the Supreme Court, in particular Judge Petrachi, the president.

2) The Frame: National law (Penal Code and the National Constitution in particular) and IHRL which is both part of the frame and part of the strategy, as we will see later.

3) The goal searched for by the judges is the application of crime against humanity notion (and its juridical characteristics, as absence of prescription period)[9] for human rights violations committed during the dictatorship period in Argentina (1976-1983). The uncertainty situation or the obstacle is the absence of an international crimes category in national law during the moment when the crimes were committed (art. 18 of National Constitution: *nullum legue praevia, nullum poena*). The possibility of resolution is given by some previous national and international rulings and decisions as well as international conventions (Schwamberger's decision in 1989, Inter-

[9] Actually, Crime against humanity category has some legal specificity. This criminal category has two levels, one is individual and the other collective, political. These levels are mixed and justify the particular legal regime: no prescription time, possibility of trial in international tribunals (included heads of the state, ministers and generals) and no 'due obedience' argument is allowed.

American convention on the Forced Disappearance of Persons (1992), the International Criminal Court definition of crime against humanity (art. 7a) and others).

II. The possibility of an articulation between discourses and practices

In my thesis work, we came up to think of how discourse practices are articulated with other practices of a different nature. Against direct and reduced causes but also against the principle of discourse autonomy, the archeology makes relations between discourse formations and non discourse domains (institutions, political events, practices and economic processes) appear".[10] When faced with statements, archeology does not ask what could motivate them (formulation context), neither what is expressed in them (hermeneutics), but tries to determine how formulation rules from which it depends can be related with non discourse systems. The idea is to try to continue our work in this last direction.

2.1. An example as an argument

Reading the ruling description of Simón's crimes we can realize that there is general information about the moment in which these crimes were committed. We can see an effort to describe the context and the kind of violence. For instance we have some interesting repetitions:

1) clandestine system of repression

2) the political group[11]

[10] Rocher Chartier, *Escribir las practicas*, Bs. As., Manantial, 1996, p.27-28.

[11] Who where the disappeared? They were political actors. Poblete and Hlaczik were part of the group "Christians for the liberation", "a political group", as the ruling mention. They had to be disappeared as individuals but also as part of a social and political movement. The dictatorship ideal was to destroy social networks, impede that the opponents could continue being opponents.(…) Who were the disappeared before disappear? They were men and women involved in politic action. And this action is precisely what ends when they are disappeared" Antonia Castro Garcia. "Quienes son? Los desaparecidos en la trama política chilena", in *La imposibilidad del olvido*, Patricia FLIER and Bruno GROPPO (ed.), Al Margen, La Plata, 2001, p. 197-198. Crime against humanity only takes disappeared as victim's. Genocide takes also the idea of political group. The constitution of legal field is a principle of constitution of reality (which is truth for every field). 'Enter into the game, accepting the game, put yourself in hands of law to solve the conflict, is to accept tacitly a certain way of expression and discussion (…) is particularly to recognize the own demands of the juridical construction of the object (…) is necessary a real transcription of all the aspects of the

3) work group

4) security forces

So, we can state that there is an effort to show the repressive structure: who the perpetrators were *"work groups from Security forces"*, how they worked **"***clandestine systems of repression"* and the victim's *"political group adherents"* too.

In that sense it can be thought of as an example to sustain the rule that crimes in Argentina were systematic, massive and committed by the State. That is that these crimes were crimes against humanity[12]. In fact this kind of crime "defines an inhuman act on the idea of a criminal plan searching to attack in a massive or systematic way a population […], committed in application of a policy, in an organizational framework implemented by a whole of contributions".[13]

In this ruling the description of the kidnapping "replaces an argument or sequence of the argument" to justify the application of this juridical category for the Argentinean case, even if it is not in the national law at the moment of the dictatorship and still is not in the Penal code.

But the description goes further. As Perelman and Olbrechts-Tyteca say, the illustration is different from the example.[14] The example is the foundation of the rule and the illustration just strengthens the adhesion to a known rule. The illustration gives particular cases making the general statement clear, "showing the interest of different applications and growing its presence in the conscience (…) affects the hearer's imagination".

2.2. The details of the horror

As I mentioned above, the description of the facts go beyond "crime against humanity" definition. The ruling gives some other details:

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question". The field transform the pre-legal interest of the agents in law suit and transform in capital the expertise, assuring the control of the juridical resources demanded by the field'. (Pierre, Bourdieu, Elementos para una sociología del campo jurídica. En P. Bourdieu y G. Teubner. (Eds). *La fuerza del derecho*. Bogotá: Siglo del Hombre, 2000, p. 191.

[12] If we read other rulings in human right's subject we can find another solution. The same crimes can be also characterized as genocide. For example in Tucumán (a north state in the country), in Rozanzky ruling in La Plata (Echecolatz and Won Wernich) and in Spain in Baltazar Garzón prosecutions.

[13] Yann Jurovics, *Réflexions sur la spécificité du crime contre l'humanité*, Paris, LGDJ, 2002.

[14] Chaim Perelman y Lucie Olbrechts-Tyteca. (1994). *Tratado de la argumentación*. Madrid: Gredos, p.546.

Gertrudis Hlaczik was pulled along by her hair, naked. José Poblete, who was told "cortito" was lifted and then release from high above knowing that the absence of lower limbs would not impede his hitting the floor"§5

And the given details could be thought of as a strategy: "the discourse becomes more emotional", they show "the most negative vision from the opponent".[15]

And here the hidden opponent that is the one to whom acts of warning or threats are not addressed appears, but are speech acts in which his voice loses legitimacy without being mentioned. For example Judge Petrachi wrote: "This means that those who benefited from those laws can not invoke the prohibition or retroactivity (…)" § 31. The image of "those," appear near the "non humanity" of the description of the perpetrators above.

An interesting detail must be added here. In 2005 there were two crimes against humanity files in the Supreme Court.[16] Judges chose Simon's case and left the other one aside without solution. We could ask ourselves if it is a coincidence, that they have chosen the more violent case. That is, the case in which we have a couple, the man being in a wheelchair, Poblete, one of the most cruel clandestine arrest centers, "El Olimpo", one of the most horrible accused men, Simón, the "pulling along of the woman," Hlackzik, the appropriation of the little girl…It is the complete set and in the most extreme degree of violence. In this sense, we can say this is the ultimate portrayal of cruelty. The forced disappearance crime could be enough to legitimate the exceptional punishment measure (in fact, in Argentina, under national criminal law these crimes would have been prescribed). Nevertheless, the legal problem, the absence of international crimes category in national law, might be a good reason to search for persuasion tools.

2.3. Professional NGOs and "leading cases" or "strategic cases"

This case chosen by the Supreme Court is not a coincidence.[17] The CELS, as other human rights organizations choose leading cases or strategic cases. That is, cases in which the impact of

[15] Disqualifying ideas, discourse and the opponent image, the one who enounces the discourse hopes to induce a favorable image of himself. And the legal style, with the neutralization of interests has an effect of universality, constructing the enunciator as an universal subject.

[16] Informal meeting Supreme Court Judge, 17 august 2007.

[17] In Argentina, arts. 108, 116 and 117 establishes Supreme Court jurisdiction. For their part, cases of appellate jurisdiction, as defined in Articles 116, 117, and in the first part of the Constitution establishing Declarations, Rights and Guarantees (matters of

resolution could be important for a policy change. Cases used as public institutions pressure. Tribunals must define right's violation and also the effectiveness of those rights. The Human Rights' movement through a growing specialization and through new and original juridical strategies has a main role in the new consensus about principles and values around IHRL[18]:

> "*The lawsuit through witness cases has been and is a central objective of CELS, through different legal cases it is possible to reveal and expose patrons of illegal behavior and/or structures where human rights are systematically violated (...) These cases can question the content, orientation or way of implementation of a public policy in the light of constitutional or legal standards (...) At last, the strategic trial is used to ask the judicial power, and in that perspective to investigate about the spaces open and close to the satisfaction of better standards of rights protection and institutional rules observance".*[19]

This NGO called CELS, through its public interest clinic, picks affairs that might have an impact on public policy issues aiming at achieving both a judicial definition of Human Rights violations and these Rights respect and enforcement as well.

Civil society's participation and increasing juridical expertise on State policies is one of the clearest political transformations in the last decades. However, civil society involvement cannot be taken for granted. The *Simon case,* for instance, was the first time that an NGO became a plaintiff in a lawsuit related to prosecution of Argentinean military *junta*. According to attorney C. Varsky,

> *"Then CELS as an NGO filed the case of Emilio Mignone's daughter, Mónica, to in the federal court number four asking for the inconstitutionality of the impunity laws. In the same Tribunal was the case of the appropriation of Claudia Poblete. In this case, the Abuelas de Plaza de Mayo organization already had a role as a plaintiff in the search of Claudia Poblete. Claudia had been kidnapped with her parents (...) and CELS went to court as itself an NGO but also as Claudia's*

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federal law) can be reviewed through two main mechanisms: ordinary appeal (*recurso ordinario*) and extraordinary appeal (*recurso extraordinario*). The excessive growth of these two appeals (recurso extraordinario and recurso de queja) has been due to two doctrines created by the Supreme Court itself: the question of "arbitrariness" or "arbitrary decision" (*arbitrariedad* or *sentencia arbitraria*) and the question of "imperative institutional importance" (*gravedad institutional*), which, in fact, expanded the Court's appellate jurisdiction beyond its legal regulation, permitting the tribunal to hear cases that did not meet the requirements for extraordinary appeals or did not involve strictly federal questions.

[18] Yves Dezalay y Brian Garth. *La Mondialisation des guerres de palais*. Paris: Seuil, 2002.

[19] CELS. *La lucha por el derecho*. Buenos Aires: Siglo XXI*, 2008, p.* 17-18.

biological Grand Mother's, Buscarita Roa representative. At that moment, it was unusual that an organization asked the Court standing as a plaintiff". (Attorney Varsky, C. Interview, 2005).

In order to have standing as plaintiffs in cases involving human rights violators in courts, many organizations, like Abuelas de Plaza de Mayo, had to amend their rules statutes; although CELS had such a provision. But then another question arises: how exactly do we pass from an appropriation affair to a disappeared person affair? How do we turn an appropriation case into a disappeared person one? Varsky tell us:

"And then CELS decided to present itself in a case filed by Abuelas de Plaza de Mayo association: the case of the appropriation of Claudia Victoria Poblete. Our plan was to call the attention to the idea that Due Obedience law was a little bit schizophrenic, because at the same time that both the mother and the daughter were kidnapped, the law would allow to pursue criminal prosecution on the one hand, while leaving the authors of the crime with no punishment on the other. Given this, we asked to investigate the disappearance of Claudia Victoria Poblete's parents at the same time that we ask the court to hold Punto final and Obediencia debida statutes unconstitutional. If we had not have done that, the Judge Cavallo could not have brought the two defendants (Del Cerro y Simón) before the tribunal. We made progress on the Poblete case because the investigation of minor appropriation was really advanced and we had enough evidence to think that the affair would do well"... (Attorney Varsky, Interview 2005).

Why CELS choose *Simon Affair* to present the annulment of impunity law?

We can think that this affair was chosen as paradigmatic. It isn't an affair like others. We can talk about a strategic lawsuit with the idea of creating a new precedent. The attorney of the case said:

> *"Simon Affair is a very particular case, and in a way, similar to Conrado´s Goméz goods stealing affair investigation, in which Due Obedience Law let specifically children subtraction and good stealing out of impunity area. In fact, it was a little bit schizophrenic, by the way, because they let punish one part of the crime and not the other. They were these two affairs in the case, one related to an alternative in justice searching, to investigate the kidnapping with the idea of appropriate children and goods and the other was associate with the disappearance in itself we*

couldn't punish. This was the new thing that we found, out of impunity area, a path to follow change the frame and open the idea of justice searching for all crimes" (Attorney Varsky, Interview 2005).

The growing importance of juridical expertise in the definition of State politics is one of the most important characteristics of political transformations. But these observations cannot make us forget how this movement started. In particular, in our case, we cannot think of this leading case without the children searching for Abuelas de Plaza de Mayo association (Grand mother's of May Square). This spontaneous practice was transformed in a juridical strategy to show the systematic criminal plan.

Buenos Aires attorney Alberto Pedroncini (attorney from APDH, Association for Human Rights) used the practice of searching for a new strategy. Rather than begin "with the appropriators of the lost children and work his way up, he wanted to build on existing evidence to start at the top, and to focus solely on the systematic nature of child-stealing. Judge Bagnasco, who received Pedroncini's complaints focused on the ESMA[20] and on the existence of a plan to bring women from different detention centers to give birth there".[21]

Nowadays this juridical tactic is part of a leading case as a detonator (the beginning of the Simon case) because of the horror of the crime but also because its consequences are still very fresh (the girl recuperated her identity just eight years ago):

"*1) These actions began with the Buscarita Imperi Roa demand, who affirmed that (…) the so-called "joint forces" kidnapped his son José Liborio Poblete Roa, her daughter in law Marta Hlaczik and her grand-daughter Claudia Victoria Poblete. (…) different accusations received by "Abuelas de Plaza de Mayo" association showed that the retired army member Ceferino Landa and her wife Mercedes Beatriz Moreira, had in their power the minor under the name of Mercedes Beatriz Landa."*

[20] The clandestine center directed by the Sea force and known as the most important center of baby's kidnapping.

[21] Naomi Roth-Arriaza,*The Effect Pinochet.* University of Pennsylvania Press: Philadelphia. 2005, p. 111.

2.4. Trials for kidnapping babies and the concept of civil society review

As mentioned above, this case began with an appropriated child, Claudia Poblete. Then continued with the paradox in which her appropriators could be accused but not her parents' killers. In this sense, what is the "babies appropriation crime"?

According to Ruibal's description (2002, 17) "In the systematic method of abduction-disappearance-torture, the military not only included men and women that they considered dangerous to society, but in some cases they also abducted their children, or they waited for them to be born while the mothers were captive in concentration camps. Many of them were given in illegal adoption to families connected with the military, and even to the same officials that had abducted and tortured their parents".

As Brysk describes "Abuelas de Plaza de Mayo" led an effort to locate, identify and restore children missing as a result of the disappearance of their parents. (…) In those cases where the children had been illegally adopted by repressors, the biological families and human rights organizations south restoration of the missing children to their biological families (usually grandparents)".[22] But in the trials to the Juntas[23] the military were not judged for it, because it was considered that this crime didn't constitute a systematic practice (Pedroncini strategy showed later the contrary). And the Supreme Court ratified this criterion in 1986. The legal foundation of the work of the grandmother is the right to identity, which in 1989 was included in the United Nations Convention on the Rights of the Child[24]. The Convention was ratified by National Congress in October 1990, and after the constitutional reform of 1994 it has constitutional rank. After this convention was ratified by Argentina, "Abuelas de Plaza de Mayo" sustained that the government had the duty to ensure the missing children could recover their identity.

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[22] Chaim Perelman and Lucie Olbrechts-Tyteca, *Tratado de la argumentación*. Madrid, Gredos, 1994, 84

[23] El 'Juicio a las Juntas' (The trials of Military officers) took place in 1985. As Brysk (1994, p. 76) describes 'The Trials of the 'juntas' lasted from April through December 1985: the court heard a total of 78 days of testimony from 833 witnesses (…) The prosecution argued that the members of the juntas, as order givers in a hierarchical institution, were the indirect authors of all of the humans rights violations committed during their rule. Finally, through this accusation system based in three levels of responsibility, the verdict declared five members of the Juntas, guilty. In fact, through this accusation system, government didn't recognize the crimes as crimes against humanity'.

[24] According to Marie Törnquist-Chesnier, 'the normative enlargement' is one of the principal characteristics of IHRL nowadays. Marie Törnquist-Chesnier. *Expertise et éthique dans la fabrication du droit international public: la contribution des organisations non gouvernementales: trois cas d'étude.* Thèse de doctorat, IEP, Sciences Po, Paris, 2004.

During Alfonsín government, Abuelas de Plaza de Mayo organization obtained that two prosecutors were specially designed to search disappeared children. On the other hand and urged by the situation of probating with security the identity of disappeared children they scoured all academic spaces to find a method permitting this security. That method was finally discovered in 1983. In one of the first books written in this subject by Matilde Herrera about children appropriation and identity recuperation, she said:

> *In Abuelas de Plaza de Mayo association every work related with filiation studies were directed by a team of doctors, biologists and geneticist. The team gather genealogical trees of families, deal with judicial orders, acted as an expert in the extraction of samples and in conclusions presentation to the Tribunals (Herrera, M. y Tenenbaum)[1].*

Until 2050, the National Bank of genetics data kept blood samples of all families having denounced missing children, to cross them with whom are supposed filiation bounds could exist. It is supposed the bank will be open for at least 50 years more. However, they need an important budget and a strong political will for this tools to work. Two things that were absent all over the democratic period until today. For instance, during Carlos S. Menem government Abuelas de Plaza de Mayo obtained the creation of an Identity rights Commission depending from Humans Rights National Office.

In this commission, young people with doubts about their identity can come forgetting justice intervention. Until that moment, 1993, the only way in which someone could cross its genetics data with denouncing families was through a judicial trial. The CONADI works not only with affairs that could be related with state terrorism, but also in cases of adoption of minors.

Concerning the *Simon Affair, Abuelas de Plaza de Mayo* organization had received complaints referring to Ceferino Landa and her wife Mercedes Beatriz Moreira. Complains said that they had with them a girl called Mercedes Beatriz Landa, an appropriate girl. The 25 February 2000, the prosecution of preventive prison was ordered for colonel lieutenant Ceferino Landa and Mercedes Beatriz Moreira for crimes described in article139, inc. 2°, 146 y 293 of the Penal

Code (referring to identity suppression) and the annulment of Mercedes Beatriz Landa birth inscription as daughter of the above mentioned was declared.

The prosecutor for the affair opened the instruction request asking the defendant Juan Antonio Del Cerro (also called "Colores") and Julio Héctor (also called "Turco Julián") statement. Both of them were arrested and accused with preventive jail with charges of having kidnapped, retained and hidden Claudia Victoria Poblete.

The Poblete family and the prosecutor asked for the punishment of the crimes committed against Claudia Poblete's parents. This request was based on testimonies that showed that José Liborio Poblete and Gertrudis Marta Hlaczik had been seen in El Olimpo, a clandestine center. They were taken there when Claudia was eight months years old.

The kidnapping and tortures committed in El Olimpo were coordinated by the group of tasks in which Julio Simón had an active participation. Simón gave orders in the detention center where the Poblete family was kept until January 1979. At that moment Poblete and Hlaczik were eliminated by unidentified people. According to Alcira Ríos, attorney of Abuelas de Plaza de Mayo Association:

> *The Prosecutor saw the affair and asked for the request extension. So the judge said that the annulment was necessary ...And then some friends of mine that worked in another organism called me and told me "we are interested in the annulment problem" (...) So we became partners with CELS to sue and ask for the annulment of laws (...) With the Simon Affair, the issue is that El Olimpo was a clandestine center where there were enough survivals. Testimonies of these survivals tell us that Claudia has survived because Simón and Colores took her out of the center, they told that to the parents that took her to the grandmother on their mother's side, three witnesses told them that. It is a piece of evidence. There the trial grew. (Ríos, A. Interview, 2005).*

The court qualified the facts as crimes against humanity consisting in illegal privation of liberty, aggravated because violence and threats were mediating and because it lasted more than a month, repeated in two opportunities. Even if it isn't the object of this article to tell *Abuelas de la Plaza de Mayo* history, it is necessary, however, to show their mobilization and fight, but also the role that they have as actors of new, original and effective juridical strategies. In this perspective, and in this brief reference, we have to show their mobilization and fight, the role they have as promoting new, original and effective strategies. In this perspective and in this brief reference, we have to show that they have contributed to codifying a law that does not exist,

rights to the identity, today registered in article 8 of Children rights Convention, in which writing they have a key role. They promote the development of genetic studies of kidnapped kids and identification of remains of disappeared people, reaching scientific techniques used for other ends, bringing reparation to human rights.

The Convention of children's law was included in the constitutional reform of 1994. Then this convention was ratified by Argentina, *Abuelas de Plaza de Mayo* hold that the government had the duty to assure kidnapped kids recover their identity.

Here it is important to see how practices and juridical strategies are interconnected. For instance, De Certeau working around the conceptualization of "strategy", emphasizes the reserve of procedures not able to organize spaces or discourses, but effective to vampirize those principles or mechanisms that seem to explain everything. This perspective relocates the problem around the subject of the action (after Foucault's and Bourdieu's work). He is interested in the shrewdness that subjects can use to find the way to redefine authority. These are the tactics of the weak, the ones who made of the occasion a strategy: the art of invention of every-day activities. This conceptual view gives again its sovereignty to the subjects, able to play with the events to make them opportunities.

In conclusion, the tireless mobilization and fight of the victims' and families of victims' associations was the space in which original juridical strategies were born, in particular the appropriation of baby trials. These kids turned from "missing children" to "victims of human rights violations" [25]. The right to identity is born from the victim's families claim. It came from a practice that had no name before. "Abuelas de la Plaza de Mayo" association rationalized the search of children, one important step in the "metamorphosis of authority" according to their interests.

[25] As Antonia Castro García (2002, p.106) say: 'what we call human rights violations is an ideological construction, historically dated: it is based in US and French revolutions in XVIII century and has become doctrine since 1948 with the Human Rights declaration of the UN and specially since 1970. Antonia, Castro Garcia. *La mort lente des disparus au Chili: sous la négociation civils-militaires 1973-2002*. Paris: Maisoinneuve et Larose. 2001.

III. The primacy of IHRL or how the "strategy" can modify the frame

3.1. Jus cogens and legal fictions

At the end of the description the judge quoted the art. 118 of the Constitution. This article has been interpreted as the primacy of IHRL, and in particular criminal international law, in Argentina. In that sense, this interpretation makes the idea of an imperative law appears, the *jus cogens* concept: "When crimes are committed outside Nation limits, against *jus gentium*, Congress will dictate the place where they will be judged through a special law" (art. 118).

But what is exactly the meaning of *jus cogens*? In a more general way, we can state that legal fictions[26] hide the fact that there are judges who create the law under the appearance that they obey the legislation, objective law and other instruments that must determine their action[27]. In particular, the legal fiction can be understood as an analogy with mythic fictions[28]. In this analogy we can observe:

1) the manifestation of ideals concerning independence of law from human caprices "norms of justice so evident"
2) the image of law as an eternal and immutable order in which the divine authority is glorified, the judicial institution invested with sanctity. This hides the judge's (human)[29] responsibility and its influence on decisions: "juridical conscience of humanity" for instance[30].

[26] According to Vaihinger, fictions has an epistemological and methodological mean: they can explain the way we think about reality, the connections between things and facts as they if they were a whole. Legal fictions are one category of fictions found in jurisprudence. They assume by analogy the particular case to the general rule, the particular case under a concept that they don't really fit in. (Hans, Vahinger, *La philosophie du comme si*. Editions Kimé, Paris, 2008, p.45.

[27] Latour () describes judges particular subjectivity ideal as an objective one, they must be impartial, and stay far away from the facts of the case. Bruno Latour. *La fabrique du droit, une ethnographie du conseil d'Etat*, Paris: La Découverte. 2002

[28] Mari explains that organizing power legitimacy conditions is equal to search firsts principles. In his terms, juridical system works as to develop the love of power. Enrique Marí. 1997. *Papeles de filosofia II,* Biblos, Buenos Aires. 1997. The human rights principles are presented as imanents and satisfying the aspiration to sacred in a laic sytem. They are not constituted by the judge but declared.

[29] Latour shows the temptation of thinking imperfection of human rationality and actions, and giving preference of impersonal, objectives rules. Latour, Bruno. 2002. *La fabrique du droit, une ethnographie du conseil d'Etat*, Paris, La Découverte.

[30] This rhetorical language is also found in the parliamentary discussion of the law's annulment in 2003.

The more vague are the terms used, the larger the margin of a judge appreciation is. What we can see here is the search for the unconditional, through an "allegorical colorful language".[31] In fact, this sentence is full of this cosmopolitan rhetoric linked to IHRL and brings into the scene the traditional dichotomy between natural and positive law. Through this "strategy", judge responsibility is diminished: "it is not us but law who judges". And that is why we have the "obviousness" of norms to "humanity".

To be effective, International law suppose good will of States signing Conventions. However, today we can see a growing power of International Human Rights Law and Criminal Law. There's an attitude of changing in front of criminal international law in relation ship and as a consequence of punishment will of dictatorship crimes in Argentine. From a juridical point of view we can ask if this shift is legitimate: aren't we mixing law and moral? According to Nino:

> *Dissociation of (politics and law) can't be justified meanwhile there's a close connection between law and politics through moral (...) and there's two essential questions, the question of justification and the question of interpretation of law*[32].

3.2. Judges as "norm entrepreneurs" and transnational advocacy networks

The legal groundwork for a resurgence of legal activism came from an unexpected source: Argentina's role as a safe heaven for Nazis war criminals[33]. Judge Schiffrin finds crimes against humanity to have no prescription under customary international law, which, he added, was directly applicable in Argentina. It was an encouraging precedent and a powerful political

[31] Genaro R. Carrió, 1974, *Sobre los límites del lenguaje normati*vo. Buenos Aires, Astrea, p. 57.

[32] Carlos S. Nino, *Derecho, Moral y Política*, Buenos Aires: Gedisa, *2007, p. 104, 105.*

[33] After World War II, Argentina issued 40 000 visas to war refugees. Among those who made Argentina their new home was Schwammberger, a mid-level SS officer and head of a small concentration camp in Poland that served as a transit point to Auschwitz and Belzec. In 1989, the La Plata Federal Court agreed to extradite him to Germany to stand trial for some 5.000 murders. Schwammberger' attorney argued that the passage of time barred the case. The Court disagreed. Schiffrin Judge finds crimes against humanity to have no prescription under customary international law, which, he added, was directly applicable in Argentina. Then the Priebke (another Nazi criminal) case in 1995 established that crimes against humanity, even those that happened long ago, were subject to prosecution. Naomi Roth-Arriaza. *The Effect Pinochet.* University of Pennsylvania Press: Philadelphia. 2005.

argument. After all, if the statute of limitations could not stand in the way of fifty-year-old crimes, much less could it stand of more recent ones. And international law matter:

> "*Only a conception of art. 118 interpreted in the sense of an incorporation of criminal international law in the Constitution is the way to overpass the difficulties appearing (...) the possibility of amnesty and prescription of crimes against humanity".*[34]

Here a very strategic (or tactical)[35] vision from the judge in which he uses the juridical tools in a conscious way to justify his political position appears. We have to notice that in each country under study it is possible to trace how one or a couple of judges have been in the vanguard of applying international human rights law to domestic cases.[36] Almost all these "norms entrepreneur" judges, it turns out, have either studied or lived in other countries or have participated in extrajudicial activities that connected them to colleges elsewhere and allowed a process of mutual enrichment to take place.[37] So, this legal resistance examples can be analyzed within a social experience of the world and not only within a moral one.

Transnational advocacy networks influence the work of judges through changing the context in which they work.[38] Over time, the human rights movement also affected judges by recognizing their contributions to the development of human rights law. Contact with victims also made judges more open to forging ahead. Judges also have their own trans-governmental networks. Investigating judges communicate with one another largely in the course of concrete case-driven needs.

On the other side, we can ask what influenced the Court to choose this affair and not others. There is an anecdotal detail. In 2005 there were two rulings in CSJN for crimes against humanity. They chose these two but there was no resolution. It was the case of a couple, him in a

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[34] Leopoldo Schiffrin, *Ius gentium* y concepción estatalista del derecho en relación con los nuevos desarrollos de la doctrina y la jurisprudencia argentina in CELS (Ed.) *Verdad y Justicia, Homenaje a E. Mignone*. San José, Del Puerto, *2001, p. 418.*

[35] In the frame of hermeneutic way, many theories in French post-structuralism produce original conceptualization of strategy category.' The idea is to question the analogy that this notion has shared with the concept of strategy in Weber (…) Foucault take out the subject from the center and the strategy is no more linked to a subjective will (…) the outline of objectives suffer in the practice modifications constantly, not always conscious and rational. And this strategy is made with tactics, and these ones are much more conscious and rational. As Foucault say, tactics and strategies are linked'. (Catoggio, 2007, my translation)

[36] Naomi Roth-Arriaza, *The Effect Pinochet.* University of Pennsylvania Press: Philadelphia. 2005.

[37] To bring some examples: Judge Leopoldo Schiffrin studied international law in Germany. Judge Gabriel Cavallo (who wrote the first decision overturning the Argentina amnesty laws) had studied international law as a law student and later participated in human rights courses in the U.S. and elsewhere. See also The Honorable Claire L'Heureux-Dubé, The importance of dialogue: globalization and the international impact of the Rehnquist court, 34 Tulsa L.J 1998-1999.

[38] Margaret Keck, Kathrin Sikkink. *Activists Beyond Borders: Advocacy Networks in International Politics*. Ithaca: Cornell University Press. 199

wheelchair, in the most cruel center of detention, and the appropriated daughter, an affair with extreme violence. In this way, we can understand this insistence in the gravity with the victim's characteristics and the image of the kidnapping more than the violence of the disappeared people that justify by itself the exceptional character of the measure. In this point the testimony of a member of the CSJN is important:

> *When I came to Court, this subject was in the newspapers too (...) there were other problems, subjects (...) I think it was Petracchi the president and in one of the first meetings, he talked about the big subjects of the Court. Without having selected the file, because all the cases were in Court of Cassation. And then some files started to appear, when you start to watch them, you search, the most paradigmatic case was this one, when you see the story of a boy of 20, 21 years old without legs, and then, they take him with his wheelchair, they take him dragging him by the hair, they kidnap his wife, they steal her baby, really, when you search an affair, when you have thousands of affairs, we say, it is not that there is a lot, the Court has to choose one, of all of them, the one that fills all the requirements. (Member of the Supreme Court, 2009).*

This case chosen by the Supreme Court does not seem to be a coincidence, as we have said, one of the most important objectives of the Human Rights movement was to reach the application of crime against humanity category to forced disappearance of people. In the same way we see that judges of the Court directed their rationales in that same path.

Conclusion

Through this analysis we can see how the discourse of IHRL has been transformed into an essential instrument to defend Human Rights in Argentina and at the same time it has become a new paradigm to juridical decision. Some people ask: can we consider this change legitimate? Are not we confusing law and moral in this interpretation of article 118?

To be effective, criminal international law supposed initially the good will of States to sign the Conventions. However, nowadays we can see an increasing normative force of IHRL. For instance, in Argentina national legislation obstacles, as we see in 2005 ruling are over-passed. There is an attitude change towards criminal international law in concomitance and also as

consequence of the will to punish criminal crimes from the dictatorship periods in Argentina. This ruling enters in the frame of a governmental [39]Human Rights policy that serves to promote the trial of criminals from the last dictatorship period. But this is also the result of a complex interaction between new social actors in the largest context of the fight against impunity in the national and the international domain. We can mention the action of the National Audience in Spain, and the activism of judge Garzón and other judges and international attorneys who have given impulse to trials in other countries (Spain, France, Italy) and also the different mechanisms that the inter-American system has started.

In spite of this, we cannot talk about a new and very structured established holding in IHRL application. The debate is still open in the academic field. In the practice of judicial decision the question is still ambiguous depending on the case, the ruling or the judge. But nowadays in the criminal justice arena different human rights violation accused are being judged in all the country. And this highlights how a dissident opinion became an official one in twenty years. This also highlights the way in which a governmental policy became slowly a state policy with institutional and law reform processes.

[39] See the specific bureaucratic departments created for helping the justice system in crimes against humanity trials, for example *Unidad Fiscal de Coordinación y Seguimiento de las causas por violaciones a los derechos humanos (Procuration Department of coordination and following of human rights violations cases) and Unidad de Asistencia para Causas por Violaciones a los Derechos Humanos (Department of Human Rights violation assistance*).